

Syllabus For
SECURED TRANSACTIONS & COMMERCIAL PAPER

(Course No. 6281-10; 4 credits)

Professor Gregory E. Maggs

Content of the Course:

This course covers articles 3, 4, 5, and 9 of the Uniform Commercial Code, which address negotiable instruments, check collection, letters of credit, and secured transactions.

Negotiable instruments are written promises or orders to pay money, such as promissory notes and checks, that meet certain formal requirements and that are subject to special rules that differ from the rules of ordinary contract law. Letters of credit are undertakings by banks to pay money upon the presentation of specified documents. Secured transactions are arrangements in which a creditor may have recourse to collateral or something else of value if a debtor does not repay a debt.

The course focuses on the commercial law principles most commonly addressed on bar examinations. But these topics are not important because they are tested on bar examinations; rather, they are tested on bar examinations because they are important. They arise frequently in all manner of commercial transactions, and most lawyers need to know something about them.

The course has no prerequisites and does not presume knowledge of any special business practices. This course combines what is taught separately in Secured Transactions (No. 6280) and Commercial Paper--Payment Systems (No. 6282). Accordingly, students cannot take both this course and either of those courses. Students may take this course and any other commercial law courses, including International Business Transactions (No. 6522) and Creditors' Rights and Debtors' Protection (No. 6284).

Learning Outcomes (ABA Accreditation Standards 301 & 302)

For the expected "learning outcomes" for this course, please see the "learning outcomes statement" at the end of this syllabus.

Class Schedule:

The course will meet Monday and Wednesday from 9:55 a.m. to 11:55 a.m. The course will not meet on Sept. 4 (Labor Day) or Nov. 22 (the day before Thanksgiving). The last day of class is Nov. 29.

Office Hours, Email, Telephone:

My office is in Stuart Hall room 416. I will post my office hours on the portal. You may also contact me at (202) 994-6031 or gmaggs@law.gwu.edu.

GW Law Web Portal

This course has a page on the GW Law Web Portal (accessible through <https://my.law.gwu.edu>). On this page, you can find course announcements, the syllabus, past commercial paper and secured transactions examinations and their grading guides, links to a set of video review lectures for commercial paper, and other documents.

Required Books:

We will use the following two books:

Casebook: Warren & Walt, Commercial Law (9th ed. 2013),
Foundation Press

Statute Book: Warren & Walt, Commercial Law: Selected Statutes,
2017-2018 Edition, Foundation Press. (Note:
Earlier editions within the past 3 years are
acceptable.)

Final Examination:

This course will have a three-hour, open-book examination on Thursday, December 7, at 2:00 p.m. In completing the examination, you may use any written materials that you bring with you.

Class Participation:

At the beginning of the semester, I will divide the class into groups based on the seating chart. Each group will be "on call" on specific dates this semester. When your group is on call, you should be prepared to participate. I will post the group assignments on the portal.

Recording of Classes:

This course will follow the Law School's "Class Recording Policy," which is available at the Student Affairs Office website. This policy permits students to request the recording of classes when they will be absent for religious reasons, family emergencies, and certain other causes. Please make the requests for recording and address questions about the policy to the Student Affairs Office.

Reading Assignments and Problems:

At the end of each class, I will tell you how far to read for the next class. You should look up in the statute book and study very carefully every section of the Uniform Commercial Code cited in the reading. Read other statutes and regulations as indicated in the assignments below. For each of the assigned problems, please complete the problem worksheet that will be distributed separately. You do not have to read the notes and problems following the text and cases in the casebook unless they are specifically assigned.

I. ENFORCEMENT OF NEGOTIABLE INSTRUMENTS

A. INTRODUCTION

Text, pp. 643-647
[Gilmore article excerpt]

Lambert v. Barker, Syl. App. at A2

B. NEGOTIATION, TRANSFER, AND ENFORCEMENT

Text, pp. 647-649

Sample Note: G.W. Law School Emergency Loan,
Syl. App. at A4

Sample Check, Syl. App. at A4

Problem (1), pp. 649-650

- C. DISCHARGE BY PAYMENT TO A PERSON ENTITLED TO ENFORCE
- Text, p. 650
- DCM Ltd Partnership v. Wang, Syl. App. at A5
- Problem, pp. 650-651
- Text, pp. 651-652
- Problem, p. 652
- Sample Note: Home Mortgage, Syl. App. at A8
- D. FORMAL REQUISITES OF NEGOTIABLE INSTRUMENTS
- Text, pp. 661-664
- Sample Note: Student Loan, Syl. App. at A12
- Taylor v. Roeder, Syl. App. at A13
- E. EFFECT OF A GOOD FAITH PURCHASE ON CLAIMS AND DEFENSES
[THE "HOLDER IN DUE COURSE" DOCTRINE]
- Text, p. 664
- Text, p. 666
- Miller v. Race, Syl. App. at A16
- Problem, p. 666
- Text, pp. 667-668
- F. THE "WITHOUT NOTICE" REQUIREMENT
- Problem (2), p. 650
- Text, pp. 668-669
- Kaw Valley State Bank v. Riddle, pp. 669-676
- G. THE "GOOD FAITH" REQUIREMENT
- Maine Family Federal v. Sun Life, pp. 677-686
- Note (1), pp. 686-687
- H. OVERDUE OR IRREGULAR INSTRUMENTS

Problem, p. 688

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I. CONSUMER TRANSACTIONS

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[Universal C.I.T. v. Ingel &
Gonzales v. Old Kent Mortgage Co.]

Unico v. Owen, Syl. App. at A18

Note on the Uniform Consumer Credit Code (UCCC),
Syl. App. at 24

FTC HIDC Regulation §§ 433.1, 433.2
[reprinted in statute book, p. 1027]

J. TRANSACTIONS WITH FIDUCIARIES

Text, p. 693-694

Problem, p. 699

Smith v. Olympic Bank, pp. 699-702

Jelmoli Holding v. Raymond James, pp. 694-698

Note, pp. 698-699

K. VALUE

Text, pp. 704-705

Problems (1)-(3), pp. 705-706

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Note, pp. 709-710
[Rosenthal article excerpt]

NationsBank v. Cookies, Syl. App. at A24

L. ENFORCEMENT OF SECURITIZED NOTES

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In re Hwang, pp. 654-658

Note on In re Hwang, Syl. App. at A26

Notes (1)-(2), pp. 658-659

Video Review Lecture No. 1 (available on portal)

II. LIABILITY OF PARTIES ON CHECKS AND NOTES

A. MAKERS, DRAWERS, DRAWEES, INDORSERS, AND TRANSFERORS

Text, p. 715

Problem, pp. 715-716

Text, p. 716

Problems (1)-(4), p. 716

Text, pp. 717-719

Problem, p. 719

Text, p. 720

Problems (1)-(2), pp. 720-721

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B. CASHIER'S CHECKS AND TELLER'S CHECKS

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Crawford v. JP Morgan Chase Bank, pp. 725-728

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C. STOPPING PAYMENT AND ASSERTING DEFENSES

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Sample Stop Payment Form, Syl. App. at A27

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Sample Application for a Lost Instrument Bond,
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Blake v. Woodford Bank & Trust, pp. 759-764

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B. DEPOSITARY BANK'S MIDNIGHT DEADLINE

Text, p. 774

Essex Construction v. Industrial Bank, pp. 774-777

C. CHECK ENCODING

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Problem, pp. 778-779

U.S. Bank v. First Security Bank, Syl. App. at A38

D. CHECK TRUNCATION, ELECTRONIC PRESENTMENT, AND
CONVERSION TO ELECTRONIC FUNDS TRANSFERS

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Check 21 Act, §§ 5002(a)(16), 5003, 5004
[reprinted in statute book, p. 1013]

E. FUNDS AVAILABILITY AND EXPEDITIOUS RETURN REQUIREMENTS

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(h)(1), 229.30(a) & (c), 229.38(b), 229.41
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U.S. Bank v. HMA1., pp. 770-773

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F. CHECK KITING

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IV. FRAUD AND FORGERY IN CONNECTION WITH CHECKS

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D. IMPOSTORS, FICTITIOUS PAYEES, AND OTHER SPECIAL CASES

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- B. MEANING OF DEFAULT
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- C. REPOSSESSION AND JUDICIAL ACTION
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Video Review Lecture No. 7 (available on portal)

COMMERCIAL PAPER-PAYMENT SYSTEMS
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APPENDIX ITEM #1. SUPPLEMENTAL CASE: *LAMBERT V. BARKER*

Why is it important to study Commercial Paper? One reason is that the rules governing negotiable instruments differ from the rules governing ordinary contracts in important ways. The article by Prof. Gilmore describes two special doctrines applicable to negotiable instruments—good faith purchase and merger—which we will consider in depth in the course. Another important difference concerns assignments. Suppose that A owes money to B under simple contract, and that B assigns the right to payment to C without telling A. Under ordinary contract law, if A pays B, A will be discharged because A did not have notice of the assignment to C. *See* Restatement (Second) of Contracts § 336(2) (“The right of an assignee is subject to any defense or claim of the obligor which accrues before the obligor receives notification of the assignment, but not to defenses or claims which accrue thereafter except as stated in this Section or as provided by statute.”). Subject to exceptions described in the notes below, however, this has not traditionally been the rule for negotiable instruments. The following case provides an expensive example of not knowing enough about negotiable instruments:

LAMBERT v. BARKER
Supreme Court of Virginia
232 Va. 21, 348 S.E.2d 214 (1986)

COCHRAN, Justice.

The facts surrounding the underlying transactions are substantially undisputed. In May 1978, William K. Barker and Barbara R. Barker acquired from Robert O. Davis, Jr., property located at 2610 Monument Avenue, Richmond. As part of the consideration for their purchase, the Barkers executed a note, secured by a second deed of trust on the property, in the principal amount of \$20,300 payable to Davis, or order, in monthly installments.

In December 1978, the Barkers conveyed the property to S. David Beloff, who in turn conveyed it to Charles P. Harwood, Jr., and Ann G. Harwood in January 1979. The Harwoods, uniting in the deed from Beloff, expressly agreed to pay the Barker note. Pursuant to a loan agreement dated November 1, 1979, Davis transferred this note, along with certain other notes, to Katherine W. Lambert . . . to secure a loan . . . to Davis in the amount of \$197,234.72. The loan agreement between Davis and Lambert provided that the monthly installments on the Barker note would continue to be payable to Davis, while any prepayment was to be made to Lambert.

In February 1980, the Harwoods conveyed the property to Bryce A. Bugg and Nancy S. Bugg. At closing, Davis provided an affidavit in which he falsely asserted that he was the note holder but that the Barker note was lost. The sum of \$18,446.17 was withheld from the sale proceeds and paid to Davis, purportedly in satisfaction of the note.

In 1981, Lambert instituted this action against the Barkers and the Harwoods to recover \$18,497.94 on the note, together with interest, costs, and attorney’s fees. Alleging the note was in default and this amount represented the unpaid balance, Lambert claimed she was entitled to payment as the holder of the note.

The Barkers and Harwoods filed their separate grounds of defense denying liability on the ground that the Harwoods’ payment to Davis satisfied the note in full. They also filed third-party motions for judgment against the attorney who represented the Buggs in their purchase from the Harwoods and against his law firm, alleging negligence and breach of fiduciary duty in failing properly to discharge the obligation of the note by paying the holder.

The Barkers contend, as they did below, that payment to Davis discharged their liability as makers of the note. The right of a party to payment, however, depends upon his status as a holder. [§ 3-301]. A holder is one who is in possession of an instrument issued or indorsed to him or his order, to bearer, or in blank. [§ 1-201(b)(21)]. Payment or satisfaction discharges the liability of a party only if made to the holder of the instrument. [§ 3-602(a)]. Because payment in satisfaction of the instrument must be made to a party in possession in order to discharge the payor's liability, no notice is required for the protection of the payor. Rather, the payor may protect himself by demanding production of the instrument and refusing payment to any party not in possession unless in an action on the obligation the owner proves his ownership.

It is clear that Davis was not the holder of the Barker note at the time of payment, as the note was not in his possession. By delivering the note, indorsed in blank, to Lambert, Davis negotiated the instrument and made Lambert the holder. [§§ 1-201(b)(21), 3-201].

The Barkers contend that, even if Lambert were the holder of the note, she was not a holder in due course under [§ 3-302] and therefore did not take the instrument free from defenses under Code [§ 3-305]. Because the Barkers failed properly to assert the defense of payment to Lambert, Lambert's status—whether as a holder in due course or not in due course—does not affect this result.

The amount payable on the note is not controverted. Accordingly, we will reverse the judgment of the trial court and enter final judgment in favor of Lambert.

Reversed and final judgment.

Notes

1. Here is an outline of the parties' arguments:

Lambert's claim: The Barkers are liable to me on the note that they issued to Davis and that Davis then transferred (i.e., negotiated) to me. I am the holder of the note, § 1-201(b)(21), and am therefore entitled to enforce it, § 3-301(i).

Barkers' defense: We already discharged our liability on the note by paying Davis because we did not have notice that he had transferred the note to Lambert.

Lambert's reply: The liability of the maker of a note is discharged only if the maker pays a person entitled to enforce. § 3-602(a). Davis was not entitled to enforce the note because after he negotiated the note to me, he was no longer entitled to enforce it. The Barkers therefore did not discharge their liability.

The court agreed with Lambert because the note was a negotiable instrument governed by the Uniform Commercial Code. If the note had been an ordinary contract, the Barkers would have prevailed under the rule in Restatement (Second) of Contracts § 336(2) (quoted above). If the Barkers must pay Lambert, even though they have already paid Davis, from whom can they recover the money? Would you want to be in the position of the attorney who represented the Barkers when they paid Davis? Does this case show why it is important to know the rules in the Uniform Commercial Code?

2. Congress and some states have responded to the hardship that the rule in this case can cause. The federal Real Estate Settlement Procedures Act requires the borrower to be notified in writing of the sale or transfer of any “federally related mortgage loan.” 12 U.S.C. § 2605(b)(1). A federally related mortgage loan includes a loan made by a federally insured bank. *Id.* § 2602(1)(B). The *Lambert* case, however, did not involve such a loan. In addition, as described in the casebook, the official version of the UCC was amended in 2002 to provide that “a note is paid to the extent payment is made by . . . of a party obliged to pay the note to a person that formerly was entitled to

enforce the note only if at the time of the payment the party obliged to pay has not received adequate notification that the note has been transferred and that payment is to be made to the transferee.” § 3-602(b). But only 10 states have enacted this amendment. Thus, the rule in *Lambert v. Barker* still applies in most jurisdictions, including Virginia.

APPENDIX ITEM #2. SAMPLE NOTE: G.W. LAW SCHOOL EMERGENCY LOAN

The George Washington University Law School maintains a “Student Emergency Loan Fund” to help students with temporary financial problems, such as unexpected expenses or delays in receiving their ordinary student loans.* When students borrow money from this fund, the Law School asks them to sign the following standard form note promising to repay it:

PROMISSORY NOTE

I promise to pay to the order of The George Washington University, on or before _____, 20____, the sum of \$_____ dollars, value received, with interest at the rate of _____ per annum until paid.

Inasmuch as I am indebted to the University for the loans granted to me from this and/or other GWU Loans funds in the total sum of \$_____, including this loan, I agree to repay this total indebtedness in accordance with the provisions of each of the promissory notes signed by me for these loans. I understand and agree that all these loans must be paid in full prior to graduation.

WITNESSED AND RECOMMENDED FOR APPROVAL BY:

Law School

Student Signature

Office of Student Financial Assistance

Date

WHITE-LAW SCHOOL

YELLOW-STUDENT
G40140 (6.2010)

Notes

1. Suppose a student borrowed money and then filled out and signed this note. Who would be the “maker” and who would be the “payee” of the note?
2. What is the maker’s promise?
3. How does this note differ from a simple contract to pay money?

APPENDIX ITEM #3. SAMPLE CHECK

* When Senate Majority Leader Harry Reid, GW Law ‘64, gave the commencement address at the Law School in 2005, he reminisced—not especially fondly—about how the Associate Dean had denied him an emergency loan during his final year.

George & Martha Washington Mount Vernon, Virginia		992
DATE _____		15-7011 2540
PAY TO THE ORDER OF _____	\$ _____	
DOLLARS		Security Features include details on back.
CITIBANK® CITIBANK, F.S.B. 1-800-926-1067 P.O. BOX 18967 WASHINGTON, DC 20036-0967		
FOR _____		MP
⑈000992⑈ ⑆254070116⑆ ⑈7474 4040⑈		

Notes

1. Suppose that George Washington filled out this check and used it to pay his taxes to the United States Treasury. Who would be the “drawer,” the “drawee,” and the “payee” of the check?
2. In what sense is a check an order? Who is ordering whom to do what?
3. What implied promise does the drawer of a check make?

APPENDIX ITEM #4. SUPPLEMENTAL CASE: *DCM LIMITED PARTNERSHIP v. WANG*

DCM LIMITED PARTNERSHIP v. WANG
U.S. District Court for the Eastern District of Michigan
555 F. Supp.2d 808 (E.D. Mich. 2008)

JULIAN ABELE COOK, JR., District Judge.

* * *

DCM is a limited partnership which was chartered in the British Virgin Islands and currently conducts its business in Ann Arbor, Michigan. This limited partnership was formed as a holding company to oversee the liquidation of the D’Long America Corporation (“D’Long America”) which ceased to operate as a business entity in 2001. According to the DCM, one of the Defendants, Steve Wang, is an Illinois citizen who served as an agent of the two other Defendants, Midwest Air and MAT Automotive, during all of the times that are relevant to this proceeding. According to the complaint, these two Defendants have been and are now chartered as corporate entities by the State of Illinois.

In this case, the DCM asserts that Wang sought to secure a loan from the D’Long America during the later months of 2000 to support the purchase of Eurac Holdings Limited (“Eurac Holding”), a United Kingdom automotive parts manufacturer. The D’Long America confirmed its ability to invest the funds on Wang’s behalf by sending a letter of support to a third party on January 15, 2001. On May 24, 2001, the D’Long America (acting on behalf of the DCM) wired three million dollars to its own holding agent, Ever Nice Far East Limited, in Hong Kong, China.

Ultimately, the sought-after loan of three million dollars was apparently transmitted by Ever Nice presumably on the instructions by the Defendants. The transfer of these monies was effectuated through a series of transactions which originated with the D'Long America's account at the Comerica Bank in Michigan and ended with the Ever Nice's accounts with the HSBC Banks in New York and Hong Kong, China.

One week later, Wang, after meeting with several people, signed a Note for three million dollars at six percent interest plus collection costs. The Note, after being given in exchange "for value received," designated Wang as "the Maker" and the Payee as "DCM Limited, an entity to be formed." The Note, which stated that it was "due and payable immediately upon demand," was signed by Tom Shao as a witness.

In the complaint, the DCM asserts that it became the assignee of the Note from the D'Long America in December of 2005. Since that time, the DCM maintains that it has made several demands upon the Defendants to satisfy the principal and interest due under the Note, all of which have been unsuccessful.

In their response, the Defendants deny that Wang ever received any loan from the DCM, the D'Long America or Ever Nice. Rather, it is their joint contention that Wang received the three million dollar loan from Tang Wan Xin, who is currently detained in a Chinese jail and is commonly known in the United States as Peter Tang. Furthermore, it is their collective position that Tang was repaid in full in August of 2005. Defendants' Motion for Summary Judgment at 5.

* * *

According to § 3-412 of the UCC, a person who signs a promissory note must satisfy his financial obligation "according to its terms at the time it was issued." The maker owes the indebtedness "to a person entitled to enforce the instrument," who, according to UCC § 3-301, is "(i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to § 3-309 or 3-418(d)."

UCC § 3-308(b) instructs its reader that once the authenticity of the maker's signature has been established, a plaintiff who produces a note has a right to recover if he can establish his entitlement to enforce the instrument, subject to any valid defenses. *See also, Tuttle v. Rose*, 430 N.E.2d 356 (Ill. App. 1981) ("when the signatures on a note are admitted or established, production of the instrument entitles a holder to recover unless the defendant establishes a defense The defendant has the burden of establishing any defense, including payment, by a preponderance of the evidence").

Here, the only matters in dispute are the last two elements of the *Tuttle* test. The parties agree that the DCM has produced the instrument and that Wang's signature is valid. Thus, the only points of disagreement are (1) whether the DCM is the party who is entitled to enforce the instrument, and (2) if the Defendants have established any valid defenses.

For purposes of evaluating a motion for summary judgment, the DCM must first satisfy its burden of being the party who is entitled to enforce the Note. Thereafter, it must prove that the Defendants cannot establish a genuine issue of material fact to rebut the DCM's status as a party entitled to enforce the Note.

1. The Party Who Is Entitled to Enforce the Instrument

DCM contends that, as a "holder" under UCC § 3-301, it is entitled to enforce the Note. The UCC defines a holder as "the person in possession of a negotiable instrument that is payable . . . to an identified person that is the person in possession." UCC § 1-201(21).

Here, the DCM submits that it is “an identified person,” pointing to the Note which designates the “DCM Limited” as the intended payee. The Defendants do not agree, contending that the Note is ambiguous as to the identity of the intended payee. Based upon this alleged ambiguity, the Defendants urge the Court to incorporate extrinsic evidence in order to resolve the issue.

* * *

The Note, which is the subject matter of this dispute, reads as follows:

FOR VALUE RECEIVED, the undersigned, STEVE WANG (hereinafter “the Maker”), promises to pay to the order of DCM Limited, an entity to be formed (hereinafter “the Payee”), Three Million Dollars (\$3,000,000.00) with interest which shall accrue at rate [sic] of six percent (6.00%) per annum from and after the date hereof. The entire indebtedness, including interest, hereunder shall be due and payable immediately upon demand.

The Defendants maintain that the portion of the Note which identifies the payee as the “DCM Limited, an entity to be formed” is inherently ambiguous because “a simple internet search ... would reveal the existence of numerous DCM entities throughout the United States.” Moreover, they assert that it would have been impossible to determine the correct payee on June 2, 2001 (one day after the Note was signed), inasmuch as the DCM Limited Partnership had not been formed.

It is true that the “DCM,” as an acronym, could have meanings or represent many different words. It is also true that the language “an entity to be formed,” could suggest a variety of potential business arrangements. But, the mere fact that more than one entity may share the same name as the DCM in this lawsuit does not-by itself-render the Note ambiguous. To accept this argument would call into question every instrument where the payee’s name is not totally unique. However, the pertinent inquiry is not whether other entities exist with the words the “DCM Limited” as part of their titles. The question is whether the challenged language is subject to more than one reasonable interpretation under the circumstances of this case. *Bruder v. Country Mut. Ins. Co.*, 620 N.E.2d 355 (Ill. 1993) (“The touchstone in determining whether ambiguity exists . . . is whether the relevant portion is subject to more than one reasonable interpretation, not whether creative possibilities can be suggested. Reasonableness is the key”).

As the party who argues that the Note is ambiguous, the Defendants have not advanced another reasonable interpretation for the clause, the “DCM Limited, an entity to be formed.” Instead, they have applied speculation and conclusory arguments in an effort to establish their suggested level of ambiguity. To support their ambiguity claim, the Defendants cite UCC § 3-110, which provides in part:

The person to whom an instrument is initially payable is determined by the intent of the person . . . signing as . . . the issuer of the instrument. The instrument is payable to the person intended by the signer even if that person is identified in the instrument by a name or other identification that is not that of the intended person.

They also rely heavily on an illustration that is found in Official Comment Number 1 to § 3-110:

In the case of a check payable to “John Smith,” since there are many people in the world named “John Smith” it is not possible to identify the payee of the check unless there is some further identification or the intention of the drawer is determined. Name alone is sufficient under subsection (a), but the intention of the drawer determines which John Smith is the person to whom the check is payable.

The Defendants favorably compare the example in this Official Comment to the payee clause in the instant a name like “John Smith.” The clear purpose of this legislative enactment is to address those circumstances where the payee has a fairly common name. Such a situation simply does not

exist here. Furthermore, this Official Comment 1 observes that the issue presented in the “John Smith” illustration usually arises where a dispute exists about “the validity of an indorsement in the name of the payee,” as could occur when a note has been lost or stolen. UCC § 3-110, Official Comment 1. But here, the DCM is the entity who is in possession of the Note. This fact is significant in the law of negotiable instruments. *See generally, Martin v. Martin*, 51 N.E. 691 (Ill. 1898) (“the possession of an unindorsed note is prima facie evidence of ownership in the holder.”). The Court finds that the Note here clearly identifies the DCM as the payee. Therefore, UCC § 3-110 does not apply, and the Court will not consider Wang’s verbal assertions as extrinsic evidence with which to prove that he intended the payee to be Tang.

* * *

In its final defense, the Defendants submit that Wang fully discharged his obligation under the Note when he transmitted the total amount of money that was due and owing under the Note to Tang who, in their collective opinion, is the true person entitled to enforce the instrument. Defendants’ Brief at 12-13. To support their argument, they offer Wang’s testimony, wherein he asserts that Tang was the intended payee under the Note. *Id.* at 8. The Defendants also cite Tang’s affidavit in which he acknowledges having been fully paid by Wang for all of the monies (to wit, three million dollars) that were due and owing under the Note. *Id.*, Exhibit E. In response, the DCM has proffered an opposing affidavit from Tom Shao who avers that Wang acknowledged his receipt of the three million dollars from the D’Long America.

The Defendants correctly observe that under UCC § 3-602, a party’s obligation is discharged if a full payment is made “to a person entitled to enforce the instrument.” Notwithstanding the correctness of this statutory citation, they have failed to establish that Tang is such a person who satisfies this UCC definition. Moreover, there is nothing in the record which suggests that Tang was a holder, a non-holder in possession with the rights of a holder, or a person otherwise who is entitled to enforce the Note under § 3-309 or § 3-418. Simply put, the Defendants have not demonstrated how the payment of any funds to Tang satisfied the requirements of UCC § 3-602 and § 3-301. Therefore, the Defendants have not met their burden of proving this defense by a preponderance of the evidence. . . .

* * *

Note

How did the plaintiff prove that it was entitled to enforce? Why was the defense of discharge by payment invalid?

APPENDIX ITEM #5. SAMPLE NOTE: HOME MORTGAGE

If you buy a home, you will probably borrow money from a bank or other lender. The lender will require you to sign a note promising to repay the loan. Lenders use variations of the following standard form (the “Multistate Fixed Rate Note—Single Family—Fannie Mae/Freddie Mac Uniform Instrument Form 3200 1/01”) for almost all home loans.

1. BORROWER’S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. \$ _____ (this amount is called “Principal”), plus interest, to the order of the Lender. The Lender is _____. I will make all payments under this Note in the form of cash, check or money order.

I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

2. INTEREST

Interest will be charged on unpaid principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of _____%.

The interest rate required by this Section 2 is the rate I will pay both before and after any default described in Section 6(B) of this Note.

3. PAYMENTS

(A) Time and Place of Payments

I will pay principal and interest by making a payment every month.

I will make my monthly payment on the _____ day of each month beginning on _____, _____. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on _____, 20____, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at _____ or at a different place if required by the Note Holder.

(B) Amount of Monthly Payments

My monthly payment will be in the amount of U.S. \$_____.

4. BORROWER'S RIGHT TO PREPAY

I have the right to make payments of Principal at any time before they are due. A payment of Principal only is known as a "Prepayment." When I make a Prepayment, I will tell the Note Holder in writing that I am doing so. I may not designate a payment as a Prepayment if I have not made all the monthly payments due under the Note.

I may make a full Prepayment or partial Prepayments without paying a Prepayment charge. The Note Holder will use my Prepayments to reduce the amount of Principal that I owe under this Note. However, the Note Holder may apply my Prepayment to the accrued and unpaid interest on the Prepayment amount, before applying my Prepayment to reduce the Principal amount of the Note. If I make a partial Prepayment, there will be no changes in the due date or in the amount of my monthly payment unless the Note Holder agrees in writing to those changes.

5. LOAN CHARGES

If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from me which exceeded permitted limits will be refunded to me. The Note Holder may choose to make this refund by reducing the Principal I owe under this Note or by making a direct payment to me. If a refund reduces Principal, the reduction will be treated as a partial Prepayment.

6. BORROWER'S FAILURE TO PAY AS REQUIRED

(A) Late Charge for Overdue Payments

If the Note Holder has not received the full amount of any monthly payment by the end of

_____ calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be _____% of my overdue payment of principal and interest. I will pay this late charge promptly but only once on each late payment.

(B) Default

If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.

(C) Notice of Default

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal which has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

(D) No Waiver By Note Holder

Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

(E) Payment of Note Holder's Costs and Expenses

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

7. GIVING OF NOTICES

Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder a notice of my different address.

Any notice that must be given to the Note Holder under this Note will be given by delivering it or by mailing it by first class mail to the Note Holder at the address stated in Section 3(A) above or at a different address if I am given a notice of that different address.

8. OBLIGATIONS OF PERSONS UNDER THIS NOTE

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. The Note Holder may enforce its rights under this Note against each person individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under this Note.

9. WAIVERS

I and any other person who has obligations under this Note waive the rights of Presentment and Notice of Dishonor. "Presentment" means the right to require the Note Holder to demand payment of amounts due. "Notice of Dishonor" means the right to require the Note Holder to give notice to other persons that amounts due have not been paid.

10. UNIFORM SECURED NOTE

This Note is a uniform instrument with limited variations in some jurisdictions. In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed (the "Security Instrument"), dated the same date as this Note, protects the Note Holder from possible losses which might result if I do not keep the promises which I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. Some of those conditions are described as follows:

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED.

_____ (Seal)
- Borrower

APPENDIX ITEM #6. SAMPLE NOTE: STUDENT LOAN

If you borrowed money to pay your law school tuition, you may have signed a note like the one below. Is it a negotiable instrument?

Federal Family Education Loan Program (FFELP) Federal Stafford Loan Master Promissory Note <small>WARNING: Any person who knowingly makes a false statement or misrepresentation on this form is subject to penalties which may include fines, imprisonment, or both, under the United States Criminal Code and 20 U.S.C. 1097.</small>		Guarantor, Program, or Lender Identification	OMB No. 1845-0006 Form approved Exp. date 2-29-2008
Borrower Information <i>Please print neatly or type. Read the instructions carefully.</i>			
1. Last Name	First Name	MI	2. Social Security Number
3. Permanent Street Address (If P.O. Box, see instructions.)		4. Home Area Code/Telephone Number ()	5. Date of Birth (Month/Day/Year)
City	State	Zip Code	6. Driver's License State and Number State #
7. E-mail Address		8. Lender Name	9. Lender Code, if known
City		State	Zip Code
10. References: You must provide two separate references with different U.S. addresses. The first reference should be a parent (if living) or legal guardian. Both references must be completed in full.			
Name	A. _____	B. _____	
Permanent Address	_____	_____	
City, State, Zip Code	_____	_____	
E-mail Address	_____	_____	
Area Code/Telephone Number	() _____	() _____	
Relationship to Borrower	_____	_____	
11. Requested Loan Amount: I request a total amount of subsidized and unsubsidized loans under this Master Promissory Note not to exceed the allowable maximums under the Higher Education Act. My school will notify me of the type(s) and amount(s) of loan(s) that I am eligible to receive. I may cancel my loan or request a lower amount by contacting my lender or school. Additional information about my right to cancel a loan or request a lower amount is included in the Borrower's Rights and Responsibilities Statement and Disclosure Statements that have been or will be provided to me.		12. Interest Payments (Optional): <input type="checkbox"/> I want to pay unsubsidized interest while I am in school.	
Borrower Certifications and Authorizations <i>Read carefully before signing below.</i>			
13. Under penalty of perjury I certify that: A. The information I have provided on this Master Promissory Note and as updated by me from time to time is true, complete, and correct to the best of my knowledge and belief and is made in good faith. B. I will immediately repay any loan proceeds that cannot be attributed to educational expenses for attendance on at least a half-time basis at the school that certified my loan eligibility. C. (i) I do not now owe an overpayment on a Federal Pell Grant, Supplemental Educational Opportunity Grant, or a Leveraging Educational Assistance Partnership Grant (formerly State Student Incentive Grant); or, if I owe an overpayment, I have made repayment arrangements with the holder to repay the amount owed. (ii) I am not now in default on any loan received under the Federal Perkins Loan Program (including NDSL loans), the Federal Direct Loan Program, or the Federal Family Education Loan Program ("FFELP" as defined in the Borrower's Rights and Responsibilities Statement); or (iii) I am in default on a loan, and I have made satisfactory arrangements with the holder of the defaulted loan. 14. For all subsidized and unsubsidized Federal Stafford Loans (as described in the additional MPN provisions and the Borrower's Rights and Responsibilities Statement) I receive under this Master Promissory Note, and for certain other loans as described below, I make the following authorizations: A. I authorize my school to certify my eligibility for loans under this Master Promissory Note. B. I authorize my school to transfer loan proceeds received by electronic funds transfer (EFT) or master check to my student account. C. I authorize my school to pay to the lender any refund that may be due up to the full amount of the loan(s). D. I authorize the lender, the guarantor, or their agents, to investigate my credit record and report information concerning my loan status to persons and organizations permitted by law to receive such information. E. I request and authorize my lender to: (i) during the in-school and grace periods of any loans made under this Master Promissory Note, defer and align the repayment of principal on all of my FFELP loans that are in repayment status; and (ii) add unpaid interest that accrues on all my FFELP loans to the principal balance of such loans ("capitalization") including such loans made under this Master Promissory Note, during forbearance periods, and for unsubsidized loans, during in-school, grace, and deferment periods as provided under the Act. "Capitalization" will increase the principal balance on my loans and the total amount of interest charges I must pay. F. I authorize the release of information pertinent to my loans: (i) by the school, the lender, and the guarantor, or their agents, to the references on the applicable loans and to members of my immediate family unless I submit written directions otherwise; and, (ii) by and among my schools, lenders, guarantors, the Department of Education, and their agents. G. So that the loans requested can be approved, I authorize the Department of Education to send any information about me that is under its control, including information from the Free Application for Federal Student Aid, to the school, the lender, and to state agencies and nonprofit organizations that administer financial aid programs under the FFELP.			
Promise to Pay <i>In this Master Promissory Note (MPN), "lender" refers to, and this MPN benefits, the original lender and its successors and assigns, including any subsequent holder of this MPN.</i>			
15. I promise to pay to the order of the lender all loan amounts disbursed under the terms of this MPN, plus interest and other charges and fees that may become due as provided in this MPN. I understand that multiple loans may be made to me under this MPN. I understand that by accepting any disbursements issued at any time under this MPN, I agree to repay the loans. I understand that, within certain time frames, I may cancel or reduce the amount of any loan by refusing to accept or by returning all or a portion of any disbursement that is issued. Unless I make interest payments, interest that accrues on my unsubsidized loans during in-school, grace, and deferment periods will be added as provided under the Act to the principal balance of such loans. If I do not make any payment on any loan made under this MPN when it is due, I will also pay reasonable collection costs, including but not limited to attorney's fees, court costs, and other fees. I will not sign this MPN before reading the entire MPN, even if I am told not to read it, or told that I am not required to read it. I am entitled to an exact copy of this MPN and the Borrower's Rights and Responsibilities Statement. My signature certifies I have read, understand, and agree to the terms and conditions of this MPN, including the Borrower Certifications and Authorizations printed above, the Notice About Subsequent Loans Made Under This MPN, and the Borrower's Rights and Responsibilities Statement.			
I UNDERSTAND THAT I MAY RECEIVE ONE OR MORE LOANS UNDER THIS MPN, AND THAT I MUST REPAY ALL LOANS THAT I RECEIVE UNDER THIS MPN.			
16. Borrower's Signature _____		17. Today's Date (Month/Day/Year) _____	

Additional MPN provisions follow

APPENDIX ITEM #7. SUPPLEMENTAL CASE: TAYLOR V. ROEDER

TAYLOR v. ROEDER
Supreme Court of Virginia
360 S.E.2d 191 (Va. 1987)

RUSSELL, Justice.

The dispositive question in this case is whether a note providing for a variable rate of interest, not ascertainable from the face of the note, is a negotiable instrument. We conclude that it is not.

The facts are undisputed. VMC Mortgage Company (VMC) was a mortgage lender in Northern Virginia. In the conduct of its business, it borrowed funds from investors, pledging as security the notes secured by deeds of trust which it had obtained from its borrowers. Two of these transactions became the subject of this suit. Because they involve similar facts and the same question of law, they were consolidated for trial below and are consolidated in a single record here pursuant to former Rule 5:23.

In the first case, Olde Towne Investment Corporation of Virginia, Inc., on September 11, 1979, borrowed \$18,000 from VMC, evidenced by a 60-day note secured by a deed of trust on land in Fairfax County. The note provided for interest at “[t]hree percent (3.00%) over Chase Manhattan Prime to be adjusted monthly.” The note provided for renewal “at the same rate of interest at the option of the makers up to a maximum of six (6) months in sixty (60) day increments with the payment of an additional fee of [t]wo (2) points.” The note was renewed and extended to November 11, 1980, by a written extension agreement signed by Olde Towne and by VMC.

In May 1981, Frederick R. Taylor, Jr., as trustee for himself and other parties, entered into a contract to buy from Olde Towne the land in Fairfax County securing the \$18,000 loan. Taylor’s title examination revealed the VMC deed of trust. He requested the payoff figures from VMC and forwarded to VMC the funds VMC said were due. He never received the cancelled Olde Towne note, and the deed of trust was not released.

In the second case, Richard L. Saslaw and others, on December 31, 1979, borrowed \$22,450 from VMC evidenced by a 12-month note secured by deed of trust on Fairfax County land. This note also bore interest at “3% over Chasemanhattan [sic] prime adjusted monthly.” Interest was to be “payable quarterly beginning April 1, 1980.” In November 1980, Virender and Barbara Puri entered into a contract to purchase from Saslaw, et al., the land subject to the last-mentioned deed of trust. The Puris designated the same Frederick R. Taylor, Jr., as their settlement attorney. Taylor’s title examination revealed VMC’s deed of trust. Taylor again requested a payoff figure from VMC. At settlement, Saslaw objected to the figure, communicated with VMC and received VMC’s agreement to an adjusted figure. Taylor paid the adjusted amount to VMC. Again, Taylor failed to receive the cancelled Saslaw note, and the Saslaw deed of trust was not released.

Cecil Pruitt, Jr., was a trustee of a tax-exempt employees’ pension fund. He invested some of the pension fund’s assets with VMC, receiving as collateral pledges of certain secured notes that VMC held. The Saslaw note was pledged and delivered to him on January 25, 1980; the Olde Towne note was pledged and delivered to him on September 12, 1980. No notice was given to the makers, or to Taylor, that the notes had been transferred, and all payments on both notes were made to and accepted by VMC.

VMC received and deposited in its account sufficient funds to pay both notes in full, but never informed Pruitt of the payments and made no request of him for return of the original notes. In February 1982, VMC defaulted on its obligation to Pruitt for which both notes had been pledged

as collateral. In May 1982, VMC filed a bankruptcy petition in federal court.

Learning that the properties securing both notes had been sold, Pruitt demanded payment from the respective original makers as well as the new owners of the properties, contending that he was a holder in due course. The makers and new owners took the position that they had paid the notes in full. Pruitt caused William F. Roeder, Jr., to qualify as substituted trustee under both deeds of trust and directed him to foreclose them. Taylor and the Puris filed separate bills of complaint against Roeder, trustee, seeking to enjoin the foreclosure sales. The chancellor entered a temporary injunction to preserve the status quo and heard the consolidated cases ore tenus. By letter opinion incorporated into a final decree entered February 3, 1984, the chancellor found for the defendant and dissolved the injunctions. We granted the complainants an appeal. The parties have agreed on the record that foreclosure will be withheld while the case is pending in this Court.

Under the general law of contracts, if an obligor has received no notice that his debt has been assigned and is in fact unaware of the assignment, he may, with impunity, pay his original creditor and thus extinguish the obligation. His payment will be a complete defense against the claim of an assignee who failed to give him notice of the assignment. *Evans v. Joyner*, 195 Va. 85, 88, 77 S.E.2d 420, 422 (1953).

Under the law of negotiable instruments, continued in effect under the Uniform Commercial Code, the rule is different: the makers are bound by their contract to make payment to the holder. . . .

Code § 8.3-104(1) provides, in pertinent part:

Any writing to be a negotiable instrument within this title must

* * *

(b) contain an unconditional promise or order to pay a sum certain in money....

The meaning of “sum certain” is clarified by Code § 8.3-106:

(1) The sum payable is a sum certain even though it is to be paid

(a) with stated interest or by stated installments; or

(b) with stated different rates of interest before and after default or a specified date; or

(c) with a stated discount or addition if paid before or after the date fixed for payment; or

(d) with exchange or less exchange, whether at a fixed rate or at the current rate; or

(e) with costs of collection or an attorney’s fee or both upon default.

(2) Nothing in this section shall validate any term which is otherwise illegal.

Official Comment 1, which follows, states in part:

It is sufficient [to establish negotiability] that at any time of payment the holder is able to determine the amount then payable *from the instrument itself* with any necessary computation.... The computation must be one which can be made *from the instrument itself without reference to any outside source*, and this section does not make negotiable a note payable with interest “at the current rate.”

(Emphasis added.) Code § 8.3-107 provides an explicit exception to the “four corners” rule laid down above by providing for the negotiability of instruments payable in foreign currency.

We conclude that the drafters of the Uniform Commercial Code adopted criteria of negotiability intended to exclude an instrument which requires reference to any source outside the instrument

itself in order to ascertain the amount due, subject only to the exceptions specifically provided for by the U.C.C. *See Salomonsky v. Kelly*, 232 Va. 261, 264, 349 S.E.2d 358, 360 (1986).

The appellee points to the Official Comment to Code § 8.3-104. Comment 1 states that by providing criteria for negotiability “within this Article,” (adopted in Virginia as “within this title”) § 8.3-104(1) “leaves open the possibility that some writings may be made negotiable by other statutes or by judicial decision.” The Comment continues: “The same is true as to any new type of paper which commercial practice may develop in the future.” The appellee urges us to create, by judicial decision, just such an exception in favor of variable-interest notes.

Appellants concede that variable-interest loans have become a familiar device in the mortgage lending industry. Their popularity arose when lending institutions, committed to long-term loans at fixed rates of interest to their borrowers, were in turn required to borrow short-term funds at high rates during periods of rapid inflation. Variable rates protected lenders when rates rose and benefitted borrowers when rates declined. They suffer, however, from the disadvantage that the amount required to satisfy the debt cannot be ascertained without reference to an extrinsic source—in this case the varying prime rate charged by the Chase Manhattan Bank. Although that rate may readily be ascertained from published sources, it cannot be found within the “four corners” of the note.

Other courts confronted with similar questions have reached differing results. *See, e.g., A. Alport & Son, Inc. v. Hotel Evans, Inc.*, 65 Misc.2d 374, 376-77, 317 N.Y.S.2d 937, 939-40 (1970) (note bearing interest at “bank rates” not negotiable under U.C.C.); *Woodhouse, Drake and Carey, Ltd. v. Anderson*, 61 Misc.2d 951, 307 N.Y.S.2d 113 (1970) (note providing for interest at “8- 1/2% or at the maximum legal rate” was not usurious. Inferentially, the note was negotiable.); *Farmers Production Credit Ass’n v. Arena*, 145 Vt. 20, 23, 481 A.2d 1064, 1065 (1984) (variable-interest note not negotiable under U.C.C.).

The U.C.C. introduced a degree of clarity into the law of commercial transactions which permits it to be applied by laymen daily to countless transactions without resort to judicial interpretation. The relative predictability of results made possible by that clarity constitutes the overriding benefit arising from its adoption. In our view, that factor makes it imperative that when change is thought desirable, the change should be made by statutory amendment, not through litigation and judicial interpretation. Accordingly, we decline the appellee’s invitation to create an exception, by judicial interpretation, in favor of instruments providing for a variable rate of interest not ascertainable from the instrument itself.

* * *

Accordingly, we will reverse the decree and remand the cause to the trial court for entry of a permanent injunction against foreclosure.

Reversed and remanded.

COMPTON, Justice, dissenting.

* * *

Instruments providing that loan interest may be adjusted over the life of the loan routinely pass with increasing frequency in this state and many others as negotiable instruments. This Court should recognize this custom and usage, as the commercial market has, and hold these instruments to be negotiable.

* * *

The commercial market requires a self-contained instrument for negotiability so that a stranger

to the original transaction will be fully apprised of its terms and will not be disadvantaged by terms not ascertainable from the instrument itself. For example, interest payable at the "current rate" leaves a holder subject to claims that the current rate was established by one bank rather than another and would disadvantage a stranger to the original transaction.

The rate which is stated in the notes in this case, however, does not similarly disadvantage a stranger to the original agreement. Anyone coming into possession could immediately ascertain the terms of the notes; interest payable at three percent above the prime rate established by the Chase Manhattan Bank of New York City. This is a third-party objective standard which is recognized as such by the commercial market. The rate can be determined by a telephone call to the bank or from published lists obtained on request. . . .

Accordingly, I believe these notes are negotiable under the Code and I would affirm the decision below.

Notes

1. Why did it matter whether the notes were negotiable or not negotiable? How is this case similar to *Lambert v. Barker*?

2. As the textbook describes, the 1990 revision of article 3 changed the rule regarding variable interest rates. Under § 3-112, variable interest rates no longer render notes not negotiable. But the past is still with us. Virginia adopted the 1990 revision in 1992. Any notes made prior to 1992—including thousands of 30-year mortgage notes—are still subject to the pre-revision version rule described in *Taylor v. Roeder*. The same is true in other states as well. And of course notes can be not negotiable for other reasons also.

APPENDIX ITEM #8. SUPPLEMENTAL CASE: *MILLER V. RACE*

Miller v. Race

Court of King's Bench

1 Burr. 452, 97 Eng. Rep. 398 (K.B. 1758)

It was an action of trover against the defendant, upon a bank note, for the payment of twenty-one pounds ten shillings to one William Finney or bearer, on demand.

The cause came on to be tried before Lord Mansfield at the sittings in Trinity term last at Guildhall, London and upon the trial it appeared that William Finney, being possessed of this bank note on the 11th of December 1756, sent it by the general post, under cover, directed to one Bernard Odenharty, at Chipping Norton in Oxfordshire that on the same night the mail was robbed, and the bank note in question (amongst other notes) taken and carried away by the robber; that this bank note, on the 12th of the same December, came into the hands and possession of the plaintiff, for a full and valuable consideration, and in the usual course and way of his business, and without any notice or knowledge of this bank note being taken out of the mail.

It was admitted and agreed, that, in the common and known course of trade, bank notes are paid by and received of the holder or possessor of them, as cash; and that in the usual way of negotiating bank notes, they pass from one person to another as cash, by delivery only and without any further inquiry or evidence of title, than what arises from the possession. It appeared that Mr. Finney, having notice of this robbery, on the 13th December, applied to the Bank of England, "to stop the payment of this note:" which was ordered accordingly, upon Mr. Finney's entering into proper security "to indemnify the bank."

Some little time after this, the plaintiff applied to the bank for the payment of this note; and for that purpose delivered the note to the defendant, who is a clerk in the bank: but the defendant refused either to pay the note, or to re-deliver it to the plaintiff. Upon which this action was brought against the defendant.

The jury found a verdict for the plaintiff, and the sum of 21l. 10s. damages, subject nevertheless to the opinion of this Court upon this question—“Whether under the circumstances of this case, the plaintiff had a sufficient property in this bank note, to entitle him to recover in the present action?”

* * *

Sir Richard Lloyd, for the defendant.

The present action is brought, not for the money due upon the note; but for the note itself, the paper, the evidence of the debt. So that the right to the money is not the present question: the note is only an evidence of the money's being due to him as bearer.

The note must either come to the plaintiff by assignment; or must be considered as if the bank gave a fresh, separate, and distinct note to each bearer. Now the plaintiff can have no right by the assignment of a robber. And the bank cannot be considered as giving a new note to each bearer: though each bearer may be considered as having obtained from the bank a new promise.

I do not say whether the bank can, or cannot stop payment; that is another question. But the note is only an instrument of recovery.

Now this note, or these goods (as I may call it,) was the property of Mr. Finney, who paid in the money: * he is the real owner. It is like a medal which might entitle a man to payment of money, or to any other advantage. And it is by Mr. Finney's authority and request that Mr. Race detained it.

It may be objected, that this note is to be considered as cash “in the usual course of trade.” But still, the course of trade is not at all affected by the present question, about the right to the note. A different species of action must be brought for the note, from what must be brought against the bank for the money. And this man has elected to bring trover for the note itself, as owner of the note; and not to bring his action against the bank for the money. In which action of trover, property can not be proved in the plaintiff: for a special proprietor can have no right against the true owner.

* * *

Mr. Williams contra for the plaintiff.

The holder of this bank note, upon a valuable consideration has a right to it, even against the true owner.

1st, the circulation of these notes vests a property in the holder, who comes to the possession of it, upon a valuable consideration.

2dly, this is of vast consequence to trade and commerce; and they would be greatly incommoded if it were otherwise.

3dly, this falls within the reason of a sale in market-overt; and ought to be determined upon the same principle.

* * *

Lord Mansfield now delivered the resolution of the Court.

* When attorney Sir Richard Lord says that Mr. Finney “paid in the money,” he means that Mr. Finney paid 21£ 10s. to the Bank of England in exchange for the note.—Ed.

After stating the case at large, he declared that at the trial, he had no sort of doubt, but this action was well brought, and would lie against the defendant in the present case; upon the general course of business, and from the consequences to trade and commerce: which would be much incommoded by a contrary determination.

It has been very ingeniously argued by Sir Richard Lloyd for the defendant. But the whole fallacy of the argument turns upon comparing bank notes to what they do not resemble, and what they ought not to be compared to, viz. to goods, or to securities, or documents for debts.

Now they are not goods, not securities, nor documents for debts, nor are so esteemed: but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind; which gives them the credit and currency of money, to all intents and purposes. They are as much money, as guineas** themselves are; or any other current coin, that is used in common payments, as money or cash.

* * *

Here, an inn-keeper took it, bonâ fide, in his business from a person who made an appearance of a gentleman. Here is no pretence or suspicion of collusion with the robber: for this matter was strictly inquired and examined into at the trial; and is so stated in the case, “that he took it for a full and valuable consideration, in the usual course of business.” Indeed if there had been any collusion, or any circumstances of unfair dealing; the case had been much otherwise. If it had been a note for 1000l. it might have been suspicious: but this was a small note for 21l. 10s. only: and money given in exchange for it.

* * *

A bank-note is constantly and universally, both at home and abroad, treated as money, as cash; and paid and received, as cash; and it is necessary, for the purposes of commerce, that their currency should be established and secured.

* * *

Lord Mansfield declared that the Court were all of the same opinion, for the plaintiff; and that Mr. Just. Wilnot concurred.

APPENDIX ITEM #9. SUPPLEMENTAL CASE: *UNICO v. OWEN*

UNICO v. OWEN
Supreme Court of New Jersey
232 A.2d 405 (N.J. 1967)

FRANCIS, J.

* * *

Defendant’s wife, Jean Owen, answered an advertisement in a Newark, N.J. newspaper in which Universal Stereo Corporation of Hillside, N.J., offered for sale 140 albums of stereophonic records for \$698. This amount could be financed and paid on an installment basis. In addition the buyer would receive “without separate charge” (as plaintiff puts it) a Motorola stereo record player. The plain implication was that on agreement to purchase 140 albums, the record player would be given

** A “guinea” was a gold coin worth 21 shillings.—Ed.

free. A representative of Universal called at the Owens' home and discussed the matter with Mr. and Mrs. Owen. As a result, on November 6, 1962 they signed a "retail installment contract" for the purchase of 140 albums on the time payment plan proposed by Universal.

Under the printed form of contract Universal sold and Owen bought "subject to the terms and conditions stipulated in Exhibit 'A' hereto annexed and printed on the other side hereof and made part hereof, the following goods * * *: 12 stereo albums to be delivered at inception of program and every 6 months thereafter until completion of program," a "new Motorola consolo (sic)" and "140 stereo albums of choice * * *." The total cash price was listed as \$698; a downpayment of \$30 was noted; the balance of \$668, plus an "official fee" of \$1.40 and a time price differential of \$150.32, left a time balance of \$819.72 to be paid in installments. Owen agreed to pay this balance in 36 equal monthly installments of \$22.77 each beginning on December 12, 1962, "at the office of Universal Stereo Corp., 8 Hollywood Avenue, Hillside, N.J., or any other address determined by assignee." The contract provided:

"If the Buyer executed a promissory note of even date herewith in the amount of the time balance indicated, said note is not in payment thereof, but is a negotiable instrument separate and apart from this contract even though at the time of execution it may be temporarily attached hereto by perforation or otherwise."

It was part of Universal's practice to take notes for these contracts, and obviously there was no doubt that it would be done in the Owen case. Owen did sign a printed form of note which was presented with the contract. The name of Universal Stereo Corporation was printed thereon, and the note provided for the monthly installment payments specified. On the reverse side was an elaborate printed form of endorsement which began "Pay to the order of Unico, 251 Broad St., Elizabeth, New Jersey, with full recourse;" and which contained various waivers by the endorser, and an authorization to the transferee to vary the terms of the note in its discretion in dealing with the maker.

* * *

Owen's installment note to Universal for the time balance of \$819.72 is dated November 6, 1962. Although the endorsement on the reverse side is not dated, Unico concedes the note was received on or about the day it was made. The underlying sale contract was assigned to Unico at the same time, and it is admitted that Owen was never notified of the assignment.

Owen received from Universal the stereo record player and the original 12 albums called for by the contract. Although he continued to pay the monthly installments on the note for the 12 succeeding months, he never received another album. During that period Mrs. Owen endeavored unsuccessfully to communicate with Universal, and finally ceased making payments when the albums were not delivered. Nothing further was heard about the matter until July 1964, when the attorney for Unico, who was also one of its partners, advised Mrs. Owen that Unico held the note and that payments should be made to it. She told him the payments would be resumed if the albums were delivered. No further deliveries were made because Universal had become insolvent. Up to this time Owen had paid the deposit of \$30 and 12 installments of \$22.77 each, for a total of \$303.24. Unico brought this suit for the balance due on the note plus penalties and a 20% Attorney's fee.

Owen defended on the ground that Unico was not a holder in due course of the note, that the payment of \$303.24 adequately satisfied any obligation for Universal's partial performance, and that Universal's default and the consequent failure of consideration barred recovery by Unico. As we have said, the trial court found plaintiff was not a holder in due course of the note and that Universal's breach of the sales contract barred recovery.

This brings us to the primary inquiry in the case. Is the plaintiff Unico a holder in due course of defendant's note?

The defendant's note was executed on November 6, 1962. The Uniform Commercial Code, N.J.S. 12A:1-101 et seq., N.J.S.A., was adopted by the Legislature in 1961 (L.1961 c. 120), but it did not become operative until January 1, 1963. The note, therefore, is governed by the Uniform Negotiable Instruments Law, N.J.S.A. 7:1-1 et seq. Section 52 thereof defined a holder in due course as one who (among other prerequisites) took the instrument "in good faith and for value." N.J.S.A. 7:2-52. If plaintiff is not a holder in due course it is subject to the defense of failure of consideration on the part of Universal, both under the Negotiable Instruments Law, N.J.S.A. 7:2-58, and the Uniform Commercial Code, N.J.S. 12A:3-306(c), N.J.S.A.

* * *

Unico is a partnership formed expressly for the purpose of financing Universal Stereo Corporation, and Universal agreed to pay all costs up to a fixed amount in connection with Unico's formation. The elaborate contract between them, dated August 24, 1962, recited that Universal was engaged in the merchandising of records and stereophonic sets, and that it desired to borrow money from time to time from Unico, "secured by the assignment of accounts receivable, promissory notes, trade acceptances, conditional sales contracts, chattel mortgages, leases, installment contracts, or other forms of agreement evidencing liens." Subject to conditions set out in the agreement, Unico agreed to lend Universal up to 35% Of the total amount of the balances of customers' contracts assigned to Unico subject to a limit of \$50,000, in return for which Universal submitted to a substantial degree of control of its entire business operation by the lender. As collateral security for the loans, Universal agreed to negotiate "to the lender" all customers' notes listed in a monthly schedule of new sales contracts, and to assign all conditional sale contracts connected with the notes, as well as the right to any monies due from customers.

Specific credit qualifications for Universal's record album customers were imposed by Unico; requirements for the making of the notes and their endorsement were established, and the sale contracts had to be recorded in the county recording office. All such contracts were required to meet the standards of the agreement between lender and borrower, among them being that the customer's installment payment term would not exceed 36 months and "every term" of the Unico-Universal agreement was to "be deemed incorporated into all assignments" of record sales contracts delivered as security for the loans. It was further agreed that Unico should have all the rights of Universal under the contracts as if it were the seller, including the right to enforce them in its name, and Unico was given an irrevocable power to enforce such rights.

* * *

This general outline of the Universal-Unico financing agreement serves as evidence that Unico not only had a thorough knowledge of the nature and method of operation of Universal's business, but also exercised extensive control over it. Moreover, obviously it had a large, if not decisive, hand in the fashioning and supplying of the form of contract and note used by Universal, and particularly in setting the terms of the record album sales agreement, which were designed to put the buyer-consumer in an unfair and burdensome legal strait jacket and to bar any escape no matter what the default of the seller, while permitting the note-holder, contract-assignee to force payment from him by enveloping itself in the formal status of holder in due course. To say the relationship between Unico and the business operations of Universal was close, and that Unico was involved therein, is to put it mildly. There is no case in New Jersey dealing with the contention that the holder of a consumer goods buyer's note in purchasing it did not meet the test of good faith

negotiation because the connection between the seller and the financier was as intimate as in this case. *Compare, James Talcott, Inc. v. Shulman*, 82 N.J.Super. 438, 198 A.2d 98 (App. Div.1964); *Westfield Investment Co. v. Fellers*, 74 N.J. Super. 575, 181 A.2d 809 (Law Div.1962).

There is a conflict of authority in other jurisdictions (Annotation, 44 A.L.R.2d 8 (1955)), but we are impelled for reasons of equity and justice to join those courts which deny holder in due course status in consumer goods sales cases to those financiers whose involvement with the seller's business is as close, and whose knowledge of the extrinsic factors-i.e., the terms of the underlying sale agreement-is as pervasive, as it is in the present case. Their reasoning is particularly persuasive in this case because of the unusually executory character of the seller's obligation to furnish the consideration for the buyer's undertaking.

In *Commercial Credit Corp. v. Orange County Mach. Wks.*, 34 Cal.2d 766, 214 P.2d 819 (1950), Machine Works was in the market for a press. Ermac Company knew of one which could be purchased from General American Precooling Corporation for \$5000, and offered to sell it to Machine Works for \$5500. Commercial Credit was consulted by Ermac, and agreed to finance the transaction by taking an assignment of the contract of sale between Ermac and Machine Works. For a substantial period before this time, Ermac had obtained similar financing from Commercial Credit and had some blank forms supplied to it by the latter. By a contract written on one of these forms, which was entitled "Industrial Conditional Sales Contract," Ermac agreed to sell and Machine Works bound itself to purchase the press.

The terms of the contract were very much like those in the case now before us. The purchase price was to be paid in 12 equal monthly installments, "evidenced by my note of even date to your order." As to the note, the contract said:

"Said note is a negotiable instrument, separate and apart from this contract, even though at the time of execution it may be temporarily attached hereto by perforation or otherwise."

It provided also, as in our case:

"This contract may be assigned and/or said note may be negotiated without notice to me and when assigned and/or negotiated shall be free from any defense, counterclaim or cross complaint by me."

The note originally was the latter part of the printed form of contract, but could be detached from it at a dotted or perforated line.

Machine Works made the required down payment to Ermac, which in turn under its contract with Commercial assigned the contract and endorsed the note to the latter. Commercial then gave its check to Ermac for \$4261. Ermac sent its check to Precooling Corporation, which refused to deliver the press to Machine Works when the check was dishonored. Commercial sued Machine Works as a holder in due course of its note to Ermac. Machine Works contended Commercial was not entitled to the status of such a holder because the sales contract and attached note should be construed as constituting a single document. Machine Works contended also that the finance company was a party to the original transaction rather than a subsequent purchaser, that it took subject to all equities and defenses existing in its favor against Ermac, and that the claimed negotiability of the note was destroyed when it and the conditional sales agreement were transferred together as one instrument.

The Supreme Court of California said the fact that the contract and note were physically attached at the time of transfer to Commercial would not alone defeat negotiability. But the court pointed out the Commercial advanced money to Ermac (with which it had dealt previously and whose "credit had been checked and financial integrity demonstrated"), with the understanding

that the agreement and note would be assigned and endorsed to it immediately; and that “(i)n a very real sense, the finance company was a moving force in the transaction from its very inception, and acted as a party to it.” In deciding against Commercial, the court said:

“When a finance company actively participates in a transaction of this type from its inception, counseling and aiding the future vendor-payee, it cannot be regarded as a holder in due course of the note given in the transaction and the defense of failure of consideration may properly be maintained. Machine Works never obtained the press for which it bargained and, as against Commercial, there is no more obligation upon it to pay the note than there is to pay the installments specified in the contract.”

In the case before us Unico was brought into existence to finance all Universal’s sales contracts, and it was a major factor in establishing the terms upon which the financing and installment payment of the resulting notes and installment delivery of the record albums were to be engaged in. As in the case just cited, it too was “in a very real sense” a party not only to the Owen contract, but to all others similarly procured by Universal.

* * *

For purposes of consumer goods transactions, we hold that where the seller’s performance is executory in character and when it appears from the totality of the arrangements between dealer and financier that the financier has had a substantial voice in setting standards for the underlying transaction, or has approved the standards established by the dealer, and has agreed to take all or a predetermined or substantial quantity of the negotiable paper which is backed by such standards, the financier should be considered a participant in the original transaction and therefore not entitled to holder in due course status. We reserve specifically the question whether, when the buyer’s claim is breach of warranty as distinguished from failure of consideration, the seller’s default as to the former may be raised as a defense against the financier. *Cf. Eastern Acceptance Corp. v. Kavlick*, 10 N.J.Super. 253, 77 A.2d 49 (App.Div.1950).

II

Plaintiff argues that even if it cannot be considered a holder in due course of Owen’s note, it is entitled to recover regardless of the failure of consideration on the part of Universal, because of the so-called waiver of defenses or estoppel clause contained in the sale contract. The clause says:

“Buyer hereby acknowledges notice that this contract may be assigned and that assignees will rely upon the agreements contained in this paragraph, and agrees that the liability of the Buyer to any assignee shall be immediate and absolute and not affected by any default whatsoever of the Seller signing this contract; and in order to induce assignees to purchase this contract, the Buyer further agrees not to set up any claim against such Seller as a defense, counterclaim or offset to any action by any assignee for the unpaid balance of the purchase price or for possession of the property.”

This provision is the fifth of 11 fine print paragraphs on the reverse side of the sale contract. The type is the same as in the other clauses; there is no emphasis put on it in the context, and there is no evidence that it was in any way brought to Owen’s attention or its significance explained to him. But regardless, we consider that the clause is an unfair imposition on a consumer goods purchaser and is contrary to public policy.

The plain attempt and purpose of the waiver is to invest the sale agreement with the type of negotiability which under the Negotiable Instruments Law would have made the holder of a negotiable promissory note a holder in due course and entitled to recover regardless of the seller-payee’s default.

In our judgment such a clause in consumer goods conditional sale contracts, chattel mortgages, and other instruments of like character is void as against public policy for three reasons: (1) it is opposed to the policy of the Negotiable Instruments Law which had established the controlling prerequisites for negotiability, and provided also that the rights of one not a holder in due course were subject to all legal defenses which the maker of the instrument had against the transferor. N.J.S.A. 7:2-58; (2) it is opposed to the spirit of N.J.S. 2A:25-1, N.J.S.A., which provides that an obligor sued by an assignee “shall be allowed * * * all * * * defenses he had against the assignor or his representatives before notice of such assignment was given to him.” (It is conceded here that plaintiff gave no notice of the assignment to defendant); and (3) the policy of our state is to protect conditional vendees against inposition by conditional vendors and installment sellers. . . .

* * *

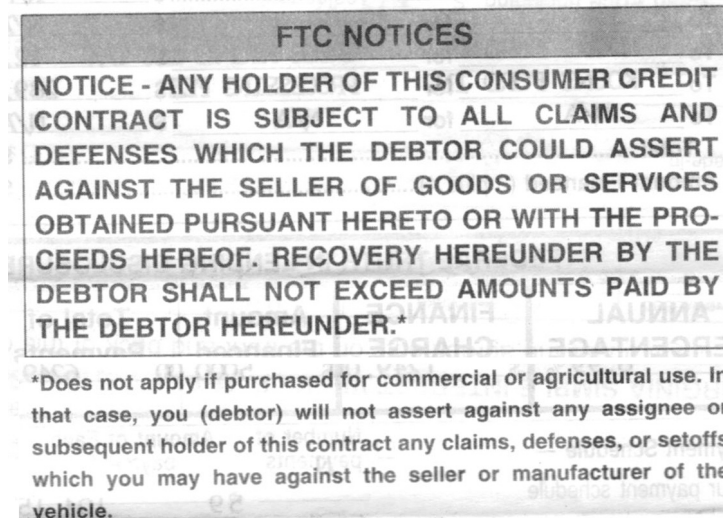
For the reasons stated, we hold the waiver clause unenforceable and invalid against Owen.

III

We agree with the result reached in the tribunals below. Plaintiff offered no proof in the trial court to show that the value of the 12 albums Owen received before breach of the contract by Universal, together with that of the record player at the time of the breach (assuming its value was material in view of the seller’s representation that there was to be no charge for it), was in excess of the \$303.24 paid by Owen under the contract. Moreover, there has been no suggestion throughout this proceeding that plaintiff is entitled to a partial recovery on the note in its capacity as an assignee thereof. Accordingly, the judgment for the defendant is affirmed.

Notes

1. How does the waiver of defense clause attempt to make the Owens’ contract similar to a negotiable instrument? Should waiver of defenses clauses be permitted?
2. How do the FTC’s holder in due course regulation and the Uniform Consumer Credit Code deal with “waiver of defenses” clauses in consumer contracts?
3. Are waiver of defenses clauses permissible in non-consumer contracts? Many purchasers of new Ford automobiles borrow money from the Ford Motor Credit Corporation. The standard contract contains this clause and footnote:



- a. Must Ford Motor Credit include this notice in consumer contracts?
- b. What function does the footnote serve? What is an example of how the footnote might apply?

APPENDIX ITEM #10. NOTE ON THE UNIFORM CONSUMER CREDIT CODE (UCCC)

On page 691, our casebook refers to the Uniform Consumer Credit Code of 1974 ("UCCC"), a model law adopted in 12 states and the District of Columbia. Two provisions of the UCCC limit negotiability in consumer transactions:

§ 3.307. Certain Negotiable Instruments Prohibited

With respect to a consumer credit sale or consumer lease, [except a sale or lease primarily for an agricultural purpose,] the creditor may not take a negotiable instrument other than a check dated not later than ten days after its issuance as evidence of the obligation of the consumer.

§ 3.404. Assignee Subject to Claims and Defenses

(1) With respect to a consumer credit sale or consumer lease [, except one primarily for an agricultural purpose], an assignee of the rights of the seller or lessor is subject to all claims and defenses of the consumer against the seller or lessor arising from the sale or lease of property or services, notwithstanding that the assignee is a holder in due course of a negotiable instrument issued in violation of the provisions prohibiting certain negotiable instruments (Section 3.307).

* * *

(4) An agreement may not limit or waive the claims or defenses of a consumer under this section.

APPENDIX ITEM #11. SUPPLEMENTAL CASE: *NATIONSBANK V. COOKIES*

NATIONSBANK OF VIRGINIA v. COOKIES, INC.
Circuit Court of Virginia
22 UCC Rep. Serv.2d 838 (1993)

Fortkort, J.

This case comes before the Court on cross-motions for summary judgment filed by plaintiff Nationsbank of Virginia (hereafter “Nationsbank”) and defendant Phoenix International Marketing Corporation (hereafter “Phoenix”). For the reasons set forth below, defendant’s motion is denied. Summary judgment is granted to plaintiff Nationsbank.

The facts underlying this case are set forth in the pleadings and memoranda filed by the parties and in a joint stipulation of facts. Defendant Cookies, Inc., maintained an account with plaintiff Nationsbank. On May 29, 1990, Phoenix issued a check for \$40,298.59 payable to a Mr. Bill Odom. Mr. Odom endorsed the check, and it was deposited in Cookies’ account at Nationsbank. Six days later, Cookies issued its own check in the amount of \$17,300.00, which it used to purchase a cashier’s check in that amount. The following day, after those funds had been withdrawn, Nationsbank learned that Phoenix had stopped payment on the original (\$40,298.59) check. Nationsbank charged back the Cookies account, resulting in an overdraft of \$15,633.19. They now seek to recover that amount from Phoenix.

In its memorandum, Nationsbank convincingly elucidates its claim to the status of a holder in due course, as defined by the Virginia code. Va.Code Ann. § 8.3-302 (1950). A holder in due course is a holder who takes an instrument for value, in good faith, and without notice of any dishonor, claim, or defense. *Id.* From the statements contained in the joint stipulation of facts, it is clear that Nationsbank acquired a security interest in the Phoenix check by allowing the proceeds of that check to be withdrawn. Va.Code Ann. § 8.4-208 (1950) [Revised UCC 4-210]. The acquisition of that security interest constitutes “value” for the purposes of determining holder in due course status. Va.Code Ann. § 8.4-209 (1950) [Revised UCC 4-211].

The second requirement of a holder in due course is that the holder have taken the instrument without notice of any claim or defense. The Virginia Supreme Court has ruled that “notice” on the part of the holder is “either actual knowledge of the infirmity in the instrument or knowledge of such facts that his action in taking the instrument amounts to bad faith.” *Lawton v. Walker*, 231 Va. 247, 343 S.E.2d 335 (1986). Mere negligence or the awareness of suspicious circumstances is insufficient to deny the holder due course status. *Id.* Phoenix has failed to show that Nationsbank had any notice of the stop payment order when the latter advanced funds against the check.

The final element of holder in due course status is good faith. There is nothing in the stipulation of facts to suggest an absence of good faith in the transaction at issue, nor does Phoenix raise any such argument in its memorandum. . . .

Summary judgment is granted to plaintiff Nationsbank in accordance with Rule 3:18 of the Virginia Supreme Court. Counsel for Nationsbank will please prepare an order on the basis of this letter opinion, submit it to opposing counsel for endorsement as to form, and forward it to this Court for entry.

Note

How did Nationsbank give value? Does this case contradict Prof. Rosenthal’s theory?

APPENDIX ITEM #12. NOTE ON *IN RE HWANG*

The decision of Bankruptcy Court in *In re Hwang*, 396 B.R. 757 (Bankr. C.D. Cal. 2008), was reversed on appeal. The U.S. District Court held:

Under California law, the holder of a note has the right to enforce the note, regardless of whether the holder is the owner of the note or is in wrongful possession of the note. *See* Cal. Com.Code § 3301. The bankruptcy court found (and the evidence confirms) that IndyMac is the holder of the Note.⁴ Thus, under California law, IndyMac has the right to enforce the Note, a fact the bankruptcy court expressly recognized. It would seem relatively straightforward, then, that IndyMac, as the party with the right to enforce a claim on the note, is the real party in interest on this Motion.

The bankruptcy court, however, concluded that the situation here was complicated by the fact that Freddie Mac (or some unknown party who may have purchased the Note from Freddie Mac) “likely” securitized the Note, that is, likely placed it in a trust with other notes in order to sell shares of interest in the trust to investors. According to the bankruptcy court, “[i]f a loan is securitized, the real party in interest is the trustee of the securitization trust. . . .” Because no such trustee was joined in IndyMac's Motion, the court denied the Motion for failure to join the real party in interest.

The record, however, simply does not support the bankruptcy court's supposition that the Note was likely securitized. There was no testimony or documentary evidence to that effect before the court. Instead, the court supported its surmise by citing to an Internet publication that supposedly indicated that some 85% of home mortgages originating in 2006 and 2007 were securitized. But this publication was not in evidence. Nor did the court take judicial notice of the information in the publication. Nor does that information appear to be the sort of which a court may take judicial notice. Because the record does not support the bankruptcy court's determination that the Note was likely securitized, this Court concludes that the bankruptcy court abused its discretion in concluding that IndyMac failed to join the real party in interest. As set forth above, the record indicates that IndyMac is the real party in interest on this Motion. The Court therefore reverses the decision of the bankruptcy court

In re Hwang, 438 B.R. 661, 665-66 (C.D. Cal. 2010).

⁴Under California law, a person qualifies as the holder of a note if the note is in the person's possession and is payable to the person. *See* Cal. Com.Code § 1201(b)(21).

APPENDIX ITEM #13. SAMPLE STOP PAYMENT FORM



Customer Care Center
11 Oval Drive, Suite 107
Islandia, NY 11749-1416
888.882.EVER (3837) F. 888.882.6977
E-mail. service@everbank.com

**Stop Payment
Order Form**

(Please PRINT All Information)

This Stop Payment Order is for: Check Electronic Fund Transfer

Date Received: _____

Time Received: _____

To: Everbank, 11 Oval Drive, Suite 107, Islandia, NY 11749-1416

From: (Print Your Name) _____

Account Number:

Check Number: _____

Check or Transfer Amount: \$ _____

Date of Check or Transfer: _____

Payable To: _____

Reason for Stop Payment: _____

NOTE: Oral stop payment orders are binding on Financial institution for fourteen (14) days only, unless confirmed by You in writing within that period. Confirmation must be sent to Financial Institution listed above.

Order Entered By: _____

Date Entered: _____

Time Entered: _____

Fee: \$ _____

Customer Signature: _____

Date: _____

You have authorized, directed and requested Financial Institution to stop payment on the check or transfer described above. You agree to indemnify and hold the Financial Institution harmless from any and all claims, liabilities, costs and expenses, including, but not limited to, court costs and reasonable attorney fees, resulting from or growing out of the Financial Institution's refusal to pay the check or transfer described above. Financial Institution shall have no liability to You for the payment of the identified check or transfer contrary to this stop payment order if the indicated check or transfer number, dollar amount or account number is not accurate. Financial Institution is not liable to You if it pays the identified check or transfer if Financial Institution acted in good faith or exercised ordinary care. Any damages that You incur and which the Financial Institution may be liable for are limited to actual damages not to exceed the amount of the check or transfer. You agree that the Financial Institution may charge You the fee indicated for processing this stop payment order as well as a similar fee for each renewal You make, such fee may be deducted from Your account.

Phrases preceded by a are only applicable if the is marked.

Check Stop Payment Orders:

1. **Effective Period:** This stop payment order shall be valid for a period of six (6) months from the date it is made if signed by You unless Financial Institution has received a written revocation or renewal prior to expiration of such period.
2. **Notification:** You understand that if the stop payment order comes too late for the Financial Institution to have a reasonable time to act on it prior to accepting, certifying, paying, settling for, posting or becoming accountable for the check described above, that this stop payment order shall be of no effect.
3. **Applicable Law:** This stop payment order shall be governed by the provisions of the Uniform Commercial Code in effect in the state in which Financial Institution is located.

Electronic Fund Transfer Stop Payment Orders:

1. **Definition:** An "electronic fund transfer" or "transfer" means a preauthorized electronic fund transfer (a transfer authorized in advance to recur at substantially regular intervals).
2. **Notification:** You must notify Financial Institution orally or in writing at any time up to three (3) business days before the scheduled date of the transfer in order for this stop payment order to be effectuated.
3. **Applicable Law:** This stop payment order shall be governed by the provisions of the Electronic Fund Transfer Act of 1978 and any applicable state law.

Notes

Is the disclaimer language above ("Financial Institution shall have no liability . . .") consistent with § 4-403 cmt. 7?

APPENDIX ITEM #14. SAMPLE APPLICATION FOR LOST INSTRUMENT BOND



ALL-IN-ONE™
COMMERCIAL SURETY APPLICATION
 (EXCEPT PROBATE & PUBLIC OFFICIAL)

**For The CBIC Office
 That Serves Your Area,
 Call Toll Free:**

(888) 283-CBIC (2242)
 (888) 293-CBIC (2242) FAX

1. AGENT/BROKER INFORMATION		Agent/Broker Name		Phone # ()		FAX # ()	
Address		City		State		Zip Code	
2. BOND INFORMATION		Type of Bond (Attach Bond Form)		Amount: \$		Effective Date	
Obligee		Obligee's Address					
3. BUSINESS INFORMATION		Company Name (Must be exactly as it is to appear on bond)				Bus. Phone #	
Company Address		City		State		Zip Code	
Nature of Business		<input type="checkbox"/> Proprietorship <input type="checkbox"/> Corporation <input type="checkbox"/> Partnership <input type="checkbox"/> LLC		Date Formed: / / (Corporation or LLC)		# of Owners, Partners or Members	
4. PERSONAL INFORMATION		Individual's Name		Soc. Sec #		Date of Birth	
Spouse's Name		Spouse's Employer		Employer Phone # ()		Soc. Sec #	
Spouse's Length of Employment		Spouse's Monthly Income \$		Personal Reference		Reference Phone # ()	
Individual's Residence Address		City		State		Zip Code	
<input type="checkbox"/> Own <input type="checkbox"/> Renting <input type="checkbox"/> Apt. <input type="checkbox"/> Buying <input type="checkbox"/> House		Monthly Payment		Residence Mortgage Holder		Purchase Date	
Are you the Trustee, Trustor or Beneficiary of any Trust?		Ever Declared Bankruptcy?		Pending or Prior IRS Liens?		Any Lawsuits Pending Against You?	
<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Yes <input type="checkbox"/> No		<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Yes <input type="checkbox"/> No		<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Yes <input type="checkbox"/> No		<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Yes <input type="checkbox"/> No	
Bank (Personal Account)		Phone # ()		Checking Acct. #		Balance: \$	
				Savings Acct. #		Balance: \$	

INDEMNIFICATION AGREEMENT
IMPORTANT! Signature Instructions - The individual who completes this form must also sign the indemnity agreement below. If married, spouse must also sign; however, no missing signature shall invalidate this agreement. **Sole Proprietorship** - Owner must sign below. If married, spouse must also sign. **Partnership** - Partners are signing as authorized agents of the partnership and as individually liable indemnitors. If married, spouse must also sign. **Corporation or LLC** - If corporate officer or LLC member or manager signs indicating his or her LLC capacity, it is nonetheless specifically understood that such individual is signing in his or her corporate or LLC capacity and as an individually liable indemnitor. If married, spouse must also sign. **Complete a separate application for each owner, partner, stockholder or LLC member.**

I request that Contractors Bonding and Insurance Company ("CBIC") execute a Bond and consider executing future Bonds for (Company Name) _____
 ("Principal"). I authorize CBIC or its agents to investigate my credit and Principal's credit, now and at any time in the future, with any creditor, supplier, customer, financial institution, or other person or entity. Authorization is hereby granted to any of the aforementioned, now and at any time in the future, to release information to CBIC pertaining to credit. I make the following promises so that CBIC will execute a Bond and consider executing future Bonds:

- I agree that the following definitions apply: (a) Bond means (i) any surety bond, undertaking, or other express or implied obligation of guaranty or suretyship, signed or committed to by CBIC at the request of Principal, or any of the indemnitors (regardless of what business entity is named on the Bond), on, before, or after the date of this agreement pursuant to which CBIC is or may be made liable for Loss, whether or not Principal is also liable; and (ii) all riders, endorsements, continuations, renewals, substitutions, modifications, extensions, replacements and reinstatements thereto; and changes in the penal sum thereto; and (b) Loss means any payment or expense either incurred or anticipated by CBIC in connection with any Bond or this agreement, including but not limited to: payment of bond proceeds or any other expense in connection with claims, potential claims, or demands; claim fees; penalties; interest; court costs; collection agency fees; costs related to taking, protecting, administering, realizing upon, or releasing collateral; and attorneys' fees (including but not limited to those incurred in defense of bond claims or pursuing any rights of indemnification or subrogation and in obtaining and enforcing any judgment arising from those rights).
- I, individually, and jointly and severally with Principal and all other indemnitors, agree to hold CBIC harmless from all Loss and to pay back or reimburse CBIC for all Loss.
- I agree to provide adequate collateral to CBIC in the event that CBIC is required or deems it necessary to establish a reserve for Loss for any Bond. The reserve for Loss may vary from time to time as CBIC deems necessary to protect itself from Loss. Cash collateral equal to the reserve for Loss shall be adequate. Other collateral shall be adequate if the net equity value of the collateral is equal to 166% of the reserve for Loss and the collateral is otherwise acceptable to CBIC. CBIC may insist upon cash collateral. Collateral may be held by CBIC until CBIC has determined it is no longer exposed to Loss as a matter of law, and CBIC may retain or sell collateral to reimburse itself for Loss. Specific performance of this paragraph shall be a remedy available to CBIC, and all procedures for executing on judgments may be used to enforce CBIC's decree(s) of specific performance. In the event that CBIC suffers a Loss, prior to being provided with collateral, CBIC may enforce any decree of specific performance, up to the amount of such decree, as a money judgment (in addition to any other judgments) to reimburse itself for such Loss without further notice or motion.
- I agree to pay to CBIC each annual premium due according to the rates in effect when each payment is due. I agree that premium for a Bond is fully earned upon execution of a Bond and is not refundable.
- I agree that a facsimile copy of this agreement shall be considered an original and shall be admissible in a court of law to the same extent as the original agreement.
- I agree that CBIC may obtain a release from its obligations as surety on a Bond whenever any such release is authorized by law.
- Unless a Bond specifically states (i) that it cannot be cancelled, or (ii) the manner in which notice of cancellation must be given, CBIC may cancel a Bond by mailing a notice of cancellation in the regular U.S. Mails to the obligee and to Principal, or Principal's representative, at the latest address provided to CBIC, and I agree to accept service of notice in such manner. I designate my insurance agent as my representative and Principal's representative for such service. Unless a Bond, statute or lawful governmental regulation specifically provides otherwise, cancellation shall be effective 30 days after CBIC deposits the requisite notice of cancellation in the U.S. Mails. I WAIVE ANY CLAIM AGAINST CBIC FOR DAMAGES which I may suffer as a result of cancellation of a Bond or any release from any obligation of CBIC on any Bond.
- I agree that CBIC has the exclusive right to decide whether to pay, compromise, defend, or appeal any claim against a Bond.
- I agree that I CANNOT TERMINATE my LIABILITY to CBIC created by this agreement except by sending written notice of intent to terminate to CBIC. Written notice to terminate shall be sent to CBIC at its home office, 1213 Valley Street, P.O. Box 9271, Seattle, WA 98109-0271. I AGREE that the termination will be effective thirty working days after actual receipt of such notice by CBIC, but only for Bonds signed or committed to by CBIC after the effective date. Thus, I agree that I will REMAIN LIABLE to CBIC for LOSS ON BONDS SIGNED OR COMMITTED TO BY CBIC PRIOR TO THE EFFECTIVE DATE OF TERMINATION.
- I agree that CBIC can bring any legal action arising out of or in any way related to any Bond or this agreement in King County, Washington, and that Washington law shall apply where CBIC makes such election.
- I agree that CBIC shall have the right to fill in any blanks left herein and to correct any errors made by me in filling in any blanks.
- I agree that I have READ AND UNDERSTOOD this agreement, that I am signing as a PERSONAL INDEMNITOR, on behalf of my MARITAL COMMUNITY, and in my CORPORATE, PARTNERSHIP, or LLC CAPACITY, if any. No missing signature shall invalidate this agreement.

Bond Premium Payment Method:		Account No.		Expiration Date		** Insert Principal's name exactly as it is to appear in Bond.	
<input type="checkbox"/> Cash <input type="checkbox"/> Visa <input type="checkbox"/> MasterCard							
Date		COMPANY NAME (Print)					
Indemnitor's Signature * X		Indemnitor's Name* (Print)		Spouse Indemnitor's Signature * X		Spouse Indemnitor's Name* (Print)	

*Each indemnitor and spouse is signing in his and her individual capacity and also in his and her capacity as an owner and/or officer and/or stockholder and/or partner and/or joint venturer and/or LLC member and/or Manager.

IMPORTANT! FOR COURT, ERISA, DEFECTIVE TITLE, JANITORIAL OR LOST INSTRUMENT BONDS
PLEASE COMPLETE INFORMATION ON REVERSE SIDE ApILL1.01-US032096

Agent Name	Phone # ()	Applicant Name
------------	----------------	----------------

IMPORTANT! PLEASE COMPLETE APPLICATION, INDEMNITY AGREEMENT AND SIGNATURE BLOCK ON REVERSE SIDE

COURT BOND INFORMATION			
CASE INFORMATION	Court	State	County
Note below or attach copy of Complaint/Judgement or details of litigation.		Cause No.	State Code No. or Statue (If Applicable)
Plaintiff(s) <input type="checkbox"/> Principal	Defendant(s) <input type="checkbox"/> Principal		
Attorney	Address	Phone # ()	

ERISA BOND APPLICATION					
BOND INFORMATION	Legal Name of Plan (Must be exactly as it is to appear on bond)			Amount \$	Effective Date
PRINCIPAL/PLAN OFFICIAL(S)	Name			Soc. Sec #	
Address		City	State	Zip Code	Phone # ()
Name		Soc. Sec #			
Address		City	State	Zip Code	Phone # ()
Has any Plan Official ever (check all that apply) <input type="checkbox"/> declared bankruptcy <input type="checkbox"/> failed in business <input type="checkbox"/> had liens or judgements filed against them <input type="checkbox"/> none of these					
PLAN INFORMATION	List or attach statements which show the types of Stocks, Bonds and Other Investments made by the Pension Fund:				
Are any trust funds invested in the employer's business? <input type="checkbox"/> Yes <input type="checkbox"/> No		Who directs the investments?			
Does the plan employ the services of an independent administrator? <input type="checkbox"/> Yes <input type="checkbox"/> No		If "Yes", who is the administrator?			
Are the assets of the Plan audited at least annually? <input type="checkbox"/> Yes <input type="checkbox"/> No		If "Yes", is the auditor an independent CPA? <input type="checkbox"/> Yes <input type="checkbox"/> No		Name of auditor	
Has any insurer or surety declined or canceled your bond in the last six years? <input type="checkbox"/> Yes <input type="checkbox"/> No If "Yes", explain fully on a separate sheet					
Has the Plan sustained any dishonesty losses in the last six years? <input type="checkbox"/> Yes <input type="checkbox"/> No If "Yes", please describe circumstances, dates, & actions taken for each loss on separate sheet.					

DEFECTIVE TITLE, & JANITORIAL/BUSINESS SERVICE APPLICATION	
CHECK BOND TYPE REQUIRED AND ANY SPECIFIC INFORMATION REQUESTED	
<input type="checkbox"/> DEFECTIVE TITLE Include papers from MVD and description of vehicle and bill of sale if available.	<input type="checkbox"/> JANITORIAL SERVICE/BUSINESS SERVICE \$2,500 Bond \$5,000 Bond \$10,000 Bond Specify Type of Business _____

LOST INSTRUMENT BOND APPLICATION				<i>Attach copies of ALL correspondence received from the obligee together with any bond forms provided.</i>	
If Applicant is acting as Fiduciary, give names, ages, addresses, and percent of interest in the estate of all heirs:					
BOND INFORMATION	Type of Bond <input type="checkbox"/> Open Penalty <input type="checkbox"/> Fixed Penalty	Bond Amount (if Fixed Penalty) \$	Present Market Value of Securities \$		
To Whom is Bond Given (Obligee) — List full names of ALL parties, including transfer agents, registrars and trustees, if any					
Obligee's Address		City	State	Zip Code	
UNDERWRITING INFORMATION	Describe all circumstances connected with loss (e.g. date loss discovered, what search made, steps taken to recover, etc.)				
STOCK CERTIFICATE	Certificate No(s).	No. of Shares	Market Value per Share \$		
Class of Stock		Name of Stock Exchange Where Traded			
Has the Stock been — Endorsed? <input type="checkbox"/> Yes <input type="checkbox"/> No		— Assigned? <input type="checkbox"/> Yes <input type="checkbox"/> No	— Pledged? <input type="checkbox"/> Yes <input type="checkbox"/> No	Has Power of Attorney Stock Power been given? <input type="checkbox"/> Yes <input type="checkbox"/> No	
Is Stock Registered or Recorded? <input type="checkbox"/> Yes <input type="checkbox"/> No		If, Yes, in whose Name do they Stand?		Issuing Company	
BOND	Number(s).	Dated	Maturity Date		
Principal Amount \$	Interest Rate	Coupons Attached? <input type="checkbox"/> Yes <input type="checkbox"/> No	Registered?	Issuing Company	
CHECK/MONEY ORDER	Number(s).	Dated	Amount \$		
Name of Bank		Name of Payee		Was Stop Payment Ordered? <input type="checkbox"/> Yes <input type="checkbox"/> No	Date
Name of Maker		Was the Check Endorsed? <input type="checkbox"/> Yes <input type="checkbox"/> No	Name of Endorser		

APPENDIX ITEM #15. NOTES ON CONTRIBUTION

U.C.C. § 3-116(b) states that a party having joint and several liability who pays an instrument is entitled to contribution in accordance with applicable law. The following excerpt from the Restatement of Restitution explains the traditional rules regarding contribution:

Two or more persons engaging in a common enterprise or becoming sureties for a third person share the duty of performance equally . . . As long as all remain solvent, available, and liable to contribution, one who pays the entire amount is entitled to recover from each of the others a sum equal to such amount divided by the number of persons participating. Thus if there are three co-debtors and one pays the entire debt, he is entitled to restitution of one-third of the amount from each of the others. If in partial satisfaction one pays less than the entire amount but more than his share, he is entitled to recover from any one of the others who has not paid his share such excess up to the amount of the unpaid share of the other, or he can recover from each of the others the amount of such excess divided by the number of others. In such case, however, where the balance of the debt still remains unpaid, he is not permitted to divide his payment into the number of shares equal to the number of persons participating and obtain from each of the others the amount of one of such shares thereby reducing the amount of his net payment below his share. Thus if upon a debt of \$1000 there are five sureties, and one of them pays the entire amount, he is entitled to recover \$200 from each of the others. If he pays \$600 in partial discharge, he is entitled to recover \$200 from any one or any two of them or \$100 from each of them. He cannot, however, recover \$120 from each of them, so that each will share equally in the \$600 payment, since his right to contribution does not entitle him to restitution which would bring his loss below that which he should pay if the claim of the creditor were fully discharged.

Restatement of Restitution § 85 cmt. e.

APPENDIX ITEM #16. NOTE ON *PLEIN V. LACKEY*

Two key paragraphs were redacted from the excerpt of *Plein v. Lackey* in our casebooks. These paragraphs should be included where the ellipses appear at the bottom of page 744:

As an accommodation party who paid off the note, Cameron was entitled to enforce the note: “An accommodation party who pays the instrument is entitled to reimbursement from the accommodated party and is entitled to enforce the instrument against the accommodated party.” Section .3-419(e). Comment 5 to section .3-419 states that “[s]ince the accommodation party that pays the instrument is entitled to enforce the instrument against the accommodated party, the accommodation party *also obtains rights to any security interest or other collateral* that secures the payment of the instrument.” (Emphasis added.) Once he paid the Sunset note, Cameron obtained the beneficiary’s right in the deed of trust and was entitled to foreclose it upon default of Alpen.

We hold that Cameron signed the Sunset note as an accommodation party, and that when he paid off the instrument he obtained the right to enforce the note as well as the beneficiary's rights in the deed of trust securing the note.

Plein v. Lackey, 67 P.3d 1061, 1065 (Wash. 2003) (en banc).

APPENDIX ITEM #17. SUPPLEMENTAL CASE: *SUTTLES V. THOMAS BEARDON*

SUTTLES v. THE THOMAS BEARDEN COMPANY

Court of Appeals of Texas
152 S.W.3d 607 (Tex. App. 2005)

LAURA CARTER HIGLEY, Justice.

* * *

On June 28, 1999, Suttles signed a one-page promissory note payable to TBC in the principal amount of \$250,000. The note stated, in relevant part, as follows:

FOR GOOD AND VALUABLE CONSIDERATION, the undersigned Borrowers, jointly and severally, do hereby promise to pay to Thomas Bearden (Lender), the amount of \$250,000, together with interest accrued at the rate of 7% percent [sic] per annual [sic]. Said amount is to be payable in 36 installments of Interest Only, the first of which is due on or before 25th of August, and following payments to be made on the 25th of each Month.

Suttles signed the note twice. His first signature appeared below the typed written body of the note as follows:

Gessner Partners Ltd.
TS Clare, Inc., General Partner
Tracy Suttles, President
/s/ Tracy Suttles
Borrower

In an empty space at the bottom of the page, the parties wrote a handwritten amendment to the note. Suttles again signed below the handwritten amendment, as did Bruce Ripper, the president of TBC. The amendment and parties' signatures appeared on the note as follows:

Interest will accrue from Oct 17, 1997. A \$50,000 principal payment will be due June 28, 2000.
/s/ Bruce Ripper
/s/ Tracy Suttles

On September 14, 2000, TBC gave appellants notice that the note was in default and demanded payment in the total sum of \$290,523.18. On November 9, 2001, TBC sued on the note, naming Suttles, NBC Properties, Inc., TS—Clare, and Gessner as defendants. On March 8, 2002, TBC requested a partial summary judgment on its claims against both TS—Clare and Suttles. The trial court granted TBC's motion for partial summary judgment against both TS—Clare and Suttles on July 9, 2002, after which TBC dismissed its remaining claims, making the partial summary judgment final.

* * *

Liability on the Promissory Note

In their first six issues on appeal, appellants contend that the trial court erred in finding Business and Commerce Code, subsection 3.402(b)(1) did not shield Suttles from liability on the note. Specifically, appellants assert that the face of the note unambiguously showed that Suttles signed solely in his representative capacity as the president of TS—Clare; therefore, subsection 3.402(b)(1) relieved him of liability. In response, TBC contends that subsection 3.402(b)(1) is not applicable to the note because (1) TS—Clare was not “identified” in the instrument and (2) the note was ambiguous with regard to whether appellant signed solely in a representative capacity.

* * *

Even if it is shown that a defendant signed as the maker of a note, the defendant may nevertheless escape liability if the signature was made in a representative capacity. TEX. BUS. & COM.CODE ANN. § 3.402 (Vernon 2003). Indeed, if Business and Commerce Code, subsection 3.402(b)(1) applies to a note, the signatory is not liable as a matter of law. *Id.* § 3.402(b)(1). . . .

Subsection 3.402(b)(1) provides as follows:

(b) If a representative signs the name of the representative to an instrument and the signature is an authorized signature of the represented person, the following rules apply:

(1) If the *form of the signature* shows *unambiguously* that the signature is made on behalf of the represented person who is identified in the instrument, the representative is not liable on the instrument.

Id. (emphasis added).

* * *

In the instant case, as president of the corporation, Suttles was a representative of TS—Clare. Relatedly, the parties do not dispute Suttles’s authority to bind TS—Clare to the note. The note, itself, shows that TS—Clare was identified in the signature block of the instrument. Also, the signature block identified Suttles as president of TS—Clare. We conclude that, when Suttles signed the note’s signature block, he did so as an authorized representative of TS—Clare. We further conclude that TS—Clare was identified in the instrument and that the form of the signature block showed unambiguously that Suttles’s signature was made on behalf of TS—Clare.

We disagree with TBC’s contention that the “represented person” (i.e., TS—Clare) was not identified in the note. Although TS—Clare was never mentioned in the body of the note, it was identified in the signature block in which Suttles signed. Subsection 3.402(b)(1) merely requires that the principal be identified “in the instrument.” TEX. BUS. & COM.CODE ANN. § 3.402(b)(1). There is no requirement that the principal be identified in the body of the note. See *id.* We conclude that the identification of TS—Clare within the note’s signature block was sufficient “identification” under section 3.402(b)(1).

We also disagree with TBC’s contention that the form of Suttles’s signature failed to show unambiguously that the signature was made solely on behalf of TS—Clare. We find the three ambiguities identified by TBC to be unpersuasive.

First, TBC directs this Court’s attention to the body of the note, which refers to multiple borrowers and provides for joint and several liability among such borrowers. This, TBC contends, is inconsistent with the notion that only Gessner—and thus TS—Clare as its general partner—was meant to be liable on the note, thereby creating ambiguity as to the capacity in which appellant signed. However, under subsection 3.402(b)(1), we do not look to the note as a whole to discern

whether representative capacity was ambiguous; we look only to the “form of the signature” to insure that the signature, itself, unambiguously shows representative capacity. See *id.* This analysis is more limited than that provided for under former section 3.403—which directed courts to look to the “instrument” to determine representative capacity—but is required to give effect to the changed language of the statute. Compare Act of September 1, 1967, 60th Leg., R.S., ch. 785, § 3.403, 1967 Tex. Gen. Laws 2343, 2423 (amended 1995) with TEX. BUS. & COM.CODE ANN. § 3.402(b)(1).

Second, TBC contends that the signature block does not unambiguously show that Suttles signed in a representative capacity because “although [Suttles] is identified as ‘President,’ his signature does not indicate that he is signing for TS—Clare, Inc. This could easily have been done by including the word ‘by’ in front of his signature.” The comments to section 3.402 indicate that the revisions made to former section 3.403 were for the purpose of providing further protection to agents who sign negotiable instruments in their representative capacity. TEX. BUS. & COM.CODE ANN. § 3.402 cmt. 2. Thus, in drafting the new provision, the legislature moved away from case law under the former provision that interpreted section 3.403 to require an obsequious adherence to a specific signature form. *Id.* As the drafters state in the comments to the new provision

The approach followed by former Section 3–403 was to specify the form of signature that imposed or avoided liability. This approach was unsatisfactory. There are many ways in which there can be ambiguity about a signature. It is better to state a general rule. Subsection (b)(1) states that if the form of the signature unambiguously shows that it is made on behalf of an identified represented person (for example, “P, by A, Treasurer”) the agent is not liable. This is a workable standard for a court to apply.

Id. We conclude that, under revised section 3.402, a preposition was not required to show Suttles’s representative capacity; it was enough that the signature identify TS—Clare, Suttles, and the capacity in which Suttles signed on behalf of TS—Clare.

Finally, TBC contends that “the handwritten interlineations on the note are consistent with an interpretation of individual liability in that there is no indication of representative capacity whatsoever.” However, the signatures below the handwritten amendment to the note are neither consistent nor inconsistent with any theory of representative capacity.

Normally, a signature and any accompanying words are considered an indorsement unless the accompanying words, terms of the instrument, place of the signature, or other circumstances unambiguously indicate that the signature was made for a purpose other than indorsement. TEX. BUS. & COM.CODE ANN. § 3.204(a) (Vernon 2003).

In the instant case, both the placement of the signatures as well as the words accompanying them suggest that the signatures were merely an attempt by the parties to indicate on the face of the note that the handwritten portion thereof was an authorized amendment to the original terms of the note. They do not suggest that either Suttles or Bruce Ripper meant to become liable on the note as indorsers by means of such signatures. Given the limited purpose for which the parties signed, we conclude that Suttles’s failure to indicate his representative capacity when signing below the handwritten amendment neither made him individually liable on the note nor created ambiguity with regard to his signature on behalf of TS—Clare.

We conclude that TBC has failed to show either that TS—Clare was not identified in the note or that the form of Suttles’s signature was ambiguous as to his representative capacity.

We hold that, as a matter of law, appellant’s signature on the note did not make him individually liable on the note, pursuant to Business and Commerce Code, subsection 3.402(b)(1); therefore, the trial court erred in granting summary judgment as to Tracy Suttles.

We sustain appellants' first six issues on appeal.

* * *

Note

How would you have recommended that Tracy Suttles sign the note?

APPENDIX ITEM #18. SUPPLEMENTAL CASE: *IFC CREDIT CORP. V. BULK PETROLEUM CORP.*

IFC CREDIT CORPORATION v. BULK PETROLEUM CORPORATION

U.S. Court of Appeals for the Seventh Circuit
403 F.3d 869 (7th Cir. 2005)

CUDAHY, Circuit Judge.

Plaintiff IFC Credit Corporation (IFC) brought suit alleging that Bulk Petroleum Corporation (Bulk) and its CEO, Darshan Dhaliwal, breached a lease agreement under which Bulk leased gasoline tanks and other equipment from IFC with an option to purchase them at the end of the lease. Bulk claims that the lease agreement has been concluded through an accord and satisfaction executed with the assignee of IFC's rights under the lease. The district court, through Magistrate Judge Aaron E. Goodstein, granted Bulk's motion for summary judgment, ruling that a valid accord and satisfaction had taken place. IFC now appeals that ruling, and we affirm.

* * *

On or about June 21, 1995, Bulk and IFC entered into a series of agreements by which Bulk leased gasoline tanks and equipment from IFC to be used at various gas stations operated by Bulk. Under the terms of the agreements, Bulk was given an option to purchase the equipment at the end of the 72-month lease term. The purchase price was to be the greater of the fair market value of the equipment and \$31,419.40, together with all applicable taxes. The lease documents also provided for extension of the lease term at a rate of \$2,820.52 per month. The documents further required that any notices regarding the purchase of the equipment were to be sent to IFC at a designated address. Concurrent with the execution of the lease, Bulk's CEO, Darshan Dhaliwal, executed a personal guaranty of the agreements.

Less than two weeks later, on or about June 30, 1995, the Bulk lease was assigned by IFC to Finova Capital Corporation (Finova), giving Finova full right, title and interest in the lease, including the initial scheduled payments under the lease. Bulk's payments were to be sent to a Finova lockbox.

Beginning in November 2000, IFC's Patrick Witowski and Bulk's John Gerth engaged in negotiations concerning the termination of the lease and purchase of the equipment by Bulk. However, the two parties could not agree on a purchase price. On January 23, 2001, while these negotiations were ongoing, Finova notified Bulk in writing that all further negotiations regarding the purchase option were to be conducted with IFC (and with Witowski specifically). Finova then promptly filed for bankruptcy on March 7, 2001.

On June 18, 2001, Dhaliwal, who to that point had apparently not been involved in negotiations, sent a letter to Finova and a check for \$31,419.40, made out to Finova Capital Corporation. The invoice attached to the check read "pay off lease 5613500," and the endorsement area on the back

of the check stated “payment in full of lease and purchase option # 5613500.” The accompanying letter from Dhaliwal stated that the check represented “payment in full of the lease and the purchase option” and that “[a]cceptance of this check represents full satisfaction of the obligation of Bulk Petroleum to Finova Capital Corporation.” *Id.* at 42A. The letter concluded by stating that if Finova did not accept the check, then it should inform Bulk as to where it should ship the leased equipment back to Finova. *Id.*

The parties dispute the exact date upon which IFC, via Witowski, received a copy of Dhaliwal’s letter. They also dispute whether the letter and the check were sent together or separately, and whether the check was sent to Finova’s “automated lockbox” rather than to its office (though the letter does not appear to have been sent to a P.O. Box address). In any event, it is undisputed that Witowski (and hence IFC) received a copy of the letter and the check via fax from Bulk on June 22, 2001. The check was negotiated three days later by Finova on June 25, 2001. Following negotiation of the check, IFC did not return the tendered money or claim that Finova had negotiated the check in error. Instead, IFC retained the tendered money, claiming that it constituted only partial satisfaction of Bulk’s outstanding obligations under the agreement (which IFC reckoned to be in excess of \$200,000). Bulk refused to make further payments, contending that its contractual obligations under the lease had been fulfilled upon acceptance and negotiation of the \$31,419.40 check to Finova.

IFC filed this action on December 15, 2002, seeking to recover \$207,961.88 (plus holdover rent) that it claims is owed by Bulk due to the breach of the lease agreement. IFC also sued Dahliwal based upon the personal guaranty he executed contemporaneously with the lease. On October 22, 2003, Bulk and Dahliwal filed a motion for summary judgment, contending that IFC’s claim was barred by a valid accord and satisfaction. The district court granted Bulk and Dahliwal’s motion, ruling that there was no remaining question of fact that defendants had met all the requirements of an accord and satisfaction under the relevant Uniform Commercial Code (UCC) provisions and Illinois law, and there was no evidence that the check was tendered in bad faith. (Apr. 5, 2004 Order.) IFC’s appeal now comes before this Court. Since Bulk’s tender met all the requirements of a valid accord and satisfaction, and above all since IFC did not return the tendered money or attempt to “undo” the transaction, we affirm.

* * *

Under both Illinois law and the relevant provisions of the UCC, an accord and satisfaction occurs when the “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.” 810 Ill. Comp. Stat. 5/3-311(a) (2004). *Accord Saichek v. Lupa*, 204 Ill.2d 127, 135, 272 Ill.Dec. 641, 787 N.E.2d 827, 832 (2003) (“An accord and satisfaction is a contractual method of discharging a debt or claim. To constitute an accord and satisfaction there must be: (1) a bona fide dispute, (2) an unliquidated sum, (3) consideration, (4) a shared and mutual intent to compromise the claim, and (5) execution of the agreement.”). Additionally, 810 Ill. Comp. Stat. 5/3-311(b) requires that “the instrument or an accompanying written communication contain[] a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.”

Clearly Bulk’s tendered check and accompanying letter facially meet these criteria. The purchase price of the tanks was subject to a “bona fide dispute” (the parties could not agree on a price), the instrument and accompanying letter sent by Bulk contained highly “conspicuous statement[s]” that the check was tendered as full satisfaction of all obligations under the lease and purchase agreement, and Finova “obtained payment of the instrument” by negotiating the check on June 25,

2001. So far so good.

Paragraph (c) of section 5/3-311 adds a slight twist. It provides for an exception to these basic requirements which is designed to avoid inadvertent satisfaction of debts when a tender is sent to a large company. Under section (c), an otherwise valid tender to a claimant “organization” fails if “(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.” 810 Ill. Comp. Stat. 5/3-311(c) (emphasis added). This exception does not apply, however, if “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.” 810 Ill. Comp. Stat. 5/3-311(d) (emphasis added).

In the present case, assuming that IFC and Finova qualify as “organizations” so as to trigger the provisions of paragraph (c), Witowski was the acknowledged “designated person” responsible for conducting communications regarding the lease/purchase agreement, and Bulk sent the disputed check to Finova rather than to IFC or Witowski directly. Had no further communications taken place, this circumstance could have thwarted any attempted accord and satisfaction under section 5/3-311(c). However, it is undisputed that Witowski eventually received notice of Bulk’s tender no later than June 22, 2001—three days before the check was cashed by Finova. The transaction here thus falls squarely within the provisions of section 5/3-311(d): regardless of any initial misdirection in making the tender, notice was given to the correct party within a reasonable time before collection of the instrument. The special exception contained in paragraph (c) does not apply, and Finova’s negotiation of the check presumptively suffices to conclude a valid accord and satisfaction.

IFC objects that there is a material question of fact as to whether Bulk tendered its check in good faith. The UCC comment provides that “good faith” implies “not only honesty in fact, but the observance of reasonable commercial standards of fair dealing. The meaning of ‘fair dealing’ will depend upon the facts in the particular case.” U.C.C. § 3-311, cmt. ¶ 4 (2002). *See also Fremarek v. John Hancock Mut. Life Ins.*, 272 Ill.App.3d 1067, 1072, 209 Ill.Dec. 423, 651 N.E.2d 601, 605 (1995) (same). Here, IFC alleges that Bulk’s failure to send the check directly to Witowski and its mailing of the check and explanatory letter separately, taken together, indicate that Bulk was surreptitiously attempting to induce IFC into an inadvertent accord and satisfaction. On this score we note first that the parties hotly contest whether the letter and check were sent separately or together, and in any case IFC has waived this particular argument since it did not advance it below. *Republic Tobacco Co. v. North Atlantic Trading Co., Inc.*, 381 F.3d 717, 728 (7th Cir.2004) (“‘We have long refused to consider arguments that were not presented to the district court in response to summary judgment motions.’”) (quoting *Arendt v. Vetta Sports, Inc.*, 99 F.3d 231, 237 (7th Cir.1996)). *See also Ryan v. Chromalloy American Corp.*, 877 F.2d 598, 603-04 (7th Cir.1989); *Liberles v. County of Cook*, 709 F.2d 1122, 1126 (7th Cir.1983).

Moreover, IFC’s allegations, even if credited, are probably not sufficient to obviate the tender in any event. Ordinarily the good faith requirement is violated where there is no bona fide mutual dispute concerning consideration, or the party tendering the payment affirmatively misleads the claimant. *See McMahon Food Corp. v. Burger Dairy Co.*, 103 F.3d 1307, 1313 (7th Cir.1996) (holding there was no good faith where debtor induces acceptance of payment by falsely leading creditor’s agent to believe that creditor agreed to the terms of the payment). Here, by contrast, there was no misrepresentation or proactive deception; Bulk merely sent the check to the wrong party. Additionally, Bulk quickly notified Witowski of the tender verbally and via fax thereafter.

But in any event, IFC continues to retain the money sent to it by Bulk. This bare fact trumps any concerns we might have about the procedural specifics of the transaction itself. On the basis of this consideration alone IFC's claims must fail. Illinois courts have long held that, where there is a bona fide dispute as to the amount due, retention of a tender conspicuously identified as an accord and satisfaction effectively dooms a claimant's case. See *In re Cunningham's Estate*, 142 N.E. 740, 742, 311 Ill. 311, 315-16 (Ill.1924); *Bankers Leasing Association, Inc. v. Pranno*, 288 Ill.App.3d 255, 264, 224 Ill.Dec. 46, 681 N.E.2d 28, 34 (1997); *Quaintance Assoc., Inc. v. PLM, Inc.*, 95 Ill.App.3d 818, 821-22, 51 Ill.Dec. 153, 420 N.E.2d 567, 569-70 (1981). An Illinois appellate court has recently applied this principle to a case analogous to the one at bar. In *Bankers Leasing Association, Inc. v. Pranno*, the debtor sent the creditor a check conspicuously marked as being in full satisfaction of all outstanding debts and accompanied by a letter to the same effect. The creditor, with full knowledge of the dispute as to the amount of the debt, promptly cashed the check and, just as IFC/Finova has done in this case, attempted to characterize the transaction as only partial satisfaction of outstanding debts. The court rejected this argument, however, holding that a valid accord and satisfaction had occurred:

When Pranno [the creditor] cashed the check, however, he knew there was a dispute. He knew the parties did not agree on what amount Bankers owed him . . . Pranno may have tried to hedge what he was agreeing to by stating in an affidavit that the check satisfied only part of the dispute, but "If there is a bona fide dispute as to the amount due, it makes no difference that the creditor protests that he does not accept the amount in full satisfaction. The creditor must either accept the payment with the condition or refuse." *Nelson v. Fire Insurance Exchange*, 156 Ill.App.3d 1017, 1020, 109 Ill.Dec. 516, 510 N.E.2d 137 (1987).

Both the check and letter Bankers sent Pranno clearly indicated that by cashing the check, Pranno agreed that all claims between Bankers and Pranno would be satisfied. If Pranno did not agree to these terms, he should not have cashed the check.

Pranno, 224 Ill.Dec. 46, 681 N.E.2d at 34. IFC attempts to distinguish *Pranno* by pointing out that there the tendered check and the explanatory letter arrived together, while in this case they were (allegedly) sent separately. Once again, IFC has waived any argument to this effect, and in any case such a minor factual quibble is irrelevant to the principle articulated here. The recipient of a conspicuously-marked tender proposing an accord and satisfaction may not keep the tender and simultaneously contend that no accord and satisfaction occurred.

* * *

In light of the foregoing, we AFFIRM the district court's grant of summary judgment in favor of defendants Bulk Petroleum and Darshan Dhaliwal.

APPENDIX ITEM #19. SUPPLEMENTAL CASE: U.S. BANK V. FIRST SECURITY BANK

U.S. BANK NAT. ASS'N v. FIRST SECURITY BANK, N.A.

U.S. District Court for the District of Utah
44 UCC Rep.Serv.2d 1088 (D. Utah 2001)

CAMPBELL, District Judge.

Plaintiff U.S. Bank National Association ("U.S.Bank") has brought this diversity action against Defendant First Security Bank (FSB). The case was tried to the court, sitting without a jury, on

August 3, 2000.

The court, having reviewed the exhibits and having heard the testimony of the witnesses, enters its Findings of Fact and Conclusions of Law.

FINDINGS OF FACTS

U.S. Bank and FSB are national banking associations chartered under the laws of the United States. U.S. Bank's principal place of business is Minneapolis, Minnesota; FSB's principal place of business is Salt Lake City, Utah. Jonathan R. Mortimer ("Mortimer") is the president of B.B. Strands, Inc., an Idaho corporation. In 1995, B.B. Strands was the operator of a restaurant in Boise, Idaho.

In November 1995, FSB was a member of the Boise Clearing House Association ("the Clearing House"); U.S. Bank was not. To facilitate U.S. Bank's clearing items through the Clearing House, U.S. Bank and FSB had an agreement under which FSB acted as U.S. Bank's correspondent bank. Under the agreement, U.S. Bank had an account with FSB into which U.S. Bank deposited checks to be cleared through the Clearing House.

Two bank accounts, both controlled by Mortimer, are relevant here. The first is a checking account that was held by Mortimer and his wife, Shara, at Key Bank of Idaho (Key Bank was also a member of the Clearing House). The second, a checking account of Mortimer's corporation, B.B. Strands, that was opened at U.S. Bank. On or about November 30, 1995, Mortimer wrote check No.1011 ("the Check"), in the amount of \$23,000, drawn on his account at Key Bank. The check was made payable to "U.S. Bank" and was deposited into the B.B. Strands account at U.S. Bank.

On November 30, 1995, U.S. Bank processed the Check at its check processing facility. During processing, an encoding error was made by a U.S. Bank employee. The employee magnetically encoded the Check and the accompanying deposit slip to reflect the amount of \$223,000, instead of the correct amount, \$23,000. U.S. Bank, in accordance with its agreement with FSB, deposited the Check, along with other checks to be cleared through the Clearing House, into its account at FSB.

When FSB received the Check from U.S. Bank on December 1, 1995, it gave a provisional credit of \$223,000 to the U.S. Bank account at FSB. That same day, December 1, 1995, FSB sent the Check to Key Bank seeking payment on it in the sum of \$223,000.

The Check was included in a cash letter to Key Bank that detailed the items being sent by FSB to Key Bank. The Cash letter identified the total amounts of the bundles of items that were being sent, \$784,281.23. The \$223,000 erroneous figure made up approximately 28% of the total amount reflected in the cash letter. The total amount of the bundle in which Check was included was \$522,477.75, and the \$223,000 accounted for approximately 43% of the bundle amount.

December 4, 1995, was a Monday. The following day, Tuesday, December 5, Key Bank discovered the encoding error made by U.S. Bank. Kendra Rae Olivares, who worked in the Key Bank operations center, prepared a Clearings Adjustment Advice ("the Advice") notifying FSB that there had been a \$200,000 encoding error in the bundle of checks FSB had sent Key Bank on December 1. While the Advice did not specifically identify the item that was the source of the error, the following information was provided: the date of the cash letter in which the Check was included; the total of the cash letter, the bundle total; the encoded amount of the Check, the actual face value of the Check, where in the bundle the Check was located; a Key Bank reference number, which could be used to find additional information about the item in the Key Bank computer system; and Ms. Olivares' name and telephone number, in case someone from FSB wanted additional information from Ms. Olivares. (Clearings Adjustment Advice, Defendant's Ex. A). Ms. Olivares

testified that it was the policy of Key bank that once the Key Bank's Adjustment Department received a clearings adjustment advice notifying it of an error, it had 48 hours to resolve the problem. If the error was over \$10,000, the problem was to be corrected within 24 hours. (See Transcript of Aug. 3, 2000 Bench Trial (hereinafter Tr.) at 47.)

When FSB first received the Check from U.S. Bank, it debited Key Bank's clearing house account in the amount of \$223,000. When FSB received the Advice from Key Bank, it reccredited Key Bank's account for \$200,000, the amount of the error. Therefore, Key Bank ultimately paid FSB \$23,000, the correct face amount of the Check.

On December 6, 1995, FSB received the Advice from Key Bank. The Check was first received by the Return Item Department. However, the department that would do the research to identify the source of the \$200,000 error was not the Return Item Department, but the Accounting Services Department. The next day, December 7, the Check was sent to the Accounting Services Department. Key Bank did not send the Check itself to FSB with the Advice because it had already paid the check (in the correct amount, \$23,000). And although Key Bank's normal procedure when sending Clearings Adjustment Advices to other banks was to attach all relevant documents, including a copy of the item, on this occasion the documents, including a copy of the Check, had been separated from the Advice and were not received by FSB.

On December 11, 1995, the Accounting Services Department "created a case" based on the Advice, that is, the information on in the Advice was entered into the FSB computer system, and a researcher was assigned to investigate and identify the source of the \$200,000 error. Whereas an experienced researcher could have identified the source of the \$200,000 error within one or two days, the researcher who was assigned the case was not experienced and had worked in the Accounting Services Department only a few months.

On December 21, 1995, the FSB researcher erroneously closed the case by offsetting the \$200,000 amount against another entry that was not the true source of the \$200,000 error. The case remained closed until January, 1996, when FSB realized that the case had been closed in error and reopened the case.

Although the case had been reopened since January, for reasons not explained at trial, it appears that FSB took no further action on the case until October 9, 1996. On that date, the unresolved adjustment was noticed by Sharen H. Carlile, who at the time was Assistant Vice-President and Operations Officer for the FSB Accounting Services Department. Ms. Carlile was an experienced researcher with many years experience in banking. Ms. Carlile immediately began an investigation of the matter and, when she realized that the supporting documents were not with the Advice, she made a telephone call to Ms. Olivares, the Key Bank employee who had prepared the Advice. Ms. Olivares quickly sent Ms. Carlile supporting documents, including a copy of the Check. With these documents, Ms. Carlile was able to correctly identify the cause of the \$200,000 error. Ms. Carlile testified that she 'would have worked on the case for one to two days.' (Id. at 106.) She also testified that had she been the researcher who had initially been assigned the case in December of 1995, she would have taken the same steps to investigate and resolve the case that she did in October of 1996-including making the telephone call to Ms. Olivares. (Id. at 109-110.)

Once the error was identified, October 9, 1996, Ms. Carlile prepared a \$200,000 charge to the U.S. Bank account and sent an adjustment advice to U.S. Bank, along with supporting documents, notifying U.S. Bank of the \$200,000 debit. This was the first notice U.S. Bank was given of the \$200,000 error. At the same time it notified U.S. Bank of the error, FSB debited U.S. Bank's account at FSB in the amount of \$200,000.

However, by October 1996, nothing remained of the \$200,000 amount that U.S. Bank had

mistakenly credited to the B.B. Strand account. In fact, the entire \$223,000 was quickly withdrawn from that account, apparently by the Mortimers. On December 1, 1995, the account balance was \$223,228.32. On December 8, the balance was \$225,697.60; by December 11, the balance had shrunk to \$63,416.44, and, at the end of December, only \$175.69 remained in the account. The account was closed in July 1996.

Both parties called expert witnesses to testify at trial. Maureen La Tendresse, U.S. Bank's expert, had been in the banking industry for approximately 23 years. At time of trial, she was an assistant vice-president of U.S. Bank, although she had previously been with Crocker National Bank and First Interstate Bank. Ms. La Tendresse described U.S. Bank's routine practice when the adjustment involved a debit in excess of \$100,000 to be charged against another bank: "Typically we would call them to say that we had this type of an adjustment coming through. If it was over \$100,000, we may call them and ask them to wire funds for an immediate settlement rather than passing paper. Paper would then follow." (*Id.* at 59.) Ms. Tendresse explained that this procedure of calling the other bank was done to "reduce the risk to both sides." (*Id.*)

Ms. La Tendresse gave her opinion that even without the supporting documents, FSB with the Advice, FSB should have identified the error and notified U.S. Bank within one to two days of receipt by the Adjustments Department. (*Id.* at 75, 77.)

Michael Fisher testified as an expert for FSB. Mr. Fisher was a vice-president of Global Concepts, a company that, as described by Mr. Fisher, is "an industry expert in the area of payment systems." (*Id.* at 179). Mr. Fisher had never worked for a private bank. According to Mr. Fisher, because of the number of checks passing through the banking system (63 billion checks were written in 1995), some banks follow a cost-benefit procedure in handling adjustments, that is, these banks will face losses on delayed adjustment items rather than hire additional researchers. It was Mr. Fisher's opinion that based on industry standards, the \$200,000 error in this case ordinarily would have been resolved on December 26, 1995. On cross-examination, however, Mr. Fisher admitted that based on his research done through his consulting work, once a researcher in 'a typical bank' had been given the Advice, the \$200,000 encoding error would have been resolved within one to three days. (*Id.* at 204.) Mr. Fisher agreed that the size of the error and the size of the bank would also dictate the speed with which the matter was resolved. (*Id.* at 205.)

CONCLUSIONS OF LAW

* * *

Is U.S. Bank Solely Responsible for its Loss under the Encoding Warranty?

There is no question that under Section 70A-4-209 <<UCC § 4-209>> [UCC Revised § 4-209; all other citations are to Revised Article 4 also; see Editors' Note above for more information-Ed.], U.S. Bank had warranted to FSB (and Key Bank) that the \$223,000 amount encoded on the Check and the deposit slip was the correct amount. However, U.S. Bank's breach of that warranty does not necessarily mean that it must bear the entire \$200,000 loss. U.S. Bank argues that its breach of this warranty does not excuse FSB's delay in discovering the error. According to U.S. Bank, it was FSB's delay that was the proximate cause of FSB's loss, not the encoding error. To hold otherwise, U.S. Bank argues, would make Section 70A-4-209 a strict liability statute and that there is nothing in the language of the statute or the case law that indicates that the drafters intended such a result. The court agrees with U.S. Bank and concludes that U.S. Bank's breach of the encoding warranty does not make it strictly liable for the resulting \$200,00 error, but is simply one factor that must be considered.

Was There a Final Settlement between FSB and U.S. Bank?

FSB made a final settlement with Key Bank on December 6, 1995, when it received the Advice notifying it of the \$2000,000 error and reccredited \$200,000 to Key Bank's clearing house account, with the result that the correct amount of the Check, \$23,000, was paid by Key Bank to FSB. See Utah Code Ann § 70A-4-215(1) <<UCC § 4-215>> (1997). This final settlement between FSB and Key Bank then triggered a final settlement between FSB and U.S. Bank: "If a collecting bank [FSB] receives a settlement for an item which is or becomes final, the bank is accountable to its customer [U.S. Bank] for the amount of the item and any provisional credit given for the item in an account with its customer becomes final." Utah Code Ann. § 70A-4-215(4) <<UCC § 4-215>>.

Although, under Section 70A-4-215(4) <<UCC § 4-215>> there was a final settlement between U.S. Bank and FSB that was triggered by the final settlement between U.S. Bank and Key Bank, it is not clear what the amount of the settlement was. Even though FSB had given U.S. Bank a provisional credit of \$223,000, FSB received a final settlement from Key Bank for only \$23,000, not \$223,000. Further, Section 70A-4-215(4) <<UCC § 4-215>> makes FSB accountable to U.S. Bank "for the amount of the item," which is \$23,000, the face amount of the Check. Based on these considerations, the court concludes that there was a final settlement under Section 70A-4-215(4) <<UCC § 4-215>> between U.S. Bank and FSB in the amount of \$23,000.

Did FSB Act within a Reasonable Time?

U.S. Bank relies on Section 70A-4-214(1) in support of its contention that FSB lost the right to charge back the \$200,000 because FSB unreasonably delayed its notification to U.S.B of the \$200,000 error. This statute reads:

If a collecting bank has made provisional settlement with its customer for an item and fails by reason of dishonor, suspension of payments by a bank, or otherwise to receive settlement for the item which is or becomes final, the bank may revoke the settlement given by it, charge back the amount of any credit given for the item to its customer's account, or obtain refund from its customer, whether or not it is able to return the item, if by its midnight deadline or within a longer reasonable time after it learns the facts, the bank may revoke settlement, charge back the credit, or obtain refund from its customer, but it is liable for any loss resulting from the delay. These rights to revoke, charge-back, and obtain refund terminate if and when a settlement for the item received by the bank is or becomes final.

Section 70A-4-214(1) (emphasis added).

According to U.S. Bank, when FSB did not receive final settlement from Key Bank for the entire \$223,000, FSB had a right to charge-back the \$200,000 only if it acted within a "longer reasonable time" after it learned of the error. Because there is no dispute that FSB did not act by the midnight deadline, the only questions remaining are: 1) whether the longer time taken by FSB was "reasonable;" and 2) whether FSB's actions caused loss 'resulting from [their] delay.'

Based on the evidence that was presented, the court concludes that FSB did not act within a reasonable time in notifying U.S. Bank of the error. And, having considered all the evidence, the court concludes that 48 hours was reasonable period of time, once the Accounting Department of FSB had received the Advice, for FSB to correctly identify the error and notify U.S. Bank. FSB's Accounting Department received the Advice on December 7 (there was no conclusive evidence that the receipt of the Advice by the Return Items Department was due to an error by FSB). Forty-eight hours from that December 7 fell on December 9, a Saturday. Accordingly, the court concludes that FSB should have located the error and contacted U.S. Bank no later than Monday, December 11, 1995. The court found Ms. Olivares' testimony concerning the policy of Key Bank to identify errors over \$10,000 within 48 hours as well as the testimony of Ms. La Tendresse, whose testimony that even without the supporting documents, it was her opinion that the error should have been

identified by FSB within one to two days, persuasive. Their testimony was supported by the actions that were, in fact, taken by Ms. Carlile, who located the source of the \$200,000 error within one to two days of beginning her research.

Did FSB Act Cause U.S. Bank's Loss?

As discussed above, the applicable statute is clear on the fact that FSB "is liable for any loss resulting from the delay." Utah Code Ann. § 70A-4-214(1) (emphasis added). However, the statute's language also implies that section 70A-4-214(1) does not impose strict liability on a collecting bank which fails to act within a "reasonable time." Rather, as official comment 6 to section 4-212 of the Uniform Commercial Code (codified in Utah as section 70A-4-214) observes: "It is clear that the charge-back does not relieve the bank from any liability for failure to exercise ordinary care in handling the item. The measure of damages for such failure is stated in § 4-103(5)." Utah's codification of section 4-103(5) states:

The measure of damages for failure to exercise ordinary care in handling an item is the amount of the item reduced by an amount that could not have been realized by the exercise of ordinary care. If there is bad faith, it includes any other damages the party suffered as a proximate consequence.

Utah Code Ann. § 70A-4-103(5) <<UCC § 4-103>>.

Taken together sections 70A-4-103(5) <<UCC § 4-103>> and 70A-4-214(1) require that the plaintiff show not only a breach of the duty of ordinary care, but also causation. Federal courts interpreting state statutes implementing the same sections of the U.C.C. have observed:

Thus, to recover from a bank for the mishandling of a check, the claimant must show two things: first, that the bank mishandled the check, and second, that the claimant would have had a reasonable chance of collecting the amount owed if not for the bank's mishandling.

Alioto v. U.S., 593 F.Supp. 1402, 1417 [39 UCC Rep Serv 1386] (N.D.Cal.1984). In essence, then, an action against a collecting bank under section 70A-4-214 is a negligence action. . . .

* * *

In the present case, Plaintiff has presented no evidence regarding causation. Although the court has determined that FSB should have contacted U.S. Bank no later than Monday, December 11, 1995, U.S. Bank has presented no evidence that it would have responded on that date to recover the amount in the account at that time. All that is before the court is evidence that came out on cross-examination of Ms. LaTendresse, which demonstrates that in October of 1996 it took U.S. Bank approximately thirteen days to address the matter. (See Tr. at 94-5.) U.S. Bank never asserted that its measure of damages caused should use this response time in damage calculation. Indeed, counsel for U.S. Bank merely asserts, without pointing to any evidence, that had U.S. Bank been informed, U.S. Bank "would have immediately been able to freeze the account and seek redress for the monies already siphoned from the account." (U.S. Bank's Mem. in Opp. to FSB's Mem in Supp. of Mot. to Amend Findings of Fact and Conclusions of Law, p. 2.) No evidence was received at trial that proves the element of causation in this case. This leaves only speculation about what might have happened if FSB had given notice on December 11, 1995. Speculation does not satisfy U.S. Bank's burden of proving causation. . . .

Accordingly, U.S. Bank has failed to prove the necessary element of causation in its case, and its claims against FSB are therefore DISMISSED.

APPENDIX ITEM #20. SAMPLE PRESENTATIONS REQUIRED IN STANDBY LETTERS OF CREDIT

Here are examples of the kinds of documents that actual standby letters of credit have required the beneficiary to present to obtain payment:

- “A statement purportedly signed by Richard G. Fanslow or his authorized representative stating that: . . . SNL Corporation has defaulted in one or more of its obligations under the terms of the promissory note in the amount of \$6,400,000.00 payable to the order of Richard G. Fanslow and dated October 5, 1988 (the ‘note’), therefore immediate payment of \$ (insert amount of draft) is now due and owing under the note.” Fanslow v. Northern Trust Co., 700 N.E.2d 692, 694 (Ill. App. 1998).
- “[A] draft accompanied by a notarized statement that the draft represents an unpaid note installment or that the outstanding balance is due as a consequence of default.” Mennen v. J.P. Morgan & Co., Inc., 689 N.E.2d 869, 872 (N.Y. 1997)
- “[An] original, written request from beneficiary for payment from the proceeds of this letter of credit accompanied by original, written instruction from applicant (containing the written signature of Jochen Rohr) permitting beneficiary to payment under this letter of credit” John Wendt & Sons v. Edward C. Levy Co., 685 N.E.2d 183, 186-87 (Ind. App. 1997).
- “A letter purportedly signed by an authorized officer of Branch Banking & Trust Company, Winston-Salem, North Carolina, stating that payment is due under promissory note dated August 2, 1990 in the amount of four hundred twenty-five thousand and no/100 (\$425,000.00) U.S. Dollars by and between Carolina First Holding Corporation and Branch Banking and Trust Company.” Carlson v. Branch Banking and Trust Co., 473 S.E.2d 631, 634 (NC. App. 1996).
- “A statement as follows: ‘1. This drawing by Eastern General Contractors, Inc. is due to the default or failure to perform by Tolley Tree and Landscaping on project No. 5001, outside repair to housing, Naval Education Training Center, in accordance with contract dated March 13, 1985.’” Rhode Island Hosp. Trust Nat. Bank v. Eastern General Contractors, 674 A.2d 1227, 1229 (R.I. 1996).

Learning Outcomes Statement

This statement identifies the "learning outcomes" for this course in accordance with ABA Accreditation Standards 301 and 302 and the "Guidance" to these Standards.

(a) Knowledge and understanding of substantive and procedural law

Upon completing Secured Transactions & Commercial Paper, students should know and understand the law of contracts pertaining to:

- Negotiation, transfer, and enforcement of negotiable instruments;
- Discharge of negotiable instruments;
- Formal requisites of negotiable instruments;
- Effect of a good faith purchase on claims and defenses [the "holder in due course" doctrine];
- Enforcement of securitized notes;
- Liability of makers, drawers, drawees, indorsers, and transferors of negotiable instruments;
- Cashier's checks and teller's checks;
- Stopping payment and asserting defenses on checks;
- Lost instruments;
- Accommodation parties;
- Signatures by representatives;
- Accord and satisfaction;
- The check collection system;
- The payor bank's midnight deadline;
- The depository bank's midnight deadline;
- Check encoding;
- Check truncation, electronic presentment, and conversion to electronic funds transfers;
- Funds availability and expeditious return requirements;
- Check kiting;
- Fraud and forgery in connection with checks;
- Default and enforcement in secured transactions;
- Creating security interests;
- Perfecting security interests;
- Priority of security interests;
- Letters of credit;
- Documentary presentation requirement for letters of credit;
- Letter of credit remedies; and
- Fraud and forgery in connection with letters of credit. 2. express and implied conditions;

(b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context

Learning Outcomes Statement

When assigned to read a contracts case, students should be able to:

1. identify and discuss the facts, the plaintiff's claim, the defendant's defense, the remedies sought, the pertinent legal rules, the issue for decision under these rules, the arguments of the parties, and the holding and reasoning of the court;
2. apply the holding to hypothetical variations of the facts;
3. discuss the logical strengths and weaknesses of the parties' arguments and the court's reasoning; and
4. identify and analyze competing policy considerations about what the law should be.

When given a hypothetical problem, students should be able to identify and discuss any claims and defenses that the parties might assert and any remedies that they might seek.

Students should be able to identify ambiguities in contractual terms and propose alternative ways to draft the terms.

Students should be able to parse and explain statutory provisions, identify ambiguities in statutory provisions, and suggest improved ways of drafting statutory provisions.

Students should be familiar with the history of the law governing negotiable instruments and secured transactions.

(c) Exercise of proper professional and ethical responsibilities to clients and the legal system

Students should be able to evaluate the legal advice that was given in actual cases, suggest what would have been better legal advice, and formulate advice that should be given in the future in similar caeses.

Students should be able to identify and discuss ethical issues that arise in willfully breaking promises, in raising technical defenses to avoid liability, and in giving legal advice that might encourage perjury.

(d) Other professional skills needed for competent and ethical participation as a member of the legal profession (including, but not limited to, interviewing, counseling, negotiation, fact development and analysis, trial practice,

Learning Outcomes Statement

document drafting, conflict resolution, organization and management of legal work, collaboration, cultural competency, and self-evaluation)

Students should be able to present arguments as if they were representing clients in contract disputes.

Students should be able to discuss controversial legal and policy issues in a professional and respectful manner.

Students should understand the role of lawyers in advising clients as they enter into contractual arrangements and resolve or litigate disputes.

Students should understand the basic structure of common contractual transactions familiar to all competent lawyers