

Understanding the Legal Issues of Endorsements

Legal Claims

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UNDERSTANDING THE LEGAL ISSUES OF ENDORSEMENTS

by Eric M. Hurwitz and Michelle H. Badolato¹

I. LEGAL CLAIMS

A. Liability

1. **Liability of drawer.** If the payee's endorsement is forged *before* the check is delivered to the payee, the underlying obligation of the drawer to the payee is not discharged by the check, and the payee can require the drawer to pay the obligation a second time. UCC §3-310, Official Comment 4 ("If the payor bank pays a person not entitled to enforce the instrument, as in the hypothetical case, the suspension of the underlying obligation continues because the check has not been paid.)

2. **Liability of payor bank.** A forged or unauthorized endorsement of the payee is ineffective as the payee's endorsement. UCC §3-403(a). Consequently, a check bearing a forged or unauthorized endorsement is not "properly payable" and the drawee or payor bank may not charge the amount of the check against the drawer's account. UCC §4-401(a).
 - (a) The drawee or payor bank is liable to the drawer even though it may have acted in good faith and exercised ordinary care.
 - (b) Generally, the liability of the drawee or payor bank to the drawer will be the amount of the check.
 - (c) The drawee or payor bank has essentially the same liability to the drawer when it pays a check bearing a forged endorsement as when it pays a check bearing a forged drawer's signature. As discussed below, however, the right of the drawee or payor bank to recover from the depository or other collecting bank the proceeds of a check bearing a forged endorsement is greater than its right to recover the proceeds of a check bearing a forged drawer's signature.

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(d) Example: John Jones draws a check payable to the order of Bob Bell. Before the check is delivered to Bob Bell, it is stolen. The thief forges the endorsement of Bob Bell on the back of the check and presents the check directly to the payor bank for payment. The payor bank pays the check. The payor bank is liable to John Jones for the amount of the check.

3. **Claim of payor bank against collecting bank.** As a general rule, a drawee or payor bank that pays a check bearing a forged endorsement may recover the proceeds of the check from a prior collecting bank (including the depository bank) or other person taking the check or receiving payment. The theory of recovery is a breach of warranty of “entitlement”. Under the UCC, a prior collecting bank (including the depository bank) or other person taking a check and receiving payment warrants to the drawee or payor bank that it was entitled to enforce the check or authorized to obtain payment on behalf of a person entitled to enforce the check. UCC §§3-417(a)(1) and 4-208(a)(1). [The 1962 UCC used the same theory of warranty but described the theory as a warranty of “good title” rather than a warranty of “entitlement.”]

(a) The general rule applies even though the prior collecting bank has not endorsed the check or guaranteed prior endorsements. [Regulation CC of the Federal Reserve Board provides that a guaranty of prior endorsement is unnecessary and is discouraged.]

(b) The general rule applies even though the prior collecting bank was not negligent and exercised ordinary care.

(c) The general rule also applies even though the drawee or payor bank may have failed to exercise ordinary care and was negligent, so long as the drawee or payor bank acted in good faith - i.e., with honesty in fact and in accordance with reasonable commercial standards of fair dealing. UCC §§3-417(b) and 4-208(b).

(d) The drawee or payor bank may recover not only the proceeds of the check but also “expenses and loss of interest” - which may include attorneys’ fees according to some courts and commentators. UCC §§3-417(b) and 4-208(b).

(e) Example: A thief steals a check and forges the endorsement of the payee. The thief cashes the check at the depository bank, which presents the check to the payor bank for payment. The payor bank pays the check. The payor bank is liable to the drawer for the amount of the check and recredits the drawer’s

account. The payor bank may recover the amount of the check from the depository bank for breach of the warranty of “entitlement”.

- (f) The drawee or payor bank must make a claim for breach of warranty based on a forged endorsement within 30 days after it has reason to know of the breach. [The 1962 UCC required that a claim be made “within a reasonable time” after the drawee or payor bank learned of the breach of warranty.] If the drawee or payor bank fails to make a claim within 30 days, the prior collecting banks will be discharged from liability to the extent of any loss caused by the delay. UCC §§3-417(e) and 4-208(e). For example, if a payor bank delays making claim on a forged endorsement, and the person committing the forgery is able to withdraw the proceeds of the check from the prior collecting bank during the delay, the prior collecting bank will be discharged from liability to the extent of the withdrawn proceeds.
- (g) When a drawee or payor bank brings a claim for breach of warranty based on a forged endorsement, a prior collecting bank may defend by proving that the drawer’s negligence substantially contributed to the forged endorsement and, therefore, that the drawer could not recover from the drawee or payor bank. UCC §§3-417(c) and 4-208(c).
- (h) When a drawee or payor bank brings a claim for breach of warranty based on a forged endorsement, a prior collecting bank (including the depository bank) may defend by proving that the endorsement is effective under the “imposter” and “fictitious payee” rules (and related rules) of the UCC. UCC §§3-417(c) and 4-208(c). [These rules are discussed below.] This means as a practical matter that the drawee or payor bank is no longer free to waive defenses that it has against the drawer (on checks bearing a forged endorsement) and simply reimburse the drawer and bring suit against a prior collecting bank for breach of warranty.

- 4. **Claim of collecting bank against depository bank.** Where a collecting bank is liable to the drawee or payor bank on a check bearing a forged endorsement, the collecting bank may recover the amount of the check from the depository bank or another prior collecting bank or other party transferring the check. The theory of recovery also is breach of warranty. UCC §§3-416 and 4-207. Ultimately, the loss resulting from the forged endorsement comes to

rest with the party dealing with the forger, typically, the depository bank.

- (a) Example: A thief steals a check and forges the payee's endorsement. The thief cashes the check at the depository bank. The depository bank sends the check to a collecting bank, which presents the check to the payor bank for payment. The payor bank pays the check. The payor bank is liable to the drawer for the amount of the check and recredits the drawer's account. The payor bank may recover the amount of the check from the depository bank or the collecting bank. If the payor bank recovers from the collecting bank, the collecting bank may recover from the depository bank.

5. **Claim of drawer against depository bank.** A drawer of a check bearing a forged endorsement sometimes seeks a direct recovery against the depository bank rather than the drawee or payor bank. However, the drawer of a check bearing a forged endorsement should have no direct action for conversion against the depository bank. UCC 3-417, Official Comment 2. A warranty of presentment is available only to a drawee against a depository bank. *Innovative Hosp. Sys., L.L.C. v. Abe's Inc.*, 2010 WL 4961809 (La. App. 3 Cir. December 810).

- (a) When the drawer of a check bearing a forged endorsement seeks recovery from the drawee or payor bank, the drawee or payor bank give notice to the depository or other collecting bank to defendant, or join the depository or other collecting bank as a third party defendant. UCC §3-119. The person notified may then give similar notice to any other person who is answerable over. If the notice states that the person notified may come in and defend and that failure to do so will bind the person notified in an action later brought by the person giving the notice as to any determination of fact common to the two litigations, the person notified is so bound unless after reasonable receipt of the notice the person notified does come in and defend. Id.

And, if the depository or other collecting bank relies on the imposter, fictitious payee, or responsible employee defenses (discussed below), the drawer may be entitled to recover from the depository or other collecting bank to the extent that the bank's failure to exercise ordinary care contributed to the loss. UCC §§3-404(d) and Official Comment 3 and 3-405(b) and Official Comment 4.

- (b) Some courts have held that the drawer has a direct right of action against the depository bank accepting checks on forged endorsements of the payees when the drawer has obtained assignments from the payor bank of its claims against the depository bank. See, e.g., Progressive Cas. Ins. Co. v. PNC Bank, N.A., 73 F. Supp. 2d 485, 489 (E.D. Pa. 1999) (“It is not settled law in Pennsylvania that a drawer cannot state a negligence claim against a depository bank. Courts in other jurisdictions are split on the matter.”), citing Wymore State Bank v. Johnson International Co., 873 F.2d 1082, 1087 (8th Cir. 1989) (holding that a drawer may sue a depository bank); Justus Co. v. Gary Wheaton Bank, 509 F.Supp. 103, 105–06 (N.D.Ill.1981) (same); Sun 'n Sand, Inc. v. United California Bank, 21 Cal.3d 671, 148 Cal.Rptr. 329, 582 P.2d 920 (1978) (same); Elwert v. Pacific First Federal Sav. & Loan Ass'n, 138 F.Supp. 395 (D.Or.1956) (same); Home Indem. Co. v. State Bank of Ft. Dodge, 233 Iowa 103, 8 N.W.2d 757 (Sup.Ct.1943) (same). Compare The Guardian Life Ins. Co. of America v. Weisman, 1999 U.S. Dist. LEXIS 2618, No. 96–1141 (N.J. January 12, 1999) (a drawer may not sue a depository bank); Bank Polska Kasa Opieki, S.A. v. Pamrapo Sav. Bank, S.L.A., 909 F.Supp. 948 (D.N.J.1995) (same).

B. Defenses

1. **Negligence.** If a drawer is negligent and the negligence substantially contributes to a forged endorsement, the drawee or payor bank has no liability to the drawer. UCC §3-406(a).
 - (a) For example, the drawee or payor bank may be able to escape liability where the drawer follows careless office procedures, which enable someone to steal checks drawn by the drawer and forge the endorsements of the payees.
 - (b) If the drawee or payor bank fails to act in good faith - *i.e.* if it fails to act with honesty in fact and in accordance with reasonable commercial standards of fair dealing - it remains liable to the drawer, notwithstanding negligence on the part of the drawer. UCC §3-406(a).
 - (c) If the drawee or payor bank fails to exercise ordinary care - *i.e.* if it also is negligent - and such failure substantially contributes to the loss, the loss is allocated between the drawer and the drawee or payor bank based on their comparative negligence. UCC §3-406(b). The burden is upon the drawer to establish

that the drawee or payor bank failed to exercise ordinary care. UCC §3-406(c).

- (d) As discussed above, in connection with forged checks, Section 3-406 of the UCC applies only to forged signatures, and not to the broader concept of unauthorized signatures.
 - (e) As discussed above, in connection with forged checks, the negligence of the drawer must only “substantially contribute” to the forgery, in order to provide a defense to the drawee or payor bank under Section 3-406 - i.e., it does not need to be the “direct and proximate cause” of the forgery.
2. **Ratification.** If the drawer ratifies a forged endorsement, the drawee or payor bank has no liability to the drawer. UCC §3-403(a).
 3. **Statute of limitations.** The UCC requires a drawer-customer to exercise reasonable promptness to examine bank statements or canceled checks and to report forged drawer’s signatures which the drawer should reasonably have discovered. This rule does not apply, however, to the discovery and reporting of forged endorsements, and the UCC has no provision imposing any duty on the drawer-customer to look for forged endorsements. The UCC does contain, however, a statute of limitations of three years after the accrual of cause of action of a drawer-customer against the drawee or payor bank for payment of a check with a forged endorsement. UCC §4-111. This should serve to bar a claim by the drawer-customer against the drawee or payor bank more than three years after payment of a check bearing a forged endorsement.
 4. **Checks payable in blank or to cash.** If a check is drawn payable to the order of “cash” or in blank, no endorsement is necessary to negotiate the check and, therefore, a forged endorsement will result in no liability to the payor bank.
 - (a) Example: A check is drawn payable to the order of “cash”. A thief steals the check and forges the endorsement of a third person (Bob Bell) on the back of the check. The payor bank pays the check. The drawer has no claim against the payor bank. Since the check was payable to “cash” or to bearer, no endorsement by Bob Bell was necessary to negotiate the check.
 - (b) Compare: A check is drawn payable to the order of John Jones. John Jones specially endorses the check to the order of Bob Bell. A thief steals the check and forges the endorsement of Sam Smith on the back of the check. The payor bank pays

the check. The drawer may recover the amount of the check from the payor bank. Since the check was specially endorsed to the order of Bob Bell, a valid endorsement of Bob Bell was necessary to negotiate the check.

5. **Absence of loss.** Where no loss results from payment of a check bearing a forged endorsement, the drawee or payor bank has no liability to the drawer. For example, if the actual payee receives the proceeds of the check, the payor bank has no liability to the drawer even though the payee's endorsement is forged.
6. **Imposter.** If an imposter induces a drawer to issue a check to him or a confederate, an endorsement by any person in the name of the named payee is an effective endorsement. UCC §3-404(a).
 - (a) This rule is commonly known as the "imposter" rule and relieves the bank from liability so long as it acts in good faith.
 - (b) The impersonation may be face-to-face, by mail, or otherwise.
 - (c) Example: An imposter represents that he is Bob Bell and, by impersonation, induces John Jones to issue a check to him payable to the order of Bob Bell. An endorsement by the imposter or any other person in the name of Bob Bell (the named payee) will be an effective endorsement. John Jones will have no claim against the payor bank or any collecting bank.
 - (d) The imposter rule applies not only in cases involving impersonation, but also in cases involving impersonation of another's agent. UCC §3-404, Comment 1. [Under 1962 UCC, the imposter rule applied only in cases involving impersonation, and not in cases involving impersonation of another's agent.]
 - (e) Example: An imposter impersonates Bob Bell, the president of ABC Corporation, and induces John Jones to issue a check payable to the order of ABC Corporation. An endorsement by the imposter or any other person in the name of ABC Corporation (the named payee) will be an effective endorsement. John Jones will have no claim against the payor bank or any collecting bank
 - (f) This rule is a rule of strict liability and applies even though the drawer was not negligent. However, if the bank failed to exercise ordinary care and such failure substantially

contributed to the loss—e.g. the depository bank opens an account in the name of the impersonated payee without obtaining proper identification, and the wrongdoer deposits the check into the account and withdraws the proceeds--, the drawer may shift the loss back to the bank to the extent that the bank's failure contributed to the loss. UCC §3-404(d).

- (g) For purposes of this rule, a check is endorsed in the name of the named payee if (i) the endorsement is made in a name substantially similar to the name of the payee or (ii) the check, whether or not endorsed, is deposited in a depository bank in an account in a name substantially similar to the name of the payee. UCC §3-404(c).

7. **Fictitious payee.** If a person signing a check as or in the name or on behalf of the drawer intends the payee to have no interest in the check, or if the payee is a fictitious person, an endorsement by any person in the name of the named payee will be an effective endorsement. UCC §3-404(b).

- (a) This rule is commonly known as the “fictitious payee” rule and relieves the bank from liability so long as it acts in good faith.
- (b) This rule applies not only where the named payee is fictitious, but also where the named payee is a real person but the person signing the check as or in the name or on behalf of the drawer intends that person to have no interest in the check.
- (c) Example: A treasurer of the drawer signs checks payable to the order of ABC Corporation. ABC Corporation is a non-existing corporation. The treasurer delivers the check to a confederate, who endorses the check in the name of ABC Corporation and deposits the check into a deposit account opened by the confederate in the name of ABC Corporation at the depository bank. The payor bank pays the check. The endorsement in the name of ABC Corporation is an effective endorsement, and the drawer has no claim against the payor bank or the depository bank.
- (d) This rule is a rule of strict liability and applies even though the drawer was not negligent. However, if the bank failed to exercise ordinary care and such failure substantially contributed to the loss— e.g. the depository bank opens an account in the name of the fictitious payee without obtaining proper identification, and the wrongdoer deposits the check into the account and withdraws the proceeds--, the drawer may

shift the loss back to the bank to the extent that the bank's failure contributed to the loss. UCC §3-404(d).

- (e) For purposes of this rule, a check is endorsed in the name of the named payee if (i) the endorsement is made in a name substantially similar to the name of the payee or (ii) the check, whether or not endorsed, is deposited in a depository bank in an account in a name substantially similar to the name of the payee. UCC §3-404(c).
- (f) The rule also applies whether or not the person signing as, or in the name or on behalf of the drawer, is an authorized signer of the drawer. For example, if a thief steals blank checks of XYZ Corporation, forges the signature of an authorized signer of XYZ Corporation, makes the check payable to ABC Corporation, and endorses the check in the name of ABC Corporation, the endorsement of ABC Corporation is an effective endorsement. [The check bears, however, a forged signature of XYZ Corporation or, in other words, a forged drawer's signature.]

8. **Responsible employee.** If an employer entrusts an employee with responsibility with respect to checks - e.g. to sign checks or to prepare checks for issue in the name of the employer - and if the employee or a confederate of the employee forges the endorsement of the payee on a check issued by the employer, the endorsement will be an effective endorsement if it is made in the name of the payee. UCC §3-405(b).

- (a) This rule is sometimes known as the "expanded fictitious payee" rule and relieves the bank from liability so long as it acts in good faith.
- (b) Example: An employee of the drawer prepares a payroll for the drawer's treasurer with additional names on the payroll (both real and fictitious). The treasurer signs checks payable to the additional persons named on the payroll. The employee obtains the checks and endorses the checks in the names of the additional persons. The endorsements in the names of the additional persons will be effective endorsements and the drawer will have no claim against the payor bank.
- (c) This rule is a rule of strict liability and applies even though the drawer was not negligent. However, if the bank failed to exercise ordinary care and such failure substantially contributed to the loss, the drawer may shift the loss back to

the bank to the extent that the bank's failure contributed to the loss. UCC §3-405(b).

- (d) This rule applies only where the employee has been entrusted by the employer with "responsibility" with respect to checks. UCC §3-405(a). Where the employee has not been entrusted with responsibility with respect to checks, a bank may still be able to avoid liability by establishing that the employer was negligent - e.g. followed careless office procedures and that such negligence substantially contributed to the forged endorsement made by the employer. UCC §3-406(a). [This defense is discussed more fully above.]

C. Rights of Payee

1. **Claim against drawer.** If the payee's endorsement is forged before the check is delivered to the payee, the underlying obligation of the drawer to the payee is not discharged and the payee can require the drawer to pay the obligation a second time. The drawer, in turn, can recover the amount of the check from the drawee or payor bank, which in turn can recover from the prior collecting banks (including the depository bank) under the rules discussed above. The payee, however, cannot obtain recovery from the drawee or payor bank, or the depository or other collecting bank, because it did not receive delivery of the check. UCC §3-420(a).
2. **Claim against payor bank.** When the payee does not seek a second payment from the drawer - because the payee's endorsement was forged after the check had been delivered to the payee - the payee often seeks recovery from the drawee or payor bank. [In the case of a check payable to joint payees, the delivery of the check to one of the payees is delivery to all of the payees.] The theory of recovery is "conversion" of property (namely, the check) owned by the payee. The measure of liability of a drawee or payor bank for conversion is presumed to be the face amount of the check. UCC §3-420(b). If the drawee or payor bank reimburses the payee, the drawee or payor bank may in turn recover from the depository or other collecting banks for breach of their warranties of "entitlement".
 - (a) Example: A thief steals a check from the payee and forges the payee's endorsement. The thief cashes the check at the depository bank, which presents the check to the payor bank for payment. The payor bank pays the check. The payor bank is liable in conversion to the payee for the amount of the check. The payor bank may recover the amount of the check from the depository bank for breach of the warranty of "entitlement".

3. **Claim against depository bank.** A payee often seeks a direct recovery against the depository bank or other collecting bank. The theory of recovery is often “conversion” of property (namely, the check) owned by the payee.
- (a) A collecting bank, is not liable in conversion or otherwise to the true owner of a check beyond the amount of any proceeds remaining in its hands, if the representative acted in good faith and in accordance with reasonable commercial standards. UCC §3-420(a). Consequently, under the UCC, a payee may bring a direct action in conversion against a depository bank. As to a collecting bank other than a depository bank, the collecting bank will have no liability to the extent that it has remitted or paid out the proceeds of a check with a forged endorsement, so long as the collecting bank acted in good faith. UCC §3-420(c).
4. **Negligence of payee.** Recovery by the payee against the drawee or payor bank or against the depository or other collecting bank will be denied where the payee is negligent and the negligence substantially contributes to the forged endorsement. UCC §3-406(a). For example, a bank may be able to escape liability when the payee was negligent on supervising the activities of the employee who makes the forged endorsements.
- (a) Example. ABC Corporation uses a signature stamp to sign checks made payable to it. The stamp is routinely left on a desk, and unlocked. A janitor steals the stamp and uses it to endorse checks, which he then deposits into his own account. Neither the drawee or payor bank, or the depository or other collecting bank, are liable to ABC Corporation.
- (a) If the bank fails to act in good faith - i.e. if it fails to act with honesty in fact and in accordance with reasonable commercial standards of fair dealing - the payee may recover from the bank, notwithstanding any negligence on the part of the payee.
- (b) If the bank fails to exercise ordinary care -i.e. if it also is negligent - and such failure contributes to the loss, the loss is allocated between the payee and the bank based on their comparative negligence. UCC §3-406(b). The burden is upon the payee to establish that the bank failed to exercise ordinary care. UCC §3-406(c).
- (c) Example: John Jones draws a check payable to the order of ABC Corporation. An employee of ABC Corporation obtains

the check and, with-out authority, endorses the check on behalf of ABC Corporation. The employee deposits the check into his personal account at the depository bank. By allowing a check payable to the order of a corporation to be deposited into a personal account, the depository bank may have acted negligently, so that the loss is allocated between ABC Corporation (assuming ABC Corporation was negligent) and the depository bank based on their relative degrees of fault.

- (d) Courts have held that, as a matter of law, a bank fails to act in accordance with reasonable commercial standards of banking when it accepts for deposit to a personal account a check made payable to a corporation.
- (e) As discussed above, in connection with forged checks, Section 3-406 of the UCC applies only to forged signatures, and not to the broader concept of unauthorized signatures.
- (f) As discussed above, in connection with forged checks, the negligence of the payee must only “substantially contribute” to the forgery, in order to be provide a defense to the drawee or payor bank or the depository or other collecting bank.

5. **Responsible employee.** Recovery by the payee against the drawee or payor bank or against the depository or other collecting bank will be denied where the forged endorsement is made by certain employees of the payee.

- (a) The UCC provides that if an employer entrusts an employee with responsibility with respect to checks - e.g. to sign or endorse checks, to deposit checks, etc. - and if the employee or a confederate of the employee forges the endorsement of the employer on a check, the endorsement will be an effective endorsement if the endorsement is made in the name of the employer. UCC §3-405(b).
- (b) Example: The bookkeeper of ABC Corporation is responsible for posting checks payable to the ABC Corporation against the accounts of customers of ABC Corporation. The bookkeeper steals a check payable to ABC Corporation, forges the endorsement of ABC Corporation, and deposits the check in an account in the name of ABC Corporation. The endorsement is an effective endorsement of ABC Corporation, and no bank handling the check is liable in conversion to ABC Corporation.

- (c) An endorsement is made in the name of the employer for purposes of this rule if it is made in a name substantially similar to the name of the employer, or if the check, whether or not endorsed, is deposited in a depository bank in an account in a name substantially similar to the name of the employer. UCC §3-405(c).
 - (d) The rule is a rule of strict liability and applies even though the employer was not negligent. UCC §3-405, Comment 1. If, however, the bank fails to exercise ordinary care and such failure substantially contributed to the loss, the employer may shift the loss to the bank to the extent that the bank's failure contributed to the loss. UCC §3-405(b).
 - (e) The effect of this rule is to shift losses due to forged endorsements by responsible employees, from banks to employers.
 - (f) This rule applies only where the employee has been entrusted by the employer with "responsibility" with respect to checks. UCC §3-405(a). Where the employee has not been entrusted with responsibility with respect to checks, a bank may still be able to avoid liability by establishing that the employer was negligent - e.g. followed careless office procedures and that such negligence substantially contributed to the forged endorsement made by the employee. UCC §3-406(a). [This defense is discussed more fully above.]
6. **Ratification.** Recovery by the payee against the drawee or payor bank or against the depository or other collecting bank will be denied where the payee has ratified the forgery. UCC §3-403(a).
7. **Statute of limitations.** Recovery by the payee against the drawee payor bank or against the depository or other collecting bank may be barred by the statute of limitation. The applicable statute of limitations is three years. UCC §3-118(g). The statute begins to run when the check is paid, and is not subject to the discovery rule exception.

D. Double Forgeries

1. **Background.** When a drawee or payor bank pays a forged check, i.e. a check bearing a forged *drawer's* signature, the drawee or payor bank generally is unable, because of the final payment rule, to recover the amount of the check from the depository or other collecting bank, so that the loss stays with the drawee or payor bank. On the other hand, when a drawee or payor bank pays a check bearing a forged

endorsement, the drawee or payor bank generally is able, based on breach of presentment warranties, to recover the amount of the check from the depository or other collecting bank, so that the loss falls upon the depository or other collecting bank. The UCC does not address expressly the allocation of loss, however, where a check contains double forgeries, *i.e.*, both a forged drawer's signature and a forged endorsement. [An example of a check with double forgeries is a counterfeit check.]

2. **Case Law.** The courts held uniformly under the 1962 UCC that a check with double forgeries should be treated as though the check contained only a forged drawer's signature, thereby leaving the loss with the drawee or payor bank. One rationale often employed by the courts was that the forged endorsement is "effective" under the fictitious payee rule (discussed above). Another rationale was that no loss results from the forged endorsement--since there is no true payee on a check bearing double forgeries--and, therefore, the check bearing double forgeries should be treated as a check bearing only a forged drawer's signature.

1990 Revisions. The UCC, as revised in 1990, adopts a scheme of comparative negligence. The fictitious payee rule, as revised, provides that with respect to a check to which the rule applies, if a person paying the check or taking the check for collection fails to exercise ordinary care in paying or taking the check and such failure substantially contributes to the loss resulting from payment of the check, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss. UCC §3-404(d). The responsible employee rule contains a similar provision. UCC §3-405(c). Consequently, with respect to a check bearing double forgeries to which the fictitious payee rule or responsible employee rule applies, although the drawee or payor bank will initially bear the loss, it will be able to shift the loss to the depository bank, if and to the extent that it establishes that the depository bank failed to exercise ordinary care in taking the check for collection and such failure substantially contributed to the loss. UCC §3-404, Comment 2.

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