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Tom Holland

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AN ANALYSIS OF THE LEGAL PROBLEMS RESULTING FROM WRONGFUL DISHONORS*

TOMMY LEE HOLLAND**

I. INTRODUCTION

When a customer of a bank makes a deposit, the relationship created between the bank and its customer is that of debtor and creditor; the bank being the debtor and the customer being the creditor.[1] Unless the agreement between the bank and its customer provides otherwise, the bank is obligated to return the deposit to the customer upon his demand or to pay out the deposit in accordance with the customer's order.[2] The customer's order is known as a check.[3]

If a bank refuses to honor a check of its customer without legal justification, the bank may be liable to the customer for damages caused by the refusal.[4] Under the Uniform Commercial Code (U.C.C.), an unjustified refusal to honor a check is known as wrongful dishonor.[5] In this article, the legal problems resulting from such wrongful dishonors will be analyzed.

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** Associate Dean and Associate Professor of Law, University of Tulsa; B.A., Friends University, 1961; J.D., University of Tulsa, 1970; LL.M., University of Illinois, 1976.

1. 5A MICHIE ON BANKS AND BANKING ch. 9, § 1 (perm. ed. 1973).

2. *Id.* at 11.

3. U.C.C. § 3-104(2)(b) (All citations to the Uniform Commercial Code are to the 1972 official text unless otherwise indicated.); 5A MICHIE ON BANKS AND BANKING ch. 9, § 100, at 276 (perm. ed. 1973).

4. U.C.C. § 4-402; H. BAILEY, THE LAW OF BANK CHECKS § 12.3 (4th ed. 1969).

5. U.C.C. § 4-402.

II. WHAT CONSTITUTES DISHONOR

Before considering which dishonors are wrongful, it is necessary to determine what constitutes dishonor. The U.C.C. provides:

> (1) An instrument is dishonored when
> (a) 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); or
> (b) presentment is excused and the instrument is not duly accepted or paid.[6]

Essentially, section 3-507(1) provides that the refusal by a bank to pay a check is a dishonor of the check. An Official Comment to the U.C.C. lists some reasons for refusing payment which constitute dishonor: "Not sufficient funds," "Account garnisheed," "No account," and "Payment stopped."[7] A check is also dishonored when payment is refused because the check is drawn against uncollected funds.[8]

Despite the broad language of section 3-507(1), every refusal to pay a check does not constitute dishonor. The U.C.C. specifically provides that "[r]eturn of an instrument for lack of proper indorsement is not dishonor."[9] Because of the nature of the bank-customer relationship, the return of a check for proper indorsement should not be a dishonor. The bank's obligation is to pay in accordance with the order of its customer.[10] If a check was paid which was not properly indorsed, the bank might be paying contrary to the order of its customer. Therefore, the return of a check is not a refusal to honor a proper order, but is merely an indication that the order is not in proper form.[11] Similarly, where the amount of the check shown in figures differs from the amount shown in words, return of the check for correction should not be dishonor.[12] If the bank pays the check, it runs the risk of paying contrary to the order of its customer. The return of such a check is only an indication that the order is not in proper form.

A bank's refusal to certify[13] a check generally is not considered dishonor. Under the U.C.C., absent contrary agreement, a bank is not obligated to certify a check.[14] The rationale for this rule is that the customer has ordered payment on demand and not certification.[15] Because there is no

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6. *Id.* § 3-507(1).
7. *Id.* § 3-510, Comment 2.
8. Bank of Louisville Royal v. Sims, 435 S.W.2d 57 (Ky. 1968); Gallinaro v. Fitzpatrick, 359 Mass. 6, 267 N.E.2d 649 (1971).
9. U.C.C. § 3-507(3). According to Official Comment 2, this section "states general banking and commercial understanding."
10. 5A MICHIE ON BANKS AND BANKING ch. 9, § 100 (perm. ed. 1973).
11. H. BAILEY, THE LAW OF BANK CHECKS § 12.1 (4th ed. 1969).
12. *See* 1 PATON'S DIGEST, *Checks* § 21C:3, at 1119 (1940).
13. Acceptance of a check is known as certification. U.C.C. § 3-411(1).
14. *Id.* § 3-411(2).
15. *Id.* § 3-411, Comment 2; Wachtel v. Rosen, 249 N.Y. 386, 164 N.E. 326 (1928).

obligation to certify a check, the mere refusal to certify should not be a dishonor.[16] However, if the bank's refusal to certify is based on some reason other than the absence of an obligation to certify, *e.g.*, the check is drawn against uncollected funds, then the refusal to certify is a dishonor.[17]

The return of a check for the reason that it is postdated is not a dishonor. A check is payable on demand,[18] but demand can be made only after the date stated on the check.[19] Payment of a postdated check prior to that date would be contrary to the order of the customer. Thus, a bank has no obligation to honor a postdated check prior to its stated date and does not dishonor the check by refusing to pay it until that date.[20] The refusal to pay indicates only that the customer's order is not yet effective. Similarly, the return of a stale check[21] is not a dishonor. Section 4-404 of the U.C.C. provides that a bank is not obligated to pay a check which has been outstanding for more than six months. When a bank refuses to pay a stale check, it indicates only that the check is no longer a proper order because of the long period of time elapsed since the check was drawn.

An Official Comment to the U.C.C. lists other reasons for refusing payment which do not result in dishonor: "Signature missing," "Signature illegible," "Forgery," "Payee altered," "Date altered," and "Not on us."[22] These reasons for refusing payment indicate that the check is not in proper form or that it is not the proper order of a customer of the bank. When a bank refuses to pay such a check, it is not refusing to honor a proper order. Therefore, there is no dishonor.[23]

In some circumstances, dishonor may result from the bank's response to inquiries concerning a check. In *Allen v. Bank of America*[24] the bank received a telegram reading "Advise if Lt. W.C. Allen check $25 good."[25] Responding to the telegram, the bank wired that Allen had no account with the bank. The court recognized that the bank could have treated the telegram as an improper presentment and could have required actual delivery of the check to the bank. The court held, however, that the bank had in effect refused payment of the check for a reason other than improper presentment when it responded that Allen had no account. The court stated that after the bank's response, it would have been an idle act for the holder of the check to deliver it to the bank. The bank's action, therefore, amounted to a waiver of its rights and constituted a dishonor of the

16. Wachtel v. Rosen, 249 N.Y. 386, 164 N.E. 326 (1928).
17. Gallinaro v. Fitzpatrick, 359 Mass. 6, 267 N.E.2d 649 (1971).
18. U.C.C. § 3-104(2)(b).
19. *Id.* § 3-114(2).
20. *See* Smith v. Maddox-Rucker Banking Co., 8 Ga. App. 288, 68 S.E. 1092 (1910); Annot., 76 A.L.R.2d 1301 (1961).
21. A check which has been outstanding for more than six months is known as a stale check. U.C.C. § 4-404, Comment.
22. *Id.* § 3-510, Comment 2.
23. H. BAILEY, THE LAW OF BANK CHECKS § 12.1 (4th ed. 1969).
24. 58 Cal. App. 2d 124, 136 P.2d 345 (1943).
25. *Id.* at 126, 136 P.2d at 347.

check.[26] Although the telegram inquiry was not a demand for payment, it is unlikely that the holder of a check would present it once he had been advised that the drawer had no account with that bank. The court correctly held that the bank had waived presentment and that such a reply to an inquiry should be treated as a dishonor.

On the other hand, a response to inquiries about a check will not always be treated as a dishonor. In *Kirby v. Bergfield*[27] the court held that a telephone inquiry to the drawee bank to determine whether the drawer had sufficient funds in his account to cover a check was not a proper presentment. Therefore, the statement of a bank employee that there were not sufficient funds was not a dishonor.[28] The decision in *Kirby* was correct because the telephone inquiry was not a demand for payment; dishonor normally does not occur without a demand for payment. Furthermore, a disclosure of insufficient funds is less likely to preclude a subsequent presentment of the check than is a disclosure that the drawer has no account. The drawer of the insufficient funds check might have sufficient funds at a later time. However, the court's indication that a check cannot be presented by telephone was erroneous. Presentment is nothing more than a demand for payment,[29] and it is immaterial where or how the demand is made.[30] A demand for payment made by telephone is permissible, but the bank has a right to require production of a check at the bank[31] during banking hours if it so desires.[32]

Unless it contains a specific demand for payment, a mere inquiry about a check may not amount to a presentment.[33] However, the bank's response to the inquiry may implicitly waive presentment[34] and effectively dishonor the check.[35] Therefore, under almost all circumstances, a bank should refuse to answer an inquiry unless there is an express demand for payment which then gives the bank the right to require production of the check at the bank.[36] If customer relations dictate a response to the inquiry, the bank should use caution in making the response.

III. WHAT CONSTITUTES WRONGFUL DISHONOR

Once it has been established that a check has been dishonored, it is then necessary to determine whether the dishonor was wrongful. Although section 4-402 of the U.C.C. imposes liability on a payor bank for wrongful dishonor, that section does not specify what constitutes wrongful dishonor.

26. *Id.* at 129, 136 P.2d at 348-49.
27. 186 Neb. 242, 182 N.W.2d 205 (1970).
28. *Id.* at 247, 182 N.W.2d at 208.
29. U.C.C. § 3-504(1).
30. *Id.* § 3-504, Comment 1.
31. *Id.* § 3-505(1)(a), -505(1)(c).
32. *Id.* § 3-503(4).
33. Kirby v. Bergfield, 186 Neb. 242, 182 N.W.2d 205 (1970).
34. U.C.C. § 3-511(2)(a).
35. Allen v. Bank of America, 58 Cal. App. 2d 124, 136 P.2d 345 (1943).
36. U.C.C. §§ 3-504(1), 3-505(1)(a), -505(1)(c).

Therefore, it is appropriate to consider other sources to determine which dishonors are wrongful.[37]

Although a bank is obligated to honor the properly drawn checks of its customers, without an agreement to the contrary it is not obligated to honor a check unless the customer has on deposit sufficient funds to cover the amount of the check.[38] Therefore, where a check is presented to a bank when the drawer's account is insufficient, dishonor of the check because of insufficient funds is not wrongful. Likewise, dishonor of a check because the drawer has no deposit account with the bank is not wrongful.[39]

Banks frequently dishonor checks due to clerical errors. When a bank credits a deposit to the wrong account, checks of the customer who made the deposit sometimes will be returned because of insufficient funds before the mistake is discovered. In that circumstance, return of the checks is a wrongful dishonor.[40] In *Weaver v. Grenada Bank*[41] checks of a depositor were dishonored after the bank charged the sum of $80.00 against his account for a check on which the figures appeared to be $80.00, but on which the actual amount of $8.00 was correctly written. The court held that the dishonor was wrongful. Thus, clerical error or mistake is no defense to an action for wrongful dishonor.[42]

A depositor is responsible for knowing his account balance and cannot rely on the balance shown on the books of the bank to establish wrongful dishonor. In *Bachtel v. Bank of America*[43] a depositor withdrew cash of $4,300.00 after being informed by the bank that his balance was slightly more than $5,000.00. The depositor failed to inform the bank of checks totaling $4,297.94 previously drawn against the account and outstanding at

37. *Id.* § 1-103.

38. H. BAILEY, THE LAW OF BANK CHECKS § 12.3 (4th ed. 1969); 5A MICHIE ON BANKS AND BANKING ch. 9, § 167 (perm. ed. 1973); 1 PATON'S DIGEST, *Checks* § 21, at 1112 (1940). " 'Properly payable' includes the availability of funds for payment at the time of decision to pay or dishonor." U.C.C. § 4-104(1)(i).

39. U.C.C. § 4-402, Comment 2.

40. Spearing v. Whitney-Central Nat'l Bank, 129 La. 607, 56 So. 548 (1911) (deposit for account of Joseph H. Spearing credited to account of J. Zach Spearing resulting in dishonor of four checks of Joseph H. Spearing); Harvey v. Michigan Nat'l Bank, 19 U.C.C. Rep. Serv. 906 (Mich. C.P. 1974) (deposit for checking account credited to savings account); Grenada Bank v. Lester, 126 Miss. 442, 89 So. 2 (1921) (deposit for William Lester credited to account of Will V. Lester); Crites & Crites v. Security State Bank, 52 Mont. 121, 155 P. 970 (1916); Nealis v. Industrial Bank of Commerce, 200 Misc. 406, 107 N.Y.S.2d 264 (Sup. Ct. 1951) (bank credited deposit for attorney account to the personal account of the depositor resulting in dishonor of check drawn on the attorney account); Wilson v. Palmetto Nat'l Bank, 113 S.C. 508, 101 S.E. 841 (1920) (Depositor had an account with a balance of $1.00. When he deposited $100.00, a new account was opened. Upon presentation of a check for $27.00, the bookkeeper looked at the account with a balance of $1.00, and the check was dishonored.).

41. 180 Miss. 876, 179 So. 564 (1938).

42. Atlanta Nat'l Bank v. Davis, 96 Ga. 334, 23 S.E. 190 (1895); Spearing v. Whitney-Central Nat'l Bank, 129 La. 607, 613, 56 So. 548, 551 (1911).

43. 127 Cal. App. 2d 728, 274 P.2d 421 (1954).

the time the bank disclosed his balance of $5,000.00. The court held that the depositor, not the bank, was responsible for the return of the outstanding checks; the depositor should have known the status of his own account. In *Turbitt v. Riggs National Bank*[44] a depositor requested his balance from the bank after the deposit of another customer mistakenly had been credited to his account. Before the error was discovered, the depositor wrote checks which exceeded his actual balance. After the error was corrected, some of the checks were dishonored because of insufficient funds. The court held that the dishonors were not wrongful because the depositor should have known the correct balance of his account.

When two or more checks drawn on the account of a depositor are presented for payment at the same time, the bank is not obligated to pay all of the checks if the total amount of the checks exceed the balance in the account of the depositor.[45] In these circumstances, the bank may select which checks are to be paid and which are to be dishonored in any manner convenient to the bank.[46] Because the depositor properly should have funds available to pay all of the checks, he cannot claim that one of the checks dishonored should have been paid instead of one that was honored.[47] Therefore, in selecting which checks to dishonor, the bank does not risk making a wrongful dishonor. In *Merchant v. Worley*[48] a draft payable to a third party and checks given to the bank in payment of indebtedness owed to the bank were presented for payment on the same day. The depositor's account was insufficient to pay all of the items, so the bank paid the checks and dishonored the draft. Relying on section 4-303(2), the court held that the dishonor of the draft was not wrongful.[49]

If a bank pays a postdated check prior to the date stated on the check, the customer's balance may be reduced to the extent that other checks will be dishonored because of insufficient funds. In *Smith v. Maddox-Rucker Banking Co.*[50] the court indicated that a dishonor under these circumstances was wrongful. It is proper to impose liability on a bank which causes dishonor of a customer's checks by prematurely charging a postdated check against the account of the customer. It is likely that the customer postdated the check because he did not anticipate having sufficient funds to cover the check prior to its date. Such premature payment by the bank is contrary to the order of its customer and further results in the dishonor of other orders of the customer.

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44. 182 A.2d 886 (D.C. 1962).

45. Authorities cited note 38 *supra*.

46. U.C.C. § 4-403(2); Andrews v. Citizens Bank, 139 Ga. App. 763, 229 S.E.2d 501 (1976) (holding unclear).

47. U.C.C. § 4-303(2), Comment 6.

48. 79 N.M. 771, 449 P.2d 787 (Ct. App. 1969).

49. *Cf.* U.C.C. § 4-303, Comment 6. "Under subsection (2) the bank obviously has the right to pay items for which it is itself liable ahead of those for which it is not."

50. 8 Ga. App. 288, 68 S.E. 1092 (1910).

Payment of a stale check by a bank could result in the dishonor of other checks because of insufficient funds. Although a bank is not obligated to honor a stale check, it may honor the check if it does so in good faith.[51] Therefore, if the payment of the stale check is made in good faith, the dishonor of other checks because of the resulting insufficient funds should not be wrongful.

When a customer deposits a check drawn on a bank other than the depositary bank[52] and receives immediate credit for the check, the customer has no right to immediate withdrawal of the credit given. Unless there is an agreement otherwise, the credit does not become available for withdrawal as of right until the bank receives final settlement and has had a reasonable time to learn of the final settlement.[53] Where a check drawn by the customer is presented to the bank prior to the time that the credit becomes available for withdrawal as of right, the check is drawn against uncollected funds.[54] Since the customer has no right to draw against uncollected funds, dishonor of a check which is drawn against uncollected funds is not wrongful.[55] However, dishonor of a check for the reason that it is drawn against uncollected funds is wrongful if enough time has elapsed so that the funds are no longer uncollected.[56] In *Bank of Louisville Royal v. Sims*[57] a clerk of the bank inadvertently placed a ten-day hold against a check deposited by Sims; the normal hold was three days. During the extended hold period, two checks drawn by Sims were dishonored for the reason that they were drawn against uncollected funds. The court held the dishonors to be wrongful.

Under certain circumstances, a bank has a right of setoff against the deposit account of its customer for amounts owed the bank by the customer.[58] When a bank exercises its right of setoff, the account balance of its depositor could be reduced to the extent that a subsequent check would be dishonored because of insufficient funds.[59] If the bank has a legal right to make the setoff, the subsequent dishonor for insufficient funds is not wrongful.[60] On the other hand, if the setoff is improper and results in a

51. U.C.C. § 4-404.

52. " 'Depositary bank' means the first bank to which an item is transferred for collection . . . ." *Id.* § 4-105(a).

53. *Id.* § 4-213(4)(a). For a check drawn on the depositary bank, the customer has a right to withdraw the credit on the second banking day after deposit of the check. *Id.* § 4-213(4)(b).

54. Bank of Louisville Royal v. Sims, 435 S.W.2d 57 (Ky. 1968); Merchant v. Worley, 79 N.M. 771, 449 P.2d 787 (Ct. App. 1969).

55. Merchant v. Worley, 79 N.M 771, 773, 449 P.2d 787, 789 (Ct. App. 1969).

56. Bank of Louisville Royal v. Sims, 435 S.W.2d 57 (Ky. 1968).

57. *Id.*

58. 5A MICHIE ON BANKS AND BANKING ch. 9, § 114 (perm. ed. 1973).

59. State Bank v. Marshall, 163 Ark. 566, 260 S.W. 431 (1924); Farmers Cooperative Elevator, Inc. v. State Bank, 236 N.W.2d 674 (Iowa 1975); Svendsen v. State Bank, 64 Minn. 40, 65 N.W. 1086 (1896); Keller v. Commercial Credit Co., 149 Or. 372, 40 P.2d 1018 (1935).

60. Farmers Cooperative Elevator, Inc. v. State Bank, 236 N.W.2d 674 (Iowa

dishonor due to insufficient funds, that dishonor is wrongful.[61] In *American Fletcher National Bank & Trust Co. v. Flick*[62] the bank set off a note due from Henry against Flick's account. The loan evidenced by the note was made to Henry to be used for the purchase of an automobile from Flick. Flick received the proceeds, but the sale was not completed. Because the sale was not finalized, Flick was obliged to return the funds to Henry, and Flick claimed that he had done so. However, Flick was not obliged to repay Henry's loan to the bank. The setoff exercised by the bank was improper. After the setoff, three checks drawn by Flick were returned because of insufficient funds. Because the setoff was improper, the dishonor of the checks was wrongful.

Under the U.C.C. a setoff as to a particular check is improper after the bank has certified the check,[63] finally paid the check,[64] evidenced its decision to pay the check,[65] or become accountable for the check because of making a late return of it.[66] Once one of these events has occurred, dishonor of the check for the reason that the bank has exercised a setoff is wrongful.

When a person other than the depositor claims an interest in the funds in the depositor's account, the bank is placed in a difficult situation. Where the claim is valid, the bank may be liable to the claimant if it disregards the claim and allows its depositor to withdraw the funds.[67] On the other hand, if the bank refuses to honor the depositor's checks because the funds have been paid to the claimant, that dishonor is wrongful if the claim proves to be invalid.[68] The bank is under a duty to hold the funds for a reasonable period of time to allow commencement of legal proceedings by the claim-

1975) (bank properly set off notes where acceleration of maturity was made in good faith); Mt. Sterling Nat'l Bank v. Green, 99 Ky. 262, 35 S.W. 911 (1896) (setoff had not been exercised, but the bank had a lien against the deposit balance of its depositor arising from a past due debt which justified dishonor of the depositor's check); Keller v. Commercial Credit Co., 149 Or. 372, 40 P.2d 1018 (1935) (bank properly exercised right of setoff where collateral was not what it purported to be).

61. State Bank v. Marshall, 163 Ark. 566, 260 S.W. 431 (1924) (bank dishonored several checks after applying deposit to a debt not yet due at a time when the depositor was not insolvent); Meinhart v. Farmers' State Bank, 124 Kan. 333, 259 P. 698 (1927) (bank charged depositor's account with a note not yet due at a time when he was not insolvent); Svendsen v. State Bank, 64 Minn. 40, 65 N.W. 1086 (1896) (bank mistakenly thought that note charged to customer's account was due).

62. 146 Ind. App. 122, 252 N.E.2d 839 (1969).

63. U.C.C. § 4-303(1)(a).

64. *Id.* §§ 4-213(1), 4-303(1)(b) to -303(1)(e).

65. *Id.* § 4-303(1)(d).

66. *Id.* §§ 4-302, 4-303(1)(e).

67. Goldstein v. Riggs Nat'l Bank, 459 F.2d 1161, 1163 (D.C. Cir. 1972); Gendler v. Sibley State Bank, 62 F. Supp. 805, 810 (N.D. Iowa 1945); 5A MICHIE ON BANKS AND BANKING ch. 9, § 82, at 243 (perm. ed. 1973).

68. Patterson v. Marine Nat'l Bank, 130 Pa. 419, 18 A. 632 (1889) (two opinions). The dishonor is not wrongful if the funds belong to the claimant. Hanna v. Drovers' Nat'l Bank, 194 Ill. 252, 62 N.E. 556 (1901); France Milling Co. v. First Nat'l Bank, 138 App. Div. 645, 122 N.Y.S. 736 (1910).

ant,[69] so it should not be wrongful to dishonor the depositor's checks during this period. However, the bank must assume the risk of determining what is a reasonable period of time.[70] The bank also is responsible for showing the proper reason for dishonor, *i.e.*, that the account is being held because of an adverse claim.[71]

To alleviate the situation caused by conflicting claims to bank deposits, many states have adopted adverse claim statutes.[72] The adverse claim statutes generally provide that a bank is not required to recognize an adverse claim unless the claimant secures a court order, furnishes an indemnity bond, or, in the case of a deposit by a fiduciary, furnishes an affidavit showing reasonable cause to believe that the fiduciary is about to misappropriate the deposit.[73] Where the claimant has complied with an adverse claim statute and had his claim recognized by the bank, dishonor of the depositor's checks will not be wrongful.[74]

Other situations involving third parties may result in wrongful dishonors. In *Winkler v. Citizens' State Bank*[75] the cashier of the bank thought that the depositor's funds should be paid to a third party pursuant to an agreement between the depositor and the third party. However, the bank had not agreed to hold the deposit for the third party; nor was the bank under any legal obligation to protect the third party's interests. Therefore, the bank's refusal to pay a check drawn by the depositor for the entire amount of the deposit was wrongful. The bank in *Pascagoula National Bank v. Eberlein*[76] believed that a part of the funds in the wife's account had come from the sale of the husband's business and paid the deposit into court on a garnishment proceeding against the husband only. The subsequent dishonor of the wife's checks drawn on the account was held to be wrongful.

The payment of a check over a stop payment order also may result in the dishonor of other checks because of insufficient funds. When a dishonor is caused by a payment made contrary to an order of the depositor, the dishonor is normally wrongful. However, because of special rules applicable to stop orders, there is some doubt whether the dishonor caused by payment of a check over a stop order is always wrongful.

69. Gendler v. Sibley State Bank, 62 F. Supp. 805 (N.D. Iowa 1945).

70. 2 PATON'S DIGEST, *Deposits* § 6:3, at 1657 (1940).

71. Wildenberger v. Ridgewood Nat'l Bank, 230 N.Y. 425, 130 N.E. 600 (1921) (The dishonor was wrongful where the returned checks showed "account closed." According to the cashier, the bookkeeper had been instructed to return them showing "account held.").

72. 2 PATON'S DIGEST, *Deposits* § 6:3, at 1657 (1940). For a list of states, see *Id.* § 6:3 (1940 & Supp. 1957).

73. The statute recommended by the American Bankers Association is printed in 2 PATON'S DIGEST, *Deposits* § 6:3, at 1657-58 (1940).

74. Goldstein v. Riggs Nat'l Bank, 459 F.2d 1161, 1163 (D.C. Cir. 1972); *cf.* Sumitomo Shoji New York, Inc. v. Chemical Bank New York Trust Co., 47 Misc. 2d 741, 746, 263 N.Y.S.2d 354, 359 (Sup. Ct. 1965), *aff'd mem.*, 267 N.Y.S.2d 477 (App. Div. 1966).

75. 89 Kan. 279, 131 P. 597 (1913).

76. 161 Miss. 337, 131 So. 812 (1931).

Under section 4-403(3) of the U.C.C., the depositor has the burden of establishing that he incurred a loss because of a payment contrary to a stop order. If the check is negotiated to a holder in due course, the drawer remains liable to the holder in due course despite defenses that might be available against the payee.[77] Because the depositor will be required to pay the holder in due course, he suffers no loss as to that check when the bank pays the check contrary to a stop order.[78] The bank is specifically subrogated to the rights of the holder in due course.[79] Using similar reasoning, Professor Leary concluded:

> If the bank can establish the payee was really owed the money, or that the item was presented on behalf of a holder in due course, then the customer cannot establish that he suffered any loss by the payment, and cannot claim, further, that additional checks were improperly dishonored causing further loss. On the other hand, should the customer establish that as between himself and the payee, he, the drawer, was entitled to the money and that there is no holder in due course involved, then it would seem to follow that he has suffered loss and the dishonor of other items, caused by the improper debit, will be an element of the damages.[80]

Though not expressly stated, Professor Leary's view makes a check subject to a stop order properly payable when negotiated to a holder in due course. As to that particular check, the result can be justified because the depositor could ultimately be required to pay the check. However, as to other checks dishonored due to insufficient funds resulting from the payment over a stop order, the result is more difficult to justify. Had the bank stopped payment as it was ordered, the customer might be required to pay the amount of the check to a holder in due course, but sufficient funds would remain in the customer's account to honor the other checks—checks which the customer may have written in anticipation that the stop order would be honored. Because the dishonor resulted from an improper payment by the bank, it is appropriate to treat the dishonor as wrongful and to permit the depositor to recover damages for the bank's wrongful act.

IV. DAMAGES FOR WRONGFUL DISHONOR

Once it has been established that the dishonor of a check was wrongful, the bank is liable to the customer for the damages resulting from the injury caused by the wrongful dishonor. The nature and extent of the injuries caused by wrongful dishonors and the damages recoverable therefor will be analyzed in this section.

77. U.C.C. § 3-305.

78. Universal C.I.T. Credit Corp. v. Guaranty Bank & Trust Co., 161 F. Supp. 790 (D. Mass. 1958).

79. U.C.C. § 4-407(a).

80. Leary, *Article 4: Bank Deposits and Collections Under the Uniform Commercial Code*, 15 U. PITT. L. REV. 565, 581 (1954).

A. *The Presumption of Substantial Damages*

Under the common law rule, a merchant or trader was allowed to recover substantial damages for wrongful dishonor without proof of actual damages.[81] The rule usually was based on the theory that dishonor of the check of a merchant or trader involved an imputation of insolvency, dishonesty, or bad faith and thus slandered him in his trade or business.[82] The rule also was supported on the ground that the dishonor necessarily resulted in an impairment of the credit of the merchant or trader and that the impairment of credit constituted a substantial injury for which he was entitled to recover more than nominal damages.[83] Due to the difficulty in proving special or actual damages, the courts presumed substantial damages, the amount to be determined by the trier of fact.[84] One court held that the presumption was conclusive.[85]

In some jurisdictions, if the depositor was not a merchant or trader, his recovery for wrongful dishonor was limited to nominal damages unless he pleaded and proved special or actual damages; there was no presumption of injury to credit or reputation.[86] In other jurisdictions, however, depositors were entitled to substantial damages[87] without proof of actual damages and without regard to whether a depositor was a merchant or trader.[88] Because the extent of the injury and the amount of damage caused by the injury were often difficult to establish, substantial damages were based upon a presumption that dishonor results in some injury to the credit of the depositor.[89] Substantial damages also were allowed where

81. McFall v. First Nat'l Bank, 138 Ark. 370, 211 S.W. 919 (1919); Schaffner v. Ehrman, 139 Ill. 109, 28 N.E. 917 (1891); Svendsen v. State Bank, 64 Minn. 40, 65 N.W. 1086 (1896); Crites & Crites v. Security State Bank, 52 Mont. 121, 155 P. 970 (1916); Browning v. Bank of Vernal, 60 Utah 197, 207 P. 462 (1922).

82. McFall v. First Nat'l Bank, 138 Ark. 370, 374, 211 S.W. 919, 921 (1919); Schaffner v. Ehrman, 139 Ill. 109, 113, 28 N.E. 917, 919 (1891); Svendsen v. State Bank, 64 Minn. 40, 65 N.W. 1086 (1896); Crites & Crites v. Security State Bank, 52 Mont. 121, 155 P. 970 (1916).

83. Browning v. Bank of Vernal, 60 Utah 197, 207 P. 462 (1922).

84. Schaffner v. Ehrman, 139 Ill. 109, 114, 28 N.E. 917, 919 (1891); Browning v. Bank of Vernal, 60 Utah 197, 207 P. 462 (1922).

85. First Nat'l Bank v. N.R. McFall & Co., 144 Ark. 149, 222 S.W. 40 (1920).

86. Third Nat'l Bank v. Ober, 178 F. 678, 680 (8th Cir. 1910); First Nat'l Bank v. Stewart, 204 Ala. 199, 85 So. 529 (1920); Spearing v. Whitney-Central Nat'l Bank, 129 La. 607, 613, 56 So. 548, 550 (1911).

87. Substantial damages are often characterized as reasonable damages, Valley Nat'l Bank v. Witter, 58 Ariz. 491, 501, 121 P.2d 414, 419 (1942); Grenada Bank v. Lester, 126 Miss. 442, 89 So. 2 (1921); or temperate damages, Hilton v. Jesup Banking Co., 128 Ga. 30, 57 S.E. 78 (1907) (temperate damages equivalent to moderate or reasonable damages); Atlanta Nat'l Bank v. Davis, 96 Ga. 334, 23 S.E. 190 (1895); Wilson v. Palmetto Nat'l Bank, 113 S.C. 508, 101 S.E. 841 (1920).

88. Hilton v. Jesup Banking Co., 128 Ga. 30, 57 S.E. 78 (1907); Atlanta Nat'l Bank v. Davis, 96 Ga. 334, 23 S.E. 190 (1895); Grenada Bank v. Lester, 126 Miss. 442, 89 So. 2 (1921); Patterson v. Marine Nat'l Bank, 130 Pa. 419, 18 A. 632 (1889) (Case II); Wilson v. Palmetto Nat'l Bank, 113 S.C. 508, 101 S.E. 841 (1920).

89. Valley Nat'l Bank v. Witter, 58 Ariz. 491, 500, 121 P.2d 414, 418-19

there was some evidence of injury to the credit of the depositor, but the extent of the injury (specific amount of damages caused by the injury) was not proved.[90]

Seeking to change the rule that allowed substantial damages without proof of actual damages, many states enacted a statute identical or similar to a model statute recommended by the American Bankers Association (A.B.A.).[91] The A.B.A. model statute provided:

> No bank or trust company doing business in this State shall be liable to a depositor because of the non-payment through mistake or error and without malice of a check which should have been paid unless the depositor shall allege and prove actual damage by reason of such non-payment and in such event the liability shall not exceed the amount of damage so proved.[92]

The A.B.A. sponsored the statute because the rule allowing substantial damages without proof of actual damages was considered to be unjust to banks.[93] A portion of an A.B.A. statement sets out the reason for the statute:

> The courts proceed on the theory that the dishonor of [a depositor's] check must necessarily result in material injury to such drawer and therefore hold that the law will conclusively presume such to be the fact without the necessity of any proof thereof. But the fact is often contrary to the presumption and probably in the majority of instances where a customer's check is refused payment through error, the mistake is promptly corrected, an explanatory letter is written by the banker and no actual damage results to the customer. The application of the rule, therefore, works an injustice to the bank which is often mulcted in damages out of all proportion to the imaginary injury inflicted . . . .[94]

Section 4-402 of the U.C.C. has a provision similar to the A.B.A. statute which provides in part:

> A payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item. When the dishonor occurs through mistake liability is limited to actual damages proved.

The purpose of this portion of section 4-402 is similar to the purpose of the A.B.A. statute. Comment 3 to section 4-402 states this purpose as follows:

> This section rejects decisions which have held that where the

(1942); Atlanta Nat'l Bank v. Davis, 96 Ga. 334, 23 S.E. 190 (1895); Meinhart v. Farmers' State Bank, 124 Kan. 333, 338, 259 P. 698, 701 (1927).

90. Valley Nat'l Bank v. Witter, 58 Ariz. 491, 503, 121 P.2d 414, 419 (1942); Meinhart v. Farmers' State Bank, 124 Kan. 333, 259 P. 698 (1927); Johnson v. National Bank, 213 S.C. 458, 465, 50 S.E.2d 177, 180 (1948).

91. 1 PATON'S DIGEST, *Checks* § 21B:1 (1940).

92. *Id.* at 1117.

93. *Id.*

94. *Id.*

> dishonored item has been drawn by a merchant, trader or fiduciary he is defamed in his business, trade or profession by a reflection on his credit and hence that substantial damages may be awarded on the basis of defamation "per se" without proof that damage has occurred. The merchant, trader and fiduciary are placed on the same footing as any other drawer and in all cases of dishonor by mistake damages recoverable are limited to those actually proved.

Prior to the A.B.A. statute, the rule of substantial damages was often applied to situations where wrongful dishonors resulted from mistake.[95] Unquestionably, the purpose of both the A.B.A. statute and section 4-402 was to eliminate the presumption of substantial damage where the wrongful dishonor resulted from the bank's mistake. However, the language of section 4-402 suggests that it does not apply to all wrongful dishonors: "When the dishonor occurs through mistake liability is limited to actual damages proved."[96] This language implies that liability would not be limited to actual damages if the dishonor was for a reason other than mistake. Similar language was contained in the A.B.A. statute.[97]

This actual damage limitation has not been applied to all wrongful dishonors. In *Jones v. Citizens Bank*[98] the court held that a statute similar to the A.B.A. model was not applicable to a wrongful dishonor which was maliciously made. Considering a similar statute in *Woody v. National Bank*,[99] the court held the statute not applicable when the dishonor was alleged to be willful and malicious. In *Loucks v. Albuquerque National Bank*[100] the court indicated that section 4-402 applies only to dishonors resulting from mistake. In *Loucks* the bank charged to a partnership account the note of an individual partner. The bank argued that it acted under a mistaken belief that the proceeds of the loan could be traced to the partnership. However, the bank dishonored partnership checks after being informed that the note was a personal obligation and that the partnership had outstanding checks. The court held that it was a jury question whether the checks were dishonored due to mistake. Likewise, in *Northshore Bank v. Palmer*[101] the court upheld a recovery of exemplary damages after a jury finding that the dishonor was not the result of mistake.

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95. Hilton v. Jesup Banking Co., 128 Ga. 30, 57 S.E. 78 (1907) (mistake of cashier); Atlanta Nat'l Bank v. Davis, 96 Ga. 334, 23 S.E. 190 (1895) (mistake of employee); Schaffner v. Ehrman, 139 Ill. 109, 28 N.E. 917 (1891) (bookkeeping mistake); Grenada Bank v. Lester, 126 Miss. 442, 89 So. 2 (1921) (credit of deposit to wrong account); Crites & Crites v. Security State Bank, 52 Mont. 121, 155 P. 970 (1916) (credit of deposit to wrong account); Wilson v. Palmetto Nat'l Bank, 113 S.C. 508, 101 S.E. 841 (1920) (mistake of employee).

96. U.C.C. § 4-402.

97. 1 PATON'S DIGEST, *Checks* § 21B:1, at 1117 (1940).

98. 58 N.M. 48, 50, 265 P.2d 366, 368 (1954).

99. 194 N.C. 549, 556, 140 S.E. 150, 154 (1927).

100. 76 N.M. 735, 745, 418 P.2d 191, 198 (1966).

101. 525 S.W.2d 718 (Tex. Ct. App. 1975).

If the actual damage limitation of section 4-402 applies only to wrongful dishonors resulting from mistake, the presumption of substantial damages, to the extent it was the rule under prior law, remains a valid rule for wrongful dishonors not resulting from mistake. Therefore, the question of mistake is crucial to the determination of damages from wrongful dishonor.

There has long been a distinction between mistaken and willful dishonors in New York. In *Wildenberger v. Ridgewood National Bank*[102] the bank dishonored checks of a depositor after his wife asserted a claim to one-half of the funds on deposit. Discussing damages, Justice Cardozo stated:

> The dishonor of the checks was admittedly a wrong. The wrong, if willful, charged the bank with liability for the consequences. In many jurisdictions the liability is the same whether the wrong is willful or merely heedless. In this state the liability is for nominal damages and no more, if the dishonor of the checks is the result of innocent mistake. That was the situation in Clark Co. v. Mt. Morris Bank, 85 App. Div. 362, 83 N.Y. Supp. 447, and 181 N.Y. 533, 73 N.E. 1133, where dishonor was due to the blunder of a bookkeeper, who misread the plaintiff's balance. Sometimes we are told that, to permit the recovery of substantial damages, the wrong must be malicious. This does not mean, however, that it must be the product of hatred or malevolence. It is the exclusion of liability for the consequences of accident or mistake. We find nothing of accident or mistake in the defendant's dishonor of these checks. It dishonored them with full knowledge of the state of the account, setting one risk against another, the risk of adverse claims against the risk of broken contracts. Here was no heedless act, but one deliberate and willful.[103]

A similar distinction was made in *Meinhart v. Farmers' State Bank*.[104] In *Meinhart* the dishonor was held to be intentional, rather than mistaken, where the bank charged a depositor's note against his account at a time when the note was not due.

In *Northshore Bank v. Palmer*[105] depositor Palmer's account was charged with a check purportedly indorsed and cashed by Palmer. Despite Palmer's protestations that the indorsement was not his and that he had not received the proceeds of the check, the bank dishonored checks which it had previously paid indicating that they had been paid in error. The court found that the bank's actions were deliberate, intentional, and done with knowledge of the depositor's assertions that the bank's actions were wrongful.

Applying the reasoning set out in *Palmer*, *Wildenberger*, and *Meinhart*,

102. 230 N.Y. 425, 130 N.E. 600 (1921).
103. *Id.* at 427-28, 130 N.E. at 600.
104. 124 Kan. 333, 259 P. 698 (1927).
105. 525 S.W.2d 718 (Tex. Ct. App. 1975).

wrongful dishonors resulting from inadvertent bookkeeping errors and other unintentional employee errors would be mistaken dishonors. On the other hand, where a dishonor is caused by a setoff or charge made by a bank under an erroneous belief that it had a legal right to do so, the wrongful dishonor resulting from the improper setoff or charge would not be classified as mistaken. Under this test, the wrongful dishonor in *Loucks v. Albuquerque National Bank*,[106] which resulted from an improper setoff, would not be a mistaken dishonor.

Except for the allowance of nominal damages by some courts, court decisions under statutes similar to the A.B.A. model have been consistent with the act. In *Bush v. Southwark National Bank*[107] the court held that a statute similar to the A.B.A. model abrogated the presumption of substantial damage for wrongful dishonor and required proof of actual damage. Further, the court held that because of the statute, the depositor was not entitled to nominal damages since he had not proven any actual damages. Relying on a statute similar to the A.B.A. model, the court in *Thomas v. American Trust Co.*[108] stated that a depositor was entitled only to actual damages for a wrongful dishonor resulting from mistake. However, contrary to the statute, the court indicated that the depositor would be entitled to nominal damages if he failed to prove actual damages. In *State Bank v. Marshall*[109] the depositor was entitled to recover only nominal damages under a statute which limited recovery for wrongful dishonor to special damages proved. However, the result likely would have been the same without the statute because the court held that the depositor was not a merchant or trader; thus he would not have had the benefit of the presumption of substantial damages. Likewise, in *First National Bank v. Ducros*[110] the court cited a statute similar to the A.B.A. model, but the depositor would have been entitled only to nominal damages since he was not a merchant or trader. In *Abramowitz v. Bank of America*[111] the court relied on a similar statute in stating that the depositor would be limited to actual damages, but found that the depositor had established actual damages. Similarly, in *Weaver v. Bank of America*[112] the court found that actual damages had been alleged.

Some decisions under section 4-402 have been consistent with the language and purpose of the section. Following section 4-402, the court in *Continental Bank v. Fitting*[113] reversed an award of damages for a mistaken dishonor where no specific damages as a result of the dishonor had been

106. 76 N.M. 735, 418 P.2d 191 (1966).
107. 8 Pa. D. & C. 27 (Phila. County C.P. 1926).
108. 208 N.C. 653, 182 S.E. 136 (1935).
109. 163 Ark. 566, 260 S.W. 431 (1924).
110. 27 Ala. App. 193, 168 So. 704 (1936).
111. 131 Cal. App. 2d Supp. 892, 281 P.2d 380 (App. Dep't Super. Ct. 1955).
112. 59 Cal. 2d 428, 380 P.2d 644, 30 Cal. Rptr. 4 (1963).
113. 20 U.C.C. Rep. Serv. 1263 (Ariz. Ct. App. 1977); *accord*, Harvey v. Michigan Nat'l Bank, 19 U.C.C. Rep. Serv. 906 (Mich. C.P. 1974) (the court refused to allow the jury to consider an award of damages for defamation per se).

established. In *Skov v. Chase Manhattan Bank*[114] the requirement that the depositor prove actual damages was recognized, and the court found that actual damages had been established. Likewise, in *Bank of Louisville Royal v. Sims*[115] the court acknowledged the actual damage provision of section 4-402 but held that several items of the alleged damages did not constitute actual damages.

Language from other decisions under section 4-402 has been somewhat contrary to the language and purpose of the section. In *American Fletcher National Bank & Trust Co. v. Flick*[116] the court stated:

> [W]e hold that when a bank wrongfully dishonors its customer's business check there arises a presumption that the customer's credit and business standing is thereby harmed. The function of this presumption is to remove from the customer the duty of going forward with the evidence on this particular injury or harm and thereby avoid a directed verdict against him if evidence on the issue is not produced. The primary reason for the recognition of this presumption is that a wrongful dishonor renders the existence of *some* harm to the customer's credit and business standing so probable that it makes legal sense as well as common sense to assume the existence of such harm unless and until the adversary comes forward with some evidence to the contrary.

Despite this presumption, the depositor's recovery was limited to nominal damages because the court did not also presume that *substantial* damages resulted from the presumed injury. The evidence was held to be insufficient to establish that a decline in the depositor's business for which he claimed substantial damages was proximately caused by the wrongful dishonor.

Although the dishonor in *Flick* resulted from a setoff and not a mistake and thus was not subject to the actual damages provision of section 4-402, the presumption recognized by the court was not limited to mistaken dishonors. Since the court refused to presume substantial damages, the presumption does not seriously conflict with the purpose of section 4-402. However, a presumption of injury is not a necessity. If a depositor can establish damages, he should be able to establish the injury which caused the damages without the aid of a presumption. A presumption of injury without a presumption of substantial damages results in a recovery of nominal damages: an end inconsistent with section 4-402 which limits recovery to actual damages. Furthermore, once a court takes the first step of presuming injury, it might then presume substantial damages, a result in serious conflict with section 4-402. At the least, a presumption of injury could lead to confusion in applying the presumption to later cases and might encourage litigation by depositors who believe the presumption

114. 407 F.2d 1318 (3d Cir. 1969).

115. 435 S.W.2d 57 (Ky. 1968).

116. 146 Ind. App. 122, 133, 252 N.E.2d 839, 845-46 (1969) (emphasis by the court).

improves chances of recovery. Therefore, the presumption recognized by the *Flick* court properly should be rejected by future Indiana decisions and not be adopted by other jurisdictions.

Whether the depositor's credit had been damaged by a wrongful dishonor was identified by the court in *Loucks v. Albuquerque National Bank*[117] as a question of fact for the jury. The court stated:

> Damages recoverable for injuries to credit as a result of a wrongful dishonor are more than mere nominal damages and are referred to as "***compensatory, general, substantial, moderate, or temperate, damages as would be fair and reasonable compensation for the injury which he [the depositor] must have sustained, but not harsh or inordinate damages.***" 5A Michie, Banks and Banking, § 243 at 576.
>
> What are reasonable and temperate damages varies according to the circumstances of each case and the general extent to which it may be presumed the credit of the depositor would be injured. Valley National Bank v. Witter, 58 Ariz. 491, 121 P.2d 414. The amount of such damages is to be determined by the sound discretion and dispassionate judgment of the jury. Meinhart v. Farmers' State Bank, 124 Kan. 333, 259 P. 698, 701.

Although there was considerable evidence of injury to the depositor's credit, the *Loucks* opinion does not indicate the extent of evidence on the *amount of damages* resulting from that injury. Without considering any evidence of damages, the court stated that there was a presumption that substantial damages resulted from the injury. The court indicated that the actual damage limitation of section 4-402 would not apply unless the dishonor was caused by a mistake. However, the court did not state clearly an intention to limit the presumption of substantial damages to dishonors other than those resulting from mistake. Unless the use of the presumption of substantial damages is precluded in the case of mistaken dishonors, the presumption is directly contrary to the purpose of section 4-402.

Two aspects of wrongful dishonor are treated by the courts not as separate and distinct problems, but as a single problem to be resolved by a presumption of substantial damages. First, it is difficult to prove that the wrongful dishonor caused injury to the depositor's credit. Second, even with injury established, it is still difficult to prove with certainty the amount of damages resulting from the injury.

In many cases where a presumption of substantial damages was applied, courts first presumed injury to the depositor and then allowed the trier of fact to assess reasonable damages resulting from the presumed injury.[118] The reason given for applying the presumption was the difficulty

117. 76 N.M. 735, 746, 418 P.2d 191, 198-99 (1966).

118. McFall v. First Nat'l Bank, 138 Ark. 370, 211 S.W. 919 (1919); Atlanta Nat'l Bank v. Davis, 96 Ga. 334, 23 S.E. 190 (1895); Schaffner v. Ehrman, 139 Ill. 109, 28 N.E. 917 (1891); Svendsen v. State Bank, 64 Minn. 40, 65 N.W. 1086 (1896); Grenada Bank v. Lester, 126 Miss. 442, 89 So. 2 (1921); Crites & Crites v. Security State Bank, 52 Mont. 121, 155 P. 970 (1916).

of proof, but it is not clear whether the difficulty was in proof of injury or in proof of the amount of damages. It seems likely that the courts had both in mind. Where there was some evidence of injury but no proof of a definite amount of resulting damages, the presumption of substantial damages was used to allow the trier of fact to assess *reasonable* damages to compensate the depositor for the proven injury.[119] The reason given for use of the presumption was the difficulty of proof, meaning the difficulty in proving with certainty the amount of damages. On the other hand, in *Spearing v. Whitney-Central National Bank*[120] the court refused to apply the presumption purportedly because the depositor was not a merchant or trader; yet the court assessed reasonable damages upon testimony that the depositor lost credit standing with some of the payees of the dishonored checks. Thus, it is clear that confusion existed in various jurisdictions as to the meaning and the proper application of the presumption of substantial damages. This confusion resulted from a failure to distinguish between proof of injury and proof of amount of damages.

When the drafters of the A.B.A. model statute and section 4-402 sought to eliminate the presumption of substantial damages, they also failed to distinguish between proof of injury and proof of amount of damages. The drafters of both statutory provisions sought to eliminate the presumption of substantial damages by limiting liability for mistaken wrongful dishonors to actual damages proved. If the drafters intended to preclude a presumption of injury, that should have been the language used. If it was intended to preclude recovery of damages for an established injury unless the amount of damages could be established with certainty, then the language should have been more specific than "liability is limited to actual damages proved."[121]

The failure of these statutory provisions to distinguish between proof of injury and proof of amount of damages has resulted in inconsistent decisions. In *State Bank v. Marshall,*[122] despite proof that credit had been denied to the depositor as a result of the wrongful dishonors, the depositor was allowed to recover only nominal damages because she failed to establish the amount of her damages. On the other hand, in *Loucks v. Albuquerque National Bank,*[123] where there was considerable evidence of injury to the credit of the depositor, the court made it clear that reasonable damages

119. Valley Nat'l Bank v. Witter, 58 Ariz. 491, 121 P.2d 414 (1942) (loss of credit and business opportunities); Meinhart v. Farmers' State Bank, 124 Kan. 333, 259 P. 698 (1927) (refusals to make loans and cash checks); Johnson v. National Bank, 213 S.C. 458, 50 S.E.2d 177 (1948) (some direct evidence of injury to credit); Browning v. Bank of Vernal, 60 Utah 197, 207 P. 462 (1922) (necessary to return purchased goods).

120. 129 La. 607, 56 So. 548 (1911).

121. U.C.C. § 4-402.

122. 163 Ark. 566, 260 S.W. 431 (1924) (statute similar to A.B.A. statute, but requiring proof of special damages rather than actual damages).

123. 76 N.M. 735, 418 P.2d 191 (1966) (there is some question whether section 4-402 is applicable to factual situation in this case).

were to be determined by the jury without specific proof of the amount of damages. In *American Fletcher National Bank & Trust Co. v. Flick*[124] the court distinguished between proof of injury and proof of amount of damages:

> We are not unmindful that there must be drawn a clear distinction between the measure of proof necessary to establish the fact that the plaintiff sustained some harm and the measure of proof necessary to enable the trier of fact to fix the amount to compensate for such harm. And we do not preclude recovery for other than nominal damages . . . merely because plaintiff is unable to fix the exact amount. We recognize that the amount of damages appropriate for harm to credit and business standing is difficult to prove. When it is found that a harm has been caused and the only uncertainty is as to the dollar value of the harm, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever. However, there must be some evidence on which to base an award of *substantial* damages.[125]

After making this distinction, the court held that there was a presumption of injury to credit and business standing, but denied a recovery of substantial damages because the depositor failed to present evidence that the decline in his business was caused by the wrongful dishonors.

Unless section 4-402 is clarified by amendment, the proper interpretation of the section will remain uncertain. There is actually no need for a presumption of injury to credit because such an injury is not difficult to establish. In *Loucks v. Albuquerque National Bank*[126] the depositor presented evidence that, after the dishonors, some individuals and firms who had previously taken his checks now refused to do so and that other businesses had denied him credit. Similarly, in *Meinhart v. Farmers' State Bank*[127] the depositor introduced evidence that he had been denied credit because of the dishonors. In *Northshore Bank v. Palmer*[128] the customer presented evidence of being denied credit for the first time.[129] Therefore, an amendment to section 4-402 should preclude a presumption of injury to credit. However, once injury to credit has been established, it may be quite difficult to prove the exact dollar amount of damages resulting from the injury.[130] An amendment should not be too strict in specifying the degree of proof required to establish the amount of damages with sufficient certainty to allow recovery of more than nominal damages. Moreover, until section 4-402 is amended, interpretation of the section will remain a prob-

124. 146 Ind. App. 122, 252 N.E.2d 839 (1969).

125. *Id.* at 135, 252 N.E.2d at 846-47 (citations omitted) (emphasis by the court).

126. 76 N.M 735, 418 P.2d 191 (1966).

127. 124 Kan. 333, 259 P. 698 (1927).

128. 525 S.W.2d 718 (Tex. Ct. App. 1975).

129. For other cases where there was some evidence of injury, see note 119 *supra*.

130. American Fletcher Nat'l Bank & Trust Co. v. Flick, 146 Ind. App. 122, 135, 252 N.E.2d 839, 847 (1969); cases cited note 119 *supra*.

lem. When interpreting this section, the courts should keep in mind what was said in *Weaver v. Bank of America*:[131]

> The purpose of the common law presumption was to permit substantial recovery although specific damages could not be shown due to the difficulty of proof. If a concomitant amelioration of the standards of specificity and proof does not accompany the repeal of the presumption, a statute designed to prevent injustice to banks will be carried beyond the point necessary to that end; it will, instead, inflict injustice upon the depositor.

Accordingly, section 4-402 should be interpreted to preclude a presumption of injury to credit. However, once an injury has been established, the section should not be strictly interpreted as to the degree of proof necessary to establish the amount of damages.

B. *Actual Damages*

Section 4-402 of the U.C.C. limits liability for mistaken dishonors to actual damages proved. It is therefore necessary to determine what constitutes actual damage.

1. Injury to Credit

Proving actual injury to credit is not difficult.[132] Proof of the amount of damages resulting from the injury with a high degree of certainty, however, may be quite difficult.[133] The question is whether evidence of injury to credit is sufficient proof of actual damages, or whether there must be additional evidence of specific items of damage such as a loss of business.

In *Loucks v. Albuquerque National Bank*[134] the court allowed the jury to assess reasonable damages for injury to the depositor's credit where there was evidence of injury but no evidence of the specific elements of damage.[135] In *State Bank v. Marshall*[136] there was evidence that the depositor

131. 59 Cal. 2d 428, 437, 380 P.2d 644, 651, 30 Cal. Rptr. 4, 11 (1963).

132. Valley Nat'l Bank v. Witter, 58 Ariz. 491, 121 P.2d 414 (1942) (evidence of loss of mercantile credit and business opportunities); Meinhart v. Farmers' State Bank, 124 Kan. 333, 259 P. 698 (1927) (evidence of credit refusals); Spearing v. Whitney-Central Nat'l Bank, 129 La. 607, 56 So. 548 (1911) (evidence of loss of credit with payees); Loucks v. Albuquerque Nat'l Bank, 76 N.M. 735, 418 P.2d 191 (1966) (evidence of refusals to take depositor's checks and of refusals to extend credit to depositor); Northshore Bank v. Palmer, 525 S.W.2d 718 (Tex. Ct. App. 1975) (evidence of credit denial for first time).

133. American Fletcher Nat'l Bank & Trust Co. v. Flick, 146 Ind. App. 122, 135, 252 N.E.2d 839, 847 (1969).

134. 76 N.M. 735, 418 P.2d 191 (1966). It is possible that the rule on damages would not be applied to a mistaken dishonor, but the court did not formulate a different rule for mistaken dishonors.

135. *Accord*, Spearing v. Whitney-Central Nat'l Bank, 129 La. 607, 56 So. 548 (1911) (court refused to apply presumption of substantial damages, but assessed reasonable damages on the basis of evidence of loss of credit).

136. 163 Ark. 566, 260 S.W. 431 (1924) (statute similar to A.B.A. statute; Arkansas statute required proof of special damages rather than actual damages).

had been denied further credit by a merchant, but had continued to buy from the merchant by paying cash. The court held that the proof established only inconvenience, not damage. The court indicated that in order to prove damage it would be necessary for the depositor to show loss of patronage at her business or inability to obtain materials or supplies. Similarly, in *Harvey v. Michigan National Bank*[137] the depositor recovered late and service charges imposed by his mortgage company after the wrongful dishonor of a check payable to the company. He also recovered the cost of money orders purchased during the period that the mortgage company refused to accept his personal checks. However, recovery was denied for injury to credit because no other creditor learned of the dishonor, and the mortgage company again accepted his personal check when the error was explained by the bank.

In *American Fletcher National Bank & Trust Co. v. Flick*[138] the court reversed an award of substantial damages because the depositor failed to establish that the decline in his business was caused by the wrongful dishonor. However, the court did state a test to determine when damage to credit is sufficiently established:

> We recognize that the amount of damages appropriate for harm to credit and business standing is difficult to prove. When it is found that a harm has been caused and the only uncertainty is as to the dollar value of the harm, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever.[139]

This test is consistent with the approach taken by the court in *Loucks*.

When determining whether actual damages have been proved, courts should apply a standard similar to that suggested in *Loucks* and *Flick*. Under this standard, proof of injury to the depositor's credit would constitute proof of actual damages. The trier of fact would be allowed to assess a reasonable amount as damages without required proof of a certain dollar amount of damage resulting from the injury. If this standard is adopted, it will be necessary for the courts to decide which factors are relevant in arriving at reasonable damages. Although there may be others, the previous credit standing of the depositor and the number of credit denials caused by the wrongful dishonor are two factors which would be relevant to that determination.

2. Injury to Reputation

Construing a statute similar to the A.B.A. model, the court in *Weaver v. Bank of America*[140] held that actual damages include those resulting from injury to reputation. To support its conclusion, the court relied on *Mouse v. Central Savings & Trust Co.*[141] In *Mouse*, the court stated:

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137. 19 U.C.C. Rep. Serv. 906 (Mich. C.P. 1974).
138. 146 Ind. App. 122, 252 N.E.2d 839 (1969).
139. *Id.* at 135, 252 N.E.2d at 847.
140. 59 Cal. 2d 428, 437, 380 P.2d 644, 651, 30 Cal. Rptr. 4, 11 (1963).
141. 120 Ohio St. 599, 167 N.E. 868 (1929).

> What is actual damage? . . . "Actual damages" is a term synonymous with compensatory damages . . . . Corpus Juris defines the word "actual" as "real, present, visible, existent; existing at the time; existing in fact."
>
> What could be a more real and existing damage to a person of good reputation than confinement in the county jail upon a charge concededly erroneous? Such damage is actual, so real, present, and existing, in fact, that the unlawful restraint by one person of the physical liberty of another gives rise to a cause of action all its own, namely, that of false arrest.[142]

When called upon to construe the actual damages provision of section 4-402, it is likely that courts will follow the *Weaver* and *Mouse* interpretation and hold that damages resulting from injury to reputation constitute actual damages under that section.

3. Loss of Business

The decisions under section 4-402 indicate that damages resulting from the loss of business constitute actual damages under that section. Applying section 4-402 in *Skov v. Chase Manhattan Bank*,[143] the court affirmed an award of damages resulting from an erroneous dishonor of plaintiff's check. As a result of the dishonor, plaintiff's supplier of fish refused to store fish before delivery without advance payment. Plaintiff was thereby unable to continue sales to various hotel customers. The recovery was based upon loss of profits projected over a three-year period. Since the wrongful dishonor was found to be caused by the bank's mistake, plaintiff's loss of profits apparently was considered by the court to be actual damages within the meaning of section 4-402.

In *American Fletcher National Bank & Trust Co. v. Flick*[144] the court rejected a recovery for business losses because plaintiff failed to establish that the losses were caused by the dishonor of his check; the evidence indicated that the decline in business was caused by other factors. However, the court did indicate that recovery could be had under section 4-402 for a decline in business.

4. Mental Pain and Suffering

Recovery for mental pain and suffering has been denied by the majority of the courts considering such claims.[145] However, in *Weaver v. Bank of*

142. *Id.* at 610-11, 167 N.E. at 871.

143. 407 F.2d 1318 (3d Cir. 1969).

144. 146 Ind. App. 122, 252 N.E.2d 839 (1969).

145. Valley Nat'l Bank v. Witter, 58 Ariz. 491, 505, 121 P.2d 414, 420 (1942) (no recovery for mental pain and suffering such as humiliation and embarrassment); Bank of Louisville Royal v. Sims, 435 S.W.2d 57, 58 (Ky. 1968) (no recovery for embarrassment, humiliation or mortification unless punitive damages are appropriate); American Nat'l Bank v. Morey, 113 Ky. 857, 863, 69 S.W. 759, 760 (1902) (no recovery for humiliation or mortification of feeling if only compensatory damages are justified); Harvey v. Michigan Nat'l Bank, 19 U.C.C. Rep. Serv. 906 (Mich. C.P. 1974); Grenada Bank v. Lester, 126 Miss. 442, 445, 89 So. 2, 3 (1921)

America[146] the court held that a recovery could be had for impairment of health caused by mental or emotional distress. Although not always articulated in the cases, denial of recovery was likely based on the reluctance of courts to allow recovery for mental pain and suffering without physical injury.[147]

In *Meadows v. First National Bank*[148] the court held that damages resulting from mental anguish or emotional disturbance were not actual damages. However, this case was not decided under a statutory provision similar to the A.B.A. model statute; the court applied the common law of Texas. The court relied on *State National Bank v. Rogers*[149] which had held that there can be no recovery for mental suffering in an action for breach of contract or in a tort action based on a right arising from a contract.[150] On the other hand, in *Weaver v. Bank of America*[151] the court concluded that damages resulting from impairment of health caused by mental or emotional distress constituted actual damages under a statute similar to the A.B.A. model.

Interpreting section 4-402, the court in *Bank of Louisville Royal v. Sims*[152] reversed an award of damages for embarrassment, humiliation, mortification, and illness caused by nerves. Although the court stated that damages resulting from hurt feelings and nerves could not constitute actual damages, it relied primarily on the decision in *American National Bank v. Morey*[153] which held that there can be no recovery for humiliation or mortification if only compensatory damages are justified. The court in *Sims* suggested that damages for mental pain and suffering might have been recovered if the bank's actions had been willful or malicious.

At this point, the weight of authority is against the recovery of damages for mental pain and suffering in an action for wrongful dishonor. However, the trend in other areas of the law is toward the recognition of mental pain and suffering as an independent injury for which damages may be recovered.[154] The actual damages provision of section 4-402 should be interpreted to include damages for mental pain and suffering.

(no recovery for mental pain and suffering such as humiliation and embarrassment unless there was malice making punitive damages appropriate); Meadows v. First Nat'l Bank, 149 S.W.2d 591, 593 (Tex. Ct. App. 1941); State Nat'l Bank v. Rogers, 89 S.W.2d 825, 827 (Tex. Ct. App. 1935) (no recovery for mental suffering in action arising from contract).

146. 59 Cal. 2d 428, 438, 380 P.2d 644, 651, 30 Cal. Rptr. 4, 11 (1963); *accord*, Kendall Yacht Corp. v. United California Bank, 50 Cal. App. 3d 949, 958, 123 Cal. Rptr. 848, 853-54 (1975).

147. Grenada Bank v. Lester, 126 Miss. 442, 89 So. 2, 3 (1921); W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 12, 54 (4th ed. 1971).

148. 149 S.W.2d 591, 593 (Tex. Ct. App. 1941).

149. 89 S.W.2d 825 (Tex. Ct. App. 1935).

150. *Id.* at 827.

151. 59 Cal. 2d 428, 438, 380 P.2d 644, 651, 30 Cal. Rptr. 4, 11 (1963).

152. 435 S.W.2d 57 (Ky. 1968).

153. 113 Ky. 857, 69 S.W. 759 (1902).

154. W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 12, 54 (4th ed. 1971).

C. *Proximate Cause*

Under section 4-402, "[a] payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item." Since liability is limited to injuries proximately caused by a wrongful dishonor, consideration will now be given to situations involving problems of proximate causation.

1. Arrest

The issue of proximate causation has been presented most often in cases where the depositor sought to recover for injuries resulting from his arrest and detention after a wrongful dishonor of his check. The arrest and detention were based on the alleged crime of issuing a check without sufficient funds on deposit to cover the check. Because the depositor did have sufficient funds to cover the check, he was not guilty of a criminal act, and the dishonor was wrongful.

In earlier cases, the wrongful dishonor was held not to be the proximate cause of the arrest and detention of the depositor.[155] The decisions in those cases usually were based on the proposition that the act of the payee or holder of the check in procuring the arrest of the depositor was an independent, intervening cause of the arrest. This reasoning was stated in *Waggoner v. Bank of Bernie:*[156]

> When defendant bank refused payment of plaintiff's check, the natural consequence to be expected was that the person or bank which had parted with money or something of value on the faith of the check would immediately notify plaintiff of its dishonor and demand payment. Is it reasonable to suppose such person or bank would immediately procure the arrest of plaintiff under such state of facts without some attempt, at least, to permit plaintiff to make explanation or restitution? We answer no. Every day of every week such mistakes occur, but arrests are not made without investigation.

More recent cases have left the question of proximate cause to the trier of fact and have made it clear that a wrongful dishonor can be found to be the proximate cause of the depositor's arrest.[157] It has been held that the procurement of arrest by a third party does not necessarily break the chain of causation. The rationale of these decisions was set out in *Mouse v. Central Savings & Trust Co.:*[158]

155. Hartford v. All Night & Day Bank, 170 Cal. 538, 150 P. 356 (1915), *overruled*, Weaver v. Bank of America, 59 Cal. 2d 428, 380 P.2d 644, 30 Cal. Rptr. 4 (1963); Bearden v. Bank of Italy, 57 Cal. App. 377, 207 P. 270 (1922), *overruled*, Weaver v. Bank of America, *supra*; Waggoner v. Bank of Bernie, 220 Mo. App. 165, 281 S.W. 130 (1926); Western Nat'l Bank v. White, 62 Tex. Civ. App. 374, 131 S.W. 828 (1910).

156. 220 Mo. App. 165, 170, 281 S.W. 130, 132 (1926).

157. Weaver v. Bank of America, 59 Cal. 2d 428, 380 P.2d 644, 30 Cal. Rptr. 4 (1963); Collins v. City Nat'l Bank & Trust Co., 131 Conn. 167, 38 A.2d 582 (1944); Mouse v. Central Savings & Trust Co., 120 Ohio St. 599, 167 N.E. 868 (1929).

158. 120 Ohio St. 599, 605, 167 N.E. 868, 870 (1929).

> [I]t was entirely natural and probable that the act of the bank would result in the arrest of Mouse. By the exercise of reasonable diligence, the bank could have foreseen that this exact consequence would occur, for the issuance of a check upon a bank without funds or credit to meet it is a public offense, which, notoriously, frequently results in the arrest and imprisonment of the drawer of the check.

Section 4-402 adopts the position of the later cases on the question whether a wrongful dishonor can be found to be the proximate cause of an arrest:

> If so proximately caused and proved damages may include damages for an arrest or prosecution of the customer or other consequential damages. Whether any consequential damages are proximately caused by the wrongful dishonor is a question of fact to be determined in each case.

Comment 5 to section 4-402 further clarifies the purpose of the section:

> The fourth sentence of the section rejects decisions holding that as a matter of law the dishonor of a check is not the "proximate cause" of the arrest and prosecution of the customer, and leaves to determination in each case as a question of fact whether the dishonor is or may be the "proximate cause."

It is clear, therefore, that under the U.C.C. a wrongful dishonor can be found to be the proximate cause of the arrest of the depositor for issuing a check with insufficient funds in his account.

2. The Code Cases

In *Loucks v. Albuquerque National Bank*[159] the court held that the question of proximate causation was for the jury. After several of depositor's checks were dishonored, some businesses refused to continue taking his checks, and others refused to extend him credit. The court held this evidence sufficient to go to the jury to determine whether depositor's credit had been damaged as a proximate result of the dishonors.[160] Similarly, in *Skov v. Chase Manhattan Bank*[161] one of the points made by the court was that whether a dishonor is the proximate cause of an injury to the depositor is a question for the trier of fact. The court upheld an award of damages for wrongful dishonor against a contention that the evidence was insufficient to sustain the claim. The decisions in *Loucks* and *Skov* are consistent with the U.C.C. which provides that the proximate cause of consequential damages in wrongful dishonor actions is a question of fact to be determined in each case.[162]

In *American Fletcher National Bank & Trust Co. v. Flick*[163] the proximate

159. 76 N.M. 735, 746, 418 P.2d 191, 198 (1966).
160. *Id.*
161. 407 F.2d 1318 (3d Cir. 1969).
162. U.C.C. § 4-402.
163. 146 Ind. App. 122, 136, 252 N.E.2d 839, 847 (1969).

cause question was decided as a matter of law. In *Flick* there was no evidence to show that the alleged injury was caused by the wrongful dishonor. Hence, recovery was denied. The decision in *Flick*, however, was not in conflict with section 4-402. If there is no evidence to establish a fact, obviously there can be no question for the trier of fact.

Likewise, the proximate cause issue was treated as a matter of law in *Bank of Louisville Royal v. Sims*.[164] The court reversed an award of damages for mental pain and suffering, stating that "[f]rom the proximate cause standpoint, these nebulous items of damage bore no reasonable relationship to the dishonor . . . ."[165] Although the court discussed proximate cause, the decision was based primarily on previous holdings that did not allow recovery for mental pain and suffering unless the facts warranted punitive damages. The *Sims* decision conflicts with the provision in section 4-402 identifying proximate cause as a question of fact. The decision not to allow recovery for mental pain and suffering unless punitive damages are warranted, to some extent based on a lack of proximate cause, was essentially a policy decision. This was a proper use of proximate cause.[166] Proximate cause is properly a question of law when the court must decide, as a matter of policy, the extent of legal liability.[167]

3. Other Proximate Cause Problems

Even though proximate cause was not specifically discussed in the opinions, two cases involving cancelled life insurance policies present proximate cause issues. In *Roe v. Best*[168] the depositor's life insurance policy was forfeited by the insurance company following the wrongful dishonor of the depositor's check for payment of the policy premiums. There was evidence that bank employees knew the check was payable to the insurance company, and the court stated that "it is a matter of common knowledge that the failure to pay premiums on insurance policies will cause forfeiture thereof."[169] Therefore, the court found that

> the evidence . . . raised the issue of whether the bank . . . knew, or in the exercise of ordinary care should have known that the dishonor of the premium check would naturally or probably result in the forfeiture of the insurance contracts.[170]

In *Wahrman v. Bronx County Trust Co.*[171] the court stated that recovery could not be had for damages resulting from the cancellation of an insurance policy following a wrongful dishonor unless the depositor

> [establishes] that the defendant had actual or constructive knowledge of the consequences reasonably to be expected from the

164. 435 S.W.2d 57 (Ky. 1968).
165. *Id.* at 58.
166. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 41 (4th ed. 1971).
167. *Id.* § 42.
168. 120 S.W.2d 819 (Tex. Ct. App. 1938).
169. *Id.* at 822.
170. *Id.*
171. 246 App. Div. 220, 285 N.Y.S. 312 (1936).

non-payment of the check. Such knowledge cannot be inferred merely from the fact that the check was payable to an insurance company.[172]

To some extent, the decisions in *Roe* and *Wahrman* are inconsistent. Under *Roe*, cancellation of an insurance policy would be reasonably foreseeable and thus proximately caused by wrongful dishonor of a premium check, if employees of the bank knew that the check was payable to an insurance company. In *Wahrman* there was no evidence that bank employees knew the check was payable to an insurance company. However, cancellation of an insurance policy was held not reasonably foreseeable, and thus not proximately caused by wrongful dishonor, merely on the basis that the check was payable to an insurance company.

No policy reasons can be discerned from these cases for refusing to allow recovery of damages for the cancellation of an insurance policy resulting from the wrongful dishonor of a premium check. The loss resulting from cancellation should be held to be reasonably foreseeable, and thus proximately caused by the wrongful dishonor, whenever the bank knows or should have known that the check was given in payment of insurance premiums.

In *Abramowitz v. Bank of America*[173] the bank wrongfully dishonored a check which had been given in payment of a monthly installment on a conditional sales contract for the purchase of an automobile. As a result of the wrongful dishonor, the automobile was repossessed by the conditional vendor. The court held that the loss of the automobile was proximately caused by the wrongful dishonor, stating: "[I]t is difficult to conceive of a situation wherein a loss could be sustained more directly related to the dishonor of a check than that sustained by plaintiff here."[174]

The approach to proximate cause in *Abramowitz* is considerably less stringent than that used by the courts in *Roe* and *Wahrman*. No foreseeability requirement was imposed in *Abramowitz*; all that was required was a direct relationship between the wrongful dishonor and the loss. Except for cases involving arrest as the result of a wrongful dishonor, there are not enough decisions to predict what will be the nature of a generally accepted test to determine whether a loss was proximately caused by a wrongful dishonor.

D. *Punitive Damages*

Section 4-402 of the U.C.C. does not provide for punitive damages for wrongful dishonor. However, except for dishonors resulting from mistake, the section does not specifically exclude an award for punitive damages. It is necessary to go beyond section 4-402 to determine whether punitive damages are recoverable for wrongful dishonor.

172. *Id.* at 221, 285 N.Y.S. at 313.
173. 131 Cal. App. 2d Supp. 892, 281 P.2d 380 (App. Dep't Super. Ct. 1955).
174. *Id.* at 897, 281 P.2d at 384.

Under the General Provisions of the U.C.C., section 1-106 provides: "[N]either consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law." Since punitive damages for wrongful dishonor are not authorized by the U.C.C., the possibility of recovery of punitive damages depends on other rules of law.

In *Loucks v. Albuquerque National Bank*[175] the court held that the evidence was insufficient to present a jury question on the claim for punitive damages. However, the court did set out the circumstances under which an award of punitive damages for wrongful dishonor would be appropriate:

> The last question . . . concerns the claim for punitive damages. . . . Punitive or exemplary damages may be awarded only when the conduct of the wrongdoer may be said to be maliciously intentional, fraudulent, oppressive, or committed recklessly or with a wanton disregard of the plaintiff's rights.
>
> Malice as a basis for punitive damages means the intentional doing of a wrongful act without just cause or excuse. This means that the defendant not only intended to do the act which is ascertained to be wrongful, but that he knew it was wrong when he did it.[176]

Similarly, in *Bank of Louisville Royal v. Sims*[177] the court suggested that punitive damages for wrongful dishonor would be justified if the acts of the bank had been willful or malicious.

An award of exemplary damages was upheld in *Northshore Bank v. Palmer*.[178] In *Palmer* the jury was instructed "that punitive damages may be recovered only where there has been oppressive conduct or a reckless or malicious disregard of the rights of another. . . ."[179] The facts in *Palmer* provide an indication of what courts are likely to consider oppressive, reckless, or malicious:

> The checks written by Palmer . . . had already been paid by the Bank, when the situation with respect to the forgery became known to it. The officer in charge immediately charged Palmer's account with the forged check despite his protestations that his endorsement was a forgery. When he went to see the bank officer to deny endorsement and receipt of the proceeds of the forged check, the officer called over a uniformed guard. Even though the checks had been cleared for payment and were covered by sufficient funds when presented, the Bank recalled them and returned them marked "paid in error" or "account closed". Palmer immediately reported the forgery to the police . . . . He then underwent the embarrassment of calling on each of the payees of

175. 76 N.M. 735, 746, 418 P.2d 191, 199 (1966).

176. *Id.* (citations omitted); *accord*, Kendall Yacht Corp. v. United California Bank, 50 Cal. App. 3d 949, 958, 123 Cal. Rptr. 848, 854-55 (1975).

177. 435 S.W.2d 57, 58 (Ky. 1968).

178. 525 S.W.2d 718 (Tex. Ct. App. 1975).

179. *Id.* at 720.

> the dishonored checks. The Bank never relented. They charged appellee $5 for each check they considered drawn on "insufficient funds". Additionally, after all of the claims of Palmer were known to the Bank officer having charge of the matter, the Bank placed the claimed balance due in the hands of a collection agency, where it rests today. The Bank never has paid Palmer the $275 which under the jury's findings is wrongfully charged to his account.[180]

Relying on a statute similar to the A.B.A. model statute, the bank in *Jones v. Citizens Bank*[181] argued that an instruction authorizing exemplary damages should not have been given by the trial court. The court found the evidence sufficient to establish malice and held that the statute was not applicable where the dishonor was malicious. Thus, it was proper for the trial court to submit the issue of exemplary damages to the jury. In *Woody v. National Bank*,[182] a case decided under a statute similar to the A.B.A. model statute, the court stated that punitive damages could be awarded if the bank's act was determined by the jury to be "willful, malicious, wanton and oppressive."

In *Deposit Guaranty Bank & Trust Co. v. Silver Saver Stores, Inc.*,[183] a decision not involving a statute, the court approved an instruction authorizing the jury to award punitive damages if it determined that the checks were willfully dishonored. The court also stated that the evidence was sufficient for the jury to find that the bank's acts were willful or oppressive. Where a dishonor is willful and malicious, the depositor is entitled to recover exemplary damages.[184] If the dishonor results from gross negligence which "evinces a conscious disregard of the rights of others," exemplary damages also may be awarded.[185] Instructions permitting the jury to award punitive damages have been held erroneous where there was no evidence of fraud, malice, or oppression.[186] These rulings imply, however, that punitive damages can be awarded under proper circumstances. In those jurisdictions which allow punitive damages,[187] the authorities support a conclusion that punitive damages may be recovered for malicious dishonors.

E. *Mitigation of Damages*

When a dishonor results from mistake or error on the part of the bank, the extent of injury to the depositor's credit may be less than such injury if the dishonor had resulted from insufficient funds in the de-

180. *Id.* at 721.
181. 58 N.M. 48, 265 P.2d 366 (1954).
182. 194 N.C. 549, 557, 140 S.E. 150, 155 (1927).
183. 166 Miss. 882, 891, 148 So. 367, 369 (1933).
184. Wood v. American Nat'l Bank, 100 Va. 306, 312, 40 S.E. 931, 933 (1902).
185. *Id.* at 312, 40 S.E. at 934.
186. Winkler v. Citizens' State Bank, 89 Kan. 279, 131 P. 597 (1913); American Nat'l Bank v. Morey, 113 Ky. 857, 863, 69 S.W. 759, 760 (1902); Pascagoula Nat'l Bank v. Eberlein, 161 Miss. 337, 344, 131 So. 812, 814 (1931).
187. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.9 (1973).

positor's account.[188] The amount of damages resulting from mistaken dishonor may be reduced where the bank offers to write letters explaining the error.[189] However, the depositor is under no duty to request that the bank explain the error to persons receiving notice of the dishonor; the bank should know that this method of mitigating damages is available to it.[190]

In a situation involving a bank error, damages may be mitigated where the persons learning of the dishonor are readily available to the depositor for explanation of the circumstances causing the dishonor.[191] Damages also may be reduced if the checks are paid on a second presentment following dishonor on the first presentment.[192]

The fact that the bank properly returned a number of the depositor's checks because of insufficient funds prior to the wrongful dishonor may be a mitigating circumstance. Where checks of a depositor are repeatedly and properly returned because of insufficient funds, a subsequent wrongful dishonor of that depositor's check may cause little injury to his credit.[193]

V. WHO MAY RECOVER DAMAGES FOR WRONGFUL DISHONOR

Section 4-402 of the U.C.C. provides in part: "A payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item." A person who has a checking account with a bank is a customer of the bank.[194] When the customer draws a check against his account, the bank is a payor bank as to that check.[195] Thus, the customer who has a checking account in a bank may recover damages under this section if the bank wrongfully dishonors his check.

In some circumstances, it may be difficult to determine who is the

188. Gonzales v. Colonial Trust Co., 7 Misc. 2d 508, 162 N.Y.S.2d 754 (Sup. Ct. 1957), *aff'd mem.*, 6 App. Div. 2d 679, 174 N.Y.S.2d 444, *appeal dismissed*, 5 N.Y.2d 779, 154 N.E.2d 559, 180 N.Y.S.2d 300 (1958); *accord*, Spearing v. Whitney-Central Nat'l Bank, 129 La. 607, 615, 56 So. 548, 551 (1911).

189. Weaver v. Grenada Bank, 180 Miss. 876, 179 So. 564 (1938).

190. Gonzales v. Colonial Trust Co., 7 Misc. 2d 508, 162 N.Y.S.2d 754 (Sup. Ct. 1957), *aff'd mem.*, 6 App. Div. 2d 679, 174 N.Y.S. 2d 444, *appeal dismissed*, 5 N.Y.2d 779, 154 N.E.2d 559, 180 N.Y.S. 2d 300 (1958).

191. Nealis v. Industrial Bank of Commerce, 200 Misc. 406, 107 N.Y.S.2d 264 (Sup. Ct. 1951).

192. Gonzales v. Colonial Trust Co., 7 Misc. 2d 508, 162 N.Y.S.2d 754 (Sup. Ct. 1957), *aff'd mem.*, 6 App. Div. 2d 679, 174 N.Y.S.2d 444, *appeal dismissed*, 5 N.Y.2d 779, 154 N.E.2d 559, 180 N.Y.S.2d 300 (1958).

193. *See* Love v. Tioga Trust Co., 68 Pa. Super. 447, 451 (1917). *See also* Gonzales v. Colonial Trust Co., 7 Misc. 2d 508, 162 N.Y.S.2d 754 (Sup. Ct. 1957), *aff'd mem.*, 6 App. Div. 2d 679, 174 N.Y.S.2d 444, *appeal dismissed*, 5 N.Y.2d 779, 154 N.E.2d 559, 180 N.Y.S.2d 300 (1958).

194. The definition of customer is set out in § 4-104(1)(e) of the U.C.C.:

> "Customer" means any person having an account with a bank or for whom a bank has agreed to collect items and includes a bank carrying an account with another bank; . . . .

195. Payor bank is defined in § 4-105(b) of the U.C.C.: " 'Payor bank' means a bank by which an item is payable as drawn or accepted; . . . ."

customer of a bank. In *Loucks v. Albuquerque National Bank*[196] a partnership and the individual partners sought to recover damages for the wrongful dishonor of partnership checks. The checking account was in the name of the partnership and required the signatures of both partners for checks drawn on the account. One of the questions considered by the court was whether the individual partners were customers of the bank under section 4-402. Relying on the U.C.C.'s definitions of person[197] and organization,[198] the court concluded that "[t]he Uniform Commercial Code expressly regards a partnership as a legal entity."[199] Bolstering this conclusion by other instances where partnerships are considered to be legal entities, the court decided that only the partnership was a customer of the bank. Hence, the individual partners could not recover damages for wrongful dishonor since they were not customers of the bank.[200]

Although the U.C.C. recognizes that a partnership may be a legal entity, it does not require that a partnership be treated as an entity in every situation. The language of the Code does not absolutely preclude the partners from being customers of the bank. The credit standing of individual partners could be injured by the dishonor of partnership checks, particularly if the partners are legally liable for partnership obligations. Therefore, the likelihood of injury to the credit of the partners should be a factor considered by the courts in determining whether partners are customers under section 4-402. If the partnership account is carried in the names of the individual partners, they then would be customers of the bank within the meaning of section 4-402.

In *Kendall Yacht Corp. v. United California Bank*[201] the court refused to follow the narrow interpretation of the term "customer" that was adopted by the court in *Loucks*. The Kendalls were officers and prospective principal shareholders of a corporation which had never issued stock and which was undercapitalized. "[I]t was, in effect, nothing but a transparent shell, having no viability as a separate and distinct legal entity."[202] Because of this situation, the Kendalls personally guaranteed corporate obligations to the bank. They controlled the corporation's financial affairs and vouched for its fiscal responsibility. The bank and other corporate creditors were well aware of the situation. Therefore, the bank knew that the dishonor of corporate checks could injure the credit and reputation of the Kendalls. In these circumstances, the Kendalls were found to be "customers" of the

196. 76 N.M. 735, 418 P.2d 191 (1966).

197. Under § 1-201(30) of the U.C.C., " 'Person' includes an individual or an organization . . . ."

198. " 'Organization' includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity." U.C.C. § 1-201(28).

199. 76 N.M. at 742, 418 P.2d at 196.

200. *Id.* at 744, 418 P.2d at 196-97.

201. 50 Cal. App. 3d 949, 123 Cal. Rptr. 848 (1975).

202. *Id.* at 956, 123 Cal. Rptr. at 853.

bank under section 4-402 and entitled to recover for the wrongful dishonor of corporate checks.

In *Macrum v. Security Trust & Savings Co.*,[203] a pre-U.C.C. case, the manager of a company sought to recover damages for injury to his personal credit and reputation resulting from the wrongful dishonor of a check drawn by him on the account of the company. Because of the wrongful dishonor, he had been arrested and confined in jail. The bank argued that there was no breach of duty to the manager; that the only duty owed by the bank was to the company. The court acknowledged that the manager was not a party to the contract between the company and the bank and that the manager would not have an action for breach of the contract, but concluded that the bank owed to the manager a duty arising from the contract to honor checks properly drawn by the manager. The court reasoned that the bank should have known that some injury to the manager might result from the wrongful dishonor of a check drawn by him.[204] On rehearing, the court further supported its decision by pointing out that wrongful dishonor tends to slander the drawer of the check in his trade or business and imputes insolvency, dishonesty, or bad faith. Hence, the wrongful dishonor of the check indicated that the manager, in his individual capacity, acted dishonestly or in bad faith.[205]

Under the U.C.C., an organization with an account at a bank is a customer of that bank.[206] It could be argued that, as to the account of the organization, an officer of an organization would not be a customer of the bank because he has no account. Because section 4-402 provides for liability of the bank only to its customer, the officer of an organization arguably would have no right to recover damages for the wrongful dishonor of a check drawn by him on the account of the organization.[207] However, as the *Kendall Yacht Corp.* and *Macrum* cases demonstrate, the officer may be injured by the wrongful dishonor of an organization check drawn by him. The organization officer should not be denied relief under section 4-402. Since an organization acts only through its officers, it is reasonable to hold

203. 221 Ala. 419, 129 So. 74 (1930).

204. *Id.* at 422, 129 So. at 76.

205. *Id.* at 423, 129 So. at 77-78.

206. "'Customer' means any person having an account with a bank . . . ." U.C.C. § 4-104(1)(e). "'Person' includes . . . an organization . . . ." *Id.* § 1-201(30); Farmers Bank v. Sinwellan Corp., 367 A.2d 180, 183 (Del. 1976).

207. Farmers Bank v. Sinwellan Corp., 367 A.2d 180, 183 (Del. 1976). The opinion of the superior court demonstrates the weakness of the reasoning by the supreme court. Sinwellan Corp. v. Farmers Bank, 345 A.2d 430 (Del. Super. Ct. 1975), *rev'd*, 367 A.2d 180 (Del. 1976). The superior court held that one of the officers was a customer of the bank. He established the account for the corporation and designated authorized drawers for the account. In addition, a criminal action was commenced against him as a result of the wrongful dishonors, bringing publicity and expense to him. The other officer did not participate in establishing the account; nor was she subjected to criminal liability. Thus according to the superior court, she was not a customer under § 4-402.

that the bank owes a duty to the officers of the organization as well as to the organization itself. It also is reasonable to impose liability on the bank for injuries sustained by the officer as a result of the wrongful dishonor. Accordingly, the term "customer" in section 4-402 should be interpreted broadly to include the officers of organizations who draw checks that are wrongfully dishonored.

The situation in *De Launay v. Union National Bank*[208] raises another question concerning the right to recover damages for wrongful dishonor. The depositor was treasurer of a church, and church funds apparently were carried in his name as treasurer. The bank dishonored a check drawn by the treasurer. The bank argued that the treasurer was not entitled to damages because his personal credit was not injured by the dishonor. Rejecting this argument, the court stated:

> A fiduciary is supposed to be more particular with the trust funds than with his own, and his laxity in reference to them is correspondingly a greater reflection, not only upon his credit, but upon his business methods and the scrupulous care which he should exercise.[209]

When funds are carried in the account of a depositor as trustee or agent, the trustee or agent is the customer of the bank. Therefore, the trustee or agent should have a right to recover damages under section 4-402 for the wrongful dishonor of his check if he can establish injury resulting from the wrongful dishonor.

VI. CONCLUSION

The first step in analyzing a refusal to honor a check is to determine whether the refusal constitutes dishonor. Refusal to honor a check for the reason that it is not in proper form does not constitute dishonor. Dishonor usually does occur, however, when payment of a proper order is refused. After determining that a dishonor has occurred, the next step is to consider whether the dishonor was wrongful. The primary reason for dishonor is the lack of sufficient funds to cover the amount of the check. When the drawer's account is in fact insufficient, dishonor is not wrongful. However, the account balance shown on the books of the bank is frequently incorrect due to clerical errors made by the bank. Dishonor resulting from a clerical error is wrongful. Wrongful dishonor also frequently occurs after the bank has made an improper setoff against the customer's account.

A large majority of the legal issues arising from wrongful dishonors center around determining the nature and extent of damages to be awarded. The most difficult problem is the determination of the proper measure of damages for mistaken wrongful dishonors. This problem exists because the attempt in section 4-402 of the U.C.C. to eliminate the presumption of substantial damages for mistaken wrongful dishonors does not distinguish

208. 116 S.C. 215, 107 S.E. 925 (1921).
209. *Id.* at 216, 107 S.E. at 925.

between proof of injury and proof of amount of damages. The drafters sought to eliminate the presumption by limiting liability to actual damages proved. Certainly this limitation on liability means that there should be no presumption of injury from wrongful dishonor; the customer must establish some injury to prove actual damages. The question remains, however, whether this limitation also means that the customer must establish with a high degree of certainty a specific dollar amount of damages which was caused by the injury. Such a stringent proof requirement would lead to no recovery in a large majority of the cases. Therefore, proof of injury should be sufficient to satisfy the actual damage limitation of section 4-402, leaving the assessment of a reasonable amount of damages to the trier of fact. Preferably, the section should be redrafted to preclude a presumption of injury in mistaken dishonor cases.