



# Understanding the Legal Issues of Endorsements *Rights and Responsibilities*

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# UNDERSTANDING THE LEGAL ISSUES OF ENDORSEMENTS

by Eric M. Hurwitz and Michelle H. Badolato<sup>1</sup>

## I. BACKGROUND

Having an understanding of endorsements and handling checks is crucial to making sound check cashing decisions. Checks and notes are a negotiable instrument where the right to enforce the obligation can be transferred through endorsements on the back of the item.

The liabilities and defenses of banks and other parties (including bank customers) arising out of the payment of forged checks, altered checks, and checks with forged endorsements are governed largely by provisions in Articles 3 and 4 of the Uniform Commercial Code (“UCC”).<sup>2</sup> Article 3 covers checks and other negotiable instruments, and Article 4 covers bank deposits and collections. Articles 3 and 4 have been adopted, with minor variations, in all 50 states and the District of Columbia.

There are two general types of negotiable instruments under Revised Article 3—drafts and notes. A draft is an instrument that is an order, and includes a check. A note is an instrument that is a promise—a promissory note. If an instrument falls within the definition of both a note and a draft, the person entitled to enforce the instrument is entitled to enforce it as either.

A draft is a three-party instrument consisting of a drawer, a drawee, and a payee. The drawer is the person who signs or is identified in a draft as a person ordering payment. The drawee is the person ordered in a draft to make payment. The payee is the person to whom the drawee is to make payment.

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<sup>2</sup> The regulations of the Board of Governors of the Federal Reserve System (e.g. the Expedited Funds Availability Act, 12 U.S.C. 4001 et seq. (“Regulation CC”)) and the operating circulars of Federal Reserve Banks supersede Article 3 and displace Article 4, to the extent of any inconsistency. UCC §§3-102(c) and 4-103(b). In addition, parties may agree to vary the provisions of Article 4. UCC §4-103(a). Consequently, the liabilities and defenses of banks and other parties in check frauds may be determined in some instances by regulations and agreements outside of the UCC.

## II. OVERVIEW OF NEGOTIABLE INSTRUMENTS

- A. What is a “negotiable instrument”?** To be a negotiable instrument, an instrument must meet certain requirements. Section 3-104 defines a negotiable instrument as an unconditional promise to pay a fixed amount of money that: (a) is payable to bearer or to order at time it is issued or first comes into possession of a holder; (b) is payable on demand or at definite time; and (c) does not state any undertaking or instruction to do any act in addition to paying the money, but the promise may contain an undertaking or power to “give, maintain, or protect collateral to secure payment.”
- B. Types of instruments.** There are two main types of negotiable instruments (or “instruments”), both of which can be endorsed:
- 1. Check** – An instrument that is an “order” (also known as a “draft”). An “order” is a written instruction to pay money signed by the person giving the instruction. The instruction may be addressed to any person, including the person giving the instruction, or to one or more persons jointly or in the alternative but not in succession. UCC §3-103(a)(8).  
  
A check is draft payable on demand and drawn on a bank, including a cashier’s check or teller’s check, and also including a substitute check. A draft may be a check even though it is described on its face by another term, such as “money order,” if it is drawn on a bank. UCC §3-104(f).  
  
**Cashier’s check** - a draft with respect to which the drawer and drawee are the same bank or branches of the same bank. UCC §3-104(g).  
  
**Teller’s check** - a draft drawn by a bank (i) on another bank, or (ii) payable at or through a bank. UCC §3-104(h).
  - 2. Note** – An instrument that it is a promise to pay, but is not an “order,” meaning it is not an instruction to pay someone. UCC §3-104(e). A “promise” is a written undertaking to pay money signed by the person undertaking to pay. An acknowledgment of an obligation by the obligor is not a promise unless the obligor also undertakes to pay the obligation. UCC §3-103(a)(12).
- C. Holder.** The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession. UCC §1-201(b)(21).
- D. Negotiation.** A transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby

becomes its holder. UCC §3-201(a). Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone. UCC §3-201(b).

### III. RIGHTS AND RESPONSIBILITIES TO A CHECK

- A. **Customer** - A person having an account with a bank.
- B. **Drawer** - A person drawing a check on a bank.
- C. **Payee** - The person to whom or to whose order a check is made payable.
- D. **Drawee or Payor Bank** - The bank on which a check is drawn or by which it is payable.
- E. **Depository Bank** - The first bank in which a check is deposited for collection and includes a bank that cashes a check. A depository bank also may be the payor bank, if the check is drawn on or payable by the depository bank.
- F. **Collecting Bank** - Any bank handling a check for collection. A collecting bank may include the depository bank, but not the payor bank.

A person to whom an instrument is payable may be identified in any way, including by name, identifying number, office, or account number. UCC 3-110(c).

If an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone. UCC 3-201(b).

Section 3-301 provides three ways in which a person is entitled to enforce an instrument:

- (a) A person who qualifies as holder of the note;
- (b) A person who is a non-holder in possession of the note, but with the rights of a holder; or
- (c) A person is attempting to enforce a lost, stolen or destroyed note.

Under Section 1-201(b)(21)(A), a person qualifies as a **holder** if that person is in possession of the original note, and either: (a) the note is payable to that person; or (b) the note is payable to bearer. Accordingly, determining if a person qualifies as a

holder requires examination of the note and any indorsements. In particular, the party to whom a note is made payable can be changed by indorsements.

#### IV. TYPES OF ENDORSEMENTS AND WHO MAY ENDORSE

- A. Indorsements.** An “indorsement” means a “signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words is made on an instrument for the purpose of negotiating the instrument, restricting payment of the instrument or incurring indorser’s liability on the instrument.” UCC 3-204(a). Further, “a signature and its accompanying words is an indorsement unless the accompanying words, terms of the instrument, place of the signature, or other circumstances unambiguously indicate that the signature was made for a purpose other than indorsement.” *Id.* For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument. An endorsement generally appears on the back of the check.
- B. Indorser.** An indorser is a person making an indorsement. UCC 3-204(b).
- C.** If an instrument is payable to a holder under a name that is not the name of the holder, indorsement may be made by the holder in the name stated in the instrument or in the holder's name or both, but signature in both names may be required by a person paying or taking the instrument for value or collection. UCC 3-204(d).
- D. Definition of “Signature.”** Under UCC 1-201(b)(37), the term “signed” “[i]ncludes using any symbol executed or adopted with present intention to adopt or accept a writing.” See Official Comment 37 (“as the term ‘signed’ is used in the Uniform Commercial Code, a complete signature is not necessary. The symbol may be printed, stamped or written; it may be by initials or by thumbprint. It may be on any part of the document and in appropriate cases may be found in a billhead or letterhead. No catalog of possible situations can be complete and the court must use common sense and commercial experience in passing upon these matters. The question always is whether the symbol was executed or adopted by the party with present intention to adopt or accept the writing.”).
- E. Special Indorsement.** Section 3-205(a) provides for a special indorsement, which “identifies a person to whom it makes the instrument payable.” Thus, when specially endorsed, “an instrument becomes payable to identified person and may be negotiated only by the indorsement of that person.” *Id.*
- F. Blank Indorsement.** On the other hand, an indorsement that is not a special indorsement is a “blank indorsement.” UCC 3-205(b). “When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by

transfer of possession alone until specially indorsed.” *Id.* The holder may convert a blank indorsement that consists only of a signature into a special indorsement by writing, above the signature of the indorser, words identifying the person to whom the instrument is made payable. UCC 3-205(c).

- G. Restrictive indorsement.** An indorsement limiting payment to a particular person or otherwise prohibiting further transfer or negotiation of the instrument is not effective to prevent further transfer or negotiation of the instrument. UCC 3-206(a) (an indorsement that purports to limit further transfer or negotiation is ineffective to prevent further transfer or negotiation). *Id.*, Official Comment 2.
- H. Joint payees.** Where a check is payable to two or more persons jointly, and not in the alternative, the endorsements of all the payees are necessary. UCC 3-110(d) (“If an instrument is payable to two or more persons alternatively, it is payable to any of them and may be negotiated, discharged, or enforced by any or all of them in possession of the instrument. If an instrument is payable to two or more persons not alternatively, it is payable to all of them and may be negotiated, discharged, or enforced only by all of them. If an instrument payable to two or more persons is ambiguous as to whether it is payable to the persons alternatively, the instrument is payable to the persons alternatively.”) If the check lacks an endorsement of one of the joint payees, or if the endorsement of one of the joint payees is forged or unauthorized, there is a forged or unauthorized endorsement for purposes of the UCC.
- I. Alternative Payees.** If an instrument is payable to two or more persons *alternatively*, it is payable to any of them and may be negotiated, discharged, or enforced by any or all of them in possession of the instrument. UCC 3-110(d).
- J. Conditional Indorsements.** An indorsement stating a condition to the right of the indorsee to receive payment does not affect the right of the indorsee to enforce the instrument. UCC 3-206(b). Under revised Article 3, a conditional indorsement is ineffective with respect to parties other than the indorser and indorsee. UCC 3-206(b), Official Comment 2.
- K. “For Deposit” and “For Collection.”** If an instrument bears an indorsement using the words “for deposit,” “for collection,” or other words indicating a purpose of having the instrument collected by a bank for the indorser or for a particular account, the depositary bank or the payor bank, if it takes the check for immediate payment over the counter, must act consistently with the indorsement, but an intermediary bank or payor bank that takes the check from a collecting bank is not affected by the indorsement. UCC 3-206(c) and Official Comment 3.

## V. UNAUTHORIZED ENDORSEMENTS

- A. Unauthorized endorsement.** A forged or unauthorized endorsement is an endorsement made without the express, implied or apparent authority of the person whose name is signed, and includes a forgery. See UCC §1-201(b)(41).
- B. Unauthorized signature.** Unless otherwise provided in this Article or Article 4, an unauthorized signature is ineffective except as the signature of the unauthorized signer in favor of a person who in **good faith** pays the **instrument** or takes it for value. An unauthorized signature may be ratified for all purposes of this Article. UCC 3-403(a).

Under UCC 3-403(b), if the signature of more than one person is required to constitute the authorized signature of an organization, the signature of the organization is unauthorized if one of the required signatures is lacking.

- (a) **Example:** The resolutions of ABC Corporation on file with the payor bank require a check to be signed by two officers. A check is signed by only one officer and is paid by the payor bank. The signature of ABC Corporation on the check is unauthorized.
- C. “Organization.”** UCC 3-403(b) refers to “the authorized signature of an organization.” The definition of “organization” in Section 1-201(28) is very broad. It covers not only commercial entities but also “two or more persons having a joint or common interest.” Hence, subsection (b) would apply when a husband and wife are both required to sign an instrument. UCC 3-403.
- D. Failure to Deny Authentic Signature.** In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument *is admitted* unless specifically denied in the pleadings. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, but the signature is presumed to be authentic and authorized *unless* the action is to enforce the liability of the purported signer and the signer is dead or incompetent at the time of trial of the issue of validity of the signature. UCC 3-308 *See also PHH Mortgage Corp. v. Powell*, No. 1899 WDA 2013, 2014 Pa. Super 197 (Sept. 10, 2014) (granting summary judgment in favor of servicer where borrower failed to come forward with evidence to rebut the presumption of a valid signature).

## VI. AUTHORIZED SIGNERS FOR BUSINESSES, TRUSTS AND OTHER ENTITIES

- A. General Rules.** Section 3-110(c)(2) states rules for determining the identity of the person to whom an instrument is initially payable if the instrument is payable to an identified person. Official Comment 1.

If an instrument is payable to:

(i) a trust, an estate, or a person described as trustee or representative of a trust or estate, the instrument is payable to the trustee, the representative, or a successor of either, whether or not the beneficiary or estate is also named.

(ii) a person described as agent or similar representative of a named or identified person, the instrument is payable to the represented person, the representative, or a successor of the representative.

- (a) Example - Under subsection (c)(2)(ii), if the instrument states that it is payable to Doe, President of X Corporation, either Doe or X Corporation can be holder of the instrument.

(iii) a fund or organization that is not a legal entity, the instrument is payable to a representative of the members of the fund or organization. This subsection concerns informal organizations that are not legal entities such as unincorporated clubs and the like. A ny representative of the members of the organization can act as holder.

(iv) an office or to a person described as holding an office, the instrument is payable to the named person, the incumbent of the office, or a successor to the incumbent. This subsection applies principally to instruments payable to public offices such as a check payable to County Tax Collector. UCC-3-110, Official Comment 3.

- B. Enforcement of Instrument v. Owner of Proceeds.** Subsection (c)(2) merely determines who can deal with an instrument as a holder. It does *not* determine ownership of the instrument or its proceeds.

- C. Breach of Fiduciary Duty.** UCC § 3-307 governs misappropriation of checks by agents, partners, corporate officers, and “ other representative[s] owing a fiduciary duty,” 3-307(a)(1).

Section 3-307(b) applies when one takes the instrument from a fiduciary and has “knowledge of the fiduciary status of the fiduciary.” Section 3-307 also

interacts with 3-404, 3-405, and 3-406 in various situations, such as where the embezzling person is a corporate employee.

- a. 3-307 applies where a check is made payable to, e.g. an “individual, as trustee” or an “individual, as agent of X Corp.” 3-307(b)(2).
- b. 3-307 also applies where a check made payable to a trust is indorsed by the trustee and deposited into the trustee’s own personal account, or in payment of a personal debt, or for use in a transaction known by the taker to be for the personal benefit of the trustee. *Id.*
- c. 3-307(b)(3) applies where the check is made payment to the trustee or agent personally. The case is not covered by 3-404 or 3-405 because the trustee or agent is the payee, signs his own name, and does not forge the indorsement.
- d. If the check is made payable to a corporation and is indorsed by an employee, then any fraud would fall within 3-405, as well as 3-307(b)(2).
- e. 3-404 applies where the employee or trustee makes a check which is payable to a fictitious payee, and the employee or trustee indorses the fictitious payee’s name and his own and deposits it in his personal account.
- f. 3-307(b)(2) applies where the check is made payable to the corporation or the trust, the employee or agent forges the indorsement and receives the proceeds. Section 3-404 will apply if the embezzler formed the intent to steal the check before it was written. If on the other hand, the embezzler formed the intention to steal the check only after they had been properly written, then 3-405 might apply. Section 3-406 might apply to either.
- g. Where there is a fraudulent indorsement by an employee, the fraud falls within 3-405, as well as 3-307(b)(2)

One who has knowledge specified in 3-307(b) has notice of a “claim” and fails to be a holder in due course (3-302). Such a person will be “subject to” that and other “claims.” 3-306.

The drawee of the check can assert a claim for restitution against the depository bank. However, if the depository bank took the check with knowledge pursuant to 3-307, then the depository bank cannot claim in good faith under 3-418(c) that it took the instrument in good faith and for value.

The drawee does not appear to have a warranty claim under 4-208(a) because the check has not been altered, and the signature of the drawer is authorized.

## VII. ALLONGES

- A. Overview.** An allonge is another form of affixing an indorsement, most commonly to promissory notes. UCC § 3-204(a). An allonge is an additional page physically attached to the instrument. “For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument.” *Id.* An indorsement on an allonge is valid even though there is sufficient space on the instrument for an indorsement. *Id.*, Official Comment 1.
- B. Must Be Physically Attached.** “The allonge which was presented, however, was not affixed to the note, but rather was a separate sheet of paper, clipped to the note by a paper clip. Since the purported allonge was not firmly affixed to the note so as to become a part of the note, it is insufficient to make the note a negotiable instrument. Thus, ownership of this note could not be transferred by mere delivery. The delivery to Plaintiff would have to have been accompanied by an indorsement made on the face of the note, or an allonge actually securely affixed to the note.” *HSBC Bank USA Nat. Ass’n v. Roumiantseva*, 2013 WL 2500829, at \*6-7 (N.Y. Sup. Ct. June 11, 2013) Most courts find that allonge must be actually attached to the instrument, meaning “some form of physical connection securing the paper to the instrument.” *See Wells Fargo Bank, N.A. v. Settoon*, 2013 WL 2476563, at \*3 (La. Ct. App. June 7, 2013).

## VIII. INCOME TAX AND OTHER TREASURY CHECKS

- A. General Rules.** 31 CFR 240.1 et seq. prescribe the requirements for indorsements and condition for payment of checks drawn on the United States Treasury. Treasury checks must be indorsed by the named payee or by another on behalf of such named payee. 31 CFR 240.13(a).
- B. Proper Indorsements.** A Treasury check is properly indorsed when:
- (i) The check is indorsed by the payee in a form recognized by general principles of law and commercial usage for negotiation, transfer or collection of negotiable instruments. (ii) The check is indorsed by another on behalf of the named payee, and sufficiently indicates that the indorser has indorsed the check on behalf of the payee pursuant to authority expressly conferred by or under law or other regulation. An example would be: “John Jones by Mary Jones.” This example states the minimum indication acceptable. However, §§ 240.14, 240.15, and 240.17(f) specify the addition of an indication in specified situations of the actual capacity in which the person other than the named

payee is indorsing. (iii) Absent a signature, the check is indorsed “for collection” or “for deposit only to the credit of the within named payee or payees.” The presenting bank shall be deemed to guarantee good title to checks without signatures to all subsequent indorsers and to Treasury. (iv) The check is indorsed by a financial institution under the payee's authorization. 31 CFR 240.13(b)(1).

- C. Indorsement of checks by a duly authorized fiduciary or representative.** The individual or institution accepting a check from a person other than the named payee is responsible for determining whether such person is authorized and has the capacity to indorse and negotiate the check. Evidence of the basis for such a determination may be required by Treasury in the event of a dispute. 31 CFR 240.13(b)(2).

31 CFR 240.14 - .16 govern individual requirements for Treasury checks issued to incompetent payees, deceased payees, and minor payees.

- D. Causes of Action.** 31 C.F.R. § 240.1 does not provide a federal private cause of action. See *Harris v. United States*, No. 15-1026C, 2016 WL 6427661, at \*5 (Fed. Cl. Oct. 31, 2016), reconsideration denied, No. 15-1026C, 2016 WL 7330560 (Fed. Cl. Dec. 16, 2016); and *Hamburg v. Santander Bank, N.A.*, No. CV 16-5142, 2016 WL 7404482, at \*2 (E.D. Pa. Dec. 21, 2016).

## **IX. POST-DATED CHECKS**

- A. General Rule.** A bank may charge against the account of a customer a check that is otherwise properly payable from the account, even though payment was made before the date of the check, *unless* the customer has given notice to the bank of the postdating describing the check with reasonable certainty. UCC § 4-401(c).
- B. Remedies.** If a bank charges against the account of a customer a check before the date stated in the notice of postdating, the bank is liable for damages for the loss resulting from its act. UCC § 4-401(c).
- C. Timing of Notice.** The notice is effective for six months, as set forth in UCC § 4-403(b) for stop-payment orders, and must be received at such time and in such manner as to afford the bank a reasonable opportunity to act on it before the bank takes any action with respect to the check.
- D. Analysis.** These provisions were created because the automated check collection system cannot easily accommodate postdated checks. A check is usually paid upon presentment, without respect to the date of the check. Under the former law, if a payor bank paid a postdated check before its stated date, it could not charge the customer's account because the check was not

“properly payable.” Hence, the bank might have been liable for wrongfully dishonoring subsequent checks of the drawer that would have been paid had the postdated check not been prematurely paid.

Now, a customer wishing to postdate a check must notify the payor bank of its postdating in time to allow the bank to act on the customer's notice *before* the bank has to commit itself to pay the check. If the bank fails to act on the customer's timely notice, it may be liable for damages for the resulting loss which may include damages for dishonor of subsequent items.

These provisions do not regulate the fees that banks may charge customers for notices of postdating or other services covered by the UCC, but under principles of law such as unconscionability or good faith and fair dealing, courts have reviewed such fees and the bank's exercise of discretion to set fees. See Perdue v. Crocker National Bank, 38 Cal.3d 913 (1985) (unconscionability); Best v. United Bank of Oregon, 739 P.2d 554, 562-566 (1987) (good faith and fair dealing). In addition, UCC § 1-203 provides that every contract or duty within the act imposes an obligation of good faith in its performance or enforcement. UCC § 4-401(c) comment 3.

## X. LOST, DESTROYED, OR STOLEN CHECKS

- A. **Overview.** A person may also be entitled to enforce a *lost or destroyed instrument*.
- B. **Requirements.** Under the UCC, a person can enforce a lost or destroyed instrument when “the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.” UCC § 3-309(a)(iii). The person seeking to enforce must also demonstrate the terms of the instrument and that the person was formerly in possession of the instrument, entitled to enforce it when the loss of possession occurred, and the loss of possession was the not the result of a “transfer” or a lawful seizure. Many states have specific statutes that specifically define what a party must demonstrate to satisfy this category.
- C. **Cashier’s Checks, Teller Checks, and Certified Checks.** A person may also enforce a lost, destroyed or stolen cashier’s check, teller’s check or certified check. UCC § 3-312. “A claimant may assert a claim to the amount of a check by a communication to the obligated bank describing the check with reasonable certainty and requesting payment of the amount of the check, if (i) the claimant is the drawer or payee of a certified check or the remitter or payee of a cashier's check or teller's check, (ii) the communication contains or is accompanied by a declaration of loss of the claimant with respect to the

check, (iii) the communication is received at a time and in a manner affording the bank a reasonable time to act on it before the check is paid, and (iv) the claimant provides reasonable identification if requested by the obligated bank. Delivery of a declaration of loss is a warranty of the truth of the statements made in the declaration.” UCC § 3-312(b).

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