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Wrongful Dishonor of a Check: Payor Bank's Liability Under Section 4-402

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WRONGFUL DISHONOR OF A CHECK: PAYOR BANK'S LIABILITY UNDER SECTION 4-402

In contrast to the days of "cash and carry" transactions, modern business relies almost exclusively upon the extensive use of credit to finance purchases.[1] This development requires that individuals or businesses conduct their commercial affairs in such a manner as to establish and maintain a reputation for responsible fiscal conduct. But more than a reputation is established, for past transactions are documented and the records centrally computerized. On the basis of these records, so-called "credit ratings" are established upon which the general availability of credit is based.

An effective way to adversely affect a credit rating, other than to not pay at all, is to pass a check[2] that is returned stamped "insufficient funds." In the majority of cases this occurs through the fault of the owner of the account, either willfully or through an oversight, but occasionally the payor bank[3] itself errs. When the drawer's mistake results in dishonor, he is clearly liable for the results of his error, even to the destruction of his ability to do business, which is particularly likely if the individual operates a fiscally marginal enterprise.[4] Where the bank wrongfully dishonors[5] a check, the courts must decide the extent of the bank's liability for the resultant damages. The consideration paid to the bank for checking account services is at best nominal, such as a ten-cent service charge per check written, or the retention of a minimum amount in the account. The bank's liability for wrongful dishonor, however, could be substantial, amounting to thousands of dollars in damages.[6] Yet the innocent drawer of the check should not have to suffer the injury caused by the bank's error.

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1 See generally Bergsten, Credit Cards—A Prelude to The Cashless Society, 8 B.C. Ind. & Com. L. Rev. 485 (1967).

2 The term "check" is not defined in the U.C.C. The more general term "item" is used. U.C.C. § 4-104(g) defines "item" as "any instrument for the payment of money even though it is not negotiable but does not include money." Unless otherwise indicated, all references to the Uniform Commercial Code are to the 1962 Official Text.

3 U.C.C. § 4-105(b) defines "payor bank" as "a bank by which an item is payable as drawn or accepted."

4 Specifically, his suppliers could refuse to allow him credit on his purchases. If he was unable to make these payments, his business would be destroyed. See Skov v. Chase Manhattan Bank, 407 F.2d 1318 (3d Cir. 1969).

5 U.C.C. § 4-402, Comment 2, states in part that "'wrongful dishonor' excludes any permitted or justified dishonor, as where the drawer has no credit extended by the drawee, or where the draft lacks a necessary indorsement or is not properly presented." This definition by exclusion only touches upon the very obvious, but with the transition of the banking business to data processing systems most wrongful dishonors occur when a deposit is placed in the wrong account. See Gardner v. Warren Bank, 14 Mich. App. 548, 164 N.W.2d 869 (1968) where the bank was held to be not liable for a night deposit until it had been accepted by the bank; Turbitt v. Riggs Nat'l Bank, 182 A.2d 886 (D.C. Mun. Ct. of App. 1962) which held that a mutual mistake of fact occurred when the plaintiff disregarded notices that his account had been inadvertently credited with another's deposit.

6 Valley Nat'l Bank v. Witter, 58 Ariz. 491, 121 P.2d 414 (1942).

The payor bank's liability has been the subject of diverse cases under the common law, Section 4-402 of the Uniform Commercial Code, and the American Banking Association Statute,[7] which was superceded by the Code. The purpose of this comment is to analyze the present extent of the payor bank's liability under section 4-402, in light of cases based on the common law and the A.B.A. statute.

I. Payor Bank's Liability Under The Common Law

The relationship between the payor bank and the depositor is that of a debtor and creditor.[8] This relationship is founded in common law upon a contract.[9] The bank's obligation is to pay all checks properly presented to it when they are covered by sufficient deposits, in consideration of the deposit by the customer.[10]

Despite the fact that the transaction out of which the wrongful dishonor arises is a contractual one, some courts held very early that the cause of action sounds both in tort and contract.[11] Recognizing that the failure of a bank to pay on a properly presented check creates a far different impact than the normal failure of a debtor to pay,[12] courts in many cases allowed an action to be brought in tort that was closely related to defamation.[13] The bank in such cases, by its wrongful dishonor, was said to have cast a shadow on the reputation and character of the depositor and to have left the depositor open to criminal

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[7] Hereinafter referred to as the A.B.A. statute. The states that adopted this statute are Alabama, Arkansas, California, Idaho, Illinois, Maine, Michigan, Missouri, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Virginia, West Virginia, and Wyoming.

[8] Valley Nat'l Bank v. Witter, 58 Ariz. 491, 499, 121 P.2d 414, 418 (1942).

[9] Marzetti v. Williams, 109 Eng. Rep. 842, 845 (K.B. 1830).

[10] Valley Nat'l Bank v. Witter, 58 Ariz. 491, 499, 121 P.2d 414, 418 (1942). U.C.C. § 4-104(e) defines "customer" as "any person having an account with a bank or for whom a bank has agreed to collect items and includes a bank carrying an account with another bank."

[11] 109 Eng. Rep. at 845. In New York only actions based on contract were allowed. Meadow Brook Nat'l Bank v. Rogers & Haggarty, Inc., 25 App. Div. 2d 754, 263 N.Y.S.2d 939 (1966).

[12] Valley Nat'l Bank v. Witter, 491, 499, 121 P.2d 414, 418 (1942).

[13] Id. Defamation is the general term used to include the older remedies of libel and slander and is defined "to injure 'reputation' in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him." W. Prosser, Handbook on The Law of Torts § 106, at 756 (3d ed. 1964). The test is whether the plaintiff is lowered in the esteem of any substantial and respectable group, even though it is a small minority.

At common law, courts treated libel and slander differently. In libel, which was considered the greater wrong due to the wider circulation of the printed word there was a conclusive presumption of damages not requiring proof of actual damages, and these were classed as nominal and substantial damages. In slander, actual damages had to be proved, unless the slander fell into one of four catagories: (1) accusing one of having committed a crime of moral turpitude, (2) saying one has a loathsome disease, (3) affecting plaintiff in his business, trade, profession, office, or calling, and (4) accusing a woman of a lack of chastity. These four catagories received the same damages as under libel and were called slander per se. Id. §§ 106-11.

prosecution under "bad check" laws.[14] Recognizing the inherent difficulty of proving actual damages by the injury to the victim's reputation, courts created a presumption of damages in defamation actions. Alternatively, some jurisdictions allowed an action based on negligence rather than defamation.[15]

Jurisdictions also differed on the validity and importance of the distinction between business and non-business depositors.[16] This distinction resulted in the development of the trader doctrine,[17] which allowed every plaintiff to recover nominal damages for the wrongful dishonor of his check,[18] but required damages in excess of nominal to be alleged and proved by the non-trader.[19] The trader was assumed to have suffered greater damages and therefore was entitled to substantial damages.[20] This rule was based on the assumption that businessmen particularly conduct their affairs on credit, and they alone receive substantial injury by a wrongful dishonor. The injury to a non-trader was considered to be insignificant.[21]

The trader doctrine was expanded or rejected in various jurisdictions. One expansion was the inclusion of professionals and fiduciaries in the trader classification.[22] New York modified the doctrine by distinguishing between a willful or a mistaken dishonor, allowing only nominal damages for a mistake.[23] Furthermore, the doctrine was not applied until substantial damages were alleged for a willful dishonor. Moreover, the non-trader was also entitled to substantial damages if his check was part of a business transaction.[24] Other jurisdictions re-

14 In general, all statutes covering the passing of bad checks, require the elements of knowledge of the funds on deposit, and intent to defraud, although most statutes provide for the presumption of these elements on the proof of certain facts. In some jurisdictions, on proof of the dishonor the presumption of intent to defraud and knowledge of lack of funds is raised, but in others proof is required that the defendant refused to pay the amount of the check, or that amount plus collection costs, within a certain period after the notice of the dishonor. Both elements are essential to the offense, but the courts are divided on the question whether the requisite intent exists where the drawer of the check expected to collect funds deposited after the check was written but before it was presented for collection. See People v. Becker, 137 Cal. App. 349, 30 P.2d 562 (Dist. Ct. App. 1934); Johns v. State, 30 Ohio App. 440, 163 N.E. 579 (1928).

15 See Weaver v. Bank of America Nat'l Trust & Sav. Ass'n, 59 Cal. 2d 428, 431-32, 380 P.2d 644, 647-48, 30 Cal. Rptr. 4, 7-8 (1963).

16 Rollins v. Stewart, 139 Eng. Rep. 245 (C.P. 1854).

17 "A trader originally meant a shopkeeper—that is, a tradesman; but it now in this connection means merely a businessman." Peabody v. Citizens State Bank, 98 Minn. 302, 310, 108 N.W. 272, 276 (1906).

18 1 T. Paton, Digest of Legal Opinions § 21A:1 (1940).

19 Third Nat'l Bank v. Ober, 178 F. 678 (8th Cir. 1913).

20 Valley Nat'l Bank v. Witter, 58 Ariz. 491, 505, 121 P.2d 414, 420 (1942).

21 Id. at 500, 121 P.2d at 418. The non-trader would be allowed substantial damages if the dishonor was willful or malicious. For an example of willful, wrongful dishonor, see Davis v. Standard Nat'l Bank, 50 App. Div. 210, 63 N.Y.S. 764 (1900) where the bank dishonored checks on four different occasions.

22 DeLaunay v. Union Nat'l Bank, 116 S.C. 215, 107 S.E. 925 (1921); Nealis v. Industrial Bank of Commerce, 200 Misc. 406, 107 N.Y.S.2d 264 (Sup. Ct. 1951).

23 200 Misc. at 407, 107 N.Y.S.2d at 265.

24 2 New York Law Revision Commission Report, Study of the Uniform Commercial Code 1483 (1955).

jected the trader doctrine,[25] recognizing the fact that a large part of the non-business population carries on its affairs by credit transactions, and that an injury to their credit may be just as harmful as one to a business.[26]

Jurisdictions which applied the trader doctrine diverged widely on what damages were allowed the non-trader. Jurisdictions which allowed an action to be brought only in contract disagreed as to the measure of damages. The damages were limited either to the amount of the check plus interest from date of dishonor[27] or to the natural and probable consequences of the breach.[28] In those jurisdictions which allowed an action to be brought in tort, the non-trader had to prove actual damages which were proximately caused by the dishonor. The most notable divergence occurred when the drawer of the check was arrested under a bad check law. Courts differed widely on whether the action of the party bringing charges acted as an intervening cause, and whether the action was forseeable by the bank.[29]

Where there was an injury to the reputation and character of the nontrader, courts were virtually uniform in allowing recovery for a loss of credit, and in refusing recovery for mental anguish or public humiliation.[30] Damages for mental anguish and public humiliation were only allowable when the bank willfully dishonored the check.[31]

Banking institutions were particularly dissatisfied with the common law trader doctrine and its expansion in various jurisdictions. The A.B.A. regarded the conclusive presumption of damages as "unjust" to the banks, and consequently drafted a uniform statute to replace the trader doctrine.[32]

II. Wrongful Dishonor Under The American Banking Association Statute

The American Banking Association Statute, drafted in 1914, stated that:

> No bank or trust company doing business in this State shall be liable to a depositor because of the non-payment through mistake or error and without malice of a check which should have been paid unless the depositor shall allege and

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[25] Valley Nat'l Bank v. Witter, 58 Ariz. 491, 121 P.2d 414 (1942). See Johnson v. Nat'l Bank, 213 S.C. 458, 50 S.E.2d 177 (1948).

[26] Valley Nat'l Bank v. Witter, 58 Ariz. 491, 500-02, 121 P.2d 414, 418-19 (1942).

[27] Id.

[28] Wiley v. Bunker Hill Nat'l Bank, 183 Mass. 495, 67 N.E. 655 (1903).

[29] See Weaver v. Bank of America Nat'l Trust & Sav. Ass'n, 59 Cal. 2d 428 380 P.2d 644, 30 Cal. Rptr. 4 (1963) which held that an arrest and prosecution is forseeable under a contract action; Woody v. First Nat'l Bank, 194 N.C. 549, 140 S.E. 150 (1927) which held that an arrest and prosecution is a proximate result of a wrongful dishonor.

[30] American Nat'l Bank v. Morey, 113 Ky. 857, 69 S.W. 759 (1902).

[31] Jones v. Citizens Bank, 58 N.M. 48, 265 P.2d 366 (1954) where the plaintiff's death was held to be the result of a malicious dishonor.

[32] 1 T. Paton, supra note 18, § 21B:1.

> prove actual damage by reason of such non-payment and in such event the liability shall not exceed the amount of damages so proved.[33]

It was the aim of the statute to abrogate the trader rule and make all persons who sought recovery against a bank prove actual damages.[34] The Association disagreed with the underlying assumption of the trader doctrine that a business would always sustain a loss to its credit and reputation by the wrongful dishonor of its check. It was contended that the situation was exactly the opposite because the bank, in most cases, takes immediate steps to rectify the error by contacting all persons who are concerned with the check. The Association also contended that most dishonored checks are drawn on accounts that are frequently overdrawn or contain a small balance.[35] It was alleged that the banks often are "mulcted in damages out of all proportion to the imagined injury inflicted . . . ."[36]

As applied by the courts the statute appears only to have aggravated the already confused state of the law regarding recovery for wrongful dishonor. The statute replaced only the trader doctrine and did not provide guidelines for recovery in other cases of wrongful dishonor. This lack of comprehensiveness produced a variety of approaches among different jurisdictions on questions not covered by the statute, such as whether punitive damages should be allowed in all cases or just to a trader.[37] Thus, while it might be assumed that uniformity would be a primary goal of the A.B.A. statute, little uniformity actually resulted.

It would also be reasonable to assume that because the A.B.A. statute requires proof of actual damages for recovery, actions in defamation, which require no such proof, would no longer be allowed. It has been seen that the presumption of substantial damages in an action for defamation is based upon judicial recognition of the inherent difficulty of proving the actual extent of damages resulting from a wrongful dishonor. However, since the A.B.A. statute specifically requires such actual proof of loss, it would be inconsistent to defeat this express purpose by allowing an action in defamation. Nevertheless, such actions continue to be allowed despite this conflict with the statute.[38]

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[33] Id.

[34] Id.

[35] Id.

[36] Id.

[37] See Weaver v. Bank of America Nat'l Trust & Sav. Ass'n, 59 Cal. 2d 428, 431, 380 P.2d 644, 647, 30 Cal. Rptr. 4, 7 (1963). See also Roe v. Best, 120 S.W.2d 819 (Tex. Civ. App. 1938) which held that cancellation of an insurance policy was a result of wrongful dishonor; Abramowitz v. Bank of America Nat'l Trust & Sav. Ass'n, 131 Cal. App. 2d 892, 281 P.2d 380 (1955) holding that a cancellation of an automobile installment contract was a proximate result of a wrongful dishonor.

[38] Woody v. First Nat'l Bank, 194 N.C. 549, 140 S.E. 150 (1927). See also W. Prosser, supra note 13, § 106 at 754.

In allowing actions in defamation to be brought in jurisdictions which also adopted the A.B.A. statute courts overlooked a more basic theoretical conflict between the two. Recovery under defamation is based upon the injury done to the victim's reputation among the community. It is this potential loss of respect within the community which gives rise to a presumption of damages.[39] On the other hand, money damages for wrongful dishonor are usually more precisely ascertainable. The probable injury to a sound credit rating resulting from a wrongful dishonor directly affects an individual's or a business's ability to carry on financial affairs, even to the point of producing bankruptcy. These adverse effects usually result in money damages which are relatively easily quantifiable for specific transactions. In fact, damage to the credit rating is itself quantifiable even apart from its effect on particular transactions, because such ratings are systematized, often to the point of computerization, in centralized bureaus.[40]

It is also inconsistent to allow actions for defamation in jurisdictions adopting the A.B.A. statute because the former is primarily punitive, intended also to deter future conduct, while the A.B.A. statute is designed to compensate the victim of a wrongful dishonor for his actual loss. The statute recognizes that most wrongful dishonors result from mere clerical errors; thus punitive action is unjustified. Furthermore, a bank's paramount interest in avoiding a wrongful dishonor to maintain a favorable business reputation can be assumed. Consequently, the need for deterence appears to be minimal. Thus, it may be concluded that the A.B.A. statute's effect was not as pronounced as it might have been had the courts refused to continue allowing actions for defamation to recover for wrongful dishonor.

III. Wrongful Dishonor Under Section 4-402 of the Uniform Commercial Code

A. *Evolution of the Statutory Language*

The section of the 1949 draft of the U.C.C. dealing with wrongful dishonor stated:

> The drawee is liable to the drawer for any wrongful dishonor of a draft, but where the dishonor occurs through mistake the liability is limited to the actual damages proved including damages for any arrest and prosecution of the drawer.[41]

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39 W. Prosser, supra note 13, § 106 at 754.

40 A better analogy would be with the concept of "good faith." It is considered to be a property interest of a business and is considered to be a capital asset. It can be sold and it can be damaged. Avery v. City of Lyons, 183 Kan. 611, 621, 331 P.2d 906, 914 (1958).

41 U.C.C. § 3-417 (1949 version). That section was titled "Liability of Drawee for Dishonor." This text also used the term "wrongful," which was not present in the A.B.A. statute. The term "wrongful" has a tortious connotation since it is defined as "injurious, heedless, unjust, reckless, unfair or an infringement of some right." Wrong "usually

The purpose of this section was essentially the same as that of the A.B.A. statute; it attempted to abrogate the trader doctrine and the conclusive presumption of damages.[42] It differed from the A.B.A. statute in that it specifically allowed recovery of damages for arrest and prosecution consequent to a wrongful dishonor. The Official Comments justified this change on the basis that criminal statutes were "universal" for bad checks and "that nothing is more probable than the arrest and prosecution of the drawer when a check is dishonored."[43] The extent to which actual damages would be allowed, a definition of actual damages, and damages which would be allowed for a willful dishonor were not enunciated in the 1949 text.[44]

The present version[45] of section 4-402 incorporates major changes from the original 1949 text, and states:

> A payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item. When the dishonor occurs through mistake liability is limited to actual damages proved. If so proximately caused and proved damages may include damages for an arrest and prosecution of the customer or any other consequential damages. Whether any consequential damages are proximately caused by the wrongful dishonor is a question of fact to be determined in each case.

Limiting damages to those proximately caused by the wrongful dishonor is an attempt to more precisely define the extent of a bank's liability.[46] However, the concept of proximate cause lends itself more fully to actions based on negligence or defamation than to a contract action. It is suggested that limiting damages to those foreseeable at the time of the dishonor would have been more effective since this approach

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signifies injury to person, property, or relative noncontractual rights of another than wrongdoer, with or without force, but, in a more extended sense, includes a violation of contract." Black's Law Dictionary 1788 (5th ed. 1957). Arguably the proper action is one of negligence.

42 U.C.C. § 3-417, Comment 3 (1949 version).

43 Id. Comment 4.

44 U.C.C. § 4-402, Comment 2, continued this position by refusing to choose among contract, negligence, or defamation theories. U.C.C. § 4-204 (1950 version) provided that:

> The bank is liable to its customer for any wrongful dishonor of an item but where the dishonor occurs through mistake the liability is limited to the actual damages proved including damages for any arrest and prosecution.

U.C.C. § 4-402 (1952 version) provided that:

> A payor bank is liable to its customer for the wrongful dishonor of an item but where the dishonor occurs through mistake its liability is limited to the actual damages proved including damages for any arrest and prosecution of the customer.

Also, Comment 5 to the 1950 version provided that the section could be modified by agreement, which probably meant that a bank could write a disclaimer of liability in an application for a checking account. This Comment was deleted from the 1952 version.

45 The present text of this section originated in the 1956 version.

46 This was probably due to the criticism the section received in the New York Legislative Hearings on the Code. The commentators seem to think that the section allowed virtually automatic damages when an arrest came after a wrongful dishonor.

is used in both tort and contract theories.[47] Thus, recovery under section 4-402 would accord with the Official Comments which leave the choice of negligence, defamation, or contract theories to the courts and the plaintiff.[48]

Another new concept appearing in section 4-402 is that of "consequential damages," which also appears and is explained in section 2-715(2).[49] While the latter section applies only to sales transactions, the interpretation of consequential damages appearing therein could reasonably apply to section 4-402. Consequential damages under the common law were awarded for all damages of which at the time of contracting, the seller had "reason to know." Section 2-715(2) modifies this concept by requiring the buyer[50] to minimize the seller's[51] loss either by obtaining "cover"[52] wherever possible or some other good faith method. This concept, like proximate cause, is applied with great difficulty, because the amount of consequential damages "is always attended with some uncertainty."[53] The Official Comments to

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The end result of the criticism was that the section was reported by the committee as an ambiguous element. See generally New York Law Revision Commission Report, Study of the Uniform Commercial Code (1955-56).

[47] The court in Victoria Laundry Ltd. v. Newman Indus. Ltd., [1949] 1 All E.R. 997, used the term in the contract sense. The court in Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'r Co., [1961] 1 All E.R. 404 (P.C.), used it in the tort sense.

[48] U.C.C. § 4-402, Comment 2, states in part:

> The liability of the drawee for dishonor has sometimes been stated as one for breach of contract, sometimes as for negligence or other breach of a tort duty, and sometimes as for defamation. This section does not attempt to specify a theory.

The joining together of "arrest and prosecution" and "consequential damages" terminology is confusing due to their tortious and contract connotations.

[49] U.C.C. § 2-715(2) states:

> Consequential damages resulting from the seller's breach include
>
> (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
>
> (b) injury to person or property proximately resulting from any breach of warranty.

It might also be noted that the definitional cross references to section 4-402 do not include reference to "consequential damages" in section 2-715.

[50] U.C.C. § 2-103(1)(a) defines "buyer" as "a person who buys or contracts to buy goods."

[51] U.C.C. § 2-103(1)(d) defines "seller" as "a person who sells or contracts to sell goods."

[52] U.C.C. § 2-712 provides that:

> (1) After a breach within the preceeding section the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.
>
> (2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2-715), but less expenses saved in consequence of the seller's breach.
>
> (3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.

[53] Neville Chem. Co. v. Union Carbide Corp., 294 F. Supp. 649 (W.D. Pa. 1968).

section 2-715(2) recognize this and specifically reject any need for mathematical formulation or precision in the proof.[54]

It is inherently difficult to prove knowledge by the bank of the probable consequences of a wrongful dishonor of a particular drawer's check. After the initial opening of an account, the relationship between the bank and the depositor is usually impersonal. While an imputation of general knowledge could be made of consequent damages to a credit rating and lost profits from an inability of a business to obtain credit, proof of specific knowledge on the part of the bank is virtually impossible, unless an officer of the bank acted in close conjunction with the drawer. Moreover, because the standards of proof for both specific and general knowledge may be difficult to meet, and since section 4-402 seeks to reduce the liability of banks, it has been recognized that there may be a necessity for a corresponding reduction in the degree of proof demanded of the plaintiff. For example, the California Supreme Court said, when construing the A.B.A. statute:

> The purpose of the common law presumption was to permit substantial recovery although specific damages could not be shown due to the difficulty of proof. If a concommitant amelioration of the standard of specificity and proof does not accompany the repeal of the presumption, a statute designed to prevent injustice to banks will be carried beyond the point necessary to that end; it will, instead, inflict injustice upon the depositor.[55]

Consequential damages are again the subject of the third new feature of the section: the requirement that the causal relationship between the wrongful dishonor and the consequential damages be viewed as a question of fact "to be determined in each case." The Official Comments discuss the application of this principle only in relation to cases involving an arrest and prosecution resulting from a wrongful dishonor, although this probably should not be construed as limiting the scope of the requirement to only these types of cases.[56]

The statutory evolution of section 4-402 is the result of attempts to provide more specific guidelines for awarding damages for wrongful dishonor. While it has been argued that courts should be entirely free to determine all damages in such cases, the counter argument has been made that this unstructured approach encourages litigation, and that "the purpose of legislation is to clarify the law and not obscure it . . . the court's function [is not] to legislate or to hold a statute within 'reasonable limits.' "[57] An examination of the cases interpreting

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[54] U.C.C. § 2-715, Comment 4.

[55] Weaver v. Bank of America Nat'l Trust & Sav. Ass'n, 59 Cal. 2d 428, 437, 380 P.2d 644, 651, 30 Cal. Rptr. 4, 11 (1963).

[56] U.C.C. § 4-402, Comment 5. See also Prosser, Proximate Cause in California, 38 Cal. L. Rev. 369, 411 n.206 (1950).

[57] 1 New York Law Revision Commission Report, Study of the Uniform Commercial Code 342 (1955).

section 4-402 indicates that courts have indeed awarded damages on the basis of diverse and often conflicting theories under the section. It is concluded on the basis of the cases that a uniform statute, particularly in the form of section 4-402, may be inadequate to provide sufficient guidelines for recovery. It is suggested that legislative guidelines might be more effective if established by individual states according to their respective requirements, particularly in view of the diverse theories upon which actions are brought and damages awarded for wrongful dishonor.

B. *Cases Under the Code*

There have been only three appellate cases which have interpreted section 4-402. The approaches of the three courts varied widely.

In *Loucks v. Albuquerque Nat'l Bank*,[58] a partnership consisting of Loucks and Martinez claimed damages in excess of $126,000 for the wrongful dishonor of "nine or ten checks" amounting to just over $200. The dishonors occurred when the bank charged the partnership account with a debt of Martinez which had been incurred before the formation of the partnership. All but two of the checks had been written before the account was charged and notice delivered to the plaintiffs. The trial court withdrew from the jury all issues of damages with the exception of $402 which represented the amount in the account withheld by the bank.

On appeal to the Supreme Court of New Mexico the appellant asserted error in taking from the jury the questions of (1) costs; (2) punitive damages; (3) damages for personal injuries to Loucks in the form of an ulcer; and (4) damages to business reputation and credit.[59]

The supreme court held that the question of costs are within the discretion of the trial court. The claim for punitive damage was disallowed, because the court believed there was insufficient evidence of a willful or wanton dishonor necessary for the recovery of punitive damages. The court stated that punitive damages would be allowed only where there was the requisite amount of proof. The claim for damages to recover for the results of Loucks' ulcer was also disallowed. He claimed personal damages and the partnership claimed damages for his loss to the business. The appellant cited two cases decided under the A.B.A. statute[60] which allowed such recovery. The court, however, refused to apply those holdings in interpreting section 4-402, since the A.B.A. statute had at that time been repealed in New Mexico. The court then disallowed recovery by Loucks for the ulcer holding that the partnership was the customer of the bank, and only it could sue and recover.[61] Nevertheless, recovery by the partnership for the loss

[58] 76 N.M. 735, 418 P.2d 191 (1966).

[59] This appears to be an understatement as the partnership was required to make all purchases in cash because the suppliers would no longer accept a check. 76 N.M. at 746, 418 P.2d at 198.

[60] Jones v. Citizens Bank, 58 N.M. 48, 265 P.2d 366 (1954); Weaver v. Bank of America Nat'l Trust & Sav. Ass'n, 59 Cal. 2d 428, 380 P.2d 644, 30 Cal. Rptr. 4 (1963).

[61] The court cited the Code's definition of "customer" with the accent on "person";

of Loucks' services to the business was also disallowed, because there was insufficient evidence to support the claim and the partnership "had no legally enforceable right to recover for personal injuries inflicted upon a partner."[62] The court held that damages to business reputation and credit, however, were allowable, and therefore remanded the case to the lower court for jury determination of these issues.

Although the decision centered on the partnership issue and only tangentially discussed section 4-402, its use of cases from the common law to interpret the section, and its disregard of those under the A.B.A. statute is inconsistent.[63] Moreover, at one point the court referred to compensatory damages, a term which does not appear in either section 4-402 or the Official Comments. At best, the case illustrates the great degree of confusion arising from the lack of specific guidelines for recovery in section 4-402.

In contrast to *Loucks*, the court in *Bank of Louisville Royal v. Sims*[64] held that the U.C.C. merely codified Kentucky law, which included the A.B.A. statute, and then simply applied existing case law. The dishonor occurred when the bank put a ten day hold on a deposited check rather than the normal two days. The trial court awarded damages for two weeks lost wages, a telephone call, and "illness, harassment, embarrassment, and inconvenience" totaling $631.50. On appeal all but the $1.50 for the telephone call were dissallowed, since the only damages allowable were those "which could be reasonably foreseeable by the parties as the natural and probable result of the breach."[65]

It appears that the telephone call was an expense incurred by the plaintiff in rectifying the bank's error.[66] Thus, recovery would not be available under section 4-402 as the expense was only incidental to the actual loss. However, even though the court recognized that the

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then the court cited § 1-201(30) which provides that "'person' includes an individual or organization," and § 1-201(28) which includes a "partnership" as one of the organizations. It continued that the modern tendency is to treat the partnership as a legal entity. For a full discussion of the partnership issue involved, see 8 Nat. Res. J. 169 (1968).

The forgotten person in this discussion is of course the drawee of the check. The section does not mention his remedies when a payor bank wrongfully dishonors a check. Under the common law, the jurisdictions were split on whether he shared the necessary privity with the bank in order to recover damages from it. Those states that allowed recovery held that the check acted as an assignment of funds. 5A A. Michie, Banks and Banking § 198 (1950).

The Uniform Negotiable Instrument Law specifically rejected the theory of assignment of funds, therefore, the payor bank was not liable unless it accepted or certified the check, and then it was liable in tort. Elmore v. Palmer First Nat'l Bank & Trust Co., 221 So.2d 164 (Fla. 1969). This concept is continued in U.C.C. § 3-409. State Bank v. Stallings, 19 Utah 2d 146, 427 P.2d 744 (1967).

[62] 76 N.M. at 746, 418 P.2d at 199.

[63] U.C.C. § 4-402, Comment 1, states that statutes similar to section 4-402 are in existence in twenty-three jurisdictions.

[64] 435 S.W.2d 57 (Ky. 1968).

[65] Id. at 58.

[66] See, e.g., Weaver v. Bank of America Nat'l Trust & Sav. Ass'n., 59 Cal. 2d 428, 437, 380 P.2d 644, 650, 30 Cal. Rptr. 4, 10 (1963).

plaintiff had some difficulty in rectifying the bank's error,[67] she recovered no other incidental expenses. This might be due to ambiguous phrasing in the complaint. For example, the court might have granted lost wages to the plaintiff, if they had been lost while rectifying the bank's error. But when the recovery of lost wages was pleaded along with the damages for "embarrassment," they resembled too closely the types of damages which were not recoverable under the A.B.A. statute. Moreover, the bank's failure to promptly rectify its error aggravated the plaintiff's damages thus rendering the final award of $1.50 particularly unjust.

In *Skov v. Chase Manhattan Bank*,[68] plaintiff Skov, a seller of frozen fish, paid his supplier by a check which was wrongfully dishonored by the defendant. The supplier thereafter required Skov to pay in cash in advance instead of storing the fish and accepting payment on delivery. Lacking the necessary funds to operate on this basis, the plaintiff's business was ruined. The trial court awarded damages in the amount of plaintiff's yearly profits before the dishonor for three years. The lost profits were recovered as consequential damages as described in section 2-715(2). On appeal the Court of Appeals for the Third Circuit affirmed, describing section 4-402 as "not a model of clarity in its reference to 'damages proximately caused,' 'actual damages proved,' and 'consequential damages.' "[69]

CONCLUSION

It is apparent from the variety of interpretations manifested by the courts that section 4-402 lacks clarity and specificity as to damages allowable for wrongful dishonor. This result is particularly unfortunate in light of the Code's declared purpose of unifying and simplifying the law regarding commercial transactions. A possible solution is to encourage states to individually enact legislation designed to meet their specific commercial requirements. It is suggested that standardization is not required or even desirable as circumstances surrounding recovery for wrongful dishonor may substantially vary from state to state.

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[67] 435 S.W.2d at 58.
[68] 407 F.2d 1318 (3d Cir. 1969).
[69] Id. at 1319.