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The Witch's Brew: Nigerian Schemes, Counterfeit Cashier's Checks, and Your Trust Account

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THE WITCH'S BREW: NIGERIAN SCHEMES, COUNTERFEIT CASHIER'S CHECKS, AND YOUR TRUST ACCOUNT

I. INTRODUCTION

Over the past few years, check fraud schemes have grown significantly, with incidents of counterfeit cashier's checks more than tripling between 2004 and 2006.[1] Fueling this explosive growth, new technologies have enabled more sophisticated counterfeits, and modern commerce has connected unsuspecting consumers to fraudsters.[2] Typically, these schemes involve the fraudster presenting a too-good-to-be-true offer to the consumer. The fraudster asks the victim to deposit a counterfeit official check into the victim's account and then transfer a portion of the check's proceeds back to the fraudster.[3] Attempting to curb the effectiveness of these schemes, the Office of the Comptroller of the Currency (OCC) warned all national banks of typical counterfeit cashier's check schemes.[4] In particular, the OCC warned of a scheme that could victimize an unwary attorney:

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1. 4 FDIC OMBUDSMAN REP. TO THE INDUSTRY NO. 2 (2007), *available at* http://www.fdic.gov/regulations/resources/ombudsman/feedback/message0807.html [hereinafter FDIC REPORT]; *5 Things You Can Do to Avoid Costly Scams Involving Fake Checks and Money Orders*, FDIC CONSUMER NEWS, Winter 2006/2007, at 6, 6, *available at* http://www.fdic.gov/CONSUMERS/consumer/news/cnwin0607/scams.html [hereinafter FDIC CONSUMER NEWS].
2. *See* FDIC CONSUMER NEWS, *supra* note 1, at 6.
3. *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, OCC BULL. NO. 2007-2, FRAUDULENT CASHIER'S CHECKS: GUIDANCE TO NATIONAL BANKS CONCERNING SCHEMES INVOLVING FRAUDULENT CASHIER'S CHECKS (2007), *available at* http://www.occ.treas.gov/ftp/bulletin/2007-2.html [hereinafter OCC BULL. NO. 2007-2]. Negotiable instrument law, especially with regard to checks, has a unique terminology. "Official checks" normally refer to teller's checks or cashier's checks. Although similar, a cashier's check and a teller's check are not the same. A "cashier's check" is a draft where the same bank is both the drawer and the drawee, S.C. CODE ANN. § 36-3-104(g) (Supp. 2009), and a "teller's check" is a draft issued by a bank that is drawn on the issuing bank's account at another bank, *id.* § 36-3-104(h). The "drawer" of a check is the party ordering another to make payment. *Id.* § 36-3-103(a)(5). The "drawee" is the party ordered to make payment. *Id.* § 36-3-103(a)(4). In addition, if the drawee is a bank, then that bank is known as the "payor bank." *Id.* § 36-4-105(3). The "payee" of an instrument is the party the instrument identifies as authorized to receive payment. *See id.* § 36-3-109 official cmt. 2. The first bank to take the instrument from the payee (or other holder) of the instrument is the "depositary bank." *Id.* § 36-4-105(2). In addition, a "collecting bank" is "a bank handling an item for collection except the payor bank." *Id.* § 36-4-105(5). As with the instruments and their parties, this area of law has specifically defined certain activities as well. A "forged check" refers to a check bearing an unauthorized drawer's signature, *see id.* § 36-3-403 official cmt. 1; an "altered check" includes a check whose amount has been changed, *see id.* § 36-3-407(a); and a "counterfeit check" is a check that has been manufactured to resemble a valid check, *see* George Brandon & Matthew J. Ohre, *The Nigerian Check Scam: An Oldie Revisited*, 126 BANKING L.J. 223, 224 (2009). Different loss allocation rules govern cases involving checks bearing a forged drawer's signature and checks bearing a forged indorsement. *Compare* § 36-3-406 (responsibility for forged signature), *with* § 36-3-405 (responsibility for forged indorsement). This Note will focus on counterfeit check schemes involving cashier's checks as opposed to teller's checks.
4. OCC BULL. NO. 2007-2, *supra* note 3.

> Money Transfer Agent. The consumer is solicited to act as a money transfer agent. The consumer is told that he or she will receive cashier's checks to deposit into his or her bank account. The consumer is then told to wire specific sums to various persons or accounts in other countries.[5]

For the schemes that do come to fruition, the OCC asserts that the bank customer "will likely be the one who suffers the financial loss."[6]

Although courts and commentators have sometimes described the victims of these schemes as "desperate, greedy, naïve, gullible, and even dumb,"[7] a plethora of people, including electricians,[8] engineers,[9] and attorneys,[10] have fallen prey to counterfeiters' and forgers' efforts. Most people's common sense prevents them from entering into these schemes, but for some their better judgment falls to the wayside "once [they] sp[y] the . . . pot of gold at the end of the rainbow."[11] Consequently, "[w]hen you fold into one pot a hint of gullibility, a pinch of need, a dose of a practiced get-rich sales pitch, and the flavor of the safety and security that comes with a cashier's check, you have a witch's brew of trouble."[12] Moreover, this witch's brew becomes even more dangerous when a bank employee, without qualification, indicates "that the check is 'good.'"[13]

In some check fraud cases, customers receiving checks have asked their depositary bank whether the check is "good."[14] To the customer, this question

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5. *Id.*

6. OFFICE OF THE COMPTROLLER OF THE CURRENCY, OCC CA 2007-1, AVOIDING CASHIER'S CHECK FRAUD (2007), *available at* http://www.occ.treas.gov/ftp/ADVISORY/2007-1.html [hereinafter OCC CA 2007-1]; *see also* FDIC CONSUMER NEWS, *supra* note 1 ("In these cases, *the depositor most likely will be held responsible for the entire amount of the fraudulent check.*"); William O. Higgins, *Are You Sure You're Ready to Disburse?*, S.C. LAW., Nov. 2009, at 37, 39 (advising lawyers of the risk of refund and charge back in the case of such schemes); *ALERT: Law Firm Scams*, E-BLAST (S.C. Bar Ass'n, Columbia, S.C.), June 23, 2009, http://www.scbar.org/member_resources/publications/e-blast (follow "E-Blast Archives" hyperlink; then follow "June 23, 2009" hyperlink) [hereinafter E-BLAST] (warning law firms to be aware of possible funds schemes).

7. Gene A. Marsh, *Counterfeit Cashier's Check Scams—Bank Liability. "The Check Is Good." Or Is It?*, 40 UCC L.J. 417, 418 (2008).

8. *See* Bank One, NA v. Dunn, 927 So. 2d 645, 646, 649 (La. Ct. App. 2006).

9. Hickory Point Bank & Trust, F.S.B. v. Kucera (*In re* Kucera), 373 B.R. 878, 880–81 (C.D. Ill. 2007).

10. *See* Lucas v. BankAtlantic, 944 So. 2d 1031, 1032 (Fla. Dist. Ct. App. 2006).

11. *Dunn*, 927 So. 2d at 649.

12. Marsh, *supra* note 7, at 422.

13. *Id.*

14. *See, e.g.*, First Nat'l Bank of Denver v. Ulibarri, 557 P.2d 1221, 1222 (Colo. App. 1976) (involving customer releasing goods to a third party after bank employee stated that the third party's check "had been paid"); First Ga. Bank v. Webster, 308 S.E.2d 579, 580 (Ga. Ct. App. 1983) (involving bank employee responding that a deposited check was "good" in response to customer's inquiry); Valley Bank of Ronan v. Hughes, 147 P.3d 185, 188 (Mont. 2006) (involving customer asking bank employee the duration of the hold period for deposited checks); Burke v. First Peoples Bank of N.J., 412 A.2d 1089, 1090 (N.J. Dist. Ct. 1980) (involving customer asking bank employee

means "do I have the money?"[15] However, the bank employee may interpret this inquiry as merely asking his opinion as to the authenticity of the check.[16] The employee's response to this question will greatly impact the highly fact-specific litigation that will arise if the check is in fact counterfeit.[17]

This Note contends that because of their superior knowledge of banking operations and greater access to information from the bank that purportedly issued the counterfeit cashier's check, depositary banks are best positioned to prevent the losses resulting from these fraudulent schemes. In fact, traditional negotiable instrument law supports placing the burden of loss on the depositary bank because it is the least cost risk avoider.[18] Nevertheless, most courts and commentators interpret the Uniform Commercial Code (UCC)[19] as imposing the loss on the customer even if the customer can prove the depositary bank was best positioned to avoid the loss, the bank failed to exercise ordinary care in permitting the customer to withdraw uncollected funds, and the loss could have been avoided had the bank exercised ordinary care.[20] Although a depositary bank may avoid liability for failing to exercise ordinary care, if the bank's conduct also failed to satisfy the objective standard of good faith under revised Articles 3 and 4 of the UCC, then the customer may be able to shift the loss to the bank.[21] Moreover, under certain facts, the bank's communications with the customer concerning the counterfeit instrument should support a nonstatutory claim, such as negligent misrepresentation or equitable estoppel, that would offset the customer's UCC liability.[22]

In addition, this Note addresses the separate problems arising from these counterfeit cashier's check schemes when the victim is an attorney and the counterfeit check's dishonor creates a significant negative balance in the attorney's trust account. Even if the attorney succeeds in shifting the financial loss resulting from the scheme to the depositary bank, the overdraft of his trust account may violate the South Carolina Rules of Professional Conduct, which may result in disciplinary sanctions.[23] While this conduct violates South Carolina's disciplinary rules, the rules promote the misconception of cashier's

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whether money orders were legitimate); Call v. Ellenville Nat'l Bank, 774 N.Y.S.2d 76, 79 (App. Div. 2004) (involving bank employee responding that a counterfeit check had "cleared" in response to the customer's inquiry).

15. Marsh, *supra* note 7, at 425.

16. *Id.* at 424.

17. *Id.* at 418.

18. *See infra* Part II.A.

19. Articles 3 and 4 of the UCC were substantially revised in 1990. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 6 (5th ed. 2000). In this Note, references to the "UCC" or the "revised UCC" refer to the 1990 revisions and references to the "former UCC" refer to the original.

20. *See infra* Part III.D–F.

21. *See infra* Part V.C.

22. *See infra* notes 258–300 and accompanying text.

23. *See infra* Part VI.A.

checks being cash equivalents and may contribute to the success of the counterfeit cashier's check schemes.[24]

Part II of this Note analyzes the rules for apportioning losses resulting from check fraud, noting that modern technology has strained these rules but not their reasoning. Using a legitimate hypothetical cashier's check transaction, Part III outlines the revised UCC's approach to apportioning liability between the bank and the customer on the instrument. Part IV explores the banks' and their customers' relative knowledge concerning cashier's check transactions and fraudulent schemes. Applying a hypothetical counterfeit scam, Part V considers possible ways a customer could offset his liability to the bank. Finally, Part VI examines the ethics considerations arising from a lawyer succumbing to a counterfeit cashier's check scheme.

II. LOSS APPORTIONMENT DOCTRINE FOR NEGOTIABLE INSTRUMENTS

A. *The Traditional Approach*

At the time of the UCC's drafting, the predominant forms of check fraud were forged drawer's signatures and altered dollar amounts.[25] These forgeries and alterations were often clumsily performed, making many of these check fraud schemes readily apparent to a person exercising common ordinary care.[26] The former UCC, as well as its predecessors and the revised UCC, allocated the loss from forged indorsements and fraudulent alterations to the party taking the instrument from the fraudster.[27] The rationale supporting this general rule is that if a reasonable inspection of the instrument would reveal the forged indorsement or alteration, then imposing liability on the party best positioned to prevent the fraud from occurring—the person taking the instrument from the fraudster—is justified.[28] In contrast, with respect to forged checks, the former UCC followed the holding and reasoning of the seminal case of *Price v. Neal*[29] and held the payor bank liable for the loss.[30] As Lord Mansfield stated, "[i]t was incumbent upon [the drawee], to be satisfied 'that the bill drawn upon him was the drawer's

24. *See infra* Parts IV, VI.B.

25. Marsh, *supra* note 7, at 418.

26. *See, e.g.*, Nat'l Dredging Co. v. President of Farmers' Bank of Del., 69 A. 607, 613–14 (Del. 1908) (finding that the different ink and writing angle should have made the bank suspicious of alteration); St. Charles Mercantile Co. v. Armour & Co., 156 S.C. 397, 401, 153 S.E. 473, 474 (1930) ("It appears from a sight of the instrument that it was originally dated September 1st and thereafter 'Sept.' was changed to 'Aug.'").

27. James Steven Rogers, *The Basic Principle of Loss Allocation for Unauthorized Checks*, 39 WAKE FOREST L. REV. 453, 453–54 (2004) (citing RICHARD E. SPEIDEL ET AL., PAYMENT SYSTEMS TEACHING MATERIALS 165 (5th ed. 1993)).

28. *See id.*

29. (1762) 97 Eng. Rep. 871 (K.B.).

30. *See* Rogers, *supra* note 27, at 458–67 (discussing *Price v. Neal* as it relates to the former UCC and the revised UCC).

hand,' before he accepted or paid it."[31] In other words, the former UCC assumed that the payor bank knew the signature of the drawer—its customer—and thus the bank was the "least cost risk avoider" and should be liable for failing to dishonor a forged check.[32]

B. The Effect of Modern Commerce on the Traditional Approach

The validity of the former UCC's assumption has not withstood the increases in commercial activity and the technological advances that have occurred since the 1950s. As a consequence of increased commerce, check usage rose, which strained the banks' traditional procedure of physically examining every check presented for payment.[33] In response, banks adopted automated systems that process checks according to their magnetic ink character recognition (MICR) lines, which resulted in the vast majority of checks being processed mainly by machines.[34] This lack of a human presence has undercut the rationale supporting *Price v. Neal* because even if the payor bank knows the drawer's signature, this knowledge is inapplicable when no one inspects the signature.[35]

In addition, increased commerce resulted in many bank customers utilizing facsimile signature machines to conduct their businesses efficiently,[36] which also strains the logic of applying the *Price v. Neal* rule. To avoid being liable for paying checks bearing unauthorized or forged signatures, many banks under the former UCC employed (some may say exploited) the contractual modification provision[37] to shift the burden of loss to the customer when the customer uses facsimile signatures to issue checks.[38] However, most courts have enforced a facsimile signature agreement in forged check cases only when the customer's negligence contributed to the forged or unauthorized facsimile signature.[39] The

31. *Price*, 97 Eng. Rep. at 872.

32. Rogers, *supra* note 27, at 454, 459 (quoting SPEIDEL ET AL., *supra* note 27, at 165).

33. *See* S.C. CODE ANN. § 36-4-406 official cmt. 1 (Supp. 2009) (describing MICR processing as a preferred low cost alternative to physical examination due to high check volume).

34. *See* WHITE & SUMMERS, *supra* note 19, § 16-3(g), at 580.

35. Rogers, *supra* note 27, at 460.

36. *See, e.g.*, Johnson v. Town of Elizabethtown, 800 F.2d 404, 405 (4th Cir. 1986) (describing town administrator's use of facsimile signature stamp on town checks); Perini Corp. v. First Nat'l Bank of Habersham County, 553 F.2d 398, 400 (5th Cir. 1977) (describing customer's use of a facsimile signature machine); Jefferson Parish Sch. Bd. v. First Commerce Corp., 669 So. 2d 1298, 1299 (La. Ct. App. 1996) (describing customer's desire to use facsimile signature machine).

37. S.C. CODE ANN. § 36-4-103(1) (2003). The variation by agreement provision under the revised UCC is the same for all intents and purposes. *See* S.C. CODE ANN. § 36-4-103(a) (Supp. 2009).

38. *See Perini*, 553 F.2d at 400; *Jefferson Parish*, 669 So. 2d at 1300.

39. *Cf.* Rogers, *supra* note 27, at 484–96 (arguing enforcement of facsimile signature agreements depends on "outsider fraud" or "insider fraud"). *Compare* Cumis Ins. Soc'y, Inc. v. Girard Bank, 522 F. Supp. 414, 421–22 (E.D. Pa. 1981) (determining facsimile signature agreement is ambiguous and should be construed against the drafter, the bank, when evidence did not indicate

varied enforcements of these agreements illustrates the shortcomings of assuming the payor bank knows the drawer's signature and should bear the loss in the modern commercial climate where many bank customers, in the name of efficiency, issue checks without handwritten signatures.[40] Thus, these advances in issuing and processing checks have made check usage more efficient, but they have also precluded the payor bank from detecting forged drawers' signatures through examination of the check. When the payor bank negligently failed to dishonor a forged check, the former UCC, following *Price v. Neal*, precluded the bank from asserting the drawer's negligence to offset its liability.[41] Under the revised UCC, the *Price v. Neal* rule is retained, but the payor bank is no longer precluded, due to its negligence, from asserting that its customer's negligence contributed to the loss.[42] Moreover, under the revised UCC, a bank's failure to review the check's signatures does not constitute negligence.[43]

C. *Modern Technology and Counterfeit Checks*

While increased commercial activity has led to difficulty in applying the *Price v. Neal* rule to traditional forms of forged checks, recent advances in imaging technology have spawned a new breed of counterfeit checks that can be indistinguishable from a legitimate draft.[44] Applying the least cost risk avoider rationale of *Price v. Neal* is troublesome in these situations because neither the payor bank nor the party receiving the check from the fraudster would have knowledge that a perfect counterfeit is not authentic.[45] If the counterfeit check is properly treated as a forged check, then, unless there is a contractual arrangement to the contrary,[46] the payor bank should avoid liability only if it can

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customer's acts led to forgeries), *with* Wilmington Trust Co. v. Phoenix Steel Corp., 273 A.2d 266, 267–68 (Del. 1971) (enforcing facsimile signature agreement when customer's employee committed the forgery), *and* Wall v. Hamilton County Bank of Jasper, 276 So. 2d 182, 182–84 (Fla. Dist. Ct. App. 1973) (enforcing facsimile signature agreement when forger stole checks from customer's cash register and used customer's facsimile signature machine to sign checks). *But see Jefferson Parish*, 669 So. 2d at 1300 (enforcing facsimile signature agreement without evidence that customer's actions led to forgeries).

40. *See* Rogers, *supra* note 27, at 484–96.

41. *See* S.C. CODE ANN. §§ 33-3-406, -4-406(2)–(3) (2003).

42. *See* S.C. CODE ANN. §§ 36-3-406(b), -4-406(d)–(f) (Supp. 2009).

43. *Id.* § 36-3-103(a)(9).

44. Brandon & Ohre, *supra* note 3, at 224; Marsh, *supra* note 7, at 418; *see also* Wachovia Bank, N.A. v. Foster Bancshares, Inc., 457 F.3d 619, 622 (7th Cir. 2006) (explaining that modern technology can allow a fraudster to create a new check rather than just altering information name on an existing check). When the courts know that they are dealing with a counterfeit check as opposed to an altered check, they have used the rules applicable to forged drawer's signatures. *See* Chevy Chase Bank, F.S.B. v. Wachovia Bank, N.A., 208 F. App'x 232, 234–35 (4th Cir. 2006); *Foster Bancshares*, 457 F.3d at 622–23.

45. *See* Brandon & Ohre, *supra* note 3, at 228–30; Rogers, *supra* note 27, at 464.

46. *See* Jefferson Parish Sch. Bd. v. First Commerce Corp., 669 So. 2d 1298, 1300–01 (La. Ct. App. 1996) (finding that a facsimile signature agreement shifted liability to customer for checks where the drawer's signature "'resemble[d] the facsimile specimens'").

prove the customer's negligence substantially contributed to the loss.[47] Moreover, even when the fraudster does not use sophisticated technology to create a bogus check, federal legislation permitting electronic presentment[48] has created a problem with apportioning the loss because of the difficulty in determining whether the check was forged, altered, or counterfeited.[49]

As applied to official checks, this problem is unlikely to arise. As the drawer of a cashier's check,[50] a payor bank should know the cashier's checks it issues and the payees of those checks. Consequently, most payor banks presented with a counterfeit cashier's check likely dishonor the draft rather than pay it.[51] Even though this reasoning is not applicable to teller's checks because the payor bank is not the drawer,[52] electronic advice of drawings (EAOD) services allow payor banks to determine whether a presented teller's check is counterfeit, altered, or subject to some other defense.[53] An EAOD service allows issuing banks to submit information, such as the payee and the amount, that allows the payor bank to identify a teller's or cashier's check.[54] If the payor bank is presented with a teller's or cashier's check whose information does not match the issuing bank's submission, then the payor bank contacts the issuing bank for payment instructions.[55] Consequently, the issuing bank is alerted to a counterfeit teller's

47. *See* §§ 36-3-406, -4-406.

48. Check 21 Act, 12 U.S.C. §§ 5001–5018 (2006).

49. The problem arises when a thief steals a signed check and both the depositary bank and the payor bank use automated electronic processing systems. *See Chevy Chase Bank*, 208 F. App'x at 233; *Foster Bancshares*, 457 F.3d at 620. Because this type of check processing results in the destruction of the actual paper check, it is difficult for a reviewing court to determine whether the thief altered the payee on the actual check or used the stolen check's information to manufacture a counterfeit check. *See Chevy Chase Bank*, 208 F. App'x at 233; *Foster Bancshares*, 457 F.3d at 621–22. Whether a fraudulent check should be considered an alteration or a forgery/counterfeit when it is electronically presented and the paper copy has been destroyed is an issue that has split the circuits. *Chevy Chase Bank*, 208 F. App'x at 236 (Niemeyer, J., dissenting). In the United States Court of Appeals for the Fourth Circuit, these checks are presumed to be forgeries/counterfeits, *id.* at 235 (majority opinion), while the United States Court of Appeals for the Seventh Circuit presumes these checks are alterations, *Foster Bancshares*, 457 F.3d at 622. The practical importance of whether a check is classified as an alteration or a forgery/counterfeit is the availability of presentment warranty defenses to the payor bank. *See* §§ 36-3-407(c), -3-418(c). In *Foster Bancshares*, Judge Posner opined that the least cost avoider theory for apportioning losses in these situations fails because perhaps both banks are not in a position to avoid the loss efficiently. 457 F.3d at 623. In *Chevy Chase Bank*, Judge Shedd apparently rejected this view and deemed the payor bank as the least cost avoider because it is the party that bears the presumably expensive burden of producing evidence (i.e., the original check) to show that the check was an alteration and not a forgery. *See* 208 F. App'x at 235.

50. § 36-3-104(g).

51. *See, e.g.*, Valley Bank of Ronan v. Hughes, 147 P.3d 185, 188–89 (Mont. 2006) (involving payor bank dishonoring counterfeit cashier's check); Amthor v. Commerce Bank, No. SC3311/06, 2007 WL 1299235, at *1 (N.Y. Dist. Ct. May 1, 2007) (same).

52. § 36-3-104(h).

53. *See* Trump Taj Mahal Assocs., L.L.C. v. Bank of N.Y., 2006 WL 2956333, at *1 (N.J. Super. Ct. App. Div. Oct. 18, 2006).

54. *Id.*

55. *Id.*

check and can issue a valid stop payment order preventing the loss.[56] Although payor banks and issuing banks are the normal subscribers to EAOD services,[57] it is reasonable to assume that depositary banks would benefit from using these services as well.[58] But before delving too deeply into the intricacies of counterfeit cashier's check schemes, it is helpful to review the collections process for a legitimate cashier's check.

III. LEGITIMATE CASHIER'S CHECK COLLECTIONS PROCESS

A. Legitimate Cashier's Check Hypothetical

Assume that Legitimate Company (Legitimate), an overseas corporation, retains Allen Attorney, P.A., a South Carolina law firm owned by Allen, to help service Legitimate's debt collection activities in the United States. Under their agreement, Allen will accept payment from Legitimate's American debtors and deposit those payments into his trust account at First Depositary Bank of Columbia (First Depositary).[59] After depositing the payments, Allen will wire these funds, less a servicing fee, to Legitimate's offshore account.[60] During Allen's representation of Legitimate, he is responsible for collecting a debt from Debbie Debtor (Debbie). Debbie purchases a $500,000 cashier's check from First Payor Bank of New York (First Payor) payable to the order of Allen Attorney, P.A., which she sends to Allen to satisfy her debt to Legitimate. Upon receipt of the cashier's check, Allen deposits it into the trust account at First Depositary. Two days later, Allen executes a $490,000 wire transfer from his trust account to Legitimate's offshore account while retaining $10,000 as his servicing fee. That fee is then transferred from the trust account to the firm's operating account.

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56. *See id.* (describing how an EAOD service helps alert the issuing bank to a potentially fraudulent check and provide the bank an opportunity to issue payment instructions).

57. *See id.* (noting that both the payor bank and issuing bank in this case used the EAOD service).

58. *Cf. id.* (describing a casino's attempt at contacting payor bank to determine the validity of an altered teller's check before making funds available to the gambler who negotiated the check to the casino).

59. In South Carolina, all "nominal or short-term funds" a lawyer receives in trust from a client or third party must be placed in an interest bearing bank account (the Interest on Lawyer Trust Account (IOLTA) account) that remits the interest or dividends from funds to the South Carolina Bar Foundation. S.C. APP. CT. R. 412. Debbie's payment will probably be considered "short-term funds" because Allen most likely will disburse the funds to Legitimate before the accrued interest revenue exceeds the cost of opening and maintaining a separate account in Legitimate's name. *Id.* R. 412(a)(1), (d)(1).

60. Because Allen will not have fully performed under the agreement with Legitimate until he wires the funds, he likely cannot withdraw his service fee until he executes the funds transfer. *See id.* R. 407, R. 1.15(c).

B. The Parties to the Cashier's Check

On these facts, First Payor is the drawer of the cashier's check when its authorized agent signs the instrument.[61] In addition, as drawer of a cashier's check, First Payor is also the drawee–payor bank.[62] First Payor issues the cashier's check to Debbie when she purchases it.[63] As the issuer of the cashier's check, First Payor "is obliged to pay the instrument . . . according to its terms at the time it was issued . . . to a person entitled to enforce the instrument or to an indorser who paid the instrument."[64] Although the cashier's check is issued to Debbie, because it is payable to the order of Allen, Debbie is the remitter[65] and Allen is the payee.[66]

C. The Remitter's Transfer to the Payee

Even though Debbie, as the remitter, is not a party to the cashier's check, she owns the instrument until her interest is transferred at negotiation.[67] This transfer of possession occurs when Debbie mails the check to Allen.[68] Although the cashier's check is an order instrument, a remitter can negotiate a cashier's check to a holder without indorsing it.[69] Moreover, despite not being a holder of the cashier's check,[70] as a remitter, Debbie is a nonholder in possession of the instrument entitled to enforce the instrument.[71]

As a person entitled to enforce the cashier's check and because the negotiation of the instrument to Allen is in consideration for the debt to

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61. *See* S.C. CODE ANN. § 36-3-103(a)(5) (Supp. 2009).

62. *See id.* §§ 36-3-103(a)(4), -4-105(3).

63. "Issue" is defined as "the first delivery of an instrument by the maker or drawer, whether to a holder or nonholder, for the purpose of giving rights on the instrument to any person." *Id.* § 36-3-105(a). "Delivery" occurs when possession of the instrument is voluntarily transferred. S.C. CODE ANN. § 36-1-201(14) (2003).

64. S.C. CODE ANN. § 36-3-412(i) (Supp. 2009).

65. *See id.* § 36-3-103(a)(15). However, if the cashier's check had been made payable to Debbie, then she would be a "holder" of the cashier's check. *See* S.C. CODE ANN. § 36-1-201(20) (2003).

66. *See* S.C. CODE ANN. § 36-3-109(b) (Supp. 2009).

67. *Id.* § 36-3-201 official cmt. 2.

68. "Negotiation" is defined as "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." *Id.* § 36-3-201(a).

69. *See id.* § 36-3-201(b). The code defines "indorsement" as "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 (i) negotiating the instrument, (ii) restricting payment of the instrument, or (iii) incurring indorser's liability on the instrument." *Id.* § 36-3-204(a).

70. *See* S.C. CODE ANN. § 36-1-201(20) (2003) (defining "holder" as the person in possession of a negotiable instrument that is payable to bearer or to the order of the person in possession).

71. *See* S.C. CODE ANN. § 36-3-301 official cmt. (Supp. 2009).

Legitimate, Debbie has made various transfer warranties on the instrument.[72] Specifically, Debbie warrants that she is entitled to enforce the cashier's check, the cashier's check contains only authentic and authorized signatures, the cashier's check is unaltered, and there are no defenses or claims in recoupment to the cashier's check.[73] Moreover, because she did not indorse the cashier's check, her transfer warranties are effective only as to Allen and do not attach to the instrument.[74] Assuming Allen takes the cashier's check in good faith,[75] if Debbie breaches one of her transfer warranties, then she is liable to Allen for any loss he incurs resulting from the breach up to the valid face amount of the instrument plus expenses and lost interest.[76] Although not explicitly stated in the statute, her liability for expenses may include legal fees Allen incurrs resulting from the breached transfer warranty.[77]

D. The Payee's Deposit of the Cashier's Check

As a consequence of obtaining the cashier's check through negotiation, Allen is a holder entitled to enforce the instrument.[78] When Allen deposits the cashier's check in his trust account at First Depositary, the bank becomes the holder of the instrument.[79] Although First Depositary is a holder of the cashier's check, it is not an owner of the instrument.[80] Rather, the bank is an agent of the owner of the cashier's check during the collections process.[81] The practical result of First Depositary's agency status is that Allen carries the risk of loss instead of the bank until final settlement occurs.[82] Normally, negotiation of an order instrument requires the transferor's indorsement.[83] However, when a customer deposits an instrument at his bank for collection, the bank is considered a holder even if the instrument does not bear the customer's indorsement.[84] Although it is unnecessary for Allen to indorse the cashier's check for him to deposit it at First Depositary, if he were to indorse the instrument, he becomes liable for the cashier's check amount if it is dishonored.[85] This liability extends to both

72. *See id.* § 36-3-416(a).
73. *See id.* § 36-3-416(a)(1)–(4).
74. *See id.* § 36-3-416(a).
75. "Good faith" is defined as "honesty in fact and the observance of reasonable commercial standards of fair dealing." *Id.* § 36-3-103(a)(6). For further discussion on the issue of good faith, see *infra* Part V.C.
76. § 36-3-416(b).
77. *Id.* § 36-3-416 official cmt. 6 ("[Attorney's fees] could be granted because they fit within the phrase 'expenses . . . incurred as a result of the breach.'").
78. *See id.* § 36-3-301(i).
79. *See id.* § 36-4-205.
80. *See id.* § 36-4-201(a).
81. *Id.*
82. *Id.* official cmt. 4.
83. *Id.* § 36-3-201(b).
84. *Id.* § 36-4-205.
85. *Id.* § 36-3-415(a).

persons entitled to enforce the cashier's check and subsequent indorsers who gave value for the instrument.[86]

When Allen deposits the cashier's check into the firm's trust account at First Depositary, First Depositary may provisionally credit $500,000 to the firm's account on the day of receipt.[87] Although state law governs when a depositary bank may provisionally credit a deposited cashier's check to a customer's account, federal regulations govern when the depositary bank must make these provisional credits available to the customer for withdrawal.[88] As a general rule, when a customer deposits a cashier's check, the depositary bank must make the provisional credit available for withdrawal "not later than the business day after the banking day on which the funds are deposited."[89] However, because the cashier's check in this hypothetical exceeds $5,000, First Depositary *may* withhold making the provisional credit available to Allen for withdrawal until the fifth business day after the day of deposit.[90]

E. The Payee's Transfer and Presentment Warranties

Like Debbie, Allen too will make transfer warranties.[91] However, because most fraudsters abscond from the jurisdiction with their ill-gotten gains, if the cashier's check is counterfeit and Debbie flees the jurisdiction, then Allen's transfer warranty will likely be the only one the collecting banks can enforce.[92] Allen makes the following transfer warranties to all of the collecting banks, including First Depositary: the firm is entitled to enforce the cashier's check, the cashier's check contains only authentic and authorized signatures, the cashier's check is unaltered, and there are no defenses or claims in recoupment that can be asserted against the firm on the cashier's check.[93] Note that unlike Debbie's transfer warranties, Allen's transfer warranties not only apply to the initial transferee, First Depositary, but also to any subsequent transferees that are collecting banks, such as the Federal Reserve Bank (FRB), even if he does not indorse the instrument.[94]

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86. *Id.*

87. *See id.* § 36-4-201(a).

88. Regulation CC, 12 C.F.R. §§ 229.10, .12–.13 (2009).

89. *Id.* § 229.10(c).

90. *Id.* § 229.13(b), (h) (allowing depositary banks to withhold availability of deposited cashier's check funds for five business days if the instrument's amount exceeds $5,000).

91. *See* § 36-4-207(a).

92. *See* Brandon & Ohre, *supra* note 3, at 228 (describing depositary banks and customers as normal candidates to bear a loss resulting from a counterfeit cashier's check).

93. § 36-4-207(a)(1)–(4). Unlike the Article 4 transfer warranties, *id.*, the Article 3 transfer warranties will extend only to subsequent transferors if the transferee—Allen—indorses the instrument. *Id.* § 36-3-416(a). Due to this conflict, when an item is deposited at a bank for collections, the Article 4 transfer warranties govern. *See id.* § 36-4-102(a).

94. *Compare id.* § 36-4-207(a) (extending all Article 4 transfer warranties to subsequent collecting banks), *with id.* § 36-3-416(a) (extending Article 3 transfer warranties to subsequent transferors only if the instrument is indorsed).

Although Allen makes transfer warranties to First Depositary and FRB, these warranties do not extend to First Payor because it is not a collecting bank.[95] Rather, First Payor receives Allen's presentment warranties because he deposited the cashier's check to obtain payment from First Payor.[96] Moreover, First Payor also receives presentment warranties from the collecting banks.[97] Consequently, Allen, First Depositary, and the FRB make the following presentment warranties to First Payor: the warrantor is entitled to enforce the cashier's check, which in effect means the cashier's check contains only authentic and authorized indorsements and no indorsements are missing; the cashier's check is unaltered; and the warrantor does not know that the drawer's signature is unauthorized.[98] However, these warranties will arise only if First Payor pays the cashier's check.[99]

F. Final Payment, the Right of Charge Back, and the Right of Refund

Although Regulation CC requires First Depositary to make the cashier's check funds available to Allen by the fifth business day after the banking day of deposit,[100] this does not mean Allen has received payment for the cashier's check. Rather, the provisional credit and its availability represent only uncollected funds, and these funds will not be considered collected until First Depositary receives final settlement from First Payor.[101] There are only three ways First Depositary can receive final payment from First Payor: First Payor pays cash for the instrument;[102] First Payor settles for the cashier's check without a statutory or contractual right to revoke settlement;[103] or First Payor provisionally settles for the cashier's check with a statutory or contractual right to revoke but fails to do so in accordance with the relevant statute or contract.[104] In other words, First Payor's settlement for the cashier's check will become final only when First Depositary receives usable funds.[105] Upon First Depositary's receipt of final settlement from First Payor, Allen's provisional credit becomes final and represents collected funds.[106] Until this occurs, Allen may be liable to First Depositary for withdrawing available but uncollected funds.[107]

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95. *See id.* §§ 36-4-105(5), -4-207(a).
96. *See id.* §§ 36-3-417(a), -4-208(a).
97. *Id.* §§ 36-3-417(a), -4-208(a).
98. *Id.* §§ 36-3-417(a)(1)–(4), -4-208(a)(1)–(3).
99. *Id.* §§ 36-3-417(a), -4-208(a).
100. Regulation CC, 12 C.F.R. § 229.13(b), (h) (2009).
101. *See* § 36-4-215(b), (d).
102. *See id.* § 36-4-215(a)(1).
103. *See id.* § 36-4-215(a)(2).
104. *Id.* § 36-4-215(a)(3); *see also id.* § 36-4-301(a)–(b) (granting multiple statutory rights to payor banks to revoke provisional settlements).
105. *See id.* § 36-4-302 official cmt. 2.
106. *See id.* § 36-4-215(d).
107. *See id.* § 36-4-214(a).

Consequently, until First Depositary receives final settlement, it retains the rights of charge back and refund.[108] The right of charge back allows First Depositary to revoke the provisional credit for the cashier's check in the trust account if the instrument is dishonored, as well as to withdraw any existing collected funds attributable to other clients if Allen has already spent a portion of the provisional credit.[109] Thus, if Allen's trust account has a balance of $1.2 million—$500,000 attributable to the provisional credit extended on the cashier's check and $700,000 in collected funds—then First Depositary may revoke the $500,000 provisional credit pursuant to its right of charge back, resulting in a going forward account balance of $700,000.[110] Moreover, if Allen has disbursed $250,000 of the provisional credit and the trust account also contains $700,000 of collected funds, then, upon dishonor, First Depositary's right of charge back allows the bank to revoke the remaining provisional credit and to withdraw the difference between the revoked provisional credit and the face amount of the dishonored instrument from collected funds.[111] Consequently, under this scenario, after First Depositary exercises its right of charge back, Allen's trust account would have a going forward balance of $450,000.[112]

While the right of charge back allows First Depositary to recover the face amount of the dishonored cashier's check from funds (collected and uncollected) in Allen's trust account, First Depositary's right of refund allows the bank to recover on the dishonored cashier's check from Allen personally.[113] Consequently, if at the time of dishonor the trust account's balance is $250,000, then First Depositary may exercise both its right of charge back and right of refund.[114] First Depositary's right of charge back entitles it to withdraw the $250,000 in the account, and its right of refund entitles it to pursue Allen personally to recover the $250,000 that could not be obtained through charge back.[115]

Although the rights of charge back and refund sound similar, there are differences. One difference is that a depositary bank that negligently handles an instrument retains the right of charge back while the bank's right of refund will be subject to the UCC's comparative fault provisions.[116] Moreover, unlike the right of refund, the right of charge back allows a depositary bank to recover collected funds from its customer immediately.[117] While the average bank customer may not view this difference as noteworthy, if the customer is a lawyer and the charge back is applied to collected funds in the lawyer's trust account,

108. *Id.*
109. *See id.*
110. *See id.*
111. *See id.*
112. *See id.*
113. *See id.*
114. *See id.*
115. *See id.*
116. *See id.* § 36-4-214(d) & official cmt. 5.
117. *Id.* § 36-4-214(a).

then the lawyer may face serious disciplinary actions.[118] Moreover, the lawyer will face civil liability resulting from his warranties, his indorser's obligation, and the depositary bank's rights of refund and charge back.

IV. CASHIER'S CHECKS ARE NOT CASH

As one commentator describes it, "[t]he 'mystique' applied to a genuine cashier's check explains in part why they have become an attractive vehicle for fraud when used for payments to consumers."[119] This mystique often arises because, under the UCC, a genuine and unaltered cashier's check "offer[s] a certain security and peace of mind that a plain old check does not."[120] As the official comments explain, a cashier's check "is taken by the creditor as a cash equivalent on the assumption that the bank will pay the check."[121] The New Jersey Superior Court summarized the reasoning of viewing cashier's checks as cash equivalents:

> A cashier's check circulates in the commercial world as the equivalent of cash. People accept a cashier's check as a substitute for cash because the bank stands behind it, rather than an individual. In effect, the bank becomes a guarantor of the value of the check and pledges its resources to the payment of the amount represented upon presentation.[122]

Evidence of the widespread assumption that cashier's checks are cash equivalents can be found not only in cases arising from the dishonor of a cashier's check but also in South Carolina's Rules of Professional Conduct.[123] Consequently, it is not surprising that payees, including attorneys, who deposit apparently authentic cashier's checks in their accounts assume there is no risk of

118. *See* S.C. APP. CT. R. 407, R. 1.15(f); *see also In re* Craig, 317 S.C. 295, 298–99, 454 S.E.2d 314, 316 (1995) (disciplining attorney for having multiple overdrafts and negative balances in his trust account); *In re* Abney, 316 S.C. 182, 184–85, 447 S.E.2d 848, 849–50 (1994) (disbarring an attorney for multiple professional conduct violations, including having a negative balance in his trust account).

119. Marsh, *supra* note 7, at 421.

120. *Id.*

121. § 36-3-411 official cmt. 1.

122. Nat'l Newark & Essex Bank v. Giordano, 268 A.2d 327, 329 (N.J. Super. Ct. Law Div. 1970) (citation omitted) (citing Scharz v. Twin City State Bank, 441 P.2d 897, 899 (Kan. 1968)); *accord* Flatiron Linen, Inc. v. First Am. State Bank, 23 P.3d 1209, 1213 (Colo. 2001) ("People accept cashier's checks as a substitute for cash because the bank, not an individual, stands behind it. By issuing a cashier's check, the bank becomes a guarantor of the value of the check and pledges its resources to the payment of the amount represented upon presentation.").

123. *See* S.C. APP. CT. R. 407, R. 1.15(f) (allowing attorneys to treat cashier's checks as collected funds with respect to funds disbursal from trust accounts).

the check being dishonored.[124] Furthermore, the depositary bank has reason to know that its customers, in making this assumption, believe that they have received a final and irrevocable settlement.[125]

Although one official comment suggests that cashier's checks are cash equivalents,[126] under limited circumstances, a bank may refuse to honor a cashier's check without incurring any liability to the holder of the instrument.[127] A bank rightfully dishonors a cashier's check when it asserts its own defenses as opposed to the remitter's defenses to the underlying transaction.[128] In addition, a bank properly dishonors a cashier's check if it joins the remitter to the action and the remitter successfully raises his defenses to payment.[129] In the words of Barkley and Barbara Clark, the UCC's cash equivalence language merely reflects the banks' inability to raise the remitter's defenses on their own:

> Cashier's checks are indeed considered to be cash equivalents, even under the Revised UCC, but that characterization goes more to the fact that the *remitter* has no right to stop payment and no right to force the issuing bank to stop payment. That is 95 percent of the cases. In the remaining 5 percent, where the issuing bank itself never received payment for the check, it should be able to refuse payment as against a holder (including the remitter) who does not qualify as a holder in due course. If the drafters of the revised UCC had intended to codify a "pure cash-equivalence" theory, under which the issuing bank has no right to stop payment under any circumstances, it would have said so clearly. Instead, we are left with Revised UCC § 3-422(c)(ii) [enacted in South Carolina Code section 36-3-411] and the Official Comment, which cut the other way.[130]

Consequently, the UCC's somewhat schizophrenic depiction of cashier's checks as cash equivalents has resulted in some courts treating them like cash and others treating them like negotiable instruments.[131] If the courts cannot clearly recognize that cashier's checks are not cash equivalents, then it is more

124. *See Flatiron Linen*, 23 P.3d at 1213 (citing Shari Barron, Comment, Bossuyt v. Osage Farmers National Bank: *Cashier's Checks Under the Iowa Uniform Commercial Code*, 73 IOWA L. REV. 521, 521 (1988)).

125. *See id.*

126. *See* § 36-3-411 official cmt. 1.

127. *See id.* § 36-3-411 & official cmt. 3; Transcon. Holding Ltd. v. First Banks, Inc., 299 S.W.3d 629, 656 (Mo. Ct. App. 2009) ("[W]e hold that First Bank could refuse payment and assert its own defenses against liability on its cashier's checks.").

128. *See* § 36-3-411 official cmt. 3.

129. *See id.*

130. 1 BARKLEY CLARK & BARBARA CLARK, THE LAW OF BANK DEPOSITS, COLLECTIONS AND CREDIT CARDS ¶ 3.06[3][b][ii] at 3-186 (rev. ed. 2009).

131. *Transcon. Holding*, 299 S.W.3d at 646–47.

than fair to assume that the average consumer will fail to make this distinction as well.

Attempting to prevent consumers from becoming victims of counterfeit cashier's check schemes, the OCC issued the following explanation for why people trust cashier's checks:

> Many consumers have become victims of scams involving a fraudulent cashier's check . . . . Cashier's checks are viewed as relatively risk-free instruments and, therefore, are often used as a trusted form of payment to consumers for goods and services.
>
> However, cashier's checks lately have become an attractive vehicle for fraud when used for payments to consumers. Although the amount of a cashier's check quickly becomes "available" for withdrawal by the consumer after the consumer deposits the check, these funds do not belong to the consumer if the check proves to be fraudulent. It may take weeks to discover that a cashier's check is fraudulent. In the meantime, the consumer may have irrevocably wired the funds to a scam artist or otherwise used the funds—only to find out later, when the fraud is detected—that the consumer owes the bank the full amount of the cashier's check that had been deposited.[132]

In addition to the OCC's consumer notification, newspapers nationwide have chronicled the increased occurrences of counterfeit cashier's check fraud schemes and bank customers' misplaced sense of security in cashier's checks.[133] However, despite these warnings, counterfeiters likely will continue to find unsuspecting prey.

Bank customers are not the only people with this erroneous belief that cashier's checks are always secure. For example, prior to the dramatic rise of counterfeit cashier's checks experienced nationwide over the past several

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132. OCC CA 2007-1, *supra* note 6.

133. *See, e.g.*, Kurt Blumenau, *A Cashier's Check Is Safe, Right? Wrong; Popular Scams Use Victims' Trust to Take Their Money*, MORNING CALL (Allentown, Pa.), July 22, 2007, at A1 (describing the increase of counterfeit cashier's check fraud schemes and potential ways banks and customers can avoid them); Sarah Colwell, *Colorado Springs Financial Briefs: April 20, 2007*, COLO. SPRINGS BUS. J., Apr. 20, 2007 (describing the FDIC's reestablishment of the Check Fraud Working Group due to the increase in counterfeit cashier's check fraud); *Feds Warn About Mailed Check Scam*, ATLANTA J.-CONST., Jan. 18, 2007, at C2 (describing government regulators' notification to bank customers of counterfeit cashier's check fraud schemes); K.C. Myers, *Bogus Island Bank Checks Used in Scam*, CAPE COD TIMES, Sept. 12, 2008 (describing a national mystery shopper scheme involving issuances of counterfeit cashier's checks); Julie Tripp, *Managing Your Money–Check Holds Can Tie Up Funds for Days*, SUNDAY OREGONIAN (Portland), Apr. 22, 2007, at D1 (explaining that bank's extended holds on cashier's checks are used to avoid counterfeit check scams).

years,[134] even a spokesman for the FDIC had viewed "'cashier's checks as being the same as cash.'"[135] Due to these misconceptions, both the FDIC and the OCC have issued warnings to national banks of the potential for counterfeit cashier's check fraud scams.[136] The OCC's bank notification describes the common scenarios these scams may take, and it requests that banks be especially vigilant when taking a cashier's check for deposit:

> [T]he consumer believes that the cashier's check is valid and deposits the check into a deposit account. After the depositary bank makes the funds available to the consumer, the consumer sends goods or, where requested, funds to the third party. Some time later, the check is returned unpaid by the paying bank because the check is discovered to be fraudulent. The depositary bank then reverses the credit to the consumer's account. As a result of this check fraud, the consumer suffers a loss of the goods sold, the funds wired, or both.
>
> It can be very difficult to detect fraudulent cashier's checks in these scenarios. Fraud perpetrators may employ various devices to delay or make more difficult the detection of the fraud. For example, the check may be drawn on a bank located in a different check processing region than the region in which the depositor is located. Fraud perpetrators also may take actions to make the transaction look as genuine as possible, such as using—and altering—a genuine check. Checks may also list the name of one bank, but contain the routing number for another bank. Similarly, the perpetrator may deliberately make part of the check illegible in order to ensure that the check must be handled manually, slowing its processing time.[137]

Through these warnings, federal regulators have placed both banks and their customers on notice of the possibility of counterfeit cashier's check fraud scams. Despite these notifications, bank customers in general, and attorneys in particular, are still falling prey to these schemes.[138] The resulting litigation often focuses on who should bear the loss or, in other words, who is the least cost avoider—the bank customer who fell for the "get rich quick" scheme or the bank that failed to warn of the potential of fraud.[139]

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134. From 2004 to 2006, the FDIC's annual number of "Special Alerts primarily concerning counterfeit cashier's checks" more than tripled from 106 in 2004 to 342 in 2006. FDIC REPORT, *supra* note 1.

135. Blumenau, *supra* note 133.

136. FDIC REPORT, *supra* note 1; OCC BULL. NO. 2007-2, *supra* note 3.

137. OCC BULL. NO. 2007-2, *supra* note 3.

138. *See, e.g.*, Lucas v. BankAtlantic, 944 So. 2d 1031, 1032 (Fla. Dist. Ct. App. 2006) (describing an attorney falling prey to a money transfer agent scheme).

139. *See, e.g.*, White v. Hancock Bank, 477 So. 2d 265, 268 (Miss. 1985) ("'[I]n my opinion the bank was not at fault . . . . The [customer], it seems, was dealing with a bunch of crooks . . . . So

V. THE NIGERIAN SCHEME AS APPLIED TO LAWYERS

A. Nigerian Scheme Hypothetical

After completing his representation of Legitimate, Allen receives an email purportedly from Louis Sketché (Louis), the president of Roi de Contrefaçon, Inc. (RCI), asking Allen to represent RCI in essentially the same fashion as he did Legitimate. Although Allen's representation of Legitimate went without incident, some recent South Carolina Bar publications have made him wary of doing collections work for unknown foreign corporations.[140] Consequently, Allen researches RCI on the internet and discovers RCI's website, www.RCI-intl.be.[141] After reviewing the website, Allen believes that RCI is an actual company. However, to be on the safe side, Allen emails Louis stating that he is willing to perform collections work for the company, but RCI must first send him an official copy of the company's articles of incorporation. Louis promptly responds to Allen's email, stating that the requested documents will be mailed shortly.

A week after receiving Louis's second email, a package arrives at Allen's office containing RCI's articles of incorporation. After a thorough examination of the document, Allen concludes that RCI is a real Belgian corporation and that he will perform collections work for its American accounts. Consequently, Allen and Louis enter into a legal services contract. Under the agreement, Allen is to contact RCI's American debtors, beginning with the largest past-due accounts, and offer to settle their debt to RCI if the debtors pay ninety percent of the amount due in the form of a cashier's, teller's, or certified check within one month. Upon receipt of these payments, Allen must deposit the checks into his trust account at First Depositary. Moreover, Allen must execute a funds transfer from this account that ultimately sends the payments, less a 2% servicing fee, to RCI's account at the Brussels branch of Banque de La Poste (BLP).

Of RCI's supposed debtors, Degrelle Importers (Degrelle), allegedly a Seattle-based importer of, among other things, waffle irons, has the largest past-due account in the amount of $10 million. Pursuant to his agreement with RCI, Allen mails a letter to Degrelle's address, which RCI had provided, stating that Degrelle must send Allen a cashier's, teller's, or certified check in the amount of $9 million within thirty days or face legal action. Three weeks after mailing the letter, Allen receives a $9 million cashier's check and a letter stating the check is payment for Degrelle's outstanding debt to RCI. The cashier's check identifies Seattle Payor Bank (SPB) as the drawer and is payable to the order of "Allen

I think it would be unjust to make the bank stand for the loss.'"). In this case, the court was dealing with a forged certified check. *Id.* at 267.

140. *See* Higgens, *supra* note 6; E-BLAST, *supra* note 6.

141. This is not a real Web site at the time of writing this Note. In addition, www.RCI.be is the Belgian Web site of an international time share company. This Note does not intend to imply that the international time share company is involved in any illegal action.

Attorney, P.A." Moreover, SPB's insignia, the letters *S*, *P*, and *B* in script over a rising sun, is on the top left corner of the instrument.

After receiving the cashier's check from Degrelle, Allen properly indorses the instrument and instructs his law clerk Lucy to deposit the check into his trust account at First Depositary. In addition, Allen requests that Lucy ask the teller how long it will take for the cashier's check to clear because he intends to wire the check proceeds to RCI's account at BLP as soon as possible. Lucy dutifully performs Allen's requests. In response to her inquiry, the teller states that First Depositary's policy is to make deposited official checks available for withdrawal the day after deposit unless the customer's account history raises suspicion. The teller then reviews the trust account's history, and seeing that it had a high average balance while never having an overdraft, the teller informs Lucy that the funds would be available to transfer the next day. Moreover, the teller adds that banks cannot dishonor cashier's checks and that Allen could treat them like cash. Hearing this, Lucy deposits the cashier's check into the trust account. Prior to the deposit, the account contained $1 million attributable to Allen's other clients. By the close of business on the day after deposit, the account has an available balance of $10 million.

Two days later, Allen goes to First Depositary to execute a funds transfer in the amount of $8,820,000 to RCI's account at BLP. Prior to executing the funds transfer, Allen asks First Depositary's branch manager whether the trust account has a sufficient balance to cover the funds transfer. She responds that the account has an available balance of $10 million. In addition, the manager reiterates the teller's statement that Allen could treat the cashier's check like cash. Satisfied with her response, Allen executes the funds transfer.[142] Two days later, First Depositary receives the cashier's check, which SPB has dishonored and returned. Accompanying the returned cashier's check is a letter from SPB stating that it had neither issued a cashier's check payable to Allen Attorney, P.A, nor had it issued a cashier's check corresponding to the check number of the instrument presented. Moreover, the letter states that SPB believes the cashier's check is a pure counterfeit, as opposed to an alteration or forgery, because SPB's insignia is

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142. The communications between Allen, Lucy, and First Depositary's employees are based on the exchanges that Charles Hughes, a bank customer, had with Nancy Smith and Milanna Shear, bank employees, in *Valley Bank of Ronan v. Hughes*, 147 P.3d 185, 188 (Mont. 2006). In his deposition, Hughes testified to having the following conversation with Smith prior to depositing the check:

> Well, my question was, how long do you have to hold money to have—how long do you have to hold these checks before they're sufficient funds; I think the bank calls them collected funds. And she said, these are official checks, Chuck. These two big ones are official checks. You will be transferring these? And I said I will be transferring a large sum. We'll have to determine next week what it will be. And she says, official checks, same as cash. You can do whatever you want to do.

Id. (internal quotation marks omitted). In addition, Smith stated "that official checks were 'just like' cashier's checks." *Id.* Moreover, faced with the same question, Shear "told Hughes to believe whatever Smith said regarding the validity of the checks." *Id.*

the words "SEATTLE PAYOR BANK" listed beneath a soaring eagle rather than its initials over a rising sun.

Upon receiving the returned cashier's check and accompanying letter from SPB, First Depositary attempts to cancel the payment order it executed two days before.[143] However, by this time, Louis has already closed RCI's account with BLP and absconded with the funds. After learning that it cannot reverse the funds transfer, First Depositary immediately exercises its right of charge back against Allen's IOLTA account in the amount of $1,180,000 (the $1 million representing Allen's other clients' funds and the $180,000 representing Allen's fee from RCI). In addition, First Depositary notifies Allen that the check has been dishonored, the bank has exercised its right of charge back, and pursuant to its right of refund, Allen is liable to the bank for the remainder of the dishonored check amount, $7,640,000.

B. Depositary Bank's Claims Against the Customer

Under the facts set forth above, First Depositary has multiple causes of action against Allen to collect the remaining $7,640,000. First, Allen is liable to the bank pursuant to its right of refund.[144] Second, because SPB neither issued the instrument nor signed it, Allen breached the authentic and authorized signature transfer warranty.[145] Third, as an indorser of a dishonored instrument, Allen is liable to First Depositary for the face amount of the cashier's check under his indorser's obligation.[146] In response to First Depositary's claims, Allen will find little solace in the UCC.

First Depositary's right of charge back is virtually unlimited, and Allen will have very little success challenging the propriety of the bank exercising that right under the UCC. Under the UCC, a depositary bank that extends a provisional credit to its customer for an instrument that is later dishonored may charge back the credit extended even if it failed to exercise ordinary care in handling the instrument.[147] Consequently, First Depositary "can enforce its right to charge back even if [its] negligence caused" the instrument to be dishonored.[148]

143. First Depositary's right and ability to cancel the payment order to BLP, along with other potential issues arising under Article 4A, are beyond the scope of this Note. That being said, after BLP, the beneficiary's bank, *see* S.C. CODE ANN. § 36-4A-103(a)(3) (2003), accepts the payment order and credits the funds to the account of RCI, the beneficiary, *see id.* § 36-4A-103(a)(2), BLP would have to agree to cancel the payment order, *see id.* § 36-4A-211(c). Because cancelling the payment order at this point is in the beneficiary bank's discretion, *id.*, it is highly unlikely that BLP would cancel First Depositary's payment order after the funds are withdrawn from RCI's account.

144. *See* S.C. CODE ANN. § 36-4-214(a) (Supp. 2009).

145. *See id.* §§ 36-3-416(a)(2), -4-207(a)(2). Because Degrelle's cashier's check was a pure counterfeit as opposed to an alteration of a valid cashier's check, Allen did not breach the unaltered instrument transfer warranty. *See id.* §§ 36-3-416(a)(3), -4-207(a)(3).

146. *See id.* § 36-3-415(a).

147. *Id.* § 36-4-214(d)(2).

148. *Id.* § 36-4-214 reporter's cmt.

Although its negligence does not affect its right of charge back, First Depositary remains liable for failing to exercise ordinary care.[149] However, the scope of First Depositary's duty under the UCC is likely limited to exercising its statutory collections obligations with ordinary care.[150] Because First Depositary satisfied these statutory requirements under these facts, Allen's statutory protection from First Depositary's charge back "is found in the general obligation of good faith."[151] If he can show the bank acted in bad faith, then his remedy will offset the charge back and potentially provide consequential damages.[152]

Moreover, First Depositary's refund, breach of transfer warranty, and indorser's liability claims against Allen will find little resistance under the UCC. Unlike First Depositary's right of charge back, these claims against Allen are subject to his claim that the bank failed to exercise ordinary care while handling the instrument.[153] Exercising "ordinary care" is defined as observing the "reasonable commercial standards" for the industry and locality of the party.[154] Furthermore, handling of an instrument as applied to banks has been interpreted as the bank's activities with respect to processing and collecting the instrument.[155] Here, Allen likely does not have a claim against First Depositary for failing to exercise ordinary care in handling the instrument.

Under these facts, First Depositary observed reasonable banking standards during the collections process for the cashier's check. First Depositary timely sent the cashier's check for collections and timely gave notice to Allen of dishonor.[156] Moreover, a majority of banks provide provisional settlements and availability for "cash items,"[157] such as the cashier's check in question. Consequently, First Depositary most likely exercised ordinary care while handling the cashier's check. Thus, Allen most likely does not have a specific statutory defense or counterclaim to offset First Depositary's refund, breach of

149. *See id.* § 36-4-214(d)(2).

150. *See id.* § 36-4-202(a).

151. *Id.* § 36-4-214 official cmt. 5.

152. *See id.* § 36-4-103(e).

153. *See id.* § 36-3-415(a) ("[A]n indorser is obliged to pay the amount due on the instrument . . . ."); *id.* § 36-4-103(e) ("The measure of damages for failure to exercise ordinary care in handling an item is the amount of the item reduced by an amount that could not have been realized by the exercise of ordinary care."); *id.* § 36-4-207(c) ("A person . . . may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach . . . ."); *id.* § 36-4-214 reporter's cmt. ("[I]f the collecting bank seeks to recover a refund from its customer . . . the customer can assert the bank's failure to exercise ordinary care as a defense . . . .").

154. *Id.* § 36-3-103(a)(9). Moreover, with respect to banks in the collections process, exercising ordinary care does not require it to physically inspect deposited instruments unless the bank's internal procedures require such an examination. *Id.*

155. *See* Valley Bank of Ronan v. Hughes, 147 P.3d 185, 191 (Mont. 2006).

156. § 36-4-202(b) ("A collecting bank exercises ordinary care . . . by taking proper action before its midnight deadline following receipt of an item, notice, or settlement.").

157. *Id.* § 36-4-214 official cmt. 1.

transfer warranty, or indorser's obligation causes of action other than the bank's failure to act in good faith.[158]

C. Bank's Bad Faith as a Defense for the Customer

1. Good Faith Under the Revised UCC

Because First Depositary likely handled the counterfeit cashier's check with ordinary care, Allen's sole defense under the UCC is to prove the bank acted in bad faith.[159] Article 1 of the UCC "imposes an obligation of good faith" in the performance of all contracts and duties that the statute governs.[160] Under South Carolina's version of Article 1, the obligation to perform in good faith requires parties only to meet a subjective "honesty in fact" standard.[161] However, the 1990 revisions to the UCC included a new definition of good faith applicable under Articles 3 and 4 that requires "honesty in fact and the observance of reasonable commercial standards of fair dealing."[162] Thus, as applied to transactions involving cashier's checks, a party must do more than simply be honest in fact to satisfy its obligation of good faith.[163]

Under the revised definition of good faith, a party must satisfy both an objective and a subjective test to fulfill its obligation of good faith.[164] To satisfy the subjective test, a party must observe "the 'pure heart and empty head' standard."[165] Consequently, a party must be honest in fact, which requires no knowledge of illegality or defects affecting the instrument.[166] However, the addition of an objective test to the good faith obligation requires "[t]he pure heart of the [party to] be accompanied by reasoning that assures conduct comporting with reasonable commercial standards of fair dealing."[167] Although

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158. *See id.* official cmt. 5 ("The customer's protection is found in the general obligation of good faith . . . .").

159. *See id.*

160. S.C. CODE ANN. § 36-1-203 (2003).

161. *See id.* § 36-1-201(19) ("'*Good faith*' means honesty in fact in the conduct or transaction concerned."); *id.* § 36-1-203 official cmt. (noting that Article 2's definition of good faith imposes an additional objective standard). In 2001, the American Law Institute approved a revised Article 1 to the UCC. Under revised Article 1, good faith "means honesty in fact *and* the observance of reasonable commercial standards of fair dealing." U.C.C. § 1-201(19) (Proposed Draft, May 2001) (emphasis added). South Carolina has not yet adopted revised Article 1. References in this Note to the revised definition of good faith refer to the Article 3 revision as opposed to the Article 1 revision.

162. S.C. CODE ANN. § 36-3-103(a)(6) (Supp. 2009); *see id.* § 36-4-104(c).

163. *See id.* § 36-3-103 official cmt. 4.

164. *Id.* ("The definition [of good faith] requires not only honesty in fact but also 'observance of reasonable commercial standards of fair dealing.'").

165. Me. Family Fed. Credit Union v. Sun Life Assurance Co. of Can., 727 A.2d 335, 340 (Me. 1999).

166. *See id.* at 341–42.

167. *Id.* at 342.

the UCC does not define "fair dealing,"[168] it does distinguish the concept of fair dealing from the idea of ordinary care:

> Although fair dealing is a broad term that must be defined in context, it is clear that it is concerned with the fairness of conduct rather than the care with which an act is performed. Failure to exercise ordinary care in conducting a transaction is an entirely different concept than failure to deal fairly in conducting the transaction. Both fair dealing and ordinary care, which is defined in Section 3-103(a)[(9)], are to be judged in the light of reasonable commercial standards, but those standards in each case are directed to different aspects of commercial conduct.[169]

Thus, to satisfy the objective prong of the good faith obligation, a party's conduct must "comport[] with industry or 'commercial' standards applicable to the transaction," and "those standards [must be] reasonable standards intended to result in fair dealing."[170] Consequently, a party may act in good faith "where it acts pursuant to . . . reasonable commercial standards of fair dealing—even if it is negligent—but may [be found to have not acted in good faith], even where it complies with commercial standards, if those standards are not reasonably related to achieving fair dealing."[171]

In *Maine Family Federal Credit Union v. Sun Life Assurance Co. of Canada*,[172] a leading case interpretating the revised definition of good faith, the Maine Supreme Court held that a jury could reasonably conclude that a bank acted in bad faith when it made provisional credit immediately available for withdrawal on three large out-of-state checks.[173] In determining the reasonable commercial standards of fair dealing in the banking industry, the court found that the issue of good faith was one of fact and that "[t]he factfinder must consider all

168. *Id.* at 342–43.

169. § 36-3-103 official cmt. 4.

170. *Me. Family*, 727 A.2d at 343.

171. *Id.*

172. 727 A.2d 335 (Me. 1999). *Maine Family* involved the life insurance proceeds of Elden Guerrette (Elden). *Id.* at 336–37. Elden's life insurance policy with Sun Life Assurance Company of Canada (Sun Life) named his three children, Daniel, Joel, and Claire, as equal beneficiaries, and upon Elden's death in 1995, each child received a check for $40,759.35 drawn on Sun Life's account at Chase Manhattan Bank in Syracuse, New York. *Id.* Sun Life's agent, Steven Hall, and his associate, Paul Richard, fraudulently induced the children to negotiate the Sun Life checks to them as an investment in Hall and Richard's company. *Id.* at 337. Richard deposited the checks into his account at Maine Family Federal Credit Union (Credit Union), which made the funds immediately available for withdrawal. *Id.* Quickly regretting their decision, the Guerrette children asked Sun Life to stop payment on the checks, which it did the day after Richard deposited the checks at the Credit Union. *Id.* The Credit Union received notice of dishonor six business days after deposit, but Richard had already withdrawn $122,278.05, representing the provisional credit given for the checks. *See id.* The Credit Union presumably charged back almost $80,000 that remained in Richard's account when the bank received notice of dishonor, and the case focused on who should be liable for the remaining $42,366.56. *See id.*

173. *Id.* at 344.

of the facts relevant to the transaction."[174] Consequently, the terms of the bank's internal policy, the law governing the transaction in question, and the parties to and size of the instrument in question were appropriate facts to consider in determining a party's good faith.[175]

With respect to the bank's internal policy, the court considered whether it set forth mandatory guidelines or created discretionary power on placing holds on deposited items.[176] The court implied that an unwritten, internal policy that provided discretionary power, especially to lower level bank employees, was indicative of the bank's bad faith.[177] Moreover, the court examined the bank's internal policy to ensure that it complied with applicable law.[178] However, the court noted that the law governing the transaction "does not itself establish [a] reasonable commercial standard of fair dealing."[179] Rather, the governing law sets the outer limits of acceptable commercial practices, but individual transactions may require a higher standard of fair dealing.[180] Thus, although not dispositive, a jury is entitled to consider Regulation CC's provisions on holding large, nonlocal checks when determining if making funds available to a customer on such a check breaches the bank's obligation of good faith.[181] After making these determinations, the court held that a jury could reasonably find that a bank breaches its duty of good faith when it fails to place a hold on a large, out-of-state check for a reasonable time.[182]

In *Maine Family*, the parties to the checks and the check amounts arguably should have raised the Credit Union's suspicions. The checks were for equal amounts, issued to three payees with the same last name, drawn on a life insurance company's account, and deposited into a third party's account that had no discernable relationship with the named payees.[183] Although these facts, without more, may not have proven that fraud was afoot, they reflected a substantial risk that the person depositing the checks may have wrongfully deprived the payees, through fraud or theft, of their payments as beneficiaries under a life insurance policy. As a result, the Credit Union had notice of facts suggesting that granting immediate availability to the funds representing the checks could further a scheme to defraud the beneficiaries. This notice of a potential scheme to defraud, though not addressed in the court's opinion, is perhaps the most compelling argument supporting the court's holding that a jury

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174. *Id.*
175. *Id.*
176. *See id.*
177. *See id.* ("Moreover, the Credit Union had no written policy explicitly guiding its staff regarding the placing of a hold on uncollected funds. Rather, the decision on whether to place a temporary hold on an account was left to the 'comfort level' of the teller accepting the deposit.").
178. *Id.* at 343.
179. *Id.* at 344.
180. *See id.*
181. *Id.*
182. *Id.*
183. *See id.* at 336–37.

analyzing the totality of the circumstances may reasonably find that a bank failed to exercise commercially reasonable standards of fair dealing when it made funds immediately available despite being legally allowed to withhold availability for a longer period.

In *In re Jersey Tractor Trailer Training Inc.*,[184] the United States Court of Appeals for the Third Circuit applied *Maine Family*'s two-step inquiry for determining whether a party's conduct comported with reasonable standards of fair dealing.[185] *Jersey Tractor Trailer* involved Wawel Savings Bank (Wawel) obtaining a security interest on all of debtor Jersey Tractor Trailer Training, Inc.'s (JTTT) "capital equipment and assets" to secure a $315,000 loan.[186] Wawel perfected this security interest when it filed a financing statement under JTTT's correct name.[187] Subsequently, JTTT entered into an agreement with a factor, Yale Factors, L.L.C. (Yale).[188] Under the JTTT–Yale agreement, JTTT promised to sell its accounts to Yale for less than face value, which directly violated the terms of the JTTT–Wawel loan agreement.[189] The accounts at issue appear to be the tuition obligations of would-be truck drivers.[190] Moreover, invoices associated with the accounts receivable were the instruments giving rise to Yale's claim.[191]

Article 9 governed JTTT's agreements with both Wawel and Yale because it applies to the sale of accounts.[192] As the buyer of accounts receivable, the JTTT–Yale agreement gave Yale a security interest in the accounts.[193] To ensure its security interest would not be subordinate to a third party's security interest, Yale retained Dun & Bradstreet to perform monthly lien searches on "Jersey Tractor Trailer Training."[194] Apparently, because the lien search omitted the word "Inc." from JTTT's name, it did not disclose Wawel's outstanding lien on the accounts receivable for "Jersey Tractor Trailer Training, Inc."[195]

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184. 580 F.3d 147 (3d Cir. 2009).

185. *Id.* at 157 ("Our inquiry, therefore, contains two steps: '[F]irst whether the conduct of the holder [of the instruments] comported with industry or "commercial" standards applicable to the transactions and, second, whether those standards were reasonable standards intended to result in fair dealing.'" (alterations in original) (quoting *Me. Family*, 727 A.2d at 343)).

186. *Id.* at 148–50.

187. *See id.* at 150 n.3.

188. *Id.* at 150.

189. *Id.*

190. *See id.*

191. *See id.* at 150–52.

192. *See* S.C. CODE ANN. § 36-9-109(a)(3) (2003). Because New Jersey adopted the revised Article 9 for secured transactions, the court refers to the revised UCC itself, rather than the specific New Jersey code sections. *See Jersey Tractor Trailer*, 580 F.3d at 149 n.2. In this Note, all references to the revised UCC are to the version found in the South Carolina Code.

193. *See Jersey Tractor Trailer*, 580 F.3d at 150–51; *see also* § 36-1-201(37) ("The term [security interest] also includes any interest of a buyer of accounts . . . .").

194. *Jersey Tractor Trailer*, 580 F.3d at 150.

195. *Id.*

Under Article 9's residual priority rule, Wawel's security interest in the accounts had priority because the bank was the first secured party to perfect its interest.[196] However, Yale argued that, as a holder in due course or a good faith purchaser of an instrument for value, its security interest in JTTT's accounts had priority.[197] Unless Yale established that it was a holder in due course or a good faith purchaser for value of the accounts, Wawel's priority in the accounts would extend to the checks as well.[198] Consequently, the central issue facing the Third Circuit was whether Yale acted in good faith.[199]

In determining whether Yale was a holder in due course, the Third Circuit applied the definition of *good faith* applicable to negotiable instruments.[200] Because the parties did not dispute that Yale acted in subjective good faith, the critical issue became whether Yale's conduct comported with "'reasonable commercial standards of fair dealing.'"[201] Applying *Maine Family*'s two-step analysis of the objective standard of good faith,[202] the court held that industry standards applicable to the transaction required Yale to conduct "a commercially reasonable lien search," which required "'using the filing office's standard search logic.'"[203] Moreover, the court determined that "[r]easonable commercial standards of fair dealing doubtlessly require a lien searcher to 'examine the results of a proper search with reasonable diligence,' and a complete absence of secured debt may be an indication that the lien search was improperly conducted."[204] Although the court asserted that "a wiser course" of action may have been for Yale to make further inquiries under the circumstances, it held that Yale's failure to do so, without more, was insufficient to find Yale did not meet "reasonable commercial standards of fair dealing."[205]

The principal impact of *Jersey Tractor Trailer* on the liability of a depositary bank in a counterfeit cashier's check scheme is the court's recognition that circumstances may require a party to take extraordinary actions to meet the objective standard of good faith.[206] For example, Article 9 notes that "[a]lthough

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196. *See id.* at 149.

197. *See id.* at 155–56.

198. *See id.* at 149.

199. *Id.* at 156.

200. *Id.* at 157 n.17; *see also* S.C. CODE ANN. § 36-9-102(b) (2003) (stating that the Article 3 definition of holder in due course, found in § 36-3-302, applies to Article 9); *id.* § 36-9-330 official cmt. 7 ("[T]o collect and retain checks that are proceeds (collections) of accounts free of a senior secured party's claim to the same checks, a junior secured party must satisfy the good-faith requirement (honesty in fact and the observance of reasonable commercial standards of fair dealing) of this subsection. This is the same good-faith requirement applicable to holders in due course.").

201. *Jersey Tractor Trailer*, 580 F.3d at 156.

202. *Id.* at 157 (quoting Me. Family Fed. Credit Union v. Sun Life Assurance Co. of Can., 727 A.2d 335, 343 (Me. 1999)).

203. *Id.* at 158 (emphasis omitted) (quoting U.C.C. § 9-506(c) (2005)).

204. *Id.* at 159 (citations omitted) (quoting *In re* Summit Staffing Polk County, Inc., 305 B.R. 347, 355 (Bankr. M.D. Fla. 2003)).

205. *Id.*

206. *See id.* at 158–59.

'good faith' does not impose a general duty of inquiry, . . . there may be circumstances in which 'reasonable commercial standards of fair dealing'" require a person taking an instrument to conduct a search for senior liens.[207] *Jersey Tractor Trailer* accepts the example of such circumstances that Article 9 sets forth[208]: because a factor is aware that a debtor may have granted a prior security interest in its accounts, the factor must conduct a commercially reasonable search to satisfy the objective good faith standard and take free of the senior secured party's claim as a holder in due course.[209] Moreover, the court suggested that under the objective standard of good faith, the scope of a factor's search varies with the extent of its notice of the risk of senior claims.[210] In essence, *Jersey Tractor Trailer* supports the argument that under the objective standard of good faith, if a person knows or should know that his handling of an instrument may result in a loss to another party, then he must take commercially reasonable steps to prevent the loss.[211] Under this interpretation of commercially reasonable standards of fair dealing, if a depositary bank has notice that its customer may be the target of a counterfeit cashier's scheme, then it would act in bad faith if it permits the customer to withdraw funds prior to receiving final settlement. Moreover, even if the customer's deposit of a large cashier's check would not raise a "red flag" with the depositary bank, the customer's request to immediately wire the check proceeds offshore should put the bank on notice of the risk of fraud.

2. *Good Faith in South Carolina*

In South Carolina, the two leading prerevision interpretations of the good faith standard are *First Federal Savings & Loan Ass'n of South Carolina v. Chrysler Credit Corp.*[212] and *Midfirst Bank, SSB v. C.W. Haynes & Co.*[213] In *Chrysler Credit Corp.*, the United States Court of Appeals for the Fourth Circuit explained that "good faith and notice of a defense go hand in hand. Although the good-faith requirement only relates to defenses to the payment of a check in question, those defenses are not limited to defenses inherent against the check itself."[214] Consequently, a party acts in bad faith when it has notice of "defenses with respect to the underlying attendant transaction."[215] Moreover, "the general standard [is] that lack of good faith is shown on actual notice *or* on knowledge of

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207. S.C. CODE ANN. § 36-9-331 official cmt. 5 (2003).
208. *See Jersey Tractor Trailer*, 580 F.3d at 156.
209. *See* § 36-9-331 official cmt. 5.
210. *See Jersey Tractor Trailer*, 580 F.3d at 159.
211. *See id.* at 156–59.
212. 981 F.2d 127 (4th Cir. 1992).
213. 893 F. Supp. 1304 (D.S.C. 1994).
214. *Chrysler Credit Corp.*, 981 F.2d at 132.
215. *Id.*

facts and circumstances that give rise to a defense or claim."[216] Thus, if a bank has actual notice of a claim or defense to the transaction underlying a negotiable instrument, then the bank acts in bad faith if it does not act upon that notice.[217]

Although a bank's notice of underlying claims or defenses may amount to subjective bad faith, a bank's negligence does not necessarily result in the same conclusion.[218] In *Midfirst Bank*, the court stated, "The fact that every policy was not strictly complied with does not seem to bear on [the bank's] notice of the claims" to the instruments at issue.[219] Moreover, "[e]ven 'negligence has no reflection on the good faith requirement . . . absent such outrageous conduct as would reflect on the issue of honesty.'"[220] Consequently, a bank acts with subjective good faith even when it fails to observe strictly its internal procedures, unless the failure is so significant it calls into question the banks honesty.[221] Thus, if a bank violates its policy requiring an officer's approval before taking certain actions with respect to specific types of instruments, then the violation alone does not establish that the bank acted with subjective bad faith.[222]

South Carolina's revision to the UCC expressly states that the addition of the objective prong to the good faith requirement "does not affect the validity of" *Midfirst Bank*'s conclusion that negligence does not establish bad faith.[223] However, it is arguable that the objective component expands the definition of "outrageous conduct [that] would reflect on the issue of honesty."[224] Specifically, if the bank violates its internal policy with respect to handling a cashier's check, then it has acted negligently, which would not independently establish bad faith.[225] However, if the policy the bank violates is commercially reasonable for similarly situated banks and the policy promotes fair dealing, then the bank may have failed the objective standard and acted in bad faith.[226] Consequently, the adoption of the objective good faith standard suggests that a bank acts in bad faith when its negligent conduct calls into question the issue of

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216. *Id.* (citing Andrea G. Nadel, Annotation, *What Constitutes Taking Instrument in Good Faith, and Without Notice of Infirmities or Defenses, to Support Holder-In-Due-Course Status, Under UCC § 3-302*, 36 A.L.R. 4th 212, 218 (1985)).

217. *See id.* at 132–33.

218. S.C. CODE ANN. § 36-3-302 reporter's cmt. (Supp. 2009) ("[P]roof of negligence does not establish a lack of good faith.").

219. Midfirst Bank, SSB v. C.W. Haynes & Co., 893 F. Supp. 1304, 1316 (D.S.C. 1994).

220. *Id.* (quoting Third Nat'l Bank in Nashville v. Hardi-Gardens Supply of Ill., Inc., 380 F. Supp. 930, 941 (M.D. Tenn. 1974)).

221. *See id.*

222. *Id.* (citing Indus. Nat'l Bank of R.I. v. Leo's Used Car Exch., Inc., 291 N.E.2d 603, 606 (Mass. 1973)).

223. § 36-3-302 reporter's cmt.

224. *Midfirst Bank*, 893 F. Supp. at 1316 (quoting *Hardi-Gardens Supply*, 380 F. Supp. at 941) (internal quotation marks omitted).

225. *See id.*

226. *See* Me. Family Fed. Credit Union v. Sun Life Assurance Co. of Can., 727 A.2d 335, 343 (Me. 1999).

fair dealing in addition to its more "outrageous conduct [that] reflect[s] on the issue of honesty."[227]

As applied to Allen's quandary, he may have a viable bad faith defense to First Depositary's claims. Like the credit union's internal policy in *Maine Family*,[228] First Depositary's procedure authorized lower level employees to determine whether to make funds available for deposited instruments. Moreover, the only framework guiding the teller's determination is his subjective suspicion of the customer rather than an express framework of rules. Consequently, a jury could find that First Depositary's availability policy was not reasonably calculated to promote fair dealing, and thus, it did not satisfy the objective good faith requirement.[229]

Although the absence of strict compliance with its internal policy may not show subjective bad faith,[230] First Depositary's receipt of multiple warnings concerning counterfeit cashier's check schemes may support a finding of bad faith.[231] These warnings put First Depositary on notice that counterfeit cashier's check schemes often involve a bank customer depositing a nonlocal check and wiring a portion of the proceeds overseas.[232] Moreover, this notice is coupled with the bank's actual knowledge that Allen intended to execute a funds transfer sending the majority of the cashier's check funds to RCI's account in Belgium. Consequently, Allen may be able to show that First Depositary had "actual notice *or* . . . knowledge of facts and circumstances that give rise to a defense or claim" on the cashier's check.[233] Upon such a showing, First Depositary's making the provisional credit immediately available for withdrawal would constitute an act of bad faith. Thus, First Depositary's liability for breaching the duty of good faith would at least offset Allen's liability to the bank.[234]

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227. *Midfirst Bank*, 893 F. Supp. at 1316 (quoting *Hardi-Gardens Supply*, 380 F. Supp. at 941) (internal quotation marks omitted).

228. *Me. Family*, 727 A.2d at 344.

229. *Id.*

230. *See Midfirst Bank*, 893 F. Supp. at 1316.

231. *See* First Fed. Sav. & Loan Ass'n of S.C. v. Chrysler Credit Corp., 981 F.2d 127, 132 (4th Cir. 1992) (citing Nadel, *supra* note 216, at 218).

232. *See* FDIC REPORT, *supra* note 1; OCC BULL. NO. 2007-2, *supra* note 3.

233. *Chrysler Credit Corp.*, 981 F.2d at 132 (citing Nadel, *supra* note 216, at 218).

234. S.C. CODE ANN. § 36-4-103(e) (Supp. 2009).

D. *Negligent Misrepresentation and Equitable Estoppel Offsetting Customer UCC Liability*

1. *Scope of the UCC's Preemption of Common Law and Equity*

Although Allen's recourse under the UCC is likely confined to claiming First Depositary acted in bad faith,[235] the common law and equity may provide a counterclaim or defense to offset his liability to the bank.[236] Specifically, the teller and manager of First Depositary's communications with Allen and Lucy may support either a negligent misrepresentation claim or an equitable estoppel defense. However, raising a common law claim arising from transactions or occurrences that the UCC substantially governs is difficult.[237] In particular, before proving the merits of a negligence cause of action or an estoppel defense, Allen must show that the UCC does not preempt these claims or defenses.[238]

The UCC expressly states its provisions do not specifically displace all claims and defenses found in the common law or equity:

> Unless displaced by the particular provisions of this act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.[239]

As the Georgia Court of Appeals stated, "'[t]he UCC does not purport to preempt the entire body of law affecting the rights and obligations of parties to a commercial transaction.'"[240] Moreover, "'the UCC does not displace the common law of tort as it affects parties in their commercial dealings except insofar as reliance on the common law would thwart the purposes of the Code.'"[241] Consequently, Allen's negligence claim or equitable estoppel defense is viable unless a specific statutory provision displaces the common law.[242] South Carolina courts have determined that "[d]isplacement occurs when one or

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235. *See id.* (limiting damages for negligence in the handling of an item to "the amount of the item reduced by an amount that could not have been realized by the exercise of ordinary care" but allowing other damages "suffered as a proximate consequence" if the bank acted in bad faith).

236. *See* Valley Bank of Ronan v. Hughes, 147 P.3d 185, 191–92 (Mont. 2006); Marsh, *supra* note 7, at 434.

237. *See* Marsh, *supra* note 7, at 434 ("There is a tension between the application of [common law] theories and the loss allocation rules established in . . . the Uniform Commercial Code.").

238. *See, e.g.*, Equitable Life Assurance Soc'y of the U.S. v. Okey, 812 F.2d 906, 908–09 (4th Cir. 1987) (applying South Carolina law in considering whether the UCC conversion statute displaced a common law negligence claim for paying on a forged indorsement).

239. S.C. CODE ANN. § 36-1-103 (2003).

240. First Ga. Bank v. Webster, 308 S.E.2d 579, 581 (Ga. Ct. App. 1983) (quoting N.J. Bank, N.A. v. Bradford Sec. Operations, Inc., 690 F.2d 339, 345 (3d Cir. 1982)).

241. *See id.* (quoting *Bradford Sec.*, 690 F.2d at 346).

242. *See Okey*, 812 F.2d at 909.

more particular provisions of the U.C.C. comprehensively address a particular subject."[243] Thus, the facts supporting Allen's negligence claim or equitable defense must fall outside of situations the UCC specifically governs.

2. *Overcoming Preemption:* Valley Bank of Ronan v. Hughes[244]

Although the issue of whether a bank employee's statements to a bank customer regarding a deposited instrument can give rise to a negligent misrepresentation claim that the UCC does not displace is novel in South Carolina, other jurisdictions have considered the issue. In *Valley Bank of Ronan v. Hughes*, the Montana Supreme Court held that common law and equitable principles govern a bank's communications to its customer about the check collections process "[b]ecause such communications are not addressed with specificity by the UCC."[245]

a. *Facts of* Valley Bank of Ronan

Valley Bank of Ronan involved a bank customer, Hughes, who "was conned by a 'Nigerian scam'" that requested "his aid in procuring agricultural equipment for import into Africa."[246] In exchange for his assistance, Hughes was promised a multimillion dollar commission.[247] Among the bogus instruments the swindlers sent him, Hughes received two official checks.[248] Prior to depositing the official checks, Hughes had a bank employee, who was both an officer and a teller, verify the validity of the instruments.[249] She told Hughes that official checks were the "'same as cash'" and that he could "'do whatever [he] want[ed] to do [with them].'"[250] Moreover, she "assured Hughes that official checks were 'just like' cashier's checks."[251] After wiring the funds to the swindler's accounts, the counterfeit instruments were returned dishonored and the bank charged back Hughes's account, resulting in the account being overdrawn.[252] To satisfy the overdraft, Hughes deposited all of his retirement savings into the overdrawn account, and he executed a promissory note secured by mortgaged property.[253]

243. Hitachi Elec. Devices (USA), Inc. v. Platinum Techs., Inc., 366 S.C. 163, 170, 621 S.E.2d 38, 41 (2005) (citing Flavor-Inn, Inc. v. NCNB Nat'l Bank of S.C., 309 S.C. 508, 511, 424 S.E.2d 534, 536 (Ct. App. 1992)); *accord Okey*, 812 F.2d at 908–11 (explaining UCC conversion statute's comprehensive coverage displaced a negligence claim under South Carolina common law for paying a forged indorsement).
244. 147 P.3d 185 (Mont. 2006).
245. *Id.* at 191.
246. *Id.* at 188.
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*
252. *See id.* at 188–89.
253. *Id.* at 189.

After Hughes failed to make payments on the note, Valley Bank of Ronan commenced foreclosure proceedings.[254] In response, Hughes raised multiple counterclaims, including a negligent misrepresentation claim arising from his conversation with the bank employee prior to depositing the counterfeit instruments.[255] The trial court granted Valley Bank of Ronan's motion for summary judgment on Hughes's negligent misrepresentation claim.[256] Basing its conclusion on its interpretation of Montana's version of UCC section 1-103,[257] as well as *Chase v. Morgan Guarantee Trust Co.*,[258] *Allen v. Carver Federal Savings and Loan Ass'n*,[259] and *Call v. Ellenville National Bank*[260] (collectively "the New York cases"), the trial court determined that on the facts presented, "the UCC preempt[ed] Hughes' equitable and common law claims."[261]

b. UCC's Definition of "Ordinary Care" and Other Jurisdictions That Support Negligent Misrepresentation and Equitable Estoppel Claims

In reversing the trial court's finding of statutory preemption, the Montana Supreme Court focused on whether Valley Bank of Ronan exercised ordinary care.[262] In doing so, the court determined that the UCC duty of ordinary care applied to some bank activities while common law duties were applicable to other bank activities.[263] Relying on the second sentence of the UCC's definition of ordinary care,[264] the court held that the UCC preempts common law claims relating to a bank's processing of checks.[265] However, the court also held that the UCC does not preempt common law claims arising from a bank's communications to its customer while it is processing checks.[266] Thus, "common law and equitable principles . . . govern the legal rights and responsibilities that

254. *Id.*
255. *Id.*
256. *Id.*
257. MONT. CODE ANN. § 30-1-103 (2009). This statute is nearly identical to South Carolina's version of UCC section 1-103. *See* S.C. CODE ANN. § 36-1-103 (2003).
258. 590 F. Supp. 1137 (S.D.N.Y. 1984).
259. 477 N.Y.S.2d 537 (App. Term 1984).
260. 774 N.Y.S.2d 76 (App. Div. 2004).
261. *Valley Bank of Ronan*, 147 P.3d at 190.
262. *Id.* at 191.
263. *Id.* at 191–92.
264. MONT. CODE ANN. § 30-3-102(g) (2009) ("In the case of a bank that takes an instrument for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably from general banking usage not disapproved by this chapter or chapter 4."). This statute is the same, in substance, as South Carolina's UCC definition of ordinary care. *See* S.C. CODE ANN. § 36-3-103(a)(9) (Supp. 2009).
265. *Valley Bank of Ronan*, 147 P.3d at 191.
266. *Id.*

apply to [the bank's] representations to [its customer], upon which [the customer] allegedly relied."[267]

In addition to finding that the trial court erred in applying the UCC's duty of ordinary care,[268] the Montana Supreme Court also came to a different understanding of the New York cases that the trial court relied on in support of preemption.[269] Although the court acknowledged that the New York cases were decided against the party making common law claims, it found they supported a "determination that common law principles apply to bank communications to a depositor inquiring about the processing of checks."[270] The *Valley Bank of Ronan* court found the following passage from the *Chase* opinion particularly enlightening:

> [B]anks have nothing to gain by misleading customers into believing that uncleared items have cleared. Indeed, banks are usually overly cautious in giving provisional credit precisely because of the uncertainty of uncollected items. A bank could be liable for a misstatement in these general circumstances if the misstatement were part of a scheme to defraud a customer in Chase's position by, for example, a conspiracy between the bank and the party to whom Chase transferred the funds. This of course is merely one example. As discussed supra, however, [the UCC charge-back provision] simply does not hold liable for charge-back a bank whose employee inadvertently in some remark misleads a customer as to the precise likelihood that an item will clear.
>
> The outcome might be different if a bank expressly informed a customer that it had made a final settlement on the account, but that is not the case here.[271]

Moreover, it found the *Allen* court also indicated a bank could be liable for negligent misrepresentations from its employees to customers about check processing information:

> We are dubious that the mere statement of a depositor that an unidentified teller told her (mistakenly) that a check had "cleared", when in fact it had not, constitutes that quantum of proof of negligence

267. *Id.*
268. *Id.* at 191–92.
269. *See id.* at 192–93.
270. *Id.* at 192.
271. *Id.* (first alteration in original) (emphasis omitted) (quoting Chase v. Morgan Guarantee Trust Co., 590 F. Supp. 1137, 1139 n.3 (S.D.N.Y. 1984)) (internal quotation marks omitted).

which will enable a customer to prevail against the bank under the circumstances disclosed here.[272]

Finally, after thoroughly noting its opposition to the *Call* court's interpretation that the term "cleared" does not mean "final settlement,"[273] the Montana Supreme Court found that *Call*'s language "left open the possibility that a bank's misrepresentation of the status of the check settlement process could lead to liability for the bank."[274]

From the New York cases, the Montana Supreme Court determined that a bank could satisfy the UCC but still be liable under the principles of common law and equity:

> In each of the above cases, the defendant bank was granted summary judgment because the plaintiff depositor failed to allege facts sufficient to impute liability to the bank. However, though the bank prevailed in each case, the analyses do not support the proposition that common law and equitable principles have been preempted by the UCC. *Instead, they intimate that, in certain circumstances, common law and equitable principles may supplement the UCC where the bank—though not violating its UCC-defined duty of ordinary care with respect to processing checks—breaches a duty to its depositor by misrepresenting the status of the check settlement process.*[275]

Consequently, the Montana Supreme Court reversed the trial court's dismissal of Hughes's negligent misrepresentation claim.[276] Moreover, it held "while Hughes bore the obligation to repay Valley Bank to satisfy the bank's right of charge-back . . . , it nevertheless is possible for Hughes to obtain a judgment to compensate him for the charge-back debt."[277]

3. *Comparison of ERISA's Preemption of State Law Claims to the UCC's Preemption of Common Law and Equity*

The Montana Supreme Court viewed Hughes's negligence claim as encompassing two different activities: "a claim made by Hughes directed toward the UCC-defined standard of ordinary care with respect to check processing (focusing purely on process), and the alleged representations made by bank

272. *Id.* (quoting Allen v. Carver Fed. Sav. & Loan Ass'n, 477 N.Y.S.2d 537, 538 (App. Term 1984)) (internal quotation marks omitted).

273. *Id.* at 193 & n.6 (quoting Call v. Ellenville Nat'l Bank, 774 N.Y.S.2d 76, 79 (App. Div. 2004)) (internal quotation marks omitted).

274. *Id.* at 193.

275. *Id.* (emphasis added).

276. *Id.*

277. *Id.* at 192.

personnel regarding the check settlement process."[278] Although South Carolina has yet to adopt this multiple activities view in the context of UCC preemption of common law claims, it has done so with regards to the Employee Retirement Income Security Act's[279] (ERISA) federal preemption of state law causes of action.[280]

Like UCC section 1-103,[281] ERISA explicitly states its preemptive nature: "[T]he provisions of this subchapter and subchapter III of this chapter *shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan* . . . ."[282] Under the United States Supreme Court's interpretation of ERISA's preemptive language, "the phrase 'relate to' should be given its broad, common-sense meaning such that a state law 'relates to' an employee benefit plan . . . if it has a 'connection with or reference to' such a plan."[283] Despite the "conspicuous . . . breadth" of ERISA's preemptive language,[284] South Carolina courts have found state negligence claims do not "relate to" an employee benefits plan when those claims arise from misrepresentations concerning the terms of a plan or incompetent advice offered in connection to the administration of the plan.[285]

As compared to the ERISA preemptive language, the UCC preemption provision has a narrow scope. The plain language of the ERISA statute creates the presumption of federal preemption of state law claims concerning employee benefit plans.[286] In contrast, common law and equitable principles govern commercial transactions "[*u*]*nless displaced by* [*a*] *particular provision*[]" of the UCC.[287] Consequently, ERISA preempts all state law claims arising from activities that have "a 'connection with or reference to'" an employee benefits plan,[288] while the UCC merely displaces common law and equitable claims based on activities that it comprehensively addresses.[289]

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278. Marsh, *supra* note 7, at 431 (citing *Valley Bank of Ronan*, 147 P.3d at 191).

279. 29 U.S.C. §§ 1001–1461 (2006).

280. *See* Med. Park OB/GYN, P.A. v. Ragin, 321 S.C. 139, 143–46, 467 S.E.2d 261, 263–65 (Ct. App. 1996).

281. S.C. CODE ANN. § 36-1-103 (2003).

282. 29 U.S.C. § 1144(a) (emphasis added).

283. *Ragin*, 321 S.C. at 143–44, 467 S.E.2d at 264 (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987)).

284. FMC Corp. v. Holliday, 498 U.S. 52, 58 (1990).

285. *Ragin*, 321 S.C. at 145, 467 S.E.2d at 264–65; Heaitley v. Brittingham, Dial & Jeffcoat, 320 S.C. 466, 469–70, 465 S.E.2d 763, 765 (Ct. App. 1995).

286. *See Ragin*, 321 S.C. at 143, 467 S.E.2d at 263 ("Without question, Congress has expressed its intent to occupy the field of employee benefit plans to the exclusion of the states.").

287. S.C. CODE ANN. § 36-1-103 (2003) (emphasis added).

288. *Ragin*, 321 S.C. at 143–44, 467 S.E.2d at 264 (quoting *Pilot Life Ins.*, 481 U.S. at 47).

289. *See* Hitachi Elec. Devices (USA), Inc. v. Platinum Techs., Inc., 366 S.C. 163, 170, 621 S.E.2d 38, 41 (2005) (citing Flavor-Inn, Inc. v. NCNB Nat'l Bank of S.C., 309 S.C. 508, 511, 424 S.E.2d 534, 536 (Ct. App. 1992)); *see also* Equitable Life Assurance Soc'y of the U.S. v. Okey, 812 F.2d 906, 908–11 (4th Cir. 1987) (holding that UCC conversion statute displaced negligence claim under South Carolina common law for paying a forged indorsement).

Accordingly, South Carolina's interpretation that ERISA does not bar state law negligence claims concerning employee benefits plans strongly supports a similar finding that the UCC does not displace Allen's common law and equitable claims. Specifically, a misrepresentation made during the creation of an employee benefits plan can serve as the basis for a negligence claim despite its logical relationship to the plan.[290] Similarly, the bank's misrepresentations to Allen occurred during the creation of a comprehensively covered UCC topic—the check collections process. Moreover, like a plan administrator's state law claim that does not challenge its federally defined responsibilities,[291] Allen's negligent misrepresentation claim does not challenge his or the bank's statutory liability. Rather, his claim merely seeks to make First Depositary liable for its employees' false and misleading statements, which no UCC provision specifically addresses. Therefore, in light of other jurisdictions' allowance for negligent misrepresentation claims on similar facts and South Carolina's interpretation of ERISA's preemption provision, a South Carolina court should not bar his common law claims and equitable defenses due to UCC displacement.

4. *Negligent Misrepresentation and Equitable Estoppel in South Carolina*

In these circumstances, the most likely common law cause of action will be the bank customer's negligent misrepresentation claim against the depositary bank based upon the communications surrounding the deposit and funds transfer.[292] Moreover, some courts have allowed customers to assert an estoppel defense to offset their liability to the bank.[293] In South Carolina, for a customer's negligent misrepresentation claim to succeed, he must prove by a preponderance of the evidence the following six elements:

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290. *Ragin*, 321 S.C. at 145–46, 467 S.E.2d at 265 ("Indeed, the claims relate to advice given prior to the implementation of the Plan.").

291. *Id.* at 146, 467 S.E.2d at 265.

292. *See* Valley Bank of Ronan v. Hughes, 147 P.3d 185, 191–92 (Mont. 2006) (recognizing possible negligent misrepresentation claim arising from bank employee's communications to customer concerning deposited official check).

293. *See, e.g.*, First Nat'l Bank of Denver v. Ulibarri, 557 P.2d 1221, 1223 (Colo. App. 1976) (estopping bank from asserting indorser's liability claim when bank employee misrepresented to customer that check was finally settled); First Ga. Bank v. Webster, 308 S.E.2d 579, 582 (Ga. Ct. App. 1983) (holding sufficient evidence existed for a jury to find that bank was estopped from asserting refund and indorser's liability claims when customer detrimentally relied on bank employee's statement that deposited check was "good"); Burke v. First Peoples Bank of N.J., 412 A.2d 1089, 1090–93 (N.J. Cumberland County Ct. 1980) (considering whether depositary bank was estopped from asserting warranty claims and its right to charge back when bank employee misrepresented facts within the bank's knowledge and holding that factual issues precluded granting summary judgment in bank's favor).

> (1) the defendant made a false representation to the plaintiff, (2) the defendant had a pecuniary interest in making the statement, (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff, (4) the defendant breached that duty by failing to exercise due care, (5) the plaintiff justifiably relied on the representation, and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation.[294]

Likewise, South Carolina courts also require a party to establish six elements for a successful equitable estoppel defense:

> The essential elements of estoppel as related to the party estopped are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; [and] (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, the essential elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) prejudicial change in position.[295]

Comparing the two, both require the claimant to show essentially the same facts: the defendant made a false representation to the claimant; the defendant knew or should have known the actual facts and that the claimant would rely on his representation of the facts; the claimant's reliance on the defendant's representation was justified; and the claimant's reliance was to his detriment.

To establish that the defendant made a false representation to the claimant, the defendant's statement "must relate to a present or pre-existing fact and be false when made,"[296] rather than being a "mere statement of opinion."[297] The teller's and branch manager's statements to Lucy and Allen that cashier's checks could be treated "just like cash" are statements of preexisting fact rather than opinion. The plethora of warnings concerning cashier's check fraud schemes the bank received and the customers' misplaced reliance on cashier's check

294. Turner v. Milliman, 381 S.C. 101, 112–13, 671 S.E.2d 636, 642 (Ct. App. 2009) (quoting McLaughlin v. Williams, 379 S.C. 451, 456, 665 S.E.2d 667, 670 (Ct. App. 2008)).

295. Frazier v. Smallseed, 384 S.C. 56, 65–66, 682 S.E.2d 8, 13 (Ct. App. 2009) (alteration in original) (quoting S. Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth., 311 S.C. 29, 33, 426 S.E.2d 748, 750 (1993)) (internal quotation marks omitted).

296. Spires v. Acceleration Nat'l Ins. Co., 417 F. Supp. 2d 750, 755 (D.S.C. 2006) (citing AMA Mgmt. Corp. v. Strasburger, 309 S.C. 213, 222, 420 S.E.2d 868, 874 (Ct. App. 1992)).

297. *AMA Mgmt. Corp.*, 309 S.C. at 222, 420 S.E.2d at 874 (citing Winburn v. Ins. Co. of N. Am., 287 S.C. 435, 339 S.E.2d 142 (Ct. App. 1985)).

concretely establish that cashier's checks are not cash.[298] Consequently, First Depositary's employees' comparison of cashier's checks to cash was a false representation relating to an actual fact.

Proving the knowledge requirement can be done in two ways. For the negligent misrepresentation claim, this requirement is established if "the defendant ha[s] a pecuniary interest in making the statement" and a duty to provide truthful information to the claimant.[299] In South Carolina, a party is deemed to have a pecuniary interest in a statement if "the statement was made in the course of the [party's] business, profession, or employment."[300] This rule applies even if the party did not receive consideration for making the statement.[301] Moreover, a party with a pecuniary interest in a transaction has the duty to exercise reasonable care when giving information relating to the transaction.[302] A party may breach this duty if it fails to ascertain the financial conditions surrounding the underlying obligations of the transaction.[303] Similarly, a showing of the defendant's pecuniary interest and his duty to communicate truthfully may support an equitable estoppel defense.[304] Indeed, under the test for equitable estoppel, the defendant need not have actual knowledge of the facts or a duty to communicate truthfully.[305] Rather, the defendant must merely have constructive knowledge of the truth and an expectation that the plaintiff will rely on the misrepresentation.[306]

Here, the bank employees' misrepresentations to Allen and Lucy occurred during the deposit of the cashier's check and the execution of the funds transfer, which are clearly parts of First Depositary's normal course of business. As such, First Depositary had a pecuniary interest in making these statements, which obligated the bank to exercise reasonable care when giving information related to the transactions. Consequently, even if the bank employees did not have actual knowledge of the liabilities and nature of cashier's checks, they failed to exercise

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298. *See* FDIC REPORT, *supra* note 1 ("The growth in financial fraud is troubling. Of particular concern is the significant increase in the number of counterfeit cashier's and official checks . . . ."); OCC BULL. NO. 2007-2, *supra* note 3 (describing cashier's checks as vehicles for fraud).

299. *See Turner*, 381 S.C. at 112, 671 S.E.2d at 642 (quoting *McLaughlin*, 379 S.C. at 456, 665 S.E.2d at 670) (internal quotation marks omitted).

300. *AMA Mgmt. Corp.*, 309 S.C. at 223, 420 S.E.2d at 874 (citing *Winburn*, 287 S.C. at 442, 339 S.E.2d at 146–47).

301. *Id.* (citing *Winburn*, 287 S.C. at 442, 339 S.E.2d at 146–47).

302. Osborn v. Univ. Med. Assocs. of the Med. Univ. of S.C., 278 F. Supp. 2d 720, 735 (D.S.C. 2003) (citing *Winburn*, 287 S.C. at 441, 339 S.E.2d at 146).

303. *See id.*

304. *See* S. Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth., 311 S.C. 29, 33, 426 S.E.2d 748, 751 (1993) ("Estoppel by silence arises where a person owing another a duty to speak refrains from doing so and thereby leads the other to believe in the existence of an erroneous state of facts." (citing Ridgill v. Clarendon County, 192 S.C. 321, 326, 6 S.E.2d 766, 768 (1939))).

305. *See* Frazier v. Smallseed, 384 S.C. 56, 65, 682 S.E.2d 8, 13 (Ct. App. 2009) (citing *S. Dev. Land & Golf*, 311 S.C. at 33, 426 S.E.2d at 750).

306. *Id.*

reasonable care because they should have known that cashier's checks were not cash equivalents. Allen can probably prove the reliance requirement as well. First Depositary's employees expected Allen to act on their misrepresentations because he and Lucy both stated to the bank's employees that the purpose of the communications was to determine when Allen could wire the funds to RCI. Thus, Allen can likely establish that First Depositary knew the true facts with respect to its false statement and that it expected Allen to rely on that misrepresentation, which would support both a negligent misrepresentation claim and an equitable estoppel defense.

Although Allen may likely show that First Depositary knew or should have known that it communicated false information to him and that he relied on it, it may be difficult for Allen to prove that his reliance was justified. Determining whether a party justifiably relied on a representation "involves the evaluation of the totality of the circumstances."[307] In this determination, South Carolina courts examine the parties' relative positions and relations.[308] Thus, a plaintiff's reliance is justifiable "'only if the relationship of the parties is such that the defendant occupies a superior position to the plaintiff with respect to knowledge of the truth of the statement made.'"[309] Consequently, a party cannot justifiably rely on a representation he actually knows is false.[310] Moreover, reliance is unjustified if a party "'could ascertain [the truth] on his own in the exercise of due diligence.'"[311]

Here, Allen's profession may prevent him from showing that he justifiably relied on First Depositary's misrepresentations. As an attorney, Allen is ethically obligated to represent his clients competently, which requires him to have legal knowledge pertaining to the matter at issue.[312] Consequently, his representation of Legitimate most likely required him to ascertain the potential risks attributable to cashier's checks and wiring their proceeds overseas.[313] Thus, even though no attorney–client relationship may have formed between Allen and RCI giving rise to an ethical obligation,[314] Allen likely violated this obligation when he did not

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307. West v. Gladney, 341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct. App. 2000) (citing Elders v. Parker, 286 S.C. 228, 233, 332 S.E.2d 563, 567 (Ct. App. 1985)).

308. *Id.* (quoting *Elders*, 286 S.C. at 233, 332 S.E.2d at 567).

309. Hit Prods. Corp. v. Anchor Fin. Corp., 111 F. Supp. 2d 723, 727 (D.S.C. 1999) (quoting Harrington v. Mikell, 321 S.C. 518, 522, 469 S.E.2d 627, 629 (Ct. App. 1996)), *aff'd*, 215 F.3d 1318 (4th Cir. 2000) (unpublished table decision).

310. *Id.* (citing *Harrington*, 321 S.C. at 522, 469 S.E.2d at 629) ("Reliance is not reasonable if the plaintiff knows the truth of the matter misrepresented.").

311. *West*, 341 S.C. at 134, 533 S.E.2d at 337 (quoting AMA Mgmt. Corp. v. Strasburger, 309 S.C. 213, 223, 420 S.E.2d 868, 874 (Ct. App. 1992)).

312. S.C. APP. CT. R. 407, R. 1.1.

313. *Id.* cmt. 5 ("Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.").

314. It is arguable that no attorney–client relationship arose between Allen and RCI because it is unlikely that RCI actually expected Allen to provide any actual legal representation or sought legal advice from him. *See* Marshall v. Marshall, 282 S.C. 534, 539, 320 S.E.2d 44, 47 (Ct. App.

fully discover the risks associated with his representation of Legitimate.[315] Although violations of ethical rules normally do not "give rise to a cause of action against a lawyer nor should [they] create any presumption in such a case that a legal duty has been breached,"[316] whether Allen exercised due diligence is an issue of his conduct rather than an issue of whether First Depositary has a claim against him or whether he had a legal duty. Consequently, his failure to ascertain the true legal character of cashier's checks may be used as evidence that he failed to exercise due diligence.[317] Therefore, Allen's reliance on First Depositary's misrepresentations may have been unjustified, which would be fatal to his negligent misrepresentation claim and his equitable estoppel defense.[318] Although Allen's non-UCC claims may fail because of the professional standard for competent representation, the typical bank customer's non-UCC claims will not have to overcome this hurdle.

VI. ETHICAL ISSUES ARISING FROM A NIGERIAN SCHEME

A. Application of South Carolina Rule 1.15(f)

In addition to possibly facing civil liability to First Depositary, Allen may face serious disciplinary sanctions for the charge back against his trust account. South Carolina's ethics rule concerning safekeeping of client's property permits attorneys to disburse funds from an account containing multiple clients' funds only if "the funds to be disbursed have been deposited [into their trust] account and are collected funds."[319] However, the definition of "collected funds" in the ethics context differs from the UCC concept of receipt of final settlement.[320] In the ethics arena, collected funds encompass not only funds that have been finally settled, but also the following items, which constitute "collected funds equivalents":

> deposits treated by the depository institution as equivalent to cash, properly endorsed government checks, certified checks, cashiers checks or other checks drawn by a depository institution, and any other instrument payable at or through a depository institution, if the amount

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1984) ("A person attains the status of a 'client' when that person seeks legal advice by communicating in confidence with an attorney for the purpose of obtaining such advice." (citing *In re* Colocotronis Tanker Sec. Litig., 449 F. Supp. 828, 831 (S.D.N.Y. 1978))). Instead, RCI sought only to defraud Allen.

315. S.C. APP. CT. R. 407, R. 1.1.

316. *Id.* Scope ¶ 7.

317. *See id.* ("[S]ince the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.").

318. *See supra* notes 294–95 and accompanying text.

319. S.C. APP. CT. R. 407, R. 1.15(f).

320. *See* S.C. CODE ANN. § 36-4-215 (Supp. 2009) (establishing UCC's concept of final settlement).

of such other instrument does not exceed $5,000 and the lawyer has reasonable and prudent belief that the deposit of such other instrument will be collected promptly.[321]

Moreover, because personal checks are the only items restricted to a $5,000 maximum amount, all the other listed instruments, including cashier's checks, are collected funds equivalents unrestricted in amount.[322] In addition, an attorney disbursing unrestricted collected funds equivalents need not have a reasonable belief that the unrestricted collected funds equivalents will in fact be collected.[323] If an attorney disburses any collected funds equivalent and no actual collection occurs, then the attorney must deposit replacement funds within five working days of the notice of noncollection.[324]

As applied to Allen's predicament, South Carolina's ethics rules require Allen to deposit $8,820,000 into the trust account within five business days of learning Degrelle's cashier's check was dishonored. Although some South Carolina lawyers may have this much cash at their personal disposal, it would be fair to assume that Allen and the average South Carolina attorney does not. Consequently, like the defendant in *Valley Bank of Ronan*, Allen most likely will have to deposit his personal savings into the trust account and issue a promissory note to First Depositary secured by Allen's property for the remainder of the overdraft.[325] However, due to the size of the debt, it is also possible that First Depositary may view a promissory note as too risky or that Allen simply does not have enough unencumbered property to secure such a note. Assuming that Allen and First Depositary do not reach a settlement agreement within five business days, Allen has violated his ethical obligation to safeguard his client's property.[326]

As a result, on the sixth day after receiving notice that Degrelle's cashier's check was dishonored, Allen will violate the South Carolina Rules of Professional Conduct because he has not replaced the uncollected funds in his trust account.[327] Even though Allen will be subject to discipline,[328] he should

321. S.C. APP. CT. R. 407, R. 1.15(f).

322. *See id.*

323. *See id.*

324. *Id.*

325. *See* Valley Bank of Ronan v. Hughes, 147 P.3d 185, 189 (Mont. 2006).

326. *See* S.C. APP. CT. R. 407, R. 1.15(f).

327. *See id.*

328. *Id.* R. 413, R. 7(a)(1). The South Carolina Supreme Court "'has made it abundantly clear that an attorney is charged with a special responsibility in maintaining and preserving the integrity of trust funds.'" *In re* Houston, 382 S.C. 164, 167, 675 S.E.2d 721, 723 (2009) (per curiam) (quoting *In re* Padgett, 290 S.C. 209, 211, 349 S.E.2d 338, 338 (1986) (per curiam)). Because Allen's misconduct involved breaching this special responsibility, he could face severe sanctions, including disbarment, suspension, or public reprimand. S.C. APP. CT. R. 413, R. 7(b). Moreover, Allen's sanctions will likely require him to reimburse his clients who lost money as a result of his misconduct. *Id.* R. 7(b)(7).

self-report his violation.[329] Although Allen's misconduct is arguably insufficient to warrant another lawyer at his firm reporting him,[330] the disciplinary committee eventually will learn of the violation. Specifically, if Allen's other clients do not report him for not protecting the funds they gave him in trust, then First Depositary will almost assuredly make note of the charge back in its IOLTA notification to the state bar foundation.[331]

In addition to accepting that someone will inevitably report his violation, if Allen self-reports this violation, it may reduce the disciplinary sanctions he will receive. In determining the appropriate disciplinary sanctions, the South Carolina Supreme Court views whether the attorney self-reports his violation as a significant factor.[332] Moreover, the court has recently held that self-reporting an ethics violation, along with cooperating with the disciplinary investigation, may reduce the severity of the sanctions provided the attorney has no prior violations.[333] Consequently, to avoid suspension or disbarment, Allen should not

329. *Compare In re* Gray, 381 S.C. 406, 414, 673 S.E.2d 442, 446 (2009) (per curiam) (suspending attorney for nine months after noting that attorney never self-reported his misconduct), *with In re* Lee, 370 S.C. 501, 503–05, 636 S.E.2d 624, 625–26 (2006) (per curiam) (suspending attorney for 180 days after noting that attorney self-reported his violation and cooperated with the disciplinary committee).

330. *See* S.C. APP. CT. R. 407, R. 8.3(a). Although "[s]elf regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation," *id.* cmt. 1, a lawyer is not obligated to report every violation, *id.* cmt. 3. Rather, the violations a lawyer must report are those that he "*knows* that another lawyer has committed" and that "raise[] a *substantial* question as to [the other] lawyer's honesty, trustworthiness or fitness as a lawyer." *Id.* R. 8.3(a) (emphasis added). Consequently, a lawyer's reporting obligation under this rule is limited "to those offenses that a self regulating profession must vigorously endeavor to prevent." *Id.* cmt. 3. Here, Allen's violation does not reflect on his honesty or trustworthiness. Thus, if this violation were to trigger another lawyer's reporting obligation, then it would have to reflect on Allen's "fitness as a lawyer." *Id.* R. 8.3(a). Because a "measure of judgment is . . . required in" determining whether to report, *id.* cmt. 3, another lawyer's failure to report Allen's violation may not give rise to a violation of the rules if the other lawyer felt in good faith that Allen's violation did not reflect on his fitness to practice. However, as noted above, the South Carolina Supreme Court "'has made it abundantly clear that an attorney is charged with a special responsibility in maintaining and preserving the integrity of trust funds.'" *In re Houston*, 382 S.C. at 167, 675 S.E.2d at 723 (quoting *In re Padgett*, 290 S.C. at 211, 349 S.E.2d at 338). Consequently, the disciplinary committee may find that Allen's violation was an "offense[] that a self regulating profession must vigorously endeavor to prevent," S.C. APP. CT. R. 407, R. 8.3 cmt. 3, and require lawyers who know of Allen's violation to report it.

331. *See* S.C. APP. CT. R. 412(h). Moreover, if any checks drawn on Allen's trust account are dishonored for insufficient funds, then First Depositary will be obligated to report this occurrence to the Commission on Lawyer Conduct. *Id.* R. 407, R. 1.15(h) (requiring attorneys to direct financial institutions to report to ethics commission when instruments drawn on trust accounts are dishonored for insufficient funds).

332. *Compare In re Gray*, 381 S.C. at 414, 673 S.E.2d at 446 (suspending attorney for nine months who did not self-report overbilling), *with In re Lee*, 370 S.C. at 504–05, 636 S.E.2d at 625–26 (suspending attorney for 180 days who self-reported overbilling).

333. The South Carolina Supreme Court expressed this sentiment in the following way:

> The misconduct reported in this opinion would normally warrant the imposition of a suspension from the practice of law. However, because respondent self-reported his misconduct to [the Office of Disciplinary Counsel], fully cooperated with the disciplinary

only self-report his violation, but also fully cooperate with the disciplinary investigation. Furthermore, even if Allen avoids disbarment or suspension, he will likely have to reimburse any of his clients who were financially injured as a result of his misconduct and possibly pay the costs of the disciplinary proceedings.[334]

B. Policy Rationale of Rule 1.15(f)

The genesis of South Carolina's rule allowing lawyers to disburse deposited collected funds equivalents arose from issues surrounding real estate closings.[335] Commonly, lawyers conducting real estate closings must "table fund" a portion of the closing costs.[336] Table funding is the "practice whereby a mortgage loan is funded at settlement by an advance of loan funds and a contemporaneous assignment of the loan is made to the person advancing the funds."[337]

In the normal table funding scenario, a "lawyer . . . conducting the closing [has] already confirmed the deposit (via verified and documented wire transfer) of some of the funds to be disbursed while having just received (in the form of collected fund equivalents which are not yet deposited) the balance of the funds to be disbursed."[338] In this situation, the closing attorney is permitted to disburse funds representing the confirmed deposit, but he may not disburse funds from his trust account representing the table funds until those funds are deposited.[339] Consequently, the rules merely require the closing attorney to deposit table funds that are collected funds equivalents prior to disbursing trust funds.[340] Thus, if a real estate attorney does not receive a verified and documented receipt of a wire transfer for all of the funds needed to close the transaction, but he does receive a cashier's check for the balance, then he can simply have the cashier's check deposited into his trust account on the closing date and disburse all of the necessary funds from that account.[341]

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investigation, and has served the Bar of this State for more than thirty years with no prior disciplinary history, we find that a public reprimand is warranted.

In re Fayssoux, 381 S.C. 637, 643, 675 S.E.2d 428, 431 (2009) (per curiam).

334. *See* S.C. APP. CT. R. 413, R. 7(b)(7)–(8).

335. *See, e.g.*, S.C. Bar Ethics Advisory Comm., Op. 06-03 (2006), *available at* http://www.scbar.org/member_resources/ethics_advisory_opinions/&id=631 (addressing whether a closing attorney can table fund a "transaction to the extent [the closing attorney] has received 'collected funds' via verified and documented wire transfer or via deposit of 'cash equivalents'").

336. *See id.*

337. OFFICE OF THE COMPTROLLER OF THE CURRENCY, INTERPRETIVE LETTER NO. 1002, at 2 (2004), *available at* http://www.occ.treas.gov/interp/aug04/int1002.pdf.

338. S.C. Bar Ethics Advisory Comm., Op. 06-03 (2006), *available at* http://www.scbar.org/member_resources/ethics_advisory_opinions/&id=631.

339. *Id.*

340. *See id.* ("Rule 1.15(f) neither explicitly nor implicitly prohibits a partial table funding provided that the funds so disbursed are collected funds that have been deposited into the account from which the disbursements are being made.").

341. *See id.*

Although Rule 1.15 benefits real estate closings, its general application to all trust account disbursements is problematic. The forms of payment the rule lists as unrestricted collected funds equivalents incorrectly implies cashier's and other bank checks (i.e., teller's and certified checks) can safely be treated as collected funds.[342] Unlike the other forms of unrestricted collected funds equivalents, bank checks are subject to dishonor or stop payment orders, which would prevent the deposited instrument from actually being collected.[343] Moreover, bank checks are more susceptible to counterfeiting, forgeries, and alterations than the other forms of collected funds equivalents.[344] In comparison, there are far fewer government agencies that issue government checks than there are banks that issue bank checks.[345] With more options to choose from, common sense suggests that a counterfeiter armed with modern imaging technology is more likely to find a bank check with weak security features than a similarly infirm government check. Furthermore, although it is possible for a counterfeiter to create a fake funds transfer, it is improbable that this could be done at the neighborhood Kinko's like a counterfeit bank check.

Viewed in light of the potential risks associated with bank checks, they appear more like personal checks than the other unrestricted collected funds equivalents. However, under Rule 1.15, personal checks and bank checks are treated differently.[346] In South Carolina, a lawyer may treat a deposited personal check as collected funds if the check "does not exceed $5,000 and the lawyer has reasonable and prudent belief that the deposit of such other instrument will be collected promptly."[347] If these same requirements were applied to bank checks, then they may help prevent a lawyer from becoming a victim to a counterfeiter's scheme. In particular, the $5,000 limitation has the potential to reduce significantly the negative impact those counterfeit schemes create.[348] Moreover,

342. *See* S.C. APP. CT. R. 407, R. 1.15(f).

343. *See* S.C. CODE ANN. § 36-3-411 (Supp. 2009). A funds transfer also may be reversed, but reversal would require the attorney's bank to agree to the reversal, which seems unlikely without first obtaining the attorney's consent. *See* S.C. CODE ANN. § 36-4A-211(c)(2) (2003). In addition, once a check is certified, the depositor may treat the certified check as collected funds because the payor bank is obligated to pay the check. S.C. CODE ANN. § 36-3-409(a), (d) (Supp. 2009). Although it is plausible that a government check may be dishonored, if a United States government check, which is the predominant government check used in the United States, is dishonored, then the state of the nation's economy is probably of more concern to the depositor than whether he is facing disciplinary sanctions.

344. *See* OCC BULL NO. 2007-2, *supra* note 3 (describing risks associated with cashier's and other bank checks).

345. Assuming that each state and the federal government has fifty agencies that issue government checks, then as of May 11, 2010, there are over 5,000 more FDIC-insured institutions that could issue checks than government agencies. *See* FDIC: Institution Directory, http://www2.fdic.gov/idasp/index.asp (last visited May 11, 2010).

346. *See* S.C. APP. CT. R. 407, R. 1.15(f).

347. *Id.*

348. Many cashier's check fraud schemes involve amounts that exceed $5,000. *See, e.g.*, United States v. Blood, 435 F.3d 612, 616 (6th Cir. 2006) (describing fraudulent investing scheme involving over $1.5 million of counterfeit cashier's checks); United States v. Himler, 355 F.3d 735,

the South Carolina Bar's Ethics Advisory Committee's words of caution concerning treating personal checks as collected funds are equally applicable to bank checks:

> [L]awyers should exercise great caution in accepting [personal checks] as collected funds equivalents items . . . if $5000 or less in amount. The Committee believes that that particular collected funds equivalent should be used only in rare cases to accommodate last minute changes to closing statements or similar unforeseen circumstances and that it should not be treated as an indication that amounts less than $5000 are insignificant.[349]

Thus, considering bank checks' infirmities, lawyers should treat them as collected funds equivalents only in similar rare cases where the lawyer knows the actual identity of the party transferring the instrument and waiting for actual collection is infeasible.

VII. CONCLUSIONS AND RECOMMENDATIONS

Traditional negotiable instrument law and the UCC's loss apportionment doctrines were formed contemplating forgeries and alterations.[350] Yet modern advancements in commerce and imaging technology have made pure counterfeits a common component of recent check fraud cases.[351] This trend has strained the UCC's loss apportionment rules, although not necessarily their underlying reasoning of holding the least cost risk avoider accountable for the loss.

Despite numerous warnings to both customers and banks, these schemes continue to find unsuspecting victims. These victims often fall for the scheme due to their misconception that cashier's checks are the same as cash. Although banks have more knowledge concerning the true character of cashier's checks in comparison to the average customer, the UCC burdens the customer with the loss from these schemes unless the bank acted in bad faith.

Even when the bank has acted in good faith, depending on the facts, the customer may have a viable common law or equitable claim to offset his statutory liability. Often these non-UCC causes of action arise from communications between the bank and the customer regarding whether the deposited cashier's check is "good." However, if the customer is an attorney, then his ethical duty to represent his clients competently may prevent him from

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737 (3d Cir. 2004) (describing fraudulent real estate purchase involving $195,000 of counterfeit cashier's checks); Valley Bank of Ronan v. Hughes, 147 P.3d 185, 188 (Mont. 2006) (describing Nigerian scheme involving $1.5 million in counterfeit bank checks).

349. S.C. Bar Ethics Advisory Comm., Op. 06-03 (2006), *available at* http://www.scbar.org/member_resources/ethics_advisory_opinions/&id=631.

350. *See* Marsh, *supra* note 7, at 433.

351. *Id.*

justifiably relying on the bank's misrepresentations. Yet for the average customer, "[w]here banks and bank employees fall short and are responsible for the customer's confusion, it is appropriate to allow claims of negligent misrepresentation and [equitable] estoppel."[352]

Moreover, in addition to the civil liability, a South Carolina lawyer will owe to the bank, he will also face disciplinary sanctions for violating Rule 1.15(f). However, Rule 1.15(f) enables a lawyer to fall victim to these counterfeit schemes because it allows him to disburse uncollected funds. Consequently, if the South Carolina Bar wishes to prevent its members from facing professional and civil liabilities arising from counterfeit cashier's checks, then it should petition the South Carolina Supreme Court to change Rule 1.15(f) so that it restricts all collected funds equivalents similar to the restrictions placed on personal checks.

In addition, there are several steps South Carolina lawyers may take to prevent being exposed to counterfeit cashier's check schemes. Primarily, the attorney will not face liability to the bank or suffer disciplinary sanctions if he waits for final settlement before disbursing. If it is absolutely infeasible to wait for final settlement, then the attorney should contact the bank identified as the drawer on the check to verify the instrument's authenticity.[353] When making this call, the attorney should independently find the drawer bank's contact information because a counterfeiter will likely alter this information on the face of the check.[354] In addition, when possible, the attorney should require the cashier's check to be drawn on a local bank.[355] This measure will allow the attorney to have the check physically inspected at the local bank to ensure its authenticity.[356] In any event, bank customers in general and South Carolina attorneys in particular should exercise caution when dealing with cashier's checks due to the high potential for fraudulent schemes.

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352. *Id.* at 434.
353. *See* OCC CA 2007-1, *supra* note 6.
354. *Id.*
355. *Id.*
356. *See id.*