The Bank-Customer Relationship Under the Louisiana Commercial Laws

Ronald Hersbergen
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INTRODUCTION

Part 4 of Chapter 4 of the Louisiana Commercial Laws1 provides a body of rules governing the relationship between a payor bank2 and its customer.3 The Commercial Laws do not attempt a comprehensive treatment of the customer-payor bank relationship; the attempt, rather, is to provide for the most important and historically troublesome aspects of that relationship. The effect of these and other provisions of Chapter 4 can, however, be varied by agreement under § 4-103. This article will examine the bank-customer relationship under the Commercial Laws and the viability of § 4-103.

THE BANK-CUSTOMER RELATIONSHIP UNDER THE COMMERCIAL LAWS

"Properly Payable" Items

The relationship between a bank and its customer under the Commercial Laws4 is based upon the agreement by the

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1. LA. R.S. 10:4-401 to 4-407 (Supp. 1974). The source of the laws is the Uniform Commercial Code, 1972 Official Text [hereinafter cited as UCC]. The portions of the UCC adopted by La. Acts 1974, No. 92, i.e., articles 1, 3, 4 and 5, will hereinafter be generally called the “Commercial Laws.” The “articles” were termed “chapters” by the legislature to comport with the style of the Louisiana Revised Statutes.

2. Defined in LA. R.S. 10:4-105(b) (Supp. 1974) as “a bank by which an item is payable as drawn or accepted.”

3. Defined in LA. R.S. 10:4-104(1)(a) (Supp. 1974) as “any person having an account with a bank or for whom a bank has agreed to collect items.”

bank to pay out of its customer's account according to his order. As to the deposited money, the bank is a debtor and the customer is a creditor. Banks must follow their customer's order to pay; likewise, the customer's order not to pay must be obeyed. Most of the legal controversies between bank and customer involve the question of whether an item is "properly payable." If the item is "properly payable," the bank must pay it, debiting the customer's account; to fail to do so raises the issue of wrongful dishonor. If the item is not properly payable, the bank cannot charge the item to the customer's account in the absence of negligence or ratification on the part of the customer.

Section 4-401(1) states:

As against its customer, a bank may charge against his account any item which is otherwise properly payable from that account even though the charge creates an overdraft.

Implicit in this section is the bank's inability to charge the customer's account on items that are not properly payable, but that key label is not meaningfully defined in Chapter 4.


6. Defined in LA. R.S. 10:4-104(1)(g) (Supp. 1974) as "any instrument for the payment of money even though it is not negotiable but does not include money." Personal checks, bank checks, cashiers' checks, notes, and non-negotiable instruments payable at a bank are all "items."


8. Definitional sections are found in Louisiana Revised Statutes, Title 10, Chapter 1 which apply generally throughout the act; these sections are subject to or qualified by definitional sections found in Chapter 3 and in Chapter 4 which apply only to the chapter in which they are found. See LA. R.S. 10:1-201, 3-102, 4-104-05 (Supp. 1974). An item coming within the scope of both Chapters 3 and 4 is subject to the provisions of both chapters, but Chapter 4 controls in the event of a conflict. LA. R.S. 10:3-103(2), 4-102(1) (Supp. 1974).
Apparently the intent of the legislature and of the drafters of the UCC was to leave undisturbed the existing case law on the issue. Thus, absent the customer's negligence or ratification, courts generally hold that checks bearing an unauthorized or forged signature of the customer, or no signature at all, are not properly payable. Similarly, checks bearing a forged necessary indorsement, altered items, prematurely presented post-dated checks, stale checks, conditional checks, and checks subjected to valid and timely stop-payment orders are not properly payable.

The Commercial Laws provide properly payable status to some items which heretofore were either not properly payable or only arguably within the properly payable category.

12. Under LA. R.S. 10:4-401(2)(a) (Supp. 1974), and consonant with the rights of a holder in due course against the drawer, altered items are properly payable to the extent of the original tenor; the raised amount would not be properly payable. Cf. LA. R.S. 10:3-407(3) (Supp. 1974).
14. Under LA. R.S. 10:4-404 (Supp. 1974), a check becomes stale six months after its date, and a payor bank may at its option treat it as not properly payable and dishonor it, or in good faith treat it as properly payable and honor it.
15. Fulfillment of the condition makes such items properly payable.
Under § 4-401(1), for instance, an overdraft item is clearly properly payable. Items issued by incompetent or subsequently deceased customers are properly payable under § 4-405 until the bank knows of interdiction or death and has reasonable opportunity to act on that knowledge. In the case of checks, a bank with knowledge of its customer's death may for ten days after the date of death pay or certify checks drawn on or prior to the date of death, unless ordered to stop payment by a person claiming an interest in the account.

Checks emanating from payroll padding schemes, or which otherwise bear an unauthorized indorsement of a "fictitious" payee, are properly payable whenever the provisions of § 3-405(1)(b) and (c) apply, in that such indorsements are thereby rendered effective. As under § 9(3) of the N.I.L.,

17. Official UCC Comment 1 to § 4-401 recognizes that such an item "itself authorizes the payment for the drawer's account and carries an implied promise to reimburse the drawee." UCC decisions equate the overdraft payment with a loan to the customer as to which the customer is liable for interest at the applicable lawful rate. See State v. Creachbaum, 24 Ohio App. 2d 31, 263 N.E.2d 675 (1970); City Bank v. Tenn, 52 Hawaii 51, 469 P.2d 816 (1970). Prior Louisiana case law is in accord. See Caddo Trust & Sav. Bank v. Bush, 182 So. 397 (La. App. 2d Cir. 1938).

18. Under this section an adjudication of interdiction is not constructive notice to the payor bank. See Official UCC Comment 2 to § 4-405. Thus, the burden of administering the affairs of the incompetent drawer are placed on his family or perhaps on his business associates, and on the court system, rather than on the banking system. La. R.S. 10:1-201 (Supp. 1974) contains several definitions of importance regarding "notice" and "knowledge" in the case of an "organization."


20. UCC § 4-405, Comment 3 points out that the purpose of the ten-day period is to permit holders of checks drawn and issued shortly before the customer's death to cash them without the necessity of filing a claim in probate. The purpose is said to be justified by the fact that checks are normally given in immediate payment of an obligation and rarely is there a reason to dishonor them. The representative of the deceased may, of course, recover from the party paid if the deceased could have done so.

21. UCC § 4-405, Comment 4 says that such a notice has the same effect as a stop payment order, but the bank has no responsibility to determine the validity of the claim. The probable response of most banks would be to stop payment at the order of anyone, no matter how tenuous his interest in the account might appear.

22. La. R.S. 10:3-405(1) (Supp. 1974) (in part): "An indorsement by any person in the name of a named payee is effective if . . . (b) a person signing as or on behalf of a maker or drawer intends the payee to have no interest in
the drawee-payor bank may treat such items as properly payable out of the customer-drawer's account. The implicit policy determination is that the drawer-employer is in a better position vis-à-vis the drawee-payor bank to prevent such unauthorized endorsements by utilizing prudent hiring practices and internal controls on the drawing and handling of checks. The drawer in such circumstances is also in a better position to protect against and absorb the inevitable loss through insurance and cost-price pass-through.\textsuperscript{23}

Section 3-405(1)(a)\textsuperscript{24} gives properly payable status to checks bearing the unauthorized indorsement of an "imposter." Imposter cases were not within the coverage of N.I.L. § 9(3), but developed in the courts, which usually followed the dominant intent theory.\textsuperscript{25} Section 3-405(1)(a) codifies the properly payable nature of imposter-indorsed checks, but rejects the intent approach.\textsuperscript{26} Section 3-405 can be viewed as a specialized application of the broader principle of preclusion embodied in other provisions of the Commercial Laws, under which items bearing forgeries of the customer's name or of indorsements, and altered items may be properly payable if the customer is precluded by his own negligence from asserting the forgery or alteration against the payor bank.\textsuperscript{27}

A stop payment order not received "at such time and in such manner as to afford the bank a reasonable opportunity to act on it"\textsuperscript{28} has no effect on an item that is otherwise properly payable. In like manner, items deposited without the

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24. LA. R.S. 10:3-405(1) (Supp. 1974) (in part): "An indorsement by any person in the name of a named payee is effective if: (a) an imposter by use of the mails or otherwise has induced the maker or drawer to issue the instrument to him or his confederate in the name of the payee. . . ."


26. UCC § 3-405, Comment 2.


necessary indorsement of the payee or other holder become properly payable whenever the depositary bank utilizes the right granted it by § 4-205 to supply the missing indorsement. 29 Non-negotiable instruments may also be properly payable items, 30 as may instruments made payable to a person under a wrong or misspelled name. 31 Finally, § 4-401(2)(b) permits a bank in good faith to charge the customer’s account according to the tenor of his completed item, unless the bank has notice that the completion was improper. 32

Order in Which Items May Be Charged

Customers’ items are normally honored in the order of presentment. But suppose three checks in the amounts of $5, $100, and $500, all drawn by one customer, are presented simultaneously to the payor bank for payment at a time when the customer’s balance is $575—insufficient to cover all three checks. Assuming all three items are otherwise properly payable, the payor bank may, under § 4-401(1), charge all three against the customer’s account and create an overdraft of $30. But § 4-401(1) is merely permissive, and since “properly payable” includes availability of funds for payment, 33 the bank can, absent an agreement with the customer to the contrary, refuse to create the overdraft on the basis that one of the three items is not properly payable. The problem, of course, is which one of the items may be dishonored. Clearly, all three items cannot be dishonored. 34 Some bankers may feel in such circumstances that checks should be honored according to amount, honoring as many small checks as possible and dishonoring the remaining checks, 35 while others may reasonably feel that the largest checks should be hon-

29. The right is limited to a depositary bank supplying the missing necessary indorsement of its customer.
30. Cf. Irving Trust Co. v. Leff, 253 N.Y. 359, 171 N.E. 569 (1930). If the reason for non-negotiability is the conditional nature of the item, it may not be properly payable. See note 15, supra.
31. LA. R.S. 10:3-203 (Supp. 1974). Such a payee may indorse the instrument with his true indorsement, or may indorse in the wrong or misspelled name; but he may be required to sign in both names.
32. The subsection is consonant with §§ 3-115, 3-407(3). “Notice” is defined in LA. R.S. 10:1-201 (Supp. 1974).
35. The theory here would be that the dishonor of a small check carries the greatest potential for adverse reflection on credit worthiness of the customer.
ored first, leaving only smaller items to be dishonored. Still other bankers may adopt some other approach. Section 4-303(2) solves the dilemma by permitting the payment or charging of items "in any order convenient to the bank." Banks, however, remain under the general obligations of good faith and ordinary care regarding the application of the convenient order of charge.

Wrongful Dishonor

The Commercial Laws omitted the last three sentences of UCC § 4-402 in order to preserve the Louisiana jurisprudence regarding wrongful dishonor. Under the jurisprudence, wrongful dishonor of the check of a non-merchant gives rise to an action for actual damages proved, or at least nominal damages, while wrongful dishonor of a merchant's check may result in an award of damages without proof of actual loss. Injury to credit standing and reputation, humiliation, and annoyance provide the basis for the action. Courts

36. Bankers who take this view may feel that the holder of a large check is more likely to take legal action against the drawer upon dishonor.

37. UCC § 4-303, Comment 6 notes that the rule is justified because of the impossibility of stating a rule that would be fair in all cases. The Comment further observes that "where the drawer has drawn all the checks, he should have funds available to meet all of them and has no basis for urging [that] one should be paid before another. . . ."


42. Ott v. Kentwood Bank, 152 La. 962, 94 So. 899 (1922) ($1.00 damages).
43. Levin v. Commercial Germania Trust & Sav. Bank, 133 La. 492, 63 So. 601 (1913) ($5.50 check; judgment for $30 damages affirmed). But see Ott v. Kentwood Bank, 152 La. 962, 94 So. 899 (1922). The presumption of damage to a merchant was eliminated in the portion of UCC § 4-402 not adopted in Louisiana.
46. Galloway v. Vivian State Bank, 168 La. 691, 123 So. 126 (1929) ($1,500 judgment reduced to $500).
have recognized such mitigating circumstances as prior questionable credit standing,\(^47\) prompt action by the bank in notifying the customer's creditors of the mistake,\(^48\) and the type of error involved.\(^49\) While an action under § 4-402 could be viewed as premised upon breach of the bank-customer agreement,\(^50\) Louisiana courts hold the action to be within article 2315 of the Civil Code.\(^51\) Accordingly, damages for arrest or prosecution occasioned by wrongful dishonor should be recoverable.\(^52\)

**Customer's Duties**

Under § 4-406(1) the customer has an affirmative duty to exercise reasonable care and promptness to examine the statement of account and paid items sent to him or otherwise reasonably made available to him by the payor bank\(^53\) and to discover forgeries\(^54\) of his signature or any alteration\(^55\) on an

\(^{47}\) Id. See also Ott v. Kentwood Bank, 152 La. 962, 99 So. 899 (1922). In Spearing v. Whitney-Central Nat'l Bank, 129 La. 607, 56 So. 548 (1911), the bank argued that the customer's prior credit reputation was so good it couldn’t possibly have been tarnished by the wrongful dishonor.


\(^{49}\) Id.


\(^{51}\) Cf. Spearing v. Whitney-Central Nat'l Bank, 129 La. 607, 56 So. 548 (1911).


\(^{53}\) The issue of “made available” under § 4-406 is discussed against an interesting factual backdrop in Jackson v. First Nat'l Bank, 55 Tenn. App. 545, 403 S.W.2d 109 (1966). See also Sabatino v. Curtiss Nat'l Bank, 446 F.2d 1046 (5th Cir. 1971); Faber v. Edgewater Nat'l Bank, 101 N.J. Super. 354, 244 A.2d 339 (1968) (cancelled items made available to depositor's dishonest agent); Rainbow Inn, Inc. v. Clayton Nat'l Bank, 86 N.J. Super. 13, 205 A.2d 753 (1965) (same). The customer has no duty under the Commercial Laws with respect to items charged to his account which do not purport to be drawn against the account. See Faber v. Edgewater Nat'l Bank, 101 N.J. Super. 354, 244 A.2d 339 (1968).

\(^{54}\) Under LA. R.S. 10:3-404 (Supp. 1974) there is no meaningful distinction between an unauthorized signature and a forged signature; either is “wholly inoperative as that of the person whose name is signed unless he ratifies it or is precluded from denying it.” Id.


While the phrase “any alteration” is probably broader than “material alteration” as defined in § 3-407(1), in the § 4-406 context alterations falling short of
item. If his examination discloses any forgeries or alterations, the customer must promptly notify the bank. Failure to comply with these duties may preclude the customer from asserting the forgery or alteration against the bank, but only if the bank has both suffered a loss by reason of the failure and exercised ordinary care in paying the item. The customer must in any event discover and report his unauthorized signature or any alteration on the face or back of the item within one year from the time the statement and items are made available to him, or be precluded thereafter from asserting them against the bank. In addition, though he has

material alterations under § 3-407(1) are probably inconsequential, in that an alteration which does not "change the contract of any party to the instrument" would not make the item "not properly payable" under § 4-401(1).

56. LA. R.S. 10:4-406(2)(a) (Supp. 1974). Compare Jackson v. First Nat'l Bank, 55 Tenn. App. 545, 403 S.W.2d 109 (1966), with Terry v. Puget Sound Nat'l Bank, 80 Wash. 2d 155, 492 P.2d 534 (1972). Cf. Israel v. State Nat'l Bank, 6 Orleans App. 325 (La. App. 1909). The failure of the customer with respect to the duty imposed is a question of fact as to which the burden is upon the bank to establish. See UCC § 4-406, Comment 4. Prior Louisiana law under La. Acts 1904, No. 64, § 36 was very similar, although the duty imposed under § 36 concerned the discovery and reporting of "any errors" in the account. However, unlike forgeries of the customer's signature and alterations of the amount payable ("raised" items), a forged indorsement would not result in an "error" in the account, so that the duty would appear to be quite similar to that under LA. R.S. 10:4-406 (Supp. 1974). The decision in Smith v. Richland State Bank, 9 So. 2d 327 (La. App. 2d Cir. 1942), placing the burden on the party asserting the "error" under La. Acts 1904, No. 64, § 36 would not be rendered inconsistent under § 4-406.

The customer may also be precluded from asserting the forgery as an alteration under LA. R.S. 10:3-404, 3-406, and 3-407(2)(a) (Supp. 1974).


The customer may also be precluded from asserting forgeries or alterations by the same wrongdoer after the initial item and statement is available for a reasonable period not exceeding fourteen calendar days, and before notification by the customer of the initial forgery or alteration. LA. R.S. 10:4-406(2)(b) (Supp. 1974).

no affirmative duty under § 4-406 to discover or promptly report unauthorized indorsements,\(^5\) a customer is precluded from asserting against the bank any unauthorized indorsements not reported to the bank within three years from the time the statement and items are made available to him.\(^6\) Indorsements made in imposter or fictitious payee circumstances set forth in § 3-405 are not unauthorized indorsements. Such items are properly payable and any notice to the bank by the customer of the alleged unauthorized nature of the indorsements under § 4-406(4) would be ineffective.\(^6\) The bank could treat a notice given prior to payment as a countermand of the customer’s order to pay and could dishonor the item without incurring liability to any party to the instrument.\(^6\) Finally, if a payor bank has a valid preclusion defense under § 4-406 to raise against the customer’s claim that the account should be recredited, a waiver of the defense or a failure to assert it upon request precludes the bank from thereafter asserting the unauthorized signature or alteration against any collecting bank or other prior party presenting or transferring the item.\(^6\) The preclusion apparently does not operate against the bank waiving or failing to assert a defense based on other sections of the Commercial Laws.\(^6\)

Customer’s Right to Stop Payment

As a natural corollary of the rule that a bank must obey the order of its customer to pay, a customer may, by order to


60. LA. R.S. 10:4-406(4) (Supp. 1974). For justification of the time period, see UCC § 4-406, Comment 5.

61. See UCC § 406, Comment 6.

62. The payor bank’s duty to pay is owed only to its customer, unless the bank certifies the item. LA. R.S. 10:3-411 (Supp. 1974). Accordingly, the dishonor would create no liability on the part of the bank.


64. Similar defenses would arise under §§ 3-404, 3-406 and 3-407. UCC § 4-406, Comment 7 concedes that the preclusion principle of subsection 5 “might well be applied” to other types of customer claims and defenses to such claims, but states that the rule of subsection 5 is limited to defenses of a payor bank under § 4-406 and that “no present need is known to give the rule wider effect.”
the bank, stop payment on "any item payable for his account." The right under § 4-403 is given only to a customer, and the stop payment order has no effect beyond the bank-customer relationship, but a stop payment order which is proper and timely under § 4-403 is effective against the payor bank, or other drawee, regardless of the status of the holder or payor bank as a holder in due course. While § 4-403 is less than clear on the point, it would seem that both parties to a joint checking account would be "customers," and either could, in the absence of an agreement to the contrary, issue a valid stop payment order with respect to an item drawn by the other and payable from the joint account.

65. LA. R.S. 10:4-403 (Supp. 1974). Since a check is no more than an order or direction of the drawer to the drawee revocable at the will of the drawer, a countermand of such an order or direction has equal standing and must, at the peril of the drawee-payor bank, be obeyed. See Universal C.I.T. Credit Corp. v. Guaranty Bank & Trust Co., 161 F. Supp. 790 (D. Mass. 1958). Official UCC § 4-403, Comment 2 expresses the view that stopping payment "is a service which depositors expect and are entitled to receive from banks notwithstanding its difficulty, inconvenience and expense."

66. See LA. R.S. 10:4-104(1)(e) (Supp. 1974), at note 3, supra. Under LA. R.S. 10:4-405(2) (Supp. 1974) a non-customer may in the limited circumstances order payment stopped, though liability for a wrongful payment over such an order is not clear.

67. The holder of an item on which payment is stopped is owed no duty at all by the payor bank which has not certified the item or paid it. LA. R.S. 10:3-411(1), 3-413(1), 4-213(1) (Supp. 1974). But while he is not entitled to payment on the instrument, the holder has recourse against the drawer and any prior recourse indorsers under LA. R.S. 10:3-413-14 (Supp. 1974). Cf. Mason v. Blayton, 119 Ga. App. 203, 166 S.E.2d 601 (1969).


70. Professor Hawkland adopts this view, but points out that a pre-UCC decision held to the contrary. See Hawkland, Stop Payment Orders Under the Uniform Commercial Code, 3 U.C.C. L.J. 108, 106-07 (1970). Under the provisions of LA. R.S. 6:32(B, C) (1950) (not repealed by the Commercial Laws), payment out of a joint deposit under the names of two or more persons, payable to each, may be stopped by one of the joint depositors but only by a written notice to the bank. Thereafter, the bank may refuse to honor any check or demand on the account by any of the joint depositors (including the one requesting the stopping of payment), unless all the joint depositors join in drawing a check or demand or other withdrawal. Presumably, all joint depositors may in concert stop payment by oral notification, and certainly if
Section 4-403 does not prescribe any particular form for a stop payment order, but subsection (1) implies that the customer should be prepared to reasonably identify the item, as by providing his account number and either the check number or the payee\(^7\) and date, and possibly the face amount of the check.\(^2\) Any statement of the customer's reasons for ordering payment stopped is irrelevant under § 4-403.\(^7^3\)

A written stop order is effective for six months and can be renewed in writing.\(^7^4\) Oral stop orders are binding for only fourteen calendar days, but can be confirmed in writing within the fourteen day period,\(^7^5\) and if so confirmed would presumably be effective for the six month period. While oral stop payment orders are effective, the use of an oral order not only entails obvious problems of proof,\(^7^6\) but also involves the issue of whether the stop payment order is received by the bank "at such time and in such manner as to afford the bank a reasonable opportunity to act on it."\(^7^7\)

Payment cannot be effectively stopped on a bank check, a

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\(^7^1\) In *Levine v. Bank of United States*, 132 Misc. 130, 229 N.Y.S. 108 (Mun. Ct. 1928), the stop payment order recited that the payee's name was "Harold Orkland," but the check was in fact payable to "H. Orkland." The stop order was held reasonably descriptive and valid.


\(^7^3\) Cf. *Cicci v. Lincoln Nat'l Bank & Trust Co.*, 46 Misc. 2d 465, 260 N.Y.S.2d 100 (1965) (defense that the check had been issued to pay an unlawful gambling transaction raised without success by a bank which had paid the check over a valid and timely stop payment order).

\(^7^4\) *LA. R.S. 10:4-403(2) (Supp. 1974).*

\(^7^5\) *Id. UCC § 4-403*, Comment 6 observes that stop orders are normally given first by telephone. Validation of oral stop payment orders codifies decisions such as *Hiroshima v. Bank of Italy*, 78 Cal. App. 362, 248 P. 947 (1926). Several states have, however, adopted a version of UCC § 4-403 which requires written stop orders. See, e.g., *TEX. BUS. & COM. CODE § 4.403(b) (1968).*

\(^7^6\) Under *LA. R.S. 10:4-403(3)*, the customer has the burden of establishing "the fact . . . [of] payment . . . contrary to a binding stop payment order . . ." as well as the amount of loss resulting therefrom. The inference is compelling that subsection (3) was a trade-off for valid oral stop payment orders in the process of drafting the UCC's official text. For problems of proof, see *Hawkland, Stop Payment Orders Under the Uniform Commercial Code*, 3 U.C.C. L.J. 103 (1970).

\(^7^7\) *LA. R.S. 10:4-403(1) (Supp. 1974).*
certified check, or a cashier's (or "teller's") check. Because a bank drawing a check on its account in another bank is a "customer," payment of a bank check technically can be stopped by the drawer-bank, but since its engagement as a drawer under § 3-413 would thereby be triggered, the bank would be liable to the holder. Furthermore, in the unlikely event that the bank itself has a personal defense to raise, the defense could be cut off by a holder in due course of the bank check. The drawer bank's "customer" cannot compel the bank check to be stopped since the item is not "an item payable for his account" but rather is an obligation of the drawer-bank.

The drawer-customer cannot stop payment of a certified check by virtue of § 4-303(1)(a), regardless of whether certification was procured by the drawer-customer or by the holder. Neither can the certifying bank stop payment, because it is not a customer within the meaning of § 4-403(1), and because it has, by certification, become primarily liable on the instrument.

A cashier's check is a draft drawn by a bank on itself. Neither the bank nor the customer can stop payment since the bank is not its own "customer" and the check is not "an item payable for [the customer's] account" under § 4-403. Furthermore, courts may view cashiers' checks as accepted in advance upon issuance, and therefore not subject to a stop order by virtue of § 4-303(1)(a).

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79. La. R.S. 10:3-305 (Supp. 1974). Additionally, La. R.S. 10:4-407 (Supp. 1974) does not seem applicable to such a situation, and it is doubtful that a bank-drawer could raise the defenses of its customer. But see Wilmington Trust Co. v. Delaware Auto Sales, 271 A.2d 41 (Del. 1970) (bank successfully refused to honor a treasurer's check as to which there was a failure of consideration).
80. La. R.S. 10:3-411, 3-413(1) (Supp. 1974).
Payments Over Valid Stop Orders: Subrogation and Proof of Damages

Payment in violation of a valid and timely stop payment order is improper, even though made by mistake or inadver-
tence, unless the customer ratifies the action. The burden of
establishing the loss from the improper payment is on the
customer under § 4-403(3). But frequently a customer with
personal defenses to assert has suffered no loss from the
wrongful payment because the item was held by a holder in
due course or his transferee to whom the customer would
have been liable under §§ 3-413 and 3-305 had the check been
dishonored. Some early cases reflected the feeling that
banks should not be required to recredit the customer's ac-
count in such circumstances by ruling that payment cannot
be stopped against a holder in due course. Though techni-
cally incorrect, such decisions do state a shorthand refer-
ence to the principle of subrogation, under which payment
may not be effectively stopped as against an item in the
hands of one who is, or has the rights of, a holder in due
course. Section 4-407 adopts that principle:

If a payor bank has paid an item over the [valid] stop
payment order of the drawer . . ., to prevent unjust en-
richment and only to the extent necessary to prevent loss
to the bank by reason of its payment of the item, the
payor bank shall be subrogated to the rights (a) of any
holder in due course on the item . . .; (b) and of the payee
or any other holder of the item against the drawer . . .

83. UCC § 4-403, Comment 8.
84. LA. R.S. 10:4-403(3) (Supp. 1974).
85. See LA. R.S. 10:3-201(1) (Supp. 1974).
86. See Universal C.I.T. Credit Corp. v. Guaranty Bank & Trust Co., 161
87. See Gulf Refining Co. v. Bagby, 200 La. 258, 275, 7 So. 2d 903, 909
(1942).
88. The doctrine that payment cannot be stopped against a holder in due
course would only be true if a check were treated as an assignment of the
drawer's funds. Cf. LA. R.S. 10:3-409(1) (Supp. 1974); Hiroshima v. Bank of
89. LA. R.S. 10:4-407(a), (b) (Supp. 1974) (emphasis added). The theory
underlying this section is that the bank has paid out its own money by virtue
of its inability to charge the customer's account under § 4-401. See Clarke v.
The preventing of unjust enrichment is a proper but not an indispensable
Viewing §§ 4-403(3) and 4-407(a) together, it is difficult to see the need for both subsections since the litigated result is likely to be the same under either. Subsections (b) and (c) of § 4-407, however, extend the subrogation rule to permit banks to assert against the drawer the rights of the payee or any other holder either on the item or on the underlying transaction, and to assert the drawer's rights against the payee or other holder with respect to the transaction out of which the item arose.

Section 4-407, though directed primarily toward payments over valid stop orders, extends the right of subrogation to circumstances which otherwise give the customer a basis for objection to payment. Subrogation, then, apparently can be invoked by a bank whenever the customer alleges that his item was not properly payable. Of course, if the bank refuses to recredit the customer's account it has suffered no loss and § 4-407 would not be triggered. Finally, UCC Comment 5 makes it clear that § 4-407 does not limit other rights or defenses assertable against the customer by the payor bank, including ratification of the wrongful payment.

VARYING THE PROVISIONS OF THE COMMERCIAL LAWS

Provisions and Limitations

The Commercial Laws contain both a general and a limited provision empowering the parties to vary the effect of provisions of the new law. Sections 1-102(3) and 4-103(1)

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91. See UCC § 4-407, Comments 2-4.

92. See R.G. McClung Cotton Co. v. Cotton Concentration Co., 479 S.W.2d 733 (Tex. Civ. App. 1972). If the bank recredits the drawer's account, for example, it may be subrogated to the rights of the drawer to bring a fraud action against the payee, but double recovery by the bank is not within the scope of § 4-407 (see Official UCC Comment 4), and the bank must prove that the drawer-customer would have been entitled to recover against the payee had the check been paid, or that had it not been paid, that the drawer would have had a valid defense to the payee's claim. See First Nat'l Bank v. Heatherly, 8 Ill. App. 3d 1073, 291 N.E.2d 280 (1972).

93. Statutory authority to vary the effect of provisions of a statute by
embody, within limits, the principle of freedom of contract, and predictably attempts will be made pursuant to these sections to vary the effect of the bank-customer provisions of §§ 4-401 to 4-407. Bankers will no doubt want to exorcise the recurrent problems incident to conditional checks, post-dated checks, and stop payment orders, to name only a few. Whether, and the degree to which, that is possible under the Commercial Laws is the focus of the remainder of this article. Due to the similarity between §§ 1-102(3) and 4-103(1), attention will be directed in the main to § 4-103(1).

Sections 1-102(3) and 4-103(1) permit variation by agreement of the effect of provisions of the Commercial Laws with the following exceptions: (a) no variation is permitted whenever the Commercial Laws otherwise provide; (b) no agreement can disclaim the obligations prescribed by the Commercial Laws pertaining to good faith, diligence, and care prescribed by this Title may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

94. LA. R.S. 10:1-102(3) (Supp. 1974) provides: “The effect of provisions of this Title may be varied by agreement, except as otherwise provided in this Title and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Title may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.”

95. LA. R.S. 10:4-103(1) (Supp. 1974) provides: “The effect of the provisions of this Chapter may be varied by agreement except that no agreement can disclaim a bank’s responsibility for its own lack of good faith or failure to exercise ordinary care or can limit the measure of damages for such lack or failure; but the parties may by agreement determine the standards by which such responsibility is to be measured if such standards are not manifestly unreasonable.”

96. These and other contractual provisions are discussed in J. WHITE & R. SUMMERS, HORNBOOK ON THE UNIFORM COMMERCIAL CODE 552-58 (1972).

97. See notes 94, 95 supra.

98. LA. R.S. 10:1-102(3) (Supp. 1974). Given the adoption in Louisiana of only Articles 1, 3, 4 and 5 of the UCC, the exception in question is of little present relevance, since the only examples of an “otherwise provided” exception occur in LA. R.S. 10:4-103(1) (Supp. 1974) and impliedly in LA. R.S. 10:1-203 (Supp. 1974). The exception, however, has greater relevance to provisions of the UCC not adopted in Louisiana, such as UCC §§ 2-719, 9-501(3). UCC § 1-102. Comment 3 does point out that as a matter of drafting style, the absence of words such as “unless otherwise agreed,” occurring, for example, in LA. R.S. 10:3-201(3) (Supp. 1974) and LA. R.S. 10:3-414(2) (Supp. 1974) has no negative implication vis-à-vis § 1-102(3).


100. See LA. R.S. 10:1-203, 1-208, 4-108(1), 4-401(2), 4-404 (Supp. 1974).

101. See LA. R.S. 10:4-202(2), 4-301-02 (Supp. 1974).
reasonableness\textsuperscript{102} and care;\textsuperscript{103} (c) no agreement can disclaim a bank's responsibility for its lack of good faith\textsuperscript{104} or failure to exercise ordinary care;\textsuperscript{105} and (d) no agreement can limit the measure of damages for any such lack or failure. Within these limits, the parties may determine by agreement the standards by which good faith and the exercise of ordinary care are to be measured, so long as the standards are not manifestly unreasonable.

While no reported decisions have dealt meaningfully with the scope or application of the freedom of contract principle embodied in §§ 1-102(3) and 4-103(1), examination of the Official UCC Comments to each section sheds light upon the intent behind them.\textsuperscript{106} Comment 2 to § 1-102(3), for example, indicates that the word “agreement” includes the effect given by § 1-205 to prior course of dealing between the parties and any applicable usages of trade.\textsuperscript{107} The Commercial Laws do not adopt the UCC definition of “agreement,” but § 1-205 was adopted.\textsuperscript{108} Obviously an “agreement” within the meaning of Louisiana Revised Statutes 10:4-103 must, under Louisiana Revised Statutes 10:1-103, be a valid and enforceable agreement under Louisiana law,\textsuperscript{109} though a course of dealing between the parties or a usage of trade may “give particular meaning to and supplement or qualify” the terms of an agreement between them.\textsuperscript{110}
reveals that within the intent of the drafters of the UCC, the agreement “may be direct, as between the customer and the depositary bank,”112 or “indirect, as where the customer authorizes a particular type of procedure and any bank in the collection chain acts pursuant to such authorization”;113 it “may be with respect to a single item,”114 or “to all items handled for a particular customer,”115 as for example, a “general agreement between the depositary bank and the customer at the time a deposit account is opened.”116 Legends on deposit tickets, collection letters and acknowledgments of items, “coupled with action by the affected party constituting acceptance, adoption, ratification, estoppel or the like, are agreements if they meet the tests of the definition of ‘agreement.’”117

Taken together, the language of § 4-103(1) and its Comments and § 1-102 requires an agreement, which may vary the effect of or the legal consequences that otherwise flow from the Commercial Laws, but neither the statute itself nor its definitions can be varied.118 Variations can disclaim, expressly or in fact, neither the obligations expressly provided with respect to good faith, diligence, reasonableness and care, nor the bank’s obligation to exercise ordinary care,119 though an agreement may set forth reasonable standards by which those obligations are to be measured.

Comment 2 to UCC § 1-102 also makes it clear that while freedom of contract is a principle of the section, the parties cannot by agreement vary the meaning of the statute, rather, that meaning “must be found in its text, including its definitions, and in appropriate extrinsic aids.”120 Thus, an instrument cannot be made negotiable by agreement,121 nor can the

112. UCC § 4-103, Comment 2.
113. Id.
114. Id.
115. Id.
116. Id.
120. UCC § 1-102, Comment 2.
121. Of course, the instrument may be negotiable anyway under LA. R.S. 10:3-104 (Supp. 1974).
meaning of such terms as "holder in due course" be changed by agreement.\textsuperscript{122} The general scope and philosophy of agreements which vary the effects of the provisions of the Commercial Laws are found in the UCC Comments to § 4-103:

[I]t would be unwise to freeze present methods of operation by mandatory statutory rules. This section, therefore, permits within wide limits variation of provisions of the [Chapter] by agreement.

Subsection (1) confers blanket power to vary all provisions of the [Chapter] by agreements of the ordinary kind. The agreements may not disclaim a bank's responsibility for its own lack of good faith or failure to exercise ordinary care and may not limit the measure of damages for such lack or failure, but this subsection like Section 1-102(3) approves the practice of parties determining by agreement the standards by which such responsibility is to be measured. In the absence of a showing that the standards manifestly are unreasonable, the agreement controls. . . .\textsuperscript{123}

\textit{Exculpation from Negligence}

One type of agreement or clause which seems clearly impermissible under §§ 1-102(3) and 4-103(1) is that by which a bank seeks to exculpate itself from the legal effect of its own failure to exercise ordinary care. The term "ordinary care" is not defined, but Comment 4 to § 4-103 indicates that it is used "with its normal tort meaning and not in any special sense relating to bank collections" and that Chapter 4 makes no attempt "to define in \textit{toto} what constitutes ordinary care or lack of it."\textsuperscript{124} Several provisions of Chapter 4 do state certain respects in which collecting banks\textsuperscript{125} and payor banks\textsuperscript{126} must use ordinary care, and section (3) provides, as Comment 4 points out, that bank action or inaction either approved by the Commercial Laws or taken "pursuant to Federal Reserve regulations or operating letters, constitutes the exercise of ordinary care."\textsuperscript{127} Action or inaction in accordance with

\textsuperscript{122} UCC § 1-102, Comment 2.
\textsuperscript{123} UCC § 4-103, Comments 1, 2 (emphasis added; bracketed language inserted to conform to Louisiana adoption).
\textsuperscript{124} UCC § 4-103, Comment 4.
\textsuperscript{125} See LA. R.S. 10:4-103(5), 4-202, 4-204, 4-210, 4-212 (Supp. 1974).
\textsuperscript{126} See LA. R.S. 10:4-401(2), 4-403(1), 4-406(1) & (3) (Supp. 1974).
\textsuperscript{127} UCC § 4-103, Comment 4.
clearing house rules or "a general banking usage not dis-
approved" by the Commercial Laws "prima facie constitutes
the exercise of ordinary care." The fact that the procedure
used is novel or innovative should not alone be sufficient to
find that the bank failed to exercise ordinary care.

Since stop payment orders create handling problems,
banks might seek to exculpate themselves from the legal ef-
teffects of failure to exercise ordinary care by paying an item
over a valid stop payment order. Official UCC Comment 8 to
§ 4-403 states that "a payment in violation of an effective direc-
tion to stop payment is an improper payment, even though it
is made by mistake or inadvertence," and "any agreement to
the contrary is invalid under § 4-103(1) if in paying the item
over the stop payment order the bank has failed to exercise
ordinary care." Comment 8 adopts a line of pre-UCC com-
mon law decisions holding such exculpatory clauses void as
against public policy. One pre-UCC common law decision
pointed to § 4-103(1) as supportive of its holding. The de-
positor in Thomas v. First National Bank of Scranton signed a "Request to Stop Payment of Check" containing
an exculpation clause. The bank made payment on the
check in question despite the stop payment "request," appar-
ently through "inadvertence, accident or oversight." In void-
ing the purported release on public policy grounds, the
Pennsylvania Supreme Court ruled that payment over a valid
stop payment order, even through inadvertence, accident or
oversight, constitutes a failure to exercise due care, i.e., neg-
ligence. The court also observed that depositors desiring to

128. Id.
PAPER AND BANK DEPOSITS AND COLLECTIONS 356 (1967) [hereinafter cited as HAWKLAND]. UCC § 4-103, Comment 1.
(1926); Speroff v. First-Central Trust Co., 149 Ohio St. 415, 79 N.E.2d 119
(1948); Thomas v. First Nat'l Bank, 376 Pa. 181, 101 A.2d 910 (1954). Contra:
Hodnick v. Fidelity Trust Co., 96 Ind. App. 342, 183 N.E. 488 (1932); Tremont
Trust Co. v. Burack, 235 Mass. 398, 126 N.E. 782 (1920); Gaita v. Windsor
Bank, 251 N.Y. 152, 167 N.E. 203 (1929). See also Note, 62 HARV. L. REV. 1224
(1949); Note, 34 VA. L. REV. 834 (1948); Annot., 9 A.L.R. 1067 (1920); Annot.,
1 A.L.R.2d 1150 (1948).
132. The clause purported to release the bank from all liability for pay-
ment over the stop order where the payment resulted through "inadver-
tence, accident or oversight." Id. at 183, 101 A.2d at 911.
133. 376 Pa. 181, 184, 101 A.2d 910, 911 (1954). See also Montano v.
stop payment are under no obligation in Pennsylvania to sign an agreement of release. In Reinhardt v. Passaic-Clifton National Bank & Trust Co. the court noted, in reference to § 4-103 of the 1950 Proposed UCC Draft:

Perhaps the bank and its depositor may . . . be viewed as having equal bargaining power and freedom of contract, although full recognition of modern day realities may well suggest a contrary conclusion . . . . Nevertheless, the bank has been entrusted with an important franchise to serve the public and has, from time to time, received broad legislative protection. . . . Under the circumstances might it not be appropriate to apply to banks the legal doctrine which has deprived quasi-public enterprises such as utilities of the power to require release clauses comparable to that used by the defendant? 

An exculpatory clause which escapes the public policy net may still run afoul of the rule that the bank's own contract language will be strictly construed against it, or the court may find that the depositor's assent to the clause was not obtained in fact. Professors Clark and Squillante take the view that the bank may not by agreement eliminate the customer's right to give valid stop payment orders:

[S]uch a clause . . . does not involve a disclaimer of the bank's obligation of ordinary care. On the other hand, 4-403 gives an affirmative right to the customer, and the availability of an oral stop order seems to be part and

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136. Id. at 436, 84 A.2d at 744 (citations omitted, and emphasis added). The court declined to base its decision on the public policy issue thus framed, ruling instead that the release was unenforceable for lack of consideration. The analogy to utility companies was also drawn by the Pennsylvania Supreme Court in Thomas v. First Nat'l Bank, 376 Pa. 181, 101 A.2d 910 (1954).


parcel of that right. . . . For purposes of determining the scope of allowable disclaimers under 4-103, a distinction should be drawn between affirmative protections given to the customer and mechanical rules governing the bank collection system. It would seem too easy for a bank effectively to contract away its liability for negligence simply by contracting away the protection which would otherwise give rise to that liability. For this reason, a clause limiting the customer to written stop orders should be deemed ineffective.\textsuperscript{140}

Clark and Squillante add that because payor banks receive the advantage of §§ 4-403(3) and 4-407 in connection with payments over valid stop orders, courts should look with disfavor upon any exculpatory clause which attempts to tip the scale even further against the customer with regard to stop payment orders.\textsuperscript{141} Clauses relied upon by a bank having prematurely paid a post-dated check will also be subjected to the public policy and related arguments.\textsuperscript{142}

\textit{Variations in Time Limits}

While agreements that attempt to exculpate banks from the consequences of their own lack of due care seem without question impermissible under § 4-103(1), particularly where fine print\textsuperscript{143} or other circumstances\textsuperscript{144} call into question the customer's assent, other significant variations of the effect of Chapter 4 of the Commercial Laws do seem permissible. In

\textsuperscript{140} B. CLARK \& A. SQUILLANTE, \textit{THE LAW OF BANK DEPOSITS, COLLECTIONS AND CREDIT CARDS} 45-46 (1970) [hereinafter cited as CLARK \& SQUILLANTE].

\textsuperscript{141} Id. The views of Professors White and Summers on this issue are in accord. Id. at 552-58. Professor Hawkland has taken a contrary position on the issue of written stop payment orders only. HAWKLAND at 114.


\textsuperscript{144} See, e.g., Hiroshima v. Bank of Italy, 17 Cal. App. 362, 248 P. 947 (1926) (customer unable to read; exculpatory clause in stop payment order not read to him; customer erroneously informed that he was required to sign the order); Reinhardt v. Passaic-Clifton Nat'l Bank \& Trust Co., 16 N.J. Super. 430, 84 A.2d 741 (1951) (follow-up letter to customer assured him that check would not be paid); Montano v. Springfield Gardens Nat'l Bank, 207 Misc. 840, 140 N.Y.S.2d 63 (1955) (exculpatory clause in quarterly statement, but not in passbook; no evidence that clause called to customer's attention: clause itself non-conspicuous).
New York Credit Men's Adjustment Bureau, Inc. v. Manufacturers Hanover Trust Co.,\textsuperscript{145} the depositor entered an agreement with the bank that unless the depositor notified the bank in writing of forgeries of its signature within thirty days of the mailing of the statement of account, and of forged indorsements within six months of the mailing of the account, the statement would be deemed correct for all purposes and the bank would not be liable for any payments made and charged to the depositor's account.\textsuperscript{146} The court upheld the agreement, ruling that it did not absolve the bank for its negligence or lack of good faith or ordinary care. Rather, said the court, "it provides a condition precedent to liability in the nature of an abbreviated period of limitations."\textsuperscript{147} Under the court's rationale, agreements varying the time limits of § 4-406(4) within which to bring actions against the bank seem permissible under § 4-103(1),\textsuperscript{148} particularly in view of the "technical complexity of the field of banking, the enormous number of items handled by banks, . . . the uncertainty of changing conditions and the possibility of developing improved methods of collection to speed the process. . . ."\textsuperscript{149} Section 4-103(1) should also allow agreements determining the standard by which to judge the customer's duty to notify the bank promptly of forgeries of his signature or alterations of his checks. But the duty of prompt notification under § 4-406(1) may be irrelevant if the bank did not exercise ordinary care in paying the items.\textsuperscript{150} The New York court read into the agreement the caveat that had the customer shown that the bank lacked good faith or failed to exercise ordinary care, the effect of the agreement could have been avoided.\textsuperscript{151}

The agreement in New York Credit presumably would become important only where the customer could have dis-

\textsuperscript{146} The depositor's duties under § 4-406 are discussed in text accompanying notes 54-65, supra.
\textsuperscript{148} Accord, CLARK & SQUIRLAN TE at 14-15.
\textsuperscript{149} UCC § 4-103, Comment 1 (emphasis added).
\textsuperscript{150} LA. R.S. 10:4-406(3) (Supp. 1974); UCC § 4-406(3).
\textsuperscript{151} 41 A.D.2d 912, 914, 343 N.Y.S.2d 538, 540. The one-year limit is only relevant where the bank fails to exercise ordinary care. LA. R.S. 10:4-406(4) (Supp. 1974); UCC § 4-406(4).
covered the forgeries or alterations by the exercise of reasonable care and promptness.\textsuperscript{152} For the individual depositor, thirty days seems a reasonable time within which to discover and report such items, even where the forgery or alteration is skillfully accomplished. The extent to which the promptness standard may be shortened by agreement depends upon the courts' view of the § 1-203 obligation of good faith, which cannot be disclaimed or unreasonably varied.

The time limits provided by the Commercial Laws within which to act with respect to altered or forged items should be variable by agreement.\textsuperscript{153} In fact, no reason appears why all time limits imposed by the Commercial Laws cannot be varied, so long as the variance is not manifestly unreasonable, as those which de facto eliminate the bank's duties or the customer's rights.\textsuperscript{154} For example, it seems permissible to vary the six-months "staleness" time period under § 4-404, at least to the extent that no attempt to disclaim negligence liability is involved, since the provision is basically protective of the bank anyway.\textsuperscript{155}

\textbf{CONCLUSION}

The key consideration prompting the latitude granted banks under § 4-103 is the desire to provide flexibility so that the law governing commercial transactions will be simplified and modernized, while permitting the "continued expansion of commercial practices through . . . agreement of the parties."\textsuperscript{156} This flexibility rests, however, upon the realization that it would be unwise to freeze present collection methods by inflexible statutory rules, in view of the technical complexity involved, the great number of items handled in the collection process and the possibility that new and improved methods of collections will be developed to speed the process.\textsuperscript{157} The issue, then, in each case should be: does the variation attempt to disclaim any non-disclaimable obliga-

\begin{itemize}
  \item 152. LA. R.S. 10:4-406(1) (Supp. 1974).
  \item 154. CLARK \& SQUILLANTE at 14-15.
  \item 155. Id. at 31-32. Squillante suggests it could not be cut below thirty days.
  \item 156. LA. R.S. 10:1-102(2) (Supp. 1974).
  \item 157. UCC § 4-103, Comment 1.
\end{itemize}
tions or responsibilities of the bank, and if not, to what extent should it be enforceable absent some compelling evidence that the collection system will thereby be improved? Such evidence should relate to the volume of items handled, increasingly complex technical advances or some other justification related to the "flexibility" premise outlined in Comment 1 to § 4-103.

It is doubtful that rights and liabilities expressly provided in the Commercial Laws can be varied. Even though a bank could demonstrate, for example, that an unforeseeable and unpreventable computer breakdown caused a wrongful dishonor, disclaimer of liability for such dishonor should be unenforceable since the cause of action is expressly granted by § 4-402.158 The Commercial Laws also expressly grant the right to stop payment of any item payable for the customer's account and moreover to do so orally.159 Banks, then, face two hurdles in their attempts to vary the effect of § 4-403: first, that the right is expressly given by the statute, and second, that payments over valid oral stop orders have an aura of negligence160 about them, which, of course, cannot be disclaimed. The fact that § 4-403 requires the customer to affirm the order within 14 days for further effectiveness provides an argument against variance.161

In the area of properly payable items, banks and their customers may have more flexibility. Liability for payment of post-dated or conditional checks prior to date or to fulfillment of the condition perhaps cannot be disclaimed since it would be difficult to show any reason other than negligence for paying such items, but the customer could agree that conditional and post-dated checks, as "counter" or "universal" checks, are not to be drawn at all, and that, if drawn, no liability shall attach to their handling. Several factors support such an agreement: first, unlike wrongful dishonor, the customer is given no express right under Chapter 4 to draw a post-dated or conditional check;162 second, conditional and

158. CLARK & SQUILLANTE at 14.
159. LA. R.S. 10:4-403 (Supp. 1974); UCC § 4-403.
160. This is the view of the court in Thomas v. First Nat'l Bank, 376 Pa. 181, 101 A.2d 910 (1954).
161. CLARK & SQUILLANTE at 15.
162. Under LA. R.S. 10:3-114 (Supp. 1974), post-dating a check does not make it non-negotiable, but non-negotiability is largely irrelevant to the issue of whether an item is properly payable.
post-dated checks are not compatible with modern methods of collection designed to facilitate speedy movement and handling of items; third, the customer has available alternative methods by which to achieve his purpose, including the drawing of a draft on his bank, rather than a check, or by issuing a promissory note payable at his bank.

On the other hand, altered items and items bearing forgeries of the signature of the drawer, maker, or of indorsers are subject to an allocation of loss scheme under the Commercial Laws which probably cannot be varied. Even though banks have no meaningful way to prevent payment, such items are also usually outside the control of the customer; to the extent the customer has control over such items, the Commercial Laws provide him the right to stop payment, or provide an allocation of loss based not on the negligence of the bank but on the negligence of the customer. To the extent that the allocation of loss scheme of the Commercial Laws is keyed to timely notification as in § 4-406, time limits can, under *New York Credit*, be shortened, so long as the basic right of the customer to avail himself of the right granted is preserved, and so long as no de facto attempt by the bank to avoid negligence is involved, since a speeding up of the collection process is the result.

Chapter 4 of the Commercial Laws, as a faithful adoption of Article 4 of the UCC, was drafted with the problems, needs, and desires of bankers in mind. Particularly is this the case with respect to the bank-customer provisions of §§ 4-401-407. Bank interests receive great protection while few concessions, largely illusory, are made to the customer. Section 4-103(1) is consistent with such a scheme. The courts should

163. See *LA. R.S. 10:3-104*(2)(a) & (b) (Supp. 1974).

164. Under *LA. R.S. 10:3-121* (Supp. 1974), the bank will ask the drawer for instructions as to payment.

165. See *LA. R.S. 10:3-404-07, 3-417-19, 4-207* (Supp. 1974). *See generally CLARK & SQUILLANTE at 1-16.*


167. *LA. R.S. 10:4-402* (Supp. 1974) (wrongful dishonor) and *LA. R.S. 10:4-403* (Supp. 1974) (right to stop payment) are examples of the illusion. Both protections are based on a showing of damages or loss resulting from the bank's wrongful action in paying or dishonoring, a very difficult assignment for the non-merchant customer. *See text at notes 41-53, 85-94, supra.*
therefore proceed cautiously in this area, for while the scope of § 4-103(1) is difficult to define, it was not intended that facilitation of the collection process be used as a guise for imposing unconscionable bank-customer agreements on the public.