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Although the *Colgate* court was aware of the undesirability of adopting existing stereotypes as standards to be used in the interpretation of Title VII's exception and the necessity of effecting the purpose of Title VII through the elimination of undesirable motives as a basis for establishing a practice which comes within the exception, the court has not effectively implemented these policies. Further consideration must be given to refine its application of these policies.

Commercial Paper: Postal Money Orders Receive Negotiable Equality

Postal money order blanks were stolen from a post office station, validated with an all purpose stamp, forged with the initials of an issuing employee, and presented to defendant bank for payment. The orders were ordinary on their face, and the bank, in good faith, paid the thief and forwarded the orders to the Federal Reserve Bank for reimbursement. The government paid them as a matter of course. Upon discovery of the forgery, the government demanded return of the money paid, which the bank refused. On cross motions for summary judgment,[1] the federal district court *held* that there was no duty of restitution if the bank paid value for orders ordinary on their face and received payment without reason to know of the forgery and lack of authorization. *United States v. First National Bank*, 263 F. Supp. 298 (D. Mass. 1967).

The general rule, originating in equity courts, is that a payor may obtain restitution of money paid another if the payor was deprived of the expected exchange because of his mistake of fact as to some essential element of the contract.[2] An excep-

1. The law determining the rights and obligations of persons dealing with postal money orders is either federal statutory law or federal common law. *See* Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). In United States v. Cambridge Trust Co., Civil No. 60-319-W (D. Mass., March 24, 1961), the court suggested that some of the sources for such judicially fashioned federal common law might include state commercial law, the Negotiable Instruments Law, the Uniform Commercial Code, and the British statutes with respect to bills and notes. *See also* United States v. Cambridge Trust Co., 300 F.2d 76 (1st Cir. 1962).

2. RESTATEMENT OF RESTITUTION § 15 (1937). The policy underlying this position is that where there has been a payment under mistake of fact, it would be inequitable to allow the recipient to retain the benefit of the mistake, thereby unjustly enriching him. *See, e.g.*, Peerless Glass Co. v. Pacific Crockery Co., 121 Cal. 641, 54 P. 101 (1898); Strong v. Lane, 66 Minn. 94, 68 N.W. 765 (1896); Rackemann v. Riverbank Imp. Co., 167 Mass. 1, 44 N.E. 990 (1896).

tion to this doctrine, known as the rule of *Price v. Neal*,[3] is that when the holder of a negotiable instrument receives payment from the drawee on a forged signature of the drawer, he has no duty of restitution if he has paid value and received payment without reason to know of the forgery.[4] The Uniform Commercial Code adopts this exception in section 3-418.[5] Its purpose is to promote free marketability of negotiable commercial paper by according finality to payments made by the drawee where his drawer's signature is forged. Thus, the mercantile transaction is concluded with the surrender of the instrument and no action for recovery of payment based on mistake is allowed.

Prior to 1951, the Postmaster General was authorized by statute to establish a uniform money order system at all suitable post offices.[6] The purpose of this system was to afford the public greater convenience and security in the transfer of money through the mails. In *United States v. Stockgrowers' National Bank*,[7] the court held that money orders were essentially transfers of funds between post office stations, never injected into commercial channels and, therefore, not negotiable instruments. Thus, the government was allowed to recover payments for fraudulently issued money orders on the theory that the money was paid under mistake of fact.[8] A second defense for the government was established in *United States v. Northwestern National Bank & Trust Company*.[9] There the government was permitted to recover payments made on forged instruments on the ground that when the government issued money orders it was exercising a sovereign function rather than engaging in a commercial activity.[10]

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3. 97 Eng. Rep. 871 (K.B. 1762). See note 26 *infra*.
4. RESTATEMENT OF RESTITUTION § 30 (1937); UNIFORM COMMERCIAL CODE § 3-418 [hereinafter cited as U.C.C.].
5. *See* U.C.C. § 3-418, Comment 2.
6. Act of June 8, 1872, ch. 335, § 102, 17 Stat. 297.
7. 30 F. 912 (D. Colo. 1887). There are relatively few decisions considering postal money orders. This paucity probably results from the fact that money orders may not be issued for an amount in excess of $100 and hence, under most circumstances, it is economically prohibitive to bring or defend an action on them. It is only when a substantial number are involved (sixty-three in the instant case) that their legal status is questioned.
8. *See also* Bolognesi v. United States, 189 F. 335 (2d Cir.), *cert. denied*, 223 U.S. 726 (1911); United States v. Northwestern Nat'l Bank & Trust Co., 35 F. Supp. 484 (D. Minn. 1940); Lewin v. United States, 170 F. Supp. 646 (Ct. Cl. 1959); Jaselli v. Riggs Nat'l Bank, 36 App. D.C. 159 (1911).
9. 35 F. Supp. 484 (D. Minn. 1940).
10. *Id.* at 489. The court rejected the applicability of *Price v. Neal*

In 1951 the uniform money order system was changed to permit money orders to be cashed in banks as well as post offices.[11] This change, designed to increase the circulation of postal money orders, increased the similarity between money orders and negotiable instruments.

To be negotiable under the Uniform Commercial Code,[12] an instrument must be an unconditional promise or order[13] to pay a sum certain in money[14] at a determinable time,[15] and comply with the provisions governing negotiability[16] and transferability.[17] While the article governing negotiable instruments applies only to instruments within this definition, it does not preclude similar treatment of nonnegotiable instruments.[18] Moreover, a limited application of the law merchant to instruments not squarely within the language of the U.C.C.[19] is permissible.

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to money orders. It held the doctrine was based on public policy, a policy superseded by a need to protect the government in issuing instruments in connection with the performance of a public duty. The case was criticized on the grounds that it placed an unfair burden on both holders and payors of money orders, 40 MICH. L. REV. 108 (1941). *Contra*, 25 MINN. L. REV. 516 (1941); 14 S. CAL. L. REV. 471 (1941). *See generally* Wachtell, *Sovereign Immunity and Its Application to Commercial Paper*, 6 BROOKLYN L. REV. 1 (1936).

11. 39 U.S.C. § 5101 (1964). 39 CFR § 171.3 (b) (1) (1967) provides that money orders may be cashed at any post office or bank, and presently, 99% of all such orders issued are collected through the Federal Reserve Banks.

12. U.C.C. § 3-104 codifies the criteria which must be met before an instrument may be negotiable within the terms of Article Three. The court in Quality Fin. Co. v. Hurley, 337 Mass. 150, 155, 148 N.E.2d 385, 389 (1958), referred to this section as combining provisions "comparable" to those of the Negotiable Instruments Law all within one section.

13. U.C.C. § 3-105. A postal money order is an unconditional order to pay within the tenor of this section, notwithstanding the limitations imposed by 39 U.S.C. § 5104 (1964). One construction of this section, United States v. Farrington, 172 F. Supp. 797 (D. Mass. 1959), held that if an instrument contains the phrase "subject to" the terms of another document, that such a reference would be fatal to negotiabiltity regardless of the provisions of the other document.

14. U.C.C. §§ 3-106, 3-107, 1-201(24).

15. U.C.C. §§ 3-108, 3-109.

16. U.C.C. §§ 3-202, 3-206.

17. U.C.C. § 3-201.

18. U.C.C. § 3-104, Comment 2, provides that a result similar to negotiability may also be reached with respect to nonnegotiable paper, as through estoppel. *See, e.g.*, Brown v. Scales, 109 Ga. App. 138, 135 S.E.2d 525 (1964).

19. U.C.C. §§ 3-104, 3-805. While postal money orders are not negotiable instruments under the Code, they must be treated as mercantile specialties rather than as simple contracts. *See, e.g.*, United States v. Bank of New York, 219 F. 648 (2d Cir. 1914); President & Directors of Manhattan Co. v. Morgan, 242 N.Y. 38, 150 N.E. 594 (1926).

Money orders are distinguishable from negotiable instruments in that the former are statutorily limited to one endorsement, contrary to the provisions of the Uniform Commercial Code,[20] and are made payable "to" the payee,[21] rather than payable either "to order" or "to bearer."

Yet, while money orders do not possess all the qualities of negotiable instruments,[22] they do have many of the characteristics of, and circulate as freely as, negotiable instruments. Consequently, decisions subsequent to 1951 have tended to erode the earlier rationalizations which permitted the government to recover from holders of unauthorized money orders. In *United States v. Citizens & Southern National Bank*,[23] the court rejected the rationale expressed in *Northwestern* and denied the government recovery because of its negligent supervision of its employees.[24] It also noted that although money orders are technically nonnegotiable, they are widely used in commerial transactions and, therefore, the transferee should be given protection comparable to the endorsee of a negotiable instrument. The court in *United States v. Cambridge Trust Company*[25] continued

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See generally Aigler, *Recognition of New Types of Negotiable Instruments*, 24 COLUM. L. REV. 563 (1924); Goodrich, *Nonnegotiable Bills and Notes*, 5 IOWA L. BULL. 65 (1920).

20. *Compare* U.C.C. § 3-104 *and* § 3-206 *with* 39 U.S.C. § 5104 (1964).

21. U.C.C. § 3-805 provides that an instrument not payable to order or bearer, shall, if it is otherwise negotiable and its terms do not prohibit transfer, be governed by the Code, except that the transferee cannot be a holder in due course. It would seem that the instant court is treating defendant bank as a holder in due course. In Strauss v. State, 113 Ga. App. 90, 147 S.E.2d 367 (1966), the court held that bank money orders which were not payable to order or bearer were not negotiable instruments under the Code, even though their appearance would suggest to the purchaser that they were negotiable.

22. U.C.C. §§ 3-104, 3-206. The Code requires that to be a negotiable instrument, a writing must be an unconditional promise to pay a sum certain. 39 U.S.C. § 5104 (1964) limits negotiation to one endorsement, contrary to the Code policy of unrestricted transferability. *See* Lewin v. United States, 170 F. Supp. 646 (Ct. Cl. 1959). However, 39 U.S.C. § 5104 (1964) is, in fact, merely an explication of commercial reality, since checks, as demand instruments, presume immediate presentment for payment without numerous endorsements or transfers.

23. 144 F. Supp. 601 (S.D. Ga. 1956).

24. In United States v. Northwestern Nat'l Bank & Trust Co., 35 F. Supp. 484, 486 (1940), the court held that negligence would not prejudice the position of the government while engaging in a sovereign function.

25. 300 F.2d 76 (1st Cir. 1962). The court denied the government recovery on an agency basis, another exception to the general rule of restitution for payment by mistake of fact. Under this exception, payment by mistake to a known agent, followed by payment over by the

the erosion of the prior position of nonnegotiability by holding that money orders were neither negotiable nor nonnegotiable, but *sui generis* to commercial paper.

The court in the instant case rejected the defendant's contention that the post-1951 postal money orders were negotiable instruments under the Uniform Commercial Code and that section 3-418 prohibited recovery by the government. Yet it indicated that money orders were so similar to negotiable instruments that nearly all of the policy considerations behind section 3-418 and the rule of *Price v. Neal*[26] were applicable. First, the court noted that bona fide purchasers of money orders, just as holders in due course of negotiable instruments, should be assured that their purchase of the instrument will pass ownership to them.[27] It felt that denial of this protection to money

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agent to its principal, in good faith, and without notice of any adverse claims, does not give rise to liability on the part of the agent. RESTATEMENT (SECOND) OF AGENCY § 339, comment *f*, at 99 (1958); RESTATEMENT OF RESTITUTION § 24 (1937). *See* Hooper v. Robinson, 98 U.S. 528 (1878); United States v. Bethke, 132 F. Supp. 22 (D. Colo. 1955); Insurance Co. of N. America v. Fourth Nat'l Bank, 14 F.2d 131 (N.D. Ga. 1926).

26. 97 Eng. Rep. 871 (K.B. 1762). This rule has been incorporated into U.C.C. § 3-418. Unique to negotiable instruments, it is designed to make payments on an instrument final in favor of a holder in due course, contrary to the normal legal obligation to repay money received through mistake of fact in the simple contract situation. Prior to its codification in the Negotiable Instruments Law, § 62, the rule was already a fundamental principle in the law of negotiable instruments. *See, e.g.*, Bank of United States v. Bank of Georgia, 23 U.S. (10 Wheat.) 333 (1825); First Nat'l Bank v. First Nat'l Bank, 151 Mass. 280, 24 N.E. 44 (1890).

There have been four general theories supporting the proposition that the drawee cannot recover money paid another on a check or other instrument bearing a forged maker's signature: the drawee was negligent in failing to detect the forgery; the drawee is estopped to deny what he has already admitted by paying the item, *i.e.*, the genuineness of his drawer's signature; the consideration of finality of commercial transactions; and there is no superior equity in the drawee which would require shifting the loss. The theory that public policy demands finality of payment in commercial transactions is given the most credence, Dedham Nat'l Bank v. Everett Nat'l Bank, 177 Mass. 392, 59 N.E. 62 (1901), and this is the position adopted by the Uniform Commercial Code. However, Professor Ames argues that there is a lack of superior equity in the claimant who is seeking recovery and that as between two persons of equal equities, there would be no compelling reason to redistribute the loss in any other manner than has already occurred. Ames, *The Doctrine of Price v. Neal*, 4 HARV. L. REV. 297 (1891). *See* KEENER, ON QUASI-CONTRACTS (1893); WOODWARD, THE LAW OF QUASI-CONTRACT § 86 (1913); Aigler, *The Doctrine of Price v. Neal*, 24 MICH. L. REV. 809 (1926); Note, *Current Status of Price v. Neal in New York*, 13 SYRACUSE L. REV. 426 (1962).

27. *See* O'Malley, *Legal Aspects of Postal Money Orders*, 52 CORN.

orders would reduce the market for them and create a reluctance within the banking community to accept them. This would contravene the government's purpose for issuing the orders by detracting from the convenience and security of the public in transferring money through the mails.[28]

Furthermore, the court pointed out that the position of the post office would in no way be prejudiced by the denial of this claim, for it is in a superior position to protect itself against the payment of fraudulent money orders. The Post Office Department could arrange with the Federal Reserve Banks to make only provisional credit to the accounts of the collecting banks until final payment had been authorized through the Audit Division of the Post Office Department, thus eliminating the situation found in the instant case. Hence, the court held that the bank, in receiving payment for the money order, which appeared regular on its face but which in part bore forged authorization, did not become obligated to give restitution to the government if it paid value and received payment without reason to know of the forgery and lack of authorization.

This rule seems desirable, for the government is in the best position to defend itself from payment by mistake. Arguably it is not an "innocent party" if it has failed to take reasonable precautions to avoid such payment. Yet, even if the government is considered an innocent party here, the rule is justified by the desirability of the widest possible distribution of the risk of loss when one of two equally innocent parties must suffer

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L.Q. 357 (1967). This article is the definitive treatment of postal money orders. Professor O'Malley argues that money orders should be treated like negotiable instruments, since the sovereignty and non-negotiability bases on which they were originally distinguished are no longer applicable. In support of this argument, he shows that average annual sales of money orders during the five year period from 1961 to 1965 were 243,553,600, with a value of $4,771,907,270. For fiscal year 1966, the government received over $59 millions in revenues from sales of money orders. During the period 1961 to 1965, 99% of the total number of money orders issued, with 98% of the total value issued, were handled not by post offices, but by commercial banks, paid through the Federal Reserve System. Thus, it is readily apparent that money orders have been injected into the normal bank collection processes, and have become a part of the commercial paper currently in circulation.

28. Extending the finality of payment rule to postal money orders would also increase the transferability, since private parties, protected from forgery loss would be more willing to accept government instruments. *See* United States v. First Nat'l Bank, 131 F.2d 985 (10th Cir. 1942), *cert. denied*, 318 U.S. 774 (1943).

from the wrongful acts of a third.[29] In this instance, the government is in a superior position to bear the risks because of its power to set rates.

Despite the desirability of its application of the commercial paper law to money orders, the court failed to specify the nature of the instrument created. The form of the postal money order does not clarify the matter. One possible construction is to consider the purchaser of a money order a remitter, with the post office issuing the order as both drawer and drawee. Under this analysis, money orders would be analogous to both government checks and bank cashier's checks.[30] It is established that the government when issuing checks drawn on itself is both drawer and drawee, and that when such instruments are presented and accepted for payment, the government cannot recover the amount paid on the instrument under a theory of mistake.[31] Such decisions have rested on the ground that the government is subject to all the laws of commercial transactions governing private citizens.[32] The application of negotiable instrument law to government checks and the judicial recognition given the analogy between these instruments and government money orders[33] support application of negotiable instrument law to government money orders.

Postal money orders may also be viewed as being similar to

29. *See* Note, *Forged Government Checks: Misallocation of Loss by the Federal Common Law*, 66 YALE L.J. 1107 (1957).

30. A cashier's check is the primary obligation of the bank which issues it, and it constitutes a written promise to pay upon demand. A cashier's check is a bill of exchange drawn by a bank on itself, and accepted in advance by the very act of issuance. *In re* Bank of United States, 243 App. Div. 287, 291, 277 N.Y.S. 96, 100 (1935). *See also* U.C.C. § 3-802 (1) (a). If money orders are in fact purchases of drafts by the government drawn on itself, it would be analogous to a purchased cashier's check. Payment of cashier's checks cannot be stopped by the party securing its issuance. *See, e.g.*, Cross v. Exchange Bank Co., 110 Ohio App. 219, 168 N.E.2d 910 (1958); Scott v. Seaboard Sec. Co., 143 Wash. 514, 255 P. 660 (1927).

31. United States v. Guaranty Trust Co., 293 U.S. 340 (1934); Lynch v. United States, 292 U.S. 571 (1934); United States v. National Exch. Bank, 270 U.S. 527 (1926).

32. *See, e.g.*, United States v. National Exch. Bank, 270 U.S. 527 (1926); Cooke v. United States, 91 U.S. 389 (1875). Moreover, any defense which may be asserted against a private party may be raised against the government when the government is a plaintiff. *See, e.g.*, United States v. Norwegian Barque "Thelka," 266 U.S. 328 (1924); *see generally Developments in the Law—Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827 (1957).

33. United States v. Cambridge Trust Co., 300 F.2d 76 (1st Cir. 1962).

personal checks or bank money orders. A check[34] is an order by the drawer drawn on funds on deposit in a bank, directing payment to a person, his order, or the bearer. A postal money order is an order drawn on funds deposited in the post office by the purchaser directing a post office or bank to pay a person. The purchaser may be seen as the drawer and the post office, the drawee, calling on funds deposited with it. The distinction is slight between an order drawn against a specific deposit, and an order in a series of ongoing orders, drawn against a sustained fund of money. The analogy between bank money orders and personal checks has been adopted in recent decisions which have held that the law of negotiable instruments is generally applicable to money orders.[35] Given the qualities of postal money orders, the analogy to checks and bank money orders is persuasive. The only distinctions which can be drawn between bank and postal money orders are the nature of the parties from whom the instruments are procured, the statutory restrictions on endorsement of postal money orders, and the extent of the right to stop payment.[36] None of these distinctions is of paramount significance, and it would be untenable to apply different rules of law to each.

Under either a drawer-drawee or bank money order analogy, the result obtained in the instant case is appropriate. It is desirable both because it will shift the risk of loss from the bona fide purchaser to the issuer of the instruments, who is generally able to spread that risk by adjusting the instrument's

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34. U.C.C. § 3-104(2)(b). A check is, strictly speaking, a negotiable instrument, bill of exchange, drawn on a bank, and payable on demand. Irving Trust Co. v. Leff, 253 N.Y. 359, 362, 171 N.E. 569, 571 (App. Ct. 1930). *See also The Law of Bank Checks—General Principles*, 78 BANK. L.J. 277, 282-313 (1961).

35. *See* Garden Check Cashing Serv., Inc., v. First Nat'l City Bank, 38 Misc. 2d 623, 238 N.Y.S.2d 751 (Civ. Ct. N.Y. City 1963), *rev'd*, 46 Misc.2d 721, 260 N.Y.S.2d 718 (Sup. Ct. 1965), *rev'd*, 25 App. Div.2d 137, 267 N.Y.S.2d 698, *aff'd mem.*, 18 N.Y.2d 941, 223 N.E.2d 566, 277 N.Y.S.2d 141 (1966). *See also* Note, *Personal Money Orders and Tellers Checks: Mavericks Under the UCC*, 67 COLUM. L. REV. 524 (1967).

36. U.C.C. § 4-403. *See, e.g.*, American Defense Soc'y, Inc. v. Sherman Nat'l Bank, 225 N.Y. 506, 122 N.E. 695 (1919).

A limited right to stop payment is, however, available to holders of postal money orders as well. Postal Manual § 171.37 provides that if an order was purchased because of false representations or fraud, or if the payee is conducting a scheme for obtaining money fraudulently through the mails, notification of the post office will permit a stop-payment on the instrument. The Postmaster General, at his own discretion, authorized such a stop-payment in Enterprise Sav. Ass'n v. Zumstein, 67 F. 1000 (6th Cir. 1895).