University of Kentucky
UKnowledge

Law Faculty Scholarly Articles | Law Faculty Publications

1984

Pleading and Practice in Commercial Paper Cases: Burdens of Proof

Harold R. Weinberg
University of Kentucky College of Law, hweinber@uky.edu

Follow this and additional works at: https://uknowledge.uky.edu/law_facpub

Part of the Commercial Law Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation
Harold R. Weinberg, *Pleading and Practice in Commercial Paper Cases: Burdens of Proof*, 72 Ky. L.J. 575 (1984).

This Article is brought to you for free and open access by the Law Faculty Publications at UKnowledge. It has been accepted for inclusion in Law Faculty Scholarly Articles by an authorized administrator of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

Pleading and Practice in Commercial Paper Cases: Burdens of Proof

Notes/Citation Information
Kentucky Law Journal, Vol. 72, No. 3 (1983-1984), pp. 575-594

This article is available at UKnowledge: https://uknowledge.uky.edu/law_facpub/195

Pleading and Practice in Commercial Paper Cases: Burdens of Proof

HAROLD R. WEINBERG*

INTRODUCTION

Money debts are frequently paid by checks and evidenced by notes subject to Article Three of the Uniform Commercial Code.[1] Financial institutions and other creditors ordinarily take these instruments with the expectation that they will be paid on time without resort to litigation.[2] This expectation fails when the debtor or some other obligor on the instrument claims that its signature was unauthorized or that there is a defense against payment.[3] This Article analyzes the Uniform Commercial Code (UCC) rules concerning burdens of proof that apply to these disputes and gives consideration to related procedural and evidentiary questions. It concludes with some observations on the relationship between burdens of proof in commercial paper cases and the policies underlying commercial paper negotiability.[4]

BURDEN OF ESTABLISHING SIGNATURE AUTHENTICITY, DEFENSES, AND HOLDER IN DUE COURSE STATUS

Code section 3-307 is the principal Article Three provision with respect to burdens of proof. It provides:

---

*Professor, University of Kentucky College of Law. The author expresses his appreciation to his colleagues, Robert Lawson and Richard Underwood, for their comments on an earlier draft of this Article, and to David W. Regan, Class of 1985, University of Kentucky College of Law, for his research assistance.

[1] *See* UNIF. COMMERCIAL CODE §§ 3-301, 3-303, 3-104(1)-(2)(b),(d) (Official Text 1978)[hereinafter cited as U.C.C.]. Article Four of the Code, which deals with bank deposits and collections, is also relevant to checks. *See* U.C.C. § 4-102(1).

[2] The time for payment is controlled by the terms of the instrument and applicable Code time limits. For example, a check is payable on demand, but the Code gives the drawee bank a period of time in which to pay or dishonor. *See* U.C.C. §§ 3-104(2)(b), 4-213, 4-301, 4-302.

[3] "No person is liable on an instrument unless their signature appears thereon." U.C.C. § 3-401. "A signature may be made by an agent or other representative." U.C.C. § 3-403(1). An unauthorized signature may be the result of forgery or lack of authorization. *See* U.C.C. §§ 1-201 (43), 3-404.

[4] Other Article Three provisions dealing with procedural and evidentiary matters are

> (1) Unless specifically denied in the pleadings each signature on an instrument is admitted. When the effectiveness of a signature is put in issue
>
> (a) the burden of establishing it is on the party claiming under the signature; but
>
> (b) the signature is presumed to be genuine or authorized except where the action is to enforce the obligation of a purported signer who has died or become incompetent before proof is required.
>
> (2) When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense.
>
> (3) After it is shown that a defense exists a person claiming the rights of a holder in due course has the burden of establishing that he or some person under whom he claims is in all respects a holder in due course.[5]

Section 3-307 must be read in light of the Code's definition of "burden of establishing," which means "the burden of persuading the triers of fact that the existence of the fact is more probable than its non-existence."[6] Section 3-307 also takes meaning from the definition of "presumption" or "presumed" which means "the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its non-existence."[7] For clarity of analysis, section 3-307 may be broken down into four constituent rules.[8]

---

beyond the scope of this discussion. *See, e.g.*, U.C.C. §§ 3-115 (incomplete instruments), 3-414(2) (indorser's contract), 3-419(2) (action against drawee).

[5] U.C.C. § 3-307. *See* U.C.C. § 1-201(18), (39) (defining "genuine" and "signed"). The definitional cross references in the official comments to section 3-307 also refer to other definitions including those quoted in the text at notes 6-7 *infra*. At least two jurisdictions have enacted nonuniform versions of U.C.C. § 3-307. *See* Mo. REV. STAT. § 400.3-307 (1984 Cum. Supp.); WIS. STAT. § 403.307 (1964 & Cum. Supp. 1983).

[6] U.C.C. § 1-201(8).

[7] U.C.C. § 1-201(31).

[8] These Code rules may be supplemented or varied by local non-Code procedural and evidentiary requirements. *See* U.C.C. § 3-307 & comment 1. *See, e.g.*, Spurlock v. Commercial Banking Co., 260 S.E.2d 912, 27 U.C.C. Rep. Serv. 1342 (Ga. Ct. App. 1979). In some instances courts have applied non-Code rules and overlooked the Code. *See generally* Winship, *Annual Survey of Texas Law—Commercial Transactions*, 33 SW. L.J. 203, 217-20 (1979).

Rule One. Unless specifically denied in the pleadings, each signature on an instrument is admitted.

A specific denial is required in order to give the plaintiff notice that it must meet a claim of forgery or lack of authority.[9] The signature is admitted in the absence of a specific denial.[10] A defendant that fails to specifically deny the authenticity of a signature is precluded from using lack of genuineness as a defense.[11] However, the defendant may be allowed to amend its answer pursuant to extra-Code pleading rules so as to raise the issue of authenticity.[12] Other authority indicates that pleading a special defense that an agent lacked authority to sign on behalf of an alleged principal is sufficient to prevent the signature from being established by admission.[13]

Rule Two. If the effectiveness of a signature is placed in issue, the party claiming thereunder has the burden of establishing its authenticity. However, the signature is presumed to be authorized.

This rule reflects the Code draftsmen's belief that unauthorized signatures are uncommon and that evidence concerning authenticity is normally more available to the defendant than to the plaintiff suing on the instrument.[14] This assumption may be reasonable (though certainly not always correct) when the signature in question is that of a defendant against whom enforcement of the instrument is sought. The assumption may be less accurate when the

---

[9] *See* U.C.C. § 3-307(1) & comment 1. One source of legal forms for use in commercial paper litigation is 4A BENDER'S UNIFORM COMMERCIAL CODE SERVICE (1983).

[10] U.C.C. § 3-307(1) & comment 1. *See, e.g.,* Ferris v. Nichols, 245 So. 2d 660, 8 U.C.C. Rep. Serv. 1284 (Fla. Dist. Ct. App. 1971).

[11] *See* Mechanics Nat'l Bank v. Shear, 386 N.E.2d 1299, 26 U.C.C. Rep. Serv. 438 (Mass. App. Ct. 1979). *But see* Calcasieu Marine Nat'l Bank v. Greene's Marine Prod., Inc., 386 So. 2d 926, 29 U.C.C. Rep. Serv. 1319 (La. Ct. App.), *writ refused,* 390 So. 2d 202 (La. 1980).

[12] U.C.C. § 3-307 & comment 1. *See also* note 8 *supra.*

[13] *See* General Prods. Co. v. Bezzini, 365 A.2d 843 (Conn. Super. Ct. 1976).

[14] *See* U.C.C. § 3-307 & comment 1. The presumption does not operate when the action is to enforce the instrument against a deceased or incompetent signer. *See* U.C.C. § 3-307(1)(b).

signature in issue is an indorsement necessary to the plaintiff's holder status, [15] but upon which no claim is made. Nonetheless, the Rule Two presumption is broadly worded, and courts have relied upon it in both of the above situations.[16] After the presumption of signature authenticity is rebutted by the defendant, section 3-307 allocates the burden of establishing the authenticity of the signature to the plaintiff.[17] The issue of authenticity is ultimately decided by the trier of fact upon all the evidence introduced.[18]

As previously noted, "burden of establishing" and "presumption" are defined by the Code.[19] These definitions have been the subject of much scholarly comment and criticism.[20] Regardless of the criticism of these definitions, at least two points are reasonably clear.

First, a party with the burden of establishing a fact clearly bears the risk of nonpersuasion. That is, the trier of fact must find against the party with the risk of nonpersuasion as to a particular fact if all the evidence relevant to that fact is in equipoise.[21] Thus, a plaintiff who brings an action upon an instrument must prove by a preponderance of the evidence that the signature in question is authentic in order to be entitled to a verdict after the presump-

---

[15] See note 41 and accompanying text *infra* for a discussion of what constitutes a holder of a negotiable instrument.

[16] *See, e.g.,* Watertown Fed. Sav. & Loan Ass'n v. Sparks, 193 N.E.2d 333 (1963); Freeman Check Cashing, Inc. v. New York, 412 N.Y.S.2d 963, 26 U.C.C. Rep. Serv. 1186 (N.Y. Ct. Cl. 1979). *But cf.* Petty v. First Nat'l Bank, 363 N.E.2d 599, 21 U.C.C. Rep. Serv. 1375 (Ohio Ct. App. 1976). Pre-Code cases typically placed the burden of establishing the authenticity of both types of signatures on the plaintiff. *See generally* W. BRITTON, HANDBOOK OF THE LAW OF BILLS AND NOTES §§ 102, 129 (2d ed. 1961). However, some courts may have given the plaintiff the benefit of a presumption of authenticity in the case of questioned indorsements. *See* 2 NEW YORK LAW REVISION COMMISSION, STUDY OF THE UNIFORM COMMERCIAL CODE 973-74 (1955) [hereinafter cited as N.Y. U.C.C. STUDY].

[17] U.C.C. § 3-307 comment 1.

[18] *See* Bates & Springer, Inc. v. Stallworth, 382 N.E.2d 1179, 26 U.C.C. Rep. Serv. 1181 (Ohio Ct. App. 1978).

[19] *See* U.C.C. § 1-201(8), (31). *See also* text accompanying notes 6-7 *supra.*

[20] *See, e.g.,* Bigham, *Presumptions, Burden of Proof and the Uniform Commercial Code,* 21 VAND. L. REV. 177 (1968); Kinyon, *Actions on Commercial Paper: Holder's Procedural Advantages Under Article Three,* 65 MICH. L. REV. 1441 (1967); Note, *The Law of Evidence in the Uniform Commercial Code,* 1 GA. L. REV. 44 (1966).

[21] *See generally* F. JAMES, JR. & G. HAZARD, CIVIL PROCEDURE § 7.6 (2d ed. 1977) [hereinafter cited as CIVIL PROCEDURE]; R. LAWSON, KENTUCKY EVIDENCE LAW HANDBOOK § 9.00 (1976).

tion of authenticity is rebutted.[22]

It is also clear that the word "presumed" allocates the initial burden of going forward on the authenticity issue to the defendant who must introduce some evidence of nonauthenticity or suffer a directed verdict.[23] While the definition of presumed has been criticized because it also may be interpreted to allocate the risk of nonpersuasion in some contexts, only the former meaning can be intended by Code section 3-307(l).[24]

In order to rebut the presumption of signature validity, the alleged signer must introduce evidence sufficient to support a finding of nonauthenticity.[25] The evidence need not be so overwhelming as to require a directed verdict in the defendant's favor, but it must be sufficient to permit a finding in its favor.[26] One court has stated that the presumption will be rebutted when some evidence is introduced to support each element of the claim of nonauthenticity without regard to whether the evidence possesses any particular weight.[27] The cases disagree as to whether a sworn denial without any additional evidence of nonauthenticity is sufficient to rebut the presumption.[28]

The forms of evidence relevant to the question of signature authenticity can be a function of the type of signature in issue. For example, suppose an action is brought on a corporate instrument against an alleged individual obligor who claims that her signature was forged. Evidence indicating that the defendant's interest in the

---

[22] *See* Metropolitan Mortgage Fund, Inc. v. Basiliko, 407 A.2d 773 (Md. Ct. Spec. App. 1979), *aff'd*, 415 A.2d 582 (Md. 1980).

[23] *See generally* CIVIL PROCEDURE, *supra* note 21, at § 7.7; R. LAWSON, *supra* note 21, at § 10.00.

[24] Professor Bigham criticized the definition, but assumed that "presumed" is used in section 3-307(1)(b) to allocate the burden of going forward. *See* Bigham, *supra* note 20, at 192. Other commentators agree with this interpretation of section 3-307 but apparently not with the criticism of the definition. *See* Kinyon, *supra* note 20, at 1449-50; Note, *supra* note 20, at 46-49, 52-53.

[25] *See* U.C.C. § 1-201(8).

[26] *See* U.C.C. § 3-307 comment 1.

[27] *See* Freeman Check Cashing, Inc. v. New York, 412 N.Y.S.2d at 963.

[28] *See* Bates & Springer, Inc. v. Stallworth, 382 N.E.2d at 1179 (sworn denial insufficient); McCusker v. Fascione, 368 A.2d 1220 (R.I. 1977) (sworn denial sufficient, but there was other evidence of nonauthenticity). *See also* Burkett v. Finger Lake Dev. Corp., 336 N.E.2d 628 (Ill. App. Ct. 1975); Metropolitan Mortgage Fund, Inc. v. Basiliko, 407 A.2d at 773.

corporation benefitted by her signing (for example, her signature may have induced a loan to the corporation) can have weight in establishing that the signature is genuine. Eyewitness testimony by the plaintiff, or by some other person present at the making of the signature by the defendant, can also be of probative value.[29] The lack of these types of evidence may give rise to an inference that the signature is not authentic.

Each side may wish to employ a qualified questioned document and handwriting identification expert to give an opinion as to authenticity.[30] Of course, even a marked dissimilarity between a defendant's true signature and the signature on an instrument does not conclusively demonstrate that the latter was unauthorized, for the defendant may have authorized another person to sign on its behalf.[31]

Claims against corporate entities constitute another important class of litigation in which signature validity can be in issue. Evidence relative to an agent's power to bind a corporate principal might be found in corporate resolutions or other documents containing express grants of authority,[32] or in conduct or language on the part of the alleged principal amounting to a grant of apparent authority.[33]

Although the issue of signature authenticity is distinct from questions relating to the type of commercial paper contract made by the alleged signer, the same evidence might be relevant to both issues. For example, a woman might allege that her signature on a note was forged by her former husband and, in the alternative, that she signed as an accommodation party. Accommodation liability might permit her to invoke suretyship defenses not available to a co-maker.[34] Proof that the loan evidenced by the note was

---

[29] *See, e.g.,* Metropolitan Mortgage Fund, Inc. v. Basiliko, 407 A.2d at 778.

[30] One source for locating specialists is 1 MARTINDALE-HUBBELL LAW DIRECTORY at IX-X (1984). Sample questions to be employed in the qualification of an expert document examiner may be found in IMWINKELRIED, EVIDENTIARY FOUNDATIONS 60-62 (1980).

[31] *See, e.g.,* McCusker v. Fascione, 368 A.2d at 1220.

[32] B&C Enters. v. Utter, 498 P.2d 1327 (Nev. 1972).

[33] *See, e.g.,* General Prods. Co. v. Bezzini, 365 A.2d at 843. The power to sign for another may be established under agency principles which, for the most part, are found in extra-Code law. *See* U.C.C. §§ 1-103, 3-403(1), 4-405. *See generally* RESTATEMENT (SECOND) OF AGENCY §§ 7-8, 8A-8B, 26-27 (1958).

[34] *See* U.C.C. §§ 3-415, 3-416, 3-606.

utilized to purchase a house in which the defendant resided with her former spouse could help to establish both that the signature is authentic and that co-maker's liability was intended.[35] Similarly, evidence concerning a corporate agent's authority might help to establish both that the agent was authorized to bind the corporation on a negotiable instrument and that the agent's signature created a contract that was intended to bind the corporation and not the agent.[36]

Rule Three. When signatures are admitted or established, production of the instrument entitles a holder to recover thereon unless the defendant establishes a defense.

A holder is a person who has possession of a negotiable instrument and who is entitled to payment on the instrument.[37] Rule Three protects the defendant because the plaintiff's production of the instrument insures that it has not been negotiated to some other person. This protection is necessary because, had the instrument been negotiated to some other person, the unknown person could be a holder in due course entitled to enforce the instrument against the defendant despite the defendant's prior satisfaction of the plaintiff's claim.[38]

Rule Three creates a rebuttable presumption that the holder is entitled to recover on the instrument.[39] It allocates the burden of going forward with evidence of defenses to the defendant. The right to recover is presumed because the claimant is a holder. Of course, the claimant must establish that it is a holder prior to obtaining the benefit of the presumption.[40]

---

[35] *See* Riegler v. Riegler, 426 S.W.2d 789, 5 U.C.C. Rep. Serv. 150 (Ark. 1968).

[36] *See* U.C.C. § 3-403(2). *See generally* Holland, *Corporate Officer Beware—Your Signature on a Negotiable Instrument May Be Hazardous to Your Economic Health*, 13 IND. L. REV. 893 (1980).

[37] *See* U.C.C. §§ 1-201(20), 3-102(1)(a), 3-202(1), 3-301, and note 41 *infra*. A transferee who is not a holder is not aided by the presumption that he is entitled to recover. *See* U.C.C. § 3-201(3). The Code provides special procedures for recovery by owners of lost, destroyed or stolen instruments. *See* U.C.C. § 3-804.

[38] Payment of the instrument would discharge the defendant. U.C.C. § 3-603. However, discharge is a defense that is not good against a holder in due course. U.C.C. §§ 3-305, 3-602.

[39] *See* U.C.C. § 3-201(3) & comment 8.

[40] *See, e.g.*, Lloyd v. Lawrence, 472 F.2d 313, 316, 11 U.C.C. Rep. Serv. 1205 (5th

To obtain holder status a person must be in possession of an instrument which meets the Article Three form requirements for a negotiable instrument.[41] In addition, the claimant's possession must be the result of a transfer which satisfies the Article's requirements for a negotiation.[42] These requirements often demand one or more authentic indorsements. For example, a payee in possession of a check drawn to his order must indorse the check in order to negotiate it.[43] Rule Three requires a would-be holder of the check to establish the authenticity of the payee's indorsement.[44] However, the Rule Two presumption of signature authenticity assists the claimant and may obviate the need for any evidence on this issue.[45]

In many instances there will be little reason to doubt the plaintiff's claim to holder status. However, the defendant may wish to raise this issue and require production of the instrument in order to be certain of the instrument's whereabouts and its availability for cancellation and surrender in the event the plaintiff obtains a

---

Cir. 1973); Blair v. Halliburton Co., 456 S.W.2d 414, 415, 8 U.C.C. Rep. Serv. 67 (Tex. Civ. App. 1970). The rights of a holder are set out in U.C.C. § 3-301.

[41] *See* P P Inc. v. McGuire, 509 F. Supp. 1079, 31 U.C.C. Rep. Serv. 606 (D.N.J. 1981). Holder is defined as "a person who is in possession of a document of title or an instrument . . . drawn, issued, or indorsed to him or his order or to bearer or in blank." U.C.C. § 1-201(20).

The form requirements for a negotiable instrument are contained in U.C.C. §§ 3-104 to -112. Article Three also applies to some nonnegotiable instruments. *See* U.C.C. § 3-805.

[42] *See* U.C.C. §§ 1-201(20), 3-202(1). *See generally* B. CLARK, THE LAW OF BANK DEPOSITS, COLLECTIONS AND CREDIT CARDS ¶ 1.2(2) (Rev. ed. 1981).

[43] *But see* U.C.C. § 4-205(1) (refers to a missing indorsement supplied by a depositary bank).

[44] A person who is not entitled to claim holder status in his own right because of a missing indorsement may attempt to obtain this status under the Article Three "shelter provision," which provides the transferee of an instrument with all the protecton of his transferor's title. *See* U.C.C. § 3-201(1). However, it is questionable whether this provision was intended to operate in this manner. *See generally* McDonnell, *Freedom from Claims and Defenses: A Study of Judicial Activism Under the UCC*, 17 GA. L. REV. 509, 586-90 (1983); B. CLARK *supra* note 42, at ¶ 4.3.

A non-holder transferee may be entitled to enforce the instrument as a contractual assignee of the transferor's rights to payment. However, the transferee would not be entitled to the rights of a holder. *See* U.C.C. § 3-201(3). *See generally* BRADY ON BANK CHECKS § 7.09 (1979).

[45] *See, e.g.*, Lawson v. Finance Am. Private Brands, 537 S.W.2d 485 (Tex. Civ. App. 1976).

judgment and the instrument must be paid.[46] A general denial may be sufficient for this purpose.[47] If the plaintiff is, in fact, a holder, the right to the Rule Three presumption can readily be established. For example, holder status might be established through actual introduction of a note into evidence or by submission of a sworn copy of the note and an affidavit attesting to the fact of possession.[48]

Once the Rule Three presumption becomes operative, the holder is entitled to recover unless the defendant produces evidence that "establishes a defense." According to the Code's official comments, this language is intended to place upon the defendant the burden of establishing defenses "not only in the first instance but by a preponderance of the total evidence."[49] Thus, Rule Three places the risk of nonpersuasion on the defendant with the result that the plaintiff is entitled to a verdict in its favor if, after considering all relevant evidence, the trier of fact is unable to decide whether a defense has been established. The issue of plaintiff's status as a holder in due course does not even arise if the defendant is unable to establish a defense.[50]

Rule Three applies in cases where an officer signs his name to a corporate instrument in such a way that personal liability is apparently created. Assuming that the Code permits the officer to

---

[46] *See* U.C.C. § 3-605. If the instrument is not surrendered, a holder in due course may later require another payment. *See* U.C.C. §§ 3-305, 3-602.

[47] *See, e.g.,* Riley v. First State Bank, 469 S.W.2d 812 (Tex. Civ. App. 1971); Blair v. Halliburton Co., 456 S.W.2d at 414. *See also* Lloyd v. Lawrence, 472 F.2d at 313.

[48] U.C.C. § 3-307(2) has been interpreted to require production of the original instrument. *See* Ferris v. Nichols, 245 So. 2d at 660; Riley v. First State Bank, 469 S.W.2d at 812. However, this section does not expressly preclude judgment if the plaintiff provides sworn assurances that the instrument is within its control. *See* Chaviers v. Simmons, 510 S.W.2d 301 (Ark. 1974); McKirgan v. American Hosp. Supply Corp., 375 A.2d 591, 22 U.C.C. Rep. Serv. 101 (Md. Ct. Spec. App. 1977).

[49] *See* U.C.C. § 3-307 comment 2. *See also* U.C.C. § 3-305 comment 3; U.C.C. § 3-306 comment 4. "Established" and "establishes" as used in U.C.C. § 3-307(2) apparently refer to "burden of establishing" as defined by U.C.C. § 1-201(8). *See* note 6 *supra*; Kinyon, *supra* note 20, at 1452.

[50] Nutmeg Fin. Serv., Inc. v. Cowden, 524 F. Supp. 620, 621, 32 U.C.C. Rep. Serv. 484 (E.D.N.Y. 1981). *But see* Oklahoma Nat'l Bank v. Equitable Credit Fin. Co., 489 P.2d 1331 (Okla. 1971). For a brief discussion of this case, see text accompanying notes 71-72 *infra*.

introduce parol evidence to show that the signature was intended to bind only the corporation,[51] the officer must affirmatively plead and establish this defense in order to escape liability to a holder.[52]

It should be noted that Rule Three leaves many pleading and proof matters to extra-Code law.[53] The usual procedural requirement that a complaint state a claim for relief requires pleadings describing the terms of the instrument and the amount owing thereunder.[54] Special characteristics of the commercial paper contract being sued upon may also have to be specified in the complaint. For example, a complaint by the payee of a check against the drawer should plead the occurrence of the conditions precedent to drawer liability such as dishonor of the check by the drawee bank.[55] The burden of establishing dishonor presumably follows the burden of pleading.[56]

Rule Four. After the defendant shows that a defense exists, the claimant has the burden of establishing the rights of a holder in due course.

A holder is entitled to recover on an instrument so long as there is no valid defense thereon. If a defense that may be cut off by a holder in due course has been shown to exist, the claimant may seek to cut it off by virtue of this status.[57] The claimant has the

---

[51] The Code does not permit agents to raise this type of defense in some cases. *See* U.C.C. § 3-403(2); note 36 *supra*.

[52] *See, e.g.,* Norfolk County Trust Co. v. Vichinsky, 359 N.E.2d 59, 20 U.C.C. Rep. Serv. 1226 (Mass. App. Ct. 1977); Seale v. Nichols, 505 S.W.2d 251, 14 U.C.C. Rep. Serv. 457 (Tex. 1974).

[53] *See* U.C.C. § 1-103; note 8 *supra*.

[54] *See* FED. R. CIV. P. 8 & form 3 [hereinafter cited as FRCP]; KY. R. CIV. P. 8.01 & form 2.

[55] Regard should always be given to these "statutory contracts" in drafting a complaint. *See* U.C.C. §§ 3-122 (accrual of cause of action), 3-413 (contracts of maker, drawer, or acceptor), 3-414 (contract of indorser), 3-415 (contract of accommodation party), 3-416 (contract of guarantor).

[56] *See generally* Kinyon, *supra* note 20, at 1454-55.

[57] "Personal defenses" such as breach of warranty and failure of consideration may be cut off by holders in due course. *See, e.g.,* U.C.C. §§ 3-305(1)-(2), 3-408, 3-407(2), 3-306. However, holders in due course are subject to a few "real defenses" such as certain types of incapacity or illegality. *See* U.C.C. § 3-305(2)(a)-(d). If evidence of a real defense is introduced by the defendant, a holder in due course may introduce rebuttal evidence. *See* U.C.C. § 3-307(2).

burden of establishing by a preponderance of the evidence that it is a holder in due course.[58] This burden can be met by establishing that the plaintiff is a holder in due course in its own right. This requires affirmative proof that the instrument was taken for value, in good faith, and without notice of any defense.[59] The plaintiff's own clear, direct and uncontradicted testimony may be sufficient to establish these facts.[60] The plaintiff might also meet this burden by establishing that it obtained the rights of a holder in due course from its transferor who was a holder in due course.[61]

Rule Four employs different statutory terminology than Rule Three. A defendant will lose under Rule Three unless it "*establishes* a defense."[62] Rule Four states that the plaintiff has the burden of establishing holder in due course status after it is "*shown* that a defense exists."[63] This shift in language creates an issue concerning the intended meaning of Rule Four.

The draftsmen may have used "shown" in Rule Four to describe the situation in which a defense has been "established" pursuant to Rule Three. Only after the existence of a defense has been shown to be more probable than not or stipulated would a holder need to prove due course status. This interpretation leaves the Rule Three burden of persuasion of establishing a defense on the defendant within the context of Rule Four.

On the other hand, this difference in language might have been intended to indicate that evidence insufficient to establish a defense under Rule Three may nonetheless be sufficient to show a defense

---

[58] U.C.C. § 3-307 comment 3. *See* United Bank Ltd. v. Cambridge Sporting Goods Corp., 360 N.E.2d 943, 950, 20 U.C.C. Rep. Serv. 980 (N.Y. 1976).

[59] *See* U.C.C. §§ 3-302, 3-303, 3-304. The plaintiff may also be required to prove that it is a holder. *See* Bank v. Blackwelder Furniture Co., 181 S.E.2d 785, 9 U.C.C. Rep. Serv. 608 (N.C. Ct. App. 1971). For the definition of "holder" see U.C.C. §§ 1-201(20), 3-202(1).

[60] *See, e.g.,* Favors v. Yaffe, 605 S.W.2d 342, 31 U.C.C. Rep. Serv. 154 (Tex. Civ. App. 1980). Of course, the defendant may offer counter testimony. *See, e.g.,* Funding Consultants, Inc. v. Aetna Casualty & Surety Co., 447 A.2d 1163, 34 U.C.C. Rep. Serv. 591 (Conn. 1982).

[61] U.C.C. § 3-307(3). This result also follows under the Article Three "shelter provision." *See* U.C.C. § 3-201(1). *See also* Blake v. Samuelson, 524 P.2d 624, 15 U.C.C. Rep. Serv. 131 (Colo. Ct. App. 1974); B. CLARK, *supra* note 42, at § 4.3; McDonnell, *supra* note 44, at 586-90.

[62] U.C.C. § 3-307(2) (emphasis added).

[63] U.C.C. § 3-307(3) (emphasis added).

under Rule Four, thus requiring the plaintiff to establish that it is a holder in due course. A defense might be shown if the evidence is sufficient to avoid a directed verdict against the defendant but insufficient to support a verdict in the defendant's favor.

The former interpretation must be correct.[64] It is supported by the official comments to section 3-307(3) which indicate that a plaintiff-holder may obtain a favorable verdict in the face of evidence of a defense even if it does not offer rebuttal evidence or attempt to establish holding in due course.[65] These comments suggest that the section's intent is to give the plaintiff the choice of (1) rebutting the defendant's case; (2) cutting off the defense by establishing holder in due course status; or (3) testing the sufficiency of the defendant's evidence by moving for a directed verdict or by allowing the evidence to go to the trier of fact.[66] Rule Four's drafting history also supports the former interpretation. This rule was not intended to change pre-Code law requiring a defendant to prove a defense by a preponderance of the evidence before the plaintiff had to prove holding in due course.[67]

---

[64] The former interpretation enjoys commentator support. *See generally* R. ALDERMAN, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE § 3.34 (2d ed. 1983); Kinyon, *supra* note 20, at 1456, 1462-63; Note, *supra* note 20, at 53-54. *But see* BRADY ON BANK CHECKS, *supra* note 44, at § 9.9 ("Under the Code, proof of a defense is not necessary; it is only necessary that a defense be asserted to impose the burden upon the holder to establish due course status." However, the difference between showing and establishing a defense may be "slight.").

[65] *See* U.C.C. § 3-307 comment 3.

[66] *See id.*

[67] *See* UNIF. NEGOTIABLE INSTRUMENTS LAW § 59 (1896) ("Every holder is deemed prima facie to be a holder in due course; but when it is *shown* that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove [holding in due course] . . . .") [hereinafter cited as N.I.L.] (emphasis added).

The best view was that a title was "defective" when there was a personal defense that would not be good against a holder in due course. *See generally* W. BRITTON, *supra* note 16, at § 104. There was substantial agreement that a defective title was "shown" and the presumption of holding in due course rebutted only after the defense was proved by a preponderance of the evidence. *Id.* at § 103.

Pre-1956 official drafts of U.C.C. § 3-307 eliminated the presumption of holding in due course and provided that "*[a]fter evidence of a defense has been introduced* a person claiming the rights of a holder in due course has the burden of establishing that he or some person under whom he claims is in all respects a holder in due course." U.C.C. § 3-307 (Proposed Official Draft 1952) (emphasis added). The New York Law Revision Commission recognized that the italicized draft language placed a less substantial evidentiary burden on the defendant than was provided in N.I.L. § 59. *See* N.Y. U.C.C. STUDY, *supra* note 16, at 975-76; 1 NEW YORK LAW REVISION COMMISSION, STUDY OF THE UNIFORM COMMER-

Moreover, the latter interpretation lacks a logical and persuasive rationale and fails to provide guidance in the event the defendant shows but does not establish a defense, perhaps by evidence of suspect credibility, and the plaintiff-holder is unable to establish due course. These circumstances should not entitle the defendant to a directed verdict if reasonable minds might differ upon whether the defendant has a defense.[68] Rule Three requires that a defense be established in order to prevent recovery by a holder; Rule Four does not alter this recovery right. Thus, the defendant must still establish a defense, and the plaintiff is still entitled to have the trier of fact consider the defensive evidence. But then, why is the plaintiff required to put on evidence of holding in due course if it has any to offer? One might postulate that it takes fewer judicial and private resources to decide whether the plaintiff is a holder in due course than to decide whether there is a defense and that the lower cost and potentially dispositive inquiry should be completed before the more expensive inquiry is undertaken. However, this assumption of relative costs is not universally (and perhaps not even generally) correct. Moreover, a plaintiff needs no statutory encouragement to plead and prove holding in due course if this status appears to be the more efficient means to a judgment.[69] Of course, Rule Four does not prevent a plaintiff from pleading in its complaint and proving as part of its case in chief that it is a holder in due course.[70]

CIAL CODE 268-69, 544-45 (1954). The 1956 recommendations of the editorial board for the Uniform Commercial Code replaced the italicized draft wording with the current "[a]fter it is shown that a defense exists" for the following reason: "The addition was inserted, in accord with a suggestion of the American Bankers Association Committee, to restore the expression 'it is shown that,' which occurs at N.I.L. § 59, in order to make clear that no change in the quantum of evidence is here intended." A.L.I. & NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE 107 (1956).

[68] *But see* Bigham, *supra* note 20, at 194.

[69] It seems likely that the least costly means to a resolution in private resources also would be the least costly in public resources such as those spent on maintenance of the judicial system. The value of the public resources allocable to a particular case are probably modest in comparison with the costs born directly by the litigants. *See generally* R. POSNER, ECONOMIC ANALYSIS OF LAW 401-02 (2d ed. 1977).

[70] *See, e.g.*, Jaeger & Branch, Inc. v. Pappas, 433 P.2d 605, 4 U.C.C. Rep. Serv. 950 (Utah 1967). This tactic may minimize the impact of the defendant's evidence. *See generally* Kinyon, *supra* note 20, at 1463-64. It also may preclude the need to decide whether there is a defense. *See* note 85 *infra* and accompanying text.

Rule Four has been considered in numerous reported cases. There are indications that a fairly minimal evidentiary showing may be sufficient in some courts to trigger the plaintiff's burden of establishing holding in due course. One appellate case indicates that the defendant's evidence need show only the "possibility of a defense."[71] That this court meant what it said is suggested by its holding that the record supported the trial court's conclusion that the plaintiff-holder failed to establish due course status pursuant to Rule Four, but that a new trial was necessary because the drawer had not sustained its Rule Three burden of establishing a defense.[72]

Frequently it is difficult to assess the precise manner in which Rule Four is being applied. Some opinions lack detailed consideration of the defensive evidence in the record, perhaps because defendants sometimes prove a defense with relative ease and a close inquiry into the quantum of evidence necessary to show a defense is not needed.[73] In other cases this inquiry may be unnecessary because the evidence supports findings both of a defense and of the plaintiff's notice of the defense or bad faith.[74] For example, the facts might establish both that the corporate payee of a note failed to perform the transaction for which the note was issued by the maker and that the corporate officer holding the note was intimately involved in the transaction.[75] A third reason that it can be difficult to gauge judicial applications of Rule Four may lie in an unstated preference to dispose of cases on the plaintiff's holder in due course standing when it is questionable whether a defense has been shown.[76]

---

[71] Oklahoma National Bank v. Equitable Credit Finance Co., 489 P.2d at 1334.

[72] *See id.* at 1334-35.

[73] *Cf.* Pugatch v. David's Jewelers, 278 N.Y.S.2d 759, 4 U.C.C. Rep. Serv. 202 (N.Y. Cir. Ct. 1967); Favors v. Yaffe, 605 S.W.2d at 342.

[74] *See, e.g.,* Northwestern Nat'l Bank v. Shuster, 307 N.W.2d 767, 32 U.C.C. Rep. Serv. 585 (Minn. 1981).

[75] *See* Frequency Elecs., Inc. v. National Radio Co., 422 F. Supp. 609 (S.D.N.Y. 1975), *aff'd,* 546 F.2d 497 (2d Cir. 1976) (per curiam).

[76] *Cf.* Chemical Bank v. Haskell, 411 N.E.2d 1339 (N.Y. 1980), in which the New York Court of Appeals stated that defenses were alleged, assumed their validity, and then held that the plaintiff was a holder in due course. The lower court had previously held that the defenses had been established and that the plaintiff was not a holder in due course. *See* Chemical Bank v. Haskell, 417 N.Y.S.2d 541 (N.Y. App. Div. 1979), *rev'd,* 411 N.E.2d at 1339.

In one case that may exemplify this tendency, the defendant-drawer stopped payment on a check which was thereafter returned to the depositary bank.[77] The bank had advanced the amount of the check to its customer, the payee. The drawer alleged that he stopped payment because he did not owe the full amount of the check; he testified that "the whole thing is a mess, it can't be determined who owes who" or how much.[78] At the time of the trial an accounting between the drawer and the payee had been undertaken, but was incomplete.[79]

The court unequivocally held that the defendant failed to meet its burden of establishing a defense and that the bank was entitled to recover *qua* holder pursuant to Rule Three. Nonetheless, the court went on to consider the plaintiff's due course standing, indicating that if the defendant had established a good defense, then the burden would shift to the plaintiff pursuant to Rule Four. The court stated that this determination had utility in ascertaining the size of the judgment due the plaintiff who had recovered some of the amount given for the check through a charge-back against the customer-payee's account.[80] The court believed that this assistance would come through a technical analysis of whether the bank had given "value" as specially defined by the Code for purposes of bank due course standing.[81] However, assuming that a determination of value was useful to prevent double recovery,[82] there was no good reason to also decide whether the bank had taken the check in good faith or lacked notice of defenses, unless the court wanted to be certain of the bank's right to recover in the face of the drawer's claimed defense.[83]

---

[77] American Exch. Bank v. Cessna, 386 F. Supp. 494 (N.D. Okla. 1974).

[78] *Id.* at 496.

[79] *Id.*

[80] *See id.* at 497.

[81] *See id. See also* U.C.C. §§ 4-208, 4-209.

[82] It is doubtful that a pro tanto discharge of the drawer resulted from the "satisfaction" of the check by the depositary bank's charge-back against the customer's account. *Cf.* U.C.C. §§ 3-601(3), 3-603; note 83 *infra.*

[83] Mere holder status is sufficient to enable a depositary bank to enforce the entire amount of an unpaid check against the drawer. *See generally* B. CLARK, *supra* note 42, at ¶ 4.2[2][d]. The double payment problem arises when the bank charges back against the customer-payee's account with the result that it does not need the entire amount of the check to be made whole. The drawer then owes (absent a good defense) part of the check to the bank and part to the payee-customer. The Code's "value" provisions may be helpful

Often courts are not asked to decide a case directly on the operation of Rule Four. Instead, they must weigh proof of defenses and holder in due course status in the context of summary judgment procedure. In such cases, the immediate issues are whether the moving party has shown the absence of any genuine issue as to any material fact and whether the moving party is entitled to a judgment as a matter of law.[84] One commentator has stated that summary judgment procedure is particularly well suited to actions on instruments because holder in due course status, if established, precludes the need to consider whether there is a genuine factual issue as to the existence of defenses.[85] A plaintiff might seek to establish that it is a holder in due course through the use of affidavits, depositions, admissions or other evidentiary materials in support of its motion. The defendant may be unable to successfully controvert these facts if the plaintiff's claim to due course status is legitimate and adequately supported.[86]

While the road to summary recovery is inviting, in practice plaintiffs sometimes fail to clearly establish due course status through the use of summary forms of proof.[87] In one of these cases the payee of three checks totaling $160,000, who had told the drawer that the checks would not be negotiated, deposited them

---

in measuring the amount due the bank and, hence, the payee. *See* U.C.C. §§ 4-208, 4-209. The drawer may be protected against multiple suits by the law of assignments, at least when it is sued by a holder-depositary bank that lacks due course standing. *See* U.C.C. § 3-306. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS §§ 326, 339. The drawer's contract will be discharged to the extent of its payment to the bank-holder. U.C.C. § 3-603. It is not likely that the payee, if it subsequently sued the drawer on the check, could avoid this discharge. *See* U.C.C. §§ 3-201(1), 3-305(2); note 38 *supra*.

[84] *See* FRCP 56(c). It is generally agreed that this burden is on the moving party. *See generally* CIVIL PROCEDURE, *supra* note 21, at § 6.18.

[85] 6 J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 56.17[8] (2d ed. 1982).

[86] *See, e.g.*, St. Cloud Nat'l Bank & Trust Co. v. Sobania Constr. Co., 224 N.W.2d 746, 15 U.C.C. Rep. Serv. 679 (Minn. 1974); Washington Trust Co. v. Fatone, 244 A.2d 848 (R.I. 1968).

[87] *See, e.g.*, Northside Bank v. Investors Acceptance Corp., 278 F. Supp. 191, 5 U.C.C. Rep. Serv. 169 (W.D. Pa. 1968). *Cf.* Peoples Bank v. Haar, 421 P.2d 817, 3 U.C.C. Rep. Serv. 1065 (Okla. 1966). In general, courts will not grant a motion for summary judgment if there is any chance that the facts at trial will look different from the summary proof tendered in support of and in opposition to the motion. *See generally* CIVIL PROCEDURE, *supra* note 21, at § 6.18. In the specific context of commercial paper litigation, this judicial reluctance may be reinforced by the loss of valid defenses against payment of an instrument that is a consequence of negotiability. *See* text accompanying notes 97-106 *infra*.

in her overdrawn account and was subsequently permitted by the depositary bank to make withdrawals of over $157,000 even though the checks had not cleared.[88] The checks proved to be drawn against insufficient funds, and the depositary bank sued the drawer for the amount withdrawn plus interest, claiming that it was a holder in due course. In defense the drawer pleaded that the payee had committed fraud.[89]

In the trial court the plaintiff bank supported its motion for summary judgment with the affidavit of the vice-president in charge of the branch where the payee's account was located. This document recounted the deposit, immediate clearance, and crediting of the three items and stated upon personal knowledge as well as information and belief that the bank had neither notice nor knowledge of any defense and that the bank had acted in good faith. The trial court granted summary judgment.[90]

On appeal this affidavit was held inadequate to establish the plaintiff's right to recover. Its general statements were framed in terms of conclusions of law, and it did not contain the testimony of the bank employees who actually dealt with the payee-customer. Their knowledge and state of mind, and not that of the branch vice-president, was seen by the court as requisite to establishing the bank's due course standing.[91] The court noted that, standing alone, neither the bank's indulgence of its customer (who had been chronically overdrawn), nor its allowance of the withdrawals prior to clearance of the items and without verification of the drawer's balance was sufficient to establish bad faith. However, it indicated that the bank's "foolish" and "precipitate" actions in attempting to shift the loss to the drawer raised an inference that could be characterized as the "antithesis of good faith."[92]

It should be noted that the depositary bank probably did

---

[88] *See* Seinfeld v. Commercial Bank & Trust Co., 405 So. 2d 1039, 32 U.C.C. Rep. Serv. 1137 (Fla. Dist. Ct. App. 1981).

[89] *Id.* at 1041.

[90] *Id.*.

[91] *See id.* at 1042.

[92] *See id. See also* Northside Bank v. Investors Acceptance Corp., 278 F. Supp. at 191; Oklahoma Nat'l Bank v. Equitable Credit Fin. Co., 489 P.2d at 1331. *But see* Citizens Nat'l Bank v. Fort Lee Sav. & Loan Ass'n, 213 A.2d 315 (N.J. Super. Ct. Law Div. 1965); Bowling Green, Inc. v. State St. Bank & Trust Co., 425 F.2d 81 (1st Cir. 1970); St. Cloud Nat'l Bank & Trust Co. v. Sobania Constr. Co., 224 N.W.2d at 746.

manage to establish that it was a holder. As such, it would be entitled to recover pursuant to Rule Three unless the defendant established a defense.[93] Apparently the bank did not pursue this avenue, and the court was not required to consider the drawer's affidavit which stated that he issued the checks in reliance upon the payee's misrepresentation that they would not be negotiated.[94] However, other cases suggest that an affidavit reciting an alleged defense on personal knowledge and belief and setting forth facts that are admissible into evidence will be sufficient to demonstrate a genuine issue of material fact, thus preventing the entry of summary judgment against the defendant.[95] Perhaps even more minimal summary proof would be sufficient to avoid a summary judgment.[96]

CONCLUSION: BURDENS OF PROOF AND NEGOTIABILITY

There is an oft-described relationship between the legal principles governing burdens of proof in commercial paper litigation and the policies that underlie commercial paper negotiability. For example, negotiability doctrine contractually obligates persons who make commercial paper contracts to holders even when there is an absence of direct privity.[97] This attribute can provide holders with multiple obligors, thereby making commercial paper easier to enforce and facilitating its transfer.[98] The Rule Two presumption of signature authenticity clearly seems intended to serve the same ends. Similarly, the holder in due course's right to cut off defenses enhances the collectibility and, hence, marketability of commercial paper, as does the Code's allocation of the burdens of proving defenses and due course status in Rules Three and Four.[99]

---

[93] *See* text accompanying notes 37-56 *supra*.

[94] *See* 405 So. 2d at 1041.

[95] *See* Northside Bank v. Investors Acceptance Corp., 278 F. Supp. at 191; Pitillo v. Demetry, 145 S.E.2d 792, 3 U.C.C. Rep. Serv. 58 (Ga. Ct. App. 1965).

[96] However, the defendant will lose if it makes no attempt to show a defense or offers only hearsay evidence. *See* Loew v. Minasian, 280 N.E.2d 688, 10 U.C.C. Rep. Serv. 676 (Mass. 1972); Anderson v. Industrial State Bank, 478 S.W.2d 215 (Tex. Civ. App. 1972).

[97] *See* U.C.C. §§ 3-413 to -416. This result was once very controversial. *See generally* Freyer, *Antebellum Commercial Law: Common Law Approaches to Secured Transactions*, 70 KY. L.J. 593, 594-95 (1981-82).

[98] *See generally* Weinberg, *Commercial Paper in Economic Theory and Legal History*, 70 KY. L.J. 567, 571-72 (1981-82).

[99] *See id.* at 572-73, 579; Kinyon, *supra* note 20, at 1457-64.

This relationship between negotiability and burdens of proof may sometimes be employed to strengthen the position of commercial paper claimants. Counsel might successfully argue, for example, that the policy favoring the free flow of commercial paper militates against an unduly burdensome application of Rule Four's requirement that the claimant-holder establish due course status.[100] Of course, such an approach is unavailable when the action is on a consumer note against which defenses may be asserted as a result of consumer protection legislation or regulations.[101] However, it still may be employed in actions on nonconsumer notes and on checks and other types of negotiable instruments.

The relationship between negotiability and burdens of proof also creates a risk for commercial paper claimants. The same dissatisfaction with negotiability that led to the demise of the right to cut off defenses on consumer notes is still very much alive. Perhaps its starkest manifestation is in proposed modifications to Articles Three and Four of the Code entitled "New Uniform Payments Code" (NUPC).[102] The changes proposed by this tentative draft, produced under the auspices of the Permanent Editorial Board of the Uniform Commercial Code, include the denial of holder in due course status to transferees of consumer checks, and also may have this effect with respect to nonconsumer, or business checks.[103] The reasons for this change in existing law should have a very familiar ring to persons familiar with the prevailing arguments against consumer note negotiability:

> Checks, like notes, have ceased to be widely negotiated, and are no longer treated as cash substitutes . . . . [P]arties to whom checks are negotiated rely principally on the credit of the person from whom they take the check, rather than the drawer. This

---

[100] *See* Chemical Bank v. Haskell, 411 N.E.2d 1339, 1342 (N.Y. 1980); Jaeger & Branch, Inc. v. Pappas, 433 P.2d 605, 607-08, 4 U.C.C. Rep. Serv. 950, 952 (Utah 1967).

[101] A Federal Trade Commission Rule preempts the state law right to cut off defenses in many cases. *See* 16 C.F.R. § 433.1-2 (1982). State statutes may provide supplemental consumer protection. *See, e.g.,* KY. REV. STAT. § 367.610 (Cum. Supp. 1982).

[102] NEW UNIF. PAYMENTS CODE (Nat'l Conf. of Comm'rs on Uniform State Laws, Discussion Draft 1982) [hereinafter cited as 1982 NUPC DRAFT]. This draft was submitted at the August 1982 meeting of the National Conference of Commissioners on Uniform State Laws for a first reading and then made available for public comment.

[103] *See id.* at § 103. *See generally* Benfield, *The New Payments Code and the Abolition of Holder in Due Course Status as to Consumer Checks*, 40 WASH. & LEE L. REV. 11, 13-19 (1983).

> is particularly the case with checks drawn by consumers. . . . If a bank takes a check from a payee, it is relying on that person's credit if it allows withdrawal against uncollected funds, not the credit standing of a drawer with whom it is unfamiliar. . . . [Banks are] . . . in a better position to appraise and to take the risk of insolvency of the parties with which they deal. . . .[104]

Although the NUPC draft language abolishing holder in due course may never become final, it does reflect dissatisfaction with the current negotiability rules. If the provisions are included in a final draft, they may be enacted into law.[105] Similar concern with check negotiability may be found in judicial opinions applying Code section 3-307 and summary judgment procedures to bank claims of holder in due course standing. For example, in a case discussed above the court found genuine issues as to a depositary bank's good faith and lack of notice of defenses and refused to allow the bank "to shift to [the drawer] . . . its own probable loss from the [payee's] . . . machinations."[106] Thus, caution must be exercised in asserting that the policies underlying negotiability require a determination that holder in due course status has been established by a commercial paper claimant that is thereby entitled to cut off defenses.

---

[104] 1982 NUPC DRAFT § 103 comment 1.

[105] The final draft must be approved by the Uniform Commercial Code Permanent Editorial Board, the National Conference of Commissioners of Uniform State Laws (NCCUSL), and the American Law Institute. Benfield, *supra* note 101, at 11 n.3. There have already been some modifications to the 1982 NUPC language dealing with cutting off defenses. *See id.* at 13 n.10.

Enactment could be at the state or federal level, and the NCCUSL is studying the feasibility of a coordinated state and federal enactment. *See* 1982 NUPC DRAFT introduction at 37-40.

[106] Seinfeld v. Commercial Bank & Trust Co., 405 So. 2d 1039, 1042 (Fla. Dist. Ct. App. 1981). *See also* Northside Bank v. Investors Acceptance Corp., 278 F. Supp. 191 (W.D. Pa. 1968); Arcanum Nat'l Bank v. Hessler, 433 N.E.2d 204, 33 U.C.C. Rep. Serv. 604 (Ohio 1982). *See generally* McDonnell, *supra* note 44, at 600-08.