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Rights of Drawers, Banks, and Holders in Bank Checks and Other Cash Equivalents

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RIGHTS OF DRAWERS, BANKS, AND HOLDERS IN BANK CHECKS AND OTHER CASH EQUIVALENTS

Leona Beane*

Sellers often consider personal checks unreliable and seek more secure forms of payment. Professor Beane analyzes various forms of cash substitutes, and discusses the legal ramifications of each, including ability to stop payment and recourse against banks. Professor Beane also makes suggestions for amendments to the Uniform Commercial Code.

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I. INTRODUCTION

In the commercial world, checks¹ are used by buyers as a form of payment. When a buyer pays with a personal check the right to stop payment of the instrument and issue a stop payment order to the bank

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1. A check is a draft drawn on a bank, payable on demand. U.C.C. § 3-104(2)(b) (1978). The depositor is the drawer and the bank is the drawee. Until a bank accepts a check, it is not liable on the instrument. *Id.* at § 3-401(1). Acceptance is the drawee's "signed engagement to honor the draft as presented." *Id.* at § 3-410(1). Certification of a check is acceptance by the drawee, bank. *Id.* at § 3-411(1). Once the bank certifies the check, the bank becomes primarily liable.

is provided for by statute.² As a general rule, a bank customer has the right and the power to issue a stop payment order to the bank any time prior to payment or acceptance.³ The ability to stop payment is a service which depositors expect and are entitled to receive from banks.⁴ If a bank failed to honor a stop payment order, the bank would have failed to follow its depositor's instructions, and would be responsible for damages sustained by the customer.⁵

Frequently, sellers are unwilling to accept payment by personal check because of the risk of insufficient funds or a stop payment order. If a stop payment order is used, the seller may have to instigate substantial litigation in order to collect its money. This is particularly true in transactions involving large sums of money, such as the purchase of

2. U.C.C. § 4-403(1) (1978) provides:

A customer may by order to his bank stop payment of any item payable for his account but the order must be received at such time and in such manner as to afford the bank a reasonable opportunity to act on it prior to any action by the bank with respect to the item

3. See *id.* § 4-303, § 4-403 and the Official Comments (customer's right to stop payment; items subject to stop order). For discussion of customer's rights relating to stop payment orders, see generally PRACTICING LAW INSTITUTE, U.C.C. SURVEY 77-91 (1981).

4. U.C.C. § 4-403 comment 2 (1978) provides that "stopping payment is a service which depositors expect and are entitled to receive from banks notwithstanding its difficulty, inconvenience and expense."

For a discussion of a customer's right to issue stop payment orders and the problems involved, see Hawkland, *Stop Payment Orders Under The Uniform Commercial Code*, 3 U.C.C. L.J. 103 (1970); Holahan, *Stop Orders*, 1 RUT.-CAM. L. REV. 31 (1960); Murray, *The Stop Payment of Checks And The Holder In Due Course*, 84 BANKING L.J. (1967); Note, *The Stop Payment Order—A Potential Pandora's Box For the Drawer*, 39 ALB. L. REV. 252 (1975); Note, *Stopping Payment of Checks*, 79 BANKING L.J. 185 (1962); Comment, *Stop Payment Orders Under the Uniform Commercial Code*, 38 IND. L.J. 693 (1963); Note, *Stop Payment and the Uniform Commercial Code*, 28 IND. L.J. 95 (1952) (pre-Code article; includes a discussion of proposed U.C.C.); Note, *Adverse Claims and the Consumer: Is Stop Payment Protection Available?*, 67 NW. U.L. REV. 915 (1973).

5. See, e.g., *Hiroshima v. Bank of Italy*, 78 Cal. App. 362, 248 P. 947 (1926) (pre-Code, holding bank responsible, creating absolute liability of bank); *Chase Nat'l Bank v. Battat*, 297 N.Y. 185, 78 N.E.2d 465 (1948) (common law liability of bank is to follow customer's instructions as absolute in absence of ratification by depositor or contract limiting liability); *American Defense Soc'y v. Sherman Nat'l Bank*, 225 N.Y. 506, 122 N.E. 695 (1919) (rule prior to adoption of the Uniform Commercial Code).

Pursuant to U.C.C. § 4-403(3) (1978), the burden of establishing the loss is on the customer. *Cicci v. Lincoln Nat'l Bank & Trust Co.*, 46 Misc. 2d 465, 260 N.Y.S.2d 100 (Syracuse City Ct. 1965). In such an action, the bank, according to U.C.C. § 4-407 (1978), is subrogated to the rights of the payee or any other holder against the drawer, the rights of the drawer against the payee or any other holder, and of any holder in due course on the item against the drawer, so as to prevent unjust enrichment.

For rules concerning the burden of proof by plaintiff and the bank's burden of going forward, see *Sunshine v. Bankers Trust Co.*, 34 N.Y.2d 404, 358 N.Y.S.2d 113 (1974), *modified on other grounds*, 34 N.Y.2d 994, 360 N.Y.S.2d 419 (1974); *Saratoga Polo Assoc. v. Adirondack Trust Co.*, 118 Misc. 2d 247, 460 N.Y.S.2d 712 (Sup. Ct. Saratoga County 1983); *Thomas v. Marine Midland Tinkers Nat'l Bank*, 86 Misc. 2d 284, 381 N.Y.S.2d 797 (N.Y. Civ. Ct. 1976).

As to the subrogation rights of the bank, see *Manufacturers Hanover Trust Co. v. AVA Industries, Inc.*, 98 Misc. 2d 614, 414 N.Y.S.2d 425 (Sup. Ct. New York County 1978).

a business, a piece of real estate, or a car. A dissatisfied buyer can block or delay payment on a personal check by issuing a stop payment order to the bank. The buyer thus strengthens his bargaining position by forcing the seller to proceed with court action or satisfy the buyer's complaints. An unscrupulous buyer may use such procedures to postpone payment till a much later date after prolonged litigation. Such tactics may also force the seller to settle the dispute early and give the buyer a substantial discount so as to avoid a lengthy court battle.

To combat such abuses, many sellers insist on payment in the form of a "bank check" such as a certified check, cashier's check, teller's check, or bank money order. These various bank checks are thought of as cash substitutes, that is, the equivalent of cash. The use of such checks avoids the risk of insufficient funds, since a bank is holding the money and it is unlikely that a bank will become insolvent, particularly since the federal government insures such deposits. Recently, however, sellers have increasingly found themselves involved in litigation concerning bank checks. As a result, sellers are starting to question whether these bank checks are really cash equivalents.

This article will show that there are significant differences between these various types of bank checks, especially in the obligations of the parties and the ability of bank customers to direct the bank to stop payment of these instruments.⁶

II. CERTIFIED CHECKS

A certified check is a personal check of the depositor, drawn on the depositor's own account, and subsequently signed by an authorized bank officer. By signing the check, the drawee bank accepts the draft⁷ and becomes primarily liable on the instrument to the payee and any subsequent holder.⁸ At the time of certification, the bank charges the check as an item and withdraws the funds from the control of the

6. The right to direct a bank to stop payment is not limited to a drawer of a check, "but may be issued by any customer who wishes to countermand the payment of any item to be charged against his bank account." Hawkland, *supra* note 4, at 105.

7. U.C.C. §§ 3-410 to 411 (1978); H. BAILEY, BRADY ON BANK CHECKS §§ 10.1, 10.7 (5th ed. 1979).

8. U.C.C. § 3-413(1) (1978) provides that "[t]he maker or acceptor engages that he will pay the instrument according to its tenor at the time of his engagement . . ." See Note, *Blocking Payment on a Certified, Cashier's or Bank Check*, 73 MICH. L. REV. 424, 425 (1974) (bank, as drawer and drawee, primarily liable to the payee for the check's stated amount). Certification is more than an acceptance, "it is more than a promise by an acceptor to assume the payment of an instrument." Note, *The Liability of a Bank Upon the Certification of a Check*, 9 BROOKLYN L.

drawer.⁹ By certifying a check a bank implies that it has sufficient funds to cover the check, and the bank will be estopped from denying that it lacks such funds.¹⁰ The check may be certified at the request of a drawer, payee, or holder.¹¹ Certification made at the request of a drawer does not become effective until the check is issued and delivered to the payee.¹²

A depositor may not direct a bank to stop payment of an item after it has been certified, but in some situations stopping payment after certification is allowed.¹³ For example, if the rights of third parties are not involved, courts allow a depositor to issue a stop payment order to its

REV. 318, 319 (1940). A certified check circulates as the equivalent of that much cash in the bank, payable on demand to the holder.

See also *Wachtel v. Rosen*, 249 N.Y. 386, 164 N.E. 326 (1928), where the court held that "certification of a check by the bank is equivalent to payment." *Id.* at 390, 164 N.E. at 327. In *First Nat'l Bank v. Whitman*, 94 U.S. 343 (1872), the Court held that certification of a check is a contract which brings the holder of the check into privity with the drawee bank who has certified it. *Id.* at 345-46.

9. H. BAILEY, *supra* note 7, at § 7.1. The amount of the check is withdrawn from the drawer's account and held by the bank as a deposit to the credit of the check.

There is no particular form essential in the certification of a check, except that it must be the signed engagement of the bank to honor the check as presented. U.C.C. § 3-410(1) (1978). The usual practice is to stamp or write on the check the word "certified" or "accepted" or an equivalent expression, along with the signature of an officer of the bank.

10. See, e.g., *Cooke v. State Nat'l Bank*, 52 N.Y. 96 (1873) (bank estopped to deny sufficient funds of drawer even though certification was fraudulent because bank had no funds of drawer). See also *Carnegie Trust Co. v. First Nat'l Bank*, 213 N.Y. 301, 107 N.E. 69 (1915) (certification equivalent to acceptance); *Manhattan Co. v. Tunick*, 134 Misc. 863, 237 N.Y.S. 230 (Sup. Ct. New York County 1929) (bank liable for certification made subsequent to stop payment order). It is a federal crime to certify a check before the amount is regularly deposited, or to evade the law on certification. 18 U.S.C. § 1004 (1982).

11. If the holder procures certification of the check, the drawer and all prior endorsers are discharged. U.C.C. § 3-411(1) (1978). The drawer is not discharged if he obtains the certification. Wallach, *Negotiable Instruments: The Bank Customer's Ability to Prevent Payment on Various Forms of Checks*, 11 IND. L. REV. 579, 583 n.22 (1978); Comment, *Uniform Commercial Code Commentary: Commercial Paper: The Rights of a Remitter of a Negotiable Instrument*, 8 B.C. IND. & COMM. L. REV. 260, 261 (1966).

12. See U.C.C. § 3-410(1) (1978) (acceptance operative when completed by delivery or notification).

13. U.C.C. § 4-403(1)(j) (1978). Comment 5 states:

There is no right to stop payment after certification of a check or other acceptance of a draft, and this is true no matter who procures the certification . . . The acceptance is the drawee's own engagement to pay, and he is not required to impair his credit by refusing payment for the convenience of the drawer.

Id. comment 5. A drawer may not stop payment on a check after certification, whether certification was at the request of the holder, payee, or drawer. *Maintenance Serv. Inc. v. Royal Nat'l Bank*, 4 U.C.C. Rep. Serv. (Callaghan) 766 (Sup. Ct. New York County 1967). See also *Hawland*, *supra* note 4, at 108 (commenting on U.C.C. § 4-403).

Between a bank and a drawer, certification has the same effect as payment, since the funds representing the amount of the check are effectively withdrawn from the control of the drawer. *Whiting v. Hudson Trust Co.*, 234 N.Y. 394, 404, 138 N.E. 33 (1923) (pre-Code). See 9 N.Y. JUR. 2d *Banks* § 373 at 611 (1982) (effect of certification; liability of certifying bank).

bank, and authorize the bank to honor such a demand.¹⁴ To accommodate its customer, a bank may issue a stop payment order on a certified check,¹⁵ but the bank will usually require indemnity from its customer.¹⁶ If a bank refuses to honor a stop payment order of a certified check, courts in some instances may enjoin the bank from making payment.¹⁷ If the drawee bank honors the drawer's stop payment order, the

14. In *Balducci v. Merchants Nat'l Bank & Trust Co.*, 74 Misc. 2d 406, 345 N.Y.S.2d 263 (1972), *aff'd*, 41 A.D.2d 1030, 344 N.Y.S.2d 828 (4th Dept. 1973), a certified check was given to an escrow agent in connection with a real estate transaction. After the transaction fell through, the agent still had the certified check which was to be returned if there was no closing. The court held that the bank should honor the depositor's stop payment order of the certified check, as there was a third party claim of ownership, and no change in position of the parties. The court stated "the drawee bank may cancel its certification, particularly when there has been no change in the rights or situation of the holder between the time of certification and the cancellation thereof so as to render the revocation inequitable." 74 Misc. 2d at 410, 345 N.Y.S.2d at 268 (citing *Greenberg v. World Exch. Bank*, 227 A.D. 413, 237 N.Y.S. 200 (1929)).

See generally, Lawrence, *Making Cashier's Checks and other Bank Checks Cost Effective: A Plea for Revision of Articles 3 and 4 of the Uniform Commercial Code*, 64 MINN. L. REV. 275, 320-30 (1980) and Annot., 25 A.L.R.3d 1367 (1969), for two excellent discussions of certified checks and questions regarding stop payment.

15. In *Admiral Leather Corp. v. Manchester Modes, Inc.* 422 F. Supp. 387, 389 (S.D.N.Y. 1976), the court held that a bank may cancel its certification if the holder is not a holder in due course and has not changed his position in reliance on the bank's promise to pay, citing U.C.C. § 3-418. In that case, the payee received the check from the drawer in payment for goods which were the subject of the dispute. Since the payee was a party to the contract, he was presumed to have notice of any alleged defenses and could not be considered a holder in due course. The additional issues of change of position in reliance and whether the bank could raise the personal defenses of one not a holder in due course were left for trial. This decision was described as erroneous in Lawrence, *supra* note 14, at 331.

16. *See, e.g., Admiral Leather Corp.*, 422 F. Supp. 387 (S.D.N.Y. 1976) where the court concluded that the bank may cancel its certification unless the payee had changed its position in reliance thereof. When the drawee bank decided to honor the stop payment it was agreed that the bank would be indemnified. *Id.* at 388.

17. Pursuant to U.C.C. § 3-603(1) (1978), an adverse claimant may obtain an injunction against the bank enjoining payment, or may supply indemnity to the bank. *See Note, Adverse Claims Under the Uniform Commercial Code: A Survey and Proposal*, 65 YALE L.J. 807, 812-16 (1956) (noting the strengths and weaknesses of U.C.C. § 3-603).

U.C.C. § 3-603(1) (1978) provides:

The liability of any party is discharged to the extent of his payment or satisfaction to the holder even though it is made with knowledge of a claim of another person to the instrument *unless prior to such payment or satisfaction the person making the claim either supplies indemnity deemed adequate by the party seeking the discharge or enjoins payment or satisfaction by order of a court of competent jurisdiction in an action in which the adverse claimant and the holder are parties.*

Id. (emphasis added).

In *Jefferies & Co. v. Arkus-Duntov*, 357 F. Supp. 1206, 1217 (S.D.N.Y. 1973), an action was commenced to enjoin payment of two certified checks, one payable to the seller (Duntov), and one payable to United Bank, a holder in due course. The drawer of the certified check was unable to restrain the drawee bank from paying the certified check which had been certified at the request of the payee (United Bank), which was a holder in due course and which had released its collateral. However, the court permitted the drawer to enjoin payment *pendente lite* of another certified check payable to the seller of the stock, who was involved in a fraudulent transaction. Relying on U.C.C. § 3-603 the court directed Duntov to return the check to Jefferies upon the posting of a bond, which included indemnification of the drawee (Chase). The court found that when a payee

bank will still be responsible to the payee and any subsequent holder of the certified check since the drawee bank is primarily liable on a certified check.¹⁸ If a certified check is not in the hands of a holder in due course or one who has in good faith changed his position in reliance on the certification, a certifying bank may itself stop or resist payment.¹⁹

As a general rule, the drawer may not order payment stopped on a certified check since certification constitutes an acceptance.²⁰ This position is premised upon "the finality of payment rule,"²¹ which states that a drawee bank may not cancel certification of a check if the holder is a holder in due course, or a holder who has in good faith changed his position in reliance upon the certification.²² If a bank wishes to comply with its customer's directions to stop payment of a certified check, the bank may pay the proceeds into court,²³ implead the drawer, or "vouch-in" the drawer if sued by the payee on its certification.²⁴

has a check certified, the certification discharges the drawer on the instrument. Certification by a holder discharges all prior parties on the instrument according to U.C.C. § 3-411(1). For a further analysis of Jefferies, see Lawrence, *supra* note 14, at 330-32.

18. See, e.g., *Carnegie Trust Co. v. First Nat'l Bank*, 213 N.Y. 301, 197 N.E. 692 (1915) (after certification the bank cannot resist payment in order to make a setoff available to its depositor).

19. See *Rosenbaum v. First Nat'l City Bank*, 13 A.D.2d 100, 213 N.Y.S.2d 513 (1961), *aff'd*, 11 N.Y.2d 845, 227 N.Y.S.2d 670 (1962), where the court, in dicta stated that a bank may resist payment if bank certifies or pays check through mistake as to sufficiency of a maker's account or other similar circumstances.

20. U.C.C. § 4-403 (1978).

21. U.C.C. § 3-418 (1978). That section, commonly known as the "finality of payment rule," provides: "payment or acceptance of any instrument is final in favor of a holder in due course or a person who has in good faith changed his position in reliance on the payment." *Id.* See Note, *Finality of Payment and the Uniform Commercial Code*, 32 TEMP. L.Q. 182, 188-90 (1959) (material alteration does not affect rule).

22. See generally Lawrence, *supra* note 14, at 323-31. Professor Lawrence states:

Certification is final in favor of holders in due course. For persons who do not enjoy this status, it is not clear whether section 3-418 should be read literally to limit the benefits of finality to those who have changed position in reliance on the *payment* of the check, or whether it should be read broadly to confer these benefits on persons who have changed position in reliance on *certification* as well.

Id. at 325 (emphasis original) (citations omitted).

New York courts apparently do not extend finality to certification obtained by the drawer. See *Metropolitan Life Ins. Co. v. Bank of United States*, 259 N.Y. 365, 182 N.E. 18 (1932) (payee did not change position in reliance on certification and cannot recover from bank). See also N.Y. U.C.C. § 3-418 (McKinney 1964).

23. *Greenberg v. World Exch. Bank*, 227 A.D. 413, 237 N.Y.S. 200, 204 (1929).

24. See H. BAILEY, *supra* note 7, at § 20.10. See also *Bathgate v. Exchange Bank*, 199 Mo. App. 583, 205 S.W. 875, 876 (1918); *Welch v. Bank of the Manhattan Co.*, 264 A.D. 906, 35 N.Y.S.2d 894, 895 (1942); *Greenberg v. World Exch. Bank*, 227 A.D. 413, 237 N.Y.S. 200, 203 (1929) (pre-code cases).

If the certifying bank accedes to a request to stop payment and is then sued by the holder, the bank should be able to assert the defenses of the drawer if it certified the check, at his request, by "vouching in" the drawer as a party defendant under a statutory provision similar to U.C.C. § 3-803 (1978). Murray, *supra* note 4, at 892 n.26 feels that "U.C.C. § 3-803 seems broad enough to allow this result." See also *The Law of Certification of Checks*, 78 BANKING L.J. 369, 384 (1961).

If fraud is involved courts have allowed a stop payment order, and in lawsuits between a payee or holder and a drawee, courts have allowed the drawer to be interpleaded.²⁵ Where a check has been certified through error or by mistake and is still in the hands of the person who procured certification, and that person has not changed his position between certification and revocation, and the rights of third parties have not intervened, the bank may in some instances be permitted to revoke its certification.²⁶

III. CASHIER'S CHECKS

A cashier's check, like a certified check, assures its payee or holder that the instrument will be paid.²⁷ The Uniform Commercial Code (U.C.C.) does not specifically define a cashier's check, teller's check, bank check, bank draft, money order, or traveler's check.²⁸ The determining factor is not the name given to the instrument by the bank or

Yet the Code position is that a bank is not required to stop payment on a certified check. U.C.C. §§ 4-303(1)(a), § 4-403, comment 5 (1978).

See also *Lincoln Securities v. Morgan Guaranty Trust Co.*, 8 U.C.C. Rep. Serv. (Callaghan) 215 (N.Y. Sup. Ct. New York County 1970), where the court, relying on *Carnegie Trust Co. v. First Nat'l Bank*, 213 N.Y. 301, 107 N.E. 693 (1915) as authority cited the general rule that a drawer may not stop payment on a certified check, since certification constitutes an acceptance by the bank. In *Lincoln Securities*, however, there was an allegation of fraud, and the court held that interpleader of the drawer should be allowed. *Lincoln Securities*, 8 U.C.C. Rep. Serv. (Callaghan) at 216.

25. See *supra* note 24.

26. See *Metropolitan Life Ins. Co. v. Bank of United States*, 259 N.Y. 365, 182 N.E. 18 (1932) (certification through error and no change in position); *Manhattan Co. v. Tunick*, 134 Misc. 863, 237 N.Y.S. 230 (1929) (citing *Mt. Morris Bank v. Twenty-Third Ward Bank*, 172 N.Y. 244, 64 N.E. 810 (1902)); *Irving Bank v. Wetherald & Young*, 36 N.Y. 535 (1867) (certification by mistake because of insufficient funds); *Freistat v. Industrial Bank of Commerce*, 18 Misc. 2d 420, 186 N.Y.S.2d 768 (1958) (certified by mistake of teller, and payee had not been damaged, nor changed his position in reliance thereon). But see *Rockland Trust Co. v. South Shore Nat'l Bank*, 366 Mass. 74, 314 N.E.2d 438 (1974), concerning the bank's right to cancel its certification. See generally 9 N.Y. JUR. 2d *Banks* § 377, at 615-16 (1982) (certification through error; revocability).

If a check is certified by mistake after a stop payment order, and the payee has not changed its position in reliance upon the certification, the bank may recover from the payee. *Tusso v. Security Nat'l Bank*, 76 Misc.2d 12, 349 N.Y.S.2d 914 (Dist. Ct. Suffolk County 1973). A bank has been allowed to revoke a mistaken certification when no third party was harmed. *Plantation Bank v. Desormier*, 102 R.I. 565, 232 A.2d 371 (1967).

In *Rockland Trust Co. v. South Shore Nat'l Bank*, 366 Mass. 74, 314 N.E.2d 438 (1974), the bank was allowed to cancel and rescind its certification where there was fraud practiced by its customer, and plaintiff was not a holder in due course; it was indicated by the court that if payment were made in cash instead of certification, the cash payment could also be rescinded. See also, *Wallach*, *supra* note 11, at 584 n.23.

27. The U.C.C. does not define a cashier's check. The only reference to a cashier's check is found in U.C.C. § 4-211(1)(b) (1978).

28. See Note, *Personal Money Orders and Teller's Checks: Mavericks Under the UCC*, 67 COLUM. L. REV. 524, 525 (1967).

the other parties. Rather, the physical characteristics of each instrument must be examined to determine if the instrument is a cashier's check. After this determination the rights and liabilities of the parties can be ascertained.

A cashier's check may be defined as a bill of exchange or draft drawn by a bank upon itself. The bank is both the drawer and the drawee.²⁹ Cashier's checks are usually issued by a bank at the request of its customers or at the request of a non-customer purchaser.³⁰ The name of the purchaser or bank customer normally would not appear on the instrument unless that party were also listed as the payee. If the customer's name does appear, other than as payee, it might be included as an informational notation. The bank customer or purchaser of the cashier's check is called the remitter.³¹

With a cashier's check, the drawer and the drawee bank are the same and the courts and the public usually consider cashier's checks to be the equivalent of cash.³² A cashier's check is accepted as a substitute

29. H. BAILEY, *supra* note 7, § 1.11; 6 MICHIE ON BANKS AND BANKING 359 (W. Wilson, J. Vaughan, R. Thiele, & J. Dandridge eds. 1975) [hereinafter cited as Michie]; Fox, *Stopping Payment on a Cashier's Check*, 19 B.C.L. REV. 683, 683 (1978).

Most courts hold that the cashier's check is accepted in advance by the act of issuance. See Wallach, *supra* note 11, at 584-85 nn. 24-30. However, there is a division of authority whether cashier's checks are properly characterized as drafts or notes. The U.C.C. does not mention cashier's checks, but does provide definitions of the terms "draft" and "note." A draft or bill of exchange is an order to pay, whereas a note is a promise to pay. U.C.C. § 3-104(2)(a), (d) (1978). Although § 3-118(a) provides "[w]here there is doubt whether the instrument is a draft or a note the holder may treat it as either," it also states "[a] draft drawn on the drawer is effective as a note." *Id.*

Most courts follow the view that a cashier's check drawn by a bank upon itself is a draft accepted by the bank by the very act of issuance. *Swiss Credit Bank v. Virginia Nat'l Bank*, 538 F.2d 587, 588 (4th Cir. 1976); *Munson v. American Nat'l Bank & Trust Co.*, 484 F.2d 620, 623-24 (7th Cir. 1973); *Ross v. Peck Iron & Metal Co.*, 264 F.2d 262, 269 (4th Cir. 1959). A minority view, however, characterizes cashier's checks as promissory notes representing the bank's promise to pay the holder. *TPO Inc. v. FDIC*, 487 F.2d 131, 136 (3d Cir. 1973); *Banco Ganadero Y Agricola v. Society Nat'l Bank*, 418 F. Supp. 520, 524 (N.D. Ohio 1976).

30. See generally Benson, *Stop Payment of Cashier's Checks and Bank Drafts Under the Uniform Commercial Code*, 2 OHIO N.U. L. REV. 445, 445-46 (1975) for a discussion and description of the subject.

31. The term "remitter" is explained in W. BRITTON, *HANDBOOK OF THE LAW OF BILLS AND NOTES* 177 (2d ed. 1961). Britton explains that under the original practice of a bill of exchange, there were four parties involved: the drawer, drawee, payee, and the remitter. A remitter is the person who at the outset of an instrument made payable to a payee, obtains possession of same from the drawer or maker, for purposes of delivery to the payee.

The term remitter is not defined in the Code, but reference to a remitter is contained in the definition of issue. "Issue" is defined as the first delivery of an instrument to a holder or a remitter. U.C.C. § 3-102(1)(a) (1978). The term "issue" deals with the transfer of possession by the drawer to the third person or remitter. See Note, *supra* note 28, at 540-41 and Comment, *supra* note 11 for further discussion and explanation of a "remitter."

32. *E.g., In re Johnson*, 552 F.2d 1072, 1078 (4th Cir. 1977); *Swiss Credit Bank v. Virginia Nat'l Bank*, 538 F.2d 587, 588 (4th Cir. 1976); *Munson v. American Nat'l Bank & Trust Co.*, 484

for cash because the bank stands behind it.³³ A majority of state courts have determined that the issuance of a cashier's check becomes the primary obligation of the bank. The leading cases in New York hold that a cashier's check is a check drawn by a bank upon itself and issued by an authorized officer of the bank. As one case noted:

The bank, therefore, becomes both the drawer and drawee; and the check becomes a promise by the bank to draw the amount of the check from its own resources and to pay the check upon demand. Thus, the issuance of the cashier's check constitutes an acceptance by the issuing bank; and the cashier's check becomes the primary obligation of the bank.³⁴

The New York courts have further held that a cashier's check establishes a debtor-creditor relationship between the issuing bank and the payee.³⁵ One court concluded:

A cashier's check is . . . the primary obligation of the bank which issues it and constitutes its written promise to pay upon demand. It has been said that a cashier's check is a bill of exchange drawn by a bank upon itself, accepted in advance by the very act of issuance.³⁶

Most courts have adopted the general rule that a cashier's check is not subject to countermand by either the remitter³⁷ or the issuing

F.2d 620, 624 (7th Cir. 1973); *Kaufman v. Chase Manhattan Bank*, 370 F. Supp. 276, 278 (S.D.N.Y. 1973); *State v. Powell*, 536 S.W.2d 14, 16 (Mo. 1976); *National Newark & Essex Bank v. Giordano*, 111 N.J. Super. 347, 350, 268 A.2d 327, 329 (1970); *Tranarg, C.A. v. Banca Commerciale Italiana*, 90 Misc. 2d 829, 835-36, 396 N.Y.S.2d 761, 764 (Sup. Ct. New York County 1977); *Moon Over the Mountain, Ltd. v. Marine Midland Bank*, 87 Misc. 2d 918, 920, 386 N.Y.S.2d 974, 975 (N.Y. Civ. Ct. 1976); *First National Bank v. Nobel*, 179 Or. 26, 34, 168 P.2d 354, 366-67 (1946); *Angelo v. Chemical Bank & Trust Co.*, 529 S.W.2d 783, 786-87 (Tex. Civ. App. 1975); *Wertz v. Richardson Heights Bank & Trust*, 495 S.W.2d 572, 574 (Tex. 1973). See also *Fox*, *supra* note 29, at 683-84; *Lawrence*, *supra* note 14, at 289.

33. *National Newark & Essex Bank v. Giordano*, 111 N.J. Super. 347, 351, 268 A.2d 327, 329 (1970).

34. *Kaufman v. Chase Manhattan Bank*, 370 F. Supp. 276, 278 (S.D.N.Y. 1973), (citing *Bunge Corp. v. Manufacturers Hanover Trust Co.*, 65 Misc. 2d 829, 318 N.Y.S.2d 819 (Sup. Ct. New York County 1971), *rev'd. on other grounds*, 37 A.D.2d 409, 325 N.Y.S.2d 983 (1971), *aff'd*, 31 N.Y.2d 223, 335 N.Y.S.2d 412 (1972)); *In re Bank of the United States*, 243 A.D. 287, 291, 277 N.Y.S. 96, 100 (1935); See also *Bobrick v. Second Nat'l Bank*, 175 A.D. 550, 162 N.Y.S. 147 (1916), *aff'd.*, 224 N.Y. 637, 121 N.E. 856 (1918) (in issuing a cashier's check a bank incurs a direct primary obligation to pay on default of the drawee).

The court in *Kaufman* explained the use of the term "acceptance," by stating that the signature of an authorized employee of the issuing bank constitutes an acceptance under U.C.C. § 3-410 (1): "Acceptance is the drawee's signed engagement to honor the draft as presented." *Kaufman*, 370 F. Supp. at 278 n.5.

35. *Myers v. First Nat'l Bank*, 42 A.D.2d 657, 658, 345 N.Y.S.2d 204, 205 (1973).

36. *Dziurak v. Chase Manhattan Bank*, 58 A.D.2d 103, 396 N.Y.S.2d 414, 415-6 (1977), *aff'd*, 44 N.Y.2d 778, 406 N.Y.S.2d 30 (1978) (quoting from *In re Bank of United States*, 243 A.D. 287, 291, 277 N.Y.S. 96, 100 (1935)).

37. *Pennsylvania v. Curtiss Nat'l Bank*, 427 F.2d 395, 398 (5th Cir. 1970); *United States v.*

bank.³⁸ Prior to a valid delivery, however, the purchaser of a cashier's check may cause it to be cancelled,³⁹ and the cashier's check is freely returnable to the issuing bank in the hands of the remitter.⁴⁰

A customer may order a bank to stop payment on any item for his account,⁴¹ but a cashier's check is payable from the bank's and not the customer's account.⁴² As a general rule, a bank customer has no right to order the bank to stop payment on a cashier's check⁴³ since the order

Milton, 382 F.2d 976, 978 (6th Cir.), *cert. denied*, 390 U.S. 952 (1967); *State v. Powell*, 536 S.W.2d 14, 16 (Mo. 1976); *Thompson Poultry, Inc. v. First Nat'l Bank*, 199 Neb. 8, 9, 255 N.W.2d 856, 858 (1977); *Leo Syntax Auto Sales, Inc. v. Peoples Bank & Sav.*, 6 Ohio Misc. 226, 229, 215 N.E.2d 68, 71 (1965); Fox, *supra* note 29, at 685.

"Since the remitter is not liable on the instrument, and it is the bank which has the liability of a maker or drawer, the remitter is a stranger to the bank's obligation, and therefore, by definition, the remitter has no right to countermand the payment of a cashier's check." Comment, *supra* note 11, at 262.

38. *Swiss Credit Bank v. Virginia Nat'l Bank*, 538 F.2d 587, 588 (4th Cir. 1973); *Munson v. America Nat'l Bank & Trust Co.*, 484 F.2d 620 (7th Cir. 1973); *Pennsylvania v. Curtiss Nat'l Bank*, 427 F.2d 395, 398 (5th Cir. 1970); *Kaufman v. Chase Manhattan Bank*, 370 F. Supp. 276, 278 (S.D.N.Y. 1973); *Polotsky v. Artisans Sav. Bank*, 37 Del. 151, 157, 188 A. 63, 66 (1936); *Riverside v. Maxa*, 45 So.2d 678, 680 (Fla. 1950); *Meador v. Ranchmart State Bank*, 213 Kan. 372, 376, 517 P.2d 123, 127 (1973); *Scharz v. Twin City State Bank*, 201 Kan. 539, 541, 441 P.2d 897, 899 (1968); *First Nat'l Bank v. Noble*, 179 Or. 26, 54-55, 168 P.2d 354, 366 (1946).

But see Wilmington Trust Co. v. Delaware Auto Sales, 271 A.2d 41 (Del. 1970). In *Wilmington Trust Co.*, the bank issued a cashier's check in exchange for a personal check drawn on it over a customer's stop payment order. The court held that the bank could assert the personal defense of failure of consideration against the payee of the cashier's check and refuse to honor the check. The payee of the cashier's check was also the payee of the personal check. The Delaware court held that the payee had "dealt with" the bank, and, under U.C.C. § 3-305(2), personal defenses were good against the payee. The *Wilmington Trust Co.* case has been questioned by courts and commentators. *Munson v. American Nat'l Bank & Trust Co.*, 484 F.2d 620, 624 n.8 (7th Cir. 1973). H. BAILEY, *supra* note 7, at § 9.13 indicated that even a holder in due course is subject to "personal" defenses that might be asserted by a party with whom the holder has dealt directly. For a similar holding, see *Travi Constr. Corp. v. First Bristol County Nat. Bank*, 405 N.E.2d 666 (Mass. 1980).

39. See *Burke v. Mission Bay Yacht Sales*, 214 Cal. App. 2d 723, 29 Cal. Rptr. 685, 668 (1963) (valid delivery is essential to effectiveness); *Gillespie v. Riley Management Corp.*, 59 Ill. 2d 211, 319 N.E.2d 753, 757 (1974) (purchaser retains right to cancel before delivery).

40. *Bunge Corp. v. Manufacturers Hanover Trust Co.*, 31 N.Y.2d 223, 229, 335 N.Y.S.2d 412, 416 (1972). See generally *Michie*, *supra* note 29, at 371-72.

41. U.C.C. § 4-403(1) (1978) provides:

"Customer's Right to Stop Payment: . . . A customer may by order to his bank stop payment of any item payable for his account"

42. Pursuant to U.C.C. § 4-403 (1978), the right to stop payment is given to a "customer" which is defined as: "Any person having an account with a bank or for whom a bank has agreed to collect items and includes a bank carrying an account with another bank" U.C.C. § 4-104(1)(e) (Emphasis added).

The customer is not a party to the cashier's check, whereas the bank is both drawer and drawee. The item is payable for the issuing bank's account, and not for the customer's account since the person purchasing the cashier's check may not even have an account with the bank.

43. See generally *Annot.*, 97 A.L.R. 3d 714, 718-22 (1980) (collecting cases denying right to stop payment). In fact, the term "stop payment" has no application to a bank's right to refuse payment or to a remitter's ability to compel a bank to refuse payment; the use of such term confuses the real issue of whether a bank's obligation to pay a cashier's check may be avoided or

comes too late if it is received after the bank has accepted the item.⁴⁴ Since a cashier's check is accepted when issued it is beyond the power of a bank to place a stop payment on it.⁴⁵

The first major case clearly resolving issues concerning stopping payment of a cashier's check was *Kaufman v. Chase Manhattan Bank*.⁴⁶ In that case, the bank's customer requested a cashier's check payable to plaintiff. At the time the cashier's check was issued the customer's account contained sufficient funds.⁴⁷ Later a deposited item was returned. The bank realized that there were insufficient funds in the depositor's account to cover the amount of the cashier's check and stopped payment on its cashier's check. The court referred to U.C.C. section 4-303, and noted that since a cashier's check is accepted when issued,⁴⁸ it is beyond the power of the bank to stop payment on it.⁴⁹ The court further stated that since the cashier's check was the primary obligation of the bank it was presumed to have been issued for value, and once the cashier's check was issued and delivered to the payee the transaction was complete. Any failure by the bank to charge the amount against its depositor does not affect the unconditional right of payment afforded the payee.⁵⁰ Cashier's checks are widely used and readily accepted by sellers as a potential cash substitute, and so public policy favors a rule that prohibits stopping payment on such checks.⁵¹

Since cashier's checks have been treated as the equivalent of cash,

suspended by the interposition of the purchaser's or the bank's own claims or defenses. Lawrence, *supra* note 14, at 290.

44. J. WHITE & R. SUMMERS, HANDBOOK ON THE UNIFORM COMMERCIAL CODE 681 (2d ed. 1980) [hereinafter cited as WHITE & SUMMERS].

Under U.C.C. § 4-303 (1978), a stop order arrives too late to bind the bank unless it arrives at a reasonable time before the bank has accepted or paid the check. Since issuance of the cashier's check operates as an acceptance, payment of the cashier's check can not be stopped once it has been issued.

45. *Kaufman v. Chase Manhattan Bank*, 370 F. Supp. 276, 278 (S.D.N.Y. 1973); *Pennsylvania v. Curtis Nat'l Bank*, 427 F.2d 395, 398 (5th Cir. 1970); *National Newark & Essex Bank v. Giordano*, 111 N.J. Super. 347, 268 A.2d 327 (1970).

46. 370 F. Supp. 276 (S.D.N.Y. 1973).

47. *Id.* at 276 n.3.

48. The court explained that issuance of a cashier's check constitutes an acceptance by the issuing bank. Since the drawer bank and drawee bank are the same, the signature of an authorized employee of the issuing bank constitutes an acceptance under U.C.C. § 3-410(1), which states in part: "Acceptance is the drawee's signed engagement to honor the draft as presented. *It must be written on the draft, and may consist of his signature alone.*" (emphasis added). Therefore, since the drawer and drawee bank are the same, the drawer's signature acts as the drawee's signature, which acts as an acceptance upon issuance. *Kaufman*, 370 F. Supp. at 278 n.5.

49. *Id.* at 278 (relying on *National Newark & Essex Bank v. Giordano*, 111 N.J. Super. 347, 268 A.2d 327 (1970)).

50. *Kaufman*, 370 F. Supp. at 278.

51. *Id.* at 278-79.

most courts have prohibited the issuing bank from raising any defenses to payment, even against holders who are not holders in due course.⁵²

The *Kaufman* court stated:

A cashier's check circulates in the commercial world as the equivalent of cash People accept a cashier's check as a substitute for cash because the bank stands behind it, rather than an individual. In effect, the bank becomes a guarantor of the value of the check and pledges its resources to the payment of the amount represented upon presentation. To allow the bank to stop payment on such an instrument would be inconsistent with the representations it makes in issuing the check. Such a rule would undermine the public confidence in the bank and its checks and thereby deprive the cashier's check of the essential incident which makes it useful. People would no longer be willing to accept it as a substitute for cash if they could not be sure that there would be no difficulty in converting it into cash.⁵³

In a pre-U.C.C. case,⁵⁴ a New York court compared cashier's checks to certified checks, and held that a bank may not stop payment of its cashier's check to assert its customer's defenses. The court reasoned that "the requirements of stability in commerce and banking dictate that the obligations of a bank on its cashier's checks be not lightly avoided."⁵⁵ In another New York case⁵⁶ a cashier's check was issued in exchange for a certified check. Both the certified check and the cashier's check were made out to the same payee, but the certified check was not endorsed. The court held that issuing a cashier's check in exchange was the same as paying the certified check. Thus, for all practical purposes,

52. Lawrence, *supra* note 14, at 289.

53. *Kaufman*, 370 F. Supp. at 279 (quoting from *National Newark & Essex Bank v. Giordano*, 111 N.J. Super. 347, 351-52, 268 A.2d 327, 329 (1970)).

However, it should be noted that one author indicates that there are no U.C.C. provisions to support the quoted statement. That author states that courts following *National Newark Bank* and *Kaufman* have often relied upon inapplicable Code provisions which only superficially support their judgment regarding the cash-like nature of cashier's checks. Lawrence, *supra* note 14, at 289.

54. *Rosenbaum v. First Nat'l City Bank*, 13 A.D.2d 100, 213 N.Y.S.2d 513 (1961), *aff'd*, 11 N.Y.2d 845, 227 N.Y.S.2d 670 (1962).

55. *Rosenbaum*, 213 N.Y.S.2d at 515. The court went on to state that "we find no essential difference between a situation where a bank certifies or makes payment on a check and the one here where a cashier's check is issued in exchange therefor . . ." *Id.* at 101, 213 N.Y.S.2d at 514 (citation omitted).

56. *Tonelli v. Chase Manhattan Bank*, 41 N.Y.2d 667, 394 N.Y.S.2d 858 (1977). Even though both instruments were made out to the same named payee, by issuing the cashier's check in payment of a certified check without the indorsement, the drawee bank was held responsible, as this allowed fraudulent use of the check, since the certified check had been earmarked for a specific purpose.

cashier's checks are treated as the equivalent of cash.⁵⁷

In the leading New York case of *Dziurak v. Chase Manhattan Bank*,⁵⁸ a depositor requested the bank to stop payment on a cashier's check.⁵⁹ The bank refused the request without a court order. The bank paid the check and the customer sued the bank for damages for failing to abide by his stop payment order.⁶⁰ The court concluded that "a cashier's check is not one payable for the customer's account but rather for the bank's account. It is the bank which is obligated on the check."⁶¹ Although an ordinary check may be stopped if reasonable notice is given, this is not true with a cashier's check:

A cashier's check is of a very different character. It is the primary obligation of the bank which issues it and constitutes its written promise to pay upon demand. . . . [A] cashier's check is a bill of exchange drawn by a bank upon itself, accepted in advance by the very act of issuance.⁶²

This line of reasoning has been followed in several other cases.⁶³

According to the official comments of the Uniform Commercial Code,⁶⁴ there is no right to stop payment after certification or acceptance. Since the bank's signature on the instrument was deemed to be the bank's acceptance,⁶⁵ the *Dziurak* court held there was no right to stop payment on the cashier's check.⁶⁶ However, the court commented that "[i]n retrospect, the Bank, as a practical matter, could quite safely

57. See *Able & Assoc., Inc. v. Orchard Hill Farms*, 77 Ill. App. 3d 375, 395 N.E.2d 1138 (1979) (cashier's check circulates in the business world as cash); *Meador v. Ranchmart State Bank*, 213 Kan. 372, 517 P.2d 123 (1973) (cashier's check is substitute for money); *National Newark & Essex Bank v. Giordano*, 111 N.J. Super. 347, 268 A.2d 327, 329 (1970) (cashier's check is equivalent of cash in the commercial world).

58. 58 A.D.2d 103, 396 N.Y.S.2d 414 (1977), *aff'd*, 44 N.Y.2d 778, 406 N.Y.S.2d 30 (1978).

59. The instrument was called an "official bank check", but the court referred to it as a "cashier's check." *Id.* at 103-04, 396 N.Y.S.2d at 414.

60. *Id.* at 104, 396 N.Y.S.2d at 415.

61. *Id.* at 105, 396 N.Y.S.2d at 415 (quoting from *Wertz v. Richardson Heights Bank & Trust*, 495 S.W.2d 572, 574 (Tex. 1973)).

62. *Dziurak*, 58 A.D.2d at 105, 396 N.Y.S.2d at 415 (quoting from *In re Bank of United States*, 243 A.D. 287, 291, 277 N.Y.S. 96, 100 (1935)).

63. *E.g.*, *Abilities, Inc. v. Citibank*, 87 A.D.2d 831, 449 N.Y.S.2d 242 (1982); *Florida Frozen Foods v. National Comm'l Bank & Trust Co.*, 81 A.D.2d 978, 439 N.Y.S.2d 771 (1981); *Taboada v. Bank of Babylon*, 95 Misc. 2d 1000, 408 N.Y.S.2d 734 (Suff. County Ct. 1978); *Moon Over the Mountain, Ltd. v. Marine Midland Bank*, 87 Misc. 2d 918, 386 N.Y.S.2d 974 (N.Y. Civ. Ct. 1976).

64. U.C.C. § 4-403 comment 5 (1978) provides:

There is no right to stop payment after certification of a check or other acceptance of a draft. . . . The acceptance is the drawee's own engagement to pay, and he is not required to impair his credit by refusing payment for the convenience of the drawer.

65. The court stated that "the bank's own signature on the instrument constitutes both a drawing and an acceptance . . ." *Dziurak*, 58 A.D.2d at 106, 396 N.Y.S.2d at 416 (emphasis added).

66. *Id.* at 107, 396 N.Y.S.2d at 417.

have stopped payment on its cashier's check and, by interpleader, have paid the money into court."⁶⁷ This decision was affirmed by the New York State Court of Appeals, which held that the bank was under no legal obligation to honor a customer's stop payment order of a cashier's check.⁶⁸

Stopping payment of cashier's checks may raise at least two different types of problems: the bank may want to assert its own defenses or the bank may be stopping payment at the request of the purchaser. The bank may wish to assert its own defenses in situations when it issues a cashier's check, receives a check payable by or to the purchaser as consideration, and thereafter discovers that the check it received is no good because of insufficient funds or other non-payment. A bank may also wish to assert its own defenses when a depositor previously issued a stop payment order on a personal check issued by the depositor and the bank pays the personal check in violation of its customer's stop payment order by issuing the cashier's check, or where the bank issues the cashier's check by other mistake or fraud. In any of the above instances, the bank would want to cancel its cashier's check so that it could assert its own defenses.⁶⁹ The second problem arises when a bank issues a cashier's check at the request of a purchaser (who acts as remitter and who might also be a customer of the bank) and the purchaser subsequently notifies the bank that he has a claim or defense regarding the transfer of the instrument and requests the bank not to honor the cashier's check.⁷⁰

67. *Id.* at 107, 396 N.Y.S.2d at 416. The court referred to U.C.C. § 3-603(1), which provides: The liability of any party *is discharged* to the extent of his payment . . . to the holder even though it is made with knowledge of a claim of another person to the instrument *unless prior to such payment . . . the person making the claim either supplies indemnity deemed adequate by the party seeking the discharge or enjoins payment or satisfaction by order of a court of competent jurisdiction in an action in which the adverse claimant and the holder are parties.* . . .

Id. (emphasis added). According to the court, the plaintiff's attorney could have proceeded with a court order enjoining the bank from making payment, or could have provided indemnity to protect the bank. The court also indicated the bank could have stopped payment, and the bank could then commence an interpleader. This of course, presupposes that plaintiff would first provide indemnity to protect the bank. *Dziurak*, 58 A.D.2d at 107, 396 N.Y.S.2d at 416.

Interpleader is a form of equitable relief given to a debtor (in this case the bank) who is willing to pay but who is besieged by adverse claimants. This is the best alternative from the standpoint of the bank, since it allows the bank to assume the position of a passive stakeholder. Note, *Blocking Payment*, *supra* note 8, at 433-34.

68. *Dziurak*, 44 N.Y.2d 778, 778, 406 N.Y.S.2d 30, 31 (1978) (citing *Kaufman v. Chase Manhattan Bank*, 370 F. Supp. 276, 278 (S.D.N.Y. 1973)).

69. Several such situations are explained and discussed by Wallach, *supra* note 11, at 587 n.35. See also Benson, *supra* note 30, at 450; Fox, *supra* note 29, at 686-87.

70. Benson, *supra* note 30, at 450; Fox, *supra* note 29, at 690-91. This is the more common

One commentator claims that when a bank claims its own defenses, the key question would be whether the holder is a holder in due course or has changed his position in reliance upon the check.⁷¹ If he has, the bank would not be able to assert any personal defense, such as the defense of failure of consideration. However, questions arise as to whether the bank will be allowed to raise the defenses of its customers. It is argued that a bank should not be placed in the middle of a dispute between two parties asserting claims to the same instrument unless the party asserting the claim against the holder supplies indemnity or obtains a court order enjoining payment.⁷² This procedure is provided for by the Code.⁷³ For public relations reasons or to otherwise assist its depositor, a bank may decide to stop payment on the cashier's check, in which case the bank will be held responsible. In almost all situations, the bank would be precluded from defending on the basis that the purchaser or some other party had a claim or defense⁷⁴ to the instrument.⁷⁵ The real question regarding a bank's ability to stop payment on cash-

type of problem. See *Dziurak* 58 A.D.2d 103, 396 N.Y.S.2d 414 (1977), *aff'd*, 44 N.Y.S. 778, 406 N.Y.S.2d 30 (1978).

71. See generally the analysis of Fox, *supra* note 29, at 686-87, for the distinction between a holder in due course and one who has in good faith changed its position.

However, in *Kaufman*, 370 F. Supp. 276 (S.D.N.Y. 1973), the court did not consider plaintiff's status as a holder in due course, although plaintiff would not have been able to prove such status. The court merely stated that a bank may not stop payment on a cashier's check which has been properly issued by the bank and delivered to the payee.

72. Benson, *supra* note 30, at 450.

73. See U.C.C. § 3-603(1) (1978).

74. This is commonly referred to as *jus tertii*, which means the rights of a third party. BLACK'S LAW DICTIONARY 776 (5th ed. 1979).

75. Benson, *supra* note 30, at 451. U.C.C. § 3-306(d) (1978) provides:

Rights of One Not Holder in Due Course. Unless he has the rights of a holder in due course any person takes the instrument subject to . . . (d) the defense that he or a person through whom he holds the instrument acquired it by theft, or that payment or satisfaction to such holder would be inconsistent with the terms of a restrictive indorsement. *The claim of any third person to the instrument is not otherwise available as a defense to any party liable thereon unless the third person himself defends the action for such party.*

Id. (emphasis added).

Official Comment 5 to that section explains the reasoning as follows:

The contract of the obligor is to pay the holder of the instrument, and the claims of other persons against the holder are generally not his concern. He is not required to set up such a claim as a defense, since he usually will have no satisfactory evidence of his own on the issue; and the provision that he may not do so is intended as much for his protection as for that of the holder . . .

. . . .
Nothing in this section is intended to prevent the claimant from intervening in the holder's action against the obligor or defending the action for the latter, and asserting his claim in the course of such intervention or defense. Nothing here stated is intended to prevent any interpleader, deposit in court or other available procedure under which the defendant may bring the claimant into court or be discharged without himself litigating the claim as a defense. Compare section 3-803 on vouching in other parties alleged to be liable.

ier's checks is whether or not the bank will be able to raise the defenses of its customers against the holders. Those defenses could be raised if the purchaser of the cashier's check personally defends the action against the bank.⁷⁶

Numerous cases have held that a cashier's check is deemed accepted in advance by the mere act of issuance, and so banks lack the authority to terminate their duty to honor them. The courts in New York and other jurisdictions have followed the decisions of *Kaufman v. Chase Manhattan Bank*⁷⁷ and *Dziurak v. Chase Manhattan Bank*.⁷⁸ Some courts in other jurisdictions made similar findings before *Kaufman* and *Dziurak*.⁷⁹

For example, in *Moon Over the Mountain, Ltd. v. Marine Midland Bank*,⁸⁰ the bank, at the request of its customer, stopped payment on an "official check." Referring to the prior decisions of *Kaufman* and

Id. § 3-306, comment 5.

If the purchaser supplies indemnity deemed adequate by the bank, or obtains injunctive relief, then under U.C.C. § 3-603 (1978) the bank is protected. In either case, the claim of the purchaser against the holder must be personally litigated by the purchaser. The bank may not on its own, defend the holder's suit by resorting to claims of the purchaser. If the purchaser actually assumes the defense after indemnifying the bank fully, the bank is entitled to the benefit of whatever claims the purchaser has against the holder.

Under § 3-603(1), mere notice that the purchaser of the cashier's check was cheated by a third party does not impose a duty upon the bank to decline to honor the cashier's check when presented by the holder. The bank is not placed in the position of having to determine the merits of such a dispute. § 3-603, comment 3, points out that "[W]hen the party to pay is notified of an adverse claim to the instrument he has normally no means of knowing whether the assertion is true." Thus U.C.C. § 3-603 relieves the bank of any responsibility for arbitrating the dispute.

The bank may ultimately be required to pay if the holder prevails on the merits. The indemnity supplied to the bank should hold the bank harmless, so that the bank suffers no loss. Presumably, the customer will have litigated its claim in its own name and at its own expense. See U.C.C. § 3-306(d), § 3-603(1), & § 3-603, comments 2 & 3.

76. See § 3-306(d) & comment 5. See also Fox, *supra* note 29, at 691-92.

77. 370 F. Supp. 276 (S.D.N.Y. 1973).

78. 58 A.D.2d 103, 396 N.Y.S.2d 414 (1977), *aff'd*, 44 N.Y.2d 778, 406 N.Y.S.2d 30 (1978).

79. See *Swiss Credit Bank v. Virginia Nat'l Bank*, 538 F.2d 587 (4th Cir. 1976); *Munson v. American Nat'l Bank & Trust Co.*, 484 F.2d 620 (7th Cir. 1973); *Pennsylvania v. Curtiss Nat'l Bank*, 427 F.2d 395 (5th Cir. 1970); *Citizens & Southern Nat'l Bank v. Youngblood*, 135 Ga. App. 638, 219 S.E.2d 172 (1975); *Able & Assoc., Inc. v. Orchard Hill Farms*, 77 Ill. App. 3d 375, 395 N.E.2d 1138 (1979); *Gillespie v. Riley Management Corp.*, 59 Ill. 2d 211, 319 N.E.2d 753 (1974); *Meador v. Ranchmart State Bank*, 213 Kan. 372, 517 P.2d 123 (1973); *State v. Powell*, 536 S.W.2d 14 (Mo. 1976); *National Newark & Essex Bank v. Giordano*, 111 N.J. Super. 347, 268 A.2d 327 (1970); *Abilities, Inc. v. Citibank*, 87 A.D.2d 831, 449 N.Y.S.2d 242 (1982); *Florida Frozen Foods v. National Commercial Bank & Trust Co.*, 81 A.D.2d 978, 439 N.Y.S.2d 771 (Suff. County Ct. 1978); *Tranarg v. Banca Commerciale Italiana*, 90 Misc. 2d 829, 396 N.Y.S.2d 761 (Sup. Ct. New York County 1977); *Moon Over the Mountain, Ltd., v. Marine Midland Bank*, 87 Misc. 2d 918, 386 N.Y.S.2d 978 (N.Y. Civ. Ct. 1976); *Wertz v. Richardson Heights Bank & Trust Co.*, 495 S.W.2d 572 (Tex. 1973) (all holding that cashier's check is accepted when issued, and is not subject to countermand).

80. 87 Misc. 2d 918, 386 N.Y.S.2d 974 (N.Y. Civ. Ct. 1976).

Dziurak, the court held that "[a] cashier's check is accepted in advance by the act of issuance and that the issuing bank remains liable, after a stop payment order, even where there is a failure of consideration in the underlying transaction for which the check was given."⁸¹

In rendering its decision, the court referred to the effect of U.C.C. section 3-802, whereby a payee or other holder loses its rights against a purchaser when it accepts a bank instrument in payment of an underlying obligation, since that obligation would be *pro tanto* discharged.⁸² Section 3-802(1)(a) of the Code provides that the taking of an instrument when the drawer is a bank discharges the underlying obligor unless there is recourse against him on the instrument. If a cashier's check is taken as payment of an underlying obligation, the underlying obligation is discharged. If the remitter has not endorsed the cashier's check, the holder of the cashier's check could only turn to the bank as primarily liable on the instrument. In this case, the remitter-obligor would be discharged pursuant to U.C.C. section 3-802. If the bank were allowed to stop payment of the cashier's check without liability, the holder would be without recourse.⁸³

In *Moon Over the Mountain*, the court pointed out that if the bank had been a party to the underlying obligation the reasoning relating to the *pro tanto* discharge would be inapplicable.⁸⁴ Based upon U.C.C. section 3-802, it has been urged that a holder should have a cause of action against a bank on the bank's primary liability.⁸⁵ Furthermore, for policy reasons, banks should not be free to refuse payment of their obligation, "the policy considerations which underlie the UCC support the rule that a bank must remain liable on its official check even after a stop payment order by its customer. To hold otherwise could be a seri-

81. *Id.* at 921, 386 N.Y.S.2d at 976.

82. *Id.* at 920-22, 386 N.Y.S.2d at 976. U.C.C. § 3-802 (1978), which provides:

(1) Unless otherwise agreed where an instrument is taken for an underlying obligation

(a) *the obligation is pro tanto discharged if a bank is drawer, maker or acceptor of the instrument and there is no recourse on the instrument against the underlying obligor. . . .*

Id. (emphasis added).

83. Of course the bank as drawer could still have liability as a drawer under U.C.C. § 3-413(2) (1978).

Pursuant to U.C.C. § 3-802(1)(a) (1978), the use of a "bank instrument" as payment for an underlying obligation provides for a *pro tanto* discharge of the underlying obligation. But, if the instrument is in fact not paid, then in all fairness, the *pro tanto* discharge should not be applicable.

84. *Moon Over the Mountain, Ltd.*, 87 Misc. 2d 918, 920, 386 N.Y.S.2d 974, 976, n. (referring to *TPO Inc. v. FDIC*, 487 F.2d 131 (3rd Cir. 1973)).

85. *Moon Over the Mountain, Ltd.*, 87 Misc. 2d at 921, 386 N.Y.S.2d at 976. A bank issuing a cashier's check has primary liability. An acceptor of a draft has primary liability and the bank, as drawer, also has liability. See U.C.C. § 3-413 (1978).

ous impediment to public reliance on our banking system."⁸⁶

A seller may avoid the restrictions placed on *pro tanto* discharge and preserve his rights against the bank customer by obtaining the endorsement of the remitter. This allows the seller to hold the remitter of the instrument responsible as an indorser⁸⁷ and, in addition, preserve the liability of the remitter on the underlying obligation.⁸⁸ Under U.C.C. section 3-802, issuance of a bank check does *not* discharge the underlying obligation if the obligor is liable on the instrument.⁸⁹ The New York court, in *Moon Over the Mountain, Ltd.*, stated:

A cashier's check establishes a debtor-creditor relationship between the issuing bank and the payee Unlike an ordinary check drawn on a specific deposit balance, a cashier's check is an obligation of the bank which issues it and a promise to draw the amount of the check from its own resources. The bank becomes both drawer and drawee of a cashier's check and its issuance constitutes an acceptance."⁹⁰

The court stated in conclusion: "A bank issues its own checks in furtherance of its business and wishes the public to accept its checks without question."⁹¹ Therefore, a bank is not permitted to stop the payment of its cashier's check. The court stated if the bank customer (remitter) had any defenses to the underlying transaction they were not material to the dispute.⁹²

In *Taboada v. Bank of Babylon*,⁹³ the payee of a personal check cashed the check at the drawee bank and used the proceeds to purchase a bank "official check."⁹⁴ The bank's customer then attempted to place a stop payment order on the check, but the bank, unable to stop pay-

86. *Moon Over the Mountain, Ltd.*, 87 Misc. 2d at 921, 386 N.Y.S.2d at 976.

87. The remitter could be held responsible as an indorser on his contract of indorsement, or under warranty.

88. The remitter would continue to be responsible on the underlying obligation, as the discharge under U.C.C. § 3-802 (1978) would be inapplicable.

89. U.C.C. § 3-802(1)(a) (1978). *Cf.* *Dziurak v. Chase Manhattan Bank*, 58 A.D.2d 103, 108, 396 N.Y.S.2d 414, 417 (1977), where the court stated "the statute makes no distinction between a cashier's check presented for payment by a payee or one presented by an indorsee of the payee."

90. *Moon Over the Mountain, Ltd.*, 87 Misc. 2d at 920, 386 N.Y.S.2d at 975. The same statement appears in *Tranarg v. Banca Commerciale Italiana*, 90 Misc. 2d 829, 835-36, 396 N.Y.S.2d 761, 764 (Sup. Ct. New York County 1977).

91. *Moon Over the Mountain, Ltd.*, 87 Misc. 2d at 923, 386 N.Y.S.2d at 977-78.

92. *Id.* at 923, 386 N.Y.S.2d at 977. The court concluded that the issuance and delivery of the cashier's check precluded the bank from asserting any defenses the remitter may have had against the payee or the plaintiff. *Id.* at 923-24, 386 N.Y.S.2d at 978.

93. 95 Misc. 2d 1000, 408 N.Y.S.2d 734 (Suffolk County Dist. Ct. 1978).

94. *Id.* at 1002, 408 N.Y.S.2d at 735. Although the check was called an "official check," the court determined that it was a cashier's check.

ment, refused to honor its official check. In an action to collect on the official check, the bank argued that the check had been issued in exchange for its customer's personal check, thus asserting the defense of failure of consideration (since payment on the personal check, which was accepted in exchange, had been stopped by its customer). The court tried to distinguish this case from the prior New York cases and noted that no reported New York cases have approached the issue of a bank's right to dishonor a cashier's check as between the immediate parties.⁹⁵ The court held that the cashier's check had been accepted by issuance, as provided for in U.C.C. section 3-410. The defendant bank could not stop payment.⁹⁶ Although the bank had dealt directly with the plaintiff-payee, the court held that it was precluded from asserting the defense of failure of consideration.⁹⁷

In the more recent case of *Florida Frozen Foods v. National Commercial Bank & Trust Co.*,⁹⁸ a check drawn by the bank's depositor was cashed by the payee who in return received a cashier's check. Allegedly, the payee took such action because it knew that the drawer of the check, Food Fair, was about to file for bankruptcy.⁹⁹ Food Fair did file for bankruptcy on the same day the bank issued the cashier's check. The bank refused to honor the cashier's check, alleging fraud on plaintiff's part. The Appellate Division held that the plaintiff was not obligated to disclose to the defendant bank its knowledge that Food Fair might file for bankruptcy in the near future.¹⁰⁰ Therefore there was no fraud and the bank could not stop payment on its cashier's check.¹⁰¹

In *Abilities, Inc. v. Citibank*,¹⁰² a customer requested that the bank's official check be stopped. The check had been obtained by the customer-remitter and made payable to the payee. Later, when a dispute arose between the customer and the payee, the customer requested that payment be stopped on the bank's official check. The bank, after requesting the customer to sign an indemnity agreement, stopped pay-

95. *Id.* at 1003, 408 N.Y.S.2d at 736. The immediate parties to the official check were the payee (purchaser of the official check and plaintiff herein) and the bank (drawer and drawee of the instrument). *See* 408 N.Y.S.2d at 735.

96. *Id.* at 1004, 408 N.Y.S.2d at 736.

97. *Id.*

98. 81 A.D.2d 978, 439 N.Y.S.2d 771 (1981).

99. *Id.*, at 979, 439 N.Y.S.2d at 772.

100. *Id.*

101. *Id.*

102. 87 A.D.2d 831, 449 N.Y.S.2d 242 (1982). The check was called an "official check." As described in the case it meets the definition of a cashier's check. *See* text accompanying notes 27-31, *supra*.

ment on its official check and issued a new check which was deposited in the customer's account.¹⁰³ When the bank was sued by the payee on the official check, the bank attempted to assert the remitter's defense of failure of consideration. The lower court granted plaintiff leave to serve a supplemental summons and complaint, adding the remitter as an additional party defendant.¹⁰⁴ On appeal, the remitter requested to be vouched into the lawsuit.¹⁰⁵ The court, referring to prior New York cases, held that a cashier's check is deemed accepted upon issuance and a stop payment order following issuance is ineffective.¹⁰⁶ The court stated that "[t]he instrument is clear on its face as to the amount due, without resort to proof of any facts outside of the instrument."¹⁰⁷ Thus, the court did not allow the bank customer to be brought into the lawsuit, and the bank was held responsible on its cashier's check.¹⁰⁸ The bank was left to pursue its remedies against its customer on the indemnity agreement.¹⁰⁹ The court further held that any underlying dispute between the payee and the remitter could be determined in a separate lawsuit.¹¹⁰

In an earlier case a bank mistakenly issued a cashier's check to pay a customer's note after the customer had stopped payment of the note. The court said that if a bank pays over a stop payment order the bank can not recover on the check from the payee but is subrogated to the rights of a payee against a maker. The bank was thus allowed to bring a third party action against its customer.¹¹¹

Other jurisdictions have followed the New York approach. For

103. *Id.*, 449 N.Y.S.2d at 243.

104. *Id.*

105. *Id.*

106. *Id.* (referring to Kaufman v. Chase Manhattan Bank, 370 F. Supp. 276 (S.D.N.Y. 1973); Dziurak v. Chase Manhattan Bank, 58 A.D.2d 103, 396 N.Y.S.2d 414 (1977), *aff'd*, 44 N.Y.2d 778, 406 N.Y.S.2d (1978); Taboada v. Bank of Babylon, 95 Misc. 2d 1000, 408 N.Y.S.2d 734 (Suffolk County Dist. Ct. 1978); Moon Over the Mountain, Ltd., v. Marine Midland Bank, 87 Misc. 2d 918, 386 N.Y.S.2d 975 (N.Y. Civ. Ct. 1976)).

107. *Abilities, Inc. v. Citibank*, 87 A.D.2d at 831, 449 N.Y.S.2d at 244.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Winter v. First Nat'l City Bank*, 8 U.C.C. Rep. Serv. (Callaghan) 213 (N.Y. County Ct. 1970). This lower court case has not been appealed. See *supra* note 5 for a discussion of the subrogation rights and burden of proof. In *Kaiser-Georgetown Community Health-Plan, Inc. v. Bankers Trust Co. of Albany*, 110 Misc. 2d 320, 442 N.Y.S.2d 48 (Sup. Ct. Albany County 1981), a cashier's check was issued as payment for a certificate of deposit to be purchased at another bank. The bank faced liability for permitting the diversion of its customer's funds to an unauthorized person. The court held that the bank had a duty of inquiry before issuing the cashier's check. The court further held that in this situation, the bank could have stopped on the cashier's check. This decision has not been appealed.

example, in a Georgia case¹¹² the bank had issued its cashier's check in exchange for a check drawn by its customer. Later, the bank's depositor issued a stop payment order. The bank then demanded that the defendant return the cashier's check, believing that it should be subrogated to the rights of its customer as to the proceeds of the check.¹¹³ The court rejected this theory, holding the bank responsible on its cashier's check. The issuance of the cashier's check was a payment "in cash without any reservation of the right to revoke settlement."¹¹⁴ The court also held the acceptance of the buyer's check by the exchange of the cashier's check was a final payment, and that the stop payment order was too late.¹¹⁵

In *Meador v. Ranchmart State Bank*,¹¹⁶ the Kansas Supreme Court stated that cashier's checks circulate in the commercial world as a substitute for money, are the primary obligation of the issuing bank and may not be countermanded.¹¹⁷ In *State v. Powell*,¹¹⁸ the Missouri Supreme Court held that a bank was not entitled to honor the stop payment request of its customer to countermand a cashier's check, even though the customer complained that the payee had committed fraud.¹¹⁹ The court, referring to U.C.C. section 4-303(1)(a), stated that once a bank accepts the item, a stop payment order cannot be honored.¹²⁰ A cashier's check, unlike an ordinary check, is accepted by the mere act of issuance. The court reasoned that the nature and usage of cashier's checks in the commercial world is such that public policy does not favor a rule which would permit stopping payment of cashier's checks. The court followed the New York decisions of *Kaufman* and *Dzurak*.

In *National Newark & Essex Bank v. Giordano*,¹²¹ one of the earliest cases cited as authority, the defendant had signed a security agreement with the bank to finance the purchase of two trucks and the bank issued a cashier's check payable to the seller (payee). After defendant (remitter) gave the seller the cashier's check the defendant discovered that the trucks were defective and requested the bank to stop payment

112. *Citizens & Southern Nat'l Bank v. Youngblood*, 135 Ga. App. 638, 219 S.E.2d 172 (1975).

113. *Id.* at 639, 219 S.E.2d at 173.

114. *Id.*

115. *Id.* The court relied on U.C.C. §§ 4-213(1)(a), (b), & 4-303(1)(b) (1978).

116. 213 Kan. 372, 517 P.2d 123 (1973).

117. *Id.* at —, 517 P.2d at 128 (Relying on U.C.C. §§ 3-410(1), 4-303).

118. 536 S.W.2d 14 (Mo. 1976).

119. *Id.* at 16.

120. *Id.*

121. 111 N.J. Super. 347, 268 A.2d 327 (1970).

on the cashier's check, offering to post a bond to protect the bank.¹²² The bank refused to honor the stop payment order on the cashier's check. The defendant thus refused to abide by the security agreement. This was the first major decision to establish that a cashier's check is accepted when issued.¹²³ Since a stop order is ineffective after acceptance, payment of a cashier's check cannot be stopped. The court also discussed the public policy regarding the use of cashier's checks.¹²⁴

Other courts have likewise based their decisions on public policy grounds.¹²⁵ One commentator has summarized the public policy reasoning as follows:

In the commercial setting, cashier's checks . . . are generally viewed as the equivalent of cash. Creditors are ordinarily willing to take cashier's checks in lieu of cash since these instruments are bank obligations rather than personal obligations of the remitter. Since it is frequently impractical and unsafe to transfer large amounts of cash, a cashier's check . . . serves an important commercial function. If banks were allowed to countermand cashier's checks, the utility of such instruments might be undermined.¹²⁶

In a Texas case,¹²⁷ Baker delivered a personal check drawn on the bank to the payee, the American National Insurance Company, as pay-

122. *Id.* at 349-50, 268 A.2d at 328.

123. *Id.* at 350, 268 A.2d at 329.

124. The court referred to the prior decisions of *United States v. Milton*, 382 F.2d 976, 978 (6th Cir. 1967) and *Causey v. Eiland*, 175 Ark. 929, 1 S.W.2d 1008 (1928).

The court stated:

In addition to the statutory prohibition against stopping payment on a cashier's check, *the nature and usage of these checks require such a rule*. A cashier's check circulates in the commercial world as the equivalent of cash. . . . *People accept a cashier's check as a substitute for cash because the bank stands behind it*, rather than an individual. In effect, the bank becomes a guarantor of the value of the check and pledges its resources to the payment of the amount represented upon presentation. To allow the bank to stop payment on such an instrument would be inconsistent with the representation it makes in issuing the check. Such a rule would undermine the public confidence in the bank and its checks *and thereby deprive the cashier's check of the essential incident which makes it useful*. *People would no longer be willing to accept it as a substitute for cash if they could not be sure that there would be no difficulty in converting it into cash*

National Newark & Essex Bank, 111 N.J. Super. at 352, 268 A.2d at 329 (emphasis added).

125. See *Kaufman v. Chase Manhattan Bank*, 370 F. Supp. 276, 279 (S.D.N.Y. 1973); *Able & Assoc. Inc. v. Orchard Hill Farms*, 77 Ill. App. 3d 375, 380, 395 N.E.2d 1138, 1142 (1979); *State v. Powell*, 536 S.W.2d 14, 16 (Mo. 1976); *Dziurak v. Chase Manhattan Bank*, 58 A.D.2d 103, 105-06, 396 N.Y.S.2d 414, 416 (1977), *aff'd*, 44 N.Y.2d 778, 406 N.Y.S.2d 30 (1978); *Moon Over the Mountain, Ltd. v. Marine Midland Bank*, 87 Misc. 2d 918, 923-24, 386 N.Y.S.2d 974, 977-78 (N.Y. Civ. Ct. 1976); *First Nat'l Bank v. Noble*, 179 Or. 26, 38, 168 P.2d 354, 359 (1956) (all holding that cashier's checks generally pass as cash in the business world).

126. Comment, *Commercial Paper: Taking a Bank Money Order "For Value" Under U.C.C. Section 3-303*, 63 MINN. L. REV. 983, 987 (1979). See also *Benson*, *supra* note 30, at 460-61.

127. *Wertz v. Richardson Heights Bank & Trust Co.*, 495 S.W.2d 572 (Tex. 1973).

ment of a debt. Baker then stopped payment on the personal check. An agent for the insurance company brought the check to the defendant bank and exchanged it for a cashier's check payable to the American National Insurance Company. After issuing the cashier's check, the bank discovered its error and placed a stop payment on the cashier's check. The court held that the bank could not stop payment on a cashier's check once it had been issued, explaining:

A cashier's check is defined as a bill of exchange drawn by a bank upon itself and accepted in advance by the act of its issuance and not subject to countermand by either its purchaser or the issuing bank. . . . Under the code the bank's issuance of the check, which by definition is also acceptance, constituted an agreement by the bank to honor the check as presented. . . . The rule may thus be stated that a cashier's check is accepted for payment when issued.

Under the provision of . . . § 4-303, a stop order . . . comes too late . . . if it is received after the bank has accepted or certified the item. Since a cashier's check is accepted when issued, § 4-303 . . . has the effect of preventing a bank to stay payment on a cashier's check once it has been issued.¹²⁸

The court firmly stated the bank could not countermand its cashier's check. After adopting this rule, however, the court still considered whether or not plaintiff was a holder in due course.¹²⁹ This reasoning has been criticized by at least one author.¹³⁰

In a North Carolina case¹³¹ a cashier's check was issued by the bank in exchange for a personal check of its customer payable to plaintiff. The bank customer never actually had sufficient funds in the account, but on this particular day there appeared to be sufficient funds.¹³² The bank thus refused to honor its cashier's check. The court

128. *Id.* at 574 (citations omitted).

129. *Id.*

130. *See* Fox, *supra* note 29, at 688. Fox points out that if payment cannot be stopped on a cashier's check, then there is no reason to consider plaintiff's status as a holder in due course. "Thus, Wertz demonstrates that although courts broadly declare that payment on cashier's checks may not be stopped, the specific holdings of such cases may indicate adherence to a much narrower rule." *Id.*

131. *Lowe's of Sanford, Inc. v. Mid-South Bank & Trust Co.*, 44 N.C. App. 365, 260 S.E.2d 801 (1979).

132. The customer (G&G) had deposited in the account a check from another bank. Subsequently its account at the other bank was depleted, thereby rendering the customer's check in the second account worthless. It was indicated that the customer's account was frequently overdrawn, and all tellers and cashiers were instructed not to pay any checks on the G & G account without approval of a bank officer. A teller issued the bank's official check in exchange for the G & G check without consulting an officer. *Id.* at 366, 260 S.E.2d at 802.

held that a cashier's check is a bill of exchange drawn by a bank upon itself and accepted in advance by the act of issuance and not subject to countermand by the purchaser or by the issuing bank.¹³³ In addition, the court stated that acceptance is final in favor of a holder in due course, which the plaintiff was determined to be.¹³⁴ The bank was thus held responsible on its cashier's check.

In a Nebraska case,¹³⁵ the bank issued a "money order," which the court said was essentially the same as a cashier's check. The court held that a cashier's check is accepted in advance by its issuance and not subject to countermand by the purchaser or the issuing bank.¹³⁶ In *Bank of Naperville v. Catalano*,¹³⁷ an Illinois case, the bank issued a cashier's check by mistake while closing out a depositor's account. The bank was able to sue in restitution for the return of the cashier's check representing funds paid by mistake, when it was dealing with the payee directly.

In two cases from different jurisdictions, courts have stated the general rule that a bank can not stop payment on its cashier's check, but have allowed the bank to offset its defenses against the claim. In *In re Johnson*,¹³⁸ the Fourth Circuit Court of Appeals allowed the bank to set off, against the receiver in bankruptcy, its defenses against the payee. In that case, the cashier's checks were indorsed by the payee to the receiver. In *Munson v. American National Bank & Trust Co.*,¹³⁹ the court held that the bank could not stop payment on its own cashier's checks, although the court did permit the bank to offset its own claim against plaintiff on the dishonored draft which plaintiff indorsed for payment of the three cashier's checks.¹⁴⁰ The court stated that the

133. *Id.* at 367, 260 S.E.2d at 802.

134. *Id.* It should be noted that the court stated that payment of the cashier's check could not be stopped, but then commented that acceptance is final in favor of a holder in due course, and referred to the decision of *Citizens & S. Nat'l Bank v. Youngblood*, 135 Ga. App. 638, 640, 219 S.E.2d 172, 174 (1975), where the court stated:

It is, therefore, the general rule, sustained by almost universal authority, that a payment in the ordinary course of business of a check by a bank on which it is drawn under the mistaken belief that the drawer has funds in the bank subject to such check is not such a payment under a mistake of fact as will permit the bank to recover the money so paid from the recipient of such payment.

135. *Thompson Poultry, Inc. v. First Nat'l Bank*, 199 Neb. 8, 255 N.W.2d 856 (1977).

136. The court relied on *Pennsylvania v. Curtiss Nat'l Bank*, 427 F.2d 395 (5th Cir. 1970).

137. 86 Ill. App. 3d 1005, 408 N.E.2d 441 (1980).

138. 552 F.2d 1072 (4th Cir. 1977) (applying Virginia law). The court noted that the setoff was not a defense on the instrument, but a setoff as a defense to the recovery, which operates as a defense only to reduce the remedy. *Id.* at 1078.

139. 484 F.2d 620 (7th Cir. 1973).

140. *Id.* at 624-25. The offset permitted was the plaintiff's liability on the indorsement con-

bank's offset created an affirmative defense to the plaintiff's action.¹⁴¹

In a recent Massachusetts case,¹⁴² a bank customer obtained a treasurer's check payable to plaintiff, and subsequently requested the bank to stop payment. The court found the treasurer's check to be the equivalent of a cashier's check. The question arose as to whether the bank could assert against plaintiff the defenses of the remitter, its customer.¹⁴³ The court concluded that the bank could not raise any defenses of the remitter, but also suggested that it might reject an absolute rule against dishonor of cashier's checks where claims of the remitter are involved.¹⁴⁴

Other jurisdictions have followed the prohibition against a bank countermanding its cashier's check. In *Able & Associates, Inc. v. Orchard Hill Farms, Inc.*,¹⁴⁵ an Illinois case, the plaintiff had purchased the cashier's check with a personal check on which the drawer had stopped payment prior to plaintiff's purchase. The court discussed the policy considerations regarding cashier's checks and declared that in the business world cashier's checks are the equivalent of cash. If a bank were allowed to stop payment on such checks, public confidence in banks would be undermined.¹⁴⁶ The court was puzzled as to whether it should follow its prior decision in *Bank of Niles*,¹⁴⁷ or whether it should consider the issue anew.¹⁴⁸ The court, in conclusion,

tract and on their warranties of transfer. See U.C.C. §§ 3-414(1) (contract of indorser); 4-207(2) (1978) (customer's warranty to transferee and collecting bank).

141. *Munson*, 484 F.2d at 625.

142. *Louis Falcigno Enters., Inc. v. Massachusetts Bank & Trust Co.*, 14 Mass. App. Ct. 92, 436 N.E.2d 993 (1982).

143. The court referred to the case of *Leo Syntax Auto Sales, Inc. v. Peoples Bank & Sav. Co.*, 6 Ohio Misc. 226, 215 N.E.2d 68 (1965) where the bank was allowed to raise the defenses of its customer. Yet, in that case, the purchaser as an indorser was also liable on the instrument. In the *Louis Falcigno Enters. Inc.*, case, the court reviewed the different theories relating to defenses that could be asserted, and referred specifically to U.C.C. § 3-306(d). It concluded that the bank should be precluded from raising any contract defenses of its customer. The court was unwilling to allow defenses broader than those permitted under U.C.C. § 3-306(d).

144. *Louis Falcigno Enters.*, 14 Mass. App. Ct. at ___, 436 N.E.2d at 995.

145. 77 Ill. App. 3d 375, 395 N.E.2d 1138 (1979) (overruling *Bank of Niles v. American State Bank*, 144 Ill. App. 3d 729, 303 N.E.2d 186 (1973)). The court held that cashier's checks are not, under any circumstances, subject to countermand by the issuing bank. In so holding, the court specifically referred to *Kaufman v. Chase Manhattan Bank*, 370 F. Supp. 276 (S.D.N.Y. 1973) and *National Newark & Essex Bank v. Giordano*, 111 N.J. Super. 347, 268 A.2d 327 (1970) as authority.

146. *Able & Assoc., Inc.*, 77 Ill. App. 3d at 381-82, 395 N.E.2d at 1142.

147. *Bank of Niles v. American State Bank*, 144 Ill. App. 3d 729, 303 N.E.2d 186 (1973), which had held that payment may be stopped in certain circumstances.

148. The court stated:

We realize that *Bank of Niles v. American State Bank and Wilmington Trust Co. v. Delaware Auto Sales* lend support to Union's position that it was justified in refusing to

stated: "we believe that policy considerations require a rule which prohibits a bank from refusing to honor its cashier's check."¹⁴⁹

In an Ohio case,¹⁵⁰ an action was commenced on a cashier's check by the holder—indorsee against the bank issuing the cashier's check. The court held that the issuing bank may at the request of the purchaser refuse payment to an indorsee if he is not a bona fide holder for value direct from the purchaser, or has obtained the indorsement from the payee by fraud.¹⁵¹

One author¹⁵² has explained the judicial treatment of cashier's checks as follows:

The principle that cashier's checks are not subject to countermand, however, is not applied literally by the majority of courts because of the harsh effect of the rule in cases in which

honor its cashier's check. *These cases would allow a bank to stop payment* consistent with those provisions of the Uniform Commercial Code relating to holders in due course, and *we note that cases in other jurisdictions appear to follow similar reasoning.*

Able & Assoc., Inc., 77 Ill. App. 3d at 379-80, 395 N.E.2d at 1140-41 (emphasis added) (citations omitted).

The court went on to note that: "It appears, however, that a number of cases have interpreted the Uniform Commercial Code differently and adhere to a contrary rule that cashier's checks are not, under any circumstances, subject to countermand by the issuing bank." *Id.* at 380, 395 N.E.2d at 1141 (citing *Swiss Credit Bank v. Virginia Nat'l Bank-Fairfax*, 538 F.2d 587 (4th Cir. 1976); *Pennsylvania v. Curtiss Nat'l Bank*, 427 F.2d 395 (5th Cir. 1970); *Kaufman v. Chase Manhattan Bank*, 370 F. Supp. 276 (S.D.N.Y. 1973); *Meador v. Ranchmart State Bank*, 213 Kan. 372, 517 P.2d 123 (1973); *State v. Powell*, 536 S.W.2d 14 (Mo. 1976); *National Newark & Essex Bank v. Giordano*, 111 N.J. Super. 347, 268 A.2d 327 (1970); *Wertz v. Richardson Heights Bank & Trust*, 495 S.W.2d 572 (Tex. 1973)).

149. *Able & Assoc.*, 77 Ill. App. 3d at 381-82, 395 N.E.2d at 1142.

150. *Leo Syntax Auto Sales, Inc. v. Peoples Bank & Sav. Co.*, 6 Ohio Misc. 226, 215 N.E.2d 68 (1965).

151. The court wrote:

It is well settled that the purchaser of a cashier's check payable to one other than the purchaser thereof has no right to countermand payment of the instrument after its issue, *except for fraud, failure of consideration, or where payment is stopped by injunctive order.* The defense of fraud or failure of consideration under such a situation can only be made as between the bank and the purchaser of the check.

Id. at 227, 215 N.E.2d at 70 (emphasis added).

The court also outlined the attributes of a cashier's check:

It is a bill of exchange drawn by a bank upon itself and accepted in advance by the act of its issuance. It is the primary obligation of the bank and no right of countermand exists by the purchase or payee. . . .

But where the purchaser of a cashier's check is also the payee, while the right of countermand does not exist, the court is of the opinion that a different rule should be applied where the bank declines payment thereon voluntarily on the ground the purchaser's and payee's endorsement was secured by fraud or for failure of consideration.

Id. at 229, 215 N.E.2d at 71 (emphasis added) (citations omitted). In the action by the indorsee of the cashier's check against the issuing bank to recover the face amount of the check, the court held that the bank was entitled to have the benefit of any defense that the purchaser could have against the indorsee.

152. Comment, *supra* note 126, at 983-84 (footnotes omitted).

a bank has issued a cashier's check by mistake or for insufficient consideration. While many courts continue to assert that payment cannot be stopped on a cashier's check, most courts allow a bank to decline payment and assert its own defense of fraud,¹⁵³ mistake,¹⁵⁴ or failure of consideration¹⁵⁵ against one who is not a holder in due course.¹⁵⁶

There have been two general approaches to cashier's checks. Under one approach, a cashier's check is a draft which is accepted by the act of its issuance, and is treated as a cash equivalent, and thus banks are not permitted to stop payment. Under the second approach, a cashier's check is a note on which the bank as maker is primarily liable, but the bank can assert defenses if the instrument is not in the hands of a holder in due course. This second definition is based upon an interpretation of U.C.C. section 3-118(a), which provides that a draft drawn on a drawer is effective as a note.¹⁵⁷ Most courts have chosen to treat cashier's checks as accepted drafts rather than notes. The results may be the same whichever approach is taken. Under U.C.C. section 3-413(1),¹⁵⁸ the contract of the acceptor is to pay the

153. *E.g.*, *Bank of Coffee Springs v. McGilvray & Co.*, 167 Ala. 408, 409-11, 52 So. 473, 473-74 (1910) (false representation as to security given to secure loan).

154. *E.g.*, *National Bank v. Miner*, 167 Cal. 532, 537, 140 P. 27, 30 (1914) (wrongly identified teller approval stamp on check); *Wright & Trust Co.*, 108 Ga. App. 783, 789, 134 S.E.2d 457, 462 (1963) (check inadvertently certified).

155. *E.g.*, *Mine & Smelter Supply Co. v. Stock Growers' Bank*, 200 F. 245, 247-48 (8th Cir. 1912); *Banco Ganadero y Argicola v. Society Nat'l Bank*, 418 F. Supp. 520, 524 (N.D. Ohio 1976); *National Bank v. Miner*, 167 Cal. 532, 539, 140 P. 27, 30 (1914); *Laurel Bank & Trust Co. v. City Nat'l Bank*, 33 Conn. Supp. 641, 365 A.2d 1222, 1225 (1976); *Wilmington Trust Co. v. Delaware Auto Sales*, 271 A.2d 41, 42 (Del. 1970); *Wright v. Trust Co.*, 108 Ga. App. 783, 789, 134 S.E.2d 457, 462 (1963); *Bank of Niles v. American State Bank*, 144 Ill. App. 3d 729, 733-34, 303 N.E.2d 186, 189 (1973); *Dakota Transfer & Storage Co. v. Merchants Nat'l Bank & Trust Co.*, 86 N.W.2d 639, 643-44 (N.D. 1957); *Mid-Central Towing Co. v. National Bank*, 348 P.2d 327, 329 (Okla. 1960).

It should be noted that most of the cases cited above hold that a cashier's check is a note, and not a draft. The New York courts and many other courts have refused to follow such a holding. *See, e.g.*, *Kaufman v. Chase Manhattan Bank*, 370 F. Supp. 276, 278 (S.D.N.Y. 1973) (check payable on demand); *National Newark & Essex Bank v. Giordano*, 111 N.J. Super. 347, 268 A.2d 327 (1970) (bill of exchange drawn by bank on itself).

156. Comment, *supra* note 126, at 987-88 & nn.25-28.

157. U.C.C. § 3-118(a) (1978) provides: "A draft drawn on the drawer is effective as a note."

It has been argued that U.C.C. § 3-118(a) was intended simply to eliminate the need for a holder of a note (or accepted draft) to give notice of dishonor or notice of protest. The section was intended to give the holder of a cashier's check or other draft drawn on the drawer, the procedural advantages that accrue to the holder of a note, that is, eliminating the need of the holder to present the instrument for payment and give notice of dishonor as a condition precedent to the liability of the drawer. *See Lawrence, supra* note 14, at 288 n.43.

158. U.C.C. § 3-413(1) (1978) provides: "The maker or acceptor engages that he will pay the instrument according to its tenor at the time of his engagement or as completed pursuant to Section 3-115 on incomplete instruments."

instrument according to its tenor—the same contract to which the maker of a note is bound. An acceptor of a draft is primarily liable on the instrument, just as the maker of a note is primarily liable. The issues of whether the holder of the cashier's check is a holder in due course and what defenses and claims may be raised should be the same whether the instrument is a note or an accepted draft. The maker of a note and the acceptor of a draft both undertake the same primary liability.¹⁵⁹ Further, the same warranties are extended by an acceptor of a draft as are made by a maker of a note.¹⁶⁰ However, one noted author has identified one area where there might be a difference.¹⁶¹

One of the leading cases holding that a bank could effectively stop payment on its cashier's checks is *TPO Inc. v. FDIC*.¹⁶² In that case the plaintiff sued the receiver of an insolvent bank for failure to pay ten cashier's checks issued by the bank. It was alleged that the plaintiff's officers participated in a fraudulent scheme relating to the checks. Since no innocent third parties, customers of the bank, or holders in due course whose rights would be affected were involved, the court stated that "the strong considerations of public policy favoring negotiability and reliability of cashier's checks are not germane."¹⁶³ The court held that a cashier's check is equivalent to a negotiable promissory note of the bank, and is not the same as cash.¹⁶⁴ The court disagreed with and distinguished *Pennsylvania v. Curtiss National Bank*¹⁶⁵ and *Newark*

159. *Id.*

160. See U.C.C. § 3-417(1) (1978) (providing for a warranty from any person obtaining payment or acceptance).

161. Professor Benson noted:

While the rights and liabilities resulting from either method of treatment of cashier's checks appear to be the same, section 3-418 suggests an instance where they might differ. If the holder of a cashier's check is not a holder in due course, it would appear that failure of consideration could be raised by the bank/maker of the cashier's check. However, can such a defense be raised by a bank which has accepted a cashier's check and is being sued by a holder who is not a holder in due course but who has, in good faith, changed his position in reliance on the acceptance? Section 3-418 provides in part:

[p]ayment or acceptance of any instrument is final in favor of a holder in due course, or a person who has in good faith changed his position *in reliance on the payment*.

The problem is created by the possibility that the drafters did not intend to exclude from protection persons who in good faith relied on the acceptance, rather than on payment. The comments to the section provide no insight into the question.

Benson, *supra* note 30, at 452 (footnote omitted) (emphasis supplied).

162. 487 F.2d 131 (3d Cir. 1973).

163. *Id.* at 135.

164. *Id.* at 136.

165. 427 F.2d 395 (5th Cir. 1970). In that case, the payee was not a party to the agreement in which the issuance of the cashier's check played a part, and the payee was a holder in due course. The court, however, did recognize the possibility of a defense on the ground of failure of consideration if the payee were not a holder in due course.

National Bank.¹⁶⁶ The court concluded:

We think that a correct analysis of the position of the parties here is that the Bank had engaged to pay the check but, if the plaintiff is not a holder in due course, under § 3-306 and § 3-408 the Bank or the FDIC is entitled to present all defenses which would be available on a simple contract including one of lack of consideration or fraud.¹⁶⁷

In *Banco Ganadero*,¹⁶⁸ an Ohio federal court case, a bank asserted failure of consideration as a defense to a demand for payment when enforcement was sought by someone not a holder in due course. The court said that a cashier's check was either a draft accepted on issuance or a note, and in either case the bank was primarily liable on the instrument as an acceptor of a draft or as a maker of a note. The court followed *TPO*¹⁶⁹ and held that a cashier's check is more accurately treated as a note than as an accepted draft, and so the bank could assert its defense of failure of consideration against a person not a holder in due course.¹⁷⁰

In *State Bank v. American National Bank*,¹⁷¹ the court held that payment of a bank money order (in reality a cashier's check),¹⁷² could be stopped and defendant could assert the defense of failure of consideration since plaintiff was not a holder in due course,¹⁷³ adopting the

166. 111 N.J. Super. 347, 268 A.2d 327 (1970).

167. *TPO Inc. v. FDIC*, 487 F.2d at 136.

Willier and Hart approve of TPO. 6E (Part 2) W. WILLIER & F. HART, BENDER'S UNIFORM COMMERCIAL CODE SERVICE 2-1176.1 (1976), 2-1176.6 (1982). Those authors feel it would be simpler and more correct to consider a cashier's check effective as a note pursuant to U.C.C. § 3-118(a) (1978) where the bank is primarily liable as maker, and the maker can assert its defenses if the holder is not a holder in due course.

Courts have decided similarly in the following cases: *Banco Ganadero y Agricola v. Society Nat'l Bank*, 418 F. Supp. 520 (N.D. Ohio 1976); *Laurel Bank & Trust Co. v. City Nat'l Bank*, 33 Conn. Supp. 641, 365 A.2d 1222 (1976); *Wilmington Trust Co. v. Delaware Auto Sales*, 271 A.2d 41 (Del. 1970); *Tropicana Pools, Inc. v. First Nat'l Bank*, 206 So. 2d 48 (Fla. Dist. Ct. App. 1968); *Wright v. Trust Co.*, 108 Ga. App. 783, 134 S.E.2d 457 (1963); *State Bank v. American Nat'l Bank*, 266 N.W.2d 496 (Minn. 1978); *Dakota Transfer & Storage Co. v. Merchants Nat'l Bank & Trust Co.*, 86 N.W.2d 639 (N.D. 1957).

168. *Banco Ganadero y Agricola v. Society Nat'l Bank*, 418 F. Supp. 520 (N.D. Ohio 1976).

169. 487 F.2d 131 (3rd Cir. 1973).

170. 418 F. Supp. at 523-24.

171. 266 N.W.2d 496 (Minn. 1978).

172. Although the instrument was called a "bank money order," the instrument was signed by a bank, and the instrument was treated by the court as the equivalent of a cashier's check. *Id.* at 497-98. The "money order" was given in payment of a check issued by the customer, but a stop payment order of the customer's check had been given previously. *Id.*

173. *Id.* at 499-500. The reasoning of the court in this case has been criticized in Comment, *supra* note 126, at 988, in its reasoning of whether the bank was entitled to stop payment because of failure of consideration and as to whether plaintiff was a holder in due course.

rule stated in *TPO*.¹⁷⁴ In *Wilmington Trust Co. v. Delaware Auto Sales*¹⁷⁵ the bank raised a defense of failure of consideration in issuance of a "treasurer's check".¹⁷⁶ The payee received a check from the bank's customer and requested a treasurer's check from the bank in exchange. The bank failed to notice a stop payment order on the check. When the stop payment order was later noticed, the treasurer's check was cancelled. The court allowed the bank to refuse to honor the check on failure of consideration grounds.¹⁷⁷ Similarly, in a Florida pre-Code case, a cashier's check was issued in exchange for a personal check upon which a stop payment order had previously been issued. The bank was able to stop payment on its cashier's check, since the bank had dealt with the plaintiff, the original payee.¹⁷⁸

In a Massachusetts case,¹⁷⁹ the plaintiff purchased a cashier's check with a personal check received from the bank's customer (the third party). The customer placed a stop payment order on his check before the plaintiff exchanged it at the bank for the cashier's check. Due to a bank error, the bank issued a cashier's check, but later refused to honor it. The bank claimed it could refuse to honor its cashier's check for failure of consideration when the check was presented by a party to the instrument with whom the bank had dealt.¹⁸⁰ The court discussed the conflicting views of stop payment orders on cashier's checks which result from viewing the cashier's check as a draft, accepted when issued, or as a note.¹⁸¹ The court concluded that the bank

174. 487 F.2d 131 (3rd Cir. 1973).

175. *Wilmington Trust Co. v. Delaware Auto Sales*, 271 A.2d 41 (Del. 1970).

176. The check was called a "treasurer's check," which the court interpreted and treated as a cashier's check. *Id.*

177. Since plaintiff (payee) dealt directly with the bank, it would not have been immune to the defense of failure of consideration asserted by the person it had dealt with, even if it were a holder in due course. The court held that the failure of consideration allowed the bank to refuse payment when presented by the payee, the person with whom the bank dealt. Personal defenses may be asserted between the immediate parties. *Id.* at 42. The court based its decision on pre-Code cases involving cashier's checks and was decided before *TPO Inc. v. FDIC*, 487 F.2d 131 (3d Cir. 1973).

178. *Tropicana Pools, Inc. v. First Nat'l Bank*, 206 So. 2d 48 (Fla. Dist. Ct. App. 1968) (pre-U.C.C. case).

179. *Travi Const. Corp. v. First Bristol County Nat'l Bank*, 10 Mass. App. Ct. 32, 405 N.E.2d 666 (1980).

180. *Id.* at ___, 405 N.E.2d at 667. U.C.C. §§ 3-305 and 3-306 (1978) permit an obligor on an ordinary negotiable instrument to assert any defenses against a holder with whom it has dealt, even when the holder has the status of a holder in due course. Lawrence, *supra* note 14, at 294-96; Wallach, *supra* note 11, at 590-91.

181. *Travi Const. Corp.*, 10 Mass. App. Ct. at ___, 405 N.E.2d at 668. One line of cases holds a cashier's check is accepted upon issuance:

Those jurisdictions which apply a flat prohibition against dishonor of a cashier's check by the issuing bank do so on the reasoning that a cashier's check is a bill of exchange or draft drawn by a bank upon itself and accepted in advance by the act of its issuance.

could refuse to honor its cashier's check and assert the defense of failure of consideration when presented by the plaintiff, with whom the bank had dealt.¹⁸² The court noted that there were no innocent third parties or customers of the bank or holders in due course whose rights would be involved, and that the strong public policy consideration in favor of negotiability and reliability of cashier's checks did not arise. The court therefore perceived no policy need for the application of the rule prohibiting the bank's dishonor of its cashier's check.¹⁸³

In *Laurel Bank & Trust Co. v. City National Bank*,¹⁸⁴ a cashier's check issued by the defendant bank was dishonored. The customer had purchased an "official check" (a cashier's check) for \$3,446 and paid for it with cash and with checks on an overdrawn account at the plaintiff's bank. When the checks in payment of the cashier's check were returned, the defendant bank stopped payment on the cashier's check. The court referred to the *TPO* decision,¹⁸⁵ and held that a cashier's check should be considered as a note.¹⁸⁶ The defense of failure of consideration could thus be asserted against anyone not a holder in due course.¹⁸⁷ The case was remanded to decide whether the bank was a holder in due course.¹⁸⁸

A recent federal case¹⁸⁹ involved a cashier's check issued by a bank to the plaintiff as proceeds of a loan obtained in part by fraud. The court discussed the general rule not allowing a bank to stop payment on its cashier's check,¹⁹⁰ but noted that some courts have recognized an exception if the payee dealt directly with the bank and

Because a stop-payment order must be made prior to acceptance of the instrument, Uniform Commercial Code, § 4-303(a), a cashier's check cannot be dishonored.

405 N.E.2d at 667. See *id.* at 667 n.1 for cases following this theory.

The second line of cases holds a cashier's check to be a note, based upon U.C.C. § 3-118(a) (1978), which allows a draft drawn on a bank to be treated as a note.

Some jurisdictions refuse to recognize such an iron clad rule, and they allow a bank to dishonor its cashier's check in certain situations, primarily for a failure of consideration. In such a case the bank may assert its own defenses against one who is not a holder in due course.

Id. at 667. See *id.* at 667 n.2 for cases following this theory.

182. *Id.* at 668-69. The court referred to *Wilmington Trust Co. v. Delaware Auto Sales*, 271 A.2d 41 (Del. 1970) and followed *TPO Inc. v. FDIC*, 487 F.2d 131 (3rd Cir. 1973).

183. *Travi Const. Corp.*, 10 Mass. App. Ct. at ___, 405 N.E.2d at 668 (referring to *TPO Inc. v. FDIC*, 487 F.2d at 135).

184. 33 Conn. Supp. 641, 365 A.2d 1222 (1976).

185. 365 A.2d at 1224 (citing *TPO Inc. v. FDIC*, 487 F.2d 131 (3rd Cir. 1973)).

186. 365 A.2d at 1224.

187. *Id.*

188. *Id.* at 1227.

189. *Anderson, Clayton & Co. v. Farmers Nat'l Bank*, 624 F.2d 105 (10th Cir. 1980).

190. *Id.* at 109-10.

engaged in fraud to obtain the cashier's check from the bank.¹⁹¹ Since there was fraud by the plaintiff he was not a holder in due course. "Under these circumstances, 'the strong considerations of public policy favoring negotiability and reliability of cashier's checks' are not present."¹⁹² Since the plaintiff committed the fraud, the bank could stop payment on its cashier's check.¹⁹³

In a North Dakota case,¹⁹⁴ a cashier's check was received in exchange for another check, which was unpaid because of insufficient funds. The defendant bank stopped payment on its cashier's check, alleging that since no value was given plaintiff was not a holder in due course.¹⁹⁵ Since this action was between the immediate parties, and no innocent third parties were involved, the bank was permitted to assert a lack of consideration and to stop payment of its cashier's check.¹⁹⁶

In a recent Utah case the court stated the general rule that a bank cannot stop payment on a cashier's check.¹⁹⁷ The court referred to *TPO Inc. v. FDIC*¹⁹⁸ and *Laurel Bank*,¹⁹⁹ but held that plaintiff payee was a holder in due course.²⁰⁰ The court did indicate that the bank could stop payment if there was fraudulent conduct by the payee.²⁰¹ Although the bank had a defense of failure of consideration against its customer, plaintiff payee was a holder in due course who had no knowledge of the bank's position and therefore payment could not be stopped.²⁰²

A customer of the bank has no absolute right to require the bank to stop payment of the bank's cashier's check since the cashier's check constitutes a primary obligation of the bank. It is not "payable for" the customer's account, and the customer may not even be a party to the check. If the cashier's check is deemed accepted upon its issuance the

191. *Id.* at 110 (citing TPO as authority).

192. *Id.* at 110, quoting from *TPO*, 487 F.2d at 135.

193. *Id.* at 110-11. The court limited its reasoning to situations where the cashier's check is presented for payment by the party whose fraud induced the bank to issue the check, and a finding of fraud by that person is necessary. *Id.*

194. *Dakota Transfer & Storage Co. v. Merchants Nat'l Bank & Trust Co.*, 86 N.W.2d 639 (N.D. 1957).

195. *Id.* at 644.

196. *Id.*

197. *Neve Welch Enters., Inc. v. United Bank*, 628 P.2d 1295 (Utah 1981).

198. 487 F.2d 131 (3rd Cir. 1973).

199. 33 Conn. Supp. 641, 365 A.2d 1222 (1976).

200. 628 P.2d at 1296.

201. *Id.* at 1297.

202. *Id.* at 1296-97.

stop payment order comes after the acceptance.²⁰³ The Comments to the Code indicate that the drawee-bank "is not required to impair his credit by refusing payment for the convenience of the drawer."²⁰⁴ The bank's liability for failing to honor its customer's request to stop payment, as opposed to the bank's liability for failing to pay its cashier's check, is covered by U.C.C. section 3-603(1) (1978).²⁰⁵ One author has argued that sections 3-306(d) and 3-603 should be amended so that a remitter who wished payment stopped on a cashier's check would be required to initiate court action, allowing the remitter (purchaser) to prevent immediate dissipation of the funds by obtaining a court injunction.²⁰⁶ That author feels the importance of the free flow and negotiability of "bank checks" in business transactions should prevent the bank customer from routinely defeating payment, and that the customer should not be able to persuade a bank to withhold payment by indemnifying it, since that decreases the certainty that cashier's checks will be honored and detracts from their value as commercial tools. Instead, the third party claimant should be required to institute a law suit to protect his claim.²⁰⁷

Another author also suggests amending the Code to ensure that cashier's checks serve as substitutes for cash:

Guaranteeing cash equivalency for cashier's checks would require that holders take them free from all claims and virtually all defenses. These instruments then could offer both the finality of payment associated with cash and the security from loss provided by specially indorsed instruments. More specifically, the Code should be amended to provide that a holder of a cashier's check takes the instrument free from all defenses

203. See U.C.C. § 4-403 (1978) (stop payment order must be received before acceptance of item by bank).

204. U.C.C. § 4-403 official comment 5 (1978).

205. § 3-603. *Payment or Satisfaction*.

(1) The liability of any party is discharged to the extent of his payment or satisfaction to the holder even though it is made with knowledge of a claim of another person to the instrument unless prior to such payment or satisfaction the person making the claim either supplies indemnity deemed adequate by the party seeking the discharge or enjoins payment or satisfaction by order of a court of competent jurisdiction in an action in which the adverse claimant and the holder are parties.

206. See Note, *Blocking Payment on a Certified, Cashier's, or Bank Check*, 73 MICH. L. REV. 424, 440-43 (1974), advocating the amendment of U.C.C. § 3-603 by adding a new subsection (2) (a). *Id.* at 441-42. The present subsection (2) of U.C.C. § 3-603 would be changed to subsection (3).

In addition the author advocates that U.C.C. § 3-306(d) be amended by deleting the last phrase: "unless the third person himself defends the action for such party" and by adding instead: "subject to the provisions of § 3-603." *Id.* at 442.

207. *Id.* at 440.

of the bank, and from all claims—both legal and equitable—and defenses of all other parties except for the defenses of alteration and forged indorsement.

. . . .

This sort of amendment, of course, would require that banks exercise more restraint in issuing cashier's checks, since they will be liable even if the consideration given for a check fails. If a bank wishes to accommodate a customer by issuing a check prior to receiving consideration, it must gauge the good will it generates by premature issuance against the risk of loss it incurs. Under these amendments, banks will also be less likely to use cashier's checks as their own personal checks.²⁰⁸

It has also been suggested that the bank can be protected by permitting the bank to pay the proceeds of the disputed check into court.²⁰⁹ The purchaser in such case would be protected by being permitted to litigate any defenses prior to the dissipation of the funds by the holder.

IV. TELLER'S CHECKS

Another type of instrument drawn by a bank is referred to as a "bank draft," more commonly known as a "teller's check" in the eastern states. A teller's check is a check drawn by a bank (usually a savings bank or a savings and loan association) upon a commercial bank.²¹⁰ The amount of the teller's check is either charged against the purchaser's savings account or paid for by the purchaser at the time of issuance. The name of the payee and the amount is entered by the bank, and an authorized employee of the issuing bank signs the teller's check as drawer.²¹¹ A teller's check is accepted by the drawee bank when the instrument is presented by the payee or holder.²¹² A teller's check is similar to a cashier's check in that it is signed by a bank official

208. Lawrence, *supra* note 14, at 318 (footnote omitted).

209. Lawrence, *supra* note 14, at 317; Fox, *supra* note 29 at 695-96; Note, *supra* note 206, at 440-41; Comment, *Uniform Commercial Code-Stop Payment Orders—Cashier's and Teller's Checks*, 23 N.Y.L. SCH. L. REV. 518, 522-23 (1978).

210. Benson, *supra* note 30, at 454; Lawrence, *supra* note 14, at 333; Note, *Personal Money Orders and Teller's Checks: Mavericks Under the UCC*, 67 COLUM. L. REV. 524, 540 (1967).

211. Note, *supra* note 209, at 524. Teller's checks are also used by persons who maintain checking accounts as a means of transferring funds from savings banks. *Id.* at 540.

212. *Moon Over the Mountain, Ltd. v. Marine Midland Bank*, 87 Misc. 2d 918, 922, 386 N.Y.S.2d 974, 977 (N.Y. Civ. Ct. 1976).

and is the primary obligation of the issuing bank.²¹³ Benson claims that teller's checks serve much the same function as cashier's checks.²¹⁴

No matter what the instrument is called, it is necessary to look at its substance to determine who is the drawer, the drawee, the payee, the party primarily liable on the instrument, and the extent of the liability of the parties.²¹⁵ The answers must be sought from the Code.

Unfortunately, the relevant U.C.C. provisions do not provide a clear answer, since the purchaser of the teller's check is not the drawer, but the remitter,²¹⁶ and that person is usually not the payee. "The legal status of the remitter developed early in the law merchant; although he was not the payee of the instrument, he was considered its owner. . . ." ²¹⁷

Several New York cases have held that a bank customer may not request the bank to stop payment of a teller's check.²¹⁸ In fact, the New York courts have treated teller's checks much like cashier's checks²¹⁹ in cases regarding the stopping of payment. The New York courts have described a teller's check as a cash equivalent and have held, on public policy grounds, that they could not be dishonored.²²⁰ In *Moon Over the Mountain*²²¹ the court stated that the reasoning of prior cases involving teller's checks should apply as well to a cashier's check.²²² "A bank issues its own checks in furtherance of its business and wishes the public to accept its checks without question"²²³ and so the bank should not be able to stop payment on the check.

Teller's checks serve two functions: they are used as personal

213. *Id.* at 922, 386 N.Y.S.2d at 977. Teller's checks serve the same function as cashier's checks; they differ in that the drawer and drawee are different banks.

214. Benson, *supra* note 30, at 457.

215. As previously indicated, there is no clear delineation in the Code of the respective rights and duties of the purchaser, the issuing bank, and the payee or holder.

216. Note, *supra* note 210, at 540.

217. *Id.* at 540. See *supra* note 31 for discussion of the remitter.

218. See, e.g., *Malphrus v. Home Sav. Bank*, 44 Misc. 2d 705, 254 N.Y.S.2d 980 (Albany County Ct. 1965); *Meckler v. Highland Falls Sav. & Loan Ass'n*, 64 Misc. 2d 407, 314 N.Y.S.2d 681 (Sup. Ct. Rockland County 1970); *Ruskin v. Central Fed. Sav. & Loan Ass'n*, 3 U.C.C. Rep. Serv. (Callaghan) 150, 152 (Sup. Ct. Queens County 1966) (item called a cashier's check, probably a teller's check; drawer is a savings and loan association, and drawee is a commercial bank).

219. See Comment, *Commercial Law—Uniform Commercial Code—Drawer—Bank of Teller's Check Cannot Stop Payment When Not Party to Underlying Transaction*, 15 BUFFALO L. REV. 193, 194 n.8 (1965) ("a teller's check in New York is similar to a certified or cashier's check.")

220. See, e.g., *Malphrus v. Home Sav. Bank*, 44 Misc. 2d 705, 706, 254 N.Y.S. 2d 980, 982 (Albany County Ct. 1965) ("The plaintiff accepted a bank check as in the nature of cash . . . a teller's check has generally been treated as 'cash' . . .")

221. *Moon Over the Mountain*, 87 Misc. 2d at 923, 386 N.Y.S.2d at 977.

222. *Id.* at 922, 386 N.Y.S.2d at 977.

223. *Id.* at 923, 386 N.Y.S.2d at 977-78.

checks by savings banks and savings and loan associations, and as "cash equivalents" by purchasers of the checks.²²⁴ A drawee bank is not liable until it accepts the check.²²⁵ A drawer bank should have the right to stop payment on the teller's check since it is a customer of the drawee bank.²²⁶ If a teller's check is dishonored by the drawee bank, the holder may sue the drawer bank, which is secondarily liable.²²⁷

A noted author has discussed the dual function of a teller's check this way:

Even though the Code manifests an apparent intention to treat teller's checks as personal checks, it is doubtful whether the two distinct functions that the business community assigns teller's checks were considered when this decision was made. If teller's checks were in fact used merely as the personal checks of drawer banks, it would be entirely proper to give drawer banks the rights of any other drawer of an ordinary negotiable instrument. If, however, teller's checks are to serve as cash substitutes as well, it is improper to give drawer banks the same protection accorded drawers of ordinary personal checks. This protection simply imposes too many risks on holders of teller's checks for the checks to have any semblance of cash equivalency.²²⁸

Courts have recognized the problems created by the dual function of teller's checks. The present uses of teller's checks parallel those of cashier's checks. Since savings banks and savings and loan associations cannot provide checking services,²²⁹ they must use teller's checks drawn upon commercial banks in situations where commercial banks would simply issue their own cashier's checks.

The drawer bank has the obligation to pay the amount of the check upon receipt of any necessary notice of dishonor.²³⁰ The drawee bank however, is not liable until it accepts the check.²³¹ The drawer bank has the right to stop payment on the check, since it is a customer

224. Lawrence, *supra* note 14, at 333.

225. U.C.C. § 3-409(1) (1978).

226. See U.C.C. § 4-403(1) (1978) (customer's right to stop payment) and § 4-104(e) (definition of "customer"). See also Lawrence, *supra* note 14, at 333; Comment, *The Rights of a Remitter*, *supra* note 11, at 262. A teller's check is for the account of the drawer bank, and not for the purchaser-remitter.

227. U.C.C. § 3-413(2) (1978).

228. Lawrence, *supra* note 14, at 334 (footnotes omitted).

229. Federal or state law may prohibit savings banks and savings and loan associations from issuing and engaging in checking accounts. 12 U.S.C. § 1464(b)(1) (1982).

230. U.C.C. § 3-413(2) (1978).

231. *Id.* § 3-409(1) (1978).

of the drawee bank.²³² The drawer bank may exercise this right when it has a defense arising out of the issuance of the check, or simply as an accommodation to the purchaser of the teller's check if the purchaser has a claim or defense arising from the negotiation of the instrument.²³³ If the drawer bank will not voluntarily stop payment on the check at the purchaser's request, the purchaser may be able to stop payment by providing an indemnity to the bank or by applying for a court order.²³⁴

When a teller's check is dishonored, the holder sues the drawer bank.²³⁵ A drawer bank may refuse to pay a holder in due course only if it has a real defense, or if it has a personal defense and has dealt with the holder.²³⁶ If the holder is not a holder in due course, the drawer bank may raise any of its own defenses and any valid claims of ownership of third parties, as well as the equitable claims of a third party if that party will defend the action for the bank. The bank may not otherwise raise the defenses of a third party.²³⁷ In an attempt to reconcile the dual function of teller's checks, the courts in New York have consistently denied drawer banks the right to raise any claims or defenses of third parties,²³⁸ while permitting banks to raise their own defenses, just as they could if the check were regarded as an ordinary personal check.²³⁹

It is virtually impossible to devise a set of rules that can completely reconcile both functions of teller's checks. Since cashier's checks serve primarily as cash substitutes, it might make sense to designate teller's checks as the personal checks of the drawer bank. No amendments to

232. *Id.* §§ 4-403(1), 4-104(e) (1978).

233. It should be noted the purchaser of a teller's check has no right to order payment stopped, since he is not a party to the check. The purchaser may request the drawer bank to stop payment, which the bank might do to accommodate its customer.

234. U.C.C. § 3-603(1) (1978). *Cf. Id.* § 3-306(d) (third party defense not available to bank which stops check).

235. A drawer is secondarily liable. *Id.* § 3-413(2) (engages to pay upon dishonor of draft and notice).

236. *Id.* § 3-305(2).

237. U.C.C. § 3-306(d) (1978).

238. *See Manhattan Imported Cars, Inc. v. Dime Sav. Bank*, 70 Misc. 2d 889, 890, 335 N.Y.S.2d 356, 357 (App. Term 1972) (*per curiam*) (bank could not claim depositor's right to rescission against car dealer); *Meckler v. Highland Falls Sav. & Loan Ass'n*, 64 Misc. 2d 407, 314 N.Y.S.2d 681, 683 (Sup. Ct. Rockland County 1970) (bank could not stop payment, at depositor's request, of check drawn on bank's own checking account with another bank); *Ruskin v. Central Fed. Sav. & Loan Ass'n*, 3 U.C.C. Rep. Serv. (Callaghan) 150, 151 (Sup. Ct. Queens County 1966) (bank could not stop payment on depositor's request); *Malphrus v. Home Sav. Bank*, 44 Misc. 2d 705, 707, 254 N.Y.S. 980, 983 (Albany County Ct. 1965) (bank, not a party to underlying transaction, could not stop payment of its teller's check).

239. *Rubin v. Walt Whitman Fed. Sav. & Loan Ass'n*, 21 U.C.C. Rep. Serv. (Callaghan) 610, 610 (App. Term 1977) (*per curiam*).

the Code would be necessary, since that is how the Code now treats teller's checks. However, the courts, the public, and even banks would have to be reeducated, since many of them currently consider teller's checks as cash equivalents similar in nature to cashier's checks.

Many courts, in deciding whether or not a teller's check or cashier's check may be stopped, have considered the effect of U.C.C. section 3-802.²⁴⁰ Section 3-802 provides that "where an instrument is taken as payment for an underlying obligation, (a) the obligation is pro tanto discharged if a bank is drawer, maker, or acceptor of the instrument and there is no recourse on the instrument against the underlying obligor."²⁴¹ Thus, if the bank were allowed to stop payment on a teller's check without liability, and there were no indorsement by the obligor (remitter), the underlying obligation of the remitter would be discharged, and there would be no recourse against the remitter. There would also be no recourse against the bank, and the holder of the unpaid instrument would have thus lost its rights against both the original obligor and against the bank. No one would be responsible for the obligation.²⁴²

In *Malphrus v. Home Savings Bank*,²⁴³ a Miss Kuebler obtained a teller's check payable to plaintiff for the purchase of an automobile. She subsequently realized the automobile was defective and requested the defendant savings bank to stop payment. The court said that:

[b]y issuing a teller's check the defendant Savings Bank gave to its depositor an instrument upon which the plaintiff relied in making the sale and delivery of an automobile. The plaintiff did not rely on Miss Kuebler's credit but in good faith accepted the check of a savings bank. The underlying transaction, as indicated above, was between the plaintiff and Miss Kuebler. *The plaintiff accepted a bank check as in the nature of cash.* This is a procedure that is widely followed in business transactions of many varieties throughout this area and presumably elsewhere in the State of New York. *A teller's check has generally been treated as "cash".* As a business practice such checks have been used and regarded on the same basis as certified checks. There are, of course, legal distinctions between certified checks and teller's checks. Their respective legal effects may be different under different circumstances.

240. U.C.C. § 3-802(1)(a) (1978).

241. *Id.*

242. *Supra* notes 80-91 and accompanying text.

243. 44 Misc. 2d 705, 254 N.Y.S.2d 980 (Albany County Ct. 1965).

Here, however, there is no basis upon which to make a determination that the plaintiff should have considered the teller's check in any different light than he would have considered a certified check. This was a bank obligation which he received as consideration when he delivered his merchandise.²⁴⁴

The *Malphrus* court based its decision on U.C.C. section 3-802 and its effect on a discharge of the underlying obligation.

The argument which the *Malphrus* court apparently makes based on section 3-802(1)(a) is that since that section has the effect (sic) in *Malphrus* of discharging the underlying obligor who was the purchaser of the bank draft, then if the court were to allow the defendant drawer to stop payment without fear of liability to the payee, the payee would be out the amount of the draft, the purchaser of the draft would have the payee's automobile without the obligation to pay for it, and the drawer would presumably have to give the amount of the draft back to the purchaser of the draft. This argument by the *Malphrus* court would seem to be well-founded since it is difficult to conceive that the drafters of UCC § 3-802 intended to discharge the underlying obligor and preclude any recourse by the obligee against the bank which drew the instrument.²⁴⁵

Malphrus has been criticized for its failure to realize the difference between the drawee's power to stop payment and its ultimate liability to the payee or other holder.²⁴⁶

Where the drawer bank is not a party to the underlying sales transaction it cannot claim a defense of the parties to that transaction as a justification for stopping payment on its teller's check.²⁴⁷ However, if the Savings Bank were a party to a contract with the payee for the purchase of property or equipment, the Bank would then be considered the actual obligor in the underlying transaction and could stop payment if it discovered fraud or had some other defense, just as an individual may stop payment of any personal check.²⁴⁸

244. *Id.* at 706, 254 N.Y.S.2d at 982 (emphasis added).

245. Benson, *supra* note 30, at 458 (footnote omitted).

246. Benson, *supra* note 30, at 458-59; Note, *supra* note 209, at 542.

247. Comment, *supra* note 219, at 195, explains that on issuing a teller's check, the drawer Savings Bank sets aside funds immediately available for payment. The drawer Savings Bank "has accepted the duty to pay the check upon presentment. . . ." Payee and drawer Savings Bank also have an implied contractual relationship which does not concern the underlying sales transaction between the remitter and the payee. *Id.* at 195-96.

248. *Malphrus*, 44 Misc. 2d at 707, 2545 N.Y.S.2d at 983.

A New York Court of Appeals case²⁴⁹ held that a teller's check, (referred to as a bank draft)²⁵⁰ once purchased, is an executed sale of credit not subject to rescission or countermand.²⁵¹ Payment cannot be stopped, even by mutual agreement of the drawer bank and depositor.²⁵² As drawer, the bank had contracted to pay the holder of the draft. Since the bank could not assert any of the remitter's defenses in an action by the holder, any attempt to stop payment would be futile.²⁵³

Another New York case has likewise held that "the teller's check, delivered as the equivalent of cash, was the bank's own direct and primary obligation to plaintiff and it could not resist enforcement of its contract in order to make a set off or counterclaim available to its depositor."²⁵⁴

In another New York case,²⁵⁵ a defendant bank mistakenly issued a teller's check for a larger amount than was paid for. The bank was able to stop payment and issue a replacement check to the customer for the correct amount, and was able to resist payment to the plaintiff payee. In that case, however, the bank was a party to the original

249. *International Firearms Co. v. Kingston Trust Co.*, 6 N.Y.2d 406, 160 N.E.2d 656, 189 N.Y.S.2d 911 (1959).

250. The court referred to the instrument as a bank draft, but from its characteristics it seemed to be a teller's check.

251. *International Firearms Co. v. Kingston Trust Co.*, 6 N.Y.2d 406, 407, 160 N.E.2d 656, 657, 189 N.Y.S.2d 911, 912 (1959), citing *Bobrick v. Second Nat'l Bank*, 175 A.D. 550, 553, 162 N.Y.S. 147, 149 (1916), *aff'd*, 224 N.Y. 637, 121 N.E. 856 (1918).

252. 6 N.Y.2d at 411-12, 160 N.E.2d at 657, 189 N.Y.S.2d at 914.

253. Comment, *supra* note 11, at 262; U.C.C. §§ 3-413(2) and § 3-306(d) (1978).

254. *Manhattan Imported Cars v. Dime Sav. Bank*, 70 Misc. 2d 889, 890, 335 N.Y.S.2d 356, 357 (App. Term 1972), citing *International Firearms Co. v. Kingston Trust Co.*, 6 N.Y.2d 406, 160 N.E.2d 656, 189 N.Y.S.2d 911 (1959); *Malphrus v. Home Sav. Bank*, 44 Misc. 2d 705, 254 N.Y.S.2d 980 (Albany County Ct. 1965) (emphasis added).

In *Manhattan Imported Cars*, the bank's depositor (the remitter) purchased a teller's check payable to plaintiff, and delivered it to plaintiff in payment for an automobile purchased by the remitter. Later the remitter wanted to rescind the contract for the automobile and requested the bank to dishonor the teller's check. The court concluded that the depositor-purchaser (remitter) would be relegated to an action for rescission or damages against plaintiff with regard to the claims of fraudulent representation or breach of warranty relating to the purchase of the automobile. The bank had interpleaded the remitter, and the lower court held the funds should be held, pending resolution of the dispute between the plaintiff and the remitter. On appeal, plaintiff was granted judgment against the bank.

See also *Ruskin v. Central Fed. Sav. & Loan Ass'n*, 3 U.C.C. Rep. Serv. (Callaghan) 150 (Sup. Ct. Queens County 1966). In *Ruskin* the court referred to the instrument as a cashier's check, but it was clearly a teller's check. The court acceded to the request of the purchaser to stop payment. When the bank was sued by the payee, the bank interpleaded the purchaser as a defendant. The court granted summary judgment in favor of the payee against the bank, holding that the check was accepted "in the nature of cash" and could not be countermanded. *Id.* at 152.

255. *Rubin v. Walt Whitman Fed. Sav. & Loan Ass'n*, 21 U.C.C. Rep. Serv. (Callaghan) 610 (App. Term 1977).

transaction, and the court found no evidence that plaintiff-payee was a holder in due course or that she took the check for any underlying obligation.²⁵⁶

In *Fur Funtastic, Ltd. v. Kearns*,²⁵⁷ the holder of a teller's check brought an action against the drawer bank and the remitter payee because payment was stopped. The check was drawn at the request of the payee by the Harlem Savings Bank, as drawer, upon the savings bank's account in a commercial bank.²⁵⁸ The court stated that "[i]f the check were a cashier's check (a check drawn by the bank upon itself) authority would supply an easy answer. Legally, the check is treated as a note, accepted by the act of issuance, and payment may not be stopped. . . . Commercially the explanation is that the bank's obligation is regarded substantially as the equivalent of money"²⁵⁹ The court referred to prior cases involving teller's checks²⁶⁰ in which the payee (the holder of the check) was the plaintiff. In *Fur Funtastic*, the remitter was the payee, and plaintiff (the holder) was an indorsee (i.e., the person to whom the instrument was indorsed or negotiated).²⁶¹ The court distinguished between the remitter as payee and the plaintiff (holder) as indorsee, saying

[t]he distinction has enormous pragmatic and legal consequences. Legally acceptance of the check in payment does not discharge the holder's rights against the remitter on the underlying obligation as would be the result if the check were payable to the holder. . . . Commercially the holder is no longer receiving the bank's direct contractual obligation to it mitigating the cash equivalency argument, and furthermore that argument is now counterbalanced by the remitter's natural inclination to think of the check as his subject to his right

256. *Id.* at 610. In that case, the instrument was not taken in payment of any underlying obligation and there was no question of discharge under U.C.C. § 3-802 (1978). The court concluded that "a bank will not be relieved of its obligation on an instrument drawn by it where a dispute arises between third parties after delivery of the check in a transaction to which the bank is not a party. . . ." *Id.* at 611.

257. 104 Misc. 2d 1030, 430 N.Y.S.2d 27 (N.Y. Civ. Ct. 1980).

258. *Id.* at 1030, 430 N.Y.S.2d at 28.

259. *Id.* at 1031, 430 N.Y.S.2d at 28. A check is a draft, and perhaps the judge meant to say draft instead of note. In any event, the remaining portions of the statement would be the same, and for this purpose, would have the same legal effect.

260. *Id.* at 1031, 430 N.Y.S.2d at 28-29, citing *International Firearms Co. v. Kingston Trust Co.*, 6 N.Y.2d 406, 160 N.E.2d 656, 189 N.Y.S.2d 911 (1959); *Manhattan Imported Cars v. Dime Sav. Bank*, 70 Misc. 2d 889, 335 N.Y.S.2d 356 (App. Term 1972); *Meckler v. Highland Falls Sav. & Loan Ass'n*, 64 Misc. 2d 407, 314 N.Y.S.2d 681 (Sup. Ct. Rockland County 1970); *Malphrus v. Home Sav. Bank*, 44 Misc. 2d 705, 254 N.Y.S.2d 980 (Albany County Ct. 1965).

261. 104 Misc. 2d at 1031, 430 N.Y.S.2d at 29.

to stop payment if something goes awry on the underlying transaction.²⁶²

The court said the drawee bank had the right, "indeed even the obligation," to stop payment of the teller's check at the request of the drawer, Harlem Savings Bank.²⁶³

In *Savemart, Inc. v. Bowery Savings Bank*²⁶⁴ approximately one thousand teller's checks were either lost or stolen during a shipment to the bank. The bank stopped payment on the teller's checks. Some of the teller's checks were subsequently transferred to plaintiff by a third party and plaintiff claimed to be a holder in due course.²⁶⁵ The court discussed teller's checks in the commercial field:

[p]laintiff argues that a teller's check is considered in the business world as the equivalent of cash, and if 'subject to the same vagaries as the personal check, commerce in a great many areas would grind to a halt.' Although it may be true that such checks are so treated, the legal effect of delivery of a forged teller's check may be paralleled to the delivery of counterfeit cash. In neither case does the deliverer acquire a claim against the issuer (the bank or the government). Teller's checks are obviously more secure, if duly authorized, than most personal checks, as the resources of the bank are available for payment with the result that, except in a case of a bank failure, there is no problem of a teller's check being dishonored for insufficient funds. Moreover, *payment of such checks, if validly issued, may not be stopped*. Thus, although a teller's check is obviously much safer to accept than a personal check, they are not 100% safe as the payee is subject to the defense of forgery.²⁶⁶ (emphasis added)

The court in *Malphrus* concluded that a bank might have the right to stop payment on a teller's check, but only if the drawer bank is an actual party to the transaction which gives rise to the issuance of the check.²⁶⁷ If the drawer Bank were engaged in a contract for the

262. *Id.* at 1031-32, 430 N.Y.S.2d at 29.

263. *Id.* at 1032, 430 N.Y.S.2d at 29. *Fur Funtastic* involved motions for summary judgment. Both motions were denied, on the grounds that the drawer (Harlem Savings Bank) might still be liable on the check pursuant to U.C.C. § 3-413(2) (1978) as a drawer.

264. 111 Misc. 2d 1071, 445 N.Y.S.2d 963 (N.Y. Civ. Ct.) *aff'd*, 117 Misc.2d 947, 461 N.Y.S.2d 144 (App. Term 1982).

265. *Id.* at 1071, 445 N.Y.S.2d at 964.

266. *Id.* at 1072-73, 445 N.Y.S.2d at 964. In that case, the court had to consider the issue of the forgery, in addition to the question of whether the bank was negligent in its precautions during the shipment of the checks.

267. *Malphrus*, 44 Misc. 2d at 707, 254 N.Y.S.2d at 983.

purchase of property or equipment, it would be regarded as the actual obligor and could stop payment if it discovered fraud, or if any question arose as to the consideration.²⁶⁸ However, in *Malphrus* the drawer Savings Bank "sold an instrument which was used exactly as one might use cash or a certified check."²⁶⁹ Courts have referred to teller's checks as cash equivalents, similar to cashier's checks.²⁷⁰ Several authors have criticized the New York court decisions for their failure "to recognize the difference between the drawer bank's power to stop payment and its ultimate liability to the payee or other holder of the teller's check."²⁷¹

In *Fulton National Bank v. Delco Corp.*²⁷² a "bank draft" was issued to the payee at the request of the remitter. A dispute later arose, and the remitter requested the drawer bank to stop payment. The remitter defended the action on behalf of the bank.²⁷³ The third party defenses were available to the bank, since the remitter was defending the action on the bank's behalf, and the bank's ultimate liability depended on the defenses of the remitter.²⁷⁴ The court discussed the *Malphrus* holding that the bank would be unconditionally liable to the holder on a teller's check, and that the bank could then seek reimbursement in a separate action against the remitter who stopped payment. The remitter could then sue the holder for its damages in a separate lawsuit.²⁷⁵ The court concluded that the better procedure was to allow the issues to be tried in one lawsuit.²⁷⁶

New Jersey courts have also considered whether payment of a teller's check may be stopped.²⁷⁷ In *Bruno v. Collective Federal Savings*

268. *Id.*

269. *Id.*

270. *Manhattan Imported Cars v. Dime Sav. Bank*, 70 Misc. 2d 889, 890, 335 N.Y.S.2d 356, 357 (App. Term 1972) (teller's check equivalent to cash); *Malphrus v. Home Sav. Bank*, 44 Misc. 2d 705, 706, 254 N.Y.S.2d 980, 982 (Albany County Ct. 1965) (teller's check equivalent to cash); WHITE & SUMMERS, *supra* note 44, at 449.

271. Benson, *supra* note 30, at 458-59, discussing Rosenthal, *Negotiability—Who Needs It?*, 71 COLUM. L. REV. 375, 388 (1971) and Note, *Personal Money Orders and Teller's Checks*, *supra* note 210, at 542.

272. 128 Ga. App. 16, 195 S.E.2d 455 (1973). The instrument, called a "bank draft," was drawn by Fulton National Bank on its account at a Federal Reserve Bank, making it a teller's check. 195 S.E.2d at 456.

273. *Id.* at 19, 195 S.E.2d at 457.

274. Since the remitter was defending the action, the restrictions of U.C.C. § 3-306(d) (1978) would not apply. The defenses of the third party would be presented to the court since the third party is defending the action.

275. The court noted that *Malphrus* has been criticized, and also stated that *Malphrus* (a New York case) would not be binding upon a Georgia court. 128 Ga. App. at 20, 195 S.E.2d at 457.

276. 128 Ga. App. at 20, 195 S.E.2d at 457-58.

277. *Bruno v. Collective Fed. Sav. & Loan Ass'n*, 147 N.J. Super 115, 370 A.2d 874 (1977).

& Loan Association,²⁷⁸ defendant bank was the drawer, a Federal Home Loan Bank was drawee, and Samuel Cicero was the payee. The plaintiff (remitter) was not a party to the check. The check was cashed at another branch on the same day that the plaintiff attempted to have the payment stopped. The court treated the teller's check as a different kind of instrument than a cashier's check and the plaintiff was allowed to stop payment of the check.²⁷⁹

Courts have recognized the problems created by the dual function of teller's checks as both a cash equivalent and the personal check of the drawer savings bank. The drawer's right to stop payment depends on which function the particular teller's check serves.²⁸⁰

V. PERSONAL MONEY ORDERS

Another instrument, called a "personal money order," or sometimes known as a "register check," is an instrument issued by a bank for an amount of money deposited with it by the check's purchaser.²⁸¹ A money order shows the name of the bank as drawee, the date, and the amount, but the instrument has several blank spaces. For example, the name of the payee and the name of the drawer are left blank, and the instrument in effect creates the same debtor-creditor relationship between the bank and its customer which any ordinary deposit of funds would create. A personal money order is not signed by the bank and resembles an ordinary check rather than a cashier's, teller's, treasurer's, or official check. A personal money order or register check is very

278. *Id.*

279. In coming to its decision, the court made an unusual comparison. On a cashier's check, payment cannot be stopped, but the New Jersey court held that on a bank check (a check drawn by one bank on its account in another bank) payment could be stopped, referring to the prior New Jersey case of *Citizens Nat'l Bank v. Fort Lee Sav. & Loan Ass'n*, 89 N.J. Super. 43, 213 A.2d 315 (1965). *Bruno*, 147 N.J. Super. at 122, 370 A.2d at 877 n.2. The New Jersey court based its decision on its prior 1965 holding relating to teller's checks without considering several more recent New York cases.

This author disagrees with the analogy in *Bruno*, since the same rules apply or should apply as to the stop payment rights on a cashier's check or a teller's check. However, evidently New Jersey treats a cashier's check quite differently from a teller's check.

280. *Malphrus*, 44 Misc. 2d at 707, 254 N.Y.S.2d 980, 982-83. See text accompanying notes 226-240, *supra*. One author feels banks which desire to control their checks by stopping payment should use teller's checks, instead of cashier's checks. The rule would be that payment on cashier's checks cannot be stopped, but payment on teller's checks (which are the personal checks of a drawer bank) can be stopped. Lawrence, *supra* note 14, at 319. This might clarify the dual function of teller's checks.

281. "Such instruments are also often purchased from stores and other sales outlets maintained off bank premises." Bailey, *Bank Personal Money Orders As Bank Obligations*, 81 BANKING L.J. 669, 670 (1964).

often confused with a "bank money order" (which may also be a teller's check) by the courts and by leading authorities, making it difficult to determine the rights and liabilities of the parties.²⁸²

The personal money order or "register check" was first developed in 1937.²⁸³ The money order serves the financial needs of individuals with no banking connections, or in no position to maintain a continuous checking account relationship.²⁸⁴ A personal money order has been called a "poor man's checking account"²⁸⁵ or a one-time checking account.²⁸⁶ The New York Court of Appeals has held that a personal money order is not the equivalent of a cashier's check or teller's check. In fact, a personal money order is legally akin to an ordinary or personal check; it is not the obligation of the bank, which neither signs nor issues the check, but only sells it.²⁸⁷ The bank's name and address is printed on the personal money order, just as the bank's name and address appear on personal checking accounts.

The first major New York case determining the rights and liabilities of a bank in issuing a personal money order was *Garden Check Cashing Service, Inc. v. First National City Bank*.²⁸⁸ In *Garden Check Cashing Service* the instrument was called a "register check-personal money order."²⁸⁹ The purchaser bought the money order from a bank and on the same day reported to the bank that the check had been lost, requesting that payment be stopped. The defendant stopped payment on the check, and delivered to the customer a cashier's check for the same amount. The register check was subsequently transferred to plaintiff. The court's dilemma was whether to treat the instrument as a cashier's check, upon which the bank is primarily liable, or as the equivalent of a check from a personal checking account, upon which the purchaser would have the right to stop payment. The court decided

282. See, e.g., *Hong Kong Importers, Inc. v. American Express Co.*, 301 So. 2d 707, 709 (La. 1974) ("money order" may be issued by a governmental agency, by a bank, which may issue a "bank money order" or a "personal money order", or by a private person); 2 R. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 3-104:20 (1971).

283. Note, *supra* note 210, at 525; amicus curiae Brief filed in Appellate Division by New York State Banker's Association at 8, *Berler v. Barclays Bank*, 82 A.D.2d 437, 442 N.Y.S.2d 54 (N.Y. App. Div. 1981).

284. Bailey, *Bank Personal Money Orders*, *supra* note 281, at 671; Note, *supra* note 210, at 527.

285. Bailey, *Bank Personal Money Orders*, *supra* note 281, at 671.

286. See, e.g., *Berler v. Barclays Bank*, 82 A.D.2d 437, 440, 442 N.Y.S.2d 54, 56 (N.Y. App. Div. 1981); Wallach, *supra* note 13, at 579 n. 1.

287. *Garden Check Cashing Service, Inc. v. First Nat'l City Bank*, 25 A.D.2d 137, 267 N.Y.S.2d 698, 701 (1966), *aff'd*, 18 N.Y.2d 941, 223 N.E.2d 566, 277 N.Y.S.2d 141 (1966).

288. *Id.*

289. *Id.* at 139, 267 N.Y.S.2d at 700.

that the personal money order-register check issued by the bank should be treated like a personal checking account maintained by a depositor in that bank.²⁹⁰

We see small difference between the present transaction and one where a person deposits with a bank a sum of money and receives a quantity of blank checks. The obvious difference is that here a single deposit was made and a single blank check received with the amount of the deposit inserted herein. Thereafter the procedure followed the normal and customary pattern—the purchaser filled in the name of the payee, signed his name and address and delivered the instrument. Thereupon, it became a negotiable instrument subject to all the rights and provisions of the [statute]. Defendant for its own purposes may have coined the words “Personal Money Order” and “Register Check” appearing on the instrument but these words in no way altered the applicable legal principles. The purchaser under his contract with defendant was the sole person who might draw on the funds and had the clear right to stop payment prior to acceptance by the bank . . . a right . . . accorded a bank’s customer by statute (Uniform Commercial Code § 4-403).²⁹¹

The drawee enters into no contractual relations with the holder unless and until the instrument is accepted. The purchaser of the instrument may effectively stop payment prior to presentation to the drawee by the holder. The purchaser of such an instrument is very often unknown to the bank. The purchaser may not even maintain a checking account or any other account relationship with the bank. Instead, he may purchase the personal money order whenever he needs a check, and the purchase may be from any bank that may be convenient at the time. The purchaser does not have to provide any identification to the bank and, in fact, the purchaser may be an imposter.²⁹²

Several other cases in New York have followed *Garden Check Cashing Service*.²⁹³ In a recent New York case,²⁹⁴ an imposter

290. *Id.* at 141, 267 N.Y.S.2d at 702.

291. *Id.* at 141, 267 N.Y.S.2d at 702.

292. *See, e.g., Berler*, 82 A.D.2d 437, 440, 442 N.Y.S.2d 54, 56.

293. *See, e.g., id.*; *Krom v. Chemical Bank New York Trust Co.*, 38 A.D.2d 871, 329 N.Y.S.2d 91 (N.Y. App. Div. 1972); *Rutyna v. National Bank*, 10 U.C.C. Rep. Serv. (Callaghan) 167 (App. Term 1971); *Maratea v. Manufacturers Hanover Trust Co.*, 7 U.C.C. Rep. Serv. (Callaghan) 716 (N.Y. Civ. Ct. 1970); *McLaughlin v. Franklin Soc’y Fed. Sav. & Loan Ass’n*, 6 U.C.C. Rep. Serv. (Callaghan) 1183 (N.Y. Civ. Ct. 1969); *Lupowitz v. New York Bank for Sav.*, 5 U.C.C. Rep. Serv. (Callaghan) 851 (N.Y. Civ. Ct. 1968). One lower New York case refused to follow the holding in *Garden Check Cashing Service*. However, that decision has never been appealed and is merely a

purchased personal money orders, subsequently appeared at the bank, filled out an affidavit stating the checks had been lost, and requested that payment be stopped. The alleged customer thereafter received three replacement personal money orders payable to the customer's order. The next day the original personal money orders were negotiated to plaintiff for the purchase of merchandise. The lower court considered whether to require proof of negligence on the part of the bank in failing to determine who the true customer was when the affidavits of loss were submitted. The court stated:

[m]ore to the point there could be no negligence because negligence implies a duty breached. Defendant bank owed plaintiff no duty. The bank's duty was to its customer, imposter though she may have been. She purchased the money order. She had a right to stop its payment. Defendant was acting strictly in accordance with its statutory rights and obligations A bank is liable at its peril to obey any stop order²⁹⁵

The court also noted:

[p]ersonal money orders have been described as *the poor man's one-shot checking account*. They are personal checks, not banker's or cashier's or traveler's checks. Although they have a more formal appearance than the usual personal check, such appearance does not change their character or the rights and obligations of those who issue and receive them. *On their face they are plainly signed by the drawer, not by the bank*. They clearly direct the bank to pay the payee. They are not

lower court decision. See *Mirabile v. Udoh*, 92 Misc. 2d 168, 169, 399 N.Y.S.2d 869, 870 (King's County Civ. Ct. 1977) (since merchants treat personal money orders as bank checks public policy requires that personal money orders be treated as bank checks.) That case contradicts *Garden Check Cashing Service*, which was decided by the Court of Appeals in New York.

An Arkansas court, following the decision of *Mirabile v. Udoh*, and other older lower court decisions in New York (before *Garden Check Cashing Service*) has held that payment may not be stopped on a personal money order, at least where the bank attempts to stop payment on its own initiative. *Sequoyah State Bank v. Union Nat'l Bank*, 274 Ark. 1, 621 S.W.2d 683 (1981). In that case, the issuing bank stopped payment on a personal money order it had issued in exchange for a "hot" check. The money order was then in the hands of another bank, a holder in due course. This decision has been criticized by H. BAILEY, *supra* note 7, at 20-13 n.35 (Supp. 1983) because the court made the fundamental error of regarding a personal money order as a cashier's check. This case includes a strong dissenting opinion which reflects the view of most other courts that personal money orders are similar to an ordinary check. The dissenting opinion concluded that "[t]he master purpose of the Uniform Commercial Code is to clarify the law governing commercial transactions. The tragedy of this case is that both the purpose and the code are emaciated for no reason." 274 Ark. at ___, 621 S.W.2d at 686.

294. *Berler*, 82 A.D.2d 437, 442 N.Y.S.2d 54 (1981).

295. *Id.* at 440, 442 N.Y.S.2d at 56. The court cited *American Defense Soc'y v. Sherman Nat'l Bank*, 225 N.Y. 506, 122 N.E. 695 (1919), as authority.

promises by the bank that it will pay.²⁹⁶

Prior to acceptance of a check by the drawee bank, a drawee bank owes a duty only to its depositor (or drawer). A payee or holder (after a dishonor) is relegated to an action on the instrument against the drawer, and cannot proceed against the drawee bank. The drawee bank is merely a depository, and is not liable to potential payees or holders because it supplied its customer with a checkbook and some blank checks. The drawee bank has not signed the check and has made no commitment to the payee. The drawee bank becomes responsible on the check only after it has accepted it. Similarly, the mere delivery of a personal money order by the drawer to the payee prior to acceptance by the drawee bank does not create any new relationship, duty, or obligation between the payee and the drawee bank.

In one New Jersey case,²⁹⁷ a personal money order was purchased by a customer who later stopped payment and signed an indemnity that the money order was lost. The court held that the personal money order was like a personal check,²⁹⁸ and that the drawer could stop payment before acceptance by the drawee.²⁹⁹ In an Ohio case,³⁰⁰ the plaintiff (purchaser of the money orders) became drunk and lost them. The next day he notified the defendant bank and requested it to stop payment of the two money orders. The money orders were paid by the bank on a forged signature. The bank claimed that plaintiff's negligence (his drinking) contributed to the loss. However, the court said that money orders are similar to personal checks. When the plaintiff requested the money orders the request form included the signature of the drawer. Upon the drawer's request to stop payment of the two money orders the defendant bank was required to stop payment.³⁰¹ The court relied upon *Garden Check Cashing Service* and held the bank responsible to plaintiff as drawer, since the bank had paid the money orders despite the forgery. In a Louisiana case involving stolen personal money orders, the plaintiff could not prove its status as a holder in due course since the instrument was incomplete when it was trans-

296. 82 A.D.2d at 440, 442 N.Y.S.2d at 56 (emphasis added). See generally Note, *supra* note 210, at 525-40 (general discussion of money orders).

297. *Newman v. First Nat'l State Bank*, 173 N.J. Super. 598, 414 A.2d 1367 (1980).

298. *Id.* at 601-02, 414 A.2d at 1368. The court followed *Garden Check Cashing Service* as authority.

299. *Id.* at 602, 414 A.2d at 1369, citing *American Defense Soc'y.*

300. *Thompson v Lake County Nat'l Bank*, 47 Ohio App. 2d 249, 353 N.E.2d 895 (1975).

301. *Id.* at ___, 353 N.E.2d at 898.

ferred to the plaintiff.³⁰²

In a recent New York case,³⁰³ Sony Corporation as payee of money orders sued the selling bank and issuing institution for money orders that allegedly were paid over forged indorsements. Levi had purchased three American Express money orders at the Merchants Bank, payable to the Sony Corporation. Levi mailed the money orders to Sony, but they were stolen.³⁰⁴ The court determined the instruments to be personal money orders, and the selling bank's motion for summary judgment was granted. The court noted that "[t]he personal money order is treated and considered as a personal check and fulfills that purpose for those who cannot afford or who little need to maintain checking accounts."³⁰⁵ The court concluded that the purchaser of a personal money order has the same rights as the drawer of a personal check,³⁰⁶ and that the plaintiff as payee could hold the drawee responsible for conversion in paying a check on a forged indorsement.³⁰⁷

In a New York federal court case, twenty-seven money orders worth \$1000 each were purchased by a customer from a bank. Subsequently the customer issued a stop payment order to the bank and the bank refunded the amount by official check to its customer.³⁰⁸ The money orders subsequently were presented for payment by plaintiff. Payment was refused and the lawsuit was instituted.³⁰⁹ The court, referring to *Berler v. Barclays Bank* and *Garden Check Cashing Service*, stated that the bank's obligation was to its customer, and that the bank was under a statutory duty to stop payment at the customer's request, since under New York law the customer had the power to stop pay-

302. *Hong Kong Importers, Inc. v. American Express Co.*, 301 So. 2d 707, 710 (La. Ct. App. 1974).

303. *Sony Corp. v. American Express Co.*, 115 Misc. 2d 1060, 455 N.Y.S.2d 227 (N.Y. Civ. Ct. 1982).

304. The case states that the thief, Taylor "apparently added himself as copayee. . . ." and indorsed and cashed the money orders. *Id.* at 1061, 455 N.Y.S.2d at 228. If that was the case, in addition to the problem of paying on a forged indorsement, there should also have been the defense of a material alteration of an instrument. The court did not mention the material alteration.

305. *Id.* at 1062, 455 N.Y.S.2d at 229, citing *Berler v. Barclays Bank*, 82 A.D.2d 437, 442 N.Y.S.2d 54 (N.Y. App. Div. 1981).

306. 115 Misc. 2d at 1063, 455 N.Y.S.2d at 229.

307. *Id.* at 1063-64, 455 N.Y.S.2d at 229-30. See U.C.C. § 3-419(1)(c) (1978) for the payee's rights against the drawee bank on conversion.

308. *United Apparel Distrib., Inc. v. Chase Manhattan Bank*, 548 F. Supp. 672 (S.D.N.Y. 1982).

309. The money orders either were endorsed to plaintiff or were made payable to plaintiff. *Id.* at 673. It is not clear which, since the court made both statements. In either case, plaintiff is a holder of the 27 money orders, which either were endorsed to plaintiff by the customer, or were made payable to plaintiff as payee.

ment until the bank made the payment.³¹⁰ The bank was not responsible to plaintiff, since money orders are not obligations of the bank. The bank is not responsible until the money orders are signed by a bank official or accepted by the bank.³¹¹

VI. TRAVELER'S CHECKS

Traveler's check advertisements assure potential customers that the instruments are safe against loss or theft, provided the purchaser follows instructions for their issuance and use. Traveler's checks were created in 1891 by the American Express Company.³¹² Although traveler's checks have been in existence almost a century, they still are regarded as something of an anomaly. The precise legal characteristics of traveler's checks have not yet been determined.³¹³ The original purpose of the traveler's check was to create a piece of negotiable paper that would be almost as acceptable as currency yet safeguarded against loss.³¹⁴ Some cases have indicated a traveler's check is similar to a cashier's check,³¹⁵ and at least one court has described a traveler's check as currency.³¹⁶ Traveler's checks appear to satisfy the requirements of a negotiable instrument.³¹⁷ They are regarded by merchants

310. *Id.* at 673, citing U.C.C. § 4-403(1) (1978).

311. *Id.* at 673.

312. See, *Travelers Cheque—Reference Guide* issued by American Express, at 5-6 (1945); Hawkland, *American Travelers Checks*, 84 BANKING L.J. 377, 378 (1967). It should be noted that "travelers checks" have also been spelled as follows: "travelers cheques", "traveler's checks", and "traveler's cheques", depending upon the issuer, the court, and the author. No matter how it is spelled, the rights and obligations of the parties are the same.

313. Hawkland, *supra* note 312, at 378. Hawkland feels this is due in large part to the fact that cases involving travelers checks rarely come before the courts because "their issuers have pursued a policy of promoting saleability and marketability by sustaining losses in doubtful cases." *Id.* See Annot., *Rights of One Who Acquires Lost or Stolen Traveler's Checks*, 42 A.L.R.3d 846 (1972).

314. A. HATCH, AMERICAN EXPRESS 93 (1950).

The original American Express traveler's checks included instructions on their use "and the unqualified guaranty . . . that no one should suffer loss who cashed an American Express Travelers Cheque in good faith and with reasonable care. Even though the cheque had been stolen and the signature forged, American Express promised to redeem the cheque and pocket the loss." *Id.* at 94-95 (1950).

315. See, e.g., *Mellon Nat'l Bank v. Citizens Bank & Trust Co.*, 88 F.2d 128 (8th Cir.) *cert. denied*, 302 U.S. 702 (1937).

316. See, e.g., *American Express Co. v. Anadarko Bank & Trust Co.*, 179 Okla. 606, 67 P.2d 55 (1937). Traveler's checks were stolen from the selling agent, and subsequently transferred to a holder in due course who was able to sustain its claim against American Express. The traveler's checks were duly signed by an officer of American Express Co., but with the spaces for signature, countersignature and payee left blank. It was argued the selling agent and issuer were negligent, but no such finding was made. *Id.* at 607-08, 67 P.2d at 56-57.

317. See Note, *Negotiability of Traveler's Checks*, 47 YALE L.J. 470 (1938) (whether traveler's checks should be considered negotiable instruments). H. BAILEY, *supra* note 7, says "the exact nature of a traveler's check as a negotiable instrument is not completely clear." However, Bailey

and travelers all over the world as a special category of negotiable instrument.³¹⁸ Traveler's checks are covered by Article 3 of the Code.³¹⁹ A traveler's check typically is signed by an officer of the company, ordering the company to pay on demand at the company's office; it contains a serial number, and four blank spaces for the date, name of the payee, signature of purchaser, and countersignature of purchaser.³²⁰

In an older New York case, the court held that the issuer was responsible for paying traveler's checks on a forged signature, since this was a breach of the contractual obligation between the issuer and the purchaser.³²¹ Another New York court held that the issuing Bank would have to pay certain checks which had been stolen in blank from the selling agent, signed and countersigned, and transferred to a holder in due course.³²² A traveler's check presented by a holder in due course which had been signed and countersigned by the same person must be paid by the issuing bank, even if the bank has knowledge that the traveler's check has been stolen.³²³ Absent any showing of bad faith on the part of the holder, the bank must pay such instrument when presented by a holder in due course. If this were not the case, the check would lose its value as a substitute for cash.³²⁴ At the time the checks were delivered to defendant, it was made clear that the checks were to be guarded like cash.³²⁵ The New York court followed an Oklahoma case decided in 1937,³²⁶ and noted that the U.C.C. appears to adopt a ruling that the instrument is "not incomplete in the hands of the selling agent because nothing remained to be done either by issuer or selling

does acknowledge that traveler's checks "have negotiable characteristics through custom and usage." *Id.* § 2.1 at 2-3.

318. Pellingier, *Travellers' Cheques and the Law*, 19 U. TORONTO L.J. 132, 134 (1969). This article includes a detailed comparison of several different types of traveler's checks currently in use.

319. This is made clear in U.C.C. § 3-104 official comment 4 (1978) which states that "[t]raveler's checks in the usual form . . . are negotiable instruments under this article, when they have been completed by the identifying signature."

320. Hawkland, *supra* note 312, at 379-80.

321. *Sullivan v. Knauth*, 220 N.Y. 216, 115 N.E. 460 (1917).

322. *First Nat'l City Bank v. American Broadcasting Co.*, 68 Misc. 2d 861, 328 N.Y.S.2d 326, 330 (Sup. Ct. N.Y. County 1971). The action was brought by the issuer of traveler's checks (Citibank) for the face value of several checks signed by it and issued in blank to its selling agent (American Broadcasting) with authority to sell the checks. The checks allegedly were stolen while in the custody of the defendant, the selling agent.

323. *Id.*, 328 N.Y.S.2d at 330.

324. *Id.*, 328 N.Y.S.2d at 330-31.

325. *Id.* at 863, 328 N.Y.S.2d at 329. Since the "blank checks were the equivalent of cash," the selling agent's safeguards were not sufficient. The court found defendant was negligent. *Id.*

326. *Id.*, 328 N.Y.S.2d at 330, *citing* *American Express Co. v. Anadarko Bank & Trust Co.*, 179 Okla. 606, 67 P.2d 55 (1937).

agent.”³²⁷ The court rejected a New York case decided before the adoption of the U.C.C.³²⁸ Therefore, the issuing bank would have to pay a check stolen in blank from its selling agent if it was properly signed, countersigned, and transferred to a holder in due course.³²⁹

In another New York case,³³⁰ plaintiff lost traveler's checks which had not yet been signed. He immediately notified defendant of the loss. The checks subsequently were paid by defendant bank when presented with a matching signature and countersignature of a different person. The bank claimed plaintiff breached his contract by not signing the checks in advance. However, this was the plaintiff's first purchase of traveler's checks and the court held the defendant had not given the plaintiff sufficient warning and notice. Furthermore, since plaintiff relied on the defendant's advertisements that “all traveler's checks would be paid without loss to the original purchaser and are readily refundable,” defendant was required to give the refund to the plaintiff.³³¹

In *Rubin v. American Express Co.*,³³² plaintiff's assignor purchased traveler's checks from the defendant, lost them, reported the loss to defendant, and filed affidavits with the issuer. The company refused to pay, claiming it was not satisfied the checks were lost. The court granted summary judgment to plaintiff.³³³ A California court has stated that a bank which represents to prospective purchasers that there is no time limit within which its traveler's checks must be presented

327. 68 Misc. 2d at 863, 328 N.Y.S.2d at 330.

328. *First Nat'l City Bank v. Frederics-Hilton Travel Service Inc.*, 29 Misc. 2d 1041, 209 N.Y.S.2d 704 (Sup. Ct. N.Y. County 1961) (decided under the Negotiable Instruments Law). The court held there was no “delivery” because the traveler's checks were incomplete.

U.C.C. §§ 3-115 and 3-407 (1978) provide that nondelivery of an incomplete instrument creates only a personal defense, which may be cut off by a holder in due course.

329. *First Nat'l City Bank*, 68 Misc. 2d at 864-65, 328 N.Y.S.2d at 330. The court relied on U.C.C. § 3-407(3) (1978), allowing a holder in due course to complete and enforce an incomplete instrument.

330. *Rosenfeld v. First Nat'l City Bank*, 65 Misc. 2d 722, 319 N.Y.S.2d 35 (N.Y. Civ. Ct. 1971).

331. *Id.* at —, 319 N.Y.S.2d at 39-40. This case was brought in the Small Claims Court. In light of the circumstances, the court held plaintiff was not subject to the alleged contractual provisions of defendant's form, which were printed in small type on the reverse side of the form. *Id.*

332. *Rubin v. American Express Co.*, 64 Misc. 2d 470, 315 N.Y.S.2d 89 (N.Y. Civ. Ct. 1970), *modified*, 67 Misc. 2d 332, 324 N.Y.S.2d 482 (App. Term 1971).

333. *Id.* The trial court held that defendant had over a year to investigate and submit proof that no loss occurred. The appellate court said that “the requirements of stability in the use of traveler's checks as well as the defendant's agreement to replace those lost dictate that its obligation not be avoided on the mere assertion of a suspicion of fraud.” The appellate court affirmed, but modified the costs and disbursements allowed. 67 Misc. 2d 332, 324 N.Y.S.2d 482 (App. Term 1971).

cannot presume outstanding checks have been lost or stolen even after more than four years.³³⁴

In a New Jersey case,³³⁵ traveler's checks were stolen from the safe of the selling agent. The court held that traveler's checks are the equivalent of money and were considered cash. The issuer was required to pay any bona fide holder, and stolen checks presented by a bona fide holder would be honored.³³⁶

In *Fischer v. Citicorp Serv. Inc.*, the purchaser, a seventy-five year old man, was the victim of a flim-flam scam and received an empty bundle in return for his traveler's checks.³³⁷ He went to the police, notified the bank to stop payment on the traveler's checks, and filed an application for a refund. The bank claimed that it only refunded if the checks were lost or stolen. The court denied the bank's motion for summary judgment and held that the traveler's checks were stolen, that plaintiff was the victim of a theft, and that he was not involved in any illegal transaction.³³⁸

In *Ashford v. Thomas Cook & Son, Ltd.*,³³⁹ traveler's checks were sold to Mr. and Mrs. Kochton and delivered to their home. The wife's checks, which she had not yet signed, were stolen, and subsequently sold to plaintiff. The issuer of the checks refused to pay plaintiff. The court held that plaintiff was a bona fide purchaser and acquired good title to the stolen checks and that defendant was liable for the face value of the checks.³⁴⁰ The court stated:

[i]t is common knowledge that any establishment issuing travelers checks intends its checks to be readily and freely passable from one person to another as money. This is not only intended, but it is widely advertised that travelers checks are readily accepted in commerce as money and that they are safer. The public is made to believe that travelers checks are a substitute for money, a medium of exchange, which are self-identifying and accepted everywhere, but, unlike currency,

334. *Bank of America Nat'l Trust & Sav. Ass'n v. Cranston*, 252 Cal. App. 2d 208, 60 Cal. Rptr. 336, 339 (1967).

335. *American Express Co. v. Rona Travel Serv., Inc.*, 77 N.J. Super. 566, 187 A.2d 206 (1962).

336. *Id.* at 576, 187 A.2d at 212. The plaintiff, American Express, was asserting liability against defendant on its trust receipt.

337. *Fischer v. Citicorp. Serv. Inc.*, 107 Misc.2d 307, 433 N.Y.S.2d 966, 967 (N.Y. Civ. Ct. 1980).

338. The court considered the New York Penal Law § 155.02 definition of a theft and determined that plaintiff was the victim of a theft, and thus the checks were stolen. *Id.*

339. 52 Hawaii 113, 471 P.2d 530 (1970).

340. 471 P.2d at 536.

they can be carried without danger of loss or theft because of the protective device of signature and countersignature. We believe that if travelers checks are intended by the issuer and accepted by the public as a medium of exchange to take the place of money, they should be subjected to the same rules of law applicable to money under like circumstances.³⁴¹

The court indicated a more realistic and less technical approach would recognize that traveler's checks have been accepted by the public as a medium of exchange and have acquired negotiable characteristics by custom and general acceptance, not by statute.³⁴²

In *Gray v. American Express Co.*,³⁴³ a North Carolina case, plaintiff received stolen traveler's checks from a customer. The plaintiff saw the customer sign and countersign the checks, but they were not dated and no payee was filled in.³⁴⁴ The court found for the defendant because the checks lacked the payee's name and thus were incomplete.³⁴⁵

According to Hawkland, cases involving traveler's checks have been decided under one or more of three theories, each with its own pitfall: (1) a traveler's check is simply a contract, obligating the issuer to pay only where the countersignature matches (this overlooks its highly negotiable character); (2) a traveler's check is money (this theory overlooks the claimed advantage that traveler's checks are safer than money, since the public has been educated to believe that loss of a traveler's check does not carry the same consequences as loss of money); (3) a traveler's check is a negotiable instrument (the real problem with this theory is how to handle the forged countersignature).³⁴⁶

The basic appeal of traveler's checks is their world-wide acceptability and quick refund when lost or stolen. This appeal has been engendered not only by heavy advertising but also by the actual practice by issuers of honoring traveler's checks containing forged countersignatures if acquired in good faith and for value. The U.C.C. would allow this custom to override its normal provisions governing commercial pa-

341. *Id.* at 534. The court also pointed out that defendant was negligent in not seeing that the purchaser signed the checks. *Id.* at 536.

342. *Id.* at 533. This case was decided before the adoption of the Code. The court indicated that traveler's checks do not fall squarely within the ambit of the Negotiable Instruments Law or the U.C.C.

343. *Gray v. American Express Co.*, 34 N.C. App. 714, 239 S.E.2d 621 (1977).

344. *Id.*, 239 S.E.2d at 622.

345. *Id.* at 716, 239 S.E.2d at 623. The merchant himself could have completed the checks at any time within nine years. U.C.C. § 3-115. He failed to do so and so "the instruments remained incomplete and unenforceable as a matter of law." 34 N.C. App. at 716, 239 S.E.2d at 623.

346. Hawkland, *supra* note 312, at 409-10.

per and would legally implement current practices.³⁴⁷ The U.C.C. rule permitting custom to override general provisions does not require proof that the practices involved be "ancient," "immemorial," or "universal." It is enough that the usage involved be "currently observed by the great majority of decent dealers, even though dissidents ready to cut corners do not agree."³⁴⁸

VII. CONCLUSION

The public may think of any "bank check" as being the equivalent of cash. By the use of the all-encompassing term "bank check," people often confuse the terms "certified check," "cashier's check," "teller's check," "money order," "bank money order," "register check," "traveler's check," and other similar terms, mistakenly thinking of these various instruments as the same thing. By the use of any of these bank checks, one can avoid carrying large sums of cash and the inherent risk of its loss. Bank checks also allow payees to avoid the risk of insufficient funds, since after all, a bank is holding the money. However, these various instruments do differ as to the customer's right to stop payment, the bank's right to countermand payment, and in cash equivalency.

A certified check provides great protection and comes the closest among these instruments to being cash. As a general rule the drawer may not stop payment on a certified check. Once a bank has certified a check, the check is deemed accepted and the bank becomes primarily liable.

Cashier's checks have been determined by most courts to be a draft that is accepted when it is issued, since the drawer and drawee banks are the same. Most courts hold that payment on a cashier's check cannot be stopped or countermanded. Many of those courts have expressly considered public policy, since the public views a cashier's check as cash. However, several courts describe a cashier's check as a note. This view is based on the Code provision that a draft drawn on the drawee is effective as a note. The courts holding a cashier's check to be a note have indicated that payment may be stopped if the holder is not a holder in due course. The legal effect of a cashier's check thus varies greatly according to whether it is viewed as a draft or a note. It has been suggested that the Code be amended to resolve

347. *Id.* at 411. See U.C.C. § 1-205 official comment 5 (1978) as to usage of trade.

348. U.C.C. § 1-205 official comment 5 (1978).

some of the inherent problems in raising defenses to the payment of the instrument.

A teller's check is a check issued by a savings bank (or savings and loan association) and drawn upon a commercial bank. The drawer and drawee are two different banks. Teller's checks have been interpreted by most courts to be almost like a cashier's check in matters of cash equivalency. However, teller's checks, unlike cashier's checks, are sometimes issued by the savings bank as payment of the bank's own obligations. If the bank later discovers a defense, the bank, like any other drawer, would want to stop payment. Yet, if there is an absolute prohibition against stopping payment the bank cannot assert its defenses. One suggestion is that cashier's checks be deemed "cash equivalents" and that teller's checks be issued subject to the issuing bank's defenses.

A personal money order (or register check) is not equivalent to cash at all. It is instead equivalent to a personal checking account. The instrument is not signed by the bank and therefore the bank is not responsible to the payee or holder. The drawer of a personal check can issue a stop payment order to the bank and the drawer of a personal money order can do the same.

Traveler's checks are regarded as something of an anomaly and their precise legal characteristics have not been fully determined. They are regarded as a special category of negotiable instrument.

In order to decide the rights and liabilities of the parties to an instrument, it is necessary to observe carefully the physical characteristics of the instrument itself. The Code provides no answer to most problems, since these various instruments may not be referred to in the Code. Suggested amendments to cover the various problems and questions clearly are necessary.