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# The Effect of the Adoption of the Proposed Uniform Commercial Code on the Negotiable Instruments Law of Louisiana - Deferred Posting and Delayed Returns

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## The Effect of the Adoption of the Proposed Uniform Commercial Code on the Negotiable Instruments Law of Louisiana—Deferred Posting and Delayed Returns

In accord with a trend throughout the country<sup>1</sup> the Louisiana legislature in 1950 enacted a "deferred posting" statute<sup>2</sup> similar to that recommended by the American Bankers Association.<sup>3</sup> In this Comment inquiry will be made into the reasons for the enactment of this legislation, the results it has had on Louisiana law and banking practices, and the changes which would be effected in the law on this subject should the Uniform Commercial Code be adopted.

### *Past and Present Banking Operations*

Prior to the enactment of the present statute the process of collection and posting of items was usually completed by two or three o'clock in the afternoon on the day the items were received by the payer bank for the reason that any return had to be made on the same day that the check was received.<sup>4</sup> This practice often caused difficulty. Because the banks made an effort to process items as they were collected, time schedules were often tight; there were excessive machine requirements, repetitious handling of statements, and an unevenly distributed work load during the day.<sup>5</sup> With haste necessary, error was a likely occurrence.<sup>6</sup>

As a result of World War II and its attendant shortage of personnel, the present practice of deferred posting and delayed returns came into being.<sup>7</sup> Under the new procedure, both the determination of whether to honor or dishonor an item and the

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1. PATON, DIGEST OF LEGAL OPINIONS — COLLECTION § 27, p. 14 (Supp. 1954) states that "forty-seven states, Alaska and the District of Columbia now have legislation permitting the practice of deferred posting in some form and under some circumstances." Kentucky appears to be the only state without a statute. For citations to the various statutes see *id.* at 1-14, § 27.

2. La. Acts 1950, No. 144, p. 310, now LA. R.S. 6:67, 6:68 (1950).

3. PATON, DIGEST OF LEGAL OPINIONS — COLLECTION § 27, at p. 3 (Supp. 1954).

4. Leary, *Deferred Posting and Delayed Returns — The Current Check Collection Problem*, 62 HARV. L. REV. 905, 916 (1949).

5. Lawson, *Deferred Posting and Delayed Returns*, 41 BANKING 56 (Jan. 1949).

6. Leary, *Deferred Posting and Delayed Returns — The Current Check Collection Problem*, 62 HARV. L. REV. 905, 916 (1949).

7. *Id.* at 906.

process of posting can be delayed until the day *after* receipt of the item. This is because credit given before midnight of the day of deposit, other than for immediate payment over the counter, does not become final until midnight of the day *after* the check is received by the bank. While the bookkeepers are processing the items which had been handled by the proof department on the previous day, the proof department is proving the current day's items. Bookkeeping entries are posted as of the previous day.<sup>8</sup> The advantages of this practice to banks are numerous, the most important being simplicity of operation, elimination of standby forces, and the necessity of handling a customer's card only once.<sup>9</sup> The practice of deferred posting apparently has promoted banking efficiency<sup>10</sup> and does not seem to have caused adverse comment from bank customers.<sup>11</sup>

#### *Deferred Posting and the Collection Process*

The present deferred posting statute is applicable to "demand item[s] payable by, at or through" a bank. Payment made over the counter is considered final payment. In the case of payment other than that over the counter, a bank must have given credit for the item before midnight of the day of receipt in order to delay revocation of credit until the day after receipt. Credit is defined in the statute as "payment, remittance, advice of credit, or authorization to charge and, in cases where the item is received for deposit as well as for payment, also includes the passing of appropriate entries to the receiving bank's general ledger without regard to whether the item is posted to individual customers' ledgers." Apparently the item itself may be returned to constitute revocation, or "if the item is held for protest or at the time is lost or is not in the possession of the bank," written notice of dishonor, nonpayment or revocation may be given. The item "shall be deemed dishonored on the day

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8. Lawson, *Deferred Posting and Delayed Returns*, 41 BANKING 56 (Jan. 1949).

9. Leary, *Deferred Posting and Delayed Returns—The Current Check Collection Problem*, 62 HARV. L. REV. 905, 917 (1949). In Lawson, *Clearing the Way for Deferred Posting*, 32 BURROUGHS CLEARING HOUSE 24 (June 1948) a number of advantageous results of using the system are listed. Thus, at the beginning of the day the entire day's work is ready for the bookkeepers and sporadic posting is thereby eliminated. The ledgers reflect the true business condition of the day's business. Work pressure is relieved and staff morale shows improvement. The work is more orderly, and the consequent greater operating efficiency saves time and money.

10. Note, 59 YALE L.J. 961, 970 (1950).

11. Lawson, *Deferred Posting and Delayed Returns*, 41 BANKING 56 (Jan. 1949).

the item or notice is dispatched." The statute further provides that if a bank receives an item on a day other than its regular business day, or after business hours, or during periods of limited business operations, it may consider the day of receipt as being its next regular business day. The statute concludes with the statement that "each branch or office of a bank shall be deemed a separate bank."<sup>12</sup>

When the statute was adopted in Louisiana, it was predicted that "an undesirable degree of uncertainty may be introduced into some commercial transactions."<sup>13</sup> Although there has apparently been no litigation in this state reaching the appellate court level which deals with situations arising from the application of the deferred posting statute, some uncertainty does exist. It will be pertinent to consider the ways in which the statute has caused uncertainty in the collection process and the problems to which deferred posting could give rise.

Deferred posting plays an integral part in the collection process and in the problem of payment. The collection process<sup>14</sup> and the payment problem<sup>15</sup> both turn heavily on the question of who shall bear risk of loss. When the drawer's account is finally charged and the check is cancelled by the drawee bank, the drawer and endorsers are released from liability and the check is considered paid.<sup>16</sup> This payment or credit is normally considered final because the bank may, with diligence, discover facts which might stop payment of the check.<sup>17</sup> When, however,

12. LA. R.S. 6:67-68 (1950).

13. *Louisiana Legislation of 1950*, 11 LOUISIANA LAW REVIEW 27 (1951).

14. Steffen, *The Check Collection Muddle*, 10 TUL. L. REV. 537, 554 (1936) refers to the collection process as a "delightful muddle."

15. STEFFEN, CASES ON COMMERCIAL AND INVESTMENT PAPER 517 (1954) noted that the payment problem is "plainly a complicated one."

16. *City of Douglas v. Federal Reserve Bank of Dallas*, 271 U.S. 489 (1926); *Federal Reserve Bank v. Malloy*, 264 U.S. 160 (1924); *Joffrion-Woods, Inc. v. Brock*, 180 La. 771, 157 So. 589 (1934) (where drawer of a check had on deposit sufficient funds to meet check when presented by collecting bank, check was "paid" when drawee debited drawer's account with the amount of the check, stamped the check "paid" and forwarded its draft to the collecting bank for the amount of the check); cf. *Ray v. Canal Bank & Trust Co.*, 186 La. 547, 173 So. 101 (1937) (where merely stamping the check with rubber stamp did not constitute payment); *Langridge v. Dauenhauer*, 120 La. 450, 45 So. 387 (1908) (where the court noted that it is the payment of the check and not its receipt which operates to discharge the obligation of the drawer); *Hunt v. Security State Bank*, 91 Ore. 362, 179 Pac. 248 (1919); but cf. *Nineteenth Ward Bank v. First Nat. Bank*, 184 Mass. 49, 67 N.E. 670 (1903).

See LA. R.S. 7:87, 7:88 (1950). Section 87 of the NIL defines an instrument payable at a bank as an order on that bank to pay, and section 88 construes the term "payment in due course."

17. *Oddie v. National City Bank*, 45 N.Y. 735 (1871), is the leading authority

the holder deposits the check in a bank other than the drawee bank, the credit is usually not final and he may not draw against it<sup>18</sup> until the check has been processed, usually through a clearing house, and the drawee bank has credited the collecting bank with the amount of the check.<sup>19</sup> Until this time the holder technically may not use the fund and is subject to several risks: payment may be stopped,<sup>20</sup> failure of the bank may preclude collection,<sup>21</sup> the funds may be garnisheed,<sup>22</sup> or the drawer may die before payment.<sup>23</sup> Legislation permitting deferred posting and delayed returns, by allowing the bank an additional twenty-four hour period in which to revoke the credit, allows more time for the contingencies above noted to occur. Mere dispatch of a dishonor notice during this period, under certain circumstances, will meet the requirements of the statute; therefore, an item may be honored by payment or remittance through clearing house channels, and then a revocation, though given within the prescribed period, may not arrive at the drawee bank until sev-

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for this proposition. There the court remarked, *id.* at 742, that "the bank always has the means of knowing the state of the account of the drawer, and if it elects to pay the paper, it voluntarily takes upon itself the risk of securing it out of the drawer's account or otherwise." See cases in Annot., 87 A.L.R. 442 (1933).

NIL § 189, LA. R.S. 7:189 (1950), provides that "a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless or until it certifies the check." One Louisiana case, no longer followed, held that it was conditional and not final payment. *Lake Charles Feed Co. v. Sabatier*, 14 La. App. 233, 125 So. 318 (1929), *aff'd*, 14 La. App. 233, 129 So. 261 (1930). Steffen, *The Check Collection Muddle*, 10 TUL. L. REV. 537, 542, n. 25 (1936), notes that whether considered paid or not, secondary parties may still be discharged by the delay.

18. Moore, Sussman & Corstvet, *Drawing Against Uncollected Checks*: I, 45 YALE L.J. 1, 16-21 (1936).

19. See Note, 59 YALE L.J. 961, 962 (1950), and authorities cited. An excellent discussion of clearinghouse procedure may be found in Leary, *Deferred Posting and Delayed Returns — The Current Check Collection Problem*, 62 HARV. L. REV. 905, 910-15 (1949).

20. *Louisiana Ice Co. v. State National Bank*, 1 McGloin 181 (La. App. 1881). Although the thrust of the decision, that the bank is normally agent rather than debtor of the depositor, is no longer sound law after the case of *In re Liquidation of Canal Bank & Trust Co.*, 181 La. 856, 160 So. 609 (1935), its holding that the drawer has power to stop payment of the check apparently remains good law, and in accord with the majority view stated in *Florence Mining Co. v. Brown*, 124 U.S. 385 (1888) and *Miller v. Chatham & Phoenix Nat. Bank*, 126 Misc. 559, 214 N.Y. Supp. 76 (Sup. Ct. 1926). Since under NIL § 189, LA. R.S. 7:189 (1950), the check does not constitute assignment, further reason exists why stop payment orders should be permitted.

21. Upon failure of a bank the Federal Deposit Insurance Corporation protects only those holders which the drawee bank is obligated to pay, the obligation arising from either acceptance by the bank or by a final crediting of the check to the correspondent bank. 12 C.F.R. § 330.1, 330.2 (1949).

22. Cases are collected in Annots., 50 A.L.R. 403 (1927), 84 A.L.R. 412 (1933).

23. *Bridewell v. Clay*, 185 S.W.2d 170 (Tex. Civ. App. 1944) (where bank's authority to pay was considered revoked by the death of the drawer).

eral days later.<sup>24</sup> The problem of risk of loss during this period seems of paramount importance.<sup>25</sup> The risk problem is two-fold: on the one hand encompassing those risks to which the bank is liable for engaging in the practice of deferred posting, and on the other including those risks which shift the loss from drawer to payee.<sup>26</sup>

*Risks of the banks.* Banks encounter several risks in the collection process. One of these is the possible liability of the payer bank that retains a bad item longer than the prescribed time. Ordinarily a bank becomes liable for the payment of an item by what may be termed a formal acceptance.<sup>27</sup> But, by retaining an item for a period exceeding that legally allowed and refusing to return it either accepted or dishonored, the bank may be held to have accepted by retention and hence become liable for the payment of the item.<sup>28</sup> It is, therefore, necessary to determine when the period of legal delay can be said to expire and acceptance by retention shifts the risk of loss to the payer bank. The NIL provides that the period shall be twenty-four hours after delivery of the item to the drawee, or within such period as the holder may allow.<sup>29</sup> Under Louisiana deferred posting rules, the bank has twenty-four hours from midnight of the day

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24. Fear of the uncertainty this could cause was expressed in *Louisiana Legislation of 1950*, 11 LOUISIANA LAW REVIEW 27 (1951).

25. *But see* Steffen, *The Check Collection Muddle*, 10 TUL. L. REV. 537, 554 (1936). *Id.* at 555-56, the notion is offered that some form of insurance, similar to Federal Deposit Insurance, should be provided to cover bank collection losses.

26. Leary, *Deferred Posting and Delayed Returns — The Current Check Collection Problem*, 62 HARV. L. REV. 905, 917 (1949). The risks caused by deferred posting to be discussed in this Comment are as suggested by Leary.

27. LA. R.S. 7:132 (1950).

28. LA. R.S. 7:137 (1950) provides that "where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same." See *Schutte v. Citizens Bank*, 3 La. App. 547 (1926) (dictum), which follows the acceptance by retention rule of the leading case of *Wisner v. First National Bank*, 220 Pa. 21, 68 Atl. 955 (1908).

Before deferred posting drawee banks were required to give final credit to correspondent banks on the day of receipt. See Note, 59 YALE L.J. 961, 964 (1950) and authorities cited. Payment was deemed final when the deadline, traditionally at three o'clock in the afternoon, had passed. *Hallenback, Receiver v. Leinert, Receiver*, 295 U.S. 116 (1935). If subsequently forgery or an overdraft was discovered, the loss remained with the drawee bank and no charge back could be made. *Bank of the United States v. Bank of Georgia*, 23 U.S. (10 Wheat.) 333 (1825). This problem involves the ramifications of the rule advanced in *Price v. Neal*, 3 Burr. 1354, 97 Eng. Rep. 871 (K.B. 1762), discussed in Comment, *The Effect of the Adoption of the Proposed Uniform Commercial Code on the Negotiable Instruments Law of Louisiana — The Doctrine of Price v. Neal*, 16 LOUISIANA LAW REVIEW 128 (1955); Comment, 43 ILL. L. REV. 823 (1949).

29. LA. R.S. 7:136-137 (1950).

the item was delivered to it to return the dishonored item or dispatch notice of dishonor. In the event that a bank should hold the item more than twenty-four hours after delivery, the question arises whether or not it would be held to have accepted, even though notice of dishonor might have been sent to the bank of collection within the twenty-four hour period after the midnight allowable under the deferred posting rules. To give effect to the deferred posting statute the bank should not be so held.<sup>30</sup>

Another risk to which banks might be subjected concerns the right of the collecting bank to charge back the credit extended to its depositor for the item. The collecting bank would

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30. While there are no Louisiana cases involving the timeliness of acceptance, a case in point has been decided in Texas. *City State Bank v. National Bank of Commerce*, 261 S.W.2d 749 (Tex. Civ. App. 1953). Early one morning plaintiff bank received several checks, drawn on it, and forwarded to it by defendant bank for payment. The same afternoon, well within the twenty-four hour period allowable for rejection under the Texas deferred posting statute, plaintiff sent defendant a telegram stating that it was returning the checks protested. Not until the following afternoon, after the expiration of the twenty-four hour period, did plaintiff actually post the protested checks in the mail. Because the Texas statute, TEX. REV. STAT. arts. 342-704 (Vernon 1947), requires that items, if received through the mail, be returned within twenty-four hours of receipt to constitute dishonor, the court held that the payment made by plaintiff bank was irrevocable. The court noted that had the checks been presented over the counter for payment in cash or for deposit in a drawee bank, that mere notice of protest would have been valid. *Id.* art. 342-704(1). Would the result have been the same in Louisiana? Probably not, because the Louisiana statute requires only that the items be posted before midnight of the day *after* presentment, which was done here. The Louisiana statute is similar to the Texas statute in that the item itself seemingly must be returned within the time allowable. Only if the item is held for protest or is lost or not in possession of the bank will mere notice suffice. LA. R.S. 7:67 (1950).

The Louisiana statute provides, as does the Texas legislation, that the effect of the statute may be varied by agreement, thus permitting an extension of the delay period by agreement of the parties. Although no litigation has been brought before Louisiana courts on the propriety of agreements, two cases have arisen in other jurisdictions. In a California case the court held a notice sufficient because, although a day late by deferred posting rules, the parties were found to have agreed to an extension of time. *Larrus v. First Nat. Bank of San Mateo County*, 266 P.2d 143 (Calif. App. 1954). See *Bank of America Nat. Trust & Savings Ass'n v. Merchandise Nat. Bank*, 201 F.2d 68, 73, n. 18 (9th Cir. 1953) (where the court merely noted that the parties had followed the practice of "delayed posting"). In a Texas case the court refused to consider an acceptance conditional and it was held irrevocable because the bank had agreed with the depositor to accept the items under special deposit terms. *City State Bank v. Wichita Nat. Bank*, 253 S.W.2d 308 (Tex. Civ. App. 1952); *cf. Investors Syndicate v. Deposit Guaranty Bank & Trust Co.*, 172 So. 39 (La. App. 1937).

A similar question arose in another California case, *Hansen v. Bank of American Nat. Trust & Sav. Ass'n*, 225 P.2d 665 (Calif. App. 1950), as to the purpose of the additional time granted for giving notice under deferred posting legislation. There the plaintiff contended that the notice of dishonor given was not punctual because the deferred posting statute did not purport to give a bank another day in which to determine whether the check was good or bad, but gave the additional time only for giving notice when the check was found not good. The court held that the notice was timely dispatched and denied recovery.

probably not be willing to grant the additional time permitted under deferred posting rules to a payer bank unless some satisfactory charge-back agreement is reached.<sup>31</sup> In Louisiana a creditor-debtor relationship is deemed to exist between the bank and its depositor in the absence of agreement otherwise.<sup>32</sup> The Louisiana court, therefore, would probably permit the collecting bank to recover against its customer solely on his liability as endorser and then only if notice of dishonor were properly given.<sup>33</sup>

Banks also encounter risk in determining whether or not the notice of dishonor required under deferred posting rules has been timely given under the NIL. Section 104(1) of the NIL provides that when the person giving and the person receiving notice live in different towns, the notice must be "deposited in the postoffice in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter."<sup>34</sup> Since under deferred posting practices dishonor could date from midnight of the day following receipt, the question arises whether the phrase "no mail at a convenient hour" includes delay caused by the use of deferred posting.<sup>35</sup> Section 136 of the NIL provides that "the drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill; but the acceptance if given dates as of the day of presentation."<sup>36</sup> If the NIL provisions affect the application of the deferred posting statute, it could be argued that if deferred posting were employed and the delay exhausted, dishonor then dispatched would not be timely. The payer bank in Louisiana would have at least twenty-four hours after presentment to send notice of dishonor.<sup>37</sup> Because of the uncertainty which any other rule would cause, it is submitted that any notice timely given under the deferred posting statute should be considered timely under the NIL.

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31. See Leary, *Deferred Posting and Delayed Returns — The Current Check Collection Problem*, 62 HARV. L. REV. 905, 919 (1949).

32. *Hibernia Nat. Bank v. National Bank of Commerce*, 204 La. 777, 18 So.2d 352 (1943); *Allen v. Cochran*, 160 La. 425, 107 So. 292 (1926); *LaCaze v. City Bank & Trust Co.*, 31 So.2d 891 (La. App. 1947).

33. 2 PATON, *DIGEST OF LEGAL OPINIONS* 1265 (1942), discusses the bank's right of charge back in agency and owner situations.

34. LA. R.S. 7:104(1) (1950).

35. Leary, *Deferred Posting and Delayed Returns — The Current Check Collection Problem*, 62 HARV. L. REV. 905, 921 (1949).

36. LA. R.S. 7:163 (1950).

37. This would be assuming that the rule of NIL § 136 applies to checks as does that of § 137. The case of *First Nat. Bank v. First Nat. Bank*, 127 Tenn. 205, 154 S.W. 965 (1913) held that it does.



*Risks to the drawer and payee.* The second class of risks which could emanate from the practice of deferred posting are those which shift from drawer to payee. The rule is well settled in Louisiana that a check, in itself, does not constitute payment, but rather payment is contingent on the eventual payment in cash or the equivalent thereof by a bank.<sup>38</sup> Suppose that the payee delays for a time before presenting the check for payment. The NIL provides that the holder must present a check "within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay."<sup>39</sup> One situation which could cause difficulty here would be that in which the dilatory payee presents a check which might be considered late under the NIL and the bank fails during the period of extension provided by the deferred posting statute. On whom does the risk of loss fall? It would seem to depend upon the time at which presentment could be said to have occurred, and this determination could well prove troublesome.<sup>40</sup> Apparently presentment occurs under the deferred posting statute if credit is given for the item before midnight of the day of receipt,<sup>41</sup> and this might be either at the time the item is received by the payer bank, or when the payer bank posts the debit to the drawer's account, or at the time of receipt of the item by the payer bank.<sup>42</sup> There is obviously no ready solution to this risk of loss problem.

There may be different considerations where the payee does not delay in presenting the check for payment, but the bank becomes insolvent at some time during the posting process. If the check can be considered "paid," risk of loss will shift from the drawer to the payee. Personal payment may be had by merely presenting the instrument and receiving the money,<sup>43</sup> but if the check is sent for credit, there are several junctures which might be regarded as payment. The giving of credit, whether actually charged to the drawer or not, the cancelling or cancelling and crediting of the instrument, and the charging of the instrument

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38. LA. R.S. 7:127 (1950). See, e.g., *M. Feitel House Wrecking Co. v. Citizens' Bank & Trust Co.*, 152 La. 755, 106 So. 292 (1925); *Joffrion-Woods, Inc. v. Hibernia Bank & Trust Co.*, 139 So. 22 (La. App. 1932).

39. LA. R.S. 7:186 (1950).

40. See LA. R.S. 7:70, 7:143 (1950) governing the details of presentment.

41. LA. R.S. 6:67 (1950).

42. Leary, *Deferred Posting and Delayed Returns—The Current Check Collection Problem*, 62 HARV. L. REV. 905, 936-40 (1949).

43. LA. R.S. 7:74 (1950).

to the drawer's account are examples. If the check is sent for remittance, there are several possible occurrences that might serve as payment. These may be either the time that the remittance draft is prepared and the item is cancelled, or the time of mailing the draft, or the time of charging the drawer's account.<sup>44</sup> In one Louisiana case, crediting the cash book was found equivalent to payment in cash.<sup>45</sup> Under deferred posting rules the bank may have until midnight of the day following receipt to honor or dishonor an item, provided that the charge was made on the day of receipt. Therefore, it is at least possible that any charge made might be regarded, until the expiration of the delay period, as merely conditional, and not as final, payment, leaving the risk with the drawer during this period.

Another risk which affects the drawer-payee situation involves the question of when the drawer's interest in his deposited fund ceases. When it does cease the drawer loses the power to issue stop payment orders; a creditor of the drawer may not acquire an interest in the fund superior to that of the payee; and a payer bank has no privilege of set-off against the fund for a debt owed by the drawer.<sup>46</sup> Section 119 of the NIL provides that an instrument is discharged by payment,<sup>47</sup> and section 120 states that payment discharges the drawer.<sup>48</sup> Again, the unsettled concept of payment becomes decisive. The Louisiana deferred posting statute, unfortunately, merely provides that "the bank may have until midnight of its next business day after receipt within which to honor or refuse payment of such item."<sup>49</sup> Since no risk is specifically delegated to the drawee, the risk of loss would seem to remain on the drawer until the item can be considered finally paid. As previously noted, however, this would be so only if the drawee made presentment within a reasonable time.<sup>50</sup> The emphasis on the nebulous concept of payment has certainly caused a quandary in this area of the law. It has been suggested that legislatures should mark more definitely the

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44. 2 PATON, DIGEST OF LEGAL OPINIONS, opinions 1227(a) and 1228(a) (1926).

45. *Sowers Co. v. First National Bank*, 6 La. App. 721 (1927).

46. See notes 20-23 *supra*; Sneed & Morrison, *Bank Collections — A Comparative Study*, 29 TEX. L. REV. 713 (1951); Morrison & Sneed, *Bank Collections, The Stop Payment Transaction — A Comparative Study*, 32 TEX. L. REV. 259 (1954).

47. LA. R.S. 7:119 (1950).

48. *Id.* 7:120.

49. *Id.* 6:67.

50. *Id.* 7:70, 7:143.

juncture at which each of the above discussed risks shifts,<sup>51</sup> and it is submitted that the Louisiana legislature should undertake such clarification.

*Deferred Posting Under the Uniform Commercial Code*

The Uniform Commercial Code adequately covers the practice of deferred posting and delayed returns and the bankers' right to use it. The Code incorporates the present rule that payment over the counter is final payment.<sup>52</sup> In case of payment other than that over the counter, in order to employ deferred posting under the Code, a bank must fulfill several requirements. First, section 4-301(1) provides that an authorized settlement must be made by midnight of the banking day of the receipt of the item, except in the case where the payer bank is also the bank of deposit.<sup>53</sup> "Settlement" is defined as a payment "in cash, by clearing house settlement, in a charge or credit or by remittance, or otherwise as instructed. A settlement may be either provisional or final."<sup>54</sup> Settlement, as used in UCC 4-301(1), undoubtedly refers to conditional settlement since final settlement would constitute payment.<sup>55</sup> The second requirement, pertaining to dishonor procedure, is that the payer bank must return the item, or send notice of dishonor before its midnight deadline if the item is not available.<sup>56</sup> Deferred posting rules do not extend to documentary drafts,<sup>57</sup> and are limited to *demand* items.<sup>58</sup> The term "midnight deadline" is construed to mean the close of the banking day following the day of receipt of the item or notice or from which the time for taking action commences to run, whichever is later.<sup>59</sup> The third condition that the payer bank must fulfill in order to use deferred posting and to revoke extended credit is that the settlement which it makes must not amount to "final payment."<sup>60</sup> This condition prevents the inconsistency of a

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51. Leary, *Deferred Posting and Delayed Returns — The Current Check Collection Problem*, 62 HARV. L. REV. 905, 952 (1949).

52. UCC 3-418, 4-301.

53. UCC 4-301(1).

54. UCC 4-104(j).

55. See UCC 4-104, comment 6; 4-213, comment 1.

56. UCC 4-301(1).

57. *Ibid.*

58. SUPPLEMENT NO. 1 TO UCC OFFICIAL DRAFT OF 1952, UCC 4-301(2) (Jan. 1955).

59. UCC 4-104(h).

60. UCC 4-301(1).

bank's being able to revoke credit any time up to its midnight deadline even though it may have made "final" payment.<sup>61</sup>

Section 4-301(2) provides that in case the payer bank and the bank of deposit are the same, it need not settle for the item on the day of receipt. Possibly this exception is made because the holder of the item, also being a depositor, would probably be insured by the Federal Deposit Insurance Corporation regardless of whether or not the bank had settled for the item.<sup>62</sup>

Section 4-301(3) provides that "unless previous notice of dishonor has been sent an item is dishonored at the time when for purposes of dishonor it is returned or notice sent."<sup>63</sup>

Section 4-301(4) defines the time that an item is returned. Items received through clearing houses are considered returned when sent to the last clearing house or last collecting bank or delivered in accordance with clearing house rules. In all other cases return is complete when the item is sent or delivered to a bank's customer or transferor, or handled according to his instructions.<sup>64</sup>

Notwithstanding any variations above noted, the thrust of the Code's deferred posting provision is not greatly unlike present practice. The drafters state that the section codifies the content of the existing deferred posting statutes.<sup>65</sup> It is apparently for its treatment of relationships of the parties and the placement of risks that the deposits and collections scheme of the Code has been so strenuously opposed.<sup>66</sup> The 1955 amendments to the original draft of the Code would change Louisiana law by the provision that the bank is considered the agent, rather than the debtor, of the depositor,<sup>67</sup> irrespective of the form of endorse-

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61. Love, *How the Adoption of the Uniform Commercial Code Would Affect the Law of Bank Deposits in Oregon*, 32 ORE. L. REV. 288, 315 (1953).

62. *Ibid.*

63. UCC 4-301(3).

64. UCC 4-301(4).

65. UCC 4-301, comment 1.

66. Article 4, governing bank deposits and collections and including deferred posting, has been described as "a piece of vicious class legislation." Beutel, *The Proposed Uniform (?) Commercial Code Should Not Be Adopted*, 61 YALE L.J. 334, 357 (1952). Even a strong proponent of the Code has felt disinclined to defend it and feels that article 4 should be deleted. Gilmore, *The Uniform Commercial Code: A Reply to Professor Beutel*, 61 YALE L.J. 364, 379 (1952). The article seems much like the Bank Collection Code, which Louisiana has not adopted. See Beutel, *supra*, at 359.

67. UCC 4-201(1), as amended by SUPPLEMENT NO. 1 TO UCC OFFICIAL DRAFT OF 1952 (Jan. 1955); see note 32 *supra*.

ment used on the check.<sup>68</sup> That the item was sold absolutely to the depository bank could be proved only if it could be established by collateral papers or the item itself so stated.<sup>69</sup> This, together with section 4-212 of the Code, would affect present rules governing charge-back rights of banks. Section 4-212(1) authorizes the bank to charge back or to obtain a refund from a customer who has been given credit when the bank learns that it will not receive final payment. The requirement of notice of dishonor or the return of the item need only be fulfilled within a "reasonable time." The subsection provides that the midnight deadline shall be a reasonable time.<sup>70</sup> Section 4-212(4) states that the right of charge back is affected neither by the prior use of the credit given for the item nor by the failure of the bank to use ordinary care. A bank not using reasonable care may still be liable, however, although the customer apparently must prove lack of ordinary care.<sup>71</sup>

Section 4-213 originally defined the term "final payment" as either payment in cash or the completion of the posting process.<sup>72</sup> In 1955, however, the section was supplemented to provide that if a bank settles for the item without reserving the right to revoke the settlement, and is not given such right by statute, clearing house rule or agreement, this settlement also constitutes final payment.<sup>73</sup> The payer bank is accountable for the item and it is considered finally paid if the bank makes final settlement.<sup>74</sup> If the depository bank is also the payer of the item credit becomes final at the time of final payment or at the midnight deadline.<sup>75</sup> The drafters note that the concept of final payment is of utmost importance in determining priority between items and notices, stop orders, legal processes, and hence liability of the parties secondarily liable.<sup>76</sup> During the time that the item is in the hands

68. UCC 4-201(2), as amended by SUPPLEMENT No. 1 TO UCC OFFICIAL DRAFT OF 1952 (Jan. 1955), proposes that after an item has been endorsed "pay any bank," only a bank may acquire rights of a holder except where the bank by specific endorsement permits others to do so. One writer states that this should protect owners from loss or theft after the items have been so endorsed and have entered bank collection channels. Vergari, *Amending the Uniform Commercial Code—A Report on Valid Criticism and Suggested Changes—In re Articles 3, 4, and 5*, 28 TEMPLE L.Q. 520, 555 (1955).

69. UCC 4-201, comment.

70. UCC 4-212(1).

71. UCC 4-212(4), comments 5, 6.

72. UCC 4-213; see notes 43 and 44 *supra*.

73. UCC 4-213(1), as amended by SUPPLEMENT No. 1 TO UCC OFFICIAL DRAFT OF 1952 (Jan. 1955).

74. *Ibid.*

75. *Id.* UCC 4-213(3).

76. UCC 4-213, comment 1.

of a collecting bank "the collecting bank is not liable to prior parties in the event of dishonor" if proper dishonor is made.<sup>77</sup> However, the customer seemingly must give the usual warranties of a holder in due course<sup>78</sup> and must engage that in the event of dishonor he will pay the amount of the item to the transferor or to a subsequent holder.<sup>79</sup> A customer may issue stop payment orders "but the order must be received at such time and in such manner as to afford the bank a reasonable opportunity to act on it."<sup>80</sup> For an oral stop payment order to be binding on a bank for more than fourteen days it must be confirmed by writing within that period.<sup>81</sup> Only the person depositing the paper is permitted to give notice affecting it and a bank is not liable to prior parties for action taken.<sup>82</sup>

Section 4-103 provides that the effects of any provision in article 4 may be varied by agreement of the bank with its customers. This would seemingly permit a bank, by small-print contracts on deposit slips, for instance, to make its own laws concerning any aspect of bank deposits and collections. The present Louisiana deferred posting statute likewise provides that the parties may agree to other terms if they see fit to do so.<sup>83</sup> Therefore, insofar as the narrow subject of deferred posting is concerned, the provision would be no innovation in our law. Because the freedom of contract provision in the Code<sup>84</sup> would extend to all laws regulating deposits and collections, however, it has been suggested that the courts might hold it an unconstitutional delegation of legislative power to private interests, or possibly limit the bank's power to make agreements.<sup>85</sup>

Section 4-214 of the Code regulates insolvency and preference and is similar to section 13 of the Bank Collection Code, which was held unconstitutional, at least insofar as its application to national banks is concerned.<sup>86</sup> There is no reason to believe that

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77. UCC 4-211(1).

78. UCC 4-207(1), as amended by SUPPLEMENT No. 1 TO UCC OFFICIAL DRAFT OF 1952 (Jan. 1955).

79. *Id.* UCC 4-207(2).

80. UCC 4-403(1); see UCC 4-303, 4-407.

81. UCC 4-403(2), as amended by SUPPLEMENT No. 1 TO UCC OFFICIAL DRAFT OF 1952 (Jan. 1955).

82. UCC 4-203.

83. LA. R.S. 6:68 (1950).

84. UCC 4-103, as amended by SUPPLEMENT No. 1 TO UCC OFFICIAL DRAFT OF 1952 (Jan. 1955).

85. Gilmore, *The Uniform Commercial Code: A Reply to Professor Beutel*, 61 YALE L.J. 364, 375-76 (1952).

86. *Jennings v. United States Fidelity and Guaranty Co.*, 294 U.S. 216 (1935).

the defect has been removed.<sup>87</sup> The drafters state that the purpose of the section is not to confer preferential positions on banks or anyone else, but rather to "fix as definitely as possible the cut-off point of time for the completion or cessation of the collection process in the case of items that happen to be in such process at the time a particular bank suspends payments."<sup>88</sup> Here again the concept of when an item has been finally "paid" becomes important. Section 4-214(2) provides that if the item has been finally paid, the owner of the item has a preferred claim against the payer bank. But if it is finally paid, then the drawer would be discharged and the owner would have no claim against him. This would run counter to the present view that the drawer assumes responsibility for losses arising from the insolvency of the payer bank.<sup>89</sup> In most cases, however, the owner would seemingly be protected by federal deposit insurance up to the amount of \$10,000, even though final settlement has not been made. The same would be true in the event of the collecting bank's insolvency, provided conditional credit became final.<sup>90</sup>

### *Conclusion*

Many other problems might arise dealing with various aspects of the deposits and collections article of the Code. Only those, however, which the writer feels are most closely related to the effect which the adoption of the Code would have on the practice of deferred posting in Louisiana have been discussed.

Deferred posting, while adding uncertainty to the collection process, greatly facilitates banking operations when checks and other demand items are in such abundant use. Clarification of the uncertainties could prove fit subject matter for legislative revision. Whether or not this revision should be in the form of the Uniform Commercial Code is another thing. While the adoption of the Code would not change the present deferred posting law to a great extent or affect the operations of banks thereunder, it would alter considerably the present Louisiana theory of deposits and collections generally.

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87. UCC 4-214, comment 3; Beutel, *The Proposed Uniform (?) Commercial Code Should Not Be Adopted*, 61 YALE L.J. 334, 359-60 (1952).

88. UCC 4-214, comment 1.

89. See Love, *How the Adoption of the Uniform Commercial Code Would Affect the Law of Bank Deposits in Oregon*, 32 ORE. L. REV. 288, 305 (1953).

90. *Id.* at 305-06.