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Walter D. Malcolm

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## Reflections on *West Side Bank*: A Draftsman's View\*

WALTER D. MALCOLM\*\*

[*West Side Bank v. Marine National Exchange Bank*, 37 Wis. 2d 661, 155 N.W.2d 587 (1968)], has provoked much discussion concerning its effect on the law of bank deposits and collections. Following a brief summary of the facts of *West Side* are the comments of Mr. Walter D. Malcolm, primary draftsman of Article 4 of the Uniform Commercial Code.

On Thursday, August 11, 1966, following an exchange of checks between Byron Swidler and the stockbrokerage firm of Paine, Webber, Jackson & Curtis (Paine, Webber), Mr. Swidler deposited Paine, Webber's check in West Side Bank (West Side). On Friday, August 12, West Side presented for payment the \$262,000 check to defendant, Marine National Exchange Bank (Marine), at the Milwaukee clearing house, where both were members. On Friday evening, Marine commenced the posting process by sending the check through sorting and encoding machines and through the electronic computer which charged the account of its customer and affixed a "paid" stamp. On Monday morning, the next business day, Marine's bookkeeper examined the computer report and, finding no deficiencies, photographed, cancelled, and filed the check in its customer's folder. Later Monday, at about 4 o'clock, Paine, Webber, after learning that Swidler's original check had been returned for insufficient funds, notified Marine to stop payment on its check. Marine then withdrew the check from Paine, Webber's file, notified West Side that the check was being returned because of the stop-payment order, reversed the entries in the Monday night computer run, and stamped the check "payment stopped" and "cancelled in error." On Tuesday, August 16, the check was returned to West Side at the morning exchange in accordance with clearing house rules.

West Side brought an action to compel Marine to pay the check. Plaintiff moved for summary judgment on the ground that the pleadings and affidavits indicated that Marine had "finally paid" the check by completing the process of posting and was therefore indebted to West Side for the amount of the check. Summary judgment was denied and West Side appealed to the intermediate appellate court, which upheld the trial judge.

The Supreme Court of Wisconsin, in affirming the circuit court's decision,<sup>1</sup> held that the process of posting was not completed until the clearing house time limit for reversal of entries had expired. It asserted that the clear and unambiguous meaning of Section 4-109(e) of the Uniform Commercial Code, allowing for "correcting or

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\* An adaptation of a letter to Mr. Carl W. Funk, and not originally intended for publication.

\*\* Chairman, Subcommittee No. 2 of the Permanent Editorial Board for the Uniform Commercial Code. B.S., University of Oregon, 1926; LL.B., Harvard, 1929. Member of Bingham, Dana & Gould, Boston, Massachusetts.

1. *West Side Bank v. Marine Nat'l Exch. Bank*, 4 U.C.C. Rptr. 264 (1967).

reversing an entry or erroneous action with respect to the item" permitted "the reversal of entries for *any reason whatsoever* (subject to the good-faith provisions of the Code) if made within the time limited for return of items to the clearing house."<sup>2</sup> (Emphasis added.) The court further held "[i]n view of the express approval of the statutes that the Code may be waived or altered by agreement . . . that the clearing house agreement [superseded] any inconsistent portions of the Code, and in this instance additionally [served] to expand the time in which entries may be reversed."<sup>3</sup>—*Ed.*]

As the primary draftsman of Sections 4-103, 4-109, 4-213 and 4-303 of the Uniform Commercial Code, I have mixed feelings as to *West Side* and the interest it is creating. At first blush, I regret that I did not produce language that would answer unequivocally the questions posed by *West Side* and other questions that are likely to arise under these sections. On second thought, however, I think I did see most of the problems that are now developing. I not only attempted to provide reasonably definite rules but also, being aware of potential dangers, consciously avoided too much precision. Since it is a novel experience to watch lawyers, the courts, and review writers go to work on something I have produced, I think I might as well sit back and enjoy it.

I have now reviewed my file on these several sections and think that some of the material uncovered may have some value as a kind of "legislative history." Further, since both Wisconsin courts relied heavily on the Clearing House rules, I shall comment on these.

As did all of the Articles of the Code, Article 4 involved much evolutionary development over a considerable span of years. Mr. Fairfax Leary was the original draftsman and developed the Article through several drafts. In 1951 I suggested a fairly complete redraft but based mine extensively on the prior drafts. Of course, provisions in all drafts were affected by comments and suggestions from numerous individuals and groups as well as extensive discussions of the Article 4 Sub-Committee.

As a result of this evolutionary development, the several sections of Article 4 involved in *West Side* appear in three different parts. Sections 4-103 and 4-109 are in Part 1, entitled "General Provisions and Definitions." Section 4-213 appears in Part 2, entitled "Collection of Items: Depository and Col-

2. *West Side Bank v. Marine Nat'l Exch. Bank*, 37 Wis. 2d 661, 672, 155 N.W.2d 587, 593 (1968).

3. *Id.* at 594. See E. A. FARNSWORTH & J. HONNOLD, CASES AND MATERIALS ON COMMERCIAL LAW 185-88 (2d ed. 1968); ADVANCED ALI-ABA COURSE OF STUDY ON BANKING AND SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE 42, 74-76 (1968); Bailey, *UCC Cases: Group No. 6*, 14 PRAC. LAW., May 1968, at 89; 17 CATHOLIC U.L. REV. 500 (1968); 68 COLUM. L. REV. 349 (1968); 20 S.C.L. REV. 118 (1968); 3 COLUM. J.L. & SOC. PROB. 136 (1967).

lecting Banks." Section 4-303 appears in Part 3, entitled "Collection of Items: Payor Banks." Although the general subject of bank collections and different aspects of it are so intertwined that there is no way of breaking it down, I think that Part 2 approaches bank collections primarily from the point of view of depositary and collecting banks whereas Part 3 deals with the same or closely related problems from the point of view of payor banks. Comparing Sections 4-213(1)<sup>4</sup> and 4-303(1)<sup>5</sup>, the rationale for the separate treatment of Section 4-213(1) is reasonably set forth in Official Comment 1 to Section 4-213 reading, in part, as follows:

Final payment of an item is important for a number of reasons. It is one of several factors determining the relative priorities between items and notices, stop orders, legal process and setoffs (Section 4-303). It is the "end of the line" in the collection process and the "turn around" point commencing the return flow of proceeds. It is the point at which many provisional settlements become final. See Section 4-213(2). Final payment of an item by the payor bank fixes preferential rights under Section 4-214(1) and (2).

4. UNIFORM COMMERCIAL CODE § 4-213(1):

An item is finally paid by a payor bank when the bank has done any of the following, whichever happens first:

- (a) paid the item in cash; or
- (b) settled for the item without reserving a right to revoke the settlement and without having such right under statute, clearing house rule or agreement; or
- (c) completed the process of posting the item to the indicated account of the drawer, maker or other person to be charged therewith; or
- (d) made a provisional settlement for the item and failed to revoke the settlement in the time and manner permitted by statute, clearing house rule or agreement.

Upon a final payment under subparagraphs (b), (c) or (d) the payor bank shall be accountable for the amount of the item.

5. UNIFORM COMMERCIAL CODE § 4-303(1):

Any knowledge, notice or stop-order received by, legal process served upon or setoff exercised by a payor bank, whether or not effective under other rules of law to terminate, suspend or modify the bank's right or duty to pay an item or to charge its customer's account for the item, comes too late to so terminate, suspend or modify such right or duty if the knowledge, notice, stop-order or legal process is received or served and a reasonable time for the bank to act thereon expires or the setoff is exercised after the bank has done any of the following:

- (a) accepted or certified the item;
- (b) paid the item in cash;
- (c) settled for the item without reserving a right to revoke the settlement and without having such right under statute, clearing house rule or agreement;
- (d) completed the process of posting the item to the indicated account of the drawer, maker or other person to be charged therewith or otherwise has evidenced by examination of such indicated account and by action its decision to pay the item; or
- (e) become accountable for the amount of the item under subsection (1)(d) of Section 4-213 and Section 4-302 dealing with the payor bank's responsibility for late return of items.

In a recent article,<sup>6</sup> Mr. Ralph J. Rohner develops quite extensively, and correctly, additional significance for Section 4-213(1).

By way of contrast, the rationale for the separate treatment appearing in Section 4-303(1) reasonably appears in Comment 1 to that section:

1. The comments to Section 4-213 describe the process through which an item passes in the payor bank. Prior to this process or at any time while it is going on, the payor bank may receive knowledge or a legal notice affecting the item, such as knowledge or a notice that the drawer has filed a petition in bankruptcy or made an assignment for the benefit of creditors; may receive an order of the drawer stopping payment on the item; may have served on it an attachment of the account of the drawer; or the bank itself may exercise a right of setoff against the drawer's account. Each of these events affects the account of the drawer and may eliminate or freeze all or part of whatever balance is available to pay the item. Subsection (1) states the rule for determining the relative priorities between these various legal events and the item.

Explaining further the relative significance of Sections 4-213(1) and 4-303(1), I think it may properly be said that Section 4-213(1) states the general rule for final payment of an item by the payor bank for all purposes, whereas Section 4-303(1) deals more specifically with the somewhat narrower problem of the relative position or status of an item being processed by the payor bank as against the "four legals," namely, knowledge or notice (particularly of bankruptcy), stop orders, legal process and setoff. Although other elements are involved, *West Side* primarily involves the relative status of an item being processed by a payor bank as against a stop payment order and, consequently, at least prima facie, Section 4-303(1) is the first or primary section to be considered on the facts of *West Side*. My first question, therefore, as to the decisions in *West Side* is why there is only a passing reference to Section 4-303 in the decision of the lower court and none whatsoever in the decision of the Supreme Court.

Perhaps the failure to consider Section 4-303(1) is that there is no complete provision in that section as to when the payor bank becomes accountable. Mr. Carl W. Funk discarded consideration of Section 4-303(1) by his analysis of the result of the words "right or duty" in the preamble. If I may call it such, some "legislative history" with respect to Section 4-303(1) is of interest.

Section 4-303(1) in roughly its present form first appeared in the 1952 Text and Comments Edition. However, in that draft Subsection (1) read as follows:

6. Rohner, *Posting of Checks: Final Payment and the Four Legals*, 23 BUS. LAW. 1075 (1968).

(1) Any notice, stop-order or legal process received and any valid setoff exercised by a payor bank *is entitled to priority* over any item drawn on or payable by and received by the bank *until but not after* the bank has done any of the following:

- (a) accepted or certified the item;
- (b) paid the item in cash;
- (c) settled for the item by separate remittance for the particular item;
- (d) completed the process of posting the item to the indicated account of the drawer, maker or other person to be charged therewith or otherwise has evidenced by examination of such indicated account and by action its decision to pay the item; or
- (e) become liable for the item under Section 4-302 dealing with the payor bank's liability for late return of items. (Emphasis added.)

Note that this draft speaks in terms of "relative priority" as between the "four legals" and an item being processed by the payor bank.

In 1953 the Legislature of the State of New York requested the Law Revision Commission of New York to make a full and complete study of the UCC, including the holding of public hearings. Public hearings were held primarily in 1954 and in connection with these hearings numerous statements were filed. On February 26, 1954, Messrs. Milbank, Tweed, Hope & Hadley of New York City filed an extensive memorandum with the Law Revision Commission regarding Article 4, which memorandum included the following statement with respect to Section 4-303:

14. 4-303 introduces a number of questions. It provides that "Any notice, stop order or legal process . . . is entitled to priority." No limitations are stated as to type of notice or legal process. Moreover, this section would not appear to conform with the requirements of § 134(5) of the New York Banking Law.<sup>7</sup>

On January 15, 1954, Robert H. Brome, Esq., inside house counsel for Bankers Trust Company of New York City, filed with the Law Revision Commission an analysis of Article 4, including the following comments with respect to Section 4-303:

Sec. 4-303. *When Items Subject to Notice, Stop-Order, Legal Process or Set-Off; Order in Which Items May Be Charged or Certified.*

This section provides, in effect, that there may be a period of time *before* an item is finally paid during which the item nevertheless has "priority of payment" over the indicated items.

7. 1 NEW YORK LAW REVISION COMM'N, REPORT FOR 1954, at 305.

This is a substantial change in the law and may give rise to some practical problems including:

1) If before posting but after settlement by separate remittance or evidencing its decision to pay short of posting, the bank receives a stop order, what is the basis of the bank's liability if it recognizes the stop order and returns the item as unpaid within the time permitted by Secs. 4-301 and 4-302? It would appear that there is none.

2) If the bank has settled for an item by separate remittance (this is the so-called "non-cash" item presented for separate remittance) in the form of a draft, may it thereafter stop payment on that draft on the ground that it has not "finally paid" the item for which the draft was given? Would the bank not remain liable on its draft?

3) If the bank has not finally posted under Sec. 4-213 but has become liable for the item under Sec. 302 for late return and then an attachment is served, must the bank forthwith debit the check to the account and make settlement therefor notwithstanding its return? In other words, how long will the existence of the liability hold off the levy?<sup>8</sup>

On February 17, 1954, I wrote a long letter to Mr. Brome replying to many of his comments, explaining the general rationale of Article 4 and referring specifically to Section 4-303 as follows: "The hypothetical cases you pose under this section have theoretical difficulty. Query—How frequently will they arise in contested cases?"<sup>9</sup>

On September 29, 1954, John D. Killian, III, Esq., one of the consultants to the Law Revision Commission of New York, completed a thirty page memorandum with respect to Section 4-303.<sup>10</sup> As in the case of similar memoranda filed by Mr. Killian and other consultants with respect to particular sections, this memorandum analyzed the section closely, abstracted and discussed numerous existing cases in the same area, compared Section 4-303 with the existing New York law and summarized the potential effect of Section 4-303 on New York law.

The Law Revision Commission held a meeting on August 3, 1955 in which it considered memoranda and various other papers of its consultants and others dealing with various sections of Article 4. With respect to Section 4-303, the report of this meeting referred to the memoranda filed by Messrs. Milbank, Tweed, Hope & Hadley and Robert H. Brome, Esq. and then recorded the following comments and action:

It was suggested that these criticisms are relevant to the question whether "entitled to priority" is an accurate or appropriate phrase

8. *Id.* at 318.

9. *Id.* at 342. For Mr. Brome's reply, *see id.* at 361-62.

10. *See* 2 NEW YORK LAW REVISION COMM'N, REPORT FOR 1955, at 1460.

to express the intended effect of Section 4-303(1). It was suggested that Section 4-303(1) is not concerned with the question whether a notice or process is of a kind that is effective to terminate a bank's authority to pay an item drawn by its customers or to vest ownership of the account in another, or to bar the bank from charging the customer's account if it pays; and that the section is also not concerned with the effect of payment of an item which does not have "priority," and has no effect in itself to give the holder of an "item" a right to payment. It was suggested that the meaning of the section is that a notice, stop-order or legal process which, under other rules of law, would be effective to terminate or suspend or otherwise modify the bank's privilege to charge its customer's account for an item it pays, and a set-off which would, by other rules of law be effective to terminate or suspend the bank's duty to its customer to pay the item, "comes too late" if the notice, etc., is received or served or the set-off is exercised after the bank has done one of the things specified in Section 4-303.

IT WAS VOTED to recommend that the preamble of Section 4-303(1) be revised to eliminate the phrase "entitled to priority" and to substitute language making it clear that the section is concerned only with the question when the notice, etc., "comes too late."<sup>11</sup>

The Editorial Board for the UCC and its various subcommittees took very seriously the comments and suggestions with respect to the Code made by the New York Law Revision Commission. Considering ultimate acceptance and enactment of the Code, New York was a key state and the position of the Law Revision Commission in New York was of major importance. In 1956 the Editorial Board recommended a substantial number of revisions of the then existing form of the UCC, a great majority of which were traceable to the views expressed and recommendations made by the Law Revision Commission of New York. In its 1956 Report the Editorial Board recommended that Section 4-303 be amended to the form appearing in the Official 1958 and 1962 Text and Comments Editions. The reasoning for this recommended change was explained, in part, as follows:

*Reason:* In the 1952 Text the relative position of items, on the one hand, and notices, stop order, legal process and setoff, on the other hand, were stated in terms of "priority." Such formula of "priority" has evoked criticism and some uncertainty. The New York Law Revision Commission has suggested the substitution of the words "comes too late" to more aptly describe the rule and result intended. The Revision adopts this suggestion.<sup>12</sup>

11. See NEW YORK LAW REVISION COMM'N, REPORT AND APPENDICES RELATING TO THE UNIFORM COMMERCIAL CODE FOR 1956, at 429 for the adopted form of this resolution.

12. 1956 REPORT OF THE PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, at 158.



This review of the legislative history of Section 4-303(1) indicates that New York counsel were concerned with various possible difficulties with the "priority" language but the difficulties they expressed were various theoretical uncertainties quite far removed from the facts arising in *West Side*. The Law Revision Commission of New York was sufficiently impressed with these fears of New York counsel that it suggested "comes too late" as a better combination of words to achieve that for which we were groping. The Editorial Board for the UCC accepted this suggestion and, as draftsman, I certainly concurred in this acceptance. In all honesty, however, I did not think to myself or say to others that we were able to foresee or understand all of the possible implications of the "priority" language or the "comes too late" language. The language of the Law Revision Commission quoted above lends some support to Mr. Funk's analysis of the words "right or duty" but I did not attach limiting significance to the words "right or duty" when I prepared and circulated redrafts of Section 4-303. The Law Revision Commission recommended the "comes too late" language, and since we desired to go along with the Commission so far as we reasonably could, the change was made.

In one sense, what I thought about the matter may have no significance twelve years later in a particular case that no one clearly foresaw in 1956. For what it may be worth, however, I shall record my thoughts. To me, Section 4-303(1) was at all times intended to prescribe rules as to "who wins" as between an item being processed for payment by the payor bank and each of the "four legals." Also, an essential requirement of Section 4-303(1) *was to produce identically the same result* in the relative status of an item *as against each* of the "four legals." A major fault with pre-Code case law was that there were probably ten or more different answers under the cases as to when an item was finally paid and as to who won as between an item and each of the "four legals."<sup>13</sup> A clear objective of Section 4-213 was to reduce these rules to one and to provide the same and a single rule for each of the "four legals" under Section 4-303(1).

It was unsound legislative policy to think of or permit different results for the several "four legals." Particularly, this was true where in two of the "four legals," namely, notice of bankruptcy and legal process, the natural motivation of the bank would be to have the check win as against these "two legals," whereas in the case of stop payment orders and setoff, the natural motivations of the bank in each case would be to have the check lose as against these "two legals." In the case of stop payment orders, the bank would prefer to have the check lose in order to better serve the wishes of its customer. In the case of setoff, the bank would prefer to have the check lose because in

13. Malcolm, *Article 4—A Battle with Complexity*, 1952 WIS. L. REV. 265, 287-90.

close cases the bank could benefit by exercising its right of setoff, if this right existed.

In my view, therefore, Section 4-303(1) under the original "priority" language and under the Law Revision Commission "comes too late" language was designed to state rules as to "who wins" as between a check in the process of payment by the payor and each of the "four legals." It was also my view that if a bank saw fit to disregard the natural result of one of these rules, it had to bear the consequences of this act, just as under pre-Code law it might be held responsible under varying circumstances for jumping the wrong way.<sup>14</sup> Having these views, I did not think it was necessary to insert language that the bank became "accountable" at some time and, more important, it would have been incorrect to do so because under the second clause of Section 4-303(1)(d) a check "might win" as against one of the "four legals" but still have not progressed far enough to reach final payment and the accountability stage under Section 4-213.

On this reasoning, I thought in 1951 and also in 1956 that Section 4-303(1) was the primary section to determine the relative status as between a check in the process of payment by a payor bank and any one of the "four legals." This being the intention, then an additional and sixth event conferring priority of an item over each of the "four legals" exists which does not appear in Section 4-213(1). This sixth event is based upon the language "or otherwise evidenced by examination of such indicated account and by action its decision to pay the item." The rationale and explanation of this sixth item appears in Comment 3 to the 1962 Edition of Section 4-303.

As to whether this intended result may now be found, although in the preamble of Subsection (1) the "comes too late" language suggested by the Law Revision Commission of New York appears, the phraseology based on "priorities" remained throughout the Comment to Section 4-303. Of course, it also follows that if this sixth event determining priorities is to be considered, this event is *not* affected by or dependent upon the phrase "completed the process of posting." Against this background of legislative history, I can only reach the result that in *West Side* I would have considered Section 4-303(1) to be the controlling section and under this section I would have reached a result contrary to that of the Wisconsin courts.

Considering next the "process of posting" language as used in Sections 4-303(1)(d), 4-213(1)(c) and as defined in Section 4-109,<sup>15</sup> some further

14. See 1 PATON'S DIGEST 147, 1058, 1067 (4th ed. 1940) and cases cited.

15. UNIFORM COMMERCIAL CODE § 4-109:

The "process of posting" means the usual procedure followed by a payor bank in determining to pay an item and in recording the payment including one or more of the following or other steps as determined by the bank:

explanation and history may be of interest. When this language was first utilized in 1951 and 1952, it was based upon information then available to me as to typical bank practices by payor banks, which practices are fairly well summarized in Comment 5 to Section 4-213 and Comments 1, 2 and 3 of Section 4-303. The use of computers by banks involving the running of items through computers during nighttime hours and their later examination to verify signatures, sufficient funds and the like has developed since 1951 and 1952. By 1961 this practice was sufficiently widespread with resulting concern on the part of banks, particularly in California, that it seemed essential to deal with it specifically so as to avoid any risk that the nighttime computer run in advance of any examination of items could be considered "final payment." Hence, Section 4-109 was drafted, approved by the Editorial Board and included in the 1962 Official Text and Comments Edition.

I drafted Section 4-109 and to that extent I am primarily responsible for its language. Among other factors considered was the fact that banks paid many millions of items every day and there were bound to be a certain percentage of errors and some provision was clearly necessary to permit reversing errors. However, it would have been unwise to limit the reversing power to errors because the entire "post first—examine later" procedure required the reversal of some of the entries made in the nighttime computer run. I did not consider that *standard procedure* of posting every item in the nighttime computer run and then reversing a fraction of one percent of all items so posted upon the examination of the items on the next business day properly could be called an "error." Consequently, Section 4-109(e) became: "(e) correcting or reversing an entry or erroneous action with respect to the item."

For what it may be worth, I did *not* have in mind a complete change of mind and reversal of judgment as was involved in *West Side*. If the result reached in *West Side* had been intended, then the only logical thing to do would have been to delete paragraph (c) of Section 4-213(1) and paragraph (d) of Section 4-303(1). In the view of the Wisconsin courts, obviously I did not select the correct language for paragraph (e) of Section 4-109 but any defects in this language to achieve the result I intended could have been overcome and can still be overcome by the necessity of justifying the continued existence of paragraph (c) of Section 4-213 and paragraph (d) of Section 4-303. I can only conclude that against my own background I would have

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- (a) verification of any signature;
  - (b) ascertaining that sufficient funds are available;
  - (c) affixing a "paid" or other stamp;
  - (d) entering a charge or entry to a customer's account;
  - (e) correcting or reversing an entry or erroneous action with respect to the item.

reached a different conclusion with respect to paragraph (e) of Section 4-109 than that of the Wisconsin courts.

Finally, there is the question whether the Clearing House agreement existing in *West Side* had the effect of permitting the Marine Bank, upon receipt of the stop payment order late on Monday, to completely reverse its position and return an item which internally it had previously treated as paid. On this question I am confused about several matters.

At least by 1951 it was fixed policy of the Drafting Committees for the UCC and of the Sponsoring Organizations that in order "to permit the continued expansion of commercial practices through custom, usage and agreement of the parties,"<sup>16</sup> with certain very limited restrictions, affected parties should have power to vary the effect of provisions of the UCC by agreement.<sup>17</sup> Particularly in the case of Article 4, potentially affecting or controlling the handling by banks of probably more than 50,000,000 items every business day and because of the certainty of technological and other changes in this handling with the passage of time, the power of affected parties to vary the effect of provisions of the Article, again with certain limited restrictions, was considered absolutely essential.<sup>18</sup> By well-established custom, Clearing House rules constituted one of the important and natural ways to effect agreement and Section 4-103(2) codified this practice.

However, I encounter some very puzzling situations when I consider whether the Milwaukee Clearing House rules relied upon in *West Side* come within this general principle. The pertinent provisions of the By-laws of the Milwaukee Clearing House Association are as follows:

"By-Law IV, Section 1. BASIC CLEARING PROCEDURE. Checks and drafts drawn on banks participating in the clearings, either directly or through clearing agents, shall be exchanged and balances struck and settled in the following way:

"By-Law IV, Section 3. RETURN OF UNACCEPTABLE OR MIS-DIRECTED ITEMS. (a) All items deemed presented through the clearing house which shall be found to be unacceptable, shall be returned in accordance with the requirements of the Bank Collection Code (Section 220.15, Wisconsin Statutes), except that unacceptable items may be returned through the exchanges on the second business day following the date they shall be deemed presented at the exchanges [see Section 1(b) of this By-law], enclosed in an envelope provided by the Association and properly marked with the name of the bank to which it is being returned.

"(b) As soon as practicable, a member of the Association receiving an unacceptable item for \$500.00 or more from another member

16. UNIFORM COMMERCIAL CODE § 1-102(2)(b).

17. UNIFORM COMMERCIAL CODE § 1-102(3).

18. UNIFORM COMMERCIAL CODE § 4-103(1).

shall advise such presenting member by telephone as to the unacceptability of such item.<sup>19</sup>

It is apparent from this language that the Milwaukee Clearing House first dealt with the exchange and return of items by incorporating by reference the Bank Collection Code of Wisconsin. However, in examining the Wisconsin statutes I find that Section 220.15<sup>20</sup> so incorporated by reference, was a statute basically framed on the old Bank Collection Code of the American Bankers Association but with a quite considerable number of variations and modifications.

Where the Milwaukee Clearing House rules incorporated by reference a major portion of the entire Bank Collection Code, one is not quite sure to what portion of the ABA Bank Collection Code the "except" clause quoted above applies. Wisconsin enacted the ABA Bank Collection Code in 1929 and the original form of Section 3 of this Code read as follows:

Section 3. (Item on Same Bank). A credit given by a bank for an item drawn on or payable at such bank shall be provisional, subject to revocation at or before the end of the day on which the item is deposited in the event the item is found not payable for any reason . . . .<sup>21</sup>

Sometime after the American Bankers Association offered a model form of deferred posting statute (1947-48), Wisconsin amended its Bank Collection Code so that Section 3 read, in part, as follows:

(3) Demand Items. (a) In any case in which a bank receives, other than for immediate payment over the counter, a demand item payable by, at or through such bank and gives credit therefor by midnight of the day of receipt, the bank may have until midnight of its next business day after receipt within which to dishonor or refuse payment of such item. Any credit so given, together with all related entries on the books of the receiving bank, may be revoked by returning the item, or if the item is held for protest or at the time is lost or is not in the possession of the bank, by giving written notice of dishonor, nonpayment or revocation; provided that such item or notice is dispatched in the mails or by other expeditious means not later than midnight of the bank's next business day after the item was received. For the purpose of determining when notice of dishonor must be given or protest made under the law relative to negotiable instruments, an item duly presented, credit for which is revoked as authorized by this subsection, shall be deemed dishonored on the day the item or notice is dispatched. A bank, revoking credit pursu-

19. *West Side Bank v. Marine Nat'l Exch. Bank*, *supra* note 1, at 266.

20. Wis. Laws 1949 ch. 58 (repealed 1965).

21. Wis. Laws 1929 ch. 354 (repealed 1949).

ant to the authority of this subsection, is entitled to refund of, or credit for, the amount of the item.<sup>22</sup>

In *West Side*, the West Side Bank presented the item in dispute to the Marine Bank on Friday. The Marine Bank put the item through its computer run on Friday night and examined the item for signature, sufficiency of funds and the like on Monday morning. Thus, probably by noon on Monday, mechanical posting (by Friday night computer run) and the customary examination of the item was completed. Sometime, probably several hours later, Paine, Webber issued its stop payment order to Marine, Marine notified West Side by telephone that it was returning the item, Marine reversed the entries in the Monday night computer run and Marine physically returned the item sometime on Tuesday.

On these facts, the crucial language in the Clearing House rule necessarily relied upon by the Wisconsin courts was: "except that unacceptable items may be returned through the exchanges on the second business day following the date they shall be deemed presented at the exchanges . . ." <sup>23</sup> Since this language commences with the word "except," it is necessarily a qualification of or an exception to something else. But what? By its terms, the language constitutes an exception to the Wisconsin Bank Collection Code but in 1966, 1967 and 1968 there was no Bank Collection Code. It had been repealed.<sup>24</sup> Since the principal substantive provision of the Clearing House rule no longer had meaning, is it not somewhat strained to say that the "except" clause has the rather startling effect attached to it by the Wisconsin courts?

If the "except" clause is construed to constitute an exception or variation from the deferred posting rule found either in Wisconsin Bank Collection Code from around 1950 to 1965 or in Section 4-301<sup>25</sup> of the Uniform Com-

22. Wis. Laws 1949 ch. 58(3) (repealed 1965).

23. *West Side Bank v. Marine Nat'l Exch. Bank*, *supra* note 1, at 266.

24. See WIS. STAT. ANN. §§ 404.101-404.504 (1964), and Wis. Laws 1963 ch. 158, repealing WIS. STAT. ANN. § 220.15 (1957), and enacting the UNIFORM COMMERCIAL CODE to become effective July 1, 1965.

25. UNIFORM COMMERCIAL CODE § 4-301(1), (2):

(1) 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 item; or

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

(2) If a demand item is received by a payor bank for credit on its books it may return such item or send notice of dishonor and may revoke any credit given or recover the amount thereof withdrawn by its customer, if it acts within the time limit and in the manner specified in the preceding subsection.

mercial Code, then again I am somewhat startled. In the late forties I participated in the drafting of the American Bankers Association Model Deferred Posting Act and I recall very clearly that the Board of Governors of the Federal Reserve System and the various Federal Reserve Banks consented to the return of items on the business day next following the first presentment on the payor bank *only* if there was a provisional credit on the day of presentment and *only* if the return was made on the next business day. But under the Milwaukee Clearing House rule an item could be returned at any time through the *second* business day—on the facts of *West Side*, on Tuesday. Where Federal Reserve Banks have consistently urged or insisted that collection and payment practices speed collections, I am very curious to know why a provision of this sort was never criticized by some Federal Reserve Bank. The current form of Regulation J in Section 210.12 permits a payor bank to return an item only on the next business day following presentment and only “before it has finally paid the item.”<sup>26</sup>

My strong guess is that the “except” clause and the reference to the Bank Collection Code came into the Milwaukee Clearing House rule at sometime between 1919 and the adoption of deferred posting in Wisconsin so that the “except” clause was originally intended as an exception to the original form of Section 3 of the Bank Collection Code quoted above. The original Section 3 required return on the actual day of presentment and, since this was a very tight rule, it is not surprising that the Milwaukee Clearing House gave member banks two extra days.

However, where the basic concept of the deferred posting statutes enacted in the late forties and early fifties and the codification of these statutes in Section 4-301 of the Uniform Commercial Code were carefully designed to give payor banks one, but only one, extra day after presentment to return items, I think it is a clear distortion to attribute to the “except” clause the startling effect found in both the lower and Supreme Court decisions in *West Side*.

26. Federal Reserve System, Reg. J, § 210.12, Sept. 1, 1967.