

BOSTON COLLEGE LAW REVIEW

VOLUME XXXVI

JULY 1995

NUMBER 4

DETERMINING THE RIGHTS AND LIABILITIES OF THE REMITTER OF A NEGOTIABLE INSTRUMENT: A THEORY APPLIED TO SOME UNSETTLED QUESTIONS†

GREGORY E. MAGGS*

The rights of a remitter are the rights that the Code forgot.¹

Article 3 of the Uniform Commercial Code ("UCC" or the "Code") strives to establish a concise set of rules to govern the millions of negotiable instrument transactions that take place every day. For the most part, it does an excellent job. The article spells out, in straightforward terms, the rights and liabilities of the vast majority of parties who typically come into contact with checks and promissory notes, such as makers,² issuers,³ drawers,⁴ drawees,⁵ indorsers,⁶ acceptors,⁷ and holders.⁸ Article 3, however, comes up short in its treatment of one

† Copyright © 1995, Gregory E. Maggs.

* Associate Professor of Law, The George Washington University National Law Center. The author thanks Dean Jack Friedenthal and the National Law Center for providing generous support for the research and writing of this essay. The author also thanks his many colleagues at the National Law Center for their useful comments on earlier drafts.

¹ WILLIAM D. HAWKLAND ET AL., UNIFORM COMMERCIAL CODE SERIES § 4-104:03 (1992).

² See U.C.C. §§ 3-103(a)(5), 3-105(c), 3-412 (1990).

³ See *id.* §§ 3-105(c), 3-412.

⁴ See *id.* §§ 3-103(a)(3), 3-414.

⁵ See *id.* §§ 3-103(a)(2), 3-408.

⁶ See *id.* §§ 3-204(b), 3-415.

⁷ See U.C.C. §§ 3-103(a)(1), 3-413.

⁸ See *id.* §§ 1-201(20), 3-301(i).

important participant in many negotiable instrument transactions: the remitter.

The present official text of article 3 defines a remitter as "a person who purchases an instrument from its issuer if the instrument is payable to an identified person other than the purchaser."⁹ Many transactions involving cashier's checks,¹⁰ teller's checks,¹¹ and money orders¹² involve a remitter.¹³ Banks and other institutions issue and sell these instruments for their face value plus a small charge.¹⁴ For example, suppose that a buyer wants to purchase an automobile, but the dealer refuses to take a personal check. As an alternative way of paying for the vehicle, the buyer may procure a cashier's check from a bank and ask the bank to make the check payable to the dealer. In this transaction, the buyer would be a remitter because the buyer is purchasing an instrument, the cashier's check, from an issuer, the bank, and the check is payable to a person other than its purchaser—it is payable to the dealer rather than the buyer.

Unfortunately, apart from defining remitters, article 3 says almost nothing about them. Although a few sections and official comments mention them,¹⁵ the article does not give remitters the comprehensive treatment afforded other participants in negotiable instrument transactions. The article's silence has left uncertain a wide variety of basic questions about the remitter's rights and liabilities. These questions include, for example, whether a remitter can obtain a refund of the purchase price of an instrument; whether a remitter can enforce an instrument; whether a remitter makes transfer or presentment warranties; and whether a remitter has implied contractual liabilities.

This essay attempts to show how courts should answer these and many other unsettled issues. Part I explains why some people and businesses enter into remitter transactions. Part II describes what little the Uniform Commercial Code and other sources of law say about

⁹ *Id.* § 3-103(a)(11).

¹⁰ *See id.* § 3-104(g) (defining a cashier's check as "a draft with respect to which the drawer and drawee are the same bank or branches of the same bank").

¹¹ *See id.* § 3-104(h) (defining a teller's check as a "draft drawn by a bank (i) on another bank, or (ii) payable at or through a bank").

¹² Money orders vary in form, but most function like personal checks. *See id.* § 3-104 cmt. 4; Note, *Personal Money Orders and Teller's Checks: Mavericks Under the UCC*, 67 COLUM. L. REV. 524, 527-28 (1967) [hereinafter Columbia Note].

¹³ No one keeps statistics on the use of cashier's checks and similar instruments. The drafters of the Code, apparently on the basis of experience, note that "it is more common" than not for the purchasers of these instruments to be remitters. U.C.C. § 3-201 cmt. 2.

¹⁴ *See* Columbia Note, *supra* note 12, at 527-28.

¹⁵ *See infra* Part II.A (listing and discussing these sections and comments).

remitters. Part III presents a framework for courts deciding questions about remitters. It argues that courts should recognize the rights and liabilities established by the Code and by precedent. Although courts have the power to create additional rights and liabilities as a matter of common law, in answering unsettled questions they should decline to exercise that power except in very limited circumstances. Parts IV and V apply this theory to a collection of issues about remitters' rights and liabilities. Part VI states a brief conclusion.

I. USE OF REMITTER TRANSACTIONS

A party who wants to pay a sum of money generally can make the payment in a variety of ways. A consumer, for example, might pay for items purchased at a store in cash, by credit card, or with a check or money order. A business similarly might pay for supplies with a funds transfer or a letter of credit. Typically, consumers and businesses will want to tailor their transactions to the specific circumstances of each transaction.

The following discussion considers why some parties choose to make payments by remitting negotiable instruments. It addresses both legitimate and illegitimate uses of remitter transactions.

A. *Legitimate Uses*

Most people who use remitter transactions probably have legitimate reasons. They are not trying to cheat anyone or commit any form of crime. They simply want to pay money in an economical form that provides them suitable protection and is satisfactory to the party receiving payment.

A remitter is a person who purchases an instrument from its issuer if the instrument is payable to a person other than the purchaser.¹⁶ People become remitters, as a result, only after making two choices. First, they decide to purchase an instrument issued by someone else. Second, they decide to make the instrument payable to the person receiving payment. Both decisions make sense in certain circumstances.

Some remitters purchase these instruments because they have to pay money to a person who refuses to accept any other form of payment. Most car dealers, for example, require their customers to pay for new cars using one of these instruments. They will not take pay-

¹⁶ U.C.C. § 3-103(a)(11).

ment by cash or credit card and generally do not accept personal checks.

A person can justify refusing to take anything but a cashier's check or teller's check because these instruments involve few risks. Unlike personal checks, they almost never bounce. In addition, they generally do not attract thieves the way that large sums of cash might. Moreover, in contrast to other forms of payment, such as payment by credit card, these instruments do not impose costs on the person receiving them.¹⁷

Remitters also buy cashier's checks, teller's checks or money orders because they do not have checking accounts and do not want to pay in cash. A person with a small income, for example, may purchase one of these instruments to facilitate sending money to a relative. Although these instruments entail some risks,¹⁸ they do not involve the perils associated with cash.

A person who decides to purchase a cashier's check, teller's check or other instrument has several choices in determining how to complete the instrument. For example, suppose a consumer decides to buy a boat from a merchant using a cashier's check. The consumer could make the instrument payable in three different ways.

First, the consumer could ask the bank to name the merchant as the sole payee of the check. The consumer, in this case, would become the remitter of the check.¹⁹ The consumer then could pay for the boat simply by delivering the instrument to the merchant.²⁰

Second, the consumer could ask the bank to name both the consumer and the merchant as alternative payees. For example, the cashier's check could read: "Pay to the order of CONSUMER or MERCHANT."²¹ Although the consumer would not qualify as a remitter, he or she could pay for the boat simply by delivering the instrument.

Third, the consumer could ask the bank to name only the consumer as the payee of the instrument. The consumer could pay for the boat by indorsing the check and delivering it to the seller.²² Again, the

¹⁷ See generally *National Bancard Corp. v. VISA U.S.A.*, 596 F. Supp. 1231 (S.D. Fla. 1984), *aff'd*, 779 F.2d 592, 595 (11th Cir. 1986) (outlining fees and charges associated with credit cards).

¹⁸ See, e.g., *Santos v. First Nat'l State Bank*, 451 A.2d 401, 403 (N.J. Super. Ct. App. Div. 1982) (check from son to father lost in the mail).

¹⁹ See U.C.C. § 3-103(a)(3).

²⁰ See *id.* § 3-201(b) (indicating that a remitter may negotiate an instrument by transfer of possession alone).

²¹ See *id.* § 3-110(d) (authorizing alternative payees).

²² See *id.* § 3-201(b) (requiring indorsement for negotiation by non-remitter). If the consumer worried about indorser liability—i.e., liability if the bank does pay—the consumer could indorse the check "without recourse" and thus disclaim the liability. *Id.* § 3-415(b).

consumer, in this situation, would not fall within the definition of a remitter.

The consumer faced with these alternatives may prefer the second and third options to the first option because the rights of a remitter remain quite unclear. By contrast, the Code is explicit about the rights of the alternative or sole payee of a negotiable instrument. They not only may negotiate the instrument, but also may enforce it.²³

The consumer's preferences, however, may have to give way to those of the merchant. The merchant may prefer the first option, in which the consumer becomes a remitter, for several reasons. Most importantly, the merchant may not understand the other forms of structuring the transaction. By custom, most people who use cashier's checks to buy goods make the instrument payable to the merchant.²⁴ The merchant may not want to experiment with any other arrangement.

The merchant also may hesitate to accept the other forms of payment because they may involve additional risks. For example, the merchant may worry that the second option, in which the bank lists the consumer as an alternative payee, would allow the consumer to steal the check and enforce it. The merchant may fear that the third option, in which the bank lists only the consumer as a payee, will force it to rely on the validity of the consumer's indorsement for its right to enforce the instrument. If the merchant does not know the consumer, the merchant runs the risk that the consumer has stolen the check and is forging someone else's name.

In all these situations, the parties will work out the form of the transaction according to their relative bargaining strength and their willingness to give in on other factors, such as price. The merchant in this example might be able to insist that the consumer become a remitter. In another case, however, a supplier may not be able to dictate the form of a cashier's check used by a business for payment. The result simply depends on the circumstances.

²³ Whether identified as an alternative payee or the sole payee, the consumer would become a holder of the instrument. *See id.* §§ 1-201(20), 3-110 cmt. 4. As a holder, the consumer would have the right to enforce the instrument, *see id.* § 3-301(i), and negotiate it, *see id.* § 3-201. *See also id.* § 3-110(d) ("If an instrument is payable to two or more persons alternatively, it is payable to any of them and may be negotiated, discharged, or enforced by any or all of them in possession of the instrument.").

²⁴ *See* U.C.C. § 3-201 cmt. 2.

B. *Illegitimate Uses*

Remitter transactions, at present, have one serious problem: criminals find them attractive because they afford anonymity. Although cashier's checks and teller's checks generally contain a space to indicate the remitter's name, the purchaser does not need to fill in the name.²⁵ A criminal thus may purchase and use one of these checks without revealing much, if anything, about his or her identity. This anonymity enables criminals to commit various forms of wrongdoing.

Some criminals use remitter transactions to defraud merchants. One expert explains a typical scam used to buy expensive automobiles:

The perpetrator tells the car dealer that he intends to buy the car. He then buys, under a phony name a cashier's check at a prominent good-sized community bank for \$32, and scans the check on his personal computer, changing it to \$32,000. He goes back to pay the car dealer after 5 PM, when the banks are closed and the dealer just assumes the check is valid.²⁶

In this situation, the perpetrator is a remitter and the dealer is the payee of the check.

The ploy works because the bank and dealer pay little attention to the identity of the remitter. The bank principally wants to know whom it has to pay, not who bought the check. The dealer (not thinking about the possibility that the check might be void) merely wants to know which bank will pay the check. Newspapers regularly run stories about swindlers who have gotten away with variations of this simple ruse.²⁷

Other crooks use remitter transactions to "launder money"—that is, to convert cash into something that authorities cannot trace and that does not appear suspicious.²⁸ For example, suppose a drug dealer has several thousand dollars in \$100 bills. The drug dealer, like anyone else, would not want to keep this much cash sitting around the house

²⁵ See *Spears Carpet Mills, Inc. v. Century Nat'l Bank of New Orleans* (In re *Spears Carpet Mills, Inc.*), 86 B.R. 985, 993 (Bankr. W.D. Ark. 1987) ("[F]illing in of the remitter line on a cashier's check is akin to filling in of the memo line on a personal check; helpful, but not required, and of no legal effect."); cf. U.C.C. § 3-104(g) (1990) (defining cashier's check without requiring a space to identify a remitter).

²⁶ *Expert Warns Banks to Beware of Forged Checks*, BANK LETTER, Feb. 22, 1993, at 2.

²⁷ See, e.g., Roy H. Campbell, *Dealer Left Holding Bad Check, 'Doctor's' R/X for Porsche*, L.A. TIMES, Aug. 7, 1986, § 9 at 5; Jane Meinhardt, *Buyer Uses Fake Checks for Used Cars*, ST. PETERSBURG TIMES, July 22, 1992, at 1.

²⁸ See generally Margaret Samuel, *Non-cash Alternatives and Money Laundering*, 1992 AM. BUS. L.J. 69.

because someone might steal it. Yet, the drug dealer also does not want to open a bank account because tax or law enforcement authorities might discover it.

A drug dealer typically solves this problem by using the cash to buy cashier's checks, which afford safety and anonymity. The drug dealer, of course, will not want to put his or her own name on the checks. Instead, the drug dealer typically asks the bank to name as payees either creditors or "fronts" who would be expected to receive a cashier's check. The drug dealer thus becomes the remitter of the checks without attracting much attention.

Many large money laundering operations involve some variation of this scheme.²⁹ In fact, the Treasury Department already has promulgated regulations to combat money laundering through remitter transactions. These regulations generally require banks to verify and record the identity of anyone purchasing a cashier's check for more than \$3000.³⁰

II. SOURCES OF LAW

Courts tend to consult three principal sources in deciding cases about remitters: the text and official comments of the Code,³¹ precedent decided before and after promulgation of the Code,³² and the recommendations of treatises and law review articles.³³ The following sections describe the limited guidance that these sources provide.

²⁹ See, e.g., *How Bankers Lent a Greedy Hand to Money Laundering Schemes*, AM. BANKER, Feb. 15, 1985, at 4. See also Ellen J. Pollock & Viveca Novak, *Capital Secret: There May Be Less to the Whitewater Case than Meets the Eye*, WALL ST. J., Feb. 22, 1995, at A1 (reporting allegations that James McDougal bought a cashier's check in the name of Senator J. William Fulbright and used it to funnel an illegal payment to President Bill Clinton).

³⁰ See Amendments to the Bank Secrecy Act Regulations Relating to Identification Required to Purchase Banks Checks and Drafts, Cashier's Checks, Money Orders, and Traveler's Checks, 59 Fed. Reg. 52,250, 52,252-53 (1994) (to be codified at 31 C.F.R. § 103.29).

³¹ See, e.g., *Jerman v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 87 Cal. Rptr. 88, 92 (Ct. App. 1970) (citing pre-revision § 3-419(1)(c) as a basis for holding a bank liable to a remitter for paying a cashier's check without proper indorsement); *Lassen v. First Bank*, 514 N.W.2d 831, 836-37 (Minn. Ct. App. 1994) (citing pre-revision § 3-419 cmt. 4 for the opposite conclusion).

³² See, e.g., *Gillespie v. Riley Management Corp.*, 319 N.E.2d 753, 757 (Ill. 1974) (relying on a precedent from 1889 and modern cases from Kansas, New York, and California in stating that a remitter may "cancel" or return a cashier's check prior to delivery); *Fulton Nat'l Bank v. Delco Corp.*, 195 S.E.2d 455, 457 (Ga. App. 1973) (rejecting precedents from New York holding that a bank must pay a cashier's check to the payee even if the remitter has a claim to the instrument).

³³ See, e.g., *Louis Falcigno Enters., Inc. v. Massachusetts Bank & Trust Co.*, 436 N.E.2d 993, 994 (Mass. Ct. App. 1982) (citing law review articles, student notes, and a treatise for the proposition that a bank may not assert defenses of a remitter as a ground for refusing to pay cashier's check).

A. *The Uniform Commercial Code*

All fifty states and the District of Columbia have enacted article 3 of the UCC.³⁴ Two versions of the article, however, now exist. These versions say slightly different things about remitters.

1. Official Text of the Pre-Revision Article 3

Prior to the 1990 revision of article 3, all states had enacted what is now called the "pre-revision" version of article 3. The pre-revision version came into existence in 1952, but went through minor changes over the years.³⁵ Although no longer controlling in most states, the pre-revision version of article 3 has continuing relevance for two reasons. First, it remains in force in the nineteen states and other jurisdictions that have not yet adopted the revision. Second, because a wide variety of precedent has accumulated under it, courts will continue to consult it when deciding new remitter cases.

The pre-revision version of article 3 mentions remitters in only one provision. Section 3-102(1)(a) describes the "issue" of an instrument as "the first delivery of an instrument to a holder or a remitter."³⁶ This section accords with the definition of remitter in the revised article 3.³⁷ Moreover, like official comment 4 to section 3-302 of the revised article 3,³⁸ section 3-102(1)(a) also implies that remitters differ from holders.

Two official comments to the pre-revision Code also mention remitters. Comment 1 to section 3-102 notes that the description of issue differs from the definition in the Negotiable Instruments Law (the "N.I.L."),³⁹ a uniform law promulgated in 1896 and eventually

³⁴ See HENRY J. BAILEY ET AL., *BRADY ON BANK CHECKS* ¶ 1.7, at 1-11 (7th ed. 1992).

³⁵ See *id.* Massachusetts adopted it in 1952, and Pennsylvania in 1957. See *id.* All of the other states and various federal jurisdictions adopted it after it underwent various amendments in 1962. See *id.* Slight modifications occurred in ensuing years. Unless otherwise indicated, when this essay addresses the pre-revision version of article 3, it will discuss the final official text as it existed in 1989, immediately prior to the 1990 revision.

³⁶ U.C.C. § 3-102(a)(1) (1989).

³⁷ See *id.* § 3-103(a)(11) (1990).

³⁸ See *id.* § 3-302 cmt. 4 (1990) (indicating that a remitter is not a holder).

³⁹ See *id.* § 3-102 cmt. 1 (1989). The comment states:

[The N.I.L.] required that the delivery be "to a person who takes as a holder," thus raising difficulties in the case of the remitter . . . who may not be a party to the instrument and thus not a holder. The definition in subsection (1)(a) of the Section thus provides that the delivery may be to a holder or to a remitter.

Id.

enacted in all fifty states.⁴⁰ Comment 2 to section 3-302 uses remitters in two examples showing how the payee of an instrument can become a holder in due course.⁴¹ These examples differ little from the one, described below, in official comment 4 to the revised section 3-302.⁴²

2. The Revised Article 3

The American Law Institute and the National Conference of Commissioners on Uniform State Laws approved a major revision of article 3 in 1990.⁴³ As of the time of this writing, thirty-one states and the District of Columbia have adopted this revision.⁴⁴ Presently, all other jurisdictions retain the pre-revision version of the article on their books.

The 1990 version of article 3 addresses remitters in three sections. The first of these sections, section 3-103, defines various terms, including "remitter," used throughout the article.⁴⁵ Section 3-201, the second section mentioning remitters, describes the "negotiation" of instruments, a form of assignment.⁴⁶ Section 3-201(b) says that a bearer instrument—such as a check payable to cash—"may be negotiated by transfer of possession alone."⁴⁷ Section 3-201(b) also states that "[e]xcept for negotiation by a remitter," negotiation of a nonbearer instrument requires a proper indorsement.⁴⁸ Section 3-201(b), in other words, indicates that remitters can negotiate even nonbearer instruments without indorsement. Thus, if a consumer buys a cashier's check payable to a merchant, the consumer can negotiate it simply by delivering it to the merchant. The consumer does not need to sign the check.

Section 3-312, the third section in the revised version of article 3 that discusses remitters, establishes a new procedure for recovering the amount of lost, destroyed, or stolen cashier's checks, teller's checks, or

⁴⁰ See *id.* § 3-101 cmt. (1989) (discussing the N.I.L.); JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* § 1, at 2-3 (3d ed. 1988) (student edition) (same).

⁴¹ See U.C.C. § 3-302 cmt. 2 (1989).

⁴² See *id.* § 3-302 cmt. 4 (1990).

⁴³ See BAILEY, *supra* note 34, ¶ 1.8, at 1-11, 1-12.

⁴⁴ *Id.* ¶ 1.8, at S1-4, S1-5 (Supp. 1994). Some of these jurisdictions have made minor changes to the official text. *Id.*

⁴⁵ See U.C.C. § 3-103 (1990).

⁴⁶ *Id.* § 3-201. For more details on assignment, see *infra* Part IV.E.

⁴⁷ U.C.C. § 3-201(a); see *id.* § 3-111.

⁴⁸ *Id.* § 3-201(b).

certified checks.⁴⁹ The procedure requires a party who loses one of these instruments to file a "declaration of loss" with the issuing bank and to assume any liability that the bank might have on the instrument.⁵⁰ Sections 3-312(a)(3)(ii) and 3-312(b)(i) include the "remitter" as one of the parties eligible to use the procedure; both sections state that, in the case of a cashier's check or teller's check, the person claiming the right to recover must be the remitter or payee of the check.⁵¹

In addition to these three sections, six official comments to the current version of article 3 also mention remitters.⁵² Of the six, only two are important because they take controversial stances on issues that the text does not address clearly.⁵³ Comment 4 to section 3-302 explicitly distinguishes remitters from holders.⁵⁴ Additionally, comment 1 to section 3-312 asserts that remitters do not have the right to enforce instruments.⁵⁵

⁴⁹ See *id.* § 3-312(b). This provision did not exist in earlier versions of article 3.

⁵⁰ See *id.* § 3-312(b)-(c). For more details on the procedure, see *infra* Parts IV.A.1.c, IV.G.

⁵¹ See U.C.C. §§ 3-312(a)(3)(ii), (b)(1).

⁵² Four of these comments provide little new information about the rights or liabilities of remitters. Comment 1 to § 3-105 notes that the pre-revision article 3 did not define remitters. See *id.* § 3-105 cmt. 1. The comment says in pertinent part: "Under former Section 3-102(1)(a) 'issue' was defined as the first delivery to a 'holder or a remitter' but the term 'remitter' was neither defined nor otherwise used." *Id.* Comment 2 to § 3-201 gives an example of how a remitter may negotiate an instrument. See *id.* § 3-201 cmt. 2. In the example, Buyer purchases goods from Seller with a cashier's check payable to Seller. The comment states in pertinent part: "In that case Buyer is referred to as the 'remitter.' Section 3-103(a)(11). The remitter, although not a party to the check, is the owner of the check until ownership is transferred to Seller by delivery." *Id.* Comment 2 to § 3-312 reiterates that only remitters and a few other parties may use the procedure established by § 3-312. See *id.* § 3-312 cmt. 2. It states in pertinent part: "[A] claim may be asserted only by the drawer or payee of a certified check or the remitter or payee of a cashier's check or teller's check. An indorsee of a check is not covered because the indorsee is not an original party to the check or a remitter." *Id.* Comment 3 to § 3-411 states that banks sometimes refuse to pay cashier's checks and teller's checks on grounds that a remitter has a claim to them. See *id.* § 3-411 cmt. 3. The comment explains: "In the usual case [when a bank refuses to pay a cashier's check or teller's check] . . . a remitter . . . is asserting a claim to the check on the basis of a rescission of negotiation to the payee under Section 3-202." *Id.* Section 3-202 allows rescission for fraud and other grounds. See *id.* § 3-202(b).

⁵³ For a discussion of the controversy, see *infra* Part IV.A.2.

⁵⁴ See U.C.C. § 3-302 cmt. 4. The comment presents an example in which Buyer obtained a cashier's check from Bank and then delivered it to Seller. The comment states in pertinent part:

In that case, when Buyer took delivery of the check from Bank, Buyer became the owner of the check even though Buyer was not the holder. Buyer was a remitter. Section 3-103(a)(11). At that point, nobody was a holder. When Buyer delivered the check to Seller, ownership of the check was transferred to Seller who also became the holder.

Id.

⁵⁵ See *id.* § 3-312 cmt. 1. The comment notes that section 3-312 differs from section 3-309, a similar provision that allows holders and certain others to enforce instruments that they have

B. Cases

A wide variety of cases have addressed the rights and liabilities of remitters. These cases fall into two relevant categories. The first category includes common law and other cases decided prior to enactment of the Code. The second category includes all cases decided by courts after adoption in their jurisdictions of article 3 of the Code.

1. Earlier Cases

Although not extensive, a law of remitters existed prior to the promulgation of the Code. Cases in England began to discuss remitters in the seventeenth century when bills of exchange had become a common form of negotiable instrument.⁵⁶ By the late nineteenth century, courts in the United States also had rendered a variety of decisions on remitters.⁵⁷ Some of these decisions, as Part III will show, remain highly influential.

States codified the law of negotiable instruments around the turn of the century. As noted above, between 1896 and promulgation of the Code in the 1950s, every state adopted the N.I.L.⁵⁸ The N.I.L., however, did not mention remitters and thus did little to delineate their rights and liabilities.⁵⁹ As a result, even after the N.I.L.'s enactment, courts had to determine the rights of remitters by analogy to other parties whose rights the law defined and by reference to pre-N.I.L. case law.⁶⁰ Because cases rendered during this period thus do not depend on the N.I.L., courts should treat them like common law precedent.

2. Cases Under the Code

Courts have issued scores of reported opinions on remitters under the Code. Parts IV and V of this essay address several dozen of these

lost. In explaining one difference, the comment states in pertinent part: "Section 3-309 applies only to a person entitled to enforce the check. It does not apply to a remitter of a cashier's check or teller's check or to the drawer of a certified check. Section 3-312 applies to both." *Id.*

⁵⁶ For a thorough discussion of the early history of the common law of remitters, see Frederick K. Beutel, *Rights of Remitters and Other Owners Not Within the Tenor of Negotiable Instruments*, 12 MINN. L. REV. 584, 591-98 (1928).

⁵⁷ See *id.*

⁵⁸ See *supra* text accompanying note 40.

⁵⁹ See Underhill Moore, Note, *The Right of the Remitter of a Bill or Note*, 20 COLUM. L. REV. 749, 754 (1920).

⁶⁰ See WILLIAM E. BRITTON, *BILLS AND NOTES* 300 (1943); Moore, *supra* note 59, at 754, 755-56.

cases. For now, several generalizations about these decisions must suffice.

First, most courts have found determining the rights and liabilities of remitters under the Code rather difficult. Because the Code says so little about remitters, the courts simply have not had much guidance. As a result, many opinions rely on precedent rather than on statutory provisions.⁶¹ Part III will explain the legitimacy of this approach.

Second, courts have disagreed on a variety of issues that they have addressed. For example, as Part IV will show, courts currently disagree about the basis for allowing remitters to return instruments and about whether remitters may recover for wrongful payment.⁶² Fortunately, because many cases only have reached intermediate courts, the conflicts have not become permanent.⁶³ At this point, the courts of last resort in most states still have the power to undo the disagreements.

Third, despite widespread litigation of questions involving remitters, courts still have not addressed a number of significant issues. For example, no court appears to have considered the fundamental issue of whether remitters make presentment or transfer warranties.⁶⁴ Eventually, however, these issues may find their way into litigation.

Fourth, nearly all modern remitter cases involve cashier's checks. Nothing in article 3 precludes a person from becoming a remitter of other kinds of instruments.⁶⁵ Yet, only a few cases have concerned teller's checks and money orders,⁶⁶ and no case has addressed personal checks.⁶⁷ Perhaps litigation over cashier's checks predominates because they typically involve larger sums of money. Whatever the reason,

⁶¹ For examples, see *supra* note 32.

⁶² See *infra* Parts IV.A, IV.C.

⁶³ A few cases have reached state courts of last resort. See, e.g., *State ex rel. Chan Siew Lai v. Powell*, 536 S.W.2d 14, 16 (Mo. 1976) (en banc) (remitter could not enjoin bank's payment of a cashier's check to the holder); *Bunge Corp. v. Manufacturers Hanover Trust Co.*, 286 N.E.2d 903, 906 (N.Y. 1972) (absent notice of delivery, bank could accept return of cashier's check by remitter); *Mesquite State Bank v. Professional Inv. Corp.*, 488 S.W.2d 73, 75 (Tex. 1972) (bank liable to remitter to whom it failed to issue cashier's checks).

⁶⁴ See *infra* Part IV.

⁶⁵ See U.C.C. § 3-103(a)(11) (1990) (allowing remitters to purchase any kind of instrument).

⁶⁶ For remitter cases involving teller's checks, see, e.g., *Fulton Nat'l Bank v. Delco Corp.*, 195 S.E.2d 455, 457 (Ga. Ct. App. 1973); *Feinstein v. Chemical Bank*, 443 N.Y.S.2d 356, 357 (N.Y. App. Div. 1981); *Fur Fantastic, Ltd. v. Kearns*, 430 N.Y.S.2d 27, 29 (Civ. Ct. 1980); *Steenbergen v. First Fed. Sav. & Loan*, 753 P.2d 1330, 1331 (Okla. App. 1987). For cases on money orders, see, e.g., *First Nat'l Bank v. Duncan Sav. & Loan Ass'n*, 957 F.2d 775 (10th Cir. 1992); *Chicago Cicero Currency Exch., Inc. v. Continental Ill. Nat'l Bank*, 545 N.E.2d 259 (Ill. App. Ct. 1989); *Duggan v. State Bank of Antioch*, 540 N.E.2d 1111 (Ill. App. Ct. 1989).

⁶⁷ Americans apparently never have purchased personal checks for remittance. See *Moore, supra* note 59, at 759.

because of the disparity in the number of cases, this essay inevitably will discuss cashier's checks more than it discusses other instruments.

C. Secondary Sources

Britton's classic treatise on *Bills and Notes*, which appeared before the Code, contains a very helpful section on remitters at common law and under the N.I.L.⁶⁸ No major treatise on the Uniform Commercial Code, however, attempts to address remitters in a comprehensive manner. The most extensive coverage appears in the *Uniform Commercial Code Series*, a multi-volume work written by Hawkland and others.⁶⁹ It mentions remitters in over thirty places. Part IV discusses some of the authors' ideas in depth. Other modern treatises say almost nothing about remitters.⁷⁰

Most scholarship about remitters in law reviews predates the Code. In the 1920s, both the *Columbia Law Review* and *Minnesota Law Review* published thorough articles on the common law status of remitters.⁷¹ A few other articles and notes from roughly the same period also discussed remitters.⁷²

Since adoption of the Code, one brief but thoughtful student note has focused on the rights of remitters.⁷³ A number of other articles have addressed remitters incidentally in discussing cashier's checks and similar instruments.⁷⁴ None of these writings, however, has attempted to provide a complete account of the rights and liabilities of remitters.

⁶⁸ See BRITTON, *supra* note 60, at 298-303.

⁶⁹ HAWKLAND ET AL., *supra* note 1.

⁷⁰ The multi-volume treatise on the Uniform Commercial Code by Anderson addresses their rights briefly in one section. See 5A RONALD A. ANDERSON, *ANDERSON ON THE UNIFORM COMMERCIAL CODE* § 3-104:51 (1994). Bailey's leading treatise on bank checks mentions remitters in a few places, but the treatment is not consistent. See BAILEY ET AL., *supra* note 34. The treatise, for example, states that "[t]he term 'remitter' is not defined in the 1962 or 1990 UCC." *Id.* ¶ 5.1, at 5-2 n.2. In fact, as noted above, U.C.C. § 3-103(a)(11) (1990) supplies a definition. White and Summers' four-volume work on the Code appears not to mention remitters. See 1B JAMES J. WHITE AND ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* (1993) (practitioner edition).

⁷¹ See Beutel, *supra* note 56; Moore, *supra* note 59.

⁷² See Zechariah Chafee, *Progress of the Law—Bills and Notes*, 33 HARV. L. REV. 255, 263-64 (1919); *Cancellation of Bank Draft at Request of Purchaser*, 40 BANKING L.J. 527 (1923); Case Comment, *Sutherland State Bank v. Dial*, 28 YALE L.J. 695 (1919) [hereinafter Case Comment]; Comment, *Transmission of Money and Sale of Credit*, 33 YALE L.J. 177 (1923) [hereinafter Yale Comment].

⁷³ See Jane E. Tobin, Comment, *The Rights of a Remitter of a Negotiable Instrument*, 8 B.C. INDUS. & COM. L.REV. 260 (1967).

⁷⁴ See David J. Benson, *Stop Payment of Cashier's Checks and Bank Drafts Under the Uniform Commercial Code*, 2 OHIO N.U. L. REV. 445 (1975); Brian J. Davis, *The Future of Cashier's Checks under Revised Article 3 of the Uniform Commercial Code*, 27 WAKE FOREST L. REV. 613 (1992);

III. DECIDING QUESTIONS ABOUT REMITTERS

The following discussion outlines and defends a brief theory of how courts should decide questions about remitters. It asserts that courts must follow the Code where it speaks to an issue. Where the Code does not answer a question, however, courts must resort to common law principles. Sometimes precedent will govern an issue that the Code does not. When courts have discretion to shape the common law, however, they should avoid creating new rights and liabilities for remitters except in limited circumstances.

A. Questions Answered by the Code

Writers have expressed divergent views about how courts should interpret the Code.⁷⁵ No one, however, could disagree with at least one fundamental point: article 3 is a statute—a law passed by legislatures—and not simply a set of recommendations.⁷⁶ Courts, as a result, cannot ignore or disobey the Code when it addresses an issue. To the extent that the article grants rights to remitters, courts must recognize these rights. Likewise, to the extent that it imposes liabilities on remitters, courts must recognize these liabilities.

Some provisions in article 3 expressly concern remitters. For example, as noted in Part II above, section 3-201(b) states that remitters do not have to indorse instruments to negotiate them.⁷⁷ Courts must follow this provision when confronting questions about a negotiation, regardless of pre-Code precedent or contrary policy arguments.

Other provisions in article 3 do not mention remitters but, by the generality of their scope, include remitters in their coverage. Section 3-202(b), for example, states that, in certain circumstances, a "negotiation may be rescinded."⁷⁸ The section does not limit the parties that

Francine H. Fox, *Stopping Payment on a Cashier's Check*, 19 B.C. L. REV. 683 (1978); Lary Lawrence, *Making Cashier's Checks and Other Bank Checks Cost-Effective: A Plea for Revision of Articles 3 and 4 of the Uniform Commercial Code*, 64 MINN. L. REV. 275 (1980); John M. Norwood, *Cashier's Checks and the Bank's Right to Deny Payment*, 108 BANKING L.J. 476 (1991); George Wallach, *Negotiable Instruments: The Bank Customer's Ability to Prevent Payment on Various Forms of Checks*, 11 IND. L. REV. 579, 592 (1978); Note, *Blocking Payment on a Certified, Cashier's, or Bank Check*, 73 MICH. L. REV. 424 (1974) [hereinafter Michigan Note]; Columbia Note, *supra* note 12.

⁷⁵ See, e.g., WHITE & SUMMERS, *supra* note 60, § 4, at 9-10; William D. Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U. ILL. L.F. 291; Julian B. McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. PA. L. REV. 795 (1978).

⁷⁶ See U.C.C. § 3-102 (1990) (defining the scope of the article).

⁷⁷ See *id.* § 3-201(b).

⁷⁸ *Id.* § 3-202(b).

may exercise the right to rescind. As a result, courts should allow remitters to rescind to the same extent that they would allow any other party who has negotiated an instrument to rescind.⁷⁹

Provisions of general applicability, like section 3-202(b), have great importance. Even though only a few sections of article 3 refer to remitters in express terms, a great variety bear on their rights and liabilities. Parts IV and V attempt to identify these sections and explain their application.

B. *Questions Answered by Precedent*

Although article 3 answers some questions about remitters, either through sections specifically addressed to them or through sections of general applicability, it does not answer all questions. For example, several cases have confronted the issue of whether a remitter who purchases a cashier's check from a bank has a right to return the check for a refund.⁸⁰ Nothing in article 3 says whether remitters have such a right.⁸¹

A court confronted with this issue might be tempted to conclude that the statute's silence itself resolves the issue. In particular, it might take the position that remitters have only the rights and liabilities that the Code establishes and no others. Because article 3 does not mention a right to obtain a refund, a remitter could not possibly have such a right.

In many areas of the law, courts should follow this approach. Certainly, courts should not find that debtors in bankruptcy have a right to keep more property than the applicable exemption statutes permit them.⁸² Likewise, courts should not hold that individuals have a duty to pay federal taxes on any forms of income other than those specified in the Internal Revenue Code.⁸³

The Uniform Commercial Code, however, differs from many other statutes in that it does not strive to set forth a complete statement of the law. Section 1-103 states: "Unless displaced by the particular provisions of this Act, the principles of law and equity, including the

⁷⁹ See *id.* § 3-411 cmt. 3 (discussing an example in which a remitter might rescind a negotiation).

⁸⁰ See, e.g., *Saloga v. Central Kan. Credit Union*, 783 P.2d 339, 343 (Kan. 1989) (refund allowed); *Gillespie v. Riley Management Corp.*, 319 N.E.2d 753, 758 (Ill. 1974) (same); *Bunge Corp. v. Manufacturers Hanover Trust Co.*, 286 N.E.2d 903, 906 (N.Y. 1972) (same).

⁸¹ See *supra* Part II.

⁸² See 11 U.S.C. § 522(b) (1988) (identifying exemptions allowed to debtors in bankruptcy).

⁸³ See 26 U.S.C. § 61(a) (1990) (defining income).

law merchant and [other laws] . . . shall supplement its provisions."⁸⁴ In other words, although the Code assigns certain rights and liabilities to parties to commercial transactions, the parties often may have others under different statutes or the common law. Whether they do or not depends on the particular portions of the Code at issue.⁸⁵

Courts should conclude that article 3 displaces very little non-Code law on remitters. By mentioning remitters in several places, the Code contemplates that remitters will participate in some transactions involving negotiable instruments. Yet, article 3 simply does not say enough about remitters to permit courts to decide many questions.⁸⁶ As the epigraph at the start of this essay states, "the rights of remitters are the rights that the Code forgot."⁸⁷ By its near silence on the subject of remitters, therefore, the Code appears to invite courts to look to other sources to determine remitters' rights and liabilities.⁸⁸ Earlier commentators similarly asserted that courts should supplement the N.I.L. by looking to common law cases on remitters.⁸⁹

As a result, when the Code does not address an issue, but common law precedent does, courts should follow the precedent. For example, in the 1974 case of *Gillespie v. Riley Management Corp.*, the Illinois Supreme Court confronted the issue of whether a remitter has a right to return a cashier's check for a refund.⁹⁰ The court based its conclusion that the remitter had such a right, not on article 3, but instead

⁸⁴ U.C.C. § 1-103 (1990).

⁸⁵ See WHITE & SUMMERS, *supra* note 40, § 5, at 19-20; ANDERSON, *supra* note 70, § 1-103:8, at 75.

⁸⁶ See *supra* Part II.

⁸⁷ See HAWKLAND ET AL., *supra* note 1, § 4-104:03.

⁸⁸ See *id.* § 1-103:02 ("[T]here are some commercial law situations for which the UCC intentionally provides no answer, and in these cases the courts quickly resort to common law for solution or supplementation.").

One influential commentator has cautioned against overusing § 1-103, suggesting that courts in most cases should stick to the express language of the Code. See Robert A. Hillman, *Construction of the Uniform Commercial Code: UCC Section 1-103 and "Code" Methodology*, 18 B.C. INDUS. & COM. L. REV. 655, 684-85 (1977). Yet, even he agrees that when "both express Code language and Code purposes and policies are hopelessly unclear or contradictory . . . resort to common law is justified." *Id.* at 695. The treatment of remitters in the Code appears to meet this high standard. For more on the issue of displacement of other law under § 1-103, see generally ROBERT A. HILLMAN ET AL., *COMMON LAW AND EQUITY UNDER THE UNIFORM COMMERCIAL CODE* (1985).

⁸⁹ See Moore, *supra* note 59, at 754 ("[T]he framework and structure of [the N.I.L.] . . . provide no place for the treatment of the payee's claim . . . It is casus omissus. So also, of course, is the claim of the remitter or other third person, which it is judged therefore will be granted or denied on the same terms as before the statutes."); see also BRITTON, *supra* note 60, at 300 (recommending that courts determine the rights of a remitter by analogy of a remitter to a mere transferee and by looking at pre-N.I.L. case law).

⁹⁰ 319 N.E.2d 753, 754 (Ill. 1974).

on an 1889 common law precedent.⁹¹ Section 1-103 mandates this approach.

C. *Unsettled Questions*

Unfortunately, in many instances, neither the Code nor any common law precedent will answer a question about remitters. As described in Part II, although cases on remitters date to the seventeenth century, the common law has never fully addressed remitters. Consequently, many technical issues about remitters remain open.

Generally speaking, courts have no choice but to answer unsettled questions about the rights and liabilities of remitters by creating new rules as a matter of common law. Section 1-103 tells courts to look to supplementary general principles. If no such principles exist on a point, courts must improvise them.⁹²

When courts make a new common law rule to govern remitter transactions, they have considerable discretion to determine the rule's content. In exercising this discretion, courts should take policy considerations into account to ensure that they fashion appropriate standards. By contrast, as noted above, when courts merely are following statutes or precedent, policy considerations are not as important.

Courts typically confront policy issues from two different perspectives: the "ex ante" and the "ex post."⁹³ The ex ante perspective focuses on how rules will shape behavior in the future. The ex post perspective concerns the fairness of rules as applied to particular situations after they have occurred. Each perspective suggests that courts generally should refuse to create new common law rights or liabilities for remitters. In exceptional cases, however, courts may develop new rights and liabilities that will prevent unexpected forfeitures.

1. Ex Ante Perspective

Legal rules can change behavior. Any new common law that courts create with respect to remitters, as a result, may affect the willingness of parties to enter into remitter transactions. New rules that give remitters additional rights may cause more parties to want to become

⁹¹ See *id.* at 757 (citing *Buehler v. Galt*, 35 Ill. App. 225, 227 (1889)).

⁹² See, e.g., *Girard Bank v. Mount Holly State Bank*, 474 F. Supp. 1225, 1239 (D.N.J. 1979) (noting that courts may improvise new common law rights to supplement the Code). *But cf.* *HAWKLAND ET AL.*, *supra* note 1, § 1-103:02 (observing that the absence of a well-defined common law often persuades courts to stay within the Code).

⁹³ See generally Jason S. Johnston, *Uncertainty, Chaos, and the Torts Process: An Economic Analysis of Form*, 76 CORNELL L. REV. 341, 347 (1991); Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 10-12 (1984).

remitters. New rules that impose liabilities on remitters, by contrast, may have the opposite effect.

From an *ex ante* perspective, the policy issue involved in deciding unsettled questions about the rights and liabilities of remitters is whether courts should encourage or discourage remitter transactions. They should do neither. Courts should maintain the status quo by generally refusing to create new rights or liabilities for remitters.

a. Encouraging Remitter Transactions

The current use of remitter transactions discussed in Part I suggests little reason for attempting to encourage them by granting new rights to remitters in addition to those already established by the Code and precedent. Parties who currently are not using remitter transactions as a means of making payments most likely are using an alternative. Some may be paying with credit cards, personal checks or other payment devices. Others may be buying cashier's checks or teller's checks, but completing them in ways such that they do not become remitters.

If courts create common law rules that make remitter transactions more attractive, some parties may give up alternatives and decide to become remitters. But few parties will enter transactions that they would not have entered anyway. As a result, granting new common law rights to encourage remitter transactions would not enhance economic efficiency.

Efforts to encourage remitter transactions, if taken to extremes, also might conflict with the structure of the Code. The Code envisions that most negotiable instruments transactions will not involve remitters. Article 3, as noted above, carefully specifies the rights and liabilities of all parties to transactions except remitters. Remitters do not receive equal attention because the Code expects that remitter transactions will occur less frequently than other transactions.

By exerting efforts to encourage remitter transactions to a significant extent, courts would be trying to make a silk purse from a sow's ear. They would be attempting to transform remitter transactions into something more significant than the Code contemplates. To comport with the structure of the Code, therefore, courts should leave the rights of remitters as they stand.

b. Discouraging Remitter Transactions

Any effort to reduce the number of remitter transactions by imposing additional liabilities on remitters might cause two problems.

First, the effort might harm people who currently have no alternative ways of conducting their business. For example, as described in Part I, many consumers become remitters when they have no other feasible way to make payments.

Consumers sometimes have to buy checks from banks either because they do not have their own checking accounts or because the persons receiving payment refuse to take personal checks. Having purchased the instruments, they must become remitters because the persons receiving payment do not trust other arrangements. Imposing additional liabilities on these parties may prevent them from entering into transactions altogether.

Second, efforts to discourage remitter transactions, if taken to extremes, would conflict with the structure of the Code. Although article 3 does not contemplate many negotiable instrument transactions involving remitters, it does envision at least some remitter transactions. The Code, as noted, defines the term remitter and describes various aspects of remitter transactions.⁹⁴ Courts should not use their common law powers to thwart this vision by imposing liabilities that effectively would stamp out remitter transactions.

New common law rules imposing additional liabilities on remitters might have one benefit. As noted in Part I above, criminals often use remitter transactions for illegitimate purposes. Increasing the liabilities that remitters face may make some criminals less eager to become remitters.

This benefit, however, probably does not justify the costs described above. If criminal usage presents a problem, the law should focus on ways of eliminating it. The Treasury regulations discussed in Part I.B provide a good example. The law should not attempt to strike at all remitter transactions, whether legitimate or not.

2. Ex Post Perspective

The ex post perspective concerns a different question. The issue is not whether courts must create rules to encourage or discourage remitter transactions. Instead, the issue is whether courts need to create new rights or liabilities to ensure that participants in remitter transactions receive fair treatment.

Courts generally need not create new rights or new liabilities to protect the participants in remitter transactions. Instead, courts usually should presume that the existing rules under the Code and precedent treat fairly both remitters and the people with whom they deal. After

⁹⁴ See *supra* Part II.A.

all, if the existing rules did not treat the parties fairly, the parties most likely would not have entered into the transaction in the first place. Any attempt to alter the rules after the parties have made a transaction would be of questionable benefit.

The discussion in Part I above, however, suggests one possible problem with assuming that the current statutory rules and precedent have always treated the parties to remitter transactions fairly. Some parties to remitter transactions do not know the exact status of the law. For example, people who buy negotiable instruments may not know whether they have the right, under article 3 or applicable case law, to enforce them or transfer them. Similarly, parties who take instruments from remitters may not know what rights they have against remitters if something goes wrong.

This observation suggests that, in certain circumstances, courts may have to create new rules to protect remitters and the people with whom they deal. Because of uncertainty in the law, parties understandably may believe that they have protections that, in fact, do not exist. Courts, however, must keep their lawmaking to a minimum to avoid substantial changes in the status quo.

To ensure fairness, courts should create rights for remitters that will prevent them from suffering unexpected forfeitures. As Part IV below indicates, however, the occasions for creating new rights are very few. The existing rules, although not always clear, generally treat remitters fairly.

Courts similarly should feel free to impose new liabilities on remitters to protect the parties with whom they deal. Yet, to conserve the status quo and ensure compatibility with the Code, courts should model these liabilities after those imposed on other parties under article 3. As discussed in Part V, courts should rarely exercise this power.

IV. THE RIGHTS OF REMITTERS

Typically, remitters negotiate their instruments to the named payees. The payees later present the instruments to their issuers. The issuers then pay without objection. The result satisfies everyone involved. Most remitter transactions, accordingly, do not end up in litigation.

In a significant number of cases, however, something goes wrong. For example, the parties involved in a remitter transaction may dispute who owns an instrument at a particular point, or who has the power

to enforce it. To resolve such disputes, courts must determine the rights of the various parties.

When a remitter claims a particular right with respect to an instrument, courts should subject the claim to the analysis suggested in Part III. They should recognize any rights that the text of article 3 expressly or implicitly grants to remitters. Yet, they generally should refuse to create new common law rights to supplement those in the Code.

The following discussion evaluates various rights that remitters have claimed in actual cases or that they likely will assert in future disputes. It analyzes the issues primarily under the revised version of article 3, but addresses the application of the pre-revision version where it differs significantly.

A. *Right to Obtain a Refund or Right to Enforce*

A remitter may decide not to negotiate an instrument after purchasing it. For example, a consumer who procures a cashier's check or teller's check to use for a down payment on a house might decide not to buy the house after all. The remitter thus will not wish to tender the check to the payee. Instead, the remitter likely will want to return the check to bank.

Many banks, as a matter of business practice, allow remitters to return cashier's checks and teller's checks if they decide not to negotiate them to the payee.⁹⁵ In some instances, however, banks and other sellers of instruments may refuse to refund the purchase price. They may worry that the remitter has engaged in some inappropriate conduct, or they simply may not want to pay anything that they do not have a duty to pay.⁹⁶

No question has created more controversy in discussions about remitters than what rights the remitter has against the issuer if the issuer will not voluntarily take back an instrument. The debate has focused on two potential rights. One is a right to rescind the purchase of the check and to obtain a refund of the price from the bank. The other is a right to enforce the instrument, making the bank pay its face amount. Commentators long have disagreed about which, if either, of these rights the remitter has.

⁹⁵ See Tobin, *supra* note 73, at 263, ("[T]he remitter may choose not to transmit [a cashier's check or teller's check] to the payee and, under general banking practice, he will be able to recover from the obligor.").

⁹⁶ See, e.g., *Sutherland State Bank v. Dial*, 170 N.W. 666, 667-68 (Neb. 1919) (issuer refused to refund money to remitter without stating any good reason).

Prior to promulgation of the Code, early writers took every conceivable position on the issue. Some asserted that remitters had a legal right to enforce the instrument against the bank, but did not have the equitable right to rescind its purchase. As one author in 1920 passionately wrote:

Is not the remitter's claim equitable? No, his remedy is assumpsit. Surely equitable in origin? There is no hint of it in the books. Is it not merely a quasi-contractual claim for restitution of the consideration? No. It is for the payment of face of the instrument at the time and place of payment; the action is assumpsit on the instrument.⁹⁷

Other leading scholars shared this view.⁹⁸

Many writers of the period, however, disagreed. Some concluded that remitters have an equitable right to obtain a refund, but do not have right to enforce.⁹⁹ Still others thought that remitters had both rights.¹⁰⁰ One superb unsigned student case comment asserted that remitters technically have neither a right to enforce nor a right to recover, but ought to recover nonetheless.¹⁰¹

The debate has continued under the Code because nothing in article 3 expressly addresses either right. Most cases and commentators now seem to agree that remitters have the right to obtain a refund—at least in certain circumstances.¹⁰² These sources, however, disagree on

⁹⁷ Moore, *supra* note 59, at 753.

⁹⁸ See, e.g., BRITTON, *supra* note 60, at 300-01 ("[W]here the purchasing remitter has decided not to tender the instrument to the payee, the remitter . . . has a right to recover from the maker or the drawer by an action on the instrument . . .").

⁹⁹ See, e.g., Chafee, *supra* note 72, at 263-64 (arguing that the remitter's recovery is for money had and received).

¹⁰⁰ See Beutel, *supra* note 56, at 589 (recognizing that "there is a wide diversity of opinion" about the nature of the remitters rights against the principal obligor); Yale Comment, *supra* note 72, at 180-81 (noting the disagreement in theories).

¹⁰¹ The case comment appeared in the Yale Law Journal in 1919, the year Karl Llewellyn served as Editor in Chief. See 28 YALE L.J. 673 (masthead). The comment explains that a remitter cannot enforce an instrument because the remitter is not named on it and has not received it from the payee through a transfer. See Case Comment, *supra* note 72, at 696. It asserts that a remitter also has no equitable rights absent mistake or inadvertence. See *id.* Yet, in approving recovery in a particular case, the comment states: "Something had to be done; the *mores* decidedly called for action in some form. . . . Whatever the technical justification of allowing recovery, . . . it is believed that the principal case is one of those in which the court should indeed do justice, but must to do justice create new law." *Id.* at 696-97.

¹⁰² See, e.g., Whinnery v. Citizens Nat'l Bank (*In re Northwest Liquor Indus.*), 107 B.R. 616, 620 (Bankr. W.D. Wis. 1988); Burke v. Mission Bay Yacht Sales, 29 Cal. Rptr. 685, 688 (Dist. Ct. App. 1963); Parker v. Dudley, 527 So. 2d 240, 243 (Fla. Dist. Ct. App. 1988); Gillespie v. Riley Management Corp., 319 N.E.2d 753, 758 (Ill. 1974); Saloga v. Central Kan. Credit Union, 783

the theory of recovery. Some root it in grounds of equity;¹⁰³ others, in implied contract;¹⁰⁴ still others offer no clear explanation.¹⁰⁵

Courts and commentators disagree fundamentally about whether remitters have a right to enforce an instrument under the Code. On the one hand, as noted in Part II, an official comment to article 3 takes the position that remitters do not have the right to enforce. In part of a larger passage, the comment explains that the "remitter of a cashier's check or teller's check" cannot use a certain procedure because the procedure "applies only to a person entitled to enforce the check."¹⁰⁶ One recent case, discussed below, shares this view.¹⁰⁷

On the other hand, some scholars take the stance that remitters have the right to enforce an instrument. In the multi-volume treatise by Hawkland and others, the authors state that "it is not at all clear that a remitter may not sue on the instrument itself."¹⁰⁸ They then present several tentative arguments for concluding that remitters do have such a right, although they consider the issue difficult.¹⁰⁹

It is important to determine whether a remitter has a right to obtain a refund or a right to enforce. The two rights certainly resemble each other; both rights, if available, would allow remitters to recover

P.2d 339, 343 (Kan. 1989); *Bunge Corp. v. Manufacturers Hanover Trust Co.*, 286 N.E.2d 903, 906 (N.Y. 1972); 5A ANDERSON, *supra* note 70, § 3-104:51, at 51 ("[A] cashier's check . . . may be returned by the purchaser to the issuing bank for cancellation."); BAILEY ET AL., *supra* note 34, ¶ 1.17, at 1-25 ("Prior to valid delivery, the purchaser of a cashier's check may cause it to be canceled."); 5B MICHIE ON BANKS AND BANKING § 251, at 7-8 (1991) ("[U]ntil . . . delivery, the purchaser retains a right to cancel.").

¹⁰³ See, e.g., *Gillespie*, 319 N.E.2d at 758 (noting necessity of rule to prevent injustice).

¹⁰⁴ See, e.g., *Burke*, 29 Cal. Rptr. at 688 ("[T]he drawer-drawee of a cashier's check, viz., the bank, impliedly authorizes the person ordering, paying for, and receiving possession of the same, to deliver or withhold delivery thereof to the payee therein named."); BAILEY ET AL., *supra* note 34, ¶ 1.17, at 1-24, 1-25 ("A bank that issues a cashier's check impliedly authorizes the purchaser thereof to deliver or to withhold delivery of the check to the payee of check.").

¹⁰⁵ See, e.g., *Whinnery*, 107 B.R. at 620; *Saloga*, 783 P.2d at 343; *Parker*, 527 So. 2d at 243; *Bunge*, 286 N.E.2d at 906; 5A ANDERSON, *supra* note 70, § 3-104:51, at 51; 5B MICHIE ON BANKS AND BANKING, *supra* note 104, § 251, at 7-8.

¹⁰⁶ See U.C.C. § 3-312 cmt. 1 (1990) (explaining how remitters cannot use the procedure for recovering lost instruments in § 3-309).

¹⁰⁷ See *Michaud v. Community Sav. Bank*, No. CV 92-0516024S, 1994 WL 146371, at *2 (Conn. Super. Ct. Apr. 8, 1994) (noting that a person can "have no right to enforce [an] instrument as the remitter").

¹⁰⁸ HAWKLAND ET AL., *supra* note 1, § 3-419:04.

¹⁰⁹ See *id.* The authors worry that recognizing the right to enforce or the right to obtain a refund comes at a cost. In particular, it reduces "the protection that the payee has in receiving a check, namely that unless he indorses the check it cannot be cashed." See *id.* § 3-102:05. For further discussion of the issue whether a remitter can enforce, see *id.* §§ 3-419:04, 3-603:04, 4-104:03.

from an issuer. Yet, the characterization of the right may matter for four reasons.

First, the characterization may make a difference in a variety of contexts in addition to when a remitter declines to negotiate an instrument. Many provisions of the Code turn on a whether a person has a right to enforce an instrument. For example, every time a person transfers an instrument for consideration, the person warrants that he or she has the right to enforce.¹¹⁰ As discussed further below, if remitters have only a right to obtain a refund, they would breach this warranty whenever they use instruments to make payments.¹¹¹

Second, the two rights sometimes may involve different amounts of money. A person seeking to enforce an instrument against a person claims that the person must pay the face (stated) value of the instrument. This amount may exceed the purchase price of the instrument.¹¹² For example, suppose a remitter buys a note having a \$100 face value at a discount for \$90. If the remitter wants to rescind the purchase and obtain a refund, the issuer would have to pay \$90. By contrast, if the remitter could enforce the note, the remitter could recover the full \$100 face value.

Third, the right to enforce an instrument might increase the number of persons against whom the remitter would have a claim. If a remitter has only a right to obtain a refund, the remitter may only recover from the issuer—the person that the remitter paid. But if the remitter can enforce the instrument, the remitter could recover from co-makers and accommodation parties, even though they did not actually receive any money from the remitter.¹¹³

Fourth, the time available for exercising the two rights may differ. Article 3 generally establishes long periods of limitations for enforcing negotiable instruments.¹¹⁴ For example, the period for enforcing cashier's checks lasts for three years after the date of dishonor or ten years after the check's date.¹¹⁵ By contrast, because some courts may consider the right to obtain a refund an equitable right, laches might bar a remitter from exercising the right at a much earlier time.

Given these four distinctions, courts must pay careful attention to the rights claimed by remitters. For the reasons explained in the

¹¹⁰ See U.C.C. § 3-416(a)(1) (1990).

¹¹¹ See *infra* Part IV.E.

¹¹² See Beutel, *supra* note 56, at 591 (discussing how the amount of restitution may differ from the face amount of the instrument).

¹¹³ See U.C.C. § 3-419 (1990) (discussing accommodation).

¹¹⁴ See *id.* § 3-118 (stating periods for different kinds of instruments).

¹¹⁵ *Id.* § 3-118(c).

following sections, they should conclude that remitters have a right to obtain a refund only in very limited circumstances. By contrast, however, courts should conclude that remitters always have a right to enforce.

1. Right to Obtain a Refund

Article 3, as noted above, contains no provision expressly or implicitly authorizing a remitter to rescind the purchase of an instrument and obtain a refund.¹¹⁶ For the reasons stated in Part I above, courts should not attempt to give remitters a new general common law or equitable right to fill in this gap. Developing a new right would improve the general condition of remitters. Accordingly, at least at the margins, the new right might unnecessarily increase the number of remitter transactions.¹¹⁷

Courts should award rescission of the purchase of an instrument and a refund of the price only in three instances: (a) where the remitter has a contractual right to a refund; (b) where the remitter can show a traditional equitable basis for rescission; and (c) where the remitter has lost an instrument and qualifies to use the special procedure in revised section 3-312.

a. *Contractual Right to Rescind*

Even if article 3 does not grant a right to obtain a refund, a remitter might have the right as a matter of contract. A contractual right could arise in two ways. First, the remitter might enter an express agreement with the bank. Many banks, for example, ask remitters to sign a form contract when purchasing a cashier's check or teller's check. If a form grants a remitter a right to obtain a refund, courts should enforce the agreement just as they would enforce any agreement.

Most remitters, however, will not have an express contractual right to obtain a refund. The forms used by banks usually do little more than explain the nature of the instrument being purchased and state the charges that the bank will assess. For example, Citibank's form for

¹¹⁶ Cf. *id.* § 3-202 (authorizing rescission of a negotiation in certain circumstances).

¹¹⁷ How much a general right to obtain a refund would improve the position of remitters depends on whether a court believes that remitters have a right to enforce an instrument. If remitters have the right to enforce, then the addition of a right to obtain a refund does not make much difference. If they do not have a right to enforce, then a right to obtain a refund would vastly improve their condition.

applying for the purchase of cashier's checks does not cover the issue of returns.¹¹⁸

Second, even without an express agreement, a remitter may have an implied contractual right. Courts may infer that an implied contract exists from evidence of the parties' expectations and understandings. For instance, a bank implicitly might promise to refund the purchase price of a check if, in the past, the bank regularly had refunded checks that the customer purchased.

Some courts and commentators adopt the view that banks always make an implied promise to take back an instrument, regardless of the particular factual circumstances involved.¹¹⁹ Courts should reject this view. Holding that issuers invariably make an implied contract to refund would amount to granting remitters a new general right to rescind. As explained above, courts should avoid creating rights in this manner.

b. *Equitable Basis for Rescission*

Some cases and other sources, as noted above, have argued that courts should recognize a remitter's equitable right to return an instrument for a refund.¹²⁰ This view does not conflict with the policy stated in Part III, provided that courts limit its application. In particular, courts should afford a remitter a right to rescind the purchase of a cashier's check or other instrument only if the remitter can show a traditional basis for rescission, such as mistake, misrepresentation, or duress.¹²¹ Courts should not create new grounds justifying rescission applicable only to remitters.

In most cases, the issuer of the instrument will not have engaged in any conduct justifying rescission. The remitter will want to return the instrument for a refund simply because the remitter decided not to use it. By allowing a remitter to rescind in the absence of a traditional equitable ground, a court would be creating a new extra-statutory right contrary to the policy favoring maintenance of the status quo.

Some courts and commentators have asserted that justice may require granting a remitter an equitable right to return an instrument,

¹¹⁸ See Citibank, Official Check and International Money Order Request (1995).

¹¹⁹ See *supra* note 104.

¹²⁰ See *supra* note 103.

¹²¹ See RESTATEMENT (SECOND) OF CONTRACTS §§ 151-177 (1988) (stating traditional rules for rescission of contracts on these grounds).

even if it means making new law.¹²² Otherwise, they argue, the remitter will end up with an instrument that the remitter does not want to use and cannot return. This result would be unjust.

Courts may decide to accept this view, even if it means tampering with the traditional rules of equity. As explained below, however, remitters may have an alternative right that generally relieves these concerns: the right to enforce an instrument.¹²³ Courts that recognize a right to enforce need not be concerned about unjustly denying a right to obtain a refund.

c. *Section 3-312*

Under the revised version of article 3, remitters may recover from a bank the amount of a cashier's check or teller's check that they have lost. To exercise this right, as noted in Part II above, they must follow the rules and procedures set forth in section 3-312.¹²⁴ In particular, the remitter must declare under oath that he or she lost possession of the instrument¹²⁵ and then wait up to ninety days before payment.¹²⁶

Courts should not construe section 3-312 as recognizing that remitters have a general right to obtain a refund for two reasons. First, the section does not help remitters who have possession of instruments, but merely have decided not to use them. It applies only to people whose instruments have been accidentally lost, stolen, or destroyed.¹²⁷

Second, section 3-312 does not really create a right to a refund. The amount of recovery under the provision equals the amount of the instrument, not the amount paid for it. Moreover, unlike a true refund, section 3-312 affords only conditional relief. Even if the bank does pay the money to the remitter, the remitter later may have to turn it over

¹²² See, e.g., *Gillespie v. Riley Management Corp.*, 319 N.E.2d 753, 757 (Ill. 1974) (explaining that "[u]ntil the purchaser places such a check in the stream of commerce, he must, of practical, commercial necessity, be able to cancel the check upon its surrender to the bank."); Case Comment, *supra* note 72, at 697.

¹²³ See *infra* Part IV.B.

¹²⁴ See U.C.C. § 3-312 (1990). The pre-revision version of the article does not contain a comparable provision.

¹²⁵ See *id.* § 3-312(b)(ii).

¹²⁶ See *id.* § 3-312(b)(1).

¹²⁷ A remitter presumably cannot come within § 3-312 by intentionally destroying an instrument. Intentional destruction would amount to cancellation of the instrument and would discharge the issuer. See *id.* § 3-604(a)(i).

to someone one else claiming to have the right to enforce the lost instrument.¹²⁸

2. Right to Enforce

A person who signs a negotiable instrument, such as an issuer, drawer, or indorser, generally incurs a liability to pay its face amount.¹²⁹ The liability runs to those whom article 3 calls "persons entitled to enforce" the instrument.¹³⁰ The right to enforce an instrument is the right to make the party who signed the instrument pay it.

Section 3-301 identifies the various parties who may enforce instruments. It states in part: "'Person entitled to enforce' an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 3-309 or 3-418(d)."¹³¹ Remitters do not qualify as holders under subsection (i). Yet, courts should conclude that remitters do meet the definition of nonholders in possession under subsection (ii). They also may meet the definition of persons covered by section 3-309 under subsection (iii).

a. *Holders*

The current definition of "holder" precludes any argument that the term includes remitters. Section 1-201(20), amended in 1990 at the same time as article 3, says that holder means "the person in possession . . . in the case of an instrument payable to an identified person, if the identified person is in possession."¹³² A remitter does not satisfy this definition because, although the remitter has possession, the instrument is not payable to the remitter.¹³³ Instead, it is payable to another identified person (the payee).¹³⁴ As noted above, one official comment adopts precisely this view.¹³⁵

The pre-revision definition of "holder" in article 1—still in effect in many states—does not eliminate remitters as clearly as revised sec-

¹²⁸ See *id.* § 3-312(c).

¹²⁹ See U.C.C. §§ 3-412 (issuer), 3-414(b) (drawer), 3-415(a) (indorser). See also Part IV.A.

¹³⁰ U.C.C. § 3-301.

¹³¹ *Id.*

¹³² See *id.* § 1-201(20).

¹³³ See *id.* § 3-103(a)(11) (defining a remitter as "a person who purchases an instrument from its issuer if the instrument is payable to an identified person other than the purchaser").

¹³⁴ See *id.*

¹³⁵ See U.C.C. § 3-302 cmt. 4.

tion 1-201(20). It says that holder means "a person who is in possession of . . . an instrument . . . drawn, issued, or indorsed to him or his order."¹³⁶ On the basis of this definition, the treatise written by Hawkland and others asks: "[W]hen the instrument is first delivered to the remitter, is not the remitter a person 'in possession of an instrument . . . issued . . . to him'?"¹³⁷ If a remitter qualifies as a holder under this definition, then a remitter has a right to enforce the instrument.

This argument presents two difficulties. First, as the treatise itself recognizes, the pre-revision text and comments draw a distinction between holders and remitters.¹³⁸ The pre-revision section 3-102(1)(a), in particular, defines "issue" as the first delivery to a "holder or a remitter."¹³⁹ That language does not make sense unless remitters differ from holders.

Second, the definition of holder appears incomplete as written. Examining the language carefully, it defines a holder as a person who has an instrument "issued . . . to him" or who has an instrument "issued . . . to his order." The latter phrase has no meaning. Article 3 defines "issue" as a delivery to a person;¹⁴⁰ an issuer thus cannot issue an instrument to a person's order.

The original section 1-201(20) must be leaving something out. It must be referring not merely to the issuance of the instrument, but also to the way in which the instrument is made payable. Because instruments are not payable to remitters, remitters would not seem to qualify as holders under either the revised or pre-revision version of article 3.

b. *Nonholders in Possession*

The second clause of section 3-301 states that, in addition to holders, persons entitled to enforce an instrument also include nonholders in possession with the rights of holders.¹⁴¹ A moment's reflection, though, reveals that this statement suffers from circularity. A holder has one principal right: the right to enforce an instrument. Thus, in effect, section 3-301(ii) is saying that a person has a right to enforce if the person is not a holder but has the right to enforce.

¹³⁶ See U.C.C. § 1-201(20) (1989).

¹³⁷ HAWKLAND ET AL., *supra* note 1, § 4-104:03.

¹³⁸ See *id.*

¹³⁹ See U.C.C. § 3-102(1)(a) (1989).

¹⁴⁰ See *id.*

¹⁴¹ U.C.C. § 3-301(ii) (1990).

The circularity, however, does not undermine the second clause altogether. Although the clause does not indicate how a nonholder might acquire the right to enforce, the clause at least makes clear that a nonholder can have such a right. As a result, remitters are not excluded from the class of persons entitled to enforce merely because they do not meet the definition of a holder.

The drafters of the Code appear to have had a particular example in mind in the second clause of section 3-301. The typical "nonholder in possession with the rights of a holder" is a person to whom a holder has assigned or "transferred" the right to enforce.¹⁴² For example, suppose that a drawer issues a personal check to a payee. The payee then delivers and assigns all rights in the check to a third party, but does not indorse the instrument.

The third party does not qualify as a holder because the instrument is still payable to the payee.¹⁴³ Yet, the third party can enforce the instrument because the payee has assigned the right to enforce. The third party, in other words, has become "a nonholder in possession with the rights of a holder."

The question of whether remitters also may fit into the second clause of section 3-301 does not have an easy answer. There are arguments on both sides. Yet, the one good argument that courts should not consider remitters "nonholders in possession with the rights of holders" is outweighed by two arguments for the opposite conclusion.

The argument that a remitter does not have the rights of a holder rests on a simple idea: Unlike the third party in the example above, to whom all the rights in the check were assigned, no one transfers any rights to the remitter. Because the remitter purchases the instrument directly from the issuer, only the issuer could give the remitter any rights. By definition, however, the issuer makes the instrument payable to "an identified person other than" the remitter.¹⁴⁴ The issuer, therefore, does not appear to give the remitter the right to enforce.

The two arguments that remitters have the right to enforce and thus qualify as "nonholders in possession with the rights of holders" are more complicated. The first rests on the doctrine of merger. The doctrine of merger states that a negotiable instrument is "a reified right to payment" and that the "right is represented by the instrument itself."¹⁴⁵ For example, when a bank issues a cashier's check, the piece

¹⁴² See *id.* § 3-201(a) (permitting transfer of rights without indorsement).

¹⁴³ See *id.* § 1-201(20) (defining holder).

¹⁴⁴ *Id.* § 3-103(a)(11).

¹⁴⁵ *Id.* § 3-203 cmt. 1.

of paper upon which the check is written becomes a physical embodiment of a right to obtain payment from the bank.¹⁴⁶

The doctrine of merger has two principal consequences. First, a person who does not have possession of an instrument generally cannot enforce it.¹⁴⁷ Because the right to payment has become reified, a person cannot have the right if someone else has the paper in which the right has become subsumed. Second, a person who has rightful possession of an instrument generally has the right to enforce it.¹⁴⁸ Otherwise, a reified right might exist that no one owns—a result that would conflict with general notions of property law.

On the basis of these principles, a remitter should have the right to enforce an instrument prior to negotiating it to the payee. After purchasing the instrument, the remitter has possession of a reified right to enforce. No one else has a claim to that right until the remitter negotiates or transfers the instrument. Even if the remitter does not qualify as a holder and has not dealt with a holder, the remitter nonetheless stands in the position of a holder. Courts thus may describe the remitter as a nonholder in possession with the rights of a holder.

Second, remitters should have the right to enforce because two very important provisions of article 3 would not make sense otherwise. As explained below, sections 3-416 and 3-417 state that, in certain circumstances, a person who transfers an instrument warrants that he or she is a person entitled to enforce the instrument.¹⁴⁹ Remitters transfer instruments whenever they deliver them to a payee.¹⁵⁰ Thus, every remitter who uses a cashier's check or other instrument to pay for anything would incur liability for breach of warranty unless remitters have a right to enforce. That result simply does not make sense.

To avoid breaches of warranty and remain consistent with the merger doctrine, courts should conclude that remitters have a right to enforce instruments even though the issuer does not expressly give the

¹⁴⁶ See generally Grant Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 CREIGHTON L. REV. 441, 449 (1979) (contending that this doctrine "which the first time you run into it, sounds like nonsense" is what gives the law of negotiable instruments "its pure and almost unearthly beauty").

¹⁴⁷ See U.C.C. § 3-301 (1990) (requiring possession, except in cases covered by § 3-309 and § 3-418(d)).

¹⁴⁸ Even if someone else has a claim to the instrument, the person in possession still may have the right to enforce it. For example, a thief who steals a bearer instrument can enforce it. See *id.* § 3-301 ("A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.").

¹⁴⁹ *Id.* §§ 3-416(1)(a), 3-417(a)(1), (d)(1).

¹⁵⁰ See *infra* Part IV.E (discussing transfers) and Part IV.B-C (discussing transfer and presentment warranties).

remitter that right. Courts do not have to give the right to enforce to remitters as a matter of common law. Instead, they may conclude that the remitters fall within the category of nonholders in possession with the rights of holders and thus have the right to enforce under section 3-301(ii).

c. *Other Persons*

Section 3-301's third clause includes as persons entitled to enforce "a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 3-309 or 3-418(d)."¹⁵¹ Section 3-309 includes persons who were holders or nonholders in possession with the rights of holders, but have lost their instruments. Under the reasoning above, if a remitter loses an instrument, the remitter should be able to use section 3-309 to enforce it.¹⁵² The essay discusses this point more fully below.¹⁵³ Section 3-418(d), by contrast, applies only to banks and others that pay instruments by mistake; it does not appear to have any application to remitters.¹⁵⁴

B. *Right to Stop Payment*

Section 4-403(a) gives the drawer of a personal check a statutory right to "stop payment."¹⁵⁵ To exercise this right, the drawer merely has to instruct the bank not to pay a particular check.¹⁵⁶ So long as a bank has a "reasonable opportunity" to act on the instruction, it must comply.¹⁵⁷ If the bank pays the check despite a stop payment order, it must compensate the drawer for any loss resulting from the payment.¹⁵⁸

Drawers typically exercise the right to stop payment if they discover that, for some reason, they should not have delivered a particular check. For example, suppose a consumer pays a merchant for goods with a check, but then discovers that the goods have a defect. The consumer may wish to instruct the bank not to pay the check. Stopping payment will not eliminate the consumer's liability on the check, but it will give the consumer leverage in settling any subsequent dispute.¹⁵⁹

¹⁵¹ U.C.C. § 3-301(iii) (1990).

¹⁵² This conclusion directly conflicts with an official comment. *See id.* § 3-312 cmt. 4 (indicating remitters must use § 3-312 if they lose an instrument).

¹⁵³ *See infra* Part IV.G.

¹⁵⁴ *See* U.C.C. § 3-418(d) (1990).

¹⁵⁵ *See id.* § 4-403.

¹⁵⁶ *See id.* § 4-403(a).

¹⁵⁷ *Id.*

¹⁵⁸ *See id.* § 4-403(c).

¹⁵⁹ The consumer will continue to have liability under § 3-414(b), which says that "[i]f an

Remitters who use cashier's checks or teller's checks to pay for items often have a comparable desire to stop their payment. For example, suppose a remitter gives a car dealer a cashier's check as a down payment for an automobile, but the dealer refuses to convey the vehicle. The remitter may ask the bank not to pay the cashier's check to gain leverage over the dealer.

Some banks voluntarily will comply with such requests by remitters.¹⁶⁰ If the bank refuses, however, most courts and commentators recognize no right of the remitter to recover damages from the bank for the payment of the check.¹⁶¹ This view is correct.

Section 4-403 does not apply to cashier's checks. It grants the customer of a bank the right to stop payment on drafts from "the customer's account."¹⁶² Remitters are not necessarily customers of a bank, because the Code defines customer as "a person having an account" with the bank.¹⁶³ Banks, moreover, draw cashier's checks on their own accounts, not on the accounts of customers.¹⁶⁴

Courts should not invent a common law right allowing remitters to recover from banks for refusing to obey a stop payment order for two reasons. First, as always, creation of such a right would conflict with the policy of maintaining the status quo, outlined in Part III above. It would encourage remitter transactions by making the position of remitters more favorable.

Second, giving remitters the right to stop payment would conflict with a key provision of article 3. Section 3-411(b) presently prohibits banks from wrongfully refusing to pay cashier's checks or stopping payment on teller's checks.¹⁶⁵ Refusing or stopping payment on these

unaccepted draft is dishonored, the drawer is obliged to pay the draft . . . according to its terms at the time it was issued. . . ." U.C.C. § 3-414(b).

¹⁶⁰ See *id.* § 3-411 cmt. 1 ("[S]ome banks will refuse payment as an accommodation to a customer."). As noted below, however, the Code prohibits this practice in most instances.

¹⁶¹ See, e.g., *Seman v. First State Bank*, 394 N.W.2d 557, 560 (Minn. Ct. App. 1986); *National Newark & Essex Bank v. Giordano*, 268 A.2d 327, 329 (N.J. Super. Ct. Law Div. 1970); *Abilities, Inc. v. Citibank*, 449 N.Y.S.2d 242, 243 (App. Div. 1982); *HAWKLAND ET AL.*, *supra* note 1, at § 3-104:18 at n.7; *Michigan Note*, *supra* note 74, at 426. *Tobin*, *supra* note 73, at 262.

Money orders differ from cashier's checks and teller's checks. Like personal checks, many courts hold that a remitter may stop payment on them. See, e.g., *Chicago Cicero Currency Exch., Inc. v. Continental Ill. Nat'l Bank*, 545 N.E.2d 259, 262 (Ill. App. Ct. 1989); *Duggan v. State Bank of Antioch*, 540 N.E.2d 1111 (Ill. App. Ct. 1989).

¹⁶² U.C.C. § 4-403 (1990).

¹⁶³ *Id.* § 4-104(a)(5).

¹⁶⁴ See *Dziurak v. Chase Manhattan Bank*, 406 N.Y.S.2d 30, 30 (1978) (remitter cannot stop payment because "a cashier's check does not constitute an item payable for a customer's account within the meaning of . . . section 4-403. . . ."); see also U.C.C. § 3-411 cmt. 1 (1990) ("A debtor using any of these types of checks [i.e., cashier's, teller's, and certified checks] has no right to stop payment.").

¹⁶⁵ U.C.C. § 3-411(b).

instruments is wrongful unless the bank has a defense that the bank may assert against the person presenting the instrument.¹⁶⁶

The Code makes clear what kinds of defenses a bank may assert. The bank, naturally, may assert its own defenses to payment.¹⁶⁷ For example, unless the person presenting the check has the rights of a holder in due course, the bank could assert as a defense the failure of the remitter to give consideration for it.¹⁶⁸

The Code, however, specifically forbids the obligor of an instrument to "assert against [a] person entitled to enforce the instrument a defense, claim in recoupment, or claim to the instrument . . . of another person."¹⁶⁹ Thus, with few exceptions,¹⁷⁰ a bank may not refuse to pay a cashier's check or stop payment of a teller's check merely because a remitter has an objection to the payment.¹⁷¹ A common law rule requiring banks to act on remitter's stop payment orders would undermine these statutory rules.

C. *Right to Recover for Wrongful Payment*

The drawer of a personal check is protected if the bank pays the check to the wrong person. Under section 4-401, a bank only may charge "against the account of a customer an item that is properly

¹⁶⁶ See *id.* § 3-411(b) cmt. 3.

¹⁶⁷ See *id.* § 3-305(a).

¹⁶⁸ See *Godat v. Mercantile Bank*, 1994 WL 313506, at *4 (Mo. Ct. App. July 5, 1994) (bank could assert its own defense of failure of consideration from remitter against payee of cashier's check because payee was not a HIDC). But see *Wertz v. Richardson Heights Bank & Trust*, 495 S.W.2d 573, 574 (Tex. 1973) (bank issuing a cashier's check had to pay it even though there was a failure of consideration from the remitter); *Kaufman v. Chase Manhattan Bank*, 370 F. Supp. 276, 278 (S.D.N.Y. 1973) (same); *Taboada v. Bank of Babylon*, 408 N.Y.S.2d 734, 735 (D. Ct. 1978) (same).

¹⁶⁹ See U.C.C. § 3-305(c) (1990).

¹⁷⁰ A bank may assert a remitter's claim to an instrument as a defense to payment, but only if the remitter is joined as a party to a lawsuit seeking enforcement. See *id.*; see also *Fulton Nat'l Bank v. Delco Corp.*, 195 S.E.2d 455, 457 (Ga. Ct. App. 1973) (issuing bank may defend on ground that remitter has a claim to the instrument); *Michigan Note*, *supra* note 74, at 438-39. Some courts have taken a more absolute stance, apparently not caring whether the remitter may have a claim to the instrument. See, e.g., *State ex rel. Chan Siew Lai v. Powell*, 536 S.W.2d 14 (Mo. 1976) (en banc); *National Newark & Essex Bank v. Giordano*, 268 A.2d 327 (N.J. Super. Ct. Law Div. 1970). Commentators properly have criticized these cases as not following the Code. See Lawrence, *supra* note 74, at 289 & n. 50 (citing additional cases); see also Davis, *supra* note 74, at 627-28.

¹⁷¹ See *Louis Falcigno Enters., Inc. v. Massachusetts Bank & Trust Co.*, 436 N.E.2d 993, 995 (Mass. App. Ct. 1982); *Moon Over The Mountain, Ltd. v. Marine Midland Bank*, 386 N.Y.S.2d 974, 978 (Civ. Ct. 1976); see also *First Nat'l Bank v. Duncan Sav. & Loan Ass'n*, 957 F.2d 775, 777 (10th Cir. 1992) (money order); *Warren Finance v. Barnett Bank*, 552 So.2d 194, 198 (Fla. 1989) (bank could not assert defense of one of two purchasing payees); *Fur Funtastic, Ltd. v. Kearns*, 430 N.Y.S.2d 27, 29 (Civ. Ct. 1980) (dicta).

payable."¹⁷² A personal check is "properly payable" only if the payment is authorized by the customer.¹⁷³

For example, suppose that a drawer delivers a check to a merchant. Before the merchant endorses the instrument, a thief steals it. Unless an exception applies,¹⁷⁴ the bank will bear the loss if it pays the thief. The bank cannot debit the customer's account because the customer did not authorize payment.¹⁷⁵

The Code does not make clear what rights a remitter would have in a comparable situation. Suppose that a remitter buys a cashier's check and sends it to the payee. Before the payee collects the instrument, someone steals the check and presents it to a bank for payment. Does the remitter have any rights against the bank in this case or in similar cases?

A number of cases have held that remitters may collect damages from banks that pay cashier's checks to the wrong person.¹⁷⁶ These cases, however, have disagreed about the basis for liability. Some courts have applied section 4-401 to cases involving cashier's checks while other courts have based liability on an implied contract theory or conversion. The first two approaches are wrong. Courts should reject liability based on section 4-401 or an implied contract theory. In limited circumstances, however, remitters should have a right to recover from banks for conversion.

Section 4-401 simply does not apply to cashier's checks. It concerns the ability of a bank to charge a customer's account. A bank does not charge a remitter's account when it pays a cashier's check because

¹⁷² See U.C.C. § 4-401(a) (1990).

¹⁷³ See *id.*

¹⁷⁴ For exceptions to the general rule in § 4-401(a), see, e.g., *id.* § 4-406(c) (customer precluded from denying authority of certain signatures because of delay in informing the bank); § 3-406(a) (customer precluded because of customer's negligence).

¹⁷⁵ For exceptions to § 4-401(a), see, e.g., *id.* §§ 3-406(a), 4-406(d).

¹⁷⁶ See, e.g., *Jerman v. Bank of Am. Nat'l Trust & Sav.*, 87 Cal. Rptr. 88, 92 (Ct. App. 1970); *Gillespie v. Riley Management Corp.*, 319 N.E.2d 753, 758 (Ill. 1974); *Lassen v. First Bank Eden Prairie*, 514 N.W.2d 831, 836-37 (Minn. Ct. App. 1994); *Twelman v. Lindell Trust Co.*, 534 S.W.2d 83, 97-98 (Mo. Ct. App. 1976); *Kosic v. Marine Midland Bank*, 430 N.Y.S.2d 175, 177 (App. Div. 1980), *aff'd*, 430 N.E.2d 1317 (N.Y. 1981).

For related cases, see also *Meador v. Ranchmart State Bank*, 517 P.2d 123, 130 (Kan. 1973) (remitter's action against bank for paying a cashier's check with improper indorsements dismissed because the indorsements were proper); *State ex rel. Chan Siew Lai v. Powell*, 536 S.W.2d 14, 16 (Mo. 1976) (remitter could not enjoin bank's payment of a cashier's check to person entitled to payment); *First State Bank v. Hughes*, 654 S.W.2d 31, 32 (Tex. Ct. App. 1983) (remitter named as co-payee challenged payment of check without his endorsement; summary judgment inappropriate because of undecided issues).

the remitter already has purchased the check. In fact, the remitter may not even have an account at the bank.¹⁷⁷

Some courts have held banks liable to remitters on a theory that banks make an implied promise to remitters that they will pay checks only upon a proper indorsement.¹⁷⁸ Courts should hesitate to adopt this approach for two reasons. Absent evidence that the bank and the remitter actually made such a contract, recognizing this implied contract would amount to granting remitters a common law right to sue banks. As explained above in Part III, courts should maintain the status quo and avoid creating new rights for remitters.

Furthermore, remitters do not need the protection of an implied contract. Several rules protect remitters in situations in which someone steals a cashier's check or a remitter's check. To understand these rules, it is necessary to distinguish two different situations. In one, someone steals the check from the remitter directly. In the other, a remitter delivers the check to the payee, and then someone steals it.

If someone steals the check directly from the remitter and then cashes it, the remitter can sue the bank for conversion. Section 3-420(a) provides that an instrument is converted if "a bank makes . . . payment with respect to the instrument for a person not entitled to enforce the instrument . . ."¹⁷⁹ This section excludes drawers and persons who never received delivery from the class of possible plaintiffs, but does not exclude remitters.¹⁸⁰ Remitters therefore may recover under the provision.¹⁸¹

If the remitter negotiates the check to the payee or transfers it to someone else, the remitter gives up ownership in the instrument. As a result, if the bank pays the check to the wrong person, the remitter

¹⁷⁷ Although one case seems to have disagreed with this conclusion, it involved peculiar facts and may be wrongly decided. In *Kosic v. Marine Midland Bank*, 430 N.Y.S.2d 175 (App. Div. 1980), *aff'd* 430 N.E.2d 1317 (N.Y. 1981), a court held that § 4-401 applied. According to the court, Marine Midland Bank issued two "cashier's checks drawn on the account" of Kosic. *Id.* at 176. The court held that the bank could not charge Kosic's account after paying the checks upon an improper indorsement. *Id.* at 177. These facts seem a little weird. Cashier's checks, by definition, are not drawn on a customer's account. See U.C.C. § 3-104(g) (1990) (defining a cashier's check as one drawn by a bank on itself).

¹⁷⁸ See, e.g., *Jerman v. Bank of America Nat'l Trust & Sav.*, 87 Cal. Rptr. 88, 92 (Ct. App. 1970); *Lassen v. First Bank Eden Prairie*, 514 N.W.2d 831, 836-37 (Minn. Ct. App. 1994); *Twelmlan v. Lindell Trust Co.*, 534 S.W.2d 83, 97-98 (Mo. Ct. App. 1976).

¹⁷⁹ U.C.C. § 3-420(a). Section 3-419 of the pre-revision article 3 afforded the same right. See U.C.C. § 3-419 (1989).

¹⁸⁰ See U.C.C. § 3-420(a) (1990) ("An action for conversion . . . may not be brought by (i) the issuer or acceptor of the instrument or (ii) a payee or indorsee who did not receive delivery of the instrument . . .").

¹⁸¹ See *Jerman*, 87 Cal. Rptr. at 92 (citing pre-revision § 3-419(1)(c) as a basis for holding a bank liable to a remitter for paying a cashier's check without proper indorsement); Steenbergen

may not recover for conversion.¹⁸² The remitter, however, does not need to sue for conversion. Under section 3-310(a), which implements the doctrine of merger, the payee discharges the remitter by taking the check.¹⁸³ Therefore, the theft of the check becomes the payee's problem, not the remitter's.

D. *Right to Recover for Wrongful Dishonor*

Under section 4-402(b), if a bank refuses to pay a properly payable personal check, the bank generally has to pay the drawer damages for wrongful dishonor.¹⁸⁴ Suppose, however, that a remitter delivers a cashier's check or teller's check to a payee, but the bank refuses to honor it. The remitter, like the drawer, also might wish to recover damages for wrongful dishonor.

Nothing in the Code gives the remitter in this situation any rights against the bank. Section 4-402(b) does not apply to remitter transactions. The section requires banks to pay damages to a "customer"—an account holder—by virtue of dishonoring an item drawn on the customer's account.¹⁸⁵ Again, remitters do not qualify.

Courts, however, should not create this right as a matter of common law for two reasons. First, as always, courts should not supplement the statutory rights of a remitter with new common law rights. Again, although courts may have the power under section 1-103, they should not encourage remitter transactions.¹⁸⁶

Second, remitters of cashier's checks do not need a right to recover for wrongful dishonor. By taking a cashier's check from the

v. First Fed. Sav. & Loan, 753 P.2d 1330, 1331 (Okla. 1987) (bank liable to remitter for conversion where bank stopped payment on a teller's check and then issued a replacement check to a third party, thus effectively paying the check to wrong person); HAWKLAND ET AL., *supra* note 1, at § 3-419:04.

Cases that have held that remitters never have a right to collect for conversion seem wrong. See *Twellman v. Lindell Trust Co.*, 534 S.W.2d 83, 97-98 (Mo. Ct. App. 1976) (holding conversion actions unnecessary because of the implied contract between the bank and the remitter); *Jerman*, 87 Cal. Rptr. at 95 (Fleming, J., concurring) (same).

¹⁸² See *Lassen v. First Bank Eden Prairie*, 514 N.W.2d 831, 838-839 (Minn. Ct. App. 1994).

¹⁸³ See U.C.C. § 3-310(a) ("[I]f a certified check, cashier's check, or teller's check is taken for an obligation, the obligation is discharged to the same extent that discharge would result if an amount of money equal to the amount of the instrument were taken in payment of the obligation.").

¹⁸⁴ See *id.* § 4-402(b) ("A payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item.").

¹⁸⁵ See *id.* § 4-402(a)-(c) and cmt. 5; *id.* § 4-104(a)(5) (defining "customer"); see also *Tobin*, *supra* note 75, at 263 ("the [bank's] contract to pay runs not to remitter but to the holder of the instrument").

¹⁸⁶ See *supra* Part III.C.1.a.

remitter, the payee discharges the remitter's obligations.¹⁸⁷ As a result, no matter what the bank does, the remitter faces no liability. By contrast, when the payee takes a personal check, the payee only suspends the obligation; if the bank dishonors the check, the obligation revives.¹⁸⁸

E. *Right to Negotiate and Transfer*

Persons in possession of negotiable instruments generally do one of two things with them. They either enforce them (as discussed above) or they assign the right to enforce them to someone else. Assignments under article 3 come in two forms: negotiations and transfers.

Section 3-201(a) defines a negotiation as a "transfer of possession, whether voluntary or involuntary, of an instrument . . . to a person who thereby becomes its holder."¹⁸⁹ Section 3-203(a) addresses transfers. It states: "An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument."¹⁹⁰

The two forms of assignment overlap to a certain extent. Some assignments qualify as both negotiations and transfers. Others qualify as only one or the other. For example, an involuntary transfer of possession may constitute a negotiation, but not a transfer. Likewise, an assignment to a person who does not become a holder may qualify as a transfer but not a negotiation.

The distinction between negotiations and transfers has considerable significance. When a person merely transfers an instrument, but does not negotiate it, the transferee takes the instrument subject to competing claims of ownership and any defenses that the issuer may have to its payment.¹⁹¹ By contrast, when a person negotiates an instrument—whether or not the negotiation is also a transfer—the recipient potentially could take the instrument free of these claims and defenses.¹⁹²

¹⁸⁷ See U.C.C. § 3-310(a) (1990).

¹⁸⁸ See *id.* § 3-310(b). For the right of the remitter to rescind a fraudulently induced negotiation, see *infra* Part IV.F.

¹⁸⁹ *Id.* § 3-201.

¹⁹⁰ *Id.* § 3-203(a).

¹⁹¹ See *id.* § 3-305(a).

¹⁹² To take free of claims and defenses, the recipient must meet the definition of a "holder in due course." See U.C.C. § 3-302 (defining holder in due course); § 3-305(b) (indicating the defense not applicable to a holder in due course); § 3-306 (indicating claims of ownership not applicable to a holder in due course).

When a remitter delivers an instrument to the payee, the payee becomes a holder, a person in possession of an instrument payable to him or her.¹⁹³ The remitter thus negotiates the instrument. Provided that the remitter makes the delivery voluntarily—or, more specifically, for the purpose of giving the payee the right to enforce it—the remitter also transfers it.

When the remitter attempts to assign the instrument to someone other than the payee, the assignment cannot constitute a negotiation because only the payee can become the holder of the instrument. Whether a remitter may “transfer” an instrument to a person other than the payee poses more of a problem because of the uncertainty over whether a remitter has the right to enforce an instrument.

The recent case of *Michaud v. Community Savings Bank* exemplifies the problem.¹⁹⁴ A remitter named Cocopardi bought a cashier's check payable to Community Savings Bank.¹⁹⁵ Cocopardi then gave the instrument to another person named Michaud.¹⁹⁶ The exchange between Cocopardi and Michaud did not qualify as a negotiation because Michaud did not become a holder. Although she had possession, the check was not payable to her. So long as the check was payable only to Community Savings Bank, only the bank could be its holder.

Whether the exchange constituted a transfer would depend on whether Cocopardi delivered the instrument to Michaud for the purpose of giving her the right to enforce. Courts which have held that remitters do not have the right to enforce would conclude that no transfer did or could occur.¹⁹⁷ The court in *Michaud* took this position; it explained: “Cocopardi is a remitter and Cocopardi had no right to enforce the instrument as the remitter, and as the remitter and not a ‘holder’ he cannot transfer any rights he may have as a ‘holder’—he has none—to Michaud.”¹⁹⁸

If remitters can enforce instruments, as this essay suggests above, the result would change. The exchange between Cocopardi and Michaud would constitute a transfer. If Cocopardi, the remitter, had the right to enforce, then he could give that the right to Michaud, or to anyone else.¹⁹⁹

¹⁹³ See *id.* § 1-201(20).

¹⁹⁴ No. CIV.92-0516024S, 1994 WL 146371, at *2-3 (Conn. Super. Ct. 1994).

¹⁹⁵ *Id.* at *1.

¹⁹⁶ *Id.*

¹⁹⁷ See *supra* Part IV.B.

¹⁹⁸ *Michaud*, 1994 WL 146371, at *2.

¹⁹⁹ See U.C.C. § 3-203(a) (1990) (defining transfer).

F. *Right to Recover Possession*

Remitters may wish to recover possession of instruments in two instances. First, after the remitter purchases an instrument but before the remitter delivers it to the payee, the instrument may be lost or stolen. The remitter then may wish to recover the instrument from the finder or the thief. Second, after the remitter delivers the instrument to the payee, the remitter may change his or her mind about the transaction and want the instrument back.

Courts generally should allow remitters to recover instruments that fall into the hands of finders or thieves. Section 3-306 provides that any person (other than a holder in due course) takes an instrument "subject to a claim of a property or possessory right in the instrument or its proceeds."²⁰⁰ Under this provision, because the remitter owns the instrument, the remitter could sue a finder or thief to recover the instrument or its proceeds.²⁰¹ As permitted by state law, the remitter also might assert a claim for damages under a theory of conversion.²⁰²

Suppose that the remitter does not lose the instrument, but instead negotiates it to the payee. The remitter then discovers that the payee committed fraud. In this case, the remitter also may be able to recover possession. Section 3-306 states that a person who takes an instrument takes it subject to "a claim to rescind a negotiation."²⁰³ Moreover, section 3-202(b) provides that "[t]o the extent permitted by other law, negotiation may be rescinded."²⁰⁴ Thus, if state law would permit rescission for fraud or any other applicable ground, the remitter could rescind the negotiation and assert a claim to the instrument.²⁰⁵

²⁰⁰ *Id.* § 3-306.

²⁰¹ The remitter owns the instrument because the remitter, by definition, purchased it from the issuer. *See id.* § 3-103(a)(11). If the finder or thief negotiated the instrument to the payee, the payee might take it as holder in due course. In that case, under an express exception to section 3-306, the remitter would have no claim against the payee. *See id.* § 3-306. For an example, see *Burke v. Mission Bay Yacht Sales*, 29 Cal. Rptr. 685, 691 (1963) (remitter allowed to recover proceeds of cashier's check in wrongful possession).

²⁰² *See* U.C.C. § 3-420(a) ("The law applicable to conversion of personal property applies to instruments.").

²⁰³ *Id.*

²⁰⁴ *Id.* § 3-202(b).

²⁰⁵ The payee could not escape the claim by virtue of having the status of a holder in due course. Section 3-203(b) says that a person may not assert a right of rescission "against a subsequent holder in due course or a person paying the instrument in good faith and without knowledge of facts that are a basis for rescission or another remedy." *Id.* § 3-202(b). The payee

G. *Right with Respect to Lost Instruments*

If a remitter loses an instrument, the remitter cannot sue to recover possession because the remitter would not know whom to sue. Revised article 3, however, creates a special procedure that remitters may use when they have lost cashier's checks and teller's checks.

Section 3-312 allows a remitter to file a declaration of loss with the issuing bank.²⁰⁶ If no one entitled to enforce the check presents it within ninety days of its issuance, the bank must pay the remitter the amount of the check.²⁰⁷ The remitter, however, incurs a small risk. If a holder in due course presents the check, he or she may enforce it against the remitter.²⁰⁸

Remitters may have an additional option. Section 3-309 permits a person to enforce a lost instrument if the person "was in possession of the instrument and entitled to enforce it when the loss of possession occurred."²⁰⁹ The issue of whether remitters have a right to enforce again arises. A comment to the revised article 3 states that remitters cannot use section 3-309 because they have no right to enforce.²¹⁰ Courts that hold that remitters do have a right to enforce should disagree with this comment. They should allow remitters to use section 3-309 as well as section 3-312.²¹¹

V. THE LIABILITIES OF REMITTERS

Although remitters have many rights, they also have a variety of liabilities or potential liabilities. Under the theory expressed in Part III

would not be a "subsequent" holder in due course and, in most instances, would have knowledge of the relevant facts.

²⁰⁶ See U.C.C. § 3-312(b) (1990).

²⁰⁷ See *id.* § 3-312(b)(1), (2).

²⁰⁸ See *id.* § 3-312(c).

²⁰⁹ *Id.* § 3-309(a). The remitter may exercise this right only if the remitter "adequately protect[s]" the bank against the possibility of liability to another claimant. See *id.* § 3-309(b). For example, the remitter may have to post a bond equal to the amount of the instrument. See *Santos v. First Nat'l State Bank*, 451 A.2d 401, 414 (N.J. Super. Ct. App. Div. 1982).

²¹⁰ See U.C.C. § 3-312 cmt. 1 (1990) ("Section 3-309 applies only to a person entitled to enforce the check. It does not apply to a remitter of a cashier's check or teller's check . . .").

²¹¹ Section 3-309 in the revised version of article 3 replaces § 3-804 in the pre-revision version. Section 3-804 said: "The owner of an instrument which is lost . . . may maintain an action in his own name and recover from any party liable . . ." U.C.C. § 3-804 (1989). That language seems to include remitters even more clearly than the language of § 3-309. In *Parker v. Dudley*, 527 So.2d 240, 243 (Fla. Dist. Ct. App. 1988), a court allowed a remitter to collect the amount of lost cashier's checks. Although the court did not cite § 3-804, it explained that the remitter "owns [the checks] and what they represent if they have not been 'delivered' to the payee." *Id.* at 242.

above, courts should impose on remitters all of the obligations established by the Code.²¹² Furthermore, courts should hesitate to assign to remitters additional liabilities as a matter of common law.²¹³

A. *Liability on an Instrument*

A person who signs a negotiable instrument generally incurs a form of what article 3 calls "liability on the instrument."²¹⁴ For example, the issuer of a note or a cashier's check incurs an obligation to pay the instrument when it becomes due.²¹⁵ The drawer and the indorser of a check assume a slightly different obligation; they become liable to pay the check if the drawee dishonors it.²¹⁶

Most remitters do not sign the instruments that they purchase. Section 3-201(b), as explained above, states that remitters may negotiate instruments merely by delivering them.²¹⁷ The typical remitter, as a result, negotiates the instrument to the payee without indorsing it. The remitter thus does not become liable on the instrument.²¹⁸

Remitters, however, sometimes sign instruments specifically for the purpose of incurring liability. For example, the payee may ask the remitter to indorse a cashier's check or teller's check. The remitter's indorsement—an "anomalous indorsement" in article 3 terminology²¹⁹—would give the payee recourse against the remitter if the bank failed to pay it.²²⁰

Courts do not have much discretion to fashion common law rules with respect to liability on instruments. They cannot require remitters to sign instruments because section 3-201(b) specifically states that remitters do not have to sign them. Courts also cannot make a remitter liable on an instrument without a signature because section 3-401

²¹² See *supra* Part III.A.

²¹³ See *supra* Part III.C.

²¹⁴ See U.C.C. § 3-401(a) (1990). Article 3 allows some parties to disclaim this liability. For example, indorsers may disclaim liability on an instrument by indicating that they are signing "without recourse." *Id.* § 3-415(b). Drawers of checks, however, cannot disclaim this liability. See *id.* § 3-414(e).

²¹⁵ See *id.* § 3-412.

²¹⁶ See *id.* § 3-414(b) (obligation of drawers); *id.* § 3-415(a) (obligation of indorsers).

²¹⁷ *Id.* § 3-201(b).

²¹⁸ See BAILEY ET AL., *supra* note 34, ¶ 1.17, at 1-23 ("[The] purchaser is often called a remitter. The purchaser is not a party to the cashier's check itself unless the purchaser adds his own signature or indorsement to the instrument."); Tobin, *supra* note 73, at 261 (a remitter "is not a party to the instrument and, consequently, he is in no way liable on it").

²¹⁹ See U.C.C. § 3-205(d) (1990) (defining an "anomalous indorsement" as "an indorsement by a person who is not the holder of the instrument").

²²⁰ See *id.* § 3-415(a) (liability of indorser).

expressly states: "A person is not liable on an instrument unless . . . the person signed the instrument" ²²¹ The statute thus precludes any common law supplementation.

B. *Liability for Breach of Implied Transfer Warranty*

Participants in negotiable instruments transactions may incur liability for breach of implied warranties. One kind of implied warranty arises in the transfer of an instrument. Section 3-416(a) states that a person who "transfers" an instrument for consideration warrants five facts to the transferee:

- (1) the warrantor is a person entitled to enforce the instrument;
- (2) all signatures on the instrument are authentic and authorized;
- (3) the instrument has not been altered;
- (4) the instrument is not subject to a defense or claim in recoupment of any party which can be asserted against the warrantor; and
- (5) the warrantor has no knowledge of any insolvency proceeding commenced with respect to the maker or acceptor or, in the case of an unaccepted draft, the drawer. ²²²

If any of these facts proves false, the warrantor incurs liability for breach of warranty. ²²³

In proper circumstances, remitters may make the warranties listed in section 3-416. Section 3-203(a), as noted earlier, defines a "transfer" as the delivery of an instrument "for the purpose of giving to the person receiving delivery the right to enforce the instrument." ²²⁴ As explained in Part IV above, a remitter typically transfers an instrument by negotiating it to the payee; the remitter delivers the instrument to the payee precisely so that the payee may obtain payment from the issuer.

Remitters may breach the transfer warranties that they make in negotiating instruments to the payee in a variety of ways. For example, if the remitter alters a cashier's check, the remitter will breach the section 3-416(a) (3) warranty that the instrument has not been altered

²²¹ *Id.* § 3-401(a).

²²² *See id.* § 3-416(a). A person who not only transfers an instrument, but also indorses it, warrants the facts to subsequent transferees as well. *See id.*

²²³ *Id.* § 3-416(b).

²²⁴ U.C.C. § 3-203(a).

when negotiating it to the payee. Likewise, if the remitter knows that the issuer has a defense to payment, the remitter will breach the warranty in section 3-416(a)(4).²²⁵

Some courts will find problematic the implied warranty in section 3-416(a)(1), which states that "the warrantor is a person entitled to enforce the instrument."²²⁶ As stated in Part IV above, although the author and other commentators believe that remitters have the right to enforce, not everyone agrees.²²⁷ Instead, some sources—including an official comment to the Code—insist that remitters do not have the right to enforce.²²⁸

Courts that accept the view that remitters cannot enforce apparently must conclude that remitters breach the warranty in section 3-416(a)(1) every time they negotiate an instrument. That conclusion seems rather odd. The Code, after all, specifically contemplates that remitters will negotiate instruments.²²⁹

Although unusual, courts nevertheless should keep this somewhat anomalous result in perspective. In most cases, even if the remitter breaches the warranty, the breach will cause few, if any, damages. The payee, as a holder, will have the right to enforce even if the remitter does not.²³⁰

When a remitter delivers an instrument to a person other than the payee, the delivery will not constitute a negotiation. Yet, courts should hold that the delivery nonetheless constitutes a "transfer" within the meaning of section 3-416(a). A transfer, as noted, is one form of assignment.²³¹ If remitters have the right to enforce instruments, they may assign that right to others. As a result, no matter to whom the remitter delivers the instrument, the remitter will make all of the warranties stated in section 3-416(a).

As discussed above, however, some sources disagree with this conclusion.²³² Courts that believe that remitters do not have the right to enforce, in particular, have concluded that a delivery to a person other than the payee does not constitute a transfer.²³³ In such transactions,

²²⁵ See HAWKLAND ET AL., *supra* note 1, at § 3-802:02 (courts should "treat a remitter of a bank instrument as a transferor who thereby gives to his transferee the warranty under § 3-417(2)(d) [(1989) or § 3-416(a)(4) (1990)] that no defense is good against him.").

²²⁶ U.C.C. § 3-416(a)(1).

²²⁷ See *infra* Part IV.A.2.

²²⁸ See *id.*

²²⁹ See U.C.C. § 3-201(b) (1990).

²³⁰ See *id.* § 1-201(20) (defining holder); *id.* § 3-301 (stating that holders may enforce).

²³¹ See *supra* Part IV.E.

²³² See *id.*

²³³ See, e.g., *Michaud v. Community Sav. Bank*, No. CIV. 92-0516024S, 1994 WL 146371, at *2-3 (Conn. Super. Ct. Apr. 8, 1994) (transferee of remitter did not have right to enforce).

as a result, the courts would hold that the remitter does not make the transfer warranties in section 3-416.

This conclusion should give courts pause. For example, suppose that a remitter buys a cashier's check and then alters it. Instead of delivering the instrument to the payee, the remitter sells it to a third party. Unless the remitter makes transfer warranties under section 3-416(a), there is no protection for the third party.

Courts that find no liability under section 3-416 in these transactions ought to impose the liability as a matter of common law. They should conclude that remitters make the warranties in subsections 3-416(a)(2) through (a)(5), even if remitters cannot "transfer" within the meaning of the Code.²³⁴ Any other rule would surprise parties who deal with remitters and who expect them to make the same kind of warranties that others make when they transfer instruments.

C. *Liability for Breach of Implied Presentment Warranty*

A second kind of implied warranty arises in the presentment of instruments for payment. Article 3 addresses these presentment warranties in section 3-417.²³⁵ These warranties have much in common with the transfer warranties discussed above. Yet, determining when and how they arise in remitter transactions involves several difficulties.

The first difficulty is whether the presentment warranties with respect to cashier's checks differ from those with respect to teller's checks. The second is whether remitters make presentment warranties if they personally demand payment from the issuer. The third is whether remitters make presentment warranties if they transfer the instrument and someone else ultimately demands payment from the issuer.

1. Presentment Warranties Made with Respect to Cashier's Checks and Teller's Checks

Section 3-417 creates different warranties for different kinds of instruments. Subsection (a) states three presentment warranties made with respect to unaccepted drafts: "(1) the warrantor is, or was, at the time the warrantor transferred the draft, a person entitled to enforce the draft . . . ; (2) the draft has not been altered; and (3) the warrantor has no knowledge that the signature of the drawer of the draft is

²³⁴ Because these courts hold that remitters do not have the right to enforce instruments, they should not incorporate the warranty stated in § 3-416(a)(1)—that the transferor has the right to enforce—into the common law.

²³⁵ U.C.C. § 3-417 (1990).

unauthorized."²³⁶ Subsection (d)(1) states one presentment warranty made with respect to other instruments: "[T]he warrantor is, or was, at the time the warrantor transferred the instrument, a person entitled to enforce the instrument"²³⁷

The warranties remitters typically make depend on whether the remitter purchases a teller's check or a cashier's check.²³⁸ Article 3 defines both of these instruments as drafts.²³⁹ The question thus arises whether they constitute "unaccepted drafts."

Section 3-409(a) defines acceptance as "the drawee's signed agreement to pay a draft as presented."²⁴⁰ It explains further that acceptance "may consist of the drawee's signature alone."²⁴¹ Under this definition, a teller's check would not be an accepted draft. The three warranties stated in section 3-417(a), as a result, would apply to teller's checks.

Cashier's checks require more analysis. Because the same bank is both the drawer and the drawee of a cashier's check, the drawee by definition has signed the instrument.²⁴² Cashier's checks thus appear to meet the definition of accepted drafts. Many sources, as a result, have described cashier's checks as "accepted" instruments.²⁴³

Yet, the conclusion that cashier's checks are accepted drafts poses a significant difficulty. Section 3-409(d) defines a "certified check" as "a check accepted by the bank on which it is drawn."²⁴⁴ If cashier's checks are accepted, then under section 3-409(d), all cashier's checks are certified checks. That conclusion, although possible, seems rather odd. The Code, after all, distinguishes cashier's checks from certified checks in many places.²⁴⁵ As a result, some courts may wish to treat cashier's checks like teller's checks and conclude that they do not qualify as accepted drafts.

²³⁶ *Id.* § 3-417(a).

²³⁷ *Id.* § 3-417(d)(1).

²³⁸ See *supra* Part II.B.2.

²³⁹ See U.C.C. § 3-104(g)-(h) (1990).

²⁴⁰ *Id.* § 3-409(a).

²⁴¹ *Id.*

²⁴² See *id.* § 3-103(a)(3) (defining drawer as "a person who signs . . . a draft. . ."); *id.* § 3-104(g) (defining a cashier's check as "a draft with respect to which the drawer and drawee are the same bank or branches of the same bank").

²⁴³ See *Kaufman v. Chase Manhattan Bank*, 370 F. Supp. 276, 278 (S.D.N.Y. 1973); *National Newark & Essex Bank v. Giordano*, 268 A.2d 327, 329 (N.J. Super. Ct. Law Div. 1970); *Michigan Note*, *supra* note 74, at 425 n.14 *Tobin*, *supra* note 73, at 261-262.

²⁴⁴ U.C.C. § 3-409(d) (1990).

²⁴⁵ See, e.g., *id.* § 3-412 (stating obligations of issuer on a cashier's check); *id.* § 3-414(a) (stating obligations of acceptor of draft).

If courts conclude that cashier's checks are accepted drafts, they should hold that persons who present them make only the warranty listed in section 3-417(d)(1). Courts have no reason to adopt rules establishing additional warranties as a matter of common law. Banks that issue cashier's checks do not need much protection; they can determine by examining their own books whether a check has been altered or the signature of the drawer (i.e., its own signature) is unauthorized.

2. Presentment Directly by the Remitter

One way that a person may make the presentment warranties stated in section 3-417 is by presenting the instrument directly to the issuer or drawee and obtaining payment on it.²⁴⁶ The warranties made would run to the person paying the instrument. For example, anyone who cashes a personal check makes presentment warranties to the payor bank.

A few remitters may present instruments directly to a bank. For example, suppose a remitter buys a cashier's check or teller's check from a bank, but later decides not to negotiate it to the payee. Having no need for the check, the remitter returns to the bank and demands and receives payment for it. In such a case, the remitter ordinarily would make the presentment warranties in section 3-417.

Whether a remitter presents an unaccepted draft or other instrument, the remitter will warrant that he or she "is entitled to enforce."²⁴⁷ Courts that believe remitters have no right to enforce must conclude that remitters automatically breach this warranty.²⁴⁸ That conclusion, like many others that follow from saying that a remitter cannot enforce, seems a little strange. Yet, in most cases the bank will not suffer any damages.

Courts believing that remitters have a right to enforce generally will decide that remitters do not breach the warranty. In a few cases, however, a breach might occur. For example, suppose that a remitter negotiates an instrument to a payee but later steals it back. At that point, even though the remitter has possession, the remitter would not

²⁴⁶ Section 3-417(a) states: "If an unaccepted draft is presented to the drawee for payment . . . the person obtaining payment . . . warrant[s] to the drawee making payment" the facts listed in paragraphs (a)(1) through (a)(3). *Id.* § 3-417(a). Section 3-417(d) states that "if . . . any other instrument is presented for payment to a party obliged to pay the instrument . . . [t]he person obtaining payment . . . warrant[s] to the [drawee]" the fact stated in paragraph (d)(1). *Id.* § 3-417(d).

²⁴⁷ See *id.* § 3-417(a)(1), (d)(2).

²⁴⁸ See *supra* Part IV.A.2 (discussing whether remitters have a right to enforce).

have the right to enforce because the remitter would have given that right to the payee in the negotiation. The remitter thus would breach the warranty that the remitter is entitled to enforce.²⁴⁹

Remitters who present unaccepted drafts—like teller's checks—also make two additional warranties. As discussed above, they warrant that "the draft has not been altered"²⁵⁰ and that they "have no knowledge that the signature of the drawer of the draft is unauthorized."²⁵¹ If the remitter alters or forges a teller's check, the remitter naturally would breach these warranties.

Some remitters may attempt to avoid charges of breach of warranty by asserting that they have not presented an instrument.²⁵² They may claim that they instead merely returned the check to ask for a refund. While article 3 says that persons who present instruments make implied warranties, it does not say that persons who seek to rescind the purchase of an instrument make any such warranties.

Courts should thwart this argument. They should hold that, as a matter of common law, remitters make implied warranties when they return instruments for a refund. These warranties should resemble the warranties stated in section 3-417, with one change. The remitter should warrant that he or she has a right to obtain a refund as opposed to a right to enforce. Failure to hold that the remitters make additional implied warranties would surprise the many who deal with them.

3. Presentment by Someone Other Than the Remitter

A person may make a presentment warranty even without presenting an instrument directly to the drawee. The person merely has to transfer the instrument prior to its ultimate presentment. Section 3-417(a) states that, upon the presentment of an unaccepted draft, not only "the person obtaining payment," but also "a previous trans-

²⁴⁹ Facts like these arise fairly frequently. *See, e.g., Bunge Corp. v. Manufacturers Hanover Trust Co.*, 286 N.E.2d 903, 906 (N.Y. 1972) (remitter delivered checks to payee but later wrongfully reacquired them). The author, however, could find no case in which the bank sued the remitter for breach of presentment warranty.

²⁵⁰ *See* U.C.C. § 3-417(a)(2) (1990).

²⁵¹ *See id.* § 3-417(a)(2),(3).

²⁵² Some remitters may have a quirky argument to support this position. Section 3-501(a) defines a presentment as "a demand made by . . . a person entitled to enforce an instrument . . . to pay the instrument. . . ." *See id.* § 3-501(a). Courts that believe that remitters do not have rights to enforce instruments thus might have to hold that remitters could not make presentment warranties because they cannot present. The definition in § 3-501(a), however, does not square well with § 3-417. If only a person who can enforce can present, why do § 3-417(a)(1) and (d)(1) say that everyone who presents warrants that they have a right to enforce? The warranty would be superfluous.

feror," will make presentment warranties.²⁵³ Similarly, section 3-417(d)(1) states that, upon presentment of any other instrument, both "the person obtaining payment" and "a prior transferor" make presentment warranties.²⁵⁴

In many—indeed most—remitter transactions, the remitter will transfer an instrument before its ultimate presentment.²⁵⁵ For example, in a typical case, a remitter will purchase an instrument from a bank and then deliver it to the payee. The delivery constitutes a "transfer."²⁵⁶ If the payee then presents the check to the bank and obtains payment, the remitter will qualify as a previous or prior transferor and will make the presentment warranty or warranties applicable to the instrument.

Courts holding that remitters do not have the right to enforce instruments again will encounter two difficulties. First, as in the case of transfer warranties, they will have to conclude that the remitter always breaches the warranty that the remitter is a person entitled to enforce. Although that result does not make much sense, it follows directly from the statute.

Second, these courts will have to decide whether remitters should make presentment warranties if they deliver the instrument to someone other than the payee prior to its ultimate presentment. As noted above, some courts would not consider such a delivery to constitute a "transfer."²⁵⁷ The remitter thus could not qualify as a previous or prior transferor. Nonetheless, courts still should impose the presentment warranties stated in section 3-417(a)(2) and (3) as a matter of common law to prevent any unfair surprise.

D. *Other Liability*

Remitters do not face any additional forms of liability under article 3. Yet, they may incur liability independent of the Code. This liability, in appropriate circumstances, could sound either in contract or tort.

When remitters purchase cashier's checks or teller's checks from a bank, they may make express or implicit contracts with the issuing bank. For example, if the remitter does not tender cash for the instrument, the remitter usually will promise to pay for it later. If the remitter

²⁵³ *Id.* § 3-417(a).

²⁵⁴ *Id.* § 3-417(d)(1).

²⁵⁵ Why the Code says "previous transferor" in subsection (a), and "prior transferor" in subsection (d)(1), remains unclear. The distinction does not appear to make a difference.

²⁵⁶ See *supra* Part IV.E.

²⁵⁷ See *id.*

fails to pay—as sometimes happens²⁵⁸—the drawer may recover the purchase price from the remitter under a breach of contract theory.

Additionally, remitters may face tort and related liability for various forms of misconduct. For example, an issuer may have rights against a remitter who obtains an instrument by fraud.²⁵⁹ Remitters who use cashier's checks to defraud others²⁶⁰ similarly may have tort liability to their victims. The details of these forms of liability fall outside of the scope of this article. At least as a matter of policy, however, courts should not hesitate to place upon remitters the same types of liabilities that comparable parties to negotiable instrument fraud would face for similar conduct.

VI. CONCLUSION

More work remains on the subject of remitters. Although this essay has attempted to state their rights and liabilities under article 3, it has not addressed a number of other topics. For example, the essay does not investigate fully the extent to which parties may change the statutory rules by contract, a perennial issue under the Code. In addition, although the foregoing discussion has pointed out a number of difficulties with the present language of article 3, it has not recommended specific ways to remedy them.

Under the analysis presented here, however, the author hopes to have simplified the task of deciding the vast majority of issues that arise in remitter cases. Although article 3 says almost nothing expressly about remitters, this essay has strived to show that many of the article's general provisions clearly apply to them. Moreover, where the Code is silent, courts may fashion appropriate common law rules to fill in the gaps.

²⁵⁸ See, e.g., *Godat v. Mercantile Bank*, CIV. No. 63696, 1994 WL 313506, at *4 (Mo. Ct. App. July 5, 1994) (remitter failed to pay for instrument); *Wertz v. Richardson Heights Bank & Trust*, 495 S.W.2d 573, 574 (Tex. 1973) (same).

²⁵⁹ See BRITTON, *supra* note 60, at 300.

²⁶⁰ See *supra* Part I.B.