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Shelia Tims

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Recently, the Oklahoma Court of Appeals considered whether collection of a cashier's check could be stopped by a payee of the check when the payee's depositary bank became insolvent. In *New Covenant Community Church v. Federal National Bank & Trust Co.*,[1] a payee unsuccessfully sought to prevent the issuing bank from paying its cashier's check. Living Way Church had indorsed and delivered to New Covenant a $325,000 cashier's check, issued by Federal National to Living Way and New Covenant, in satisfaction of a prior debt. New Covenant deposited the check in Penn Square Bank on July 1, 1982. On July 2, 1982, Penn Square was closed by the Federal Deposit Insurance Corporation (FDIC).

Both Living Way and New Covenant requested Federal National to stop payment on the cashier's check. The bank refused to do so. After Penn Square failed, the check was presented to, and paid by, Federal National. New Covenant incurred a loss on the check because FDIC insurance was limited to $100,000. New Covenant then sued Federal National to recover both its loss on the check and $1 million in punitive damages.[2]

The court of appeals upheld the trial court's dismissal of the action in an unenlightening opinion. The court's analysis failed to extend beyond the time-worn recitation that a cashier's check is accepted upon issuance and, therefore, a stop order is not effective under section 4-303 of the Uniform Commercial Code (Code).[3] Without further analysis or consideration, the court rejected the plaintiff's assertion that the depositary bank's status as an agent of the depositor had been revoked by its insolvency. The plaintiff argued that this revocation caused two results: the depositary bank lost its authority to collect the check, and the payor bank lost its authority to pay the funds to the depository bank. The court did not consider either argument in its opinion.

This note will examine the unanswered questions raised by the plaintiff in *New Covenant*. Specifically, it considers whether a bank customer may stop payment of an item to prevent a loss from occurring as a result of the depositary bank's insolvency. This is the question the Oklahoma Court of

1. 58 OKLA. B.J. 599 (Okla. Ct. App. 1987) (mandate issued by the Oklahoma Court of Appeals on Apr. 10, 1987, 58 OKLA. B.J. 1076 (1987)).

2. *Id.* at 599-600. The exact extent of New Covenant's loss is not known at this time. Penn Square has paid 60 percent and may pay more at a later date.

3. *Id.* at 600. U.C.C. § 4-303(1)(9) (1978) provides that a stop order comes too late to suspend payment if the order comes after the bank has already accepted or certified the disputed item. There is a large body of case law and commentary that adopts the position that it is generally not possible for a bank to dishonor its cashier's check. *See* Note, *Uniform Commercial Code: A Bank's Right to Dishonor a Cashier's Check*, 38 OKLA. L. REV. 359 (1985).

Appeals failed to analyze or even to recognize in *New Covenant.* The essential issue in *New Covenant* was not whether a cashier's check was susceptible to a stop order. Rather, the question was whether the plaintiff's attempt to revoke the depositary bank's agency status was a valid solution, and if not, what alternatives were available to the customer.

This note will focus on two potential remedies for the problems encountered in attempting to prevent collection of an item deposited prior to a depositary bank's insolvency: (1) revocation of a bank's status as the customer's agent for purposes of collection (as unsuccessfully raised in *New Covenant*); and (2) application of the adverse claim procedure contained in UCC section 3-603.[4]

In preventing collection of a deposited item, these two procedures are particularly applicable to cashier's checks because the party who obtains a cashier's check cannot use a stop order under section 4-403. If an item is a regular check, the drawer could stop payment by using a section 4-403 stop order and seemingly avoid the problem encountered in *New Covenant.*[5] Nevertheless, this note considers items for deposit in general and is not confined to cashier's checks.

Revocation of Depositary Bank's Agency Status

The principal/agent relationship between a customer and its bank was firmly established in pre-Code common law and was subsequently adopted by the Code.[6] Specifically, section 4-201(1) provides that: "Unless a contrary intent clearly appears and prior to the time that a settlement given by a collecting bank for an item is or becomes final . . . the bank is an agent or sub-agent of the owner of the item."[7] The Official Comment to this section reiterates that the agency status of depositary and collecting banks is a fundamental concept of the banking system.[8]

Although an agency relationship clearly exists under the Code, the question arises whether a depositary bank's agency status is revoked upon insolvency. Analysis of that issue requires an examination of section 4-214, which dictates how insolvency affects the collection process. Subsections (1) and (3) of section 4-214 provide that if an item has come into the possession of a payor or collecting bank that becomes insolvent before the item is paid, the receiver shall return the item to the customer or presenting bank.[9] However,

4. U.C.C. § 3-603 (1978) allows a party to discharge its liability, as drawer, on an instrument by payment or satisfaction to the holder unless another person provides the liable party with indemnity or obtains an injunction against the payment of the instrument.

5. U.C.C § 4-403(1) (1978) states that a customer may order his bank to stop payment on an item, provided that the bank receives the order in a reasonable time and manner. If a regular check were involved, the payee would have to convince the drawer customer to stop payment; but absent unusual circumstances that should not pose a problem.

6. U.C.C. § 4-201 comment 2 (1978).

7. *Id.* § 4-201(1).

8. Official Comment 2 to U.C.C. § 4-201 (1978) states that a bank's status as an agent of the customer is a "strong presumption." Official Comment 3 to the same section concludes that the agency status of collecting banks is consistent with current law and commercial practice.

9. U.C.C. § 4-214(1), (3) (1978).

if the item has been paid, the customer or presenting bank has a preferred claim against the failed bank.[10] Unfortunately, a preferred claim against an insolvent bank may be of dubious value. Thus, the key to obtaining a complete recovery is to prevent payment of the item.

One might initially conclude, in light of section 4-214, that the Code contemplates that an owner can always stop the collection of an item when the depositary bank has become insolvent. If that were indeed the case, the *New Covenant* result could have been avoided because the check would have been returned to New Covenant upon Federal National's nonpayment. On the other hand, if the check were paid, New Covenant would have had a claim against Penn Square Bank.

Unfortunately, the solution to the insolvency problem is not so simple. Section 4-214 does not halt the collection of the item; rather, it allows the check to be paid and then gives the customer a preferred claim. Revocation of agency differs from section 4-214 because revoking the agency status stops the collection process. Revoking the agency status would return the *unpaid* item to the customer. The customer would logically prefer the unpaid instrument itself, rather than a preferred claim, because the funds available for distribution may not be sufficient to pay the item. FDIC insurance only covers $100,000 and, as seen in *New Covenant*, this can result in a potential loss to the customer equal to the amount of the check that exceeds that coverage. A complete recovery on the item can only be assured if the unpaid instrument is actually returned to the customer so the item may be presented directly to the solvent party liable on the item.

The basic question then becomes whether the revocation of agency theory is an appropriate means by which a customer can recover an item from the collection process when the customer's depositary bank has failed. Under the Code the customer is the principal in the relationship and the depositary bank is the customer's agent.[11] Should not a customer be able to revoke its bank's authority to collect items on its behalf? Surely it cannot be argued that the customer must consent to an irrevocable principal/agent relationship. More important, if this agency status can be revoked, what is the process for such revocation?

These questions were addressed in *Wolf v. Title Guarantee & Trust Co.*[12]

10. *Id.* § 4-214(2), (4) (1978). If a party has a preferred claim, that party is allowed to enforce its claim against the funds in the insolvent entity before the general creditors are able to share pro rata in the distribution of the funds. A preference may allow the party to collect a higher percentage of its claim than the general creditors are able to collect, but a preference does not guarantee full recovery. Moreover, it is doubtful the state law preference is valid where the insolvent bank is a national bank. *See* Jennings v. United States Fidelity & Guaranty Co., 294 U.S. 216 (1935). See *infra* notes 33-36.

11. U.C.C. § 4-201(1) (1978).

12. 251 A.D. 354, 296 N.Y.S. 800 (1937), *aff'd*, 277 N.Y. 626, 14 N.E.2d 193 (1938). Wolf sold Title Guarantee bonds, taking a cashier's check in payment. Wolf deposited the check in his account at the Bank of the United States. The depositary bank was declared insolvent the next day. Wolf notified Title Guarantee that the bank's authority to collect the check had been revoked and directed it not to pay the check. The check was either at the Bank of the United

In *Wolf* the court allowed Wolf to recover in conversion against the issuer of a cashier's check under the revocation of agency theory. The court reasoned that neither the depositary nor the collecting bank had title to the disputed item, a cashier's check issued by Title Guarantee. The depositary bank was merely the customer's agent in the transaction. Furthermore, the collecting bank could not derive title from the depositary bank. Rather, the collecting bank was the depositary bank's agent and, thus, the subagent of the customer. In short, title to the check remained in the customer until payment was made by Title Guarantee.[13]

The *Wolf* court held that by giving notice to Title Guarantee, the customer had revoked the authority of its agent and subagents to collect the item.[14] Payment of the instrument by Title Guarantee after receiving notice of the owner's revocation of the depositary bank's authority to collect the item constituted conversion. The court also stated that if Title Guarantee was in doubt as to whether to pay the check, it should have withheld payment or tendered the money into court pending an investigation.[15] Moreover, it concluded that the particular nature of the check did not affect whether a customer could revoke its bank's agency status. The customer could revoke the general authority of his agent to collect "instruments," the type of instrument involved neither affected nor diminished this authority.[16]

Similarly, the revocation of agency theory was applied to a personal check in *Union Trust Co. v. Berry*.[17] Once again, the court held that the depositary bank had no right to an item, other than as an agent of the customer.[18] The customer could deal with the bank as its agent until the proceeds of the item were collected by the bank. Furthermore, the authority of the depositary bank to credit the customer's account did not arise until it had received the money.[19]

In order to fully analyze whether a bank customer can revoke its bank's agency status, it is helpful to consider the general principles of agency law.

States or at the Federal Reserve Bank of New York at that time.

Title Guarantee paid the check. Wolf sued the Superintendent of Banks and collected most of the amount of the item. Wolf then sued Title Guarantee for the difference, plus costs.

13. *Id.*, 296 N.Y.S. at 803.

14. *Id.*

15. *Id.*

16. *Id.*, 296 N.Y.S. at 804.

17. 186 Ark. 966, 57 S.W.2d 413 (1933). In this case, Berry and Magness received a check for payment on a sale of cattle to a third party. Magness deposited the check in Western Grove Bank, which sent the item to Union Trust. Western Grove was then declared insolvent; payment was stopped on the item. The amount of the check was paid into court by stipulation of the parties. Union Trust instituted attachment proceedings to recover the proceeds which had been paid into court. The court thus approved an adverse claim procedure similar to the one contained in U.C.C. § 3-603.

18. *Id.*, 57 S.W.2d at 414.

19. *Id.* Similarly, in First State Bank v. Lisles, 144 Okla. 156, 289 P. 1105, 1106 (1930), the court allowed a depositor to recover the amount of his check that had been deposited in a bank that subsequently became insolvent. The court held that the principal/agent relationship between a customer and his bank continued throughout the period of a particular transaction and existed even when the customer deposited an item and was given credit for that item.

The *Restatement (Second) of Agency* provides that the bankruptcy of an agent terminates that agent's authority to conduct the principal's transactions if, upon knowledge of the agent's insolvency, the principal would not consent to further exercise of that authority.[20] This restatement of the common law not only parallels the reasoning adopted in *Wolf* and *Union Trust* but also reflects a fundamental premise of a principal/agent relationship—the principal may terminate the agency relationship at any time. The Code has explicitly adopted the principal/agent relationship for transactions between a customer and its bank.[21] Therefore, it should follow that the Code has also adopted the common law principles that apply to that relationship.

The principal/agency relationship between a customer and its bank is further examined in Zollmann's *Law of Banks and Banking*, a depression-era treatise.[22] Zollman examined then-current cases involving bank failures in order to ascertain the effect of insolvency upon the status of the principal/agent relationship between a customer and its bank. At the outset, he formed several general conclusions regarding the basic principles that govern this relationship. He concluded that a customer's right to revoke its bank's authority to collect an item may be exercised any time prior to collection. This right of revocation can either be express or implied. Moreover, refusal of the depositary bank to abide by this revocation constitutes conversion.[23]

Zollman also found that termination of the agency status could be accomplished by an order to the drawee from the true owner of the item directing the drawee to withhold payment. Alternatively, an injunction against the clearing house and collecting bank prohibiting collection of the item could be used to revoke the agency status.[24] The latter constituted the most extreme means of revocation and gave notice to anyone with knowledge of the injunction that the agency status was terminated.[25]

As to specific situations involving insolvency, Zollman concluded that insolvency of the depositary bank was sufficient ground for revocation of that bank's agency status. He cited numerous cases holding that insolvency of the bank ipso facto dissolved the agency relationship because the bank was disqualified from performing its duties as an agent of the customer.[26]

20. RESTATEMENT (SECOND) OF AGENCY § 113 (1958).

21. U.C.C. § 4-201 (1978).

22. 8 C. ZOLLMANN, BANKS AND BANKING § 5476 (1936). Bank failure was an issue of enormous concern during the Great Depression and was the subject of frequent litigation. The incidence of bank insolvency decreased dramatically after that time and for many years was a rarity. Thus, the issues involved in a bank's insolvency have not been addressed by the courts since the depression. Recently, however, bank failures have resurfaced in substantial numbers generating a great deal of litigation, particularly in Oklahoma and Texas. The courts addressing these issues must look to depression-era treatment for resolution.

23. *Id.* § 5476, at 261.

24. *Id* at 261-62.

25. *Id.* at 262.

26. *Id.* For the proposition that a bank's insolvency terminates its agency, see *id.* §§ 5441-46; Peoples Nat'l Bank v. Moore, 25 F.2d 599 (8th Cir. 1928); Josiah Morris & Co. v. Alabama Carbon Co., 139 Ala. 620, 36 So. 764 (1904); Lippitt v. Thames Loan & Trust Co., 88 Conn.

Finally, Zollman discussed the now-defunct trust theory as a means by which the customer could recover the proceeds from an item when the depositary or collecting bank became insolvent.[27] In applying the trust theory to an insolvent depositary bank, Zollman concluded that an item deposited prior to insolvency that remained uncollected would be impressed with a trust. If the instrument had been collected, then the proceeds of the collection became the subject of trust in favor of the customer.[28] The owner of the item could enjoin the bank from attempting the collection, or it could recover the amount of the item as a preferred claim.[29]

The portion of Zollman's analysis that is based on the trust theory is now largely irrelevant. The trust theory is expressly rejected by the Code in Official Comment 2 to section 4-214.[30] The trust theory was also rejected by the United States Supreme Court in *Jennings v. United States Fidelity & Guaranty Co.*[31]

Abolition of the trust theory by *Jennings* and by the Code, however, has not terminated the possibility that a customer may revoke its bank's agency status. Revoking a bank's agency status and its authority to collect items for the customer does not establish a preferred claim, which is directed against the existing funds of the insolvent bank. Rather, it is designed to get the item back uncollected, so that the owner of the item may collect it himself. In contrast to the trust theory, revocation of agency intervenes prior to payment, before the funds have been designated for the insolvent bank. The insolvent bank has lost nothing because at this point it has received nothing. Revoking agency simply allows the funds to reach the party intended to receive them.

As discussed previously, the Code contemplates revocation of agency status by its express adoption of the principal/agent relationship between a customer and its bank. This remedy is based on general agency law and is compatible with the Code.[32] It is fundamental that in any agency context the principal can revoke its agent's authority. It would be absurd to create a principal/agent relationship in which the principal could *not* terminate the agency status.

Thus, the bank customer, as principal, should be allowed to give notice

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185, 90 A. 369 (1914); *In re* Vavoudis, 141 Misc. 823, 252 N.Y.S. 779 (1931), *aff'd*, 233 A.D. 672, 249 N.Y.S. 870 (1931). *See also* Brennan v. Holden, 4 F. Supp. 285, 287 (D. Mass. 1933), *rev'd sub nom.* Pearson v. Brennan, 75 F.2d 958 (1st Cir. 1985). The authority of a collecting bank ends when it ceases to function as a bank. However, under section 4-214, per se termination would appear to be no longer true. *See* U.C.C. § 4-214 comment 1 (1978).

27. See *infra* text accompanying notes 33-36.

28. 8 C. ZOLLMANN, *supra* note 22, § 5441, at 231-35.

29. *Id.*

30. U.C.C. § 4-214 comment 2 (1978).

31. 294 U.S. 216, 218, 224 (1935). In an opinion authored by Justice Cardozo, the United States Supreme Court expressly rejected the use of a trust theory. A collecting bank became insolvent before it was able to collect a draft from the drawee bank to the depositary bank. The payee of the check brought an action against the assets to the extent of the draft and to recover payment. The court refused to uphold the validity of the trust.

32. *See* U.C.C. § 4-201 (1978).

of its revocation of the agency status to its agents, subagents, or the drawee. This notice should be effective if it comes before payment of the item. If the depository bank has already allowed the customer to draw on provisional credit, then under sections 4-201, 4-208, and 4-209 the bank would have a security interest in the item superior to the owner's rights.[33] The depository bank would occupy the role of a secured party, in addition to its status as the customer's agent.[34] This additional status would allow the bank to proceed with the collection of the item. If the item was returned by a bank to the owner and the owner did not repay the depositary bank, then, as any secured party, the bank would have a right to possession of the item or its proceeds.[35]

As to the form of notice, a customer could inform the depositary bank that it was no longer the agent of the customer and thus not authorized to collect items on the customer's behalf. The depositary bank would then presumably be required to relay this message. If it sent this message through collection channels, much in the same manner as it sends items for payment, then the notice would probably be ineffective because it would be difficult to catch a previously forwarded item. This type of notice would probably allow the instrument to come into the hands of the payor and be paid before notice of revocation could stop payment. On the other hand, telephone notice to the payor might be timely. However, telephone notice should not be valid unless it is verified in writing and indemnity is supplied. These requirements make it difficult to utilize this form of notice in a timely fashion.[36] Thus, the only type of notice that should be allowed to stop the collection process, whether given indirectly or directly by the owner, should be one that adequately protects the payor.

Even so, notice from the depositary bank could cause the payor further difficulty by forcing it to decide who has the better right to the item—the collecting bank holder or the nonholder asserted owner. Moreover, a question arises as to what would be the remedy of the owner if its agent failed to send any notice. Presumably, there would be no remedy because the agent is insolvent. In the final analysis, the only feasible form of notice is notice directly from the owner to the payor.

Adverse Claim Procedure Under the UCC

The Code deals with the issue of notice to the payor in the adverse claim procedure contained in section 3-603. When this section is examined, the question becomes whether the adverse claim procedure in the Code displaced the common law revocation of agency method of stopping collection of an item.[37]

33. *See id.* §§ 4-201(1), 4-208, 4-209.
34. *Id.* § 4-401 comment 1.
35. *Id.* § 9-503.
36. This is so for two reasons: (1) if an item had not yet been received, the payor would have to verify that the call had come from the holder; and (2) the only description of the item is given by the owner, which may not be fully accurate.
37. *See* U.C.C. § 3-603 (1978).

Arguably, when the owner has a claim to an item adverse or superior to that of the collecting bank holder, the adverse claim procedure provides the only means by which an owner can stop collection after revoking agency status. An in-depth analysis of the procedure is necessary to resolve this question.

Section 3-603 provides that the liability of a party on an instrument is discharged to the extent of his payment to the holder of the instrument, even though payment is made with knowledge of a claim of another person to the instrument, unless the person making the claim provides the liable party with indemnity or obtains an injunction against the payment of the instrument.[38] The Official Comments to section 3-603 stress that the paying party should not be inconvenienced by a dispute between two other parties. Therefore, the paying party may ignore an adverse claim unless indemnity that it deems to be adequate is provided or a court order prohibits payment of the instrument.[39]

Use of the adverse claim procedure has not been applied in a context which involves insolvent banks, presumably because the incidence of insolvency has only recently reappeared and the procedure has not yet found its way into the litigation process. The procedure has, however, been applied in contexts where the bank was unwilling to accept an order not to pay, usually involving a cashier's check where the remitter had no right to stop payment.

The closest application of the adverse claim procedure to the *New Covenant* situation was in *Santos v. First National State Bank*,[40] where the loss of a cashier's check in the mail prompted the payee to request the issuing bank to provide a duplicate. Under these facts, it is unlikely that a holder with a claim would come forth. A bank, however, cannot afford to make such an assumption. Accordingly, the bank in *Santos* demanded indemnification, but the payee did not have the financial resources to obtain it. Consequently, the bank refused to issue another check. The court ordered the bank to issue the payee a certificate of deposit to be held, with interest paid, for the statutory period for which the lost check could be successfully presented for payment.[41] The court reasoned that to require another check without indemnification could expose the bank to a risk of loss through no fault of its own.[42]

38. *Id.* If the item is a regular check, the bank is not liable at all and section 3-603 is inapplicable. In such cases, the owner should prevail on the drawer to stop payment because if the bank stops payment at the request of the owner, the bank faces liability under section 4-402 to the drawer. If the check is a teller's check (i.e., a check drawn by the bank on itself), then the owner can induce the drawer bank to stop payment and follow section 3-603 if the bank is sued on its drawer's contract. If the check is certified, section 3-603 works the same as if the check is a cashier's check.

39. *Id.* § 3-603 comment 3.

40. 186 N.J. Super. 52, 451 A.2d 401 (1982).

41. *Id.*, 451 A.2d at 414.

42. *Id.*, 451 A.2d at 413. This could occur if the check were indorsed in blank and transferred to a holder in due course. A comparable problem exists when the depositary bank advances credit and has a right in the check superior to that of the owner to whom the bank delivers the check.

A further extension of the adverse claim procedure in the cashier's check context was examined in *Dziurak v. Chase Manhattan Bank.*[43] In *Dziurak* the court upheld the issuing bank's right to refuse to dishonor its cashier's check. The court concluded, however, that "as a practical matter" the issue could have been resolved by several different procedures other than resorting to litigation. First, relying on section 3-603, the plaintiff could have either obtained a court order enjoining the bank from paying the check or provided indemnity to the bank to protect itself from potential liability.[44] Second, the bank could have taken the initiative by dishonoring the check after indemnity was provided and then commencing an interpleader action.[45]

The *Dziurak* court indicated that payment can be stopped on an item if the remitter either procures injunction relief or provides indemnity for the bank. However, even if the remitter pursues neither of these remedies, the bank may still resolve the situation by refusing to pay the professed holder and, instead, paying the money into the court, letting the adverse claimants battle over the proceeds. The bank, however, is not *required* to pay the money into the court. Thus, if the customer does not comply with section 3-603(1), the bank may pay the holder and thereby be discharged from liability.

The adverse claim procedure, which requires indemnity or an injunction to force the bank to dishonor the item, is preferable to the *Wolf* remedy because, by only requiring notice, the process permitted in *Wolf* leaves the bank vulnerable.[46] A bank that has issued a cashier's check does not know, and has no reasonable means of knowing, whether another claim to the check exists. As far as the bank knows, the party claiming the check has indorsed it in blank or negotiated it. The bank could do what *Wolf* suggested and tender the proceeds into court. However, this would force the bank into inconvenient litigation and impair the cash equivalency of a cashier's check. Thus, the better conclusion is that the adverse claim procedure displaces the common law revocation of agency allowed in *Wolf.*

The adverse claim procedure, however, is not perfect. Although the protection of the bank under section 3-603 is thorough and complete, the remitter's position does not receive the same degree of consideration. Both indemnification and injunctive relief are cumbersome and expensive. Moreover, section 3-603 does not provide adequate standards by which the remitter can engage these procedures.

The Code has not provided a control or standard by which the discretion

43. 58 A.D.2d 103, 396 N.Y.S.2d 414 (1977), *aff'd*, 44 N.Y.2d 776, 377 N.E.2d 474, 406 N.Y.S.2d 30 (1978). A depositor sued his bank, alleging that the bank should have stopped payment on a cashier's check issued by the bank in his favor and endorsed by him so as to be payable to a third party. During the transaction, the bank advised the plaintiff that payment could not be stopped on the check without a court order.

44. *Id.*, 396 N.Y.S.2d at 416.

45. *Id.*

46. One could argue the simple notice allowed under the *Wolf* case is still valid under the Code because the bank can always implead. But, this forces the bank to dishonor its check and endure more inconvenience than is contemplated by comment 3 to section 3-603.

of the bank may be gauged in the case of an indemnification. Instead, section 3-603 uses the language "deemed adequate by the party seeking the discharge," which allows for potentially excessive flexibility on the part of the bank. For example, the bank could either completely waive its right to indemnification by accepting a trifling amount, or it could refuse to deem any amount as adequate. The courts would certainly impose a good faith standard upon the bank under section 1-203, but when the court is forced to "second guess" bank decisions, the validity of section 3-603 is diminished because it may be very difficult for the remitter to show a violation of this standard.[47]

The use of an injunction by a remitter as provided in section 3-603 also generates problems in application. In order to comply with the terms of the section, injunctive relief may only be granted in a suit in which both the owner and the holder are parties.[48] This may raise jurisdictional problems, such as service of process, and may also impose an infeasible time frame. Furthermore, the injunction must be obtained prior to payment by the drawee bank. The remitter does not have much time to interrupt the collection process.

Another problem with section 3-603 arises because the provision does not provide the standard by which a court may decide whether to grant an injunction. In general, irreparable injury is usually required in order to obtain injunctive relief in other contexts.[49] How can the owner show that its claim against the insolvent bank will result in an unquestioned loss at this point in time? Even if it may be able to present a persuasive case, the granting of an interlocutory injunction has not been held to be a matter of right.[50] Without an established standard in the statute, the decision may be left to various peculiarities of local law or the unbridled discretion of the court.

Finally, in order for the adverse claim procedure to apply, the customer's objection to payment must be one involving an adverse title claim. Section 3-603 has incorporated the common law position that distinguishes claims and defenses.[51] The concept of "claim" within this context has traditionally been restricted to equitable or legal claims of title. In this regard, mere defenses do not produce the right to pursue an adverse claim.[52] Nevertheless, common sense dictates that the common law definitional restriction placed on a "claim" should not interfere with the use of section 3-603 in contexts similar to *New Covenant*.

47. *See* Note, *Blocking Payment on a Certified, Cashier's or Bank Check*, 73 MICH. L. Rev. 424, 438 (1974).

48. U.C.C. § 3-603 (1978).

49. D. DOBBS, REMEDIES 108 (1973).

50. *See* Note, *supra* note 47, at 437 n.91.

51. *See* Wallach, *Negotiable Instruments: The Bank Customer's Ability to Prevent Payment on Various Forms of Checks*, 11 IND. L. REV. 579, 593 (1978).

52. *Id.* at 593-94. A bank was placed in a similar position under the common law of negotiable instruments where the bank's alternatives were limited, and the bank could be penalized for choosing the wrong course. If a bank paid an instrument after receipt of notice of an adverse title claim, the bank would be liable to the customer. Therefore, the bank had to contend with the possibility of double liability if it paid an item after receiving notice of the customer's claim. Double liability could also occur even if the bank followed the customer's request.

A recent Georgia case illustrates how section 3-603 might work under *New Covenant* circumstances.[53] In *Fulton National Bank v. Delco Corp.*, the court held that under the Code a "claim" to an item involved something more than a defense. The court held that it also included the right to recover the instrument or the proceeds of the instrument.[54] The ownership interest referred to in *Fulton* seems to be the same as that which the depositor in *New Covenant* might have asserted as an adverse claim under section 3-603. The depositor of an item has an ownership interest that is paramount to any bank in the collection chain that has become a holder of the item but has not advanced funds on the item. Therefore, in the *New Covenant* context, the remitter should be able to invoke section 3-603 and successfully claim the instrument.

Conclusion

In *New Covenant* the owner of an item argued that the insolvency of its bank allowed it to revoke the bank's agency status and corresponding authority to collect the disputed item. This argument was rejected by the Oklahoma Court of Appeals because the court erroneously focused on the nature of the item, rather than the owner's rights in the item. The issue in *New Covenant* was not whether an issuing bank could stop payment on a cashier's check. Rather, the issue was whether the method proposed by the owner (i.e., the revocation of the depositary bank's agency status) was a viable means by which a customer could retrieve an uncollected item from the collection process when the depositary bank became insolvent.

The Code does not clearly indicate whether an owner of an item may halt the collection process when its depositary bank becomes insolvent. Also, the Code does not contain a clear-cut means whereby the owner can accomplish this undertaking. Arguably, the common law notice procedure, as set forth in *Wolf*, is preserved. However, if an owner is allowed to utilize the *Wolf* method, with notice alone, the payor bank is left in a vulnerable position. Also, in the case of a cashier's check, the *Wolf* procedure impairs the instrument's cash equivalency.

One might conclude that section 3-603 displaces the common law method of *Wolf* and provides a suitable remedy to the *New Covenant* problem with the adverse claim procedure. The adverse claim procedure, however, is inadequate for several reasons. First, indemnification and injunctive relief are excessively expensive, time-consuming, and burdensome to the owner. In fact, it is very probable that an owner will be denied recovery of its item in most cases because of financial or time constraints. Second, the Code neither provides a standard to determine what constitutes "adequate indemnification" nor a standard to determine whether an injunction should be granted. On

53. 128 Ga. App. 16, 195 S.E.2d 455 (1973). A franchisor sued a franchisee and a bank to collect payment on a check which represented a franchise fee. The franchise had delivered to the plaintiff a check that was drawn on the bank's account with a Federal Reserve Bank. The bank stopped payment on the check at the request of its customer, the franchisee.

54. *Id.*, 195 S.E.2d at 457.

the other hand, section 3-603 is designed to remove the bank from the dispute, giving it the most protection possible. This the section does effectively. Moreover, in the case of cashier's checks, discouraging adverse claims increases the instrument's cash equivalency. However, section 3-603 does not appear to give the *owner* of the instrument sufficient protection and consideration.

An owner is not likely to invoke the adverse claim procedure frivolously. In a context such as *New Covenant*, where the amount of the item exceeds FDIC insurance, the gravity of the problem is obvious. Without some kind of relief, the owner would be forced to accept a pro rata distribution of the insolvent bank's funds. In *New Covenant*, and in most other cases, this would not result in full restitution of the item's proceeds. It is submitted that the Code should at least clearly indicate that an owner can revoke agency and that section 3-603 is the appropriate procedure by which an owner can force the bank to refuse payment on the instrument. Moreover, since the adverse claim procedure presents less danger to the payor bank than other cases, and less threat to the cash equivalency of the instrument, the section 3-603 procedure should be eased to make it more readily available to the owner of an item in the *New Covenant* and similar situations.[55]

Shelia Tims

55. Protection could be provided to the bank by requiring the remitter to sign an affidavit attesting to its revocation of agency that would carry penalties for false statement. The bank could also be given a cause of action for any loss it sustained due to false information.