University of Richmond Law Review

Volume 32 | Issue 1 Article 3

1998

A Literalist Proposes Four Modest Revisions To U.C.C. Article 3

Timothy R. Zinnecker

A LITERALIST PROPOSES FOUR MODEST REVISIONS TO U.C.C. ARTICLE 3

*Timothy R. Zinnecker**

I. INTRODUCTION

I first taught a Payment Systems class during the fall of 1994. Not having taken the course in law school,[1] and bringing very little "real world" experience in this area of commercial law to the classroom, I approached the task of teaching the course with some degree of fear and trepidation.[2] I had already taught Secured Transactions,[3] so I was familiar with the challenges of teaching a statutory course to a reluctant audience scarred by horror stories of their predecessors. I also audited a Payment Systems course taught by a colleague during the summer, so I had a good start on my lesson plans when the class of thirty-four students first met on a Monday morning in August.[4] The students were patient, forgiving, and kind.[5] Some

---

* Associate Professor of Law, South Texas College of Law of Texas A&M University. B.S.B.A., 1981, Central Missouri State University; J.D., 1986, Brigham Young University. John L. Barnes, F. Walter Bistline, Jr., William P. Bowes, Jr., W. David East, Jennifer L. Johnson, Douglas S. Miller, Daryl B. Robertson, Dulcie Green Wink, and John J. Worley offered many insightful comments on the initial draft. My employer graciously provided me with a research stipend to write this article. I hope the Dean doesn't demand a refund after he reads it.

1. When I was a law student, the course was known as "Commercial Paper." One author has suggested that the moniker was selected in "an attempt to avoid confusion because zoning lawyers helped draft Article 3 and they were looking to distinguish commercial paper from residential and industrial paper." Marianne M. Jennings, *I Want to Know What Bearer Paper Is and I Want to Meet a Holder in Due Course: Reflections on Instruction in UCC Articles Three and Four*, 1992 BYU L. REV. 385, 385 n.1.

2. But because I knew my performance would not affect my GPA, the degree of fear and trepidation did not quite match that of the students.

3. Popularly referred to in the student lounge as "Sadistic Transactions."

4. I am thankful we did not meet at 8:00 a.m. So were the students. Commercial law giant Karl Llewellyn and his initial protégés were not so fortunate. *See* K.N. Llewellyn, *Meet Negotiable Instruments*, 44 COLUM. L. REV. 299, 299 (1944) ("The first law course I had a chance to teach was Bills and Notes [which met] three times a

even asked insightful and thought-provoking questions.[6] Together, we survived.

I must have performed adequately because those in positions of power have asked me to teach the course almost every subsequent semester,[7] and by now I have developed a rather detailed syllabus. Students can expect to spend about a week examining credit card issues,[8] another week discussing consumer electronic funds transfer concerns,[9] and a third week learning the basics of a letter of credit transaction and a nonconsumer funds transfer.[10] For most of the semester, however, our time together is spent strolling[11] through various provisions of Article 3 and (to a lesser extent) Article 4 of the Uniform Commercial Code.

One scholar has described Article 3 as "a huge machine assembled by a mad inventor and comprised of assorted sprockets, gears, levers, pulleys, and belts."[12] Having kicked its tires, changed its oil, pulled its levers, and otherwise operated it on several semester-long trips, I have concluded that Article 3 per-

---

week at 8 A.M.").

5. But they did criticize me for using a text that did not follow *Gilbert's on Commercial Law* very well.

6. For example, "Will that be on the final exam?"

7. Usually, my other course is Secured Transactions (and being assigned the task of teaching the two most feared (loathed?) courses in law school probably explains why I am never in the running for "Professor of the Year"). One semester the administration allowed me to teach a course in banking law. Knowing that using "regulatory" or "FIRREA" or "usury" in the course description would repel prospective enrollees, I used the following one-sentence enticement: "Learn how to reduce mortgage payments through arson." The registrar closed enrollment at 85. The next time I teach the course I intend to borrow the course description proposed by my friend, mentor, and BYU law professor Jim Gordon: "Discover why banks throw billions of dollars away, but keep those 98-cent pens chained to their desks." James D. Gordon III, *How Not to Succeed in Law School*, 100 YALE L.J. 1679, 1696 (1991). Normally, I hesitate to cite an article from a journal that consistently declines to publish my work, but I'm hoping that Jim notices my kind acknowledgement and retroactively raises my Conflicts grade a notch or two.

8. For example, we discuss whether Visa or American Express airs better television commercials.

9. We examine why banks offer braille screen messages at *drive-through* ATMs.

10. Several students are aghast when they discover that the CHIPS network, a major wire transfer system, is not owned and operated by Erik Estrada.

11. One former student who commented on selected passages of this article suggested that "slogging" or "trudging" would be more accurate.

12. James J. White, *Some Petty Complaints About Article Three*, 65 MICH. L. REV. 1315, 1315 (1967).

forms rather well. With some fine tuning, however, four parts could function more efficiently.[13] As identified by serial number, the parts are section 1-201(20) (the definition of "holder"),[14] section 3-201 (the description of "negotiation"),[15] section 3-310 (the ability to enforce the underlying obligation after taking an instrument),[16] and section 3-416(a)(1) (the transfer warranty of enforcement).[17] Mindful that it would be cowardly of me to disparage the extraordinary drafting efforts of others much more experienced than I in commercial matters without also offering suggestions for improvement, each section concludes with proposed modifications for the design of a "new and improved" model.

II. TINKERING WITH THE DEFINITION OF "HOLDER"

One of the most frequently-used terms in Article 3 is "holder."[18] As one would expect, the importance of the term parallels its frequency. For example, Article 3 applies only to "negotiable instruments,"[19] a term that requires a writing to be payable to bearer or to order when it is issued or initially possessed by a holder.[20] Furthermore, an instrument is not "negotiated" between parties (a recurring concept in Article 3)[21] un-

13. Throughout the article I refer to applicable U.C.C. provisions as "§ ___." For the most part, section references are to provisions currently in effect. The two sponsors of the Uniform Commercial Code, the American Law Institute and the National Conference of Commissioners on Uniform State Laws, rewrote Articles 3 and 4 in 1990. I refer to provisions in effect prior to the revisions as "pre-revised § ___." The Uniform Negotiable Instruments Law was the forerunner of Article 3. I refer to provisions of that law as "NIL § ___."

14. U.C.C. § 1-201(20).

15. § 3-201.

16. § 3-310.

17. § 3-416(a)(1).

18. *See* §§ 3-104(a)(1), 3-104(a)(3)(ii), 3-104(d), 3-105(a), 3-106(c), 3-106(d), 3-108(a)(i), 3-108(b)(iii), 3-110(c), 3-113(b), 3-201(a), 3-201(b), 3-203(c), 3-204(c), 3-204(d), 3-205(a), 3-205(b), 3-205(c), 3-205(d), 3-207, 3-301(1), 3-302(a), 3-404(b)(1), 3-409(c), 3-410(a), 3-410(c), 3-412, and 3-414(b). The term, with the same meaning, also appears in Article 4. *See* §§ 4-201(b), 4-205(1), 4-401(d), 4-407(2), and 4-407(3).

19. *See* § 3-102(a).

20. *See* § 3-104(a)(1).

21. *See, e.g.*, §§ 3-110(d), 3-202(a), 3-202(b), 3-203(b), 3-203(c), 3-203(d), 3-204(a), 3-205(a), 3-205(b), 3-205(d), 3-206(a), 3-207, 3-302(a)(1), 3-306, 3-310(b)(3), 3-404(b), 3-413(b), and 3-420(a).

less the instrument is transferred by a nonissuer to a holder.[22] Additionally, a party must fall into one of three discrete categories before qualifying as a "person entitled to enforce" a negotiable instrument (a phrase referenced throughout Article 3);[23] one category includes holders.[24] Perhaps most importantly, a party cannot be a "holder in due course" (a term used repeatedly in Article 3),[25] and thus enforce an instrument free and clear of almost all claims and defenses of any party,[26] unless it is the holder of the instrument.[27]

"Holder" is not defined in Article 3; its definition is found in the "general definitions" section of Article 1.[28] Section 1-

---

22. *See* § 3-201(a).

23. *See, e.g.*, §§ 3-104(e), 3-111, 3-116(c), 3-117, 3-302(e), 3-305(a)(2), 3-305(c), 3-305(d), 3-309(a), 3-310(b)(3), 3-312(b)(2), 3-312(b)(4), 3-411(c), 3-412, 3-413(a), 3-414(b), 3-414(f), 3-415(a), 3-416(a)(1), 3-417(a)(1), 3-417(d)(1), 3-418(d), 3-419(d), 3-420(a), 3-420(c), 3-501(a), 3-602(a), 3-602(b)(1), 3-603(a), 3-603(b), 3-603(c), 3-604(a), 3-604(c), 3-604(d), 3-605(e), 3-605(f), and 3-605(h). The phrase also is found in Article 4. *See* §§ 4-104(c), 4-207(a)(1), 4-208(a)(1), and 4-208(d).

Students often use the acronym "PETE" when referring to this phrase. Students are not alone. *See* Neil Littlefield & Kathleen Patchel, *Payments—Articles 3, 4 and 4A and Related Areas of Federal Law*, 50 BUS. LAW. 1493, 1497 (1993) (adopting the acronym).

24. *See* § 3-301(i).

25. *See, e.g.*, §§ 3-106(d), 3-202(b), 3-203(b), 3-206(e), 3-305(b), 3-305(c), 3-306, 3-308(b), 3-312(c), 3-402(b)(2), 3-413(b), and 3-601(b). The term also is found in three other U.C.C. Articles. *See, e.g.*, §§ 4-104(c), 4-205(1), 4-211, 4-407(1), 5-103(3), 5-114(2)(a), 9-105(3), 9-206(1), and 9-309.

26. *See* § 3-305(b) (stating that a holder in due course may enforce an instrument free and clear of most claims and defenses, other than the so-called "real defenses" in clause (a)(1)).

27. *See* § 3-302(a) (requiring a "holder in due course" to first be a "holder"); *see also* Adams v. Madison Realty & Dev., Inc., 853 F.2d 163, 166 (3rd Cir. 1988) ("But preliminarily, a person seeking to become a holder in due course must satisfy the threshold requirements for becoming a 'holder,' the critical issue on this appeal."); United States v. Kellerman, 729 F.2d 281, 284 (4th Cir. 1984) ("Obviously only a holder can be a holder in due course."); Douglas J. Whaley, *Forged Indorsements and the UCC's "Holder,"* 6 IND. L. REV. 45, 55 (1972) ("[B]eing a holder is obviously a *sine qua non* of holder in due course status . . . .").

One author has suggested that the definition of "holder in due course" in section 3-302 is "arguably the most important definition" in Article 3. *See* Daryl B. Robertson, *Report of the Commercial Code Committee of the Section of Business Law of the State Bar of Texas on Revised UCC Articles 3 and 4*, 47 BAYLOR L. REV. 425, 461 (1995).

28. Terms used throughout the U.C.C. have the meaning ascribed to them in section 1-201, unless the context otherwise requires or the term also is defined in one of the other Articles. *See* § 1-201 (Preamble). One term used in Article 3 that uses an Article 3 definition different from the generic Article 1 definition is "good faith." *Compare* § 3-103(a)(4) (defining "good faith" as "honesty in fact and the observance of

201(20) provides that a "holder" of a negotiable instrument is "the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, the identified person is in possession."[29] At a minimum, a party must possess the instrument to be a holder.[30] Whether possession alone is sufficient, however, depends on whether the instrument is payable to bearer or to a specified person.

The following example illustrates the difference. Bradford Corp. executes a promissory note to evidence a $100,000 loan from Fidelity Bank. If the note identifies the payee in any of the following ways, it is payable to bearer:

pay to bearer;[31]

pay to the order of bearer;[32]

pay to _____;[33]

pay to CASH;[34]

---

reasonable commercial standards of fair dealing") *with* § 1-201(19) (defining "good faith" as "honesty in fact in the conduct or transaction concerned").

29. § 1-201(20). The definition is incorporated into Article 3 through section 3-103(d). My high school English teacher, Enid Farkis, would have a struggle diagramming the definition. Miss Farkis is not alone. As the authors of one text have observed, "The drafter of the definition seems to have slipped off the grammatical path in the middle of the sentence." PETER A. ALCES & MARION W. BENFIELD, JR., CASES, PROBLEMS, AND MATERIALS ON PAYMENT SYSTEMS 51 (1993); *see also* Gregory E. Maggs, *Determining the Rights and Liabilities of the Remitter of a Negotiable Instrument: A Theory Applied to Some Unsettled Questions*, 36 B.C. L. REV. 619, 647 (1995) ("[T]he definition of holder appears incomplete as written.").

30. "The term 'possession' is never defined, but in context it is quite clear that it is intended to mean physical custody by the holder, or her agent." Jeanne L. Schroeder, *Death and Transfiguration: The Myth that the U.C.C. Killed 'Property,'* 69 TEMP. L. REV. 1281, 1341 n.171 (1996); *see also* 2 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 17-3, at 152 (4th ed. 1995 [Practitioner's Edition]) ("The ambiguity in the word 'possession' has caused little trouble. With rare exceptions, those claiming to be holders seem to have had physical possession of the instrument in question.")

31. *See* § 3-109(a)(1).

32. *See id.* One author suggests that a *check* made payable to the order of bearer is likely to elicit one of the following teller responses:

(a) "Could I see some ID, Mr. Bearer?"

(b) "Why didn't they put your first name on here?"

(c) "Is your first name Smokey?"

(d) "This looks illegal."

Jennings, *supra* note 1, at 396.

33. *See* § 3-109(a)(2).

34. *See* § 3-109(a)(3).

pay to the order of CASH;[35] or

pay to the order of Fidelity Bank or bearer.[36]

Anyone (including not only Fidelity Bank, but also a thief or finder) who possesses the note styled in any of the foregoing manners is a holder of the note. However, if the note states that it is payable to (i) the order of Fidelity Bank or (ii) Fidelity Bank or order, then it is not payable to bearer. Instead, it is payable to order and the identified person: Fidelity Bank.[37] As a general rule, absent the identified person's indorsement, no other possessor can be a holder of such an instrument.[38]

At first glance, the analysis does not seem too difficult. But consider the following classroom hypothetical. Son ("X") executes a promissory note payable to the order of his father. The father gives the note, unindorsed, to another son ("Y"). Upon Y's death, the note passes unindorsed to Y's wife ("Z"). This hypothetical is loosely based on *Smathers v. Smathers*,[39] a case in which the appellate court held that the wife was not a holder because the notes "were not drawn, issued or indorsed to her or to her order or to bearer or in blank."[40] Students generally have no trouble with the court's analysis. However, as most professors enjoy doing,[41] I tweak the facts and ask whether the following change impacts the court's analysis. Suppose that before he died, Y delivered the note to Z after indorsing the back of the note as follows: "Pay to Z. Y." Is Z, now in possession of the note, a holder?

Many students are convinced that with this one factual change Z has become a holder. And mindful of our class man-

35. *See id.* In this and the preceding example, I'm using "CASH" in a monetary context rather than as a reference to one of this country's greatest singing legends, Johnny Cash (whose song, *"Ring of Fire,"* has never been as popular at funerals as it deserves to be).

36. *See* § 3-109 cmt. 2 ("An instrument that purports to be payable both to order and bearer states contradictory terms. A transferee of the instrument should be able to rely on the bearer term and acquire rights as a holder without obtaining the indorsement of the identified payee.").

37. *See* § 3-109(b).

38. There exists an exception applicable to checks. *See* § 4-205 (permitting a depositary bank to be a holder of an unindorsed check deposited by a holder).

39. 239 S.E.2d 637 (N.C. App. 1977).

40. *Id.* at 638.

41. With fiendish glee!

tra, *"the Code is my friend,"* the students rely on a most authoritative source, section 1-201(20). Indeed, Z seems to satisfy the literal language of the definition of "holder": she is in possession of an instrument that identifies her as the party to be paid. The definition requires nothing more, so Z must be a holder.

Before illustrating why Z is not a holder under Article 3, despite what section 1-201(20) may suggest, it may be helpful to examine prior law. Before Article 3 was revised in 1990, a person possessing an instrument was a holder if the instrument was drawn, issued, or indorsed to him, to his order, to bearer, or in blank.[42] Z appears to be a holder: she possesses a note that has been indorsed to her. Under pre-revised Article 3, however, indorsements had to be written by or on behalf of holders.[43] Y indorsed the note, but Y was not a holder. Y possessed a note that X had issued to their father.[44] The father never indorsed the note, so the note continued to identify him as the party to be paid, even after Y obtained possession. Absent his father's indorsement, Y could not be a holder. And since Y was not a holder, his wife could not be a holder as the note was not "indorsed" to her.[45]

---

42. *See* 1 U.L.A. § 1-201(20) at 24 (Supp. 1997) (defining "holder"); *cf.* NIL § 191 (defining "holder" as "the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof").

43. *See* pre-revised § 3-202(2); *see also* Whaley, *supra* note 27, at 55-58 (noting that examining the interplay between section 1-201(20) and pre-revised section 3-202 "leads to madness," but concluding that the latter section requires a legally effective indorsement to be made "by one who technically qualifies" as a holder under the former section); David Mellinkoff, *The Language of the Uniform Commercial Code*, 77 YALE L.J. 185, 192-93 (1967). *But see* Robert F. T. Dugan, *A New Approach to "Holder" Conundrums Under Article 3 of the Uniform Commercial Code—A Reply to Professor White*, B.C. IND. & COM. L. REV. 1, 6-11 (1971) (suggesting that pre-revised section 3-202(2) only requires the indorsement of a holder if the possessor is a holder).

Note that the NIL contained no such clearly-expressed requirement in a single provision, but courts frequently denied holder status to transferees of transferors who were not holders. *See, e.g.*, Berger v. Georgia Power Co., 49 S.E.2d 668 (Ga. App. 1948); Fidelity Nat'l Bank v. Vuci, 68 So.2d 781 (La. 1953); *see also* William E. Britton, *Transfers and Negotiations Under the Negotiable Instruments Law and Article 3 of the Uniform Commercial Code*, 32 TEX. L. REV. 153, 160 (1953) ("The phrase 'by or on behalf of the holder,' added by [pre-revised § 3-202(2) of the] Code, merely sets forth expressly what is implied in Section 31 of the NIL.").

44. *See* pre-revised § 3-102(1)(a) (defining "issue" as "the first delivery of an instrument to a holder or remitter").

45. *See also* 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL

Reaching the same result under revised Article 3 is a bit more challenging because the indorsement language was dropped from section 1-201(20) in 1990 and replaced with language requiring the possessor to be the "identified person" if the instrument is not payable to bearer. The quoted term is not defined,[46] but section 3-110, entitled "Identification of Person to Whom Instrument is Payable," states that the intent of the person signing as, or in the name or on behalf of, the issuer determines to whom the instrument is initially payable.[47] This provision is helpful in determining the proper payee, but it does not expressly resolve issues concerning the identification of subsequent parties. Arguably, one could apply the statute by analogy and conclude that Y's intent controls because he lawfully possesses the note, and Y's indorsement reveals an intent to make the instrument payable to Z. Therefore, Z is the identified party and, accordingly, a holder. At the same time, however, one might plausibly contend the following: (i) the intent of X, as maker, determines to whom the note is initially payable; (ii) as manifested by the language used by X in drafting the note, X intended the note to be payable to the order of X's father; (iii) only X's father can honor X's intent; and (iv) until X's father indorses the note, Y's intent (and the manifestation of that intent through his indorsement) is irrelevant.

The indorsement provisions also do not conclusively resolve the matter. Section 3-204 defines an "indorser" as "a person who makes an indorsement,"[48] but the term is not defined in a manner that requires the signature of a holder.[49] Section 3-205 defines "special indorsement" as an indorsement *by a holder* that makes an instrument payable to an identified person.[50] Do these two provisions, taken together, mean that Z cannot be

---

CODE § 13-9, at 641 nn.6-7 and accompanying text (3d ed. 1988 [Practitioner's Edition]); White, *supra* note 12 at 1327.

46. This is true despite the fact that it appears in several provisions. *See* §§ 3-103(a)(11), 3-109(a)(3), 3-109(b), 3-109(c), 3-110(c)(2)(ii), 3-201(b), and 3-205(a); *cf.* §§ 3-404(b) and 3-405(a)(2) (referring to "person identified").

47. *See* § 3-110(a). If the issuer's signature is generated by automated means, then the intent of the party that supplied the payee information to the machine controls. *See* § 3-110(b).

48. § 3-204(b).

49. *See* § 3-204(a).

50. *See* § 3-205(a). Additionally, only a holder can make a blank indorsement. *See* § 3-205(b).

a holder because only a special indorsement can make an indorsee an identified person? Or can one resolve with certainty only that Y's indorsement is not a special indorsement?[51]

Concluding that Z is a holder under revised Article 3 renders a result contrary to that reached under pre-revised Article 3.[52] Despite the 1990 revisions to section 1-201(20), the Official Comments to section 1-201 do not reveal that any substantive change was intended. Therefore, notwithstanding any contrary inferences drawn from section 3-110 or the indorsement provisions, Z probably is not a holder. In fact, if one looks behind the statutes and examines the accompanying Official Comments, the reader can convert that probability into certainty.

The Official Comments to section 3-201 state in relevant part:

> A person can become [a] holder of an instrument when the instrument is issued to that person, or the status of holder can arise as the result of an event that occurs after issuance. "Negotiation" is the term used in Article 3 to describe this post-issuance event.[53]

This passage suggests that, in addition to satisfying the language of section 1-201(20), a party does not become a holder unless it obtains possession of the instrument by either "issuance" or "negotiation." Several scholars have agreed with this interpretation.[54]

---

51. Because Y is not a holder, his indorsement is an anomalous indorsement. *See* § 3-205(d).

52. *See supra* notes 42-45 and accompanying text.

53. § 3-201 cmt. 1. During my opening remarks, I stress to students the importance of reading the Official Comments that follow the assigned statutes. Regrettably, more than a few students focus on "Comments" rather than "Official" and completely ignore them—just like footnotes in cases.

54. *See, e.g.*, 6A WILLIAM D. HAWKLAND & LARY LAWRENCE, UNIFORM COMMERCIAL CODE SERIES [Rev] § 3-201:01, at 3 (1993) ("There are two ways of becoming a holder. A person may become a holder by having the instrument issued to him in bearer form or payable to his order. Or, he may become a holder through the postissuance act of negotiation.") (footnotes omitted); STEVE H. NICKLES, ET AL., MODERN COMMERCIAL PAPER: THE NEW LAW OF NEGOTIABLE INSTRUMENTS (AND RELATED COMMERCIAL PAPER) 157 (1994) ("A person becomes a holder either by issuance or negotiation."). Professor Britton's treatise indicates the same requirement existed under the NIL. *See* WILLIAM E. BRITTON, HANDBOOK OF THE LAW OF BILLS AND NOTES 117 (2d ed. 1961) ("The first holder of an instrument acquires title by issuance. . . .

Returning to the revised hypothetical, Z did not obtain possession through "issuance," which is the first delivery of an instrument by the maker or drawer for the purpose of giving rights on the instrument to any person.[55] The instrument is a note, so X is a maker rather than a drawer.[56] X first delivered the note when he gave it to his father.[57] At that moment, the father became a holder because he satisfied the requirements of section 1-201(20) (he possessed a note that identified him as the party to be paid), and he obtained possession by issuance. Issuance applies only to the first delivery of the instrument,[58] so Z cannot take by issuance. Therefore, to be a holder, Z must take the instrument by negotiation.

"Negotiation" is described as "a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder."[59] That statement is not very helpful. X, the maker, is the issuer.[60] Y, a person other than the issuer, transferred possession of the instrument to Z. As a result of this transfer, has Z become a holder? Because she possesses an instrument that, through Y's indorsement, identifies her as the party to be paid,

---

The second holder of a negotiable instrument and successive holders acquire title by negotiation.").

55. *See* § 3-105(a).

56. *See* § 3-103(a)(3), (5) (defining "drawer" and "maker," respectively).

57. *See* § 1-201(14) (defining "delivery" as a "voluntary transfer of possession"). One of the more interesting cases in which ownership of a check turned on the presence or absence of "delivery" is *Scherer v. Hyland*, 380 A.2d 698 (N.J. 1977). Catherine Wagner, the victim of an automobile accident, received a settlement check on the morning of January 23, 1974. *See id.* at 699. Before committing suicide that afternoon, she indorsed the check in blank and left it with two handwritten notes on the kitchen table in the apartment that she shared with her long-time companion, Robert Scherer. *See id.* In one of the notes she "bequeathed" to Scherer all of her possessions, including the check. *See id.* at 699-700. Litigation ensued between the administrator of Wagner's estate and Scherer over the ownership of the check. As phrased by the court,

> [t]he primary issue here is whether Ms. Wagner's acts of endorsing the settlement check, placing it on the kitchen table in the apartment she shared with Scherer, next to a writing clearly evidencing her intent to transfer the check to Scherer, and abandoning the apartment with a clear expectation of imminent death constituted delivery sufficient to sustain a gift *causa mortis* of the check.

Id. at 700. The court found a constructive delivery. *See id.* at 701-02.

58. *See* § 3-105(a).

59. § 3-201(a).

60. *See* § 3-105(c) ("'Issuer' . . . means a maker or drawer of an instrument.").

she seems to be a holder under section 1-201(20). But Z, who did not acquire possession by issuance, apparently must take the note by negotiation to be a holder.[61] Did Z take the note by negotiation? It is difficult to tell under the foregoing quote, which results in the following circular analysis: Z becomes a holder by obtaining possession by negotiation; to obtain possession by negotiation, Z must become a holder.

Fortunately, Article 3 also states that an instrument payable to an identified person is not negotiated unless it has been indorsed by a holder.[62] When X issued the note, it was payable to an identified person, his father. The father never indorsed the note, so the note remained payable to an identified person even after Y obtained possession. Therefore, the movement of the note from Y to Z is a negotiation only if the note was indorsed by a holder. Y, the only person to indorse the note, is not a holder under section 1-201(20) because he possessed an instrument that identified someone other than himself as the party to be paid. Absent indorsement by a holder, Z did not acquire possession by negotiation. And absent negotiation, Z is not a holder, notwithstanding any contrary answer gleaned from section 1-201(20) or any provision of Article 3.

"Holder" is one of the most important and frequently-used terms in Article 3.[63] The hypothetical illustrates that the language of section 1-201(20) could be improved by illuminating the bridge that exists between possession, issuance, negotiation, instruments payable to bearer, and instruments payable to an identified person. The bridge would be more discernible if the first sentence of section 1-201(20) were amended to read in its entirety as follows:

> "Holder," with respect to a negotiable instrument, means the person who possesses, by issuance or negotiation, an instrument payable to that person or payable to bearer.

---

61. *See* § 3-201 cmt. 1.

62. *See* § 3-201(b); *cf.* § 3-109 cmt. 1 ("An instrument that is payable to an identified person cannot be negotiated without the indorsement of the identified person.").

63. *See supra* notes 18-27 and accompanying text; White, *supra* note 12, at 1315 ("'Holder' is one of the most important terms of art used in Article Three of the Code."); *see also* Lary Lawrence, *Misconceptions About Article 3 of the Uniform Commercial Code: A Suggested Methodology and Proposed Revisions*, 62 N.C. L. REV. 115, 126 (1983) ("The term 'holder' is one of the most important and basic terms in Article 3.").

III. MODIFYING THE DESCRIPTION OF "NEGOTIATION"

The U.C.C. describes "negotiation" as follows:

> (a) "Negotiation" means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder.
>
> (b) Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone.[64]

Together, the two clauses indicate that a negotiation results when three, and sometimes four, conditions are satisfied. First, possession of the instrument must be transferred. Second, the transferor cannot be the issuer. Third, the transferee must become a holder as a result of the transfer. And fourth, if the instrument is payable to an identified person, the transferor-holder must indorse the instrument. The following hypothetical suggests that the language in clause (a), which creates the second requirement, may pose interpretive problems.

Patient has an upcoming dental appointment and knows the amount of the bill. On the eve of the appointment, she signs the check and completes all parts of it except the payee line, which she leaves blank so the receptionist can complete it as desired. She places the check in her purse, which is stolen just before her appointment. Is Thief a holder?

Thief satisfies the definition of "holder" because he possesses a check that is payable to bearer.[65] Thief also must acquire

---

64. § 3-201. Why are there two provisions? As one text explains,

> Negotiation is both a noun and a verb, an end and the means for accomplishing it. The purpose of 3-201(a) is only to label the process and explain the result of negotiation, which is that the transferee becomes a holder. The process itself—the conduct necessary for this result—is the verb form of negotiation and is explained in 3-201(b).

NICKLES, *supra* note 54, at 158.

65. *See* § 1-201(20); *see also* § 3-109(a)(2) (stating that an instrument is payable to bearer if it "does not state a payee"); § 3-115 cmt. 2 ("Suppose Debtor pays Creditor by giving Creditor a check on which the space for the name of the payee is left

possession by issuance or negotiation to be a holder.[66] Issuance, through its definitional reference to "delivery,"[67] requires a voluntary transfer of possession.[68] Thief stole the check, which prevents delivery, so Thief did not obtain possession by issuance. However, Thief did obtain possession by negotiation—at least under clause (b) of section 3-201. At the time of theft, the check was payable to bearer. Thus, negotiation exists under the last sentence of clause (b) if there is a transfer of possession. Clause (a) indicates that a transfer can be involuntary,[69] so Thief's acquisition—albeit by improper means—constitutes a transfer of possession.[70] For negotiation

---

blank. . . . The check is . . . payable to bearer because it does not state a payee."); WHITE & SUMMERS, *supra* note 30, § 17-3, at 154 ("On occasion, the drawer of a check will intend to make the instrument payable to a particular person but will neglect for some reason to insert that person's name in the blank space. Such an instrument is treated under sections 3-109 and 3-115(b) as payable to bearer . . . .").

A check signed by the drawer and complete but for the amount is not yet a "negotiable instrument." *See* § 3-104(a) (requiring a "fixed amount of money"); § 3-115 cmt. 3 ("In some cases the incomplete instrument does not meet the requirements of Section 3-104. An example is a check with the amount not filled in."). A drawer that delivers such a check to another party may be accused of violating the "clearly stupid" rule of jurisprudence.

66. *See supra* notes 53-54 and accompanying text.

67. § 3-105(a).

68. *See* § 1-201(14).

69. Two of the most important doctrines in Article 3 are the doctrine of negotiation, codified at section 3-201, and the shelter doctrine, found at section 3-203. Both use the term "transfer." Section 3-201 refers to a "transfer of possession," which can be voluntary or involuntary. Section 3-203(b) refers to a "[t]ransfer of an instrument," which requires voluntary movement through the "delivery" reference in section 3-203(a). As one text has observed, "*It is very important to understand that 'transfer of possession' for purposes of 3-201 is not the same as the transfer of an instrument [when 'an instrument is transferred'] for purposes of 3-203.*" NICKLES, *supra* note 54, at 159 (emphasis added). Confusion reigns supreme in the classroom when the overwhelming number of students focus attention on "transfer" and not the prepositional phrase that it precedes (and the accompanying relevance or irrelevance of voluntary movement). This confusion could be greatly mitigated if section 3-201 used a term other than "transfer" (*e.g.*, "change," as in "change in possession").

Perhaps I should be grateful for some confusion. If mere amateurs could navigate safely the statutory waterways of the U.C.C. with confidence and comprehension, then the Dean might force me to teach something else. I fear my options would include two classes that I'm not qualified to teach: *Civil Procedure* (I still cannot determine whether Pennoyer or Neff was the accountant) and *Property* (my therapist traces much of my angst to the incredibly low grade I received on my property exam, despite the fact that I wrote a brilliant essay on restraint against alienation).

70. *See* Hall-Mark Elec. Corp. v. Sims (*In re* Lee), 179 B.R. 149, 161 n.12 (B.A.P. 9th Cir. 1995) ("Delivery is defined as a voluntary transfer of possession, whereas negotiation is the transfer of possession, whether voluntary or involuntary . . . .");

of a check payable to bearer, clause (b) requires nothing more. Therefore, Thief obtained the check by negotiation and is a holder.[71]

That result has to be correct. Thief possesses a check payable to bearer, so he should be a holder. To be a holder, however, Thief must obtain possession by issuance or negotiation. The involuntary movement precludes issuance, but not negotiation. Thus, Thief must have obtained the check by negotiation. Otherwise, we have a party that possesses an instrument payable to bearer who is not a holder. That result is not possible, is it?

Application of clause (a) suggests that Thief may indeed be such an unlucky fellow. Under clause (a), the transfer of posses-

---

CLAYTON P. GILLETTE, ET AL., PAYMENT SYSTEMS AND CREDIT INSTRUMENTS 63 (1996) ("Note, however, that a 'transfer' for purposes of the Code does not require a volitional transfer. See § 3-201(a). Thus, a finder of bearer paper may be a holder."); FRED H. MILLER & ALVIN C. HARRELL, THE LAW OF MODERN PAYMENT SYSTEMS AND NOTES ¶ 3.02[2], at 3-16 n.61 (2d ed. 1992) ("Note the transfer can be involuntary; thus a stolen bearer instrument is negotiated to a thief."); NICKLES, *supra* note 54, at 159 ("[Negotiation] includes an involuntary transfer and any other change of possession. Indeed, how possession is acquired is unimportant, both as to means and motive. It is a transfer of possession when a thief steals an instrument.").

71. As a holder, Thief is a person entitled to enforce the check. *See* § 3-301(i). However, Patient may assert the defense of nonissuance. *See* § 3-105(b) ("An unissued instrument . . . is binding on the maker or drawer, but nonissuance is a defense."). If the defense of nonissuance effectively prevents Thief from successfully enforcing the check against Patient, why do we care if Thief is a holder?

The defense of nonissuance cannot be successfully asserted against a holder in due course. *See* § 3-105 cmt. 2. Thief is not a holder in due course because he did not give value for the instrument or acquire it in good faith. *See* § 3-302(a)(2)(i)-(ii). However, Thief can negotiate the check to a person who may qualify as a holder in due course. *See* GILLETTE, *supra* note 70, at 72-73 ("[The thief of a bearer note] could negotiate the note to a third party, and if that third party qualified as a holder in due course, he or she could enforce it against the maker, notwithstanding nonissuance."); RICHARD E. SPEIDEL, ET AL., PAYMENT SYSTEMS 107 (5th ed. 1993) ("If a thief steals a bearer instrument, parties downstream will be holders and are likely to be holders in due course."). To be a holder in due course, the transferee must be a holder. *See* 3-302(a). To be a holder, Thief's transferee must obtain the check by negotiation. *See* § 3-201 cmt. 1 (indicating that a person becomes a holder by issuance or negotiation). If the check remains payable to bearer, Thief's transfer of possession to the transferee is a negotiation under section 3-201 and the transferee will be a holder (and perhaps a holder in due course). Thief's status as a holder is irrelevant. Thief may nonetheless complete the check in a manner that makes it payable to an identified person. For example, Thief could insert his name on the payee line. A check that identifies Thief as the payee cannot be negotiated without the indorsement of the holder. *See* § 3-201(b). In this instance, negotiation (and, accordingly, the transferee's ability to qualify as a holder in due course) turns on Thief's status as a holder.

sion must be "by a person other than the issuer."[72] This phrase may have two meanings. First, it may mean that the initiator of the transfer cannot be the issuer. If the phrase is read in that manner, the concern is whether Thief is the issuer. Second, it may mean that the party in possession immediately prior to the transfer cannot be the issuer. Under that reading, Patient's status is subject to scrutiny.

If the first interpretation is intended, then Thief becomes a holder by negotiation because he is the initiator but not the issuer. That translation renders the desired result; for that reason alone, it may be preferred. Yet, the phrases "by a person" and "to a person" suggest that the former (who cannot be the issuer) refers to the person who had possession before the transfer, and the latter (who must be a holder) refers to the person who has possession after the transfer. That reading, although plausible, produces an unacceptable result: Thief does not become a holder by negotiation because Patient, the party from whom Thief obtained the check, is the issuer. An additional criticism of the second translation is that the phrases are "by a person" and "to a person," not "*from* a person" or "to *another* person."[73] If the drafters intended the second translation, they would have written the provision in a fashion that better revealed that intent;[74] because they did not do so, the first interpretation must be correct. Perhaps, but criticizing a proposed translation simply because the provision is not written in the best possible manner seems harsh.

If one comes to section 3-201 aware of what the law of negotiable instruments is or should be, then knowing which of two or more interpretations of a selected phrase to adopt becomes an easy task. Nevertheless, for the occasional (or first-time) visitor to Article 3, who reads its passages to discover what the

---

72. § 3-201(a).

73. One author has offered a hybrid of these phrases to describe a negotiation. *See* LARY LAWRENCE, AN INTRODUCTION TO PAYMENT SYSTEMS 57 (1996) ("'Negotiation' is a transfer of possession . . . *by a person* other than the issuer (maker or drawer) *to another person* who thereby becomes its holder.") (emphasis added) (footnote omitted).

74. Montana's version of section 3-201(1) provides an example. *See* MONT. CODE ANN. § 30-3-202(1) (1995) ("'Negotiation' means a transfer of possession, whether voluntary or involuntary, of an instrument to a person who thereby becomes its holder if possession is obtained from a person other than the issuer of the instrument.").

law is, such a task can be quite challenging. For example, even if clause (a) is read in a manner whereby negotiation hinges on Patient's status as issuer, one might logically conclude that negotiation has occurred. Thief did not take the check by issuance,[75] so common sense suggests that, absent issuance, Patient is not an issuer. If Patient is not an issuer, Thief obtained the check by negotiation under clause (a), no matter how one reads "by a person other than the issuer."

Occasionally, however, one must park common sense at the portals of Article 3 before entering its statutory domain.[76] This is one of those occasions. Not surprisingly, "issuer" refers to the maker or drawer of an instrument.[77] The term, however, applies to both issued *and unissued* instruments.[78] Because Patient is the drawer[79] of an unissued instrument,[80] she is the issuer. Therefore, negotiation and, accordingly, Thief's status as a holder, turn on knowing whether Patient or Thief is the subject of the phrase "by a person other than the issuer."

The desired result can be achieved if clause (b) alone is applied to the hypothetical. As clause (a) raises the interpretive dilemma, perhaps it should be deleted in its entirety. However, clause (a) expressly removes a roadblock to negotiation found under pre-revised Article 3 and its predecessor, the Uniform Negotiable Instruments Law ("NIL"). Under both of these statutes, negotiation required "delivery" of the instrument.[81] Delivery would be absent under pre-revised Article 3 because the transfer of possession between Patient and Thief was not voluntary.[82] Delivery would be absent under the NIL because Pa-

---

75. *See supra* notes 67-68 and accompanying text.

76. Near the end of the semester, I usually conduct the following one-question survey in my class: "What resource has helped you most in understanding the provisions of Article 3?" "Common sense" usually finishes a distant fifth. More popular responses are (i) "the outline prepared by the student who received the highest grade last semester," (ii) prayer, (iii) Dionne Warwick's psychic hotline, and (iv) "my good friends Jack Daniels and Jim Beam."

77. *See* § 3-105(c).

78. *See id.*

79. *See* § 3-103(a)(3) (defining "drawer" as "a person who signs or is identified in a draft as a person ordering payment"); § 3-104(f) (indicating that a check, payable on demand and drawn on a bank, is a "draft").

80. *See supra* notes 67-68 and accompanying text.

81. *See* pre-revised § 3-202(1); NIL § 30.

82. Pre-revised Article 3 incorporated the general definition of "delivery" from

tient did not authorize the transfer of possession.[83] Now, however, lack of delivery no longer thwarts negotiation. Instead, negotiation requires a "transfer of possession," which can be voluntary or involuntary.[84] This change is emphasized, and its effect is illustrated, in the Official Comment to section 3-201.

> In defining "negotiation" former Section 3-202(1) used the word "transfer," an undefined term, and "delivery," defined in Section 1-201(14) to mean voluntary change of possession. Instead, subsections (a) and (b) [of revised § 3-201] use the term "transfer of possession" and, subsection (a) states that negotiation can occur by an involuntary transfer of possession. For example, if an instrument is payable to bearer and it is stolen by Thief or is found by Finder, Thief or Finder becomes the holder of the instrument when possession is obtained. In this case there is an involuntary transfer of possession that results in negotiation to Thief or Finder.[85]

The reference to voluntary or involuntary movement in clause (a) is a statutory clarification worth saving in light of the drastic departure from the delivery requirement in the NIL and pre-revised Article 3.[86] This clarification could be easily sev-

---

Article 1. *See* § 3-102(4) and "Definitional Cross Reference" following "Official Comments" to that section; *see* § 1-201(14) (defining "delivery" as a "voluntary transfer of possession").

83. *See* NIL § 191 (defining "delivery" as a "transfer of possession, actual or constructive, from one person to another"); NIL § 16 ("As between immediate parties . . . the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting, or indorsing, as the case may be . . . ."); *see also In re* Andrews' Estate, 64 N.W.2d 261, 266 (Iowa 1954) ("What constitutes delivery of a promissory note by the maker is largely a matter of intention."); Bacal v. National City Bank, 262 N.Y.S. 839 (N.Y. Mun. Ct. 1933) (holding that drawer who mailed to his bank a check payable to cash never "delivered" the check to a thief who pilfered the check from the mail); JAMES M. OGDEN, THE LAW OF NEGOTIABLE INSTRUMENTS § 57, at 107 (5th ed. 1947) ("Delivery means transfer of possession with intent to transfer title . . . .").

84. § 3-201(a).

85. § 3-201 cmt. 1. The hypothetical in the quoted passage does not conclusively establish how the phrase "by a person other than the issuer" is to be interpreted because the hypothetical does not reveal whether the issuer, initial payee, or subsequent party lost the instrument or had it stolen.

86. Although lack of delivery prevented negotiation under prior law, it did not necessarily hinder scholars from persuasively arguing that in some instances a thief who steals an instrument payable to bearer should be a holder. *See, e.g.*, Dugan, *supra* note 43, at 2-5; White, *supra* note 12, at 1316-26. With that in mind, replacing

ered from clause (a) and preserved by adding a new sentence to clause (b). In a similar manner, one could retain the requirement that the new party in possession must be a holder. This cosmetic surgery excises from clause (a) all but the troublesome phrase "by a person other than the issuer." Unless a sound reason can be offered for its continued existence, the clause can be deleted, taking with it the interpretive issues it raises.

By examining what might happen if the phrase were deleted, one can arrive at a possible reason for its inclusion. Absent the troublesome language, the consensual transfer of bearer paper by the maker or drawer to the initial recipient is both an "issue" under section 3-105(a) and a "negotiation" under section 3-201(b). This awkward result exists because "issue" is defined as "the first delivery of an instrument,"[87] but that movement is not excluded from the transfer of possession in the last sentence of section 3-201(b).[88] The phrase "by a person other than the issuer" may have been included in clause (a) for the purpose of clarifying that a person can obtain possession by issuance or negotiation, but not both, at least from the same movement. Because "issuer," however, refers to makers and drawers of issued *and unissued* instruments,[89] the purpose is better achieved (and the interpretive concerns disappear) if clause (a) excludes any transfer that is an issuance under section 3-105(a), rather than any transfer by (or from) an issuer under section 3-105(c).

The foregoing concerns can be addressed—and the desired result of making Thief a holder by negotiation can be achieved—by redrafting clause (a) to read in its entirety as follows:

"delivery" with "transfer of possession" may merely reflect a desire to resolve a statutory dilemma, rather than an intent to change the law.

87. § 3-105(a).

88. The same awkward result, for the identical reason, existed under the NIL and pre-revised Article 3. *See* NIL § 191 (limiting "issue" to the "first delivery"); NIL § 30 (stating that bearer paper is "negotiated by delivery" but not excluding the first delivery); pre-revised § 3-102(1)(a) (limiting "issue" to the "first delivery"); pre-revised § 3-202(1) (stating that bearer paper is "negotiated by delivery" but not excluding the first delivery).

89. *See* § 3-105(c).

> "Negotiation" means a voluntary or involuntary transfer of possession (excluding an issue) of an instrument to a person who thereby becomes its holder.[90]

IV. CLARIFYING WHEN A PERSON CAN ENFORCE THE UNDERLYING OBLIGATION AFTER TAKING AN INSTRUMENT

Playing the piano is one of my favorite pastimes.[91] That probably explains why so many of my classroom hypotheticals involve that musical instrument.[92] Consider the following scenario, which is used to illustrate why limitations placed by section 3-310 on remedies available to a person—who no longer possesses an instrument because it has been lost, stolen, or destroyed—should be revised.

Pianist agrees to buy a Steinway baby grand piano from Dealer and delivers a check for the full purchase price to Dealer on Thursday. Dealer places the check (which is payable to the order of Dealer), unindorsed, in its vault. Thief steals the

---

90. The commentary also should be revised in a manner that removes any suggestion that negotiation must be a post-issuance event. *See* § 3-201 cmt. 1 ("A person can become holder of an instrument when the instrument is issued to that person, or the status of holder can arise as the result of an event that occurs *after issuance*. 'Negotiation' is the term used in Article 3 to describe this *post-issuance* event.") (emphasis added). In the overwhelming majority of cases, the instrument is negotiated after it is issued. The Patient-Thief hypothetical, however, illustrates that an instrument can be negotiated even though it has never been issued. Also, other provisions of Article 3 state that a party can become a holder of an instrument not yet issued. *See* § 3-104(a)(1) (indicating that a negotiable instrument must be "payable to bearer or to order at the time it is issued or first comes into possession of a holder"); § 3-412 (stating that an issuer is obligated, in certain situations, to pay the instrument "according to its terms at the time it was issued, or if not issued, at the time it first came into possession of a holder"); § 3-414(b) (explaining that a drawer is obligated to pay a dishonored and unaccepted draft "according to its terms at the time it was issued or, if not issued, at the time if first came into possession of a holder"). By stating that a person can be a holder of an unissued instrument, and because a person must obtain possession by negotiation or issuance to be a holder, *see supra* notes 53-54, the provisions reveal that negotiation can occur before issuance.

91. And if I don't get tenure, it may be my only source of income (which could be a problem unless I expand my repertoire beyond cartoon theme songs and selections from THE BAPTIST HYMNAL).

92. For example, I tell students in Secured Transactions to assume that a music store retains a security interest in a piano sold on credit. I then ask them to classify the piano in the buyer's hands. Most students correctly choose one of the three possibly correct labels: inventory, equipment, or a consumer good. But at least one aspiring comedian always suggests that the piano is an "instrument."

check from the vault that evening. Dealer discovers the theft on Friday. Dealer's efforts to contact Pianist are unsuccessful until Wednesday. Pianist immediately contacts her bank and places a "stop payment" order on the check. A bank officer calls Pianist two hours later and explains that her "stop payment" order is ineffective because the bank paid the check on Monday when it was presented for payment.[93] When Pianist relays this bad news to Dealer, Dealer threatens to sue her if she fails to deliver a replacement check immediately. Pianist is hesitant to do that for at least two reasons. First, she does not have enough funds in her checking account. Second, she is not too excited about paying twice for one piano.[94] Does Article 3 permit Dealer to sue Pianist either on the stolen check or for failing to honor her payment obligation?

Because the transaction involves an ordinary check, rather than a certified check, cashier's check, or teller's check, Pianist's underlying payment obligation is "suspended" when she delivers the check to Dealer.[95] As long as Pianist's pay-

---

93. *See* § 4-403 (indicating that a stop payment order must be "received at a time and in a manner that affords the bank a reasonable opportunity to act on it before any action by the bank with respect to the item described in Section 4-303"); § 4-303(a)(5) (stating that a reasonable period of time expires no later than "the close of the next banking day after the banking day on which the bank received the check").

94. Even if it is a Steinway.

95. *See* § 3-310(b); *see also* Congress Indus. Inc. v. Federal Life Ins. Co. (Mutual), 560 P.2d 1268, 1270 (Ariz. App. 1977) ("[T]he law is clear that absent a specific agreement to the contrary, issuance and acceptance of an ordinary check in and of itself is only provisional satisfaction of a debt, and the obligation is not fully satisfied until payment on the check is made."); National Bank of Commerce v. Chicago, B. & N. R. Co., 46 N.W. 342, 344 (Minn. 1890) ("Where payment is made by check drawn by a debtor on his banker, this is merely a mode of making a cash payment, and not giving or accepting a security. Such payment is only conditional, or a means of obtaining the money."); pre-revised § 3-802 cmt. 3 ("It is commonly said that a check or other negotiable instrument is 'conditional payment.' By this it is normally meant that taking the instrument is a surrender of the right to sue on the obligation until the instrument is due, but if the instrument is not paid on due presentment the right to sue on the obligation is 'revived.'"); E. ALLAN FARNSWORTH, CASES AND MATERIALS ON NEGOTIABLE INSTRUMENTS 169 (4th ed. 1993) ("Under UCC 3-310(b), a check is ordinarily taken as conditional rather than absolute payment, suspending the obligation rather than discharging it."); ROBERT L. JORDAN & WILLIAM D. WARREN, COMMERCIAL LAW 918 (4th ed. 1997) ("In the hands of the payee the check represents a right to receive money which is a property right of the payee. This property right is provisionally substituted for the right of the payee to enforce the obligation for which the check was received."); LAWRENCE, *supra* note 73, at 207 ("Unless the parties otherwise agree, taking an ordinary instrument for an underlying obligation is treated as

ment obligation remains suspended, Dealer cannot take any action against her to enforce it.[96] Instead, Dealer's cause of action against Pianist is limited to a lawsuit on the check. In order to prevail, Dealer must prove that it is entitled to enforce the check under section 3-301 and, absent possession, the terms of the check.[97]

The obligation remains suspended until the check is certified, paid, or dishonored.[98] The check was never certified.[99] But was it paid? One might argue that the bank paid the check (which would discharge Pianist's payment obligation to the extent of the check)[100] when it withdrew funds from Pianist's account. On the other hand, a check is not "paid" unless the bank made payment to a person entitled to enforce the check.[101] Because the check was payable to the order of Dealer, who had not yet indorsed the check prior to its theft, neither Thief nor any subsequent party could be a person entitled to enforce the check.[102] As Pianist's bank gave value to a person not entitled to enforce the check,[103] the check was not

---

only conditional payment of the obligation."); *cf.* § 2-511(3) ("Subject to the provisions of this Act on the effect of an instrument on an obligation (Section 3-310), payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment.").

96. *See* HAWKLAND & LAWRENCE, *supra* note 54, [Rev] § 3-310:04, at 244.

97. *See* § 3-309(b); *cf.* pre-revised § 3-804 (requiring proof of ownership, facts which prevent production of the instrument, and terms of the instrument).

98. *See* § 3-310(b)(1).

99. The check was not certified because Pianist's bank never agreed, in writing, to pay the check at presentment. *See* § 3-409(a) (defining "acceptance"); § 3-409(d) (defining "certified check").

100. *See* § 3-310(b)(1).

101. *See* § 3-602(a).

102. Pianist's bank did not pay a holder (a person entitled to enforce under section 3-301(i)) because the absence of Dealer's indorsement prevented any subsequent party from possessing an instrument properly identifying that party as the party to be paid. *See* § 1-201(20). Nor did the bank pay a nonholder who enjoyed the rights of a holder (a person entitled to enforce under section 3-301(ii)). The movement of the check from Dealer to Thief was not voluntary, so Dealer's enforcement rights were not transferred to Thief or any subsequent party. *See* § 3-203(a), (b); *see also* § 1-201(14) (defining "delivery"). And finally, since the party who received payment is not alleging that the check was lost, stolen, or misplaced, section 3-301(iii) is inapplicable. *See* § 3-301(iii).

103. Because Pianist's bank paid someone other than a party entitled to enforce the instrument, Dealer may have a conversion claim under section 3-420 against one or more banks, including the depository bank and the payor bank. *See* § 3-420. Dealer may prefer to pursue its possible causes of action against Pianist, rather than one

"paid."[104] Therefore, Pianist's underlying payment obligation has not been discharged.

Absent certification or payment, the obligation remains suspended[105] unless the check was dishonored.[106] At first glance, it does not appear that the bank dishonored the check. The bank did not return the check to the party presenting it for payment, nor did it give timely notice of dishonor to that party.[107] This places Dealer in a quandary. Unless the check is dishonored, Pianist's payment obligation remains suspended and Dealer is left in the unenviable position of attempting to collect on a check that has been stolen. Normally presentment is a necessary predicate for dishonor.[108] But how can Dealer present a check that it does not hold? Fortunately for Dealer, two statutes working together provide relief. First, Dealer may be unable to make presentment with reasonable diligence, in which case presentment is excused.[109] Second, when presentment is excused, dishonor occurs because the check has not been paid.[110] Once dishonor occurs, Pianist's payment obliga-

---

or more banks, especially if it enjoys a favorable relationship with a bank or a bank is located in another jurisdiction. If, however, Thief stole several checks, then Dealer may be inclined to bring a single lawsuit against one depositary bank rather than multiple lawsuits against several drawers or numerous drawee banks. *See* JORDAN & WARREN, *supra* note 95, at 918-19 ("Often a forged indorsement case involves thefts of many checks from one payee by the same thief. Actions against the various drawers of the stolen checks may not be feasible. An action against the person who took the checks from the thief is usually a better remedy.").

104. *See* Arthur G. Murphey, Jr., *Revised Article 3 and Amended Article 4 of the Uniform Commercial Code: Comments on the Changes They Will Make*, 46 ARK. L. REV. 501, 589-90 (1993) ("To label the check as 'not paid' because it is not *properly* paid is a change of terms from former Article 3 which used 'paid' to include improper payment also.").

105. *See* § 3-310 cmt. 4 ("If the payor bank pays a person not entitled to enforce the instrument . . . the suspension of the underlying obligation continues because the check has not been paid."). *See also* Henry J. Bailey, *New 1990 Uniform Commercial Code: Article 3, Negotiable Instruments, and Article 4, Bank Deposits and Collections*, 29 WILLAMETTE L. REV. 409, 472 (1993) ("If the payee's indorsement is forged, a person taking from the forger is not entitled to enforce the instrument. If the payor bank pays on the forged indorsement, the check has not been paid and the suspension of the underlying obligation continues.").

106. *See* § 3-310(b)(1).

107. *See* § 3-502(b)(1).

108. *See* § 3-502(b)(2).

109. *See* § 3-504(a)(i).

110. *See* § 3-502(e); *see also* § 3-310 cmt. 4.

tion is no longer suspended.[111] Instead, Dealer's right to sue Pianist on her payment obligation is "revived."[112]

Once suspension of Pianist's payment obligation is lifted, what remedies are available to Dealer? A lawsuit on the obligation? A lawsuit on the stolen check? Either? Both? Article 3 states that "if the check . . . is dishonored and the obligee of the obligation for which the instrument was taken is the person entitled to enforce the instrument, the obligee may enforce either the instrument or the obligation."[113] As the obligee, Dealer appears to have a choice. Dealer can sue Pianist on either her payment obligation or the check. However, the foregoing provision is expressly subject to section 3-310(b)(4),[114] which states in relevant part:

> If the obligee is the person entitled to enforce the instrument but no longer has possession of it because it was lost, stolen, or destroyed, the obligation may not be enforced to the extent of the amount payable on the instrument, and to that extent the obligee's rights against the obligor are limited to enforcement of the instrument.[115]

---

111. If Dealer is aware that the cancelled check has been returned to Pianist or is in the custody of her bank or a collecting bank, then Dealer may attempt to repossess the check voluntarily or through legal process. *See* LAWRENCE, *supra* note 73, at 220 ("When the person entitled to enforce the instrument knows who has possession of the instrument, he must bring an action against that party to recover the instrument."); DOUGLAS J. WHALEY, PROBLEMS AND MATERIALS ON PAYMENT LAW 189 (3d ed. 1992) ("Since the check is still the property of the payee, he or she can replevy it from its current possessor (probably the drawer, who will have it among his or her cancelled checks) . . . ."); Murphey, *supra* note 104, at 590 (suggesting that section 3-309(a)(iii) permits a payee to bring an action against a drawer for return of a cancelled check). Dealer could then present the check for payment. Dealer's bank may hesitate to attempt to collect a check that bears evidence of previous payment, so Dealer may be forced to present the check, in person, to Pianist's bank. Because the check bears evidence of having been paid, Pianist's bank may refuse to pay the check again. This refusal triggers dishonor, which lifts the suspension of Pianist's payment obligation. Because Dealer can obtain the same result without going through this exercise in futility, it may not attempt to repossess the check. The banks may force Dealer to repossess the check, however, hoping that repossession discourages Dealer from bringing a conversion action under section 3-420 against the banks. *See* § 3-420.

112. *See* MILLER & HARRELL, *supra* note 70, ¶ 7.01[c], at 7-4.

113. § 3-310(b)(3).

114. *See id.* ("Except as provided in paragraph (4) . . . .").

115. § 3-310(b)(4).

Under both quoted provisions, Dealer's rights are predicated on its ability to prove that it is a person entitled to enforce the check. Whether Dealer is such a person turns on knowing what path the check traveled during the collection process. There are at least four possibilities. First, the actual check was presented to Pianist's bank and then returned to Pianist with her monthly bank statement. Second, the actual check was presented to, and is being retained by, Pianist's bank.[116] Third, the actual check was truncated[117] but still exists. And fourth, the actual check was truncated and then destroyed.

Absent possession, Dealer cannot be a holder.[118] Unless the check has been destroyed after truncation, Dealer may be able to repossess the check from Pianist, her bank, or the truncating party through voluntary surrender or legal process.[119] Because Dealer never indorsed the check, neither Thief nor any subsequent party could be a holder of the check, as no one would

---

116. Article 4 permits a bank to provide periodic statements and yet retain the actual checks paid. The statement must provide information sufficient to allow the customer to identify the checks paid. Minimum information includes the check number, amount, and payment date. *See* § 4-406(a).

117. A check is truncated when the physical transportation of the check is stopped (or "truncated") in the check collection process. The actual check is either retained or destroyed after material information on the check has been converted into electronic data. *See* MILLER & HARRELL, *supra* note 70, ¶ 9.03[6], at 9-74. Most often a check is truncated by the drawee bank, but an intermediary bank, the depositary bank, or even the payee, may truncate the check. *See* BARKLEY CLARK & BARBARA CLARK, THE LAW OF BANK DEPOSITS, COLLECTIONS AND CREDIT CARDS ¶ 16.02[1], at 16-3 to 16-4 (rev. ed. 1995). Truncation by a party other than the drawee bank is also known as "electronic presentment" because information from the check, rather than the check itself, is presented electronically to the drawee bank. *See* LAWRENCE, *supra* note 73, at 350-51. Articles 3 and 4 anticipate check truncation. *See* §§ 3-501(b)(1) (authorizing electronic presentment), 4-110 (describing an electronic presentment agreement), 4-209 (imposing a retention warranty), and 4-406(a), (b) (imposing disclosure and retention duties on drawee banks).

A recent article estimates that 19% of all checks routed through the Federal Reserve System (including approximately 450 million checks issued annually by the United States Treasury) are truncated; however, fewer than 10% of all checks written are truncated. *See* Patricia A. Murphy, *Management Strategies: Paper Checks Persist as Electronic Payments Gain*, AM. BANKER, Jan. 6, 1997, at 12A. A recent study suggests that the banking industry could save $850 million annually by instituting electronic check presentment and $600 million annually by truncating paper checks via imaging and electronic check presentment exchanges. *See Digital Checking Promises Savings: Study Shows Banking Industry Could Save $2-3 Billion By Replacing Paper Checks With Electronic Equivalents*, BANK SYSTEMS TECH., May 1, 1997, at 16.

118. *See* § 1-201(20).

119. *See supra* note 111.

take possession by negotiation.[120] Since no party other than Dealer can be a holder of a check made payable to the order of Dealer, no indorsement by Thief or any other party is an effective blank or special indorsement.[121] Therefore, the check remains payable to the order of Dealer, and repossession will make Dealer a holder.[122] As a holder, Dealer is a person entitled to enforce the instrument.[123] If the bank dishonors the check after Dealer attempts to present it for payment, Dealer has the option of suing Pianist on either the payment obligation or the check.[124]

Perhaps Dealer should hope that the check, if truncated, has been destroyed.[125] After the check is destroyed, the only way Dealer can become a person entitled to enforce the check is to invoke section 3-309.[126] That statute requires Dealer to jump

---

120. *See* § 3-201(b) (requiring, as a predicate to negotiation of an instrument payable to an identified person, a holder's indorsement).

121. *See* § 3-205(a)-(b) (stating that special and blank indorsements must be written by holders). An indorsement not made by a holder is an anomalous indorsement. *See* § 3-205(d).

122. *See* § 1-201(20).

123. *See* § 3-301(i).

124. *See* § 3-310(b)(3). Dealer prefers clause (3) over clause (4) because the former provides Dealer with an option. Although the check was stolen, Dealer avoids clause (4) if it regains possession. *See* § 3-310(b)(4) ("If the obligee is the person entitled to enforce the instrument *but no longer has possession of it* . . . .") (emphasis added).

125. If the check has been destroyed, Dealer retains its ability to sue one or more banks for conversion under section 3-420. *See* § 3-420.

126. *See* § 3-301. Some courts have imposed a "clear and convincing evidence" standard on parties attempting to enforce lost, stolen, or destroyed instruments. *See, e.g.*, Crawford v. 733 San Mateo Co., 854 F.2d 1220 (10th Cir. 1988); Buster v. Gale, 866 P.2d 837 (Alaska 1994); Guaranty Bank & Trust Co. v. Dowling, 494 A.2d 1216 (Conn. App. 1985); Castellano v. Bitkower, 346 N.W.2d 249 (Neb. 1984); Lutz v. Gatlin, 590 P.2d 359 (Wash. App. 1979). One court offered the following justification for the heightened scrutiny:

> We believe that the clear and convincing standard adopted by the superior court is the appropriate standard of proof under [pre-revised § 3-804], as it provides the heightened scrutiny that is necessary to ensure that a party claiming to have lost physical control over an instrument was in fact the rightful owner of the instrument. This heightened standard should reduce the instances where multiple parties come forward to claim ownership of a missing note. While the statute envisions such a problem and accordingly provides that a court may require the posting of security to indemnify the defendant against future claimants, the heightened burden of proof serves as an additional safeguard.

Buster, 866 P.2d at 844-45. Pre-revised section 3-804 has been replaced by section 3-309. *See* § 3-309. Query whether a court will impose this higher standard of proof if the instrument is a check, rather than a note, and no one disputes the whereabouts

through four hoops. First, Dealer must have possessed the instrument at some time.[127] Dealer did possess the check from the time Pianist delivered it until it was stolen. Second, Dealer must have been entitled to enforce the check when the theft occurred.[128] Dealer acquired, by issuance,[129] possession of an instrument that at the time of theft remained payable to the order of Dealer. Therefore, Dealer was a holder under section 1-201(20) at the time of theft and, accordingly, was a person entitled to enforce the check under section 3-301(i). Third, Dealer must prove that its loss of possession did not result from a transfer or lawful seizure.[130] The check was stolen, so the loss of possession did not result from a lawful seizure or a transfer.[131] And fourth, Dealer must prove that it cannot repossess the check because it has been destroyed, its location cannot be determined, or it is wrongfully possessed by an unknown person, a person that cannot be located, or a person that is not amenable to service of process.[132] Dealer cannot obtain possession if the check has been destroyed following truncation. Having jumped through all of the hoops of section 3-309, Dealer qualifies as a person entitled to enforce the check. However, without possession of the actual check, Dealer's remedy is limited to suing Pianist on the check.[133]

In summary, if Dealer can repossess the check, it enjoys the right to sue Pianist on either the check or the underlying payment obligation if the bank dishonors the check following presentment. However, if Dealer cannot repossess the check because it has been destroyed following truncation, then Dealer's only remedy is a lawsuit on the check. The question then becomes: Should destruction of a truncated check also destroy Dealer's right to sue Pianist on the underlying obligation?[134]

(or, alternatively, the destruction) of the actual check.

127. *See* § 3-309(a)(i).

128. *See id.*

129. *See* § 3-105(a) (defining "issuance").

130. *See* § 3-309(a)(ii).

131. *See id.* (defining "delivery" as a voluntary movement); § 3-203(a) (indicating that an instrument is transferred when it is "delivered").

132. *See* § 3-309(a)(iii).

133. *See* § 3-310(b)(4).

134. Pre-revised Article 3 did not limit the remedies available to a payee of a lost, stolen, or destroyed instrument. *See* pre-revised § 3-802(1)(b) ("If the instrument is dishonored action may be maintained on either the instrument or the obliga-

The commentary explains why, under section 3-310, Dealer cannot merely disregard the instrument no longer in its possession and elect to sue Pianist on the underlying contract. If Dealer is not so constrained, then Pianist is exposed to the risk that the check, when stolen, was payable to bearer.[135] A check payable to bearer could find its way into the hands of a holder in due course, who might appear on Pianist's doorstep and demand payment from her after Dealer had successfully sued her on the underlying obligation.[136] That risk, however, is nonexistent if the check has completed its journey through the collection process before Dealer commences its lawsuit. If the check has been destroyed, it is impossible for anyone to enforce the check against Pianist after Dealer files its complaint.

A related concern is that Dealer may not be telling the truth. Perhaps Dealer indorsed the check in blank before placing it in the vault. If so, Thief was a holder of a check payable to bearer and a person entitled to enforce the check.[137] In that instance, the check may have been "paid" under section 3-602(a), which would discharge Pianist's payment obligation under section 3-310(b)(1). Alternatively, maybe Thief was one of Dealer's employees. If so, an indorsement by that employee might be an effective indorsement of Dealer.[138] If Dealer's indorsement was effective, then payment probably was made to a person entitled to enforce the check, the check would be "paid" under section 3-602(a), and Pianist's payment obligation would be discharged

---

tion . . . .").

135. *See* § 3-310 cmt. 4; *see also* § 3-309(b) ("The court may not enter judgment in favor of the person seeking enforcement [of a lost, destroyed, or stolen instrument] unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument.").

136. *See* § 3-309 cmt. ("[T]here is substantial risk that a holder in due course may make a demand for payment if the instrument was payable to bearer when it was lost or stolen."). Pianist's defense of previous payment cannot be successfully asserted against a holder in due course. *See* § 3-305(b) (indicating that a holder in due course is subject only to the so-called "real defenses" codified in section 3-305(a)(1)).

137. *See* §§ 1-201(20), 3-301(i).

138. *See* § 3-405(b) ("[I]f an employer entrusted an employee with responsibility with respect to the instrument and the employee . . . makes a fraudulent indorsement of the instrument, the indorsement is effective as the indorsement of the person to whom the instrument is payable if it is made in the name of that person."). Subsection (a) defines "employee," "fraudulent indorsement," and "responsibility." § 3-405(a).

under section 3-310(b)(1). Prudence (and lack of funds) should prompt Pianist to question Dealer's story, so she shares these concerns. But these concerns exist whether Dealer sues her on the check or on the underlying obligation and can be raised and addressed in either lawsuit because the physical check, or a two-sided legible copy[139] produced digitally, from microfiche, or otherwise, can be introduced at trial. Handwriting experts can testify whether Dealer's indorsement is a genuine or forged indorsement or the indorsement of a disgruntled employee. If evidence indicates that the bank paid a person entitled to enforce the check, then the court can enter judgment in favor of Pianist. And if the bank acted improperly, the court can order Pianist to issue a replacement check to Dealer but protect her against double liability by ordering the bank to recredit her account for the amount of the stolen check.[140]

Dealer may prefer bringing an action on the instrument, rather than for breach of contract, for procedural reasons. In a contract action, Dealer's complaint must allege (i) the existence of a contract, (ii) the terms of that contract, (iii) the consideration given by Dealer, (iv) satisfaction by Dealer of all conditions precedent, (v) Pianist's breach, and (vi) damages.[141] If Pianist places any alleged facts in issue, then Dealer bears the burden of proof and persuasion on those facts. If, however, Dealer brings a lawsuit on a check that has been destroyed by

---

139. A party that destroys a check following truncation must maintain the capacity to furnish a legible copy of the check for seven years from the date of receipt. *See* § 4-406(b). A customer has the right to request a legible copy from its bank. *See id.* If the drawee bank did not truncate the check, then the drawee bank can obtain a legible copy from the truncating party in accordance with the truncation agreement between themselves.

140. *See* § 4-401(a) ("A bank may charge against the account of a customer an item that is properly payable from the account . . . ."); § 4-401 cmt. 1 ("An item containing a . . . forged indorsement is not properly payable."). If Pianist's bank is forced to recredit her account, the bank may attempt to recover its loss by suing other parties in the collection process for breaching the presentment warranty of enforcement. *See* §§ 3-417(a)(1), 4-208(a)(1). The defendant in that lawsuit may attempt to recover its loss by initiating a lawsuit against other parties in the collection process, including Thief, for breaching the transfer warranties concerning enforcement and signatures. *See* §§ 3-416(a)(1), (2); §§ 4-207(a)(1), (2). In a perfect world, Thief will bear the loss. If Thief cannot be located, the loss will fall on the party who took the check from Thief. This seems only fair, as that person was in the best position to detect the theft by demanding identification.

141. *See* Stanley V. Kinyon, *Actions on Commercial Paper: Holder's Procedural Advantages Under Article Three*, 65 MICH. L. REV. 1441, 1459 (1967).

the truncating party, Dealer need only prove the terms of the check, Dealer's right to enforce the check, and the validity of Pianist's signature as drawer of the check.[142] Dealer can prove the terms of the check by introducing a legible photocopy of the truncated check.[143] As already illustrated,[144] Dealer can prove enforcement through sections 3-301(iii) and 3-309. Pianist's signature is presumed genuine unless she specifically denies its authenticity.[145] In an action on the check, Dealer need not allege or prove the existence or terms of any underlying contract, the nature (or adequacy) of any consideration given, Dealer's satisfaction of any conditions precedent, or any breach and resulting damages.[146] Instead, those matters become issues Pianist must raise as affirmative defenses.[147]

In many lawsuits on lost, stolen, or destroyed instruments, a court will order the payee to provide "adequate protection" under section 3-309(b).[148] For that reason, Dealer may prefer bringing an action on the underlying obligation rather than the check. In this situation, Dealer's worry is misplaced. A court will order adequate protection only if it is necessary to protect Pianist against any loss that might occur on a claim made by another person entitled to enforce the check.[149] That loss, however, is nonexistent because no other person can come forward with a valid enforcement claim if Dealer proves that the

---

142. *See* §§ 3-308(a), 3-309(b).

143. *See* Crawford v. 733 San Mateo Co., 854 F.2d 1220 (10th Cir. 1988); HAWKLAND & LAWRENCE, *supra* note 54, [Rev] § 3-309:06, at 231-32.

144. *See supra* notes 126-33 and accompanying text.

145. *See* § 3-308(a); *see also* § 1-201(31) (defining "presumption" and "presumed"). The official comment to section 3-308 provides:

> The presumption rests upon the fact that in ordinary experience forged or unauthorized signatures are very uncommon, and normally any evidence is within the control of, or more accessible to, the defendant. The defendant is therefore required to make some sufficient showing of the grounds for the denial before the plaintiff is required to introduce evidence.

§ 3-308 cmt. 1.

146. *See* Kinyon, *supra* note 141, at 1460-61.

147. *See id.*; *see also* § 3-303(b) ("The drawer or maker of an instrument has a *defense* if the instrument is issued without consideration.") (emphasis added).

148. Courts have discretion in fashioning the type and amount of adequate protection. *See* § 3-309 cmt. The protection can take many forms, including a surety bond, a standby letter of credit, or an indemnification agreement. *See* CLARK & CLARK, *supra* note 117, ¶ 2.05, at 2-46.

149. *See* § 3-309(b).

check has been destroyed and introduces into evidence a legible two-sided copy of the instrument that reveals all indorsements.

In short, absent unusual circumstances,[150] Dealer will prefer bringing an action on the check rather than the underlying obligation. But just because a lawsuit on the check may be Dealer's *first* choice does not justify a provision that makes it Dealer's *only* choice. And the concerns that warrant an exclusive remedy are not present when the truncated check has been destroyed. Therefore, the second sentence of section 3-310(b)(4) should be amended to read in its entirety as follows:

> If (i) the obligee is the person entitled to enforce the instrument but no longer has possession of it and (ii) the instrument has not been destroyed by the person making electronic presentment, then the obligation may not be enforced to the extent of the amount payable on the instrument, and to that extent the obligee's rights against the obligor are limited to enforcement of the instrument.

V. REVISING THE TRANSFER WARRANTY OF ENFORCEMENT

In September 1994, I achieved the life-long dream of many Americans: I appeared on *"The Oprah Winfrey Show."* Just kidding.[151] Actually, I bought my first house.[152] As part of

---

150. Dealer might be motivated to bring a cause of action on the underlying obligation if (i) a legible copy of the destroyed check cannot be obtained, (ii) the contract permits Dealer to recover attorney fees and other litigation costs, or (iii) the statute of limitations on the instrument claim has expired but continues to run on the contract claim. The third situation may be the most likely. Dealer must commence its action to enforce the check within three years of dishonor. *See* § 3-118(c). In many jurisdictions, the statute of limitations on a contract claim involving the sale of goods is longer than three years. *See, e.g.*, § 2-725(1) ("An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued."); 3 WILLIAM D. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-725, at 716-18 (1994) (indicating that (i) most states have adopted the 4-year period, (ii) Oklahoma has adopted a 5-year period, and (iii) Mississippi, South Carolina, and Wisconsin have adopted a 6-year period).

151. In fact, I am sufficiently dysfunctional to be a part of the lurid talk show world. Just last month, I declined Jerry Springer's invitation to be part of his show devoted to *"Law Professors Who Teach Uniform Commercial Code Courses (And The Women Who Love Them)."* Honest.

152. And just before the closing, I made the mistake of watching THE MONEY PIT (Universal Pictures 1986). I had nightmares for weeks.

the process, the title company requested that I bring a cashier's check, made payable to its order, to the closing. My bank was happy to issue the requested check to me,[153] and I delivered it to the title company at the appropriate time. Presumably, my bank paid the cashier's check when either the title company or its bank presented the check for payment.

This transaction occurs many times almost every day. First Bank issues a cashier's check payable to the order of Title Company and delivers the check to its customer, Home Buyer. Home Buyer, known as a "remitter" under Article 3,[154] delivers the check to Title Company. Title Company deposits the check into its account at Second Bank. Second Bank presents the check to First Bank for payment, and First Bank then pays the check. Assume, however, that First Bank becomes insolvent between issuance and presentment and, as a result, the check is dishonored. Meanwhile, Second Bank has extended provisional credit to Title Company for the amount of the check, and Title Company has drawn on some of that credit. What rights and remedies are available to Second Bank? Furthermore, if Second Bank can deflect any loss to Title Company, what rights and remedies are available to Title Company? The following analysis reveals that Title Company may have a statutory remedy under section 3-416 that should not exist.

Second Bank may debit Title Company's account for the amount of the check under Article 4, which states:

> If a collecting bank[155] has made provisional settlement with its customer for an item and fails by reason of dishonor, suspension of payments by a bank, or otherwise to

153. For a fee, of course. I would be happy, too, if I could charge a fee for everything I do.

154. *See* § 3-103(a)(11) (defining "remitter" as "a person who purchases an instrument from its issuer if the instrument is payable to an identified person other than the purchaser"). The term was selected "apparently because [the purchaser] typically remits the instrument in payment of an obligation . . . ." Alvin C. Harrell & Fred H. Miller, *The New UCC Articles 3 and 4: Impact on Banking Operations*, 47 CONSUMER FIN. L.Q. REP. 283, 286 (1993).

155. Second Bank falls within the definition of "collecting bank." *See* § 4-105(5) (defining "collecting bank" as "a bank handling an item for collection except the payor bank"). First Bank is the "payor bank." *See* §§ 4-105(3) (defining "payor bank" as "a bank that is the drawee of a draft"), 4-104(a)(7), (8) (defining "draft" and "drawee," respectively).

> receive settlement for the item which is or becomes final, the bank may revoke the settlement given by it, charge back the amount of any credit given for the item to its customer's account, or obtain refund from its customer . . . .[156]

Assuming that Second Bank gave provisional, rather than final, credit to Title Company at the time of deposit,[157] Second Bank may take the action stated because it has failed to receive final payment of the cashier's check for one of the three stated reasons: the check has been dishonored.[158] The statute requires Second Bank to either return the cashier's check to Title Company or, after Second Bank learns of the dishonor, notify Title Company of the problem.[159] If Second Bank fails to take the required action "by its midnight deadline or within a longer reasonable time after it learns the facts," it will be liable for any damages caused by the delay.[160] Nevertheless, a delay does not prevent Second Bank from revoking the settlement,

---

156. § 4-214(a).

157. The statutory presumption is that a collecting bank gives provisional settlement for a check deposited by its customer. *See* § 4-201(a). The contract between a bank and its customer may dictate that settlement for some or all checks (*e.g.*, cashier's checks or checks drawn on the Treasury of the United States) is final at the time of deposit.

158. Second Bank also may argue that First Bank has "suspended payments," especially if the Federal Deposit Insurance Corporation has been appointed as receiver. *See* § 4-104(a)(12) ("'Suspends payments' with respect to a bank means that it has been closed by order of the supervisory authorities, that a public officer has been appointed to take it over, or that it ceases or refuses to make payments in the ordinary course of business."). The statutory phrasing in section 4-214(a) is disjunctive, so Second Bank need only prove one of the three events that permit it to exercise the remedies afforded by the statute.

159. *See* § 4-214(a).

160. *Id.* Second Bank's "midnight deadline" is "midnight on its next banking day following the banking day on which it receives the relevant item or notice or from which the time for taking action commences to run, whichever is later." § 4-104(a)(10); *see also* § 4-104(a)(3) (defining "banking day" as "the part of a day on which a bank is open to the public for carrying on substantially all of its banking functions"); United Bank of Crete-Steger v. Gainer Bank, N.A., 874 F.2d 475 (7th Cir. 1989) (interpreting "banking day"). For example, if Second Bank receives the dishonored check from First Bank on Tuesday morning, then its "midnight deadline" is Wednesday at midnight if both Tuesday and Wednesday are banking days. If Second Bank receives the check on Friday morning, then its "midnight deadline" is Monday at midnight if Friday and Monday are banking days, but Saturday and Sunday are not.

reversing the credit to Title Company's account, or otherwise obtaining a refund from Title Company.[161]

This remedy may be the most attractive to Second Bank. The bank can act unilaterally and is usually made whole. However, the bank may be forced to consider other alternatives for at least three reasons. First, Title Company may have closed the account before Second Bank could debit the account. Second, a debit may result in an overdraft, leaving Second Bank (at least temporarily) with a partial loss. And third, Second Bank may hesitate to pursue any remedy against Title Company if Title Company is one of Second Bank's most valued customers.

Another statutory theory of recovery from Title Company may be available to Second Bank. If Title Company indorsed the check, it must pay the amount due on the check according to the terms of the check at the time of indorsement.[162] That obligation arises once the check is dishonored[163] and is owed to Second Bank if Second Bank is entitled to enforce the check.[164] Title Company deposited the check into its account, so most likely any indorsement it placed on the check was blank, rather than special.[165] Therefore, Second Bank became a holder: a party who, by negotiation,[166] obtained possession of an instrument payable to bearer.[167] Although Second Bank lost that status when it routed the check to First Bank for payment, Second Bank regained that status when First Bank returned the dishonored check to it.[168] As a holder, Second

161. *See* § 4-214(a).

162. *See* § 3-415(a).

163. *See id.* ("[I]f an instrument is dishonored, an indorser is obliged to pay the amount due . . . .").

164. *See id.* ("The obligation of the indorser is owed to a person entitled to enforce the instrument . . . .").

165. Title Company's indorsement, consisting of its name, may have been accompanied by "for deposit only" or some variation of that phrase. Contrary to popular belief, the addition of that phrase does not convert an otherwise blank indorsement into a special indorsement. The indorsement remains blank, but it also becomes restrictive. *See* § 3-205 cmt. 2 ("'For deposit only' followed by the signature of the payee of a check is a restrictive indorsement. It is also a blank indorsement because it does not identify the person to whom the instrument is payable.").

166. *See* § 3-201(b) ("If an instrument is payable to bearer, it may be negotiated by transfer of possession alone.").

167. *See* § 1-201(20).

168. The special indorsement of Second Bank, or any other bank in the collection chain, would not preclude holder status. Once First Bank returns the check to Second

Bank is entitled to enforce the instrument[169] and, accordingly, can attempt to recover the amount of the dishonored cashier's check from Title Company on a theory of indorser liability.[170]

Again, however, Second Bank may hesitate before it initiates litigation against Title Company, especially if Title Company is one of its most important customers. Furthermore, the cause of action only exists if Title Company indorsed the check. It is probable that Title Company indorsed the check, but banks have been known to accept unindorsed checks for deposit.[171] Therefore, recovery against Title Company on a theory of indorser liability may not be an attractive option.

Unfortunately (for Second Bank), Article 3 offers no other possible cause of action. Second Bank cannot sue Title Company for breach of presentment warranty under section 3-417. Clause (a) offers no relief because it applies only to unaccepted drafts,[172] and a cashier's check is accepted at issuance.[173] Furthermore, the warrantor makes the stated warranties to the

---

Bank, Second Bank may cancel its own indorsement and all subsequent indorsements, effectively leaving Title Company's blank indorsement as the last operative indorsement. *See* § 3-207.

169. *See* § 3-301(i).

170. *See* § 3-415(a).

171. Article 4 recognizes this practice. *See* § 4-205(1), cmt.

172. *See* § 3-417(a). The same limitation prevents Second Bank from invoking the presentment warranties codified at section 4-208(a). *See id.* § 4-208(a).

173. *See* Hall-Mark Elec. Corp. v. Sims (*In re* Lee), 108 F.3d 239, 241 n.2 (9th Cir. 1997) ("As the [Bankruptcy Appellate Panel] pointed out, a cashier's check is accepted upon issuance."); Kaufman v. Chase Manhattan Bank, N.A., 370 F. Supp. 276, 278 (S.D.N.Y. 1973) (noting that "the issuance of the cashier's check constitutes an acceptance by the issuing bank"); Godat v. Mercantile Bank, 884 S.W.2d 1, 3 (Mo. Ct. App. 1994) (en banc) ("A cashier's check is accepted by the issuing bank by the mere act of its issuance."); Jane E. Tobin, *The Rights of a Remitter of a Negotiable Instrument*, 8 B.C. INDUS. & COM. L. REV. 260, 261 (1967) ("Technically, [a cashier's check] is a bill of exchange which is accepted at the moment of its issuance . . . .").

The statutory analysis that renders the "acceptance at issuance" conclusion is as follows. The drawer is the party that signs the cashier's check. *See* § 3-103(a)(3). The drawer and drawee of a cashier's check are the same party. *See* § 3-104(g) (defining "cashier's check"). Therefore, the drawer's signature is also the drawee's signature. And the drawee's signature triggers acceptance. *See* § 3-409(a) (indicating that acceptance "may consist of the drawee's signature alone"). What seems to be irrelevant, at least to those disciples of the foregoing analysis, is that the drawer executes the cashier's check in its capacity as drawer, not drawee. Simply because the drawer and the drawee are the same entity does not necessarily mean that any signature made in one capacity should automatically be construed as a signature made in the other capacity.

drawee;[174] First Bank is the drawee, so Second Bank has no standing to invoke clause (a). Nor can Second Bank invoke clause (d). Clause (d) applies to dishonored drafts,[175] such as the cashier's check, but the warranty is made only when the dishonored check has been presented to the drawer or an indorser and payment is received.[176] This check was dishonored, but payment has not yet been made by any party.

Does section 3-416, the transfer warranty section, offer any hope? Probably not. Second Bank can jump over the two procedural hurdles of the section: the movement of the check from Title Company to Second Bank was a "transfer" for which Second Bank received consideration.[177] Therefore, Title Company made the five stated warranties to Second Bank.[178] However, unless Title Company had knowledge, at the time of deposit, that an insolvency proceeding had commenced against First Bank,[179] Title Company did not breach any of the warranties.[180]

---

174. *See* § 3-417(a) (stating that the warranties are made "to the drawee making payment or accepting the draft in good faith"). *See also* § 4-208(a) (similar limitation).

175. *See* § 3-417(d); *see also* § 4-208(d)(i).

176. *See* § 3-417(d); *see also* § 4-208(d) (similar requirement).

177. *See* § 3-416(a) ("A person who transfers an instrument for consideration warrants to the transferee . . . ."); *see also* § 4-207(a) (similar language). The movement of the check from Title Company to Second Bank was a "transfer" as defined at section 3-203(a) for three reasons: (1) the movement was voluntary (and thus a "delivery" under section 1-201(14)); (2) Title Company was not the issuer (a label ascribed by section 3-105(c) to First Bank as the drawer of the check); and (3) Title Company tendered the check to Second Bank so Second Bank could enforce the check against First Bank. Title Company received "consideration" (defined at section 3-303(b) as "any consideration sufficient to support a simple contract") in the form of provisional credit, and Second Bank's agreement to obtain payment of checks deposited by its customers.

178. *See* § 3-416(a) ("A person who transfers . . . warrants to the transferee . . . ."); *see also* § 4-207(a) (similar language).

179. *See* § 3-416(a)(5); *see also* § 1-201(25) (defining "knowledge" as actual, rather than constructive, knowledge); § 1-201(22) (defining "insolvency proceedings" as "any assignment for the benefit of creditors or other proceedings intended to liquidate or rehabilitate the estate of the person involved"); § 4-207(a)(5) (similar warranty as section 3-416(a)(5)).

180. Title Company possessed a check payable to its order which it had obtained by negotiation, so Title Company was a holder and a person entitled to enforce the check under section 3-301(i). Therefore, Title Company did not breach the first transfer warranty. *See* §§ 3-416(a)(1), 4-207(a)(1). Also, all signatures were authentic and authorized, rather than forged, and the instrument was not altered in any manner. *See* §§ 3-416(a)(2), (3); §§ 4-207(a)(2), (3). Nor do the facts suggest that any party had a defense or recoupment claim against Title Company. *See* §§ 3-416(a)(4), 4-207(a)(4).

Perhaps Second Bank should consider possible causes of action under Article 3 against Home Buyer, especially if Title Company is a valued customer of the bank and Home Buyer is not. Unfortunately, Article 3 provides no such action. First Bank made the cashier's check payable to the order of Title Company at issuance, so Home Buyer need not, and most likely did not, indorse the check before delivering it to Title Company.[181] The absence of Home Buyer's indorsement prevents Second Bank from suing Home Buyer for indorser liability under section 3-415. For the same reason, Second Bank cannot argue that Home Buyer breached any transfer warranty. Home Buyer only makes transfer warranties to subsequent transferees, such as Second Bank, if Home Buyer indorsed the instrument.[182] No other theories of recovery against Home Buyer are available to Second Bank under Article 3. Therefore, Second Bank probably will attempt to recoup any loss from its customer, Title Company.

Title Company may recover its loss from the Federal Deposit Insurance Corporation by treating the dishonored cashier's check as an "insured deposit."[183] The check, however, may not be fully insured if its amount exceeds $100,000.[184] Further-

181. Any indorsement by Home Buyer would be an anomalous indorsement under section 3-205(d). *See* § 3-205(d).

182. *See* § 3-416(a); *see also* LAWRENCE, *supra* note 73, at 171 ("Thus, when the transferor does not indorse the instrument, he makes the warranty only to his immediate transferee. If he indorses the instrument, he makes the warranty to all subsequent transferees."); NICKLES, *supra* note 54, at 211 ("A transferor without indorsement warrants only to her immediate transferee. An indorser warrants to her immediate transferee *and every subsequent transferee.*").

Section 4-207(a) does not have a similar limitation. That section imposes transfer warranties only on collecting banks and customers of those collecting banks. *See* § 4-207(a). Title Company, rather than Home Buyer, is the "customer" in the hypothetical. Therefore, Home Buyer did not make the transfer warranties in section 4-207.

183. *See* 12 U.S.C. § 1813(l)(4) (Supp. 1997) (including cashier's checks within the definition of "deposit"); *id.* § 1813(m) (Supp. 1997) (defining "insured deposit" as "the net amount due to any depositor for deposits in an insured depository institution" as determined under applicable statutes); *see also* Metro County Title, Inc. v. FDIC, 13 F.3d 883, 886 n.8 (5th Cir. 1994) (citing 12 U.S.C. § 1813(l) as authority for concluding that "unpaid cashier's checks are considered deposits for purposes of FDIC deposit insurance coverage"); FDIC v. McKnight, 769 F.2d 658, 662 (10th Cir. 1985) ("Therefore, in its capacity as insurer, FDIC was required to pay each of the debts represented by the cashier's checks as insured deposits in accordance with § 1813(l)(4) and 12 C.F.R. § 330.11."), *cert. denied sub nom.*, All Souls Episcopal Church v. FDIC, 475 U.S. 1010 (1986).

184. *See* 12 U.S.C. § 1821(1)(B) (Supp. 1997) (generally limiting a depositor's cover-

more, Title Company's right to any proceeds is subordinate to any remaining claim of Second Bank.[185] Therefore, Title Company may find this remedy inadequate and turn to the U.C.C. for solace.

Two theories of recovery from Home Buyer come to mind immediately: indorser liability and liability for breaching a transfer warranty. However, Home Buyer probably never indorsed the check because it was payable to the order of Title Company. Therefore, indorser liability under section 3-415 is not a viable theory.[186] And if Second Bank could not bring a cause of action against Home Buyer for breach of transfer warranty,[187] then it seems doubtful that Title Company should be able to do so. Perhaps. But it can be done.

For section 3-416 to apply, Title Company must prove that the movement of the check from Home Buyer to Title Company was a "transfer" for "consideration."[188] The movement was a "transfer" as defined in section 3-203(a). Home Buyer, a party other than the issuer,[189] voluntarily tendered the check to Ti-

---

age to $100,000); *see also Metro County Title*, 13 F.3d at 883 (upholding FDIC's payment of $100,000 to holder of three cashier's checks totaling $1,440,000); *McKnight*, 769 F.2d at 661 (concluding that holders of cashier's checks were insured up to $100,000; FDIC's erroneous payments in excess of $100,000 constituted unjust enrichment).

185. *See* § 4-201(a) (indicating that while Title Company may remain the owner of the check, its rights to the proceeds of the check "are subject to rights of a collecting bank, such as those resulting from outstanding advances on the item and rights of recoupment or setoff").

186. *See* § 3-415; *see also* § 3-401(a) (stating that a person is not liable on an instrument unless that person or his authorized agent signs the instrument).

187. *See supra* note 182 and accompanying text.

188. *See* § 3-416(a).

189. One might argue that Home Buyer—as a mere courier or middleman, or perhaps as an agent of First Bank—should be treated as the issuer, which would preclude a "transfer." This argument is without merit for at least three reasons. First, the only "issuer" of a check is the "drawer." *See* § 3-105(c). A "drawer" is "a person who signs or is identified in a draft as a person ordering payment." § 3-103(a)(3). Home Buyer cannot fall within that definition because he neither signed the check nor was identified in the check as a person ordering payment. The check identifies only one person ordering payment: First Bank. Second, the commentary expressly states that the transfer of the check by Home Buyer to Title Company is a negotiation. *See* § 3-201 cmt. 2; *see also* Bailey, *supra* note 105, at 449 ("The bank's delivery to the buyer as remitter is issuance of the check, not negotiation. But delivery by the buyer to the seller-payee is negotiation."). The transferor in a negotiation cannot be an issuer. *See* § 3-201(a). Third, Home Buyer is a remitter, a party that "purchases an instrument *from its issuer*." § 3-103(a)(11) (emphasis added). The italicized lan-

tle Company for the purpose of giving Title Company the right to enforce the check against First Bank. Additionally, Title Company's agreement to provide title insurance to Home Buyer, filing of the appropriate documents in the real property records, and performance of other services constituted "consideration."[190] Therefore, Home Buyer made the five transfer warranties to Title Company.[191]

If Title Company can prove that First Bank was involved in an insolvency proceeding at the time of deposit and Home Buyer had knowledge of the proceeding, then Title Company can establish that Home Buyer breached a transfer warranty.[192] Title Company can rely on objective evidence to establish the commencement date of any insolvency proceeding, but proving that Home Buyer had actual knowledge of that event at the time of deposit may be sufficiently difficult to prompt Title Company to examine the other warranties. The facts do not suggest that Title Company or any other party has a defense or recoupment claim that can be asserted against Home Buyer.[193] Nor does evidence suggest that the instrument has been altered in any manner[194] or that it bears a forged or unauthorized

---

guage indicates that "remitter" and "issuer" are terms that apply to two different persons.

190. *See* § 3-303(b) (defining "consideration").

191. *See* § 3-416(a) ("A person who transfers an instrument for consideration *warrants to the transferee* . . . .") (emphasis added).

192. *See* § 3-416(a)(5); *see also* § 4-207(a)(5) (same warranty). The commentary explains the policy for this warranty: "If insolvency proceedings . . . have been instituted against the party who is expected to pay and the transferor knows it, the concealment of that fact amounts to a fraud upon the transferee, and the warranty against knowledge of such proceedings is provided accordingly." § 3-416 cmt. 4. Transferors also made this warranty under pre-revised Article 3. *See* pre-revised § 3-417(2)(e); *cf.* NIL § 65(4) (imposing on a negotiating party the warranty that "he has no knowledge of any fact which would impair the validity of the instrument or render it valueless").

193. *See* § 3-416(a)(4); *see also* § 4-207(a)(5) (same warranty). "The rationale of [this warranty] is that the transferee does not undertake to buy an instrument that is not enforceable in whole or in part, unless there is a contrary agreement." § 3-416 cmt. 3; *cf.* pre-revised § 3-417(2)(d), (3) (warranting "no defense of any party is good against [the warrantor]," modified by a knowledge qualifier if the warrantor transfers the instrument "without recourse").

194. *See* § 3-416(a)(3); *see also* § 4-207(a)(3) (same warranty); *cf.* pre-revised § 3-417(2)(c) (warranting that "the instrument has not been *materially* altered") (emphasis added).

signature.[195] At this point, traipsing through section 3-416 seems like an exercise in futility to Title Company.

But wait! There's more![196] When Home Buyer delivered the check at the closing, Home Buyer warranted to Title Company that it was a person entitled to enforce the check[197] under section 3-301. Home Buyer possessed a check payable to the order of Title Company, rather than a check payable to bearer or the order of Home Buyer, so Home Buyer was not a holder[198] and not a person entitled to enforce the check under section 3-301(i). Home Buyer was a nonholder who possessed the check, so Home Buyer was a person entitled to enforce the check under section 3-301(ii) if it enjoyed the rights of a holder through section 3-203.[199] Section 3-203(b), which codifies the so-called "shelter doctrine," states that "[t]ransfer of an instrument . . . vests in the transferee any right of the transferor to enforce the instrument . . . ."[200] However, section 3-203(a) indicates that an instrument is not transferred if the instrument is delivered by the issuer.[201] Home Buyer received delivery of the check from First Bank, the issuer. Therefore, the instrument was not transferred, section 3-203 is inapplicable, Home Buyer did not enjoy the rights of a holder,[202] and Home Buyer was not a person entitled to enforce the check under section 3-301(ii). Also, because Home Buyer possessed the check, it was not a person entitled to enforce the check under section 3-301(iii). In

---

195. *See* § 3-416(a)(2); *see also* § 4-207(a)(2) (same warranty); *cf.* pre-revised § 3-417(2)(b) (warranting that "all signatures are genuine or authorized"). The warranties in pre-revised section 3-417(2)(b) and (c) replaced the warranty in section 65(1) of the NIL. *See* NIL § 65(1) (warranting that "the instrument is genuine and in all respects what it purports to be").

196. With apologies to Johnny Olson and other announcers of game show prizes. And Mom said watching too much TV would never pay off.

197. *See* § 3-416(a)(1).

198. *See* § 1-201(20); *see also* § 3-302, cmt. 4 (Case #1) ("[W]hen Buyer took delivery of the [cashier's] check [drawn to the order of Seller as payee] from Bank, Buyer became the owner of the check even though Buyer was not the holder. Buyer was a remitter. . . . At that point, nobody was the holder.").

199. *See* § 3-301 cmt. ("[The phrase 'person entitled to enforce'] also includes a person in possession of an instrument who is not a holder. A nonholder in possession of an instrument includes a person that acquired rights of a holder by subrogation or under Section 3-203(a).").

200. § 3-203(b).

201. *See* § 3-203(a).

202. *But see* Maggs, *supra* note 29, at 647-50 (arguing that a remitter should qualify as a nonholder in possession with the rights of a holder).

summary, Home Buyer was not a person entitled to enforce the cashier's check when Home Buyer delivered it to Title Company.[203] Therefore, Home Buyer breached the transfer warranty in section 3-416(a).[204] As a result, Title Company may be able to recover the amount of the dishonored check from Home Buyer.[205]

Title Company would not have this remedy under the transfer warranty provisions of pre-existing commercial law. Home Buyer did not warrant that it was a person entitled to enforce the check under either the NIL or pre-revised Article 3. Instead, Home Buyer warranted that it had "good title" to the check.[206] Neither the NIL nor pre-revised Article 3 defined "good title."[207] Most commentary and caselaw, however, limited the warranty to the presence and genuineness of all necessary indorsements.[208] Home Buyer would not breach this

---

203. At least one court has held that a remitter is not entitled to enforce a cashier's check. *See* Michaud v. Community Savings Bank, CV 92-0516024S, 1994 WL 146371, at *2 (Conn. Super. Ct. 1994) ("Cocopardi is a remitter and Cocopardi had no right to enforce the instrument as the remitter . . . .").

Although a remitter is not entitled to enforce the check, it should be entitled to a refund from the issuing bank in certain circumstances. For example, Home Buyer may refuse to deliver the cashier's check to Title Company if a last-minute problem prevents a successful closing. If Home Buyer cannot obtain a refund, First Bank receives a windfall: payment from Home Buyer for issuing a check that no one can (or will) enforce. Home Buyer should invoke section 1-103 and argue unjust enrichment. *Cf.* Hall-Mark Elec. Corp. v. Sims, 179 B.R. 149, 159 (B.A.P. 9th Cir. 1995) (noting that an issuing bank would receive a windfall if the purchaser could not obtain a refund for a cashier's check mistakenly made out to the wrong payee), *aff'd*, 108 F.3d 239 (9th Cir. 1997).

204. *See* § 3-416(a).

205. *See* § 3-416(b) (permitting a transferee that takes the instrument in good faith to recover from the warrantor damages "equal to the loss suffered as a result of the breach, but not more than the amount of the instrument plus expenses and loss of interest incurred as a result of the breach.").

206. *See* NIL § 65(2); pre-revised § 3-417(2)(a).

207. The absence of a U.C.C. definition has been noted by more than one court. *See, e.g.*, Fifth Third Bank of Toledo, N.A. v. Dziersk, 12 F.3d 600, 603 (6th Cir. 1993) ("The term 'good title' is not defined directly in the Ohio Revised Code or the Uniform Commercial Code . . . ."); Bagby v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 491 F.2d 192, 199 (8th Cir. 1974) (noting that the U.C.C. does not define "good title"); Sun 'n Sand, Inc. v. United Cal. Bank, 148 Cal. Rptr. 329, 339 (Cal. 1978) (noting that the U.C.C. "fails to define 'good title'"); North Carolina Nat'l Bank v. Hammond, 260 S.E.2d 617, 623 (N.C. 1979) ("The Code is silent as to what 'good title' means . . . ."). At least one scholar believes that the drafters created "unnecessary ambiguity" by adopting the phrase. *See* White, *supra* note 12, at 1330.

208. *See, e.g.*, *Dziersk*, 12 F.3d at 603 ("In determining whether the warranty [of

warranty because no indorsements appeared or were required on the check when Home Buyer delivered it to Title Company since the check was issued payable to the order of Title Company.

Did the drafters intend a different result when they replaced the "good title" warranty with an "enforcement" warranty? Not according to their official commentary, which states:

---

good title] has been broken, the court should ask only whether the paper has all necessary endorsements and whether they are genuine or otherwise effective."); *Bagby*, 491 F.2d at 199 (relying on Official Comment 3 to pre-revised section 3-417 and Official Comment 1 to pre-revised section 4-207 in concluding that "the draftsmen have made it clear that a good title warranty is a warranty of 'the genuineness of indorsements'"); *Hammond*, 260 S.E.2d at 623 ("The weight of authority . . . supports a specialized construction limiting good title to the apparent validity of the chain of indorsements."); *Sun 'n Sand, Inc.*, 148 Cal. Rptr. at 339, 340 (relying on the "weight of authority among cases and commentators" for holding "that the warranty of good title of [pre-revised sections 3-417 and 4-207] involves a very limited inquiry: does the instrument presented contain all necessary indorsements and are such indorsements genuine or otherwise deemed effective?"); 4 HAWKLAND & LAWRENCE, *supra* note 54, § 3-417:06, at 894 (1994) (noting that the good title warranty is breached "where an indorsement in the chain of title is unauthorized [and] where an indorsement necessary to the chain of title is missing"); WHITE & SUMMERS, *supra* note 45, § 15-9, at 772 ("In nine-tenths of the cases that lawyers will see, 'good title' will mean no more than: 'this check bears no forged indorsements.'"); *Whaley*, *supra* note 27, at 59 n.39 (1972) ("The warranty of good title refers only to the validity of the chain of necessary indorsements . . . ."); *id.* at 59-60 (citing Official Comment 3 to pre-revised section 3-417 for the proposition that "a good title warranty is a warranty of the 'genuineness of indorsements'"); *cf.* Birmingham Trust Nat'l Bank v. Central Bank & Trust Co., 275 So.2d 148, 151 (Ala. Civ. App. 1973) (holding that the statutory warranty of good title "codifies the theory of implied warranty of the genuineness of prior endorsements which was the accepted general rule . . . prior to the Uniform Commercial Code"); Aetna Life & Cas. Co. v. Hampton State Bank, 497 S.W.2d 80, 84 (Tex. App. 1973) ("A warranty of title is nothing more than an assurance that no one has better title to the check than the warrantor, and therefore, that no one is in a position to claim title as against the warrantee, as the payee or other owner of a genuine check could do if his endorsement were forged.").

Pre-revised Article 3 codified the warranty of good title in sections 3-417(1)(a) and 3-417(2)(a). The substance of the warranty of good title (but not necessarily the identity of the warrantor and the warrantee) is the same in both provisions. The same is true for the warranty of good title found in pre-revised sections 4-207(1)(a) and 4-207(2)(a). As for the relationship between the pre-revised Article 3 warranties and the pre-revised Article 4 warranties, the commentary states: "Subject to certain exceptions peculiar to the bank collection process and except that they apply only to customers and collecting banks, the warranties . . . [in pre-revised section 4-207] are identical in substance with those provided in [pre-revised section 3-417]." Pre-revised § 4-207 cmt. 1. Therefore, the fact that the sources cited in the previous paragraph do not cite the same statutory provision when discussing the warranty of good title is irrelevant.

> Subsection (a)(1) ["the warrantor is a person entitled to enforce the instrument"] is in effect a warranty that there are no unauthorized or missing indorsements that prevent the transferor from making the transferee a person entitled to enforce the instrument.[209]

Numerous scholars agree.[210] Furthermore, if the essence of the warranty did not change, then neither should the result. In fact, it seems illogical that the drafters consciously created a new term of art, "person entitled to enforce," carefully crafted it in a manner that excludes remitters, and then expected remitters to be liable for breaching a warranty that they cannot make.[211] Nevertheless, the hypothetical illustrates that a court

---

209. § 3-416 cmt. 2; *see also* § 3-417 cmt. 2 ("Subsection (a)(1) [an enforcement warranty made at presentment] in effect is a warranty that there are no unauthorized or missing indorsements.").

210. *See, e.g.*, CLARK & CLARK, *supra* note 117, ¶ 12.04[1][b], at 12-36 ("Although the terminology shifts from 'title' to 'entitlement to enforce the draft,' this change in terminology should have no substantive impact."); HAWKLAND & LAWRENCE, *supra* note 54, [Rev] § 3-416:04, at 458 ("Section 3-416(a)(1) is, in effect, a warranty that there are no unauthorized or missing indorsements that prevent the transferor from making the transferee a person entitled to enforce the instrument."); JORDAN & WARREN, *supra* note 95, at 743 ("The § 3-416(a)(1) warranty, in practice, serves as a warranty that there are no unauthorized or missing indorsements that prevent the transferor from giving to the transferee the right to enforce the instrument."); LAWRENCE, *supra* note 74, at 173 ("A transferor warrants that he is a person entitled to enforce the instrument. This is basically a warranty that there are no unauthorized or missing indorsements that prevent the transferee from becoming a person entitled to enforce the instrument."); MILLER & HARRELL, *supra* note 70, ¶ 7.02, at 7-14 n.65 ("Essentially this is a warranty of good title, that is, no missing or unauthorized indorsements, or that the transfer is otherwise rightful."); WHITE & SUMMERS, *supra* note 30, § 18-7, at 234 ("Section 4-208(a) adds clarity in yet another way. The old Code's section 4-207 contained a warranty that the transferor 'had good title.' But section 4-208(a) now says that the warrantor is 'a person entitled to enforce the draft or authorized to obtain payment or acceptance of the draft on behalf of the person entitled to the draft.' We believe this latter language will be easier to understand, at least once one understands the identity of a 'person entitled to enforce'. In most cases, this warranty really boils down to the statement 'no forged indorsements here.'"); D. Fenton Adams, *Problems With the 1990 Revision of Articles 3 and 4 of the Uniform Commercial Code*, 15 U. ARK. LITTLE ROCK L. J. 665, 688 (1993) (suggesting that replacing "good title" with "enforcement" is "a change of dubious merit" but acknowledging that the enforcement warranty "boils down to one of the genuineness of indorsements").

211. It may appear inconsistent to treat Home Buyer as the owner of the check until the check is delivered to Title Company, *see* 3-201 cmt. 2, yet exclude Home Buyer from the definition of "person entitled to enforce" in section 3-301. What may appear inconsistent, however, is intended. *See* § 3-203 cmt. 1 ("The right to enforce an instrument and ownership of the instrument are two different concepts. . . . More-

could impose liability on Home Buyer and other remitters through methodical statutory analysis. Therefore, to avoid this unintended result, the enforcement warranty in section 3-416(a)(1) should be revised to read in its entirety as follows:

> (1) the warrantor is either a remitter or a person entitled to enforce the instrument[.][212]

VI. CONCLUSION

Professor David Mellinkoff once wrote: "Some day someone will read what you have written, trying to find something wrong with it. This is the special burden of legal writing, and the special incentive to be as precise as you can."[213] My pur-

---

over, a person who has an ownership right in an instrument might not be a person entitled to enforce the instrument."); § 3-301 ("A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument."). It also may appear contradictory to conclude that Home Buyer is not a person entitled to enforce the check under section 3-301, but is a claimant with rights under section 3-312 if the cashier's check is lost, destroyed, or stolen before Home Buyer delivers the check to Title Company. *See* § 3-312(b) (providing a claimant with a claim to the amount of a lost, destroyed, or stolen cashier's check, teller's check, or certified check if "(i) the claimant is the drawer or payee of a certified check or the *remitter* or payee *of a cashier's check* or teller's check") (emphasis added). Again, however, the commentary indicates that the drafters intended different treatment. *See* § 3-312 cmt. 1 ("Moreover, Section 3-309 applies only to a person entitled to enforce the check. It does not apply to a remitter of a cashier's check or teller's check or to the drawer of a certified check. Section 3-312 applies to both."). Because section 3-312 provides only conditional relief and permits the claimant to recover only the amount of the check, rather than the amount paid for it, Home Buyer probably would prefer to be a "person entitled to enforce" rather than a mere "claimant." *See* Maggs, *supra* note 29, at 645-46.

212. The enforcement warranty in sections 3-417(a)(1), 3-417(d)(1), 4-207(a)(1), 4-208(a)(1), and 4-208(d) should be revised in the same or similar manner. In many remitter transactions, the warranties in sections 3-417(a) and 4-208(a) are irrelevant. Those presentment warranties are made only if the instrument presented for payment or acceptance is an "unaccepted draft." Most remitter transactions probably involve a cashier's check. *See* § 3-201 cmt. 2; *Maggs*, *supra* note 29, at 630 ("[N]early all modern remitter cases involve cashier's checks."). A cashier's check becomes an accepted draft when it is issued. *See supra* note 173. A remitter, however, could purchase a teller's check (defined at section 3-104(h)), which is not accepted at issuance. In those situations, the presentment warranties in sections 3-417(a) and 3-208(a) would be triggered.

213. DAVID MELLINKOFF, LEGAL WRITING: SENSE & NONSENSE 15 (1982).

pose in writing this article has not been to "find something wrong" with Article 3 as much as it has been to suggest a few ways in which selected statutory provisions could be more "precise."

Skilled operators probably can successfully maneuver the Article 3 machine through the troublesome areas I have noted and reach the proper result. But many users, whether they be students, lawyers, or judges, are not quite so adept. The introduction to the "owner's manual" states that one of the purposes and policies of the U.C.C. is to clarify the law governing commercial transactions.[214] As the modest repairs will not only further that goal, but also improve the efficiency of the machine and the proficiency of its operators, the team of architects, engineers, and others in charge of the blueprints may find the suggestions helpful.

214. *See* § 1-102(2)(a).