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DAMAGES AND PROOF IN CASES OF WRONGFUL DISHONOR: THE UNSETTLED ISSUES UNDER U.C.C. SECTION 4-402

STEVEN B. DOW*

The checking account is a legal arrangement between a bank and its customer[1] in which the bank promises to pay items (checks) drawn by the customer according to the terms of the checking account contract.[2] A bank's refusal to pay a customer's item makes it liable to the customer if the refusal, which is referred to as a dishonor,[3] was wrongful.[4] Because

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1. Currently many financial institutions that are not technically classified as banks, such as credit unions and savings and loan institutions, offer services that are functionally equivalent to checking accounts. In this Article all such institutions are referred to as "banks."

2. Under § 4-103(1) of the Uniform Commercial Code (U.C.C.) (all subsequent references are to the 1978 Official Text), the parties have a considerable amount of flexibility with respect to the terms of the checking account contract; however, § 4-103(1) also imposes significant limits on the ability of a bank to disclaim certain statutory responsibilities.

3. Section 3-507(1) specifies that an instrument is dishonored when, "in case of bank collections the instrument is seasonally returned by the midnight deadline (§ 4-301)." U.C.C. § 3-507 (1978). Under many circumstances, however, a bank's refusal to pay an item does not constitute a dishonor. A bank may refuse to pay an item because the payee's indorsement is missing, the drawer's signature is illegible or forged, the date has been altered, or the date of a postdated check has not arrived. *See* U.C.C. § 3-510, official comment 2; § 3-507(3) (1978).

4. Section 4-402 governs the liability of a bank for wrongfully dishonoring an item. It provides:

> 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. 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.

U.C.C. § 4-402 (1978).

Although this section does not specify what constitutes a *wrongful* dishonor, Official Comment 2 to § 4-402 specifies that it "excludes any permitted or justified dishonor." The typical case in which dishonors are not wrongful is when the customer's balance is insufficient to pay the item. *See, e.g.*, McMichen v. Georgia State Bank, 148 Ga. App. 680, 252 S.E.2d 198 (1979). The insufficiency may be due to the bank's proper exercise of a setoff against funds in the account, *see* Clairmont v. State Bank, 295 N.W.2d 154 (N.D. 1980); Mercantile-Safe Deposit & Trust Co. v. Delp & Chapel Concrete and Constr. Co., 44 Md. App. 34, 408 A.2d 1043 (1980); or because the customer drew against

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a customer's action against a bank for wrongful dishonor lies at the heart of the checking account relationship, it would seem likely that courts would have firmly settled the legal issues surrounding this action. However, a review of the cases applying section 4-402 of the Uniform Commercial Code (U.C.C.), the statutory basis of an action for wrongful dishonor, shows that little agreement exists over even the most basic issues. Section 4-402 has been and continues to be a generous source of judicial confusion and scholarly debate.[5]

A number of distinct legal issues involved in a customer's action for wrongful dishonor remain unsettled. This Article will focus on and analyze two of the most important of these issues. First, the Article will discuss the types of losses or injuries for which the customer may obtain

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credits that were not yet available for withdrawal, *see* Merchant v. Worley, 79 N.M. 771, 449 P.2d 787 (N.M. Ct. App. 1969).

In general, a wrongful dishonor is one in which the payor bank (defined in § 4-105(b) as the bank on which the item is drawn) refuses to pay a properly drawn, indorsed and presented item when the customer (drawer) has sufficient funds or credit in his account to pay the instrument. A wrongful dishonor includes a dishonor by the payor bank due to insufficient funds in the customer's account when the insufficiency is due to an improper act by the bank such as a wrongful setoff, hold, or charge. *See* Yacht Club Sales and Service, Inc. v. First Nat'l Bank, 101 Idaho 852, 623 P.2d 464 (1980) (wrongful hold on account); Siegman v. Equitable Trust Co., 267 Md. 309, 297 A.2d 758 (1972) (wrongful setoff); Boggs v. Citizens Bank and Trust Co., 32 Md. App. 500, 363 A.2d 247 (1976) (improper chargeback).

A wrongful dishonor also includes dishonors in which the insufficiency is due to the failure of the bank to credit a deposit to the customer's account. *See, e.g.*, Harvey v. Michigan Nat'l Bank of Detroit, 19 U.C.C. Rep. Serv. (Callaghan) 906 (Mich. Ct. C.P. 1974); Nealis v. Industrial Bank of Commerce, 200 Misc. 406, 107 N.Y.S.2d 264 (N.Y. Sup. Ct. 1951). For a more detailed account of what constitutes a wrongful dishonor, see Davenport, *Wrongful Dishonor: UCC Section 4-402 and the Trader Rule*, 56 N.Y.U. L. REV. 1117, 1119-1121 (1981) and Holland, *An Analysis of the Legal Problems Resulting From Wrongful Dishonors*, 42 MO. L. REV. 507, 508-516 (1977).

5. For the most recent commentary, see J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 17-4 (2d ed. 1980); Daniels, *Bank Liability for Wrongful Dishonor: UCC Section 4-402—Is Revision Needed?*, 8 IND. L. REV. 802 (1975); Davenport, *supra* note 4; Holland, *supra* note 4; Leibson, *Wrongful Dishonor Under the UCC: A Trip Through the Maze of 4-402*, 8 AKRON L. REV. 317 (1975); Miller & Scott, *Commercial Paper, Bank Deposits and Collections and Commercial Electronic Fund Transfers*, 38 BUS. LAW. 1129 (1983); Sabbath, *Drawee Bank's Liability for Wrongful Dishonor: A Proposed Checkholder Cause of Action*, 58 ST. JOHN'S L. REV. 318 (1984); Note, *Punitive Damages For Wrongful Dishonor of a Check*, 28 WASH. & LEE L. REV. 357 (1971); Comment, *Wrongful Dishonor of a Check: Payor Bank's Liability Under Section 4-402*, 11 B.C. INDUS. & COM. L. REV. 116 (1969); Comment, *Right of Partnership to Damages for Wrongfully Dishonoring Partnership Checks*, 8 NAT. RESOURCES J. 169 (1968). For earlier commentary on wrongful dishonor under the common law and the statutory predecessor to § 4-402, see Huffcut, *Liability of a Bank to the Maker of a Check for the Wrongful Dishonor Thereof*, 2 COLUM. L. REV. 193 (1902); Note, *Liability of Bank to Depositor for Wrongful Dishonor of Check*, 29 MICH. L. REV. 208 (1930); Comment, *The Measure of Damages for Wrongful Dishonor*, 23 U. CHI. L. REV. 481 (1956) [hereinafter cited as Comment, *The Measure of Damages*].

compensation in an action against a bank for wrongful dishonor under section 4-402. Second, this Article will address the nature of the proof required to recover such damages. In addressing these questions this Article will examine the nature of an action for wrongful dishonor both at common law and under the statutory predecessor to section 4-402. It will also examine various taxonomic problems as well as the origin of the statutory language employed in the current version of section 4-402. Finally, it will discuss wrongful dishonor under section 4-402, and suggest some approaches that would clarify and unify the current divergent approaches of the courts.

I. Taxonomic Problems

A. The Nature of the Action

The confusion surrounding an action for wrongful dishonor was perhaps inevitable given the debate that surrounded the common-law origins of section 4-402 and its statutory predecessor. A customer's action against a bank for wrongful dishonor has its roots in English common law.[6] The legal arrangement under which the bank promises to pay items drawn by its customer is essentially one of contract; therefore, courts viewed an action against the bank for failing to pay an item as a contract action.[7] Yet, it became apparent early in the development of the action for wrongful dishonor that the failure of the bank to pay an item was more than a mere breach of contract. The effect of the bank's failure to pay an item went well beyond the effect of a failure to pay an ordinary debt. The likely consequences of a dishonor included the imputation to the customer of insolvency, dishonesty, and bad faith. Thus, the dishonor also constituted a tortious wrong as well as a breach of contract. Courts found the tort akin to slander[8] and independent of the breach of contract action.

In the United States, a major source of confusion in the development of an action for wrongful dishonor was the ambivalence over the nature of the action. Some courts, focusing on the contractual nature of the bank/depositor relationship, viewed the action solely as a breach of con-

6. The early leading English decisions are Rolin v. Steward, 139 Eng. Rep. 245 (Ex. Ch. 1854) and Marzetti v. Williams, 109 Eng. Rep. 842 (K.B. 1830).

7. Marzetti v. Williams, 109 Eng. Rep. 842, 845-46 (K.B. 1830).

8. *Id.* at 845; Rolin v. Steward, 139 Eng. Rep. 245, 249-50 (Ex. Ch. 1854).

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tract.[9] Other courts viewed the action as one of tort. These courts emphasized the injury to the customer's credit standing and reputation in the community.[10] However, prior to the enactment of the U.C.C., a majority of courts viewed an action for wrongful dishonor as based *both* on contract and tort.[11] After the adoption of the UCC a substantial shift occurred. A review of wrongful dishonor cases that courts have decided under section 4-402 shows that although the drafters expressly eschewed any attempt to specify a theory,[12] an overwhelming majority of courts view the action wholly or in part based upon tort.[13] A few courts, however, continue to view the action as solely one of contract.[14] One court[15] took an unusual view, stating that the action was either contract or tort, depending upon the nature of the dishonor in the particular case.[16]

This divergence in the courts' approach to the nature of the wrongful dishonor action is significant because the label of contract or tort carries substantial doctrinal baggage. Attaching either label to the action for wrongful dishonor entails the application of various substantive doctrines

9. *See* Wiley v. Bunker Hill Nat'l Bank, 183 Mass. 495, 67 N.E. 655 (1903); First Nat'l Bank v. English, 240 S.W.2d 503 (Tex. Civ. App. 1951).

10. *See, e.g.,* Svendsen v. State Bank, 64 Minn. 40, 65 N.W. 1086 (1896); Nealis v. Industrial Bank of Commerce, 200 Misc. 406, 107 N.Y.S.2d 264 (N.Y. Sup. Ct. 1951).

11. *See* Valley Nat'l Bank v. Witter, 58 Ariz. 491, 121 P.2d 414 (1942); Weaver v. Bank of America Nat'l Trust & Sav. Ass'n, 59 Cal. 2d 428, 380 P.2d 644, 30 Cal. Rptr. 4 (1963) (en banc); Allen v. Bank of America Nat'l Trust & Sav. Ass'n, 58 Cal. App. 2d 124, 136 P.2d 345 (1943); Siminoff v. James H. Goodman & Co. Bank, 18 Cal. App. 5, 121 P. 939 (1912); Abramowitz v. Bank of America, 131 Cal. App. 2d Supp. 892, 281 P.2d 380 (1955); Woody v. Nat'l Bank, 194 N.C. 549, 140 S.E. 150, 152 (1927). For a discussion of the two theories of recovery, see Daniels, *supra* note 5, at 804-06; Davenport, *supra* note 4, at 1122-26; Huffcut, *Liability of a Bank to the Maker of a Check for the Wrongful Dishonor Thereof,* 2 COLUM. L. REV. 193, 195-97 (1902); Comment, *The Measure of Damages, supra* note 5, at 483-90.

12. Section 4-402, official comment 2 states, in part, that "[t]his section does not attempt to specify a theory."

13. *See* Kendall Yacht Corp. v. United Cal. Bank, 50 Cal. App. 3d 949, 123 Cal. Rptr. 848 (1975); Yacht Club Sales & Serv., Inc. v. First Nat'l Bank, 101 Idaho 852, 623 P.2d 464 (1980); Wright v. Commercial & Sav. Bank, 297 Md. 148, 159 n.3, 464 A.2d 1080, 1086 n.3 (1983); Siegman v. Equitable Trust Co., 267 Md. 309, 297 A.2d 758 (1972); Loucks v. Albuquerque Nat'l Bank, 76 N.M. 735, 418 P.2d 191 (1966); Luxonomy Cars, Inc. v. Citibank, N.A., 65 A.D.2d 549, 408 N.Y.S.2d 951 (1978); Shaw v. Union Bank & Trust Co., 640 P.2d 953 (Okla. 1981); Northshore Bank v. Palmer, 525 S.W.2d 718 (Tex. Civ. App. 1975).

14. *See, e.g.,* Raymer v. Bay State Nat'l Bank, 384 Mass. 310, 424 N.E.2d 515 (1981).

15. Bank of Louisville Royal v. Sims, 435 S.W.2d 57 (Ky. 1968). *See also* First Nat'l Bank v. Ducros, 27 Ala. App. 193, 168 So. 704, 705 (1936) (customer may elect to "sue for a breach of contract or for the breach of duty arising therefrom").

16. Bank of Louisville Royal v. Sims, 435 S.W.2d 57, 58 (Ky. 1968).

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concerning damages and proof of injury. This Article will explore some of these consequences below.

1. Contract Liability

One major consequence of attaching a contract label to an action for wrongful dishonor is the limitations on damages under the rule of *Hadley v. Baxendale*.[17] A traditional application of *Hadley* would erect a nearly insurmountable barrier to the recovery of other than nominal damages.

In *First National Bank v. English*,[18] the defendant bank dishonored plaintiff's checks for insufficient funds. The bank caused the insufficiency by paying out of the customer's account two checks on which the customer's signature had been forged. The customer was out of town at the time of the error and incurred the expense of traveling to the bank to straighten out the problem. The court denied recovery of reasonable travel expenses because the customer failed to show that at the time the bank accepted the customer's deposit, it could have foreseen either that it would have paid checks with forged signatures or that the customer would have to travel from New York to Texas to investigate the matter. Even if a court misapplied *Hadley* and determined what consequences the bank could have foreseen *at the time of the dishonor* instead of at the time the customer opened the account the result would have been similar. In *Wahrman v. Bronx County Trust Co.*,[19] for example, the defendant bank's wrongful dishonor of the plaintiff's insurance premium check resulted in cancellation of the plaintiff's accident and health insurance policy. The court held that the customer could not recover special damages unless the customer proved that the bank had knowledge of the reasonably foreseeable consequences of dishonoring the check. The court further held that it would not infer the requisite knowledge from the identity of the payee.[20]

Under the contract approach, the rule in *Hadley* gives a court the ability to deny recovery of special damages in all but a few cases. On the other hand, the rule is sufficiently flexible to permit a court, if it is so inclined, to allow recovery of special damages in all but a few cases.[21] In

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17. 156 Eng. Rep. 145 (Ex. 1854).

18. 240 S.W.2d 503 (Tex. Civ. App. 1951).

19. 246 A.D.2d 220, 285 N.Y.S. 312 (1936).

20. *Id.* at 221, 285 N.Y.S. at 313.

21. As Prosser points out, in "one sense, almost nothing is entirely unforeseeable" and in "another [sense], no event whatever is entirely foreseeable . . ." W. KEETON, D. DOBBS, R. KEETON,

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Roe v. Best,[22] the defendant bank's dishonor of the customers' insurance premium check resulted in the cancellation of their life insurance policies. Their insurer refused to reinstate the policies because of the customers' ages. On the issues of foreseeability and special damages the court indicated that employees of the bank knew that the check was payable to an insurance company and added, "[i]t is a matter of common knowledge that the failure to pay premiums on insurance policies will cause forfeiture thereof."[23] Thus, the very consequence that the *Wahrman*[24] court found not to be reasonably foreseeable, the *Roe* court found to be common knowledge. These two cases cannot be explained as varying interpretations of different sets of facts.

The limits on recovery of damages under *Hadley* have clearly been relaxed[25] in contract law generally as well as under U.C.C. Article 2 sales law. Primarily because so few courts subscribe to the contract theory of liability,[26] it is difficult to detect whether there has been a similar liberalization in wrongful dishonor cases. It appears, however, that in the area of wrongful dishonor some liberalization has taken place.[27]

D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 297 (5th ed. 1984) [hereinafter cited as PROSSER]. Professor Dobbs states that the idea of foreseeability

> is so readily subject to expansion or contraction that it becomes in fact merely a technical way in which the judges can state their conclusion. Unless there is proof that the parties specifically mentioned an item of damage in contracting, the judges are free to describe that item as an unforeseeable one. Everyone might disagree, but no one could prove the judges wrong, since the question is not one that can be resolved by a scientific test. Thus, what sounds like a reason for a judicial result may only be a special, symbolic way of expressing the judicial preference arrived at on grounds altogether removed from "foreseeability."

D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 814, 803-10, 812-17 (1973). *See also* G. GILMORE, THE DEATH OF CONTRACT 49-53, 83-85 (1974).

22. 120 S.W.2d 819 (Tex. Civ. App. 1938). *Roe* was decided two years after *Wahrman*, 246 A.D.2d 220, 285 N.Y.S. 312 (1936), discussed *supra* text accompanying notes 19-20.

23. 120 S.W.2d at 822.

24. Wahrman v. Bronx County Trust Co., 246 A.D.2d 220, 285 N.Y.S. 312 (1936). *See supra* text accompanying notes 19-20.

25. *See* Lewis v. Mobil Oil Corp., 438 F.2d 500 (8th Cir. 1971); Krauss v. Greenbarg, 137 F.2d 569 (3d Cir. 1943); Scott v. Johnston, 36 Cal. 2d 864, 229 P.2d 348 (1951); Nat'l Farmers Org., Inc. v. McCook Feed & Supply Co., 196 Neb. 424, 243 N.W.2d 335 (1976); Sol-O-Lite Laminating Corp. v. Allen, 233 Or. 80, 353 P.2d 843 (1960); R.I. Lampus Co. v. Neville Cement Prod. Corp., 474 Pa. 199, 378 A.2d 288 (1977); Dennis v. Southworth, 2 Wash. App. 115, 467 P.2d 330 (1970). *See also* J. WHITE & R. SUMMERS, *supra* note 5, at § 10-4; D. DOBBS, *supra* note 21, at 158, 805-07, 812-14; G. GILMORE, *supra* note 21, at 49-53, 83-84.

26. *See supra* notes 14 & 15 and accompanying text.

27. *Compare* Bank of Louisville Royal v. Sims, 435 S.W.2d 57 (Ky. 1968) (customer could not recover for nerve problems and subsequent loss of work as these problems were not foreseeable) *with* Weaver v. Bank of America Nat'l Trust & Sav. Ass'n, 59 Cal. 2d 428, 30 Cal. Rptr. 4, 380 P.2d 644, (1963) (under contract approach the arrest of the customer may be within the reasonable contempla-

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Attaching a contract label to an action for wrongful dishonor also caused some courts to view a dishonor as simply a failure to pay a liquidated sum. This view was based on the generally accepted notion that the legal relationship between the depositor and the bank is essentially one of debtor and creditor.[28] Ordinarily, common law or a statute limits a debtor's liability for failure to pay a debt to the amount of the debt plus interest.[29] Under this approach, the dishonor of a check was simply a refusal by the bank (the debtor) to pay a liquidated sum to the customer (the creditor) and courts therefore limited the damages to the amount of the check plus interest. Although California courts accepted this view for a short time,[30] most other courts rejected it.[31] One court rejected this limited view, because the "effect upon the depositor of the refusal of the bank to pay upon his order goes far beyond the effect of such a failure to pay by an ordinary debtor."[32] Because the refusal entails the imputation of insolvency, wrongdoing, and dishonesty on the customer's part, most courts viewed the liquidated sum rule as an inadequate measure of damages for wrongful dishonor.[33]

Courts deciding wrongful dishonor cases under the U.C.C. have repudiated the liquidated sum rule. The extent of this repudiation is evident when the bank dishonors a check that *the drawer* rather than a third

tion of the parties). *See also* Raymer v. Bay State Nat'l Bank, 384 Mass. 310, 317-18, 424 N.E.2d 515, 520 (Mass. 1981) (to recover consequential damages for financial loss the customer must show that such loss was caused by the wrongful dishonor rather than show that such loss was foreseeable).

28. *See, e.g.*, Valley Nat'l Bank v. Witter, 58 Ariz. 491, 499, 121 P.2d 414, 418 (1942); Siminoff v. James H. Goodman & Co. Bank, 18 Cal. App. 5, 12, 121 P. 939, 942-943 (Cal. Dist. Ct. App. 1912); Woody v. Nat'l Bank, 194 N.C. 549, 551, 140 S.E. 150, 152 (1927).

29. *See* Valley Nat'l Bank v. Witter, 58 Ariz. 491, 499, 121 P.2d 414, 418 (1942); Siminoff v. James H. Goodman & Co. Bank, 18 Cal. App. 5, 14, 121 P. 939, 943 (Cal. Dist. Ct. App. 1912); Woody v. Nat'l Bank, 194 N.C. 549, 552, 140 S.E. 150, 152 (1927). *See also* CAL. CIV. CODE § 3302 (Deering 1984) (damage due to breach of obligation to pay money is measured by amount due plus interest).

30. *See* Hartford v. All Night & Day Bank, 170 Cal. 538, 540-41, 150 P. 356, 357 (1915). *See also* Weaver v. Bank of America Nat'l Trust & Sav. Ass'n, 59 Cal. 2d 428, 380 P.2d 644 (1963) (overruling *Hartford* holding that damages are limited to amount of check plus damages).

31. *See* Valley Nat'l Bank v. Witter, 58 Ariz. 491, 121 P.2d 414 (1942); Weaver v. Bank of America Nat'l Trust & Sav. Ass'n., 52 Cal. 2d 428, 380 P.2d 644 (1963); Siminoff v. James H. Goodman & Co. Bank, 18 Cal. App. 5, 121 P. 939 (Cal. Dist. Ct. App. 1912); Wiley v. Bunker Hill Nat'l Bank, 183 Mass. 495, 67 N.E. 655, 656 (1903); Woody v. Nat'l Bank, 194 N.C. 549, 140 S.E. 150, 152 (1927).

32. 58 Ariz. at 499, 121 P.2d at 418.

33. Some courts allowed the plaintiff the option of suing in contract for the amount of the check plus interest, or suing in tort. *See, e.g., id.* at 499, 121 P.2d at 418.

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party holder presented.[34] In this situation, no imputation of insolvency or wrongdoing is possible because no one other than the customer had knowledge of the dishonor and the only practical consequence of the dishonor was to make the funds unavailable to the customer. Courts have nevertheless sustained the recovery of substantial compensatory damages unrelated to the amount of the check.[35] Courts refuse to consider the dishonor in this type of case as merely a breach of contract involving the failure to pay money according to the terms of the checking or savings account contract.

2. *Tort Liability and the Trader Rule*

Those courts that wholly or partially subscribed to a tort theory of recovery[36] linked wrongful dishonor to the law of defamation. Although this association has become increasingly less important due to the enactment of section 4-402 and the recent movement toward a general theory of tort liability for wrongful dishonor,[37] the law of defamation has made an indelible imprint on the substantive law of wrongful dishonor. Not surprisingly, this impact has been a confusing one due to the chaotic state of the law of defamation. Prosser confesses that "there is a great deal of the law of defamation which makes no sense. It contains anomalies and absurdities for which no legal writer ever has a kind word."[38] These anomalies and absurdities have, for the most part, been foisted onto an action for wrongful dishonor with unsettled results.

Recognizing the likely consequences of a bank's failure to pay an item,[39] courts in the early wrongful dishonor cases viewed the action as analogous to common-law slander.[40] Under this view, a customer could

34. Courts have repudiated the rule in third party holder cases as well. *See, e.g.,* Raymer v. Bay State Nat'l Bank, 384 Mass. 310, 317-18, 424 N.E.2d 515, 520 (1981).

35. *See, e.g.,* Hooper v. Bank of New Jersey (*In re* Brandywine Assoc.), 30 U.C.C. Rep. Serv. (Callaghan) 1369 (Bankr.. E.D. Pa. 1980) (trustee in bankruptcy presented checks drawn on debtor account knowing that account had insufficient funds); Joler v. Depositors Trust Co., 309 A.2d 871, 876-77 (Me. 1973) (§ 4-402 applied to attempted withdrawal from savings account); Shaw v. Union Bank & Trust Co., 640 P.2d 953, 955-57 (Okla. 1981) (§ 4-402 applied to attempted withdrawal from savings account). *See also* Wallick v. First State Bank of Farmington, 532 S.W.2d 520 (Mo. Ct. App. 1976) (§ 4-402 applied to attempted withdrawal from special quasi-escrow account by account owner's spouse).

36. *See supra* notes 9-16 and accompanying text.

37. *See infra* notes 95-111 and accompanying text.

38. PROSSER, *supra* note 21, at 771.

39. *See supra* text accompanying note 8.

40. *See* cases cited *supra* notes 6-8.

not recover damages merely upon proof of the wrongful dishonor. The customer had to allege and prove special damages before the court would allow substantial damages.[41] The requirement that special damages had to be pecuniary provided another obstacle to recovery. The customer could only recover damages for injury to his reputation and feelings *after* he had established pecuniary loss.[42]

On the other hand, if the customer was a merchant or trader, the courts viewed a wrongful dishonor as analogous to slander of a person in his trade, which called for different substantive rules. At common law, when a defendant slandered a person in his trade or profession the plaintiff could recover damages without proof of any actual loss, pecuniary or otherwise.[43] Prosser indicates that while this exception to the general rule requiring proof of pecuniary losses in slander cases has an obscure origin, courts probably dispensed with the requirement because they recognized the likelihood of pecuniary loss in these cases.[44] Thus, when the customer was a trader he could recover substantial damages for wrongful dishonor without proof of special damages.[45] All the customer must establish is his status as a trader and the existence of the wrongful dishonor. This rule became known as the "Trader Rule."[46] Nearly all courts in this country adopted this rule.[47]

An important impetus behind the acceptance of the Trader Rule was the courts' recognition of the vital importance of a customer's credit standing within the community, the ease with which a wrongful dishonor can damage a person's credit standing, and the difficulty in many cases of proving special damages.[48] The courts found these problems particularly

41. Rolin v. Steward, 139 Eng. Rep. 245, 250 (1854). In other words, general damages were not available merely upon proof of the wrongful dishonor.

42. PROSSER, *supra* note 21, at 793-95. "Pecuniary" loss or injury is a term Prosser used to describe loss of money or of something that could generate money as opposed to mental and emotional injury. The requirement of proof of pecuniary loss grew out of an early jurisdictional dispute between the common law courts and the ecclesiastical courts. *See* Comment, *The Measure of Damages, supra* note 5, at 489 n.39. This impediment to the recovery of nonpecuniary loss developed into a prohibition of the recovery of damages for nonpecuniary losses in some wrongful dishonor cases. *See infra* note 94 and accompanying text.

43. PROSSER, *supra* note 21, at 791, 793-95.

44. *Id.* at 791.

45. Rolin v. Steward, 139 Eng. Rep. 245, 250 (1854).

46. For a discussion of the origin and development of the Trader Rule, see Daniels, *supra* note 5, at 806-10; and Davenport, *supra* note 4, at 1122-30.

47. Some American courts significantly modified the Trader Rule. *See, e.g.*, Wildenberger v. Ridgewood Nat'l Bank, 230 N.Y. 425, 130 N.E. 600 (1921).

48. *See* Valley Nat'l Bank v. Witter, 58 Ariz. 491, 498-502, 121 P.2d 414, 418-19 (1942); Schaff-

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acute when the customer was engaged in a trade or business; hence the courts were receptive to the Trader Rule. Eventually the courts extended the Trader Rule to encompass any "businessman."[49] Modern financial practices, which made nonmerchants as heavily dependent upon the availability of credit as merchants, prompted some courts to extend the availability of the Trader Rule presumption to all customers.[50]

The Trader Rule also rested on the related view that banks are quasi-public institutions.[51] Notwithstanding that the checking account relationship is initially a private contractual one, the vital role banks play in the business of a community justified the imposition of this tort-like remedy as a matter of public policy.[52] This approach makes available the presumption of damages to trader and nontrader alike.

In summary, attaching a tort label to an action for wrongful dishonor developed a link to the law of defamation, and in particular the law of slander. One product of this association was the Trader Rule.[53] The judicial expansion of the Trader Rule eventually prompted measures to curtail its application. The most significant of these was a model statute that the American Banking Association (ABA) drafted in 1914.

B. The American Banking Association Model Statute and the Concept of Mistake

Despite the general acceptance and expansion of the Trader Rule, it generated significant dissatisfaction among bankers and some courts.[54] The bankers' dissatisfaction manifested itself in the form of a model stat-

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ner v. Ehrman, 139 Ill. 109, 113, 28 N.E. 917, 919 (1891); Svendsen v. State Bank, 64 Minn. 40, 42, 65 N.W. 1086, 1087 (1896); Woody v. Nat'l Bank, 194 N.C. 549, 140 S.E. 150 (1927); Bush v. Southwark Nat'l Bank, 8 Pa. D. & C. 27 (1926).

49. *See, e.g.,* Peabody v. Citizens' State Bank, 98 Minn. 302, 108 N.W. 272 (1906).

50. *See* Valley Nat'l Bank v. Witter, 58 Ariz. 491, 500-02, 121 P.2d 414, 418-19 (1942); Atlanta Nat'l Bank v. Davis, 96 Ga. 334, 336-37, 23 S.E. 190, 190-91 (1895); Granada Bank v. Lester, 126 Miss. 442, 444, 89 So. 2, 3 (1921); Woody v. Nat'l Bank, 194 N.C. 549, 554, 140 S.E. 150, 153 (1927); Lorick v. Palmetto Bank & Trust Co., 74 S.C. 185, 187, 54 S.E. 206, 206 (1906).

51. Patterson v. Marine Nat'l Bank, 130 Pa. 419, 18 A. 632 (1889).

52. *Id.* at 433, 18 A. at 633.

53. It should be noted that both the contract and the tort theory of liability for wrongful dishonor could accommodate the Trader Rule, although the courts had to couch it in the appropriate doctrinal terminology. *See* Wiley v. Bunker Hill Nat'l Bank, 183 Mass. 495, 496, 67 N.E. 655, 656 (1903) (Trader Rule available in a contract action for wrongful dishonor); *supra* notes 28-35 and accompanying text.

54. *See, e.g.,* Love v. Tioga Trust Co., 68 Pa. Super. 447 (1917) (dictum). *See also* Bush v. Southwark Nat'l Bank, 8 Pa. D. & C. 27, 28 (1926) (discussing the dissatisfaction with the Trader Rule prevalent before the ABA Statute).

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ute, which the ABA drafted in 1914. This statute provided that with respect to an action for wrongful dishonor:

> 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.[55]

Twenty-four states enacted this statute or a modified form of it.[56] Although the motivation behind the adoption of the ABA Statute in these jurisdictions is obscure,[57] the motivation of the ABA in drafting it is clear. The statute was an attempt to lessen the potential liability of banks by abolishing the Trader Rule in cases of dishonor arising from mistake or error.[58] The bankers argued that the assumption underlying the Trader Rule was not realistic. Further, they argued that the rule leads to harsh and unjust results because in a majority of mistaken dishonor cases the customer suffers no actual damage.[59] The ABA Statute was only partially successful in abolishing the Trader Rule; moreover, a great deal of judicial uncertainty arose over the scope of its application.[60]

The ABA Statute had a considerable impact on the development of an action for wrongful dishonor. The most significant change the model statute brought about in the law of wrongful dishonor was the distinction it drew between mistaken and nonmistaken dishonors. This distinction is one of the most curious features of the statute. A review of wrongful

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55. T. PATON, DIGEST OF LEGAL OPINIONS § 21B:1 at 1117-18 (4th ed. 1940).

56. These were: Alabama, Arkansas, California, District of Columbia, Florida, Idaho, Illinois, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Virginia, West Virginia, Wisconsin, and Wyoming. *See* 1 T. PATON, *supra* note 55, at § 21B:1.

57. Undoubtedly the influence of the banking lobby in the state legislatures was a significant factor in the adoption of the statute.

58. *See* 1 T. PATON, *supra* note 55, at § 21B:1. Some dispute exists on the intended scope of the statute. William Davenport argues that the "thrust of the ABA model statute was the total elimination of the trader rule," Davenport, *supra* note 4, at 1136 n.105. Earlier in the same article, however, he states that "the primary purpose of the ABA Statute was the elimination of the trader rule in its most unjust application—cases of negligent dishonor." *Id.* at 1134. Given the language of the ABA Statute ("through mistake or error and without malice . . ."), and a statement the ABA issued justifying the statute, it is apparent that the intent of drafters was to limit the liability of banks only in cases of mistaken wrongful dishonor. Other commentators concur. *See* Daniels, *supra* note 5, at 811; Holland, *supra* note 4, at 518-19; Comment, *The Measure of Damages, supra* note 5, at 489 n.38.

59. 1 T. PATON, *supra* note 55, at § 21B:1.

60. Not surprisingly, this confusion found its way into wrongful dishonor cases under § 4-402 largely because the drafters based § 4-402, in part, on the ABA Statute.

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dishonor cases at common law demonstrates that the courts did not utilize such a distinction.[61] The courts often did not classify the dishonors as mistaken or nonmistaken.[62] When courts did classify the type of dishonor, the classification did not affect the liability of the bank.[63] In most jurisdictions the bank's liability was the same whether the wrongful dishonor was mistaken or not,[64] and the Trader Rule was available in both types of cases.[65]

The mistake/nonmistake distinction employed by the ABA Statute is anomalous not only because of its absence from common-law wrongful dishonor cases, but also because of its absence from general principles of tort and contract liability. Liability for breach of contract does not depend on whether or not the breach was intentional.[66] Under the law of defamation the defendant is strictly liable.[67] The lack of support for the

61. *See* Siminoff v. James H. Goodman & Co. Bank, 18 Cal. App. 5, 121 P. 939 (1912); 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); Wiley v. Bunker Hill Nat'l Bank, 183 Mass 495, 67 N.E. 655 (1903); Svendsen v. State Bank, 64 Minn. 40, 65 N.W. 1086 (1896); Patterson v. Marine Nat'l Bank, 130 Pa. 419, 18 A. 632 (1889); Lorick v. Palmetto Bank & Trust Co., 74 S.C. 185, 54 S.E. 206 (1906).

62. *See, e.g.*, Siminoff v. James H. Goodman & Co. Bank, 18 Cal. App. 5, 121 P. 939 (1912); Wiley v. Bunker Hill Nat'l Bank, 183 Mass. 495, 67 N.E. 655 (1903).

63. *See, e.g.*, 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); Lorick v. Palmetto Bank & Trust Co., 74 S.C. 185, 54 S.E. 206 (1906). The courts appear to focus more on the consequences of the dishonor than on its nature:

> The check was returned unpaid. It seems clear from the evidence that this was done, not deliberately or maliciously, but in consequence of a mistake made by one of the employees of the bank. The paper was not protested or willfully dishonored. Still, so far as the plaintiff is concerned, we think what occurred amounted to a refusal to pay his check. The consequences to him, resulting from the inadvertence of the bank official, were exactly the same as it there had been an express refusal to pay.

Atlanta Nat'l Bank v. Davis, 96 Ga. 334, 334, 23 S.E. 190, 190 (1895).

64. *See* cases cited *supra* notes 61-63. A notable exception was New York where the bank's liability in cases of mistaken dishonor was limited to nominal damages. *See, e.g.*, Wildenberger v. Ridgewood Nat'l Bank, 230 N.Y. 425, 130 N.E. 600 (1921).

Significantly, some courts employed a distinction between malicious and nonmalicious dishonors. This distinction, however, had no impact on proof, the availability of the Trader Rule, or the bank's liability in general. It did have an impact on the availability of damages for mental distress and humiliation. *See, e.g.*, Valley Nat'l Bank v. Witter, 58 Ariz. 491, 505, 121 P.2d 414, 420 (1942). It also had an impact on the availability of punitive damages. *See* Note, *Punitive Damages for Wrongful Dishonor of a Check*, *supra* note 5.

65. *See* cases cited *supra* notes 61-63.

66. In general, the only effect that the nature of the breach has on the liability of the breaching party is to allow the plaintiff to recover damages for mental suffering under some circumstances. *See* 5 A. CORBIN, A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW § 1076 (1964).

67. PROSSER, *supra* note 21, at 802-04, 808-810. Except as to the element of publication to a

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mistake/nonmistake distinction in the common law or in principles of contract or tort liability, and the disapproval of the distinction by commentators[68] raise the question as to why the ABA included the distinction in its model statute.[69]

It is submitted that the mistake/nonmistake distinction is not the product of sophisticated legal theory or historical analysis; rather, it is the product of political expediency. Presumably, the ABA would have preferred to eliminate the Trader Rule altogether. However, it is also likely that the ABA believed that the chances of states adopting the model statute would be better if the model statute aimed at those applications of the Trader Rule that might be perceived by state legislatures as most unjust—dishonor through mistake or error. It would not have been politically expedient to confer an advantage on banks even when they intentionally and wrongfully dishonored a customer's item. After all, despite the dissatisfaction with the Trader Rule on the part of bankers and some courts,[70] the rule was popular with nonbanking interests; its widespread adoption and expansion to nontraders demonstrates this.[71] While courts in some states that adopted the ABA Statute accepted the mistake/nonmistake distinction,[72] other courts did not.[73] The distinction

third party, the defendant is held responsible for purely innocent defamatory conduct; however, matters of belief and intent are relevant with respect to the issues of qualified privilege and the availability of punitive damages. *Id.* Except for the availability of punitive damages, a defendant's liability in tort usually does not depend on whether the defendant's conduct is intentional or negligent once courts have determined that the particular legal interest deserves protection and redress.

68. Davenport, *supra* note 4, at 1130-39; Comment, *The Measure of Damages, supra* note 5, at 489 n.38. *Cf.* Holland, *Legal Problems, supra* note 4, at 526 (arguing that § 4-402 "should be redrafted to preclude a presumption of injury in mistaken dishonor cases." *Id.* at 540); J. WHITE & R. SUMMERS, *supra* note 5, at § 17-4 (distinguishing between willful and mistaken dishonors).

69. Again, some would argue that the thrust of the ABA Statute was to eliminate entirely the Trader Rule, *see supra* note 58. It seems obvious, however, that if the drafters had intended that the model statute abolish the Trader Rule in *all cases,* they would have chosen language to that effect.

70. *See supra* notes 54-59 and accompanying text.

71. *See supra* notes 45-50. For a discussion of the development and expansion of the Trader Rule in the United States, see Davenport, *supra* note 4, at 1126-29; and Daniels, *supra* note 5, at 809-10.

72 *See, e.g.,* Woody v. Nat'l Bank, 194 N.C. 549, 140 S.E. 150 (1927); *see also* Jones v. Citizens Bank, 58 N.M. 48, 265 P.2d 366 (1954) (court acknowledged the distinction but because of the jury's finding of malice, the court did not need to characterize the dishonor as mistaken or not). A finding that a dishonor was nonmistaken does not necessarily entail the finding of *actual* malice. Some courts found legal malice, in the sense of a wrongful act done intentionally and without just cause or excuse, sufficient to warrant the presumption of damages. *See* 58 N.M. at 51, 265 P.2d at 368.

73. *See* First Nat'l Bank v. Ducros, 27 Ala. App. 193, 168 So. 704 (1936); Waggoner v. Bank of Bernie, 220 Mo. App. 165, 281 S.W. 130 (1926); Bush v. Southwark Nat'l Bank, 8 Pa. D. & C. 27 (1924). The only distinction the courts drew was between malicious and nonmalicious dishonors.

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has,however, become firmly established in the law of wrongful dishonor.

One of the leading cases on this issue is *Wildenberger v. Ridgewood National Bank.*[74] In *Wildenberger,* the bank dishonored the customer's checks because of a hold it had placed on the account. The hold arose out of a claim the customer's wife made to the funds in the account. Writing for the New York Court of Appeals, Justice Cardozo held that there was nothing accidental or mistaken in the bank's dishonor of these checks. Rather, it was a "deliberate and willful" act done with knowledge of the state of the account and the potential risks arising from claims by both parties. Under Justice Cardozo's approach, a "mistaken" dishonor is generally limited to instances of clerical and other bookkeeping errors. It does not encompass intentional acts based on a misunderstanding of the legal rights of the bank, the customer, and third parties. In particular, a "mistaken" dishonor does not include a bank's mistaken belief that it has the legal right to hold or setoff funds in the plaintiff's account.[75] Under this view, a mistaken dishonor might be described as a mistake of fact; a dishonor based on a mistake of law is a nonmistaken or intentional dishonor.

C. Types of Dishonors Under Section 4-402

The drafters of the U.C.C. incorporated the concept of mistake into section 4-402. Section 4-402 provides, in part, that "[w]hen the dishonor occurs through mistake liability is limited to actual damages proved."

The existence of such a distinction is not always clear, however, because the courts often did not specify whether the malice necessary was actual or legal malice. Legal malice requires only a showing of a wrongful act done intentionally and without justification or excuse. Thus, when a court utilizes the legal definition of malice in its classification, it has, in affect, distinguished between mistaken and nonmistaken dishonors. *See* Jones v. Citizens Bank, 58 N.M. 48, 51, 265 P.2d 366, 368 (1954).

74. 230 N.Y. 425, 130 N.E. 600 (1921). It is surprising that *Wildenberger* would prove to be a leading case on the issue of mistake because New York had not enacted an ABA Statute. Nevertheless, the nature of a "mistake" was critical in *Wildenberger* because of the New York rule which held that "the liability [of the payor bank] is for nominal damages and no more, if the dishonor of the checks is the result of innocent mistake." *Id.* at 427-28, 130 N.E. at 600. The New York rule was much less favorable toward plaintiffs than the ABA Statute. Under the ABA Statute courts denied customers the presumption of damages in a case of mistaken dishonor, but customers could still recover damages they alleged and proved. Under the New York rule the courts denied customers all recovery (other than nominal damages) for mistaken dishonors. A court wishing to ameliorate the harshness of this rule would interpret the concept of mistake very narrowly to limit the number of cases in which the rule would apply. This appears to be what happened in the *Wildenberger* case.

75. Under *Wildenberger* then, the court need not find malice for it to find a nonmistaken dishonor. A nonmistaken dishonor can be both malicious and nonmalicious. *See supra* note 71.

Courts deciding cases under section 4-402 generally follow the *Wildenberger*[76] definition of mistake.[77] The *Wildenberger* court limited mistaken dishonors to clerical and other bookkeeping errors and excluded mistakes of law. A few courts, however, when confronted with a case where a bank has improperly placed a hold on an account or improperly exercised a setoff, view the resulting dishonor as mistaken.[78] Not all courts utilize the mistake/nonmistake distinction. A few courts

76. Wildenberger v. Ridgewood Nat'l Bank, 230 N.Y. 425, 130 N.E. 600 (1921); *see supra* notes 74-75 and accompanying text.

77. *See* Morse v. Mutual Fed. Sav. & Loan Ass'n, 536 F. Supp. 1271 (D. Mass. 1982); Yacht Club Sales & Serv., Inc. v. First Nat'l Bank, 101 Idaho 852, 623 P.2d 464 (1980); Raymer v. Bay State Nat'l Bank, 384 Mass. 310, 424 N.E.2d 515 (1981); Farmers & Merchants State Bank v. Ferguson, 617 S.W.2d 918 (Tex. 1981); *see supra* notes 74-75 and accompanying text.

78. *See, e.g.*, Continental Bank v. Fitting, 114 Ariz. 98, 559 P.2d 218 (1977); First Nat'l Bank v. Hubbs, 566 S.W.2d 375 (Tex. Civ. App. 1978).

The difficulties courts encounter when classifying types of wrongful dishonors are readily apparent when the courts confront the issue of punitive damages. The availability of punitive damages largely depends upon the nature of the dishonor. Punitive damages are not available in cases of mistaken dishonor. *See, e.g.*, Hooper v. Bank of New Jersey (*In re* Brandywine Assoc.), 30 U.C.C. Rep. Serv. (Callaghan) 1369, 1375 (Bankr. E.D. Pa. 1980); Kendall Yacht Corp. v. United California Bank, 50 Cal. App. 3d 949, 958-59, 123 Cal. Rptr. 848, 854 (1975); Siegman v. Equitable Trust Co., 267 Md. 309, 313-16, 297 A.2d 758, 760-61 (1972). In a case of nonmistaken wrongful dishonor, punitive damages may be available, depending on the nature of the nonmistaken dishonor. Most courts would allow the recovery of punitive damages when there is evidence that the dishonor was malicious, oppressive, in reckless disregard of the customer's rights, or motivated by fraud. *See, e.g.*, Hooper v. Bank of New Jersey (*In re* Brandywine Assoc.), 30 U.C.C. Rep. Serv. (Callaghan) 1369 (Bankr. E.D. Pa. 1980); Kendall Yacht Corp. v. United California Bank, 50 Cal. App. 3d 949, 123 Cal. Rptr. 848 (1975); Siegman v. Equitable Trust Co., 267 Md. 309, 297 A.2d 758 (1972); Harvey v. Michigan Nat'l Bank, 19 U.C.C. Rep. Serv. (Callaghan) 906 (Mich. Ct. C.P. 1974); Loucks v. Albuquerque Nat'l Bank, 76 N.M. 735, 418 P.2d 191 (1966); Shaw v. Union Bank & Trust, 640 P.2d 953 (Okla. 1981). *But see* Wallick v. First State Bank, 532 S.W.2d 520 (Mo. Ct. App. 1976). There is, however, some dispute over whether this kind of dishonor constitutes a third distinct classification of dishonor, or is merely a description of a type of nonmistaken dishonor. *See* Allison v. First Nat'l Bank, 85 N.M. 283, 511 P.2d 769 (N.M. Ct. App.), *rev'd on other grounds*, 85 N.M. 511, 514 P.2d 30 (1973).

On the other hand, a review of the dishonor cases involving wrongful setoff, when the bank's conduct is motivated by a reckless disregard of the customer's rights, demonstrates that courts typically require the customer to offer evidence of something more than reckless disregard of his rights before they award punitive damages. *See, e.g.*, Hooper v. Bank of New Jersey (*In re* Brandywine Assoc.), 30 U.C.C. Rep. Serv. (Callaghan) 1369 (Bankr. E.D. Pa. 1980); Siegman v. Equitable Trust Co., 267 Md. 309, 297 A.2d 758 (1972). The fact that some courts treat a dishonor triggered by a wrongful setoff as a mistaken dishonor further complicates the matter, because punitive damages are not available in cases of mistaken dishonor. *See, e.g.*, First Nat'l Bank v. Hubbs, 566 S.W.2d 375 (Tex. Civ. App. 1978). In addition, some courts hold that an intentional or willful dishonor merely allows the recovery of damages for mental anguish, not punitive damages. *See, e.g.*, Bank of Louisville Royal v. Sims, 435 S.W.2d 57, 58 (Ky. 1968); Farmers & Merchants State Bank v. Ferguson, 617 S.W.2d 918, 921 (Tex. 1981).

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determine what damages are appropriate without specifying whether or not the dishonor was mistaken.[79] One court's unusual approach rejects the mistake/nonmistake distinction and instead defines mistake under section 4-402 using the concept of the good faith requirement of section 2-103(1)(b).[80]

While uniform construction of the U.C.C. is desirable as a matter of policy,[81] there remains the question whether the lack of uniformity on the definition of mistake is cause for concern. The importance of uniformity depends upon the substantive or procedural significance that is or ought to be attached to the determination that a dishonor was mistaken or not. If the availability of certain types of damages and the nature of proof required are dependent upon the character of the dishonor, courts should endeavor to apply uniform definitions and to specify whether the dishonor is mistaken or not. On the other hand, if the availability of types of damages and requirements of proof are not dependent upon the nature of the dishonor, then the lack of uniformity has little significance.

II. DAMAGES AND PROOF IN PRE-CODE CASES[82]

A. *The Concept of Actual Damages*

As noted, one significant aspect of the impact of the ABA Statute on the development of an action for wrongful dishonor was its introduction of the concept of mistake.[83] Another aspect of the ABA Statute, one that is perhaps more troubling, is its reference to "actual damage." The intent of the drafters of the ABA Statute was to abolish the presumption of substantial damages under the Trader Rule in cases of mistaken dishonor.[84] There is no indication that the drafters intended to limit or

79. *See, e.g.,* American Fletcher Nat'l Bank & Trust Co. v. Flick, 146 Ind. App. 122, 252 N.E.2d 839 (1969).

At least one commentator argues that the mistake/nonmistake distinction should be abolished in favor of a distinction based on the presence or absence of malice. Damages and proof would be identical in both malicious and nonmalicious dishonors, but punitive damages would be permissible in cases of malicious dishonor. Davenport, *supra* note 4, at 1137-40.

80. Elizarraras v. Bank of El Paso, 631 F.2d 366, 376-77 (5th Cir. 1980).

81. For a discussion of uniformity in construction of the U.C.C., see the Official Comments to U.C.C. § 1-102, and Mellinkoff, *The Language of the Uniform Commercial Code,* 77 YALE L.J. 185 (1976).

82. "Pre-Code" cases include those decided under the ABA Statute as well as those decided prior to its adoption. The focus in this section, however, is on cases decided under the ABA Statute.

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

84. *See supra* notes 57-59 and accompanying text.

expand the types of injuries or losses for which a court could award compensation to a customer in an action for wrongful dishonor. The statute was clearly directed at issues of proof. However, following the adoption of the ABA Statute by numerous jurisdictions,[85] a subtle process began in which courts concluded that the ABA Statute embodied substantive changes in the types of losses or injuries for which a customer could recover damages in an action for wrongful dishonor. This process revolved around courts' interpretation of the phrase "actual damage."

The confusion generated by this phrase found its way into wrongful dishonor cases decided under section 4-402. This occurred because the language of section 4-402 is partially based on the language of the ABA Statute, and because the poor drafting of section 4-402 created its own ambiguities.

The ABA Statute provided that in cases of mistaken dishonor the depositor must "allege and prove actual damage" and that the bank's liability "shall not exceed the amount of damage so proved."[86] Courts imposed two different interpretations on this language. The first interpretation, which is consistent with the drafters' intent to address only matters of proof,[87] limits the liability of the bank in cases of mistaken dishonor to damages the customer *actually proves*.[88] Under this view the ABA Statute modified the Trader Rule, but brought about no changes from the common law in the types of injuries or losses that could be compensated in an action for wrongful dishonor. For example, in *Bush v. Southwark National Bank*[89] the court held that the words "actual damage" in the ABA Statute have the same meaning as the words "actual damage" in common-law defamation.[90] Since "actual damage" in common-law defamation was synonymous with pecuniary damage,[91] this had the effect of perpetuating the common-law restrictions on the recovery of nonpecuniary losses. Under this first interpretation, courts denied recovery to customers for loss or denial of credit unless the customer

85. *See supra* note 56 and accompanying text.

86. *See supra* note 55 and accompanying text.

87. *See supra* notes 56-59 and accompanying text.

88. In this first interpretation, the word "actual" is used in the sense of "real" or "genuine" and its effect is to eliminate the Trader Rule in cases of mistaken wrongful dishonor by requiring that in this type of case, the customer prove *all* damages he wishes to recover.

89. 8 Pa. D. & C. 27 (1927).

90. *Id.* at 28.

91. *See supra* notes 41-42 and accompanying text.

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could show that the denial caused a specific financial loss.[92]

The second interpretation limits the liability of the bank in cases of mistaken dishonor to *actual damages* proved by the customer.[93] Under this view courts interpret "actual damage" as a distinct concept of damages, which may entail a substantive limitation or expansion on the scope of recovery available in a case of mistaken dishonor. Therefore, under the second interpretation, the ABA Statute had two distinct effects. The first effect was to limit the availability of the Trader Rule. The second effect was to limit or expand the types of injuries or losses the customer could recover.[94]

An example of this second interpretation is found in *Mouse v. Central Savings & Trust Co.*[95] In *Mouse*, the bank mistakenly dishonored one of its customer's checks.[96] The payee of the checks, after checking with the bank, filed an affidavit with the police charging the customer with issuing bad checks. Based on this affidavit the customer was arrested and placed in jail until released on bond. One issue in *Mouse* was whether the arrest, the confinement in jail, and the accompanying humiliation constituted "actual damage" under the ABA Statute. The court held that the legislature did not intend to deprive a customer of an action for mistaken wrongful dishonor. Instead, the court determined that the purpose of the statute was to prohibit the presumption of damages and the recovery of punitive damages in this type of case. The court then held that " '[a]ctual damages' is a term synonymous with compensatory damages, and covers all loss recoverable as a matter of right."[97] The court viewed "actual damages" as "real" damages or damages "existing in fact," in contradistinction to punitive damages. On the question of whether the plaintiff's injuries and losses constituted actual damages, the court stated that the customer's damage was "so real, present, and existing, in fact, that the unlawful restraint by one person of the physical liberty of an-

92. *See, e.g.,* State Bank v. Marshall, 163 Ark. 566, 569-71, 260 S.W. 431, 432 (1924) (court's interpretation of variation of ABA Statute); Bush v. Southwark Nat'l Bank, 8 Pa. D. & C. 27, 28 (1927). *See also* Weaver v. Bank of America Nat'l Trust & Sav. Ass'n, 59 Cal. 2d 428, 436, 380 P.2d 644, 650, 30 Cal. Rptr. 4, 10 (1963).

93. In this second interpretation, the word "actual" is used in the sense of "concrete" or "tangible" and suggests that the customer cannot recover some types of damages even if he is able to prove them.

94. A similar situation exists with respect to the interpretation of U.C.C. § 4-402. *See supra* notes 76-81 and accompanying text.

95. 120 Ohio St. 599, 167 N.E. 868 (1929).

96. *Id.* at 601, 167 N.E. at 868.

97. *Id.* at 610, 167 N.E. at 871.

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other gives rise to a cause of action all its own, namely, that of false arrest."[98] The *Mouse* court was not concerned with matters of proof. The existence of injury here was not in question; rather the issue was whether the customer's injury was compensable under the concept of "actual damages."

The *Mouse* opinion is significant because it represents an expansion of the scope of a customer's recovery over that available at common law. The customer in *Mouse* proved only nonpecuniary injury, even though that injury was substantial. If the defamation did not fall into one of the categories of slander that was actionable without proof of damage, the customer could not recover at common law unless he first established pecuniary loss.[99] Because the plaintiff in *Mouse* was not a merchant or trader, a recovery of general damages for the arrest and prosecution represents a significant expansion over the scope of recovery available at common law.

According to the *Mouse* court, one purpose of the ABA Statute was to prohibit any presumption of damages for mistaken dishonor. To the extent that the ABA Statute abolished the presumption of damages provided by the Trader Rule, it also presented those courts that subscribed to the slander analogy of wrongful dishonor with the question of how to treat the common-law requirement of proving pecuniary loss. If the Trader Rule presumption resulted in an injustice to the bank by relieving the customer of the necessity of proving any damage at all, then abolishing that presumption *while at the same time retaining* the common-law requirement of proving pecuniary loss would clearly perpetrate an injustice on the customer.[100] This is especially true when the injury is only to the customer's dignitary interests. By allowing the customer to recover substantial compensatory damages for proven nonpecuniary injury without initially establishing pecuniary loss, the *Mouse* court apparently recognized that an amelioration of the specific requirements of proof borne by the plaintiff at common law must accompany the abolition of the

98. *Id.* at 611, 167 N.E. at 871.

99. *See supra* notes 39-42 and accompanying text. *See also* Weaver v. Bank of America Nat'l Trust & Sav. Ass'n, 59 Cal. 2d 428, 436, 380 P.2d 644, 650, 30 Cal. Rptr. 4, 10 (1963).

100. The courts recognized the injustice that the ABA Statute might perpetrate. In Bush v. Southwark Nat'l Bank, 8 Pa. D. & C. 27 (1924), the court stated that "[t]he policy of the [ABA Statute] is open to question; . . . recovery can seldom be had because in most cases proof of actual damage is impossible." *Id.* at 28. The *Bush* court subscribed to the slander analogy of liability. *See also* Weaver v. Bank of America Nat'l Trust & Sav. Ass'n, 59 Cal. 2d 428, 437, 380 P.2d 644, 651, 30 Cal. Rptr. 4, 100 (1963); Comment, *The Measure of Damages, supra* note 5, at 488-89.

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Trader Rule.[101] In doing so, the *Mouse* court took a significant step toward removing the trappings of common-law slander from an action for wrongful dishonor and expanding the scope of recovery by moving toward a general theory of tort liability.

Weaver v. Bank of America National Trust & Savings Association,[102] a California case decided more than thirty years after *Mouse*, confirmed this movement. In *Weaver*, the Supreme Court of California confronted facts similar to those in *Mouse*. The defendant bank wrongfully dishonored the plaintiff's check. After the bank returned the check to the payee, the payee swore out a warrant for the customer's arrest. The customer was arrested, charged, and temporarily held in jail.[103] On the issue of whether the injuries to the customer's dignitary interests incident to the arrest and confinement constituted "actual damage" under the ABA Statute, the court adopted the *Mouse* court's analysis and conclusion. The *Weaver* court stated that allowing compensation for the plaintiff's nonpecuniary losses was consistent with the apparent purpose of the ABA Statute. Moreover, such compensation was necessary following the abolition of the Trader Rule presumption of damages to avoid inflicting an injustice upon the depositor.[104] Thus, the *Weaver* court interpreted "actual damages" under the ABA Statute as a distinct concept of damages. Following the *Mouse* court, the *Weaver* court interpreted the term "actual" damages in the sense of "real" damages.[105]

Abramowitz v. Bank of America[106] provides another indication of the movement away from a common-law defamation theory and toward a theory of general tort liability in wrongful dishonor actions. In *Abramowitz*, the customer wrote a check as a monthly installment under a conditional sales contract for his automobile. The bank wrongfully dishonored the check and the seller repossessed the automobile pursuant to the sales contract. The court noted that while the relationship between the bank and the customer initially arose out of contract, the customer's

101. This amelioration did not come in the form of dispensing with the requirement of proving nonpecuniary injury. Instead, the court allowed the recovery of damages for nonpecuniary injury even in the absence of any evidence of pecuniary loss.

102. 59 Cal. 2d 428, 380 P.2d 644, 30 Cal. Rptr. 4 (1963). This case was decided under an ABA Statute.

103. *Id.* at 430, 380 P.2d at 646, 30 Cal. Rptr. at 6.

104. *Id.* at 437, 380 P.2d at 651, 30 Cal. Rptr. at 11.

105. *See id.* at 437, 380 P.2d at 651, 30 Cal. Rptr. at 11 ("injury consequent upon arrest, arraignment, and imprisonment, although difficult to measure, is real enough").

106. 131 Cal. App. 2d 892, 281 P.2d 380 (1955).

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action for damages caused by the wrongful dishonor was an action in tort.[107] The issue in *Abramowitz* was whether the customer could recover damages for the loss of the automobile. After discussing the law in California prior to the adoption of the ABA Statute, the court held that the statute entitled the customer to recover "only actual damage proved to have been sustained as a result [of the wrongful dishonor]."[108] The court also held, however, that the *measure* of damages in cases of wrongful dishonor is prescribed by a separate statute for tort actions.[109] Under that statute, tort damages include those that will compensate the plaintiff for all injuries and losses "proximately caused" by the wrongful dishonor. The court concluded that the trial court was correct in finding that the wrongful dishonor proximately caused the loss of the plaintiff's automobile.[110] The court added that "it 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 the plaintiff here."[111] The *Abramowitz* case illustrates that while the idea of actual damages under the ABA Statute was developing as a distinct concept of damages removed from the restrictions of common-law defamation, it was nevertheless closely related to issues of proof and causation.

B. Problems of Proof and Causation in Pre-Code Cases

The scope of a customer's recovery in pre-Code wrongful dishonor cases depended not only upon the court's conception of damages, but also upon the court's resolution of issues of proof and causation. A court's approach to proof and causation depended largely upon whether

107. *Id.* at 895-86, 281 P.2d at 382-83.

108. It is clear that the court is not using the phrase "actual damage" to refer to the requirements of proof. If it were, then the word "proved" would be redundant. If we substitute the word "proved," the passage would read: "the depositor is entitled to recover only proved damages that have been proved."

109. *See* CAL. CIV. CODE § 3333 (Deering 1984) ("For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which compensates for all the detriment proximately caused thereby, whether it could have been anticipated or not"). The court's use of this statute constituted a significant departure from the restrictive contract approach that had been the law in California following Hartford v. All Night and Day Bank, 170 Cal. 528, 150 P. 356 (1915), *rev'd*, Weaver v. Bank of America Trust & Sav. Ass'n, 59 Cal. 2d 428, 380 P.2d 644, 30 Cal. Rptr. 4 (1963).

110. 131 Cal. App. 2d at 896, 281 P.2d at 383. For a discussion of proximate cause in pre-Code cases, see *infra* notes 122-33 and accompanying text.

111. 131 Cal. App. 2d at 896, 281 P.2d at 384.

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the court adhered to a contract or a tort theory of liability, and whether it had adopted the Trader Rule.

The most fundamental question with respect to proof and causation in pre-Code cases concerned the effect of the ABA Statute on the Trader Rule. A review of the appellate cases decided under the ABA Statute demonstrates that the courts did not interpret the statute in a uniform manner. In fact, courts exhibited considerable disagreement over the purpose and effect of the ABA Statute. In jurisdictions that adopted the ABA Statute, courts generally curtailed the availability of the presumption of damages under the Trader Rule and placed traders and non-traders on an equal basis.[112] This statement, however, must be qualified in two important respects.

First, for some courts the restrictions on the availability of presumed damages applied only in certain types of wrongful dishonor cases. In *Woody v. National Bank*,[113] the North Carolina Supreme Court held that the ABA Statute did not apply because the plaintiff alleged that the dishonor was malicious. In addition, the court indicated it did "not appear that the nonpayment of plaintiff's check was through mistake or error on the part of defendant."[114] In *Jones v. Citizens Bank*,[115] the New Mexico Supreme Court further narrowed the application of the ABA Statute by holding that the plaintiff need not establish *actual* malice on the part of the defendant to avoid the application of the statute.[116] Legal malice, in the sense of a wrongful act done intentionally and without just cause or excuse, was sufficient.[117] It is difficult to tell how many courts adopted the *Jones* approach because while some courts acknowledged that the restrictions under the ABA Statute did not apply to malicious wrongful dishonor, they failed to discuss whether the malice necessary to avoid the statute was actual or merely legal malice.[118] A review of the appellate

112. *See, e.g.*, State Bank v. Marshall, 163 Ark. 566, 260 S.W. 431 (1924); Allen v. Bank of America Nat'l Trust & Sav. Ass'n, 58 Cal. App. 2d 124, 136 P.2d 345 (1943); Abramowitz v. Bank of America, 131 Cal. 2d 892, 281 P.2d 380 (1955); Bush v. Southwark Nat'l Bank, 8 Pa. D. & C. 27 (1924).

113. 194 N.C. 549, 140 S.E. 150 (1927).

114. *Id.* at 556, 140 S.E. at 154.

115. 58 N.M. 48, 265 P.2d 366 (1954).

116. *Id.* at 51, 265 P.2d at 368.

117. *Id.*

118. *See, e.g.*, Mouse v. Central Sav. & Trust Co., 120 Ohio St. 599, 167 N.E. 868 (1929). *See also* Weaver v. Bank of America Nat'l Trust & Sav. Ass'n, 59 Cal. 2d 428, 435 n.9, 380 P.2d 644, 649 n.9, 30 Cal. Rptr. 4, 9 n.9 (1963) (stating that since it is improbable the customer will be able to prove malicious dishonor, the court will address the impact of the statute on negligent dishonor). To

cases decided under the ABA Statute demonstrates that although some courts limited the statute's application to certain types of wrongful dishonors, at least as many applied the statute without apparent regard to the type of dishonor.[119]

Second, courts held that the purpose and effect of the ABA Statute was to place traders and nontraders on an equal basis with respect to an action for wrongful dishonor.[120] Yet, the courts continued to classify the customer as a trader or a nontrader[121] and suggested that the distinction had some significance. The distinction has no significance if, as the courts suggested, the ABA Statute placed traders and nontraders on an equal footing.

Other significant issues of proof arose in jurisdictions that had not adopted the Trader Rule or had curtailed its presumption of damages. The most significant issue was whether the wrongful dishonor was the proximate cause of the subsequent arrest and prosecution of the customer.[122] A pre-ABA Statute case on this question was *Hartford v. All Night and Day Bank.*[123] In *Hartford,* the bank dishonored a check and the holder proceeded to file a criminal complaint against the customer of the bank. The customer was subsequently arrested. Although the charges were ultimately dismissed, the customer alleged that the arrest

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some extent, this ambiguity resulted from the language of the statute, which failed to specify whether the customer must establish actual or merely legal malice to avoid the application of the restrictions under the statute. One could safely assume that the drafters of the ABA Statute intended that the restrictions apply to all wrongful dishonors unless accompanied by actual malice. Indeed, the word "malice" would be rendered somewhat redundant if it is taken to mean legal malice. Nevertheless, it is clear that not all courts interpreted it this way.

119. *See* cases cited *supra* note 112.

120. *See* State Bank v. Marshall, 163 Ark. 566, 567, 260 S.W. 431, 432 (1924); Allen v. Bank of America Nat'l Trust & Sav. Ass'n, 58 Cal. App. 2d 124, 136 P.2d 345 (1943); Abramowitz v. Bank of America, 131 Cal. 2d 892, 281 P.2d 380 (1955). This qualification, of course, would not be relevant for those courts that had abolished the trader/nontrader distinction and made the presumption of damages available to both. *See supra* note 50 and accompanying text.

121. *See, e.g.,* First Nat'l Bank v. Ducros, 27 Ala. App. 193, 195, 168 So. 704, 705 (1936); State Bank v. Marshall, 163 Ark. 566, 567, 260 S.W. 431, 432 (1924).

122. The other issues of proof and causation in pre-Code cases typically involve the foreseeability of consequential harm to the customer in the absence of an arrest. For example, in Wahrman v. County Trust Co., 246 A.D. 220, 285 N.Y.S. 312 (1936), the court denied the customer's recovery of special damages for the cancellation of an insurance policy on the grounds that the bank could not foresee the cancellation simply from the fact that the check was payable to an insurance company. *Id.* at 221, 285 N.Y.S. at 313. In Roe v. Best, 120 S.W.2d 819 (Tex. Civ. App. 1938), the court reached the opposite conclusion on identical facts. *Id.* at 822.

123. 170 Cal. 538, 150 P. 356 (1915), *rev'd,* Weaver v. Bank of America Trust & Sav. Ass'n, 59 Cal. 2d 428, 380 P.2d 644, 30 Cal. Rptr. 4 (1963).

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and detention resulted in mental suffering and injury to his reputation.[124] The California Supreme Court reversed the award of damages, in part because it found that, as a matter of law, the injuries the plaintiff suffered were not the proximate result of the dishonor.[125] The court found "no direct causal connection" between the dishonor and the arrest.[126] In the court's view, the independent and unforeseeable act of the holder, not the bank's wrongful dishonor, caused the arrest of the plaintiff.[127]

Other courts came to the same conclusion under the ABA Statute.[128] These decisions essentially rest on a holding that the bank could not foresee the act of the holder in procuring the arrest of the customer.[129] This holding is somewhat surprising given that issuing a check on insufficient funds is a crime in most jurisdictions.[130]

Another line of cases, starting with *Mouse v. Central Savings & Trust Co.*,[131] rejected the *Hartford* position and reached the opposite conclusion on the question of whether the bank could foresee the customer's arrest.[132] Indeed, the California Supreme Court specifically overruled *Hartford* in *Weaver v. Bank of America National Trust & Savings Association*.[133]

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124. 170 Cal. at 539, 150 P. at 356.

125. *Id.* at 541, 150 P. at 357.

126. *Id.*

127. It is surprising that this case became a leading case. The *Hartford* court all but concludes that the dishonor was not wrongful. *Id.* The discussion on the proximate cause issue was at best incidental, at worst dictum.

128. *See, e.g.*, Waggoner v. Bank of Bernie, 220 Mo. App. 165, 281 S.W. 130 (1926).

129. It is reasonable to suppose [that the holder] would immediately procure the arrest of the plaintiff under such state of facts without some attempt, at least, to permit plaintiff to make explanation or restitution? We answer no. . . . [W]e are unable to discover either by reason or human experience how the act of [the holder] in causing plaintiff's arrest . . . ought to have been expected to follow in the wake of defendant's [dishonor].

Id. at 170, 281 S.W.2d at 132.

130. *See* Comment, *The Measure of Damages, supra* note 5, at 490.

131. 120 Ohio St. 599, 167 N.E. 868 (1929).

132. [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.

Id. at 605, 167 N.E. at 870. *See also* Collins v. City Nat'l Bank & Trust Co., 131 Conn. 167, 38 A.2d 582 (1944) (whether the wrongful dishonor was a proximate cause of the arrest was a question of fact for the jury; the test is whether an ordinary person in the bank's position knew or should have known of the probable harm). The issue of whether the wrongful dishonor of a customer's check was the proximate cause of his arrest and prosecution has for the most part been resolved under U.C.C. § 4-402. *See infra* notes 139-141 and accompanying text.

133. 59 Cal. 2d 428, 435, 380 P.2d 644, 649, 30 Cal. Rptr. 4, 9 (1963).

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III. Damages and Proof in Cases Decided Under U.C.C. Section 4-402

The cases decided under the common law and the ABA Statute generated an array of difficult and important issues that confronted the drafters of section 4-402. These issues included: 1) the nature of the action, 2) the appropriate classification of wrongful dishonors, 3) whether or not the availability of damages and/or requirements of proof were dependent upon the type of wrongful dishonor, 4) the scope of recovery in cases of wrongful dishonor, 5) the causal connection the plaintiff must show between the dishonor and the injuries or losses for which compensation is sought, and 6) the status of the Trader Rule. This Article has already addressed the resolution of some of these issues under section 4-402 in Parts I and II.[134] Part III will focus on the scope of recovery and the nature of the proof required under section 4-402.

A. Damages Under Section 4-402

1. Damages in Cases of Mistaken Dishonor

The first sentence of section 4-402 appears to set forth a general rule of liability: "A payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item."[135] The second sentence then provides that "[w]hen the dishonor occurs through mistake liability is limited to actual damages proved."[136] Thus, like the ABA Statute, section 4-402 utilizes the concept of mistaken dishonor.[137] When a court finds the dishonor mistaken, one of the critical questions is what injuries or losses the plaintiff may recover.

The scope of recovery in cases of wrongful dishonor was a major issue at common law and under the ABA Statute.[138] This issue included the question whether the customer could recover damages for arrest and prosecution in such an action.[139] Under the ABA Statute the specific

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134. For a discussion of the issue of the nature of the action under § 4-402, see *supra* notes 6-47 and accompanying text. For a discussion of the classification of wrongful dishonors under § 4-402, see *supra* notes 76-81 and accompanying text.

135. U.C.C. § 4-402 (1978).

136. U.C.C. § 4-402 (1978).

137. For a discussion of the concept of mistake in pre-Code cases, see *supra* notes 61-74 and accompanying text. For a discussion of the concept of mistake under section 4-402, see *supra* notes 76-81 and accompanying text.

138. For a discussion of the scope of the plaintiff's recovery at common law and under the ABA Statute, see *supra* notes 83-111 and accompanying text.

139. For a discussion of the question whether, under the common law and ABA Statute, a cus-

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problem often was determining the scope of recovery under the statutory rubric of "actual damages." The language of section 4-402 addresses this issue from the perspectives of damages and proof by providing that: "If so proximately caused and proved damages may include damages for an arrest and 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."[140] These two sentences of section 4-402 specifically address the question of damages for the arrest and prosecution of the customer and, for the most part, have resolved the matter.[141] Prior to the enactment of section 4-402, however, courts were just as troubled with questions involving the recovery of damages for *other kinds* of injuries or losses that typically resulted from the dishonor of a check. These included damages for personal humiliation, embarrassment, and damage to reputation in the *absence* of an arrest, as well as the recovery of damages for other types of consequential harm, typically classified as special damages.[142] It would seem that the third and fourth sentences of section 4-402 would have settled many of these questions. The third sentence of section 4-402 states that damage "may include damages for an arrest or prosecution of the customer or other consequential damages" if "proximately caused and proved."[143] The fourth sentence specifies that proof of "any consequential damages" is "a question of fact" in each case.[144] Except for settling the issue of recovery of damages for arrest and prosecution of the customer,[145] however, section 4-402 has done disappointingly little to settle the issues concerning these other types of damages.[146] A review of

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tomer could recover damages for an arrest and prosecution following a wrongful dishonor, see *supra* notes 95-105, 122-33 and accompanying text.

140. Official Comment 5 to § 4-402 makes it clear that "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" are rejected. The issue is a question of fact to be decided on a case by case basis. *See* Johnson v. Grant Square Bank & Trust Co., 634 P.2d 1324 (Okla. Ct. App. 1981).

141. *See, e.g.*, Johnson v. Grant Square Bank & Trust Co., 634 P.2d 1324 (Okla. Ct. App. 1981).

142. For discussions of the recovery of damages in pre-Code cases for various types of injuries and losses in the absence of an arrest, see *supra* notes 17-24, 83-94, & 106-11 and accompanying text.

143. U.C.C. § 4-402 (1978).

144. U.C.C. § 4-402 (1978).

145. *See supra* note 141 and accompanying text. There is some question as to whether a customer can recover for an arrest or prosecution as actual damages in cases where the dishonor is due to mistake. This question is largely due to the failure of the third sentence of § 4-402 to specify that *actual* damages may include damages for an arrest or prosecution of the customer.

146. The reasons for this are not certain, but most likely it is because pre-Code decisions still influence some courts.

the cases decided under section 4-402 demonstrates that courts have embraced an extremely wide array of views on the question of what injuries or losses are recoverable in cases of mistaken dishonor.[147]

Bank of Louisville Royal v. Sims[148] and *Harvey v. Michigan National Bank*[149] exemplify the narrow approach to the scope of recovery in cases of mistaken dishonor under section 4-402. In *Sims*, the court upheld the plaintiff's recovery of $1.50 for a telephone call, but disallowed the plaintiff's recovery of $500 for mental distress, embarrassment, and inconvenience, and $300 for two weeks of lost wages. The plaintiff alleged that the defendant's dishonor of her two checks caused these injuries and losses. The court pointed out that even though plaintiffs can recover consequential damages as actual damages under section 4-402, they must show that the consequential damages were "proximately caused by the wrongful dishonor."[150] Using a contract analogy, the court then stated that " 'proximately' caused damages, whether direct or consequential, would be those which could be reasonably foreseeable by the parties as the natural and probable result of the breach."[151] The court found that because the plaintiff's mental distress and lost wages "bore no reasonable relationship to the dishonor of her two checks," which presumably means that the parties could not foresee these consequences, the plaintiff

147. As one court pointed out, "[t]he term 'actual damages' can, in the vernacular, present a can of worms." Morse v. Mutual Fed. Sav. & Loan Ass'n, 536 F. Supp. 1271, 1279 n.5 (D. Mass. 1982). *See also* G. GILMORE, THE AGES OF AMERICAN LAW 96-97 (1977) ("Statutory language—like any other kind of language—almost always presents alternative possibilities of construction.").

The review of cases that follows is essentially a review of cases of mistaken dishonor. In a number of cases, however, the courts neglect to specify whether the dishonor was mistaken. The review includes the discussion of damages from some of these cases when it appears that the dishonor would be classified as mistaken. Although this approach is undoubtedly troublesome for those who argue that no distinction should be made between mistaken and nonmistaken dishonors, courts routinely, though not uniformly, employ this distinction. *See supra* notes 74-81 and accompanying text. Courts will probably continue to employ this distinction as long as § 4-402 retains its reference to mistaken dishonors. Second, this review discusses what injuries or losses a consumer can recover under the rubric of "actual damages" in § 4-402. The statute limits liability of the bank to actual damages proved in cases of mistaken dishonor. Trying to determine what is compensable under the phrase "actual damage" presents problems because some courts utilize different terminology when discussing damages for a mistaken dishonor. *Compare* Kendall Yacht Corp. v. United California Bank, 50 Cal. App. 3d 949, 123 Cal. Rptr. 848 (1975) (proof of verifiable events) *with* Hooper v. Bank of New Jersey, (*In re* Brandywine Assoc.), 30 U.C.C. Rep. Serv. (Callaghan) 1369 (Bankr. E.D. Pa. 1980) (consequential damages). Moreover, some courts utilize the actual damage language when discussing a case of nonmistaken dishonor. *See infra* notes 181-184 and accompanying text.

148. 435 S.W.2d 57 (Ky. Ct. App. 1968).

149. 19 U.C.C. Rep. Serv. (Callaghan) 906 (Mich. Ct. C.P. 1974).

150. 435 S.W.2d at 57.

151. *Id.* at 58.

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could not recover them as actual damages.[152] The court in *Sims* did not appear to take the position that this type of intangible injury[153] and resulting out-of-pocket losses are *never* recoverable as actual damages. The court apparently based its denial of recovery on a failure of proof. Given the court's requirements of proof and the failure of the plaintiff to satisfy those requirements, this court is unlikely to allow recovery of this type of consequential loss in a case of mistaken dishonor.[154]

In *Harvey v. Michigan National Bank*,[155] the bank mistakenly dishonored two of the plaintiff's checks issued to a mortgage company. The mortgage company refused to accept subsequent checks from the plaintiff. A short time later, however, it resumed accepting the plaintiff's checks after the defendant bank notified the mortgage company about the errors. There was no evidence of any other denials of credit or evidence that any other creditor or person had knowledge of the dishonor.

In *Harvey*, the court pointed out that because this dishonor was a mistake, section 4-402 limited the bank's liability to actual damages. The language of the court's opinion suggests that actual damages include damages for injury to the plaintiff's credit standing; however, the court found that the plaintiff had not incurred any damages from a refusal to extend credit. The plaintiff's actual damages included only returned check charges, late charges and service charges imposed by the mortgage company, and the cost of a money order. The court noted that the plaintiff could recover consequential damages,[156] but added that damages for mental distress are not recoverable as a matter of law even though the court indicated that the evidence justified a finding that the plaintiff did suffer some mental distress as a result of the dishonor.[157]

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152. *Id.*

153. "Intangible" injury would include mental distress and embarrassment.

154. Language in the *Sims* opinion hints that a customer could recover for "loss of time" in certain cases. *Id.* at 58. Commentators have criticized the *Sims* decision. *See, e.g.*, J. WHITE & R. SUMMERS, *supra* note 5, at 675; Holland, *supra* note 4, at 532. The *Sims* opinion makes more sense if one considers that, in the court's view, § 4-402 merely codifies the "common law measure of damages as it heretofore existed in Kentucky." 435 S.W.2d at 58.

155. 19 U.C.C. Rep. Serv. (Callaghan) 906 (Mich. Ct. C.P. 1974).

156. *Id.* at 912.

157. The court's view that damages for mental distress are not recoverable as a matter of law is an antiquated position of early cases. *See supra* notes 39-42, 91-94 and accompanying text. It also conflicts with the fourth sentence of § 4-402. In support of this holding, the *Harvey* court cited 5A MICHIE, BANKS AND BANKING § 244 (3d ed. 1973), which contains the following statement:

> A recovery for humiliation or embarrassment cannot be had where compensatory damages only are allowed. The wrongful dishonor of a check will not justify such recovery unless characterized by malice or oppression warranting punitive damages. Damages for mental

Although the courts in *Sims* and *Harvey* denied recovery of most of the damages sought by the plaintiffs, both opinions offer at least limited support for the proposition that the scope of recovery in mistake cases under section 4-402 encompasses consequential damages. Yet, in relation to the other cases on this issue, *Sims* and *Harvey* exemplify a narrow approach to the scope of recovery in mistake cases. A substantial majority of cases dealing with this issue take a much more expansive view.

Skov v. Chase Manhattan Bank[158] exemplifies the expansive view. In this case, the plaintiff had been a fish distributor who served several hotels. The defendant wrongfully, but mistakenly, dishonored a check that the plaintiff had written to its supplier of fish. The appellate court upheld the trial court's finding that this dishonor "proximately caused" plaintiff's supplier to terminate the credit and storage arrangement it had with the plaintiff. This, in turn, made it impossible for the plaintiff to continue the sales of fish to its customers. The appellate court upheld the award of consequential damages, which included the annual loss of profits projected over a three-year period.

In *Kendall Yacht Corp. v. United California Bank*,[159] the plaintiffs claimed that the wrongful dishonor of their checks written to suppliers, employees, and an insurance company resulted in severe damage to their reputation, repeated threats of legal action by various creditors, criminal and administrative investigations, the arrest of one plaintiff, repeated threats of physical harm, acts of vandalism, severe mental and emotional distress, marital problems, and substantial attorney's fees. In upholding the trial court's finding that all of this harm was the "proximate consequence" of the wrongful dishonors, the appellate court held that it was foreseeable that the bank's dishonor of the plaintiff's checks would result in these consequences.[160] Following earlier cases decided under the ABA Statute,[161] the court equated the term "actual damage" with the broad concept of compensatory damages that encompasses mental and emotional distress as well as injury to reputation. Because under the lan-

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> anguish or emotional disturbance suffered by a depositor as the result of the bank's dishonoring a check drawn by him cannot be recovered as actual damages.

Id. at § 244. This statement misrepresents the law and disregards numerous cases decided under § 4-402. *See infra* notes 158-66, 173-80 and accompanying text.

158. 407 F.2d 1318 (3d Cir. 1969).

159. 50 Cal. App. 3d 949, 123 Cal. Rptr. 848 (1975).

160. Compare this court's holding with that of the *Sims* court. *See supra* text accompanying notes 149-154.

161. *See supra* notes 95-111 and accompanying text.

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guage of section 4-402, a plaintiff may recover damages for mental and emotional injuries incident to an arrest, the court found no reason to disallow damages for the mental and emotional distress incident to the other consequences of the wrongful dishonor experienced by the plaintiffs.[162]

These cases represent the expansive view of the scope of recovery under section 4-402 when a bank mistakenly dishonors a check. Typically, courts adopt the expansive view by broadly interpreting the "actual damages" provision of section 4-402.[163] This view, which equates damages in mistaken dishonor cases with compensatory damages and includes consequential damages, originated in cases decided under the ABA Statute[164] and finds support among commentators[165] and courts.[166]

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162. 50 Cal. App. 3d at 957-58, 123 Cal. Rptr. 848, 851-54.

163. *See supra* note 147.

164. *See supra* notes 95-111 and accompanying text.

165. *See* J. WHITE & R. SUMMERS, *supra* note 5, at 674-75; Davenport, *supra* note 4, at 1137-39; Holland, *supra* note 4, at 526-29.

166. *See, e.g.*, Hooper v. Bank of New Jersey (*In re* Brandywine Assoc.), 30 U.C.C. Rep. Serv. (Callaghan) 1369 (Bankr. E.D. Pa. 1980); First Nat'l Bank v. Hubbs, 566 S.W.2d 375 (Tex. Civ. App. 1978).

The scope of recovery in cases of mistaken dishonor under the rubric of "actual damages" is of critical importance, especially in light of the nearly universal denial of presumed damages in such cases. *See infra* notes 190-94 and accompanying text. The most significant question is whether consequential damages are recoverable as actual damages. The great weight of authority, both judicial and scholarly, supports their recovery. If the customer is to have any meaningful remedy in cases of mistaken dishonor, courts must make consequential damages available. All, or nearly all, of the losses or injuries that follow from the wrongful dishonor of a customer's check are consequential damages. The denial of consequential damages would mean the virtual denial of any recovery for the customer.

Courts often contrast the term consequential damages with the term direct damages. The denial of consequential damages therefore would limit the customer's recovery to direct damages. What are the direct damages from the wrongful dishonor of a check? What injuries or losses would direct damages compensate and how would courts measure such damages? The amount of the check would not be useful. The concept of direct damages would not provide a customer with any meaningful remedy if a court limited a customer's recovery to direct damages.

Courts also contrast the term consequential damages with general damages. If a court denies the recovery of consequential damages in cases of mistaken dishonor, then does the court afford the customer with a meaningful remedy by limiting the customer to general damages? General damages do offer the possibility of a meaningful remedy, *see infra* notes 216-20 and accompanying text, but there is a serious problem with courts' utilizing general damages in the context of mistaken wrongful dishonors. General damages are essentially presumed damages. They are damages based on the loss or injury that the law presumes to occur in all cases of a particular type. They do not represent the loss or injury actually suffered by plaintiffs. *See* D. DOBBS, *supra* note 21, at 138-43. The problem is that presumed damages are uniformly disallowed in cases of mistaken dishonor because of the language of the second sentence of § 4-402 and Official Comment 3. *See supra* notes 190-94 and accompanying text. Therefore, it is unlikely that courts would allow the recovery of general damages in

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Because most courts embrace this expansive view of recovery by applying "actual damage" in the comprehensive sense of compensatory damages (including consequential damages), the question arises regarding the purpose in the statutory scheme of the language of the second sentence of section 4-402. In other words, if liability in mistaken dishonor cases is *limited* to actual damages, a comprehensive conception of that term negates the effect of the limitation.

One common solution is to find that the purpose of the second sentence of section 4-402 is to prohibit *punitive* damages in cases of mistaken dishonor.[167] Under this view, the second sentence might read: when the dishonor occurs through mistake, liability is limited to compensatory damages proved, and punitive damages are prohibited.

Another solution, which also supports the expansive view of the scope of recovery, follows from an analysis of the language of the statute and its official comments. The ABA Statute introduced the phrase "actual damage" into the law of wrongful dishonor. The courts viewed the statute from two distinct perspectives. One perspective limited the operation of this language to matters of proof, which was consistent with the drafters' intent. The other perspective, which also constituted a departure from the common law, viewed the language as creating a distinct concept of damages that would govern the scope of a customer's recovery, at least

such cases. There is, on the other hand, precedent for allowing their recovery. For example, in the context of broadcast defamation, courts have allowed plaintiffs to recover general damages even under statutes limiting recovery to actual damages. *See, e.g.,* Snowden v. Pearl River Broadcasting Corp., 251 So. 2d 405 (La. Ct. App. 1971). *See also* Johnson v. Department of Treasury, I.R.S., 700 F.2d 971, 983-986 (5th Cir. 1983).

The position taken by some courts in allowing the recovery of some types of consequential damages, but disallowing the recovery of others is unsupportable. For example, there is no justification for allowing recovery for injury to credit standing but disallowing damages for mental pain and suffering. *See* Harvey v. Michigan Nat'l Bank, 19 U.C.C. Rep. Serv. (Callaghan) 906 (Mich. Ct. C.P. 1974). This is nothing more than the common-law defamation rule, which was a product of an early jurisdictional dispute. *See supra* note 42 and accompanying text. Section 4-402 allows the recovery of damages for the arrest and prosecution of the customer. This would include mental pain and suffering accompanying the arrest and prosecution. Courts should allow for recovery of such damages in the absence of an arrest and prosecution because the statute specifically allows the recovery of "other consequential damages." The trend among the courts, in both mistake and nonmistake cases, is to allow for the recovery of all consequential damages. *See supra* notes 161-66 and accompanying text. For a discussion of the scope of recovery in nonmistake cases, see *infra* notes 173-87 and accompanying text.

167. *See, e.g.,* Hooper v. Bank of New Jersey (*In re* Brandywine Assoc.), 30 U.C.C. Rep. Serv. (Callaghan) 1369, 1375 (Bankr. E.D. Pa. 1980); Kendall Yacht Corp. v. United California Bank, 50 Cal. App. 3d 949, 958-59, 123 Cal. Rptr. 850, 854 (1975); Siegman v. Equitable Trust Co., 267 Md. 309, 315-16, 297 A.2d 758, 760-761 (1972). *See also supra* note 78.

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in cases of mistaken dishonor.[168] The drafters of section 4-402 based the language of that section, in large part, on the ABA Statute, and the phrase "actual damages" in section 4-402 is similarly subject to two distinct interpretations. The second sentence of section 4-402 gives rise to two different interpretations—one emphasizing the term "actual damages" and the other emphasizing the word "proved." Most courts, following the first approach, interpret the language of the statute literally to limit a bank's liability to actual damages.[169] The issue thus becomes one of determining what injuries or losses come within the statutory language of actual damages. Most courts follow an expansive approach.

The alternative view of the second sentence of section 4-402 emphasizes the word "proved" along with the word "actual." Under this view, the sentence would read: When the dishonor occurs through mistake, liability is limited to damages actually proved. Under this approach courts limit damages with a requirement of proof. The language of Official Comment 3 to section 4-402 supports this view. The Official Comment states, in part, that "in all cases of dishonor by mistake damages recoverable are limited to those actually proved."[170] In addition, the legislative history of the ABA Statute, the statutory predecessor of section 4-402, reveals that the drafters' purpose was *not* to impose limitations on the *types* of the compensable losses or injuries; rather, the purpose was to prohibit the recovery of damages without proof.[171] Under this approach, the word "actual" refers to a matter of proof and not to types of damage. It eliminates the Trader Rule presumption, but does not limit the types of recoverable losses or injuries. Some recent appellate decisions utilize this approach.[172]

168. For a discussion of the two distinct interpretations of the phrase "actual damages" in the ABA Statute, see *supra* notes 86-99 and accompanying text.

169. *See* Kendall Yacht Corp. v. United California Bank, 50 Cal. App. 3d 951, 123 Cal. Rptr. 848 (1975); Harvey v. Michigan Nat'l Bank, 19 U.C.C. Rep. Serv. (Callaghan) 906 (Mich. Ct. C.P. 1974); Loucks v. Albuquerque Nat'l Bank, 76 N.M. 735, 418 P.2d 191 (1966); Shaw v. Union Bank & Trust Co., 640 P.2d 953 (Okla. 1981); First Nat'l Bank v. Hubbs, 566 S.W.2d 375 (Tex. Civ. App. 1978).

170. U.C.C. § 4-402, Official Comment 3 (1978).

171. For the legislative history of the ABA Statute, see *supra* notes 57-59 and accompanying text.

172. *See, e.g.*, Elizarraras v. Bank of El Paso, 631 F.2d 366, 376-377 (5th Cir. 1980); Continental Bank v. Fitting, 114 Ariz. 98, 100, 559 P.2d 218, 220 (1977); Clairmont v. State Bank, 295 N.W.2d 154, 158 (N.D. 1980).

On the other hand, several cases decided under § 4-402 suggest that the phrase "actual damages proved" does limit the types of recoverable losses or injuries in a case of mistaken dishonor. *See, e.g.*, Elizarraras v. Bank of El Paso, 631 F.2d 366 (5th Cir. 1980); Morse v. Mutual Fed. Sav. & Loan

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2. *Damages in Cases of Nonmistaken Dishonor*

There is far less diversity of opinion among the courts on the issue of damages when the dishonor was not a mistake[173] than when it was a mistake. An overwhelming majority of courts take a very expansive view of the types of losses or injuries for which the customer may obtain compensation in a case of nonmistaken dishonor. A wide array of specific losses and injuries are compensable in this type of case. These include seizure of property,[174] threats of arrest or imprisonment,[175] damage to or destruction of credit standing,[176] damage to reputation,[177] mental and emotional distress (including humiliation and embarrassment),[178] lost time from employment or school (including compensation for lost wages or income),[179] and loss of money or the use of money.[180]

Ass'n, 536 F. Supp. 1271 (D. Mass. 1982); Shaw v. Union Bank & Trust Co., 640 P.2d 953 (Okla. 1981). Unfortunately, these cases do not offer much guidance on the nature of the limitation because they are not mistake cases. These courts typically point out that in a case of nonmistaken dishonor, the bank is liable for "all damages proximately caused," and in a case of mistaken dishonor, the bank's liability is limited to "actual damages." However, their discussion is limited to determining what losses or injuries a customer may recover in nonmistake cases and does not address the nature of the limitation imposed by the actual damage language in mistake cases. *See infra* notes 173-87 and accompanying text. For a discussion of the issue of proof in mistaken dishonor cases under § 4-402, see *infra* notes 190-94 and accompanying text.

173. For a discussion of the issue of mistake, see *supra* notes 61-81 and accompanying text. *See also* Yacht Club Sales & Service, Inc. v. First Nat'l Bank, 101 Idaho 852, 623 P.2d 464 (1980); Allison v. First Nat'l Bank, 85 N.M. 283, 511 P.2d 769 (N.M. Ct. App.), *rev'd on other grounds*, 85 N.M. 511, 514 P.2d 30 (1973). The great weight of authority would classify a bank's exercise of a wrongful setoff against the customer's account as a nonmistaken dishonor. This Article will treat any wrongful setoff case as nonmistaken dishonor. An intentional dishonor is a nonmistaken one; however, some courts would place intentional dishonors involving some degree of malice in a third category. *See supra* note 78.

174. *See, e.g.*, Allison v. First Nat'l Bank, 85 N.M. 283, 291, 511 P.2d 769, 774 (N.M. Ct. App.), *rev'd on other grounds*, 85 N.M. 511, 514 P.2d 30 (1973).

175. *See, e.g.*, 85 N.M. at 287-88, 511 P.2d at 773-74.

176. *See, e.g.*, Elizarraras v. Bank of El Paso, 631 F.2d 366, 377 (5th Cir. 1980); Morse v. Mutual Fed. Sav. & Loan Ass'n, 536 F. Supp. 1271, 1279 (D. Mass. 1982); Farmers & Merchants State Bank v. Ferguson, 617 S.W.2d 918, 921-22 (Tex. 1981); Northshore Bank v. Palmer, 525 S.W.2d 718, 719 (Tex. Civ. App. 1975).

177. *See, e.g.*, Elizarraras v. Bank of El Paso, 631 F.2d 366, 377 (5th Cir. 1980); Morse v. Mutual Fed. Sav. & Loan Ass'n, 536 F. Supp. 1271, 1279 (D. Mass. 1982); Northshore Bank v. Palmer, 525 S.W.2d 718, 719 (Tex. Civ. App. 1975).

178. *See, e.g.*, Morse v. Mutual Fed. Sav. & Loan Ass'n, 536 F. Supp. 1271, 1279 (D. Mass. 1982); Farmers & Merchants State Bank v. Ferguson, 617 S.W.2d 918, 921-22 (Tex. 1981); First Nat'l Bank v. Hubbs, 566 S.W.2d 375, 378 (Tex. Civ. App. 1978); Northshore Bank v. Palmer, 525 S.W.2d 718, 719 (Tex. Civ. App. 1975).

179. *See, e.g.*, American Fletcher Nat'l Bank & Trust Co. v. Flick, 252 N.E.2d 839, 846 (Ind. Ct. App. 1969); Farmers & Merchants State Bank v. Ferguson, 617 S.W.2d 918, 921-22 (Tex. 1981); Northshore Bank v. Palmer, 525 S.W.2d 718, 719 (Tex. Civ. App. 1975).

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Courts classify these compensable losses or injuries as "damages proximately caused," a phrase found in the first sentence of section 4-402.[181] In this sense, the first sentence of section 4-402 does not set forth a general rule of liability for cases of wrongful dishonor. Instead, it only governs the scope of recovery in nonmistake cases. Some courts, however, emphasize the term "consequential damages,"[182] or "actual damages,"[183] or "compensatory damages"[184] when discussing what damages a customer can recover in a case of nonmistaken dishonor.

The tendency of some courts to use these different terms when referring to essentially the same types of damage while other courts attach different meanings to these words generates much of the confusion surrounding section 4-402.[185] In nonmistake cases, the courts typically use the term "damages proximately caused" to describe the scope of recovery available in nonmistake cases, and typically use the term "actual damages" to describe the scope of recovery available in mistake cases. In most nonmistake cases, courts draw a distinction between these two damage concepts. Each damage concept connotes a different scope of recovery and each is available only in a particular type of wrongful dishonor case—either nonmistake or mistake. The courts in these nonmistake cases imply that "actual damages" entails some restrictions on the types of losses or injuries that a customer could recover in mistake cases, but courts rarely specify these restrictions.[186] Instead, courts in nonmistake cases leave the general impression that the recovery in *mistake* cases

180. *See, e.g.,* Farmers & Merchants State Bank v. Ferguson, 617 S.W.2d 918, 921-22 (Tex. 1981).

181. *See* Morse v. Mutual Fed. Sav. & Loan Ass'n, 536 F. Supp. 1271, 1279 (D. Mass. 1982); Yacht Club Sales & Service, Inc. v. First Nat'l Bank, 101 Idaho 852, 862, 623 P.2d 464, 474 (1980); Joler v. Depositors Trust Co., 309 A.2d 871, 877 (Me. 1973); Shaw v. Union Bank & Trust Co., 640 P.2d 953, 956 (Okla. 1981); Farmers & Merchants State Bank v. Ferguson, 617 S.W.2d 918, 921 (Tex. 1981).

182. *See* Elizarraras v. Bank of El Paso, 631 F.2d 366, 376 (5th Cir. 1980); Hooper v. Bank of New Jersey (*In re* Brandywine Assoc.), 30 U.C.C. Rep. Serv. (Callaghan) 1369, 1374 (Bankr. E.D. Pa. 1980); Allison v. First Nat'l Bank, 85 N.M. 283, 287-88, 511 P.2d 769, 773-74 (N.M. Ct. App.), *rev'd on other grounds,* 85 N.M. 511, 514 P.2d 30 (1973).

183. *See* Elizarraras v. Bank of El Paso, 631 F.2d 366, 377 (5th Cir. 1980); Northshore Bank v. Palmer, 525 S.W.2d 718, 719-20 (Tex. Civ. App. 1975).

184. *See, e.g.,* Yacht Club Sales & Serv., Inc. v. First Nat'l Bank, 101 Idaho 852, 862, 623 P.2d 464, 474 (1980).

185. The courts' confusing and inconsistent use of terminology is the primary reason that any effort to analyze the concept of "actual damage" will never be completely successful. The same can be said about the concept of "mistake."

186. *See, e.g.,* Elizarraras v. Bank of El Paso, 631 F.2d 366, 376 (5th Cir. 1980); Morse v. Mutual Fed. Sav. & Loan Ass'n, 536 F. Supp. 1271, 1279 (D. Mass. 1982).

is somehow more restrictive than the scope of recovery in nonmistake cases because damages in mistake cases are "limited to actual damages." A review of the mistake cases, however, shows that a substantial majority of courts in those cases embrace an *expansive* view of the allowable recovery under the rubric of "actual damages."[187] This view of actual damages in mistake cases envisages a recovery that is essentially as expansive as the scope of recovery in the nonmistake cases in which the courts employ the *apparently more* expansive concept of "damages proximately caused."

A comparison between the scope of recovery in mistake and in nonmistake cases reveals a dichotomy between the views expressed by the courts and the empirical reality. In nonmistake cases under section 4-402, courts employ an expansive view of the scope of recovery under the "damages proximately caused" language while at the same time suggesting that the scope of recovery in mistake cases is more restrictive. On the other hand, the courts in mistake cases employ an expansive view of the scope of recovery under the rubric of "actual damages" that is essentially as expansive as the recovery allowed under the "damages proximately caused" language in nonmistake cases. At the same time, these courts suggest that recovery in nonmistake cases is more expansive. Thus, for a majority of courts, *essentially no difference* exists between the scope of recovery under "actual damages" in mistake cases, and the scope of recovery under "damages proximately caused" in nonmistake cases. This is in spite of language in the courts' opinions that strongly suggests there is such a difference.

The failure of courts to compare the scope of recovery in mistake cases with that in nonmistake cases under section 4-402 causes this confusion. The efforts of most courts in this respect do not go beyond a simple paraphrase of the language of the statute. It is likely that courts confronted with either a mistake or a nonmistake case do not expatiate on the scope of recovery in the other type of case because the result would be dictum.

If there is essentially no difference between mistake cases and nonmistake cases with respect to the allowable scope of recovery, then the question becomes whether the second sentence of section 4-402 has any significance. The second sentence purports to limit the bank's liability in cases of mistaken dishonor, but for a majority of courts this language does not impose restrictions or limits on the scope of recovery in this

187. *See supra* notes 158-66 and accompanying text.

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type of case. This Article has already suggested two other possible meanings for the limitation. First, the limitation in the second sentence of section 4-402 can be seen as limiting the availability of punitive damages to cases of nonmistaken dishonor.[188] The other solution, which is compatible with the first, is that the second sentence of section 4-402 limits the availability of a presumption of damages to cases of nonmistaken dishonor. In other words, when the dishonor occurs through mistake, section 4-402 limits the bank's liability to proven compensatory damages and abrogates any presumption of damages.[189] Either of these interpretations of the second sentence is consistent with the courts' views on the parallel scope of recovery in mistake and nonmistake cases. The remaining question is what differences, if any, exist between the requirements of proof in mistaken and nonmistaken wrongful dishonor cases.

B. Proof Under Section 4-402

1. Proof in Cases of Mistaken Dishonor

In determining the requirements of proof, courts almost uniformly hold that, at least in cases of mistaken dishonor, section 4-402 abolished the possibility of presumed damages under the Trader Rule.[190] The courts require proof of loss or injury and proof of a causal connection between the mistaken dishonor and the plaintiff's losses or injuries.[191] Some courts also require the plaintiff to prove that the bank should have been able to foresee the losses or injuries in some degree.[192] The courts most often utilize more general terminology requiring the plaintiff to

188. *See supra* note 167 and accompanying text.

189. *See supra* notes 168-72 and accompanying text.

190. *See* Continental Bank v. Fitting, 114 Ariz. App. 98, 100, 559 P.2d 218, 220 (1977); Yacht Club Sales & Serv., Inc. v. First Nat'l Bank, 101 Idaho 852, 862, 623 P.2d 464, 474 (1980); Clairmont v. State Bank, 295 N.W.2d 154, 157-58 (N.D. 1980); Shaw v. Union Bank & Trust Co., 640 P.2d 953, 956 n.3 (Okla. 1981).

The official comments to § 4-402 support the notion that presumed damages under the Trader Rule are not available in cases of mistaken dishonor. Official Comment 3 states that "[t]he 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." U.C.C. § 4-402, Official Comment 3 (1978).

191. *See* Charles Ragusa & Son v. Community State Bank, 360 So. 2d 231, 234 (La. Ct. App. 1978); Harvey v. Michigan Nat'l Bank, 19 U.C.C. Rep. Serv. (Callaghan) 906, 909-910 (Mich. Ct. C.P. 1974); National Pool Builders, Inc. v. Summit Nat'l Bank, 281 N.W.2d 181, 184 (Minn. 1979).

192. *See, e.g.,* Kendall Yacht Corp. v. United California Bank, 50 Cal. App. 3d 949, 956, 123 Cal. Rptr. 848, 853 (1975); Bank of Louisville Royal v. Sims, 435 S.W.2d 57, 58 (Ky. Ct. App. 1968).

show the dishonor "proximately caused" the losses or injuries.[193] Nevertheless, a few appellate opinions suggest that some vestige of the Trader Rule survives even in cases of mistaken dishonor.[194]

2. *Proof in Cases of Nonmistaken Dishonor*

Courts in nonmistaken dishonor cases fundamentally disagree over the requirements of proof. This dispute centers primarily on the status of the Trader Rule under section 4-402.[195] Some courts have adopted the view that the enactment of section 4-402 abolished the Trader Rule, even in cases of nonmistaken dishonor. For these courts, customers must prove *all* damages because presumed damages under the rule are no longer available in either a case of mistaken or nonmistaken dishonor.[196] How-

193. *See* Skov v. Chase Manhattan Bank, 407 F.2d 1318, 1319 (3d Cir. 1969); Hooper v. Bank of New Jersey (*In re* Brandywine Assoc.), 30 U.C.C. Rep. Serv. (Callaghan) 1369, 1369 (Bankr. E.D. Pa. 1980); Kendall Yacht Corp. v. United California Bank, 50 Cal. App. 3d 951, 955, 123 Cal. Rptr. 848, 852 (1975); Charles Ragusa & Son v. Community State Bank, 360 So. 2d 231, 234 (La. Ct. App. 1978); Harvey v. Michigan Nat'l Bank, 19 U.C.C. Rep. Serv. (Callaghan) 906, 912 (Mich. Ct. C.P. 1974); National Pool Builders, Inc. v. Summit Nat'l Bank, 281 N.W.2d 181, 184 (Minn. 1979); Shaw v. Union Bank and Trust Co., 640 P.2d at 956 n.3 (Okla. 1981).

194. *See, e.g.,* Loucks v. Albuquerque Nat'l Bank, 76 N.M. 735, 746, 418 P.2d 191, 198-199 (1966) ("Damages recoverable for injuries to credit as a result of a wrongful dishonor are . . . damages as would be fair and reasonable compensation for the injury which [the customer] must have sustained. . . ."); American Fletcher Nat'l Bank & Trust Co. v. Flick, 252 N.E.2d 839, 845-46 (Ind. Ct. App. 1970) (a "presumption" of harm arises upon the dishonor of a customer's business check, but does not limit its availability to cases of nonmistaken dishonor). *See also* Holland, *supra* note 4, at 523-26.

195. For a discussion of the Trader Rule at common law, see *supra* notes 36-53 and accompanying text. For a discussion of the status of the Trader Rule under the ABA Statute, see *supra* notes 112-21 and accompanying text.

196. For a discussion of the Trader Rule in mistake cases, see *supra* notes 190-94 and accompanying text. Some courts have specifically held that the Trader Rule did not survive the enactment of § 4-402 in nonmistake cases. Yacht Club Sales & Serv., Inc. v. First Nat'l Bank, 101 Idaho 852, 623 P.2d 464, 472-75 (1980); Raymer v. Bay State Nat'l Bank, 384 Mass. 310, 315, 424 N.E.2d 515, 520 (1981). *See also* Clairmont v. State Bank, 295 N.W.2d 154, 157-58 (N.D. 1980) (no "per se" damages for merchant). However, courts typically imply that § 4-402 abolished the Trader Rule by specifying a general requirement of proof for all damages. This requirement includes both proof of the injury and proof of the causal connection between the dishonor and the injury. *See, e.g.,* Charles Ragusa & Son v. Community State Bank, 360 So. 2d 231 (La. Ct. App. 1978); Joler v. Depositors Trust Co., 309 A.2d 871 (Me. 1973); National Pool Builders, Inc. v. Summit Nat'l Bank, 281 N.W.2d 181 (Minn. 1979); Allison v. First Nat'l Bank, 85 N.M. 283, 511 P.2d 769 (N.M. Ct. App. 1973), *rev'd on other grounds*, 85 N.M. 511, 514 P.2d 30 (1973); Luxonomy Cars, Inc. v. Citibank, N.A., 408 N.Y.S.2d 951, 65 A.D.2d 549 (N.Y. App. Div. 1978); Farmers & Merchants State Bank v. Ferguson, 617 S.W.2d 918 (Tex. 1981).

Both positions on the status of the Trader Rule find considerable support in the language of Official Comment 3 to § 4-402. It begins with the following unequivocal statement: "This section rejects decisions which have held that where the dishonored item has been drawn by a merchant,

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ever, some of these courts recognize the necessity of ameliorating the requirements of proof regarding the *amount* of losses or injuries not readily susceptible to exact proof.[197]

On the other hand, considerable authority supports the proposition that section 4-402 merely *narrowed* the Trader Rule. Some courts hold that section 4-402 eliminated the availability of per se damages only in cases of mistaken dishonor, and that some form of a presumption remains available to plaintiffs in cases of nonmistaken dishonor. For example, in *American Fletcher National Bank & Trust Company v. Flick*,[198] the court construed section 4-402 "to permit recovery of monetary compensation for *any* actual or consequential harm, loss or injury proximately caused by a wrongful dishonor."[199] The court viewed the concept of proximate cause in section 4-402 as a "statutory limitation" with respect to the issue of proof of damages. Nevertheless, on the question of the sufficiency of evidence when determining "whether a particular loss, injury, or harm was proximately caused by a wrongful dishonor," the court held:

> 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.[200]

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." U.C.C. § 4-402, Official Comment 3 (1978). The drafters then contradict themselves by stating that "in all cases of dishonor by mistake damages recoverable are limited to those actually proved." *Id.* Obviously, each side in the Trader Rule controversy can find substantial support for its position within this same comment. At least some commentators support the view that the Trader Rule has not survived the enactment of § 4-402. *See* Daniels, *supra* note 5; Davenport, *supra* note 4; Comment, *Wrongful Dishonor of a Check: Payor Bank's Liability Under Section 4-402*, 11 B.C. IND. & COM. L. REV. 116 (1969).

197. *See, e.g.*, Yacht Club Sales & Serv., Inc. v. First Nat'l Bank, 101 Idaho 852, 862, 623 P.2d 464, 474 (1980). *See also* Holland, *supra* note 58, at 525.

198. 252 N.E.2d 839 (Ind. App. 1969).

199. *Id.* at 845.

200. *Id.* at 845-46.

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In support of this presumption, the court relied upon pre-ABA Statute cases that justified the Trader Rule by emphasizing the high probability of damage to a customer's credit standing and business reputation from even a single wrongful dishonor.[201] The *Flick* court pointed out, however, that this presumption applies only to injury or damage to credit and business standing and is not available to a customer with respect to other consequential losses. A bank's wrongful dishonor may be the proximate cause of consequential damages such as loss of income, but these damages are more susceptible to proof. Therefore, with these other types of losses, the plaintiff must offer proof of the harm even though a court will not require proof of the exact amount of the harm.[202]

In *Flick*, the court viewed the presumption as a statutory component of section 4-402, consistent with the language of the statute, particularly the phrase "damages proximately caused." In *Elizarraras v. Bank of El Paso*,[203] the Fifth Circuit viewed the presumption as a common-law rule in holding that the Trader Rule survived the enactment of section 4-402. In *Elizarraras*, the court found that the dishonor was not due to mistake.[204] Because the dishonor was not "through mistake," the court held that the statutory limitations found in section 4-402 simply did not apply. Instead, the court applied the common law, which included the Trader Rule. Although the Trader Rule presumption was available to the plaintiff, the court required the plaintiff to offer some evidence of the business's size, past income, past use of credit, and future prospects in order to reduce the jury's speculation. This idea of the limited applicability of section 4-402 finds support in other cases.[205]

The view that section 4-402 eliminated the availability of presumed damages *only* in cases of mistaken dishonor finds support from several

201. Schaffner v. Ehrman, 139 Ill. 109, 28 N.E. 917 (1891); Weiner v. North Penn Bank, Inc., 65 Pa. Super. 290 (1916). For a discussion of the rationale of presumed damages under the Trader Rule, see *supra* notes 43-53 and accompanying text.

202. At least one authority has approved of the presumption suggested by the *Flick* court for cases of nonmistaken dishonor. *See* J. WHITE & R. SUMMERS, *supra* note 5, at 670-74. Other commentators have criticized the *Flick* opinion. *See* Davenport, *supra* note 4, at 1145-46; Holland, *supra* note 4, at 522-23.

203. 631 F.2d 366 (5th Cir. 1980).

204. *Id.* at 376-77.

205. For example, in Allison v. First Nat'l Bank, 85 N.M. 283, 287, 511 P.2d 769, 773 (N.M. Ct. App.), *rev'd on other grounds*, 85 N.M. 511, 514 P.2d 30 (1973), the court stated that § 4-402 only deals with "wrongful" dishonors and "mistaken" dishonors. A third and distinct type of dishonor, namely an "intentional or willful or malicious" one, is not governed by the statute at all. Presumably the common law governs cases involving this type of dishonor. *See supra* note 78.

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sources. The second sentence of section 4-402 states that "[w]hen the dishonor occurs through mistake liability is limited to actual damages proved."[206] The "actual damages proved" language refers to proof; the negative inference is that when the dishonor does *not* occur through mistake the statute does not so limit the bank's liability. The second sentence of Official Comment 3 states that "in all cases of dishonor by mistake damages recoverable are limited to those actually proved." Although the first sentence of this same comment apparently contradicts this statement, the inference again is that when the dishonor is other than by mistake, section 4-402 does not limit the damages to those actually proved. Moreover, the drafters of that section probably intended to retain the availability of presumed damages in cases of nonmistaken dishonor.[207] In general, courts justify the continued availability of the Trader Rule presumption under section 4-402 on the same grounds that courts used in the pre-Code period; namely, the high probability of damage to or destruction of a customer's credit and business reputation from even a single wrongful dishonor and the difficulties with respect to judicial proof of these types of losses.[208]

Although the apparent weight of authority supports the view that the Trader Rule did not survive the enactment of section 4-402, there is sufficient authority to the contrary to call into question the current status of the Trader Rule in the law of wrongful dishonor. Given the ambivalence of the language of section 4-402 and the official comments[209] on the status of the Trader Rule presumption, the merits of the rule itself should be considered in the resolution of the issue. Under pre-Code law there were compelling reasons for allowing both merchants and nonmerchants to utilize the presumption under the Trader Rule. These reasons were based on the realities of commerce, banking, and credit as well as a recognition of the limits of proof.[210] Consider the following passage:

> In the modern world the financial credit of a man, particularly of one engaged in commercial pursuits, is a much prized and valuable asset. Although laboriously built it is easily destroyed. The banks of the country,

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206. U.C.C. § 4-402 (1978).

207. For a discussion on the drafting history of § 4-402, see J. WHITE & R. SUMMERS, *supra* note 5, at 670-71.

208. *See* Elizarraras v. Bank of El Paso, 631 F.2d 366, 376 (5th Cir. 1980); American Fletcher Nat'l Bank & Trust Co. v. Flick, 252 N.E.2d 839, 846 (Ind. App. 1969).

209. *See supra* note 196.

210. *See* Valley Nat'l Bank v. Witter, 121 P.2d 414, 418-19 (Ariz. 1942). For a discussion of the rationale behind the development of the Trader Rule, see *supra* notes 36-53 and accompanying text.

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> through which the great volume of our commercial business is transacted, have a deserved reputation for accuracy and care in the conduct of their affairs. Hence when a check of a depositor is refused at the counter of his bank, that portion of the commercial world, greater or less, that comes within the sphere of his transaction, promptly imputes the blame to him rather than to the bank.[211]

The question is whether these conditions have been rectified with the adoption of the U.C.C. Is the availability of credit more or less critical today? Does the dishonor of an item today result in less or more harm to the customer's credit standing? One commentator answered these questions as follows:

> More than ever before, an individual's or an entity's credit rating is a key to viable commercial relations. Modern business practices rely heavily upon the use of credit to finance and to consummate purchases made by businesses and consumers. Highly computerized credit ratings generally dictate the amount of credit that can be extended to a potential purchaser. Congress, by enacting the Fair Credit Reporting Act, (citations omitted) recognized the importance of credit ratings and the need for their meticulous accuracy. The Act is intended to maintain accuracy in credit reporting and to provide remedies for abusive reporting practices . . . .
>
> A sound credit rating can be impaired or even destroyed by the negotiation of a check which is subsequently returned, stamped with the legend "not sufficient funds" or "insufficient funds."[212]

The U.C.C. has not rectified these problems. In light of the importance of credit and credit ratings in contemporary business practices, the reasons for allowing the Trader Rule presumption are far more compelling now than prior to the adoption of the U.C.C. Modern conditions require the availability of presumed damages for injury to credit standing and reputation, which inevitably results from the wrongful dishonor of a check.

Even though an action for wrongful dishonor is no longer based upon a common-law theory of defamation, but upon a theory of general tort liability,[213] it retains many affinities with common-law defamation. The harm wrought by a wrongful dishonor, like that wrought by defamation,

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211. American Fletcher Nat'l Bank & Trust Co. v. Flick, 252 N.E.2d 839, 846 (Ind. App. 1969) (quoting Weiner v. North Penn Bank, Inc., 65 Pa. Super. 290 (1916)).

212. Daniels, *supra* note 5, at 803-04. *See also* 15 U.S.C. §§ 1681 (a)-(t) (1982). For a discussion of the importance of credit as evidenced by congressional enactment of the Federal Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1693 (1982), see Brothers v. First Leasing, 724 F.2d 789, 793-95 (9th Cir. 1984).

213. *See supra* notes 95-111 and accompanying text.

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is often very subtle and indirect and thus not easily subject to monetary proof.[214] The availability of presumed damages in cases of wrongful dishonor is not a legal anomaly or anachronism. A great majority of courts in this country still allow the recovery of substantial damages in certain classes of defamation cases without proof of any injury or loss.[215]

C. Resolving the Disputes Over Damages and Proof

1. Presumed Damages As General Damages in Wrongful Dishonor Cases

The availability of presumed damages in cases of wrongful dishonor may be more acceptable in the broad context of general damages. In a great many actions for damages, a plaintiff may recover damages that generally or typically result from the particular wrong without having to prove actual loss or injury.[216] Courts assume that these general damages measure the plaintiff's loss. Even though a particular legal injury has its own rule of general damages, courts understand that the general damages do not necessarily reflect the actual loss or injury suffered by the plaintiff.

In the case of most dignitary torts, compensation for emotional harm to the plaintiff is included in general damages. A court will presume that such harm exists.[217] General damages represent an award for mental and emotional harm as well as the affront to the plaintiff's dignity. In defamation cases general damages include an estimate of the loss the plaintiff has or will suffer under the circumstances.[218] A plaintiff may recover such damages even in the absence of proven pecuniary loss.[219]

The concept of general damages should be employed in the context of wrongful dishonor. In a case of wrongful dishonor the court should permit the jury to award the customer substantial damages in the form of

214. For a discussion of fixing monetary damage, see Dalton v. Meister, 52 Wis. 2d 173, 188 N.W.2d 494 (1971).

215. *See* PROSSER, *supra* note 21, at 788-793 & 795-796. Prosser opines that proposals requiring proof of actual damage in all cases of defamation "will probably never be adopted, because it is clear that proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." *Id.* at 765.

216. For a discussion of general damages, see D. DOBBS, *supra* note 21, at 138-40.

217. *See id.* at 139 & 528-31 (general damages in dignitary torts).

218. *See* Thomas v. E.J. Korvette, Inc., 329 F. Supp. 1163, 1169 (D. Pa. 1971); Dalton v. Meister, 52 Wis. 2d 173, 176, 188 N.W.2d 494, 497-98 (1971). For a discussion of general damages in defamation cases, see D. DOBBS, *supra* note 21, at 513-14.

219. *See* Snowden v. Pearl River Broadcasting Corp., 251 So. 2d 405, 412 (La. Ct. App. 1971).

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general damages. This will result in compensation for loss and injury that "generally" flows from the wrongful dishonor of a check, which the plaintiff has very likely suffered or will suffer. Courts should allow general damages without specific proof of emotional harm or actual pecuniary loss. As in other types of cases, the amount of the jury's award should be subject to a remittitur in cases of excessiveness.[220]

2. Extent of Availability

a. Problems With the Unlimited Availability and Total Abolition of Presumed Damages

The question remains as to whether these presumed damages or general damages should be available in all cases of wrongful dishonor, or only in cases of nonmistaken wrongful dishonor. The rationale for the availability of presumed damages deals with the consequences that follow from the dishonor of a customer's check. There is a high probability that the dishonor will result in harm to the customer and the customer will experience difficulty proving the harm.[221] The consequences that follow from a wrongful dishonor do not depend on whether that dishonor was mistaken or nonmistaken. The bank's motivation behind the dishonor of the check will typically have no bearing on the consequences of that dishonor with respect to the customer.[222] Thus, the type of wrongful dishonor should have no bearing on the availability of the presumption.[223]

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220. *See, e.g.*, Thomas v. E.J. Korvette, Inc., 329 F. Supp. 1163 (E.D. Pa. 1971); Whalen v. Weaver, 464 S.W.2d 176, 182 (Tex. Civ. App. 1971); Dalton v. Meister, 52 Wis. 2d 173, 177, 188 N.W.2d 494, 498 (1971).

The most frequent objection to the Trader Rule is that damage awards are out of proportion to any actual injury suffered by the customer. *See supra* notes 56-59 and accompanying text. As in other legal contexts, the effective use of a remittitur can effectively solve this problem. Moreover, as in the case of Elizarraras v. Bank of El Paso, 631 F.2d 366, 376-377 (5th Cir. 1980), the court could require the plaintiff to offer some evidence of business size, past income, past use of credit, and future prospects in order to reduce the jury's speculation. *See supra* notes 203-08 and accompanying text.

221. *See supra* notes 36-53, 210-12 and accompanying text.

222. It is true that in some instances the bank may mitigate the customer's damages. If the dishonor was inadvertent and the bank pays the check when *re*presented, the bank may write letters of explanation and apology to the payee and other holders. But the dishonor, however, may have already caused the customer injury and individuals other than the payee and holders may have learned of the dishonor. Moreover, it may be economically advantageous for the holder to refuse to *re*present the check and instead treat it as dishonored. More importantly, the bank would only mitigate the customer's losses in the case of inadvertent dishonors. When the dishonor is intentional, such as a wrongful setoff or hold, the bank would not be interested in minimizing the customer's losses because the bank believes, albeit erroneously, that the dishonor was *justified*.

223. In other words, mistaken and nonmistaken dishonors should be treated the same, with presumed damages available in both types of cases. Commentators who oppose the availability of

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This analysis must, however, be coupled with the statutory and judicial background of the Trader Rule presumption. A line of cases decided under the ABA Statute, the statutory predecessor of section 4-402, employed the mistake/nonmistake distinction in determining the availability of presumed damages.[224] The language of section 4-402 employs the concept of mistake, but mistake typically has no impact on the types of injuries or losses for which the customer can recover damages.[225] The distinction in section 4-402 has only affected the requirements of proof in mistake and nonmistake cases. While the courts generally agree that section 4-402 abolished presumed damages in cases of mistaken dishonor,[226] there is a reasonable disagreement among the courts and commentators over the availability of presumed damages in cases of nonmistaken dishonor.[227]

The issue of presumed damages under section 4-402 may be resolved in a number of ways, none of which are totally satisfactory. Both of the extreme positions, the total abolition of presumed damages and the unlimited availability of presumed damages, are unworkable for a variety of reasons. Most importantly, both positions are in direct conflict with the express language of the second sentence of section 4-402.[228] Both are also in conflict with a portion of Official Comment 3 to section 4-402.[229] Neither position finds support in the drafting history of section 4-402.[230] Finally, neither position finds unequivocal support among the wrongful dishonor cases decided under section 4-402.[231]

In addition to these problems, the total abolition of presumed damages is unacceptable as a matter of policy. It ignores the importance of credit and credit ratings in contemporary business practices. It also ignores the

presumed damages also believe that mistaken and nonmistaken dishonors should be treated the same, but for them presumed damages should be available in *neither* type of case. *See, e.g.*, Davenport, *supra* note 4, at 1145.

224. *See supra* notes 68-69 and accompanying text.

225. *See supra* notes 187-89 and accompanying text.

226. *See supra* notes 190-94 and accompanying text.

227. *See supra* notes 195-205 and accompanying text.

228. The second sentence calls for some type of limitation in case of dishonor through mistake. Because the limitation does not impact on the scope of the recovery it must impact on requirements of proof if it is to have any significance.

229. The total abolition of presumed damages is in conflict with the second sentence of Official Comment 3. The unlimited availability of presumed damages is in conflict with the first sentence.

230. The drafters probably intended to limit the availability of presumed damages to instances of nonmistaken dishonor. *See* J. WHITE & R. SUMMERS, *supra* note 5, at 670-71.

231. *See supra* notes 195-205 and accompanying text.

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limits of judicial proof with respect to the types of losses and injuries, which are generally suffered in a case of wrongful dishonor.[232] On the other hand, the unlimited availability of presumed damages is desirable as a matter of policy, because it accounts for the importance of credit ratings and limits to judicial proof. These policy considerations, however, are insufficient to overcome the conflict with the language of the statute and official comment as well as the courts' nearly uniform disallowance of presumed damages in cases of mistaken wrongful dishonor.

b. A Compromise Approach to the Availability of Presumed Damages

A compromise between the two extreme positions presents the most reasonable approach to presumed damages. Courts should make available presumed damages to customers when the bank's dishonor is not a mistake. The concept of mistake should be the one currently employed by a majority of the courts under section 4-402.[233] This position has the support of at least some commentators[234] and a minority of courts.[235] Although the drafting history of section 4-402 is ambiguous, the drafters intended this interpretation.[236]

This position conflicts with the first sentence of Official Comment 3 to section 4-402. However, the two extreme positions are also in conflict with that comment. This conflict is inevitable because the official com-

232. *See supra* notes 209-15 and accompanying text.

233. For a discussion of the concept of mistake employed by the courts under § 4-402, see *supra* notes 74-80 and accompanying text. Because the availability of presumed damages should depend on whether the dishonor was mistaken or not the courts should endeavor to achieve a high degree of uniformity on the interpretation of the term "mistake" in § 4-402.

234. J. WHITE & R. SUMMERS, *supra* note 5, at 670-74.

235. *See supra* notes 198-205 and accompanying text.

236. *See supra* note 230. In his extensive criticism of the Trader Rule, William Davenport argues that the "rationale for the trader rule must apply in both [mistake and nonmistake cases] or in neither. . . ." Davenport, *supra* note 4, at 1145. Treating both types of cases the same, he argues that presumed damages should not be available in either type of case. Davenport criticizes Professors White and Summers for making a distinction between mistaken and nonmistaken dishonors with respect to the availability of presumed damages. *Id.* at 1135-37. Davenport's criticism of the White and Summers view fails to address the argument that perhaps most strongly supports that view. Davenport points to the language of the statute and comments, but he virtually ignores the legislative history of § 4-402. *But see* J. WHITE & R. SUMMERS, *supra* note 5, at 671-72 n.73. Given the ambiguity of the statute and the comments, the legislative history can hardly be ignored. The legislative history strongly supports the distinction between mistaken and nonmistaken dishonors. Davenport appears to be looking for logical consistency in a statute that, like its predecessor the ABA Statute, is a product of compromise and expediency. *See supra* notes 71-73 and accompanying text. *See also supra* text accompanying note 208.

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ment contains two contradictory statements. Although this position has the support of only a minority of courts, it is the only position that is totally consistent with the second sentence of section 4-402. In addition, the rationale behind the availability of presumed damages does not fully support making presumed damages available only in cases of nonmistaken dishonor. This, however, is the nature of a compromise. It will effectively minimize a substantial amount of the uncertainty and confusion surrounding an action for wrongful dishonor. Until the drafters of the U.C.C. amend section 4-402 and clarify the official comments, a compromise is probably the best solution.[237]

CONCLUSION

A customer's action against a bank for wrongful dishonor under U.C.C. section 4-402 lies at the heart of the checking account relationship, yet many of the important issues arising out of this type of action remain unsettled. The two most significant issues concern the types of losses or injuries for which the customer may obtain compensation in an action for wrongful dishonor, and the nature of the proof required to recover such damages. This Article has suggested several ways in which courts can alleviate the uncertainties surrounding these issues and achieve a greater measure of uniformity under the statute.

The first step is to achieve greater uniformity over the nature of the action. Although today an overwhelming majority of courts have moved toward a theory of tort liability, a few courts continue to view the action as solely one of contract. Inasmuch as both classifications carry substantial doctrinal baggage, this dichotomy has perpetuated unsettled substantive issues with respect to damages and proof.

Second, the courts should clarify and unify the concept of mistake.

237. For recent commentary on the efforts by the Permanent Editorial Board of the U.C.C. (P.E.B.) to revise Articles 3 and 4, see, Brandel & Geary, *Electronic Fund Transfers and the New Payments Code*, 37 BUS. LAW. 1065 (1982); Brandel & Soloway, *Electronic Fund Transfers and the New Payments Code*, 38 BUS. LAW. 1355 (1983); Miller, *Report on the New Payments Code*, 40 BUS. LAW. 1139 (1985); Miller, *A Report on the New Payments Code*, 39 BUS. LAW. 1215 (1984). One product of this effort was the proposed Uniform New Payments Code (N.P.C.), drafted by the 3-4-8 Committee of the P.E.B.. In P.E.B. Draft No. 3 (1983) of the N.P.C., the 3-4-8 Committee proposed a substantial revision of § 4-402. *See generally* Dow, *Wrongful Dishonor of a Check Under Uniform Commercial Code § 4-402 and Proposed New Payments Code § 101: A Comparison*, paper presented at the Midwest Business Law Ass'n Annual Meeting (April 4-6, 1984), *reprinted in* SELECTED PAPERS OF THE AM. BUS. LAW ASS'N REGIONAL PROCEEDINGS (Tri-State & Midwest Bus. Law Ass'ns) 32 (1984).

Although most courts view a mistaken dishonor as limited to clerical and other bookkeeping errors, the courts do not uniformly adhere to this view, and some courts ignore the distinction altogether. While this lack of uniformity has little significance with respect to the scope of losses or injuries for which a customer may obtain compensation, a uniform conception of mistake is essential with respect to the availability of both presumed damages and punitive damages.

There is considerable misunderstanding over the scope of the customer's recovery in a case of wrongful dishonor. Courts typically suggest that the scope of recovery in nonmistake cases under the "damages proximately caused" language is more expansive than that in mistake cases under the rubric of "actual damages," yet a comparison between these two types of cases reveals a dichotomy between the views expressed by the courts and empirical reality. For a majority of courts essentially no difference exists in the scope of recovery between these two types of cases. Nearly all courts allow an expansive recovery in cases of nonmistaken dishonor, and a substantial majority of courts allow the recovery of all compensatory damages, including consequential damages, in a case of mistaken dishonor. This expansive view of actual damages is justified on several grounds, and is compatible with the second sentence of section 4-402 if the language of that sentence is viewed as limiting the availability of punitive damages or presumed damages.

Perhaps the most intractable problem in the law of wrongful dishonor is the current status of the Trader Rule. Although courts agree that section 4-402 abolished presumed damages in cases of mistaken dishonor, there is fundamental disagreement among the courts and commentators over the availability of presumed damages in cases of nonmistaken dishonor. This Article has argued that courts should afford the customer a presumption of damages, but only in cases of nonmistaken wrongful dishonor. This represents a necessary compromise between the extreme positions calling for the unlimited availability of presumed damages on the one hand, and their total abolition on the other. While this compromise is not completely satisfactory, it is consistent with the language of section 4-402 and the drafters' intent. Until section 4-402 is amended, this approach will minimize a substantial amount of the uncertainty currently surrounding an action for wrongful dishonor.

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