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David J. Leibson  
*University of Louisville*

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# Handling Re-Presented Checks— Risky Business for Collecting and Payor Banks

BY DAVID J. LEIBSON\*

## INTRODUCTION

In our daily lives we take checks from friends, businesses and even strangers, and deposit them into our own accounts for collection. These checks are usually paid by the bank upon which they are drawn. Occasionally one is dishonored by the payor bank and ultimately returned to our bank which, in turn, sends it back to us. Often when a check is returned, especially if it was dishonored due to insufficient or uncollected funds, our response is to re-present it through the collection process in the hope that the uncollected funds have been collected or the drawer has deposited additional money so that it will be paid upon re-presentation. Sometimes an intermediary collecting bank<sup>1</sup> or our own depository bank<sup>2</sup> re-presents the dishonored item without first returning it to us.<sup>3</sup>

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\* Professor of Law, University of Louisville School of Law; B.A. Vanderbilt, 1966; J.D. University of Louisville, 1969; LL.M. Harvard, 1970. The author expresses his appreciation to his student assistant, Gerald Burns, who aided in the research for this Article.

<sup>1</sup> Uniform Commercial Code § 4-105(c) [hereinafter cited as U.C.C.] defines an intermediary collecting bank as "any bank to which an item is transferred in course of collection except the depository or payor bank." All cites to the U.C.C. will be from the 1978 Official Text.

<sup>2</sup> The "depository bank," is "the first bank to which an item is transferred for collection even though it is also the payor bank." U.C.C. § 4-105(a).

<sup>3</sup> A recent non-scientific survey of several banking institutions in Louisville, Kentucky, revealed a lack of uniformity in the way banks handle dishonored checks. Some automatically re-present checks of fifty dollars or less. Others re-present checks only if they are drawn on themselves. Still others routinely re-present checks of five hundred dollars or less.

It is clear that some banks feel that automatic re-presentation is economically feasible and promotes good customer relations. One bank executive said:

We conducted a survey of re-cleared items of \$200 or less, and we discovered that approximately 75% of such items are paid upon being presented a second time. It is also commonly recognized, at least within the bank's book-keeping department, that customers to whom deposited items are returned unpaid frequently re-deposit the items in hope that they will clear the second time through. Therefore, by re-presenting a check, the bank, in addition to

Absent an agreement with the depositing party,<sup>4</sup> must re-presented items be treated in the same way as those presented for the first time, or may collecting and payor banks<sup>5</sup> handle them differently, taking longer periods of time to ultimately dishonor, return and send notice of dishonor?

Four sections of the Uniform Commercial Code (U.C.C.) are relevant to this question. Section 4-301 prescribes the time limits within which a payor bank must act when a check is presented for payment through the bank collection process.<sup>6</sup> Section 4-302 states the repercussions which follow if the payor bank does not act within the proper time.<sup>7</sup> Section 4-202 defines the obligations of

saving itself considerable expense, is expediting a re-presenting which the depositing customer would likely institute anyway. \*

<sup>4</sup> The bank executive quoted in note 3 *supra* also stated: "We have standing orders from a number of commercial customers to re-clear either all deposited items or those under a certain amount."

<sup>5</sup> " 'Payor bank' means a bank by which an item is payable as drawn or accepted." U.C.C. § 4-105(b).

<sup>6</sup> U.C.C. § 4-301(1) states:

Where an authorized settlement for a demand item (other than a documentary draft) received by a payor bank otherwise than for immediate payment over the counter has been made before midnight of the banking day of receipt the payor bank may revoke the settlement and recover any payment if before it has made final payment (subsection (1) of Section 4-213) and before its midnight deadline it

(a) returns the items; or

(b) sends written notice of dishonor or nonpayment if the item is held for protest or is otherwise unavailable for return.

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

<sup>7</sup> U.C.C. § 4-302 states:

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

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

(b) any other properly payable item unless within the time allowed for acceptance or payment of that item the bank either accepts or pays the item or returns it and accompanying documents.

The Official Comment to § 4-302 states:

a bank when handling an item for collection.<sup>8</sup> Section 4-103 addresses the effect of agreements between parties and the impact of such agreements on the provisions of Article Four.<sup>9</sup> In addition to these sections, section 4-108(1) has relevance to the issues and its impact will also be considered.<sup>10</sup>

Even though all of these sections, and a few others, have been applied by courts confronted with lawsuits involving re-presented items, not one of them specifically mentions re-presentation.<sup>11</sup> This

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Purposes. Under Section 4-301, time limits are prescribed within which a payor bank must take action if it receives an item payable by it. Section 4-302 states the rights of the customer if the payor bank fails to take the action required within the limits prescribed.

<sup>8</sup> U.C.C. § 4-202(1)-(2) state:

- (1) A collecting bank must use ordinary care in
  - (a) presenting an item or sending it for presentment; and
  - (b) sending notice of dishonor or non-payment or returning an item other than a documentary draft to the bank's transferor after learning that the item has not been paid or accepted, as the case may be; and
  - (c) settling for an item when the bank receives final settlement; and
  - (d) making or providing for any necessary protest; and
  - (e) notifying its transferor of any loss or delay in transit within a reasonable time after discovery thereof.

- (2) A collecting bank taking proper action before its midnight deadline following receipt of an item, notice or payment acts seasonably; taking proper action within a reasonably longer time may be seasonable but the bank has the burden of so establishing.

<sup>9</sup> U.C.C. § 4-103(1) states:

The effect of the provisions of this Article may be varied by agreement except that no agreement can disclaim a bank's responsibility for its own lack of good faith or failure to exercise ordinary care or can limit the measure of damages for such lack or failure; but the parties may by agreement determine the standards by which such responsibility is to be measured if such standards are not manifestly unreasonable.

<sup>10</sup> U.C.C. § 4-108(1) states:

Unless otherwise instructed, a collecting bank in a good faith effort to secure payment may, in the case of specific items and with or without the approval of any person involved, waive, modify or extend time limits imposed or permitted by this Act for a period not in excess of an additional banking day without discharge of secondary parties and without liability to its transferor or any prior party.

See text accompanying notes 16-35 *infra* for a discussion of the impact of U.C.C. § 4-108(1) on the re-presentation process.

<sup>11</sup> The absence of express provisions to cover this problem is lamented by Professors Leary & Schmitt in *Some Bad News and Some Good News from Articles Three and Four*, 43 OHIO ST. L.J. 611, 624-32 (1982). Their sympathies clearly lie with the banks, and they give their reasons for treating a re-presented item differently.

There is on the horizon the Uniform New Payments Code (Proposed Draft June 2,

Article will explore re-presentment and delineate the pitfalls that face banks when handling previously dishonored checks.

### I. LIABILITY OF THE COLLECTING BANK

A collecting bank is any bank, including a non-payor depository bank, "handling the item for collection except the payor bank."<sup>12</sup> The collecting bank's obligation when collecting an item is to use ordinary care in presenting the item or sending it for presentment, and to notify its transferor if the item is dishonored.<sup>13</sup> The time component of this obligation is fulfilled if the collecting bank takes proper action within its midnight deadline<sup>14</sup> after receiving the item or notice, but if it does not act within that time it has the burden of proving that its otherwise proper action was timely enough to meet the standard of ordinary care.<sup>15</sup> Section 4-108(1) provides a modest latitude to the midnight deadline restriction. It states that a collecting bank, if not otherwise instructed, "in a good faith effort to secure payment may . . . without the approval of any person involved, waive, modify or extend time limits imposed or permitted by this Act for a period not in excess of an additional banking day . . . without liability to its transferor or any prior party."<sup>16</sup> One may argue that the effect of section 4-108(1) is to

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1983) [hereinafter cited as U.N.P.C.]. This Act is being drafted by a committee of the Permanent Editorial Board of the U.C.C. Its purpose is to amend or replace Articles 3 and 4 of the U.C.C. so as to have a single body of law that governs all noncash payment systems, including electronic funds transfers. In its latest draft, the U.N.P.C. explicitly covers the liability of a payor bank which handles an order which is "resubmitted for payment after once being dishonored and returned," and extends the midnight deadline seven business days. U.N.P.C. § 420(1)(c) (Proposed Draft June 2, 1983); U.N.P.C. § 420 comment 1.

Such a solution will probably make Professors Leary and Schmitt happier than they are now. This writer, as the reader will see, is not convinced that re-presented checks should be treated differently. The U.N.P.C. may not be too bad a solution, however, as it offers only a relatively short extension of the period to avoid liability on the re-presented item by returning it or by sending written notice of dishonor.

<sup>12</sup> U.C.C. § 4-105(d). See note 2 *supra* for the text of 4-105(a), which defines "depository bank." The definition of a depository bank is encompassed by the definition of "collecting bank" so long as the depository bank is not also the payor bank.

<sup>13</sup> U.C.C. § 4-202(1). See note 8 *supra* for the text of U.C.C. § 4-202(1).

<sup>14</sup> See note 6 *supra* for the text of U.C.C. § 4-104(h), which defines the midnight deadline.

<sup>15</sup> See U.C.C. § 4-202(2). For the text of U.C.C. § 4-202(2), see note 8 *supra*.

<sup>16</sup> U.C.C. § 4-108(1). This section only applies to collecting banks and does not give payor banks any latitude to avoid the time limits of §§ 4-301 and 4-302. Arguably, by not

make it impossible for a collecting bank to meet its burden of establishing the exercise of ordinary care when it fails to take proper action within its midnight deadline or the one banking day extended period, if applicable. Official Comment Two to section 4-108 states that "the escape provision should afford a limited degree of flexibility in special cases but should not interfere with the overall requirement and objective of speedy collections."<sup>17</sup> On the other hand, Official Comment Three to 4-202 notes that section 4-202(2) is subject to section 4-108 but does not say that it is limited by section 4-108.<sup>18</sup>

*Clements v. Central Bank of Georgia*<sup>19</sup> considered the impact of section 4-108(1) on the collecting bank's obligation. Clements was the payee of a \$30,000 check which he endorsed to Continental Equity Corporation, of which he was a director.<sup>20</sup> The check was deposited in the corporation's account in Central Bank on September 25, 1978, and that bank sent the check directly to the payor bank "for collection."<sup>21</sup> On September 29 the payor orally informed Central Bank that the check was drawn against uncollected funds and would probably never be paid.<sup>22</sup> The check was not returned to Central Bank because the bank manager of Central Bank told the payor to hold the check in the hope that it later would be covered.<sup>23</sup> The check was not covered, however, and on October 31 Central Bank told the payor to return it.<sup>24</sup> Central received the check on November 3 and on that date sent written notice of dishonor to the endorser, Clements.<sup>25</sup> Subsequently Cen-

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including payor banks, the drafters indicated an intent that § 4-301 and § 4-302 be strictly applied. See text accompanying notes 133 to 140 *infra* for a discussion of the impact of § 4-108(1) on the payor bank's liability.

<sup>17</sup> U.C.C. § 4-108 comment 2.

<sup>18</sup> See U.C.C. § 4-202 comment 3.

<sup>19</sup> 270 S.E.2d 194 (Ga. Ct. App. 1980).

<sup>20</sup> *Id.* at 196.

<sup>21</sup> *Id.* The check was sent to the payor bank directly because on the same day this check was deposited, the collecting bank received notice from the Federal Reserve System that another unrelated check by the same drawer was being returned for lack of funds. *Id.* A note was attached to the \$30,000 check when it was mailed which instructed the payor bank: "Check for collection—Return if not paid in three days." *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 197.

<sup>25</sup> *Id.*

tral filed suit against Clements on his endorser's contract<sup>26</sup> and Clements defended by asserting that the notice of dishonor was not timely, since it was given long after midnight on the day after September 29, the date on which the collecting bank knew that the check would not be paid; and thus, he was discharged from liability.<sup>27</sup> The bank argued that it had exercised ordinary care in collecting the item and cited section 4-202(2) as justifying its decision to allow the payor to retain the check and its failure to give Clements any notice until the check was finally returned.<sup>28</sup> The Georgia Court of Appeals disagreed, and stated that section 4-202:

must still comport with what is required by law, and if it does not then the action is not seasonable. . . . Any other interpretation would render most of Article 3, dealing with the circumstances under which liability or discharge of an indorser is determined, utterly meaningless.

Moreover, within Article 4 itself the provisions of [section 4-108] control the availability of [section 4-202] in these circumstances.<sup>29</sup>

The court also cited section 4-108(1), emphasizing the language of that section which gives leeway of only one additional banking day to try to secure payment.<sup>30</sup> The court held that, if Clements was entitled to notice,<sup>31</sup> the time for notice started running on September 29.<sup>32</sup>

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<sup>26</sup> *Id.* See U.C.C. § 3-414(1) for an explanation of the endorser's contract.

<sup>27</sup> 270 S.E.2d at 197. This defense is predicated upon U.C.C. § 3-502 (1978), which discharges an endorser from liability on the instrument when notice of dishonor is delayed beyond the time when it is due. See *Samples v. Trust Co. of Ga.*, 163 S.E.2d 325 (Ga. Ct. App. 1968).

<sup>28</sup> 270 S.E.2d at 198-99.

<sup>29</sup> *Id.* at 199.

<sup>30</sup> *Id.*

<sup>31</sup> The case was remanded for a determination of whether on the facts notice was excused. *Id.* at 200.

<sup>32</sup> *Id.* at 198. Whether the check was actually dishonored is questionable. U.C.C. § 3-507(1)(a) provides that in the case of a bank collection a check is not dishonored until returned by the payor's midnight deadline. This check was never returned. Thus, final payment may have occurred under U.C.C. §§ 4-213(1)(d) and 4-301(1) since the payor never revoked settlement and returned the check. The court did not discuss these sections but rather relied upon U.C.C. § 3-506(2) which requires a payor bank to make payment before midnight of the day of receipt. In the absence of such payment dishonor occurs. However, § 3-506(2) applies only when a check is presented for immediate payment over the counter.

Although *Clements* did not involve a re-presentation of a dishonored check, the situation is analogous since the collecting bank unilaterally decided not to notify its customer of the payor bank's action and allowed the payor an extended time to pay. The court, by relying on sections 4-202 and 4-108(1), served notice on collecting banks that they should notify their customers of the situation if they are to avoid liability on a dishonored check because of their negligence,<sup>33</sup> or successfully recover from the customer on his endorser's contract,<sup>34</sup> or utilize the section 4-212 right to charge back.<sup>35</sup>

The *Clements* rationale is consistent with that of the Kentucky Court of Appeals in *United Kentucky Bank v. Eagle Machine Co.*<sup>36</sup> The facts of this case represent a classic example of what can happen when a collecting bank does not notify the customer that a check has been dishonored. Tan-Dem Machinery purchased equipment from Eagle Machine Co. for \$85,000 and issued a check for \$30,000 as a down payment.<sup>37</sup> Eagle deposited the check in its account with United Kentucky on March 17, 1980.<sup>38</sup> United sent the check to Continental Illinois Bank and Trust which presented it for payment to the payor bank, First Security Trust of Utah.<sup>39</sup> First Security dishonored the check and notified Continental of the dishonor on March 20.<sup>40</sup> For some reason Continental did not notify United Kentucky of the dishonor until April 2 and did not return the check to United Kentucky until April 8. Upon receiv-

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This was not the case here even though the check was presented directly through the mail in the hope collection would be expedited. Thus, U.C.C. § 4-301 and its deferred posting provisions, not U.C.C. § 3-506(2), was applicable.

*Clements* did not assert payment by the payor bank, and therefore, no dishonor. Probably the court would not have accepted such an argument because of the collecting bank's direction to the payor bank to retain the item. Thus, it probably was best for *Clements* to direct the court's attention to the collecting bank's failure to give notice when it knew there were insufficient funds.

<sup>33</sup> See 270 S.E.2d at 199.

<sup>34</sup> See U.C.C. § 3-414.

<sup>35</sup> See U.C.C. § 4-212.

<sup>36</sup> 644 S.W.2d 649 (Ky. Ct. App. 1983).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* Presumably the check was returned at the same time, although this is not clear. First Security's liability, if any, under U.C.C. §§ 4-301 and 4-302, was not an issue.



ing the check, United Kentucky did not return the check or send any notice of dishonor to its customer. Instead, pursuant to its own regulations, it mailed the check back to Continental.<sup>41</sup> Continental ultimately returned the check to United Kentucky on May 7, and on May 20, sixty-one days after the dishonor and forty-eight days after United Kentucky had notice of the dishonor, United Kentucky notified Eagle of the dishonor.<sup>42</sup>

Eagle alleged that between April 4 and April 30, believing that Tan-Dem's \$30,000 check had cleared, it delivered three truck loads of machinery to Tan-Dem. It stated that had United Kentucky notified it of the dishonor, the machinery would never have been delivered, and thus, due to the bank's failure to exercise ordinary care as required by section 4-202, Eagle suffered loss and was entitled to recover from the bank the amount of the check.<sup>43</sup> The bank asserted that it exercised ordinary care by following its own regulation to which Eagle had agreed by opening a deposit account.<sup>44</sup> The court rejected this argument,<sup>45</sup> stating:

What is urged may be true, but what appellant overlooks is the contention that in spite of its privilege of resubmission of the check it was, nevertheless, negligent in failing to notify its depositor of the dishonor as soon as it gained that knowledge. . . . Eagle made a substantial change of position based upon a misconception occasioned by United's negligence in failing to promptly give notice of the situation.<sup>46</sup>

The court's reasoning is persuasive. U.C.C. section 4-202 makes presentment and sending notice of a dishonor two separate obligations.<sup>47</sup> Therefore, it is proper to distinguish between a bank's

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<sup>41</sup> 644 S.W.2d at 649. Continental evidently did not re-present to First Security, but held the check waiting for United Kentucky to present it a statement of loss.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 650. U.C.C. § 4-103(5) states the appropriate measure of damages. Eagle was either very lucky or very capably represented. United Kentucky received notice of dishonor on April 2 and Eagle did not begin delivering the equipment until April 4, the day after United Kentucky's midnight deadline! Had it delivered the goods earlier its loss probably would not have been caused by United Kentucky and Eagle would have been forced to look to one of the out of state banks, probably Continental Illinois, for redress.

<sup>44</sup> 644 S.W.2d at 650.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> See note 8 *supra* for the text of U.C.C. § 4-202.

right to re-submit a dishonored check and its obligation to notify its customer that a dishonor has occurred. It should not automatically follow that a right to re-present carries with it a right *not* to notify the customer of the dishonor.<sup>48</sup> Bankers may respond that re-presentation is a service to the customer,<sup>49</sup> and if the bank has to give notice of dishonor even if it re-presents, then it might as well send the dishonored check back to the customer along with the notice, thereby placing the burden of re-starting the collection process upon the customer. A bank certainly has a right to do just that, even though it may be costly. Economic infeasibility, however, is no reason to insulate a bank from any loss caused by its failure to give notice. In the absence of a contrary agreement which is clearly understood by the customer, he has a right to expect his bank to provide negative information about deposited checks. It is a normal reaction, if nothing is heard within a week or ten days after deposit, to surmise that a check has been paid<sup>50</sup> and to act accordingly.<sup>51</sup> The collecting bank that does not notify the customer

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<sup>48</sup> This is especially true where the customer does not expressly agree to waive notice of dishonor. In addition, U.C.C. § 4-103, while allowing the effect of the provisions of Article Four to be varied, specifically precludes an agreement which disclaims "a bank's responsibility for its own lack of good faith or failure to exercise ordinary care."

*See also* *Manufacturers Hanover Trust Co. v. Akpan*, 398 N.Y.S.2d 477 (Civ. Ct. 1977) (refused to validate a clause in the deposit contract waiving notice of protest, since to do so would endorse plaintiff's failure to exercise ordinary care).

<sup>49</sup> *See* notes 3-4 *supra*.

<sup>50</sup> This may not be true in the case of a documentary or other draft drawn upon a collecting bank's customer. U.C.C. § 4-501, which states the duty of a bank handling a documentary draft for its customer, is consistent with U.C.C. § 4-202 in requiring "seasonable" notification of nonpayment or nonacceptance. Of course, what is "seasonable" is a question of fact. *See* U.C.C. § 4-202 comment 3. *See also* note 52 *infra* for the text of U.C.C. § 4-104(f), which defines a "documentary draft."

A number of U.C.C. § 4-202 cases have considered whether it is negligent for the collecting bank to fail, within the midnight deadline, to inform prior parties that a non-bank draft has been dishonored. Often it does not, due to an established course of dealing or a custom that such drafts are held until paid or until the collecting bank can no longer reasonably expect payment to be made. *See, e.g.,* *Southern Cotton Oil Co. v. Merchants Nat'l Bank*, 670 F.2d 548 (5th Cir. 1982); *Phelan v. University Nat'l Bank*, 229 N.E.2d 374 (Ill. App. Ct. 1976); *Whitehall Packing Co. v. First Nat'l City Bank*, 390 N.Y.S.2d 189 (App. Div. 1976). *Cf. Marcoux v. Mid-States Livestock, Inc.*, 429 F. Supp. 155 (N.D. Iowa 1977) (collecting bank failed to carry its burden of proving the course of dealing or custom), *petition for cert. dismissed*, 439 U.S. 801 (1978).

<sup>51</sup> I recently asked my students (sixty-six in all) in two U.C.C. classes whether they felt the same is true when a previously dishonored check is re-presented. Fifty answered "yes" and stated that, absent explicit agreement by the customer to the contrary, the same

of a dishonor should be liable for any damages caused, and the reasoning of *United Kentucky Bank v. Eagle Machine Co.* should be followed.

## II. LIABILITY OF THE PAYOR BANK

U.C.C. sections 4-301 and 4-302 obligate the payor bank to act within its midnight deadline in determining whether to pay or dishonor a demand item other than a documentary draft<sup>52</sup> presented for payment through the bank collection process.<sup>53</sup> The payor bank is the crucial bank in the collection process, thus the time for acting is short.

Depository and collecting banks act primarily as conduits. The steps that they take can only indirectly affect the determination of whether or not a check is to be paid, which is the focal point in the check collection process. . . . The role of a payor bank in the collection process, on the other hand, is crucial. It knows whether or not the drawer has funds available to pay the item.<sup>54</sup>

A check is the most common demand item. It is payable on presentation to the payor bank unless a time for payment is specified on the instrument.<sup>55</sup> Whether a re-presented check changes its stripes and is no longer a demand item, or for some other reason is not

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U.C.C. obligations and time limitations should be applied to collecting and payor banks when handling a re-presented check as when handling one for the first time.

I did not reveal my position during the discussion. While it may be argued that law students with some sophistication in the U.C.C. are not "normal" samples, it seems that, if anything, they might be expected to be more sympathetic to the banks since they have studied the bank collection process and might feel that a party who re-presents a check knowing it has already been dishonored is aware of the risk and does not have a right to expect the original rules to apply. Indeed, some students took this position. However, twenty-six of thirty-two who had completed the course in Negotiable Instruments felt the same rules should apply to the re-presented check.

<sup>52</sup> U.C.C. § 4-104(f) (1978) defines "documentary draft" as "any negotiable or non-negotiable draft with accompanying documents, securities or other papers to be delivered against honor of the draft."

<sup>53</sup> See notes 6-7 *supra* for the text of U.C.C. §§ 4-301 and 4-302.

<sup>54</sup> *Rock Island Auction Sales, Inc. v. Empire Packing Co.*, 204 N.E.2d 721, 723 (Ill. 1965). See D. LEIBSON & R. NOWKA, *THE UNIFORM COMMERCIAL CODE OF KENTUCKY* 325-28, 447 (1983).

<sup>55</sup> See U.C.C. § 3-108 (1978), which defines instruments payable on demand as including "those payable at sight or on presentation and those in which no time for payment is stated."

governed by the midnight deadline rule, has been the issue in a number of cases. Two distinct lines have emerged. One, initiated by the Kansas Supreme Court in *Leaderbrand v. Central State Bank*,<sup>56</sup> does not apply the strict time limit to the re-presented check. The other, exemplified by cases such as *Sun River Cattle Co. v. Miners Bank*<sup>57</sup> and *Blake v. Woodford Bank and Trust Co.*,<sup>58</sup> rejects the reasoning of *Leaderbrand*, refuses to distinguish re-presented checks and holds payor banks liable if they do not act within the prescribed time limit.

*Leaderbrand* involved a check which had been dishonored twice due to insufficient funds when presented by the payee for payment over the counter.<sup>59</sup> After the second dishonor the plaintiff deposited the check in his account and his bank mailed it directly to the defendant payor bank "for collection."<sup>60</sup> The check was received by the payor bank on March 21 or 22. Sufficient funds were not deposited by the drawer to cover the check. In addition the drawer stopped payment on the check and returned to the payee the merchandise purchased with the check.<sup>61</sup> The payor bank did not return the check to the plaintiff's bank until April 5, long after the midnight deadline. Plaintiff filed suit alleging that the payor bank, pursuant to U.C.C. section 4-302(a), was accountable for the amount of the check.<sup>62</sup>

The Kansas Supreme Court held for the payor bank for two reasons, one statutory and one equitable. It applied U.C.C. section 3-511(4) which states: "[W]here a draft has been dishonored by nonacceptance a later presentment for payment and any notice of dishonor . . . are excused. . . ."<sup>63</sup> The court realized the weakness of its reliance on this section since the bank had dishonored the check by nonpayment, not nonacceptance.<sup>64</sup> The court admitted that section 3-511(4) speaks of nonacceptance but

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<sup>56</sup> 450 P.2d 1 (Kan. 1969).

<sup>57</sup> 521 P.2d 679 (Mont. 1974).

<sup>58</sup> 555 S.W.2d 589 (Ky. Ct. App. 1977).

<sup>59</sup> 450 P.2d at 3. U.C.C. §§ 4-301 and 4-302 are not applicable to presentations made for payment over the counter. Instead, U.C.C. § 3-506(2) applies.

<sup>60</sup> 450 P.2d at 3.

<sup>61</sup> *Id.* at 4.

<sup>62</sup> *Id.*

<sup>63</sup> U.C.C. § 3-511(4) (1978).

<sup>64</sup> *See* 450 P.2d at 8.

stated: “[W]e think reference to the dishonor of a ‘draft’ ‘by nonacceptance’ would, a fortiori, include the dishonor of a check by nonpayment.”<sup>65</sup> This statement was buttressed by a citation to section 4-301(3)<sup>66</sup> which states that “[u]nless previous notice of dishonor has been sent an item is dishonored at the time when for purposes of dishonor it is returned or notice sent in accordance with this section.” From this the court concluded that a party is entitled to only one notice of dishonor on a given check, and since the plaintiff personally had presented twice and twice the check had been dishonored, he was not entitled to a third notice.<sup>67</sup>

Even though the court went to great lengths to hold for the payor bank under the statute, it also held that the plaintiff was estopped from asserting section 4-302.<sup>68</sup> The court stated:

It is readily apparent the payor bank in the instant case did not align itself with its customer to protect that customer's credit and consciously disregard the duty imposed upon it by the statutory scheme. On the contrary, the payor bank twice dishonored the item in question when it was presented for payment. Notice of dishonor was timely imparted to the appellant in each case because he personally presented the check for payment at the payor bank without negotiating it. At no time did the appellant assume the payor bank had honored the check on the third presentment and that it would be paid, because he knew the check had been twice dishonored and was advised by the Salina bank [the depository bank], through whom the check was presented for collection, that he would not be given immediate credit.<sup>69</sup>

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<sup>65</sup> *Id.* The court then relied on the “presentment” language of § 3-507(1)(a). However, that section is applicable only to a *necessary* or *optional* presentment for acceptance. Presentment of an ordinary check for acceptance is neither necessary nor optional under U.C.C. § 3-501(1)(a), and the failure of a bank to accept (certify) an ordinary check does not amount to dishonor under § 3-507(1)(a).

<sup>66</sup> 450 P.2d at 9.

<sup>67</sup> *Id.* at 8-9. For a discussion of the propriety of the court's reliance on U.C.C. § 3-511(4) see text accompanying notes 72-82 *infra*. The problem with the court's reliance on U.C.C. § 4-301(3) is that the previous presentments were not subject to U.C.C. § 4-301, and therefore, the dishonors and notices were not made in accordance with that section. See note 59 *supra*. Thus, in reaching its decision, the court used two sections which did not explicitly apply to the facts.

<sup>68</sup> 450 P.2d at 9.

<sup>69</sup> *Id.* at 8.

At first glance it may seem Leaderbrand deserved little sympathy. He was not in the same position as one collecting a check for the first time. Twice before the check had been dishonored, so he might have expected that it would bounce again. This was reinforced by his own bank's refusal to grant him immediate credit when he finally deposited the check, a fact "which inferentially discloses that the Salina bank had notice of the previous dishonor."<sup>70</sup> However, all of this knowledge should still not deprive Leaderbrand of the right to know promptly what happened to the re-presented check. Is the customer in a re-presentation situation obligated to call the depository or payor bank and ask whether the check was paid, or is he entitled to believe that "no news is good news" and rely on the bank following the statutory mandate? The latter seems more appropriate and more in line with the customer's expectations. In light of the purpose of section 4-302, courts should apply an equitable defense only in extraordinary situations.<sup>71</sup>

Although two cases have favorably cited *Leaderbrand's* application of section 3-511(4) to a check re-presented for payment,<sup>72</sup> reliance on that section simply cannot be justified. By its language, section 3-511(4) applies only when there has been nonacceptance.<sup>73</sup> Its primary application is to time drafts<sup>74</sup> on which the holder unsuccessfully attempts to procure acceptance.<sup>75</sup> Such an application

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<sup>70</sup> *Id.* The Salina bank may not have had notice of previous dishonor. It is possible that the policy of the depository bank was not to allow withdrawal against any uncollected funds. See Duerr, *Check Floating Isn't a Big Draw, Local Banks Say*, The Louisville Times, Sept. 28, 1983, at 1, col. 5.

<sup>71</sup> As noted, the drawer stopped payment on this check and returned the merchandise to the plaintiff. 450 P.2d at 3. If the merchandise had been defective or the drawer had a contractual right to return the merchandise without liability, then a situation ripe for an equitable remedy would arise. Under such circumstances, Leaderbrand would have been unjustly enriched if allowed to recover.

<sup>72</sup> See *Whalen & Sons Grain Co. v. Missouri Delta Bank*, 496 F. Supp. 211, 214 n.2 (E.D. Mo. 1980); *Goodman v. Norman Bank of Commerce*, 551 P.2d 661, 662-63 (Okla. Ct. App. 1976).

<sup>73</sup> U.C.C. § 3-511(4) provides: "Where a draft has been dishonored by nonacceptance a later presentment for payment and any notice of dishonor and protest for nonpayment are excused unless in the meantime the instrument has been accepted." (emphasis added).

<sup>74</sup> A "time draft" is an "order to pay a sum certain in money . . . at a definite time." U.C.C. § 3-104(1)(b)-(c), (2)(a).

<sup>75</sup> See *Wiley, Tate & Irby v. Peoples Bank & Trust*, 438 F.2d 513, 516-17 (5th Cir. 1971) (holding that 3-511(4) is not applicable to demand items), *aff'd per curiam*, 462 F.2d

is consistent with sections 3-501(1)(a) and 3-507(1)(a). Section 3-501(1)(a) allows the holder of a time draft the option of presenting it for acceptance.<sup>76</sup> Section 3-507(1)(a) states that if such acceptance is sought but not obtained from the drawee, a dishonor occurs.<sup>77</sup> A cause of action then accrues against the drawer of the draft without a further presentment for payment.<sup>78</sup>

The *Leaderbrand* analysis of section 3-511(4) has been criticized not only by courts which have refused to protect payor banks in re-presentment situations,<sup>79</sup> but also by one court which insulated the payor bank from section 4-302<sup>80</sup> liability. In *David Graubart, Inc. v. Bank Leumi Trust Co. of New York*,<sup>81</sup> the New York Court of Appeals rejected the *Leaderbrand* analysis of section 3-511(4) for the reasons previously discussed.<sup>82</sup> However, the court in

179 (1972); B. CLARK & A. SQUILLANTE, *THE LAW OF BANK DEPOSITS, COLLECTIONS AND CREDIT CARDS* 71-72 (1970).

<sup>76</sup> U.C.C. § 3-501(1)(a) provides:

(1) Unless excused (Section 3-511) presentment is necessary to change secondary parties as follows:

(a) presentment for acceptance is necessary to charge the drawer and indorsers of a draft where the draft so provides, or is payable elsewhere than at the residence or place of business of the drawee, or its date of payment depends upon such presentment. *The holder may at his option present for acceptance any other draft payable at a stated date.*

(emphasis added).

See also U.C.C. § 3-501 comment 3, which states that a "holder may at his option present any time draft for acceptance." No similar right obtains for a demand draft, which entitles the holder to immediate payment but not to acceptance.

<sup>77</sup> U.C.C. § 3-507(1)(a) provides: "An instrument is dishonored when . . . a necessary or optional presentment is duly made and due acceptance or payment is refused or cannot be obtained within the prescribed time or in case of bank collections the instrument is seasonably returned by the midnight deadline (section 4-301)."

<sup>78</sup> U.C.C. § 3-122(3) provides: "A cause of action against a drawer of a draft . . . accrues upon demand following dishonor of the instrument. Notice of dishonor is a demand." This cause of action accrues against the drawer "in conformity with [the drawer's] underlying contract on the instrument." U.C.C. § 3-122 comment 1.

The drawer's contract is set forth in § 3-413(2): "The drawer engages that upon dishonor of the draft and any necessary notice of dishonor or protest he will pay the amount of the draft to the holder or to any indorser who takes it up."

<sup>79</sup> See text accompanying notes 112-21 *infra*.

<sup>80</sup> See note 7 *supra* for the text of U.C.C. § 4-302.

<sup>81</sup> 399 N.E.2d 930 (N.Y. 1979).

<sup>82</sup> See text accompanying notes 72-78 *supra*. The court in *Graubart* stated: [W]e conclude . . . that [the payor's] reliance on [*Leaderbrand*] . . . is unavailing. The [*Leaderbrand*] court reasoned that [§ 3-511(4)], in excusing further notice of dishonor with respect to "drafts" once dishonored by "nonaccept-

*Graubart* held for the payor bank because it found that the bank had held the previously dishonored check beyond the midnight deadline pursuant to a practice and custom among banks to hold such a check longer in the hope that sufficient funds will later be deposited by the drawer.<sup>83</sup> The court found that the payee agreed to the practice since its agent, the depository bank,<sup>84</sup> authorized the payor bank to follow the customary procedure by attaching an “advice to customer” slip to the re-presented check.<sup>85</sup> According to the testimony of Bank Leumi officials, this slip constituted a memorandum of an agreement “requiring it” to follow the banking practice of holding the re-presented check “for such time as is reasonable under all the circumstances, even beyond the midnight deadline if necessary, to enable funds from which to pay them to come into the account.”<sup>86</sup> Graubart received a copy of the “advice to customer” slip and made no objection.<sup>87</sup>

The court concluded that the suspension of the midnight deadline was fair and reasonable in light of the practicalities:

[T]he concept of a midnight deadline is not compatible with any approach under which the payor bank seeks to wait for the deposit of funds in the drawer’s account. The reasonableness of such a banking custom must, therefore, be measured on its own terms. We conclude that this criterion is met when a depository bank takes a possibly worthless instrument and directs the payor bank to adopt a technique that may provide the only chance for collection. . . .

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ance,” necessarily encompassed dishonor of “checks” by “nonpayment.” But, while a check is a kind of draft . . . “nonpayment” and “nonacceptance” are distinctly different concepts, the latter referring specifically to a payor’s refusal to certify that it will honor a *time* instrument when later presented for payment. . . . Since it would be futile to present for payment a draft that has been dishonored by nonacceptance . . . such presentment and further notice are excused as superfluous. In contrast, a *demand* item such as a check may eventually be paid if resubmitted at a time when the drawer’s account has an adequate balance. This possibility makes it entirely reasonable to afford redeposited checks the full panoply of article 4 protections.

399 N.E.2d at 933 (emphasis in original).

<sup>83</sup> 399 N.E.2d at 935-36.

<sup>84</sup> U.C.C. § 4-201(1) makes the depository bank the customer’s agent when the bank is collecting an item. See U.C.C. § 4-201(1) comment 4.

<sup>85</sup> 399 N.E.2d at 933.

<sup>86</sup> *Id.* at 932.

<sup>87</sup> *Id.* at 934.



There is nothing unfair about this procedure. It is calculated to produce satisfied obligations in many instances where legal recourse, with all its attendant expense, inconvenience and uncertainty, would otherwise be necessary. Furthermore, the payee here cannot claim it was injured by its reliance on the payor bank's silence after receipt of the item; the prior dishonor provided adequate warning of the questionable safety of the instrument. In any event, the payee's right to sue the drawer on the underlying obligation was revived upon the first dishonor, and representment in no way cut short that prerogative. . . .<sup>88</sup>

The court's reliance on agency principles is tenuous. In the context of any such custom it is improper to consider the payee's bank to be solely an agent-depositary bank. In the scheme of the bank collection process a bank is sometimes a depositary bank, sometimes an intermediary bank and sometimes the payor bank. Thus, a bank has every reason to further such a custom, because on many occasions it will benefit.

The payee can also benefit by allowing the payor to retain a re-presented check for a longer time, because if payment is eventually made the payee does not have to resort to other costly, time consuming remedies against the drawer.<sup>89</sup> *The same thing is true when a check is presented for the first time.* It is also true that the longer a check is held without payment the slimmer the chances of ultimate recovery from the drawer. The very fact that the check was once dishonored and is thus of "questionable safety" is a factor that mitigates against allowing the payor bank to treat a re-presented check differently from any other. The payee who represents a check normally does so with the expectation that sufficient funds will be in the drawer's account by the time the check returns to the payor. He suspects the check was dishonored because of an honest mistake or tardiness on the part of the drawer. If no word is received within a normal time, the payee may justifiably believe that the re-presented check cleared. In the absence of a bargained for agreement by the payee,<sup>90</sup> the payor bank should not

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<sup>88</sup> *Id.* at 935-36.

<sup>89</sup> A payee can bring a cause of action against the drawer based on the drawer's contract found in U.C.C. § 3-413(2). In addition, he may sue the drawer on the underlying obligation for which the check was issued. U.C.C. § 3-802(1)(b).

<sup>90</sup> A simple failure to react to an "advice to customer" slip should not amount to

be allowed to hold the re-presented check beyond its midnight deadline.<sup>91</sup>

The most recent case holding for the payor bank is *Idaho Forest Industries v. Minden Exchange Bank & Trust Co.*<sup>92</sup> Like *Graubart*, this case involved a re-presentation accompanied by instructions from the depository bank to the payor bank to hold the checks for ten days if necessary to collect payment.<sup>93</sup> Also, as in *Graubart*, the depository bank mailed the check directly to the payor bank "for collection,"<sup>94</sup> thus bypassing the normal clearing house route.<sup>95</sup> The payor bank in *Idaho Forest Industries* did not pay or dishonor the checks in question within the ten day period. Instead it held them *for more than two months*, finally returning them when the depository bank instructed the payor bank either to pay or return them.<sup>96</sup> Nonetheless, the payor bank was

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such an agreement. U.C.C. § 1-201(3) defines "agreement" as the "bargain of the parties" and may include reference to a usage of the trade. The average depositor, however, upon receiving a copy of an "advice to customer" slip sent by his bank, can hardly be expected to react in any meaningful way or to negotiate to avoid its use. Most customers are not likely to challenge bank practices because they are not likely to understand the potential hazards the bank practices may hold for them. Therefore, unless they agree in an informed way, customers should not be bound by such practices.

There is some reason to believe that the court in *Graubart* did not consider the payee to be an uninformed party. Not only did the payee receive the "advice to customer" slip, it also submitted it into evidence! This fact, according to the court, "confirmed that the agreement had been made in contemplation of the custom." 399 N.E.2d at 933.

<sup>91</sup> The U.N.P.C. does not take this position. See note 11 *supra*. The drafters of the U.N.P.C. have noted that its treatment of the re-presented order is in line with the practice sanctioned by *Graubart*. See U.N.P.C. § 420 comment 1.

<sup>92</sup> 326 N.W.2d 176 (Neb. 1982).

<sup>93</sup> *Id.* at 177.

<sup>94</sup> *Id.* Leary and Schmitt say that bankers often consider items sent directly to the payor as "collection items" rather than "cash items." See Leary & Schmitt, *supra* note 11, at 630-31. "Conceivably a court could look at the sending channel used for second presentment and find some estoppel as a basis to assert the non-applicability of the 'whether properly payable or not' penalty of section 4-302(a) when the collection item channel was used." *Id.* at 631.

Presumably estoppel would be based on the banking community's traditional treatment of items sent directly to the payor as collection items. But to impose an estoppel upon a customer who is unsophisticated in banking practices simply because his bank considers such an item "non-cash" seems harsh and inequitable.

<sup>95</sup> Direct presentment is acceptable even when presentment for payment is made for the first time. See U.C.C. § 4-204(2)(a) ("A collecting bank may send . . . any item direct to the payor bank . . ."). See also U.C.C. § 4-204 comment 2 (noting that subsection (2)(a) codifies the widespread practice of direct mail or like presentment to payor banks).

<sup>96</sup> 326 N.W.2d at 177.

absolved of liability under section 4-302.<sup>97</sup>

The court's decision seems based on a finding that the customer was bound by the instruction of the depository bank. The court noted that the instructions to " 'hold for 10 days if necessary' was a clear indication that the Bank of Idaho [depository bank] did not want the checks to be returned unpaid before the midnight deadline."<sup>98</sup> A few days after the ten day period had passed, the depository bank asked the payor bank to investigate and report the situation, but did not demand that the checks be returned. The depository's next instruction was given two months later when it instructed the payor either to pay or return the checks.<sup>99</sup> The court analogized the payee's situation to that of the payee in *Western Air & Refrigeration, Inc. v. Metro Bank*.<sup>100</sup> In *Western Air*, a check was dishonored for insufficient funds when the payee presented it to the payor bank.<sup>101</sup> After the dishonor, the treasurer of the payee corporation had a face to face discussion with officials of both the payor bank and the drawer.<sup>102</sup> Feeling confident that funds would be deposited to cover the dishonored check, the treasurer of the payee corporation left the check with the payor bank to be paid when funds were received.<sup>103</sup> As part of this transaction, the payor bank issued a collection receipt to the payee.<sup>104</sup> Under these facts, the Fifth Circuit concluded that the payee and payor bank had agreed<sup>105</sup> that the midnight deadline would not apply.<sup>106</sup>

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<sup>97</sup> *Id.* at 179.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 177.

<sup>100</sup> 599 F.2d 83 (5th Cir. 1979).

<sup>101</sup> *Id.* at 84-85.

<sup>102</sup> *Id.* at 85.

<sup>103</sup> *Id.* at 85-86.

<sup>104</sup> *Id.* at 86.

<sup>105</sup> The court found that the collection receipt, coupled with the conduct of the payor and payee after the check was left for collecting, indicated that they agreed the payor "would hold the check, without regard to its midnight deadline, for a reasonable period of time to see if funds become available." *Id.* at 90.

<sup>106</sup> The court also indicated that, under the facts, the payee no longer presented the item as a "demand item." By leaving the check with the payor bank and taking a receipt for it, the payee evidenced an intent to allow the bank to hold the check until sufficient funds were deposited to cover it. *Id.* at 88.

If a re-presented check is not considered a demand item then § 4-302(a) does not apply. See note 7 *supra* for the text of that provision. It has been suggested that the dishonored item should no longer be considered a "demand item" but rather an "overdue item." *See*

The decision in *Western Air* is correct. The analogy to *Western Air* in *Idaho Forest Industries* is erroneous, however. In *Western Air*, the officer of the payee made a conscious decision to leave the check with the payor and allowed the bank to retain the check until funds were deposited.<sup>107</sup> The payee should be bound by such a decision by its authorized agent. In contrast, in *Idaho Forest Industries*, the depository bank, an agent of the payee only by operation of section 4-201, allowed the payor to take the extra time.<sup>108</sup> In addition, there is no indication that the officers of the payee consciously acquiesced in the payor's retention of the re-presented checks for more than *two months*.<sup>109</sup>

The Nebraska Supreme Court in *Idaho Forest Industries* characterized *Graubart* as a case which held for the payor bank even though it involved "facts much more favorable to the plaintiff."<sup>110</sup> However, this characterization is not easily accepted. In *Graubart*, the payee received a copy of the "advice to customer" slip and the payor bank returned the re-presented item within the ten day period, but in *Idaho Forest Industries* the delay lasted for more than two months. This author disagrees with the *Graubart* decision, but finds it, on the facts, much more palatable than the

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Leary & Schmitt, *supra* note 11, at 624, 629-32. As such it could be treated as an "other" item within § 4-302(b). This author contends that a check, even though dishonored, is still "payable on demand" since no time for payment is stated on it and it is still payable upon presentment. See U.C.C. § 3-108 (instruments payable on demand include those payable upon presentment and those in which no time for payment is stated). See also *Huntmix, Inc. v. Bank of America, Nat'l Trust & Sav. Ass'n*, 184 Cal. Rptr. 551, 559 (Ct. App. 1982) (court rejected argument that re-presented check is not a demand item since it is an over-due instrument). *Horney v. Covington County Bank*, 716 F.2d 335, 337 (5th Cir. 1983), is consistent in its definition of "demand item," although the case does not involve a re-presented item.

<sup>107</sup> 599 F.2d at 86.

<sup>108</sup> 326 N.W.2d at 179.

<sup>109</sup> At one point the payor bank notified the depository bank that the drawer company was closed. *Id.* at 177. Presumably it was closed due to financial setbacks. The court did not consider the impact of this fact and evidently the parties did not emphasize it in their arguments. Perhaps the fact was omitted because it could potentially favor either party. Arguably, if the payor bank knew its customer had closed its doors, it should have returned the checks quickly so that the payee could institute proceedings against the drawer. On the other hand, assuming the payee knew the drawer was closed, it may have felt its best hope was to leave the checks with the payor as long as the drawer's account remained open, and thereby consciously acquiesced in the payor's retention of the check.

<sup>110</sup> *Id.* at 178.

decision in *Idaho Forest Industries*.<sup>111</sup>

Most of the cases which apply the same time limits to re-presented checks also involve re-presentments by depositary-agent banks. At least one case, *Sun River Cattle Co. v. Miners Bank*,<sup>112</sup> included a direct re-presentment to the payor bank "for collection." In *Sun River*, the court rejected the *Leaderbrand* analysis of section 3-511(4) and also found insufficient evidence to impose upon the payee an agreement that the payor bank treat the re-presented item differently.<sup>113</sup> The payor bank argued that such an agreement arose from the fact that the payee's bank, in representing "for collection," "understood that the checks would be held by Miners [the payor],"<sup>114</sup> since this was the "general custom and practice within the banking industry for the handling of checks sent for collection."<sup>115</sup>

It would be inaccurate to cite *Sun River* as a case which analyzes the appropriate U.C.C. sections in depth and considers the policy implications of the various arguments. Strong equitable considerations pervade the opinion and it is clear that the court had no interest in protecting the payor, Miners Bank.<sup>116</sup> Miners was the primary lender to the drawer and was at all times interested

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<sup>111</sup> The Nebraska court apparently believed that the *Graubart* facts were more favorable to the payee since the instruction to the payor bank was to "return immediately if not paid." *David Graubart, Inc. v. Bank Leumi Trust Co.*, 399 N.E.2d at 932. That instruction was not followed, but return was made within a reasonable time thereafter in accordance with the banking practice. *Id.*

The U.N.P.C. adopts the *Graubart* approach and extends the midnight deadline for seven days. See note 11 *supra*. Does this mean that there will be no more *Idaho Forest Industries* decisions if the U.N.P.C. is adopted? One may argue that the drafters adopted the seven day extension as a strict limit, a statement of public policy that cannot be changed even by agreement. Such an argument, made with regard to the time limit of § 4-302, was specifically rejected in *Western Air Refrigeration, Inc. v. Metro Bank of Dallas*, 599 F.2d at 83, 90 n.8 (5th Cir. 1979). In addition, U.N.P.C. § 3, like § 4-103(1) of the U.C.C., allows the effect of the provisions of the U.N.P.C. to be varied by agreement. Thus, presumably under the U.N.P.C., just as with the U.C.C., the payee can agree to an extension or waiver of the midnight deadline of U.N.P.C. § 420(1)(c). Hence, unfortunately the U.N.P.C. probably does not foreclose decisions like *Idaho Forest Industries*. Interestingly, language precluding enforcement of such an agreement made by a consumer payee was specifically excluded from the present draft. See U.N.P.C. § 3(1)(a).

<sup>112</sup> 521 P.2d 679, *aff'd per curiam*, 525 P.2d 19 (Mont. 1974).

<sup>113</sup> 521 P.2d at 687-88.

<sup>114</sup> *Id.* at 688.

<sup>115</sup> *Id.* at 687.

<sup>116</sup> See *id.* at 689.

in maintaining sufficient funds in the drawer's account to cover the drawer's obligations owed to Miners. In so doing, Miners did not pay the re-presented checks even when there were sufficient funds to cover them, nor did they return three of the checks.<sup>117</sup>

In *Blake v. Woodford Bank & Trust Co.*,<sup>118</sup> the Kentucky Court of Appeals provided significant statutory interpretation and a consideration of the policy implications in concluding that a re-presented item must be treated the same as any other demand item. The court rejected *Leaderbrand's* reliance on section 3-511(4) because that section only applies to nonacceptance.<sup>119</sup> In addition, the court properly noted that section 3-511(4) only excuses notice of dishonor whereas section 4-301, upon which section 4-302 liability is based, requires that the item be returned if available.<sup>120</sup> The court declared:

In the present case, both checks [including the re-presented one] were available to the bank for return. Neither check was being held for protest. Consequently, the only way the [payor] bank could revoke its provisional settlement for the check was by returning the check before its midnight deadline. As notice of dishonor was not available as a means of revoking the provisional settlement, the provisions of § 3-511(4) excusing notice of dishonor could have no application to the case.<sup>121</sup>

In addition, the court stated a practical reason for applying the midnight deadline rule:

A significant number of previously dishonored checks are paid upon re-resentation in the regular course of the check collection process. Such checks are often presented through intermediate collecting banks, such as the Federal Reserve Bank in this case. Each collecting bank will have made a provisional settlement with its transferor, and, in turn, received a provisional

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<sup>117</sup> *Id.* at 682-83. The case involved four re-presented checks. One was returned more than two months after the midnight deadline. The others were never returned. *Id.* at 682. Professors Leary and Schmitt have suggested that Miners' liability was more properly grounded in conversion rather than § 4-302 accountability. See Leary & Schmitt, note 11 *supra*, at 631-32.

<sup>118</sup> 555 S.W.2d 589 (Ky. Ct. App. 1977).

<sup>119</sup> *Id.* at 598.

<sup>120</sup> *Id.* at 599-600.

<sup>121</sup> *Id.* at 600.

settlement from the bank to which it forwarded the check. In this way a series of provisional credits are made. . . .

. . . If a payor bank was not required to meet its midnight deadline with respect to previously dishonored items, then none of the other banks involved in the collection process could safely assume that the check had been paid. Consider the problems of the depository bank. It must permit its customer to withdraw the amount of the credit given for the check when provisional settlements have become final by payment and the bank has had "a reasonable time" to learn that the settlement is final. See UCC § 4-213(4)(a). The depository bank will rarely receive notice that an item has been paid. . . . If a payor bank is not bound by its midnight deadline as to previously dishonored items, then there is no way for the depository bank to know whether a previously dishonored item has been paid upon re-presentation except by direct communication with the payor bank. Such a procedure would impose an unnecessary burden upon the check collection process.<sup>122</sup>

Arguably, *Blake* only makes checks which are re-presented through the bank collection process subject to the midnight deadline and does not affect checks which are re-presented directly to the payor bank "for collection" where no provisional credits are given.<sup>123</sup> Three cases which apply the midnight deadline to the re-presented item cite *Blake*, and none of them considers whether *Blake* should be so construed. Nor do these cases discuss whether the method of re-presentation is important. The crux of at least two cases is that section 4-302 states a rule beneficial to the system and easy for payor banks to follow and that they should do so. In *Bank Leumi Trust Co. v. Bank of Mid-Jersey*,<sup>124</sup> the court noted the *Blake* court's position that different treatment of re-presented items would unnecessarily burden the check collection process and stated: "The plain fact is that in the modern world of check collection a clear cut, mechanical rule of check acceptance is necessary, and the common eventuality of previously dishonored checks be-

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<sup>122</sup> *Id.* at 600-01 (citing Leary, *Check Handling Under Article Four of the Uniform Commercial Code*, 49 MARQ. L. REV. 331 (1965)).

<sup>123</sup> See note 94 *supra*.

<sup>124</sup> 499 F. Supp. 1022 (D.N.J. 1980).

ing represented cannot be permitted to upset a system relied upon by banks across the nation."<sup>125</sup>

Interestingly, in this case Bank Leumi was the depository bank arguing for strict application of section 4-302. In *Graubart*,<sup>126</sup> Bank Leumi was the payor bank which successfully argued that section 4-302 should not be applied to the re-presented item because of the custom and practice in the New York area to hold such items beyond the deadline. It seems likely that New Jersey banks, being so proximate to New York, have the same custom. Here, Bank Leumi obviously was not interested in proving such a fact!<sup>127</sup>

In *Prestige Motors, Inc. v. Carteret Bank & Trust Co.*,<sup>128</sup> the payee personally re-presented the check which had been dishonored when first presented through the collection process.<sup>129</sup> The payee left the check with the payor bank and took a receipt.<sup>130</sup> The court cited *Blake* approvingly and said:

We recognize that it may be in the holder's interest to have a drawee bank hold an item until sufficient funds arrive in the drawer's account to permit payment of the item. . . . But it is relatively simple for the drawee bank to comply with the midnight deadline rule unless contrary instructions have been re-

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<sup>125</sup> *Id.* at 1026. The court found that the payor's failure to act within the midnight deadline amounted to acceptance. In so concluding, the court cited § 3-410, which defines acceptance and speaks specifically of a bank's signature on a draft. The court recognized that the bank's signature did not appear on the check, but noted that the provisions of § 3-410 "must be read in harmony with Article 4, which provides detailed regulation of the handling of checks. . . . Article 4 makes it clear that a check is accepted when it is held past its midnight deadline." *Id.* By then citing § 4-302, the court seemingly held that acceptance occurred under that section. But § 4-302 does not provide when acceptance occurs. It is a strict liability section that makes the payor liable when it fails to act in a timely fashion. See note 7 *supra* for the text of 4-302. See also § 4-213(1)(d) (payor accountable when it has made a provisional settlement and failed to revoke same in timely fashion).

<sup>126</sup> See text accompanying notes 81-91 *supra* for a discussion and analysis of *Graubart*.

<sup>127</sup> This illustrates the point made in the *Graubart* discussion that banks will make their arguments and take actions depending upon their status in the bank collection process, and thus the agency relationship with their customers should not be the basis for binding the customer who has made no informed agreement. See text following note 88 *supra*.

<sup>128</sup> 444 A.2d 627 (N.J. Super. Ct. Law Div. 1982), *aff'd*, 458 A.2d 140 (N.J. Super. Ct. App. Div. 1983).

<sup>129</sup> 444 A.2d at 628.

<sup>130</sup> *Id.*



ceived. The drawee bank can easily protect itself against liability by satisfying the midnight deadline rule.<sup>131</sup>

The court found no evidence to indicate that the payee authorized the bank to keep the check beyond the midnight deadline.<sup>132</sup>

The third case citing *Blake* is *Huntmix, Inc. v. Bank of America*.<sup>133</sup> In *Huntmix*, the court noted the split of authority, discussed the respective rationales, and concluded that the best approach is to apply section 4-302(a) to the re-presented check and not extend the midnight deadline.<sup>134</sup> To support its position, the court adopted the reasoning of *Blake*<sup>135</sup> and in addition cited section 4-108(1)<sup>136</sup> which allows a *collecting bank*, "in a good faith effort to secure payment," to extend the time limits imposed by the U.C.C. for one additional banking day.<sup>137</sup> It gives no such option to the *payor bank*.<sup>138</sup> The court recognized the allure of allowing payor banks to hold re-presented items for a longer time, but refused to sanction such action.

A classic example of a situation calling for "a good faith effort to secure payment" by extending the time limits imposed by [section 4-302] is a re-presentation of an insufficient funds check. Typically, such re-presentation reflects a hope if not an expectation that the drawer will deposit sufficient funds to cover the check. By providing that only a collecting bank can "modify or extend time limits imposed or permitted by this Code" [section 4-108] in such situations, [section 4-108] clearly recognizes that such time limits otherwise are in effect.<sup>139</sup>

It is surprising that *Huntmix* was the first case to cite section 4-108(1) when considering the application of the midnight deadline

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<sup>131</sup> 458 A.2d at 142.

<sup>132</sup> *Id.*

<sup>133</sup> 184 Cal. Rptr. 551 (Ct. App. 1982).

<sup>134</sup> *Id.* at 555-56.

<sup>135</sup> *Id.* at 559.

<sup>136</sup> *Id.* at 558.

<sup>137</sup> See note 10 *supra* for the full text of U.C.C. § 4-108(1).

<sup>138</sup> The court in *Huntmix* noted that the authority bestowed by U.C.C. § 4-108(1) upon collecting banks "is withheld from payor banks by virtue of section 4-105(d) which defines collecting bank as 'any bank handling the item for collection *except the payor bank.*'" 184 Cal. Rptr. at 558 (emphasis by the court).

<sup>139</sup> 184 Cal. Rptr. at 558-59.

to re-presented checks. The drafters could have written the section to include payor banks. Failure to do so indicates the drafters' intent that the payor bank, a special animal in the bank collection process because only the payor has the drawer's funds and the power to pay, should not be given latitude to extend time limits without an informed agreement by the owner of the check.<sup>140</sup>

### CONCLUSION

So long as the Uniform Commercial Code in its present form governs the issue, collecting and payor banks take significant risks when they treat re-presented checks differently from checks collected for the first time. Whether the economic and customer relations benefits outweigh these risks is a decision that the individual bank must make.

One wonders just what are the customer relations benefits. While many of us may re-deposit dishonored checks returned to us,<sup>141</sup> it does not follow that we want and expect our bank to make that decision for us, especially if our bank does not notify us of the dishonor. More importantly, it does not follow that when we re-deposit a previously dishonored check we want or expect the payor bank to hold it longer or treat it differently than any other check we deposit.

The average bank customer knows little about the bank collection process and probably never has heard of the midnight deadline rule. What the average customer probably knows is that his bank allows him to draw against a deposited check after the expiration of a relatively short period of time. The customer expects that if nothing is heard from the bank during this period everything is all right and the check was honored, and he expects to hear from his bank if something goes wrong and the check is not honored. These expectations probably do not change just

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<sup>140</sup> U.N.P.C. § 401(1) is consistent with its U.C.C. counterpart, § 4-108(1), in that it allows only transmitting account institutions, not payor account institutions, to extend time limits for an additional business day. See U.N.P.C. § 401(1). The U.N.P.C. "transmitting account institution" is synonymous with a "collecting bank" as defined in the U.C.C. Compare U.N.P.C. § 53(2) with U.C.C. § 4-105(d). Similarly, a U.N.P.C. "payor account institution" is equivalent to a U.C.C. "payor bank." Compare U.N.P.C. § 53(4) with U.C.C. § 4-105(b).

<sup>141</sup> See note 3 *supra*.

because a once dishonored check is re-deposited. Such expectations should not be lost on courts when considering the re-presented check, nor should they be overlooked by the banking community when formulating its approach to this issue.