

Bill as Introduced

HB 299 - AS INTRODUCED

2009 SESSION

09-0359

08/10

HOUSE BILL **299**

AN ACT prohibiting banks from requiring blood samples, fingerprints, and DNA samples
in order to complete a banking transaction.

SPONSORS: Rep. Sapareto, Rock 5; Rep. Kurk, Hills 7

COMMITTEE: Commerce and Consumer Affairs

ANALYSIS

This bill prohibits banks from requiring blood samples, fingerprints, and DNA samples in order to complete a banking transaction.

Explanation: Matter added to current law appears in ***bold italics***.
Matter removed from current law appears [~~in brackets and struck through~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Nine

AN ACT prohibiting banks from requiring blood samples, fingerprints, and DNA samples
 in order to complete a banking transaction.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 1 New Subparagraph; Negotiable Instruments; Presentment; Unreasonable Forms of
2 Identification. Amend RSA 382-A:3-501 by inserting after subparagraph (b) the following new
3 subparagraph:

4 (c) Reasonable identification shall not include blood samples, finger prints, or DNA
5 samples.

6 2 Effective Date. This act shall take effect 60 days after its passage.

Amendments

Rep. R. Holden, Hills. 7
November 5, 2009
2009-2479h
08/09

Amendment to HB 299

1 Amend the bill by replacing the title with the following:

2

3 AN ACT prohibiting banks from requiring fingerprints in order to complete a banking
4 transaction.

5

6 Amend RSA 382-A:3-501(c) as inserted by section 1 of the bill by replacing it with the following:

7

8 (c) Reasonable identification shall not include finger prints.

Amendment to HB 299
- Page 2 -

2009-2479h

AMENDED ANALYSIS

This bill prohibits banks from requiring fingerprints in order to complete a banking transaction.

Rep. R. Holden, Hills. 7
November 5, 2009
2009-2479h
08/09

Amendment to HB 299

1 Amend the bill by replacing the title with the following:

2

3 AN ACT prohibiting banks from requiring fingerprints in order to complete a banking
4 transaction.

5

6 Amend RSA 382-A:3-501(c) as inserted by section 1 of the bill by replacing it with the following:

7

8 (c) Reasonable identification shall not include finger prints.

Amendment to HB 299

- Page 2 -

2009-2479h

AMENDED ANALYSIS

This bill prohibits banks from requiring fingerprints in order to complete a banking transaction.

Committee Minutes


**HOUSE COMMITTEE ON
COMMERCE AND CONSUMER AFFAIRS**

BILL NUMBER: HB 299

BILL TITLE: prohibiting banks from requiring blood samples, fingerprints, and DNA samples in order to complete a banking transaction.

DATE: 3-12-09

THE COMMITTEE HAS VOTED TO RETAIN THIS BILL.



Tara G. Reardon, Chairman

Speakers

#1
Fill in **ONLY** if **SPEAKING** on Bill

Bill # HB 299 Date 2/11/09

Committee Commerce

I support the bill
I oppose the bill
I have written testimony
(Number of copies)

Time needed to speak: 5 min.

Name Frank Saporito

Address Derry

Phone 894-7083

Representing Rock 5

H 2
Fill in **ONLY** if **SPEAKING** on Bill

Bill # HB 299 Date 2/11/09

Committee Commerce

I support the bill
I oppose the bill
I have written testimony
(Number of copies)

Time needed to speak: 2 min.

Name Jerry Little

Address 15 No. Main St.

Canaan, NH

Phone 224-5373

Representing NH Bankers

H 2
Fill in **ONLY** if **SPEAKING** on Bill

Bill # HB 299 Date 2/11/09

Committee Commerce

I support the bill
I oppose the bill
I have written testimony
(Number of copies)

Time needed to speak: 2 min.

Name Rep. Kunkle

Address _____

Phone _____

Representing Wills-7

Hearing Minutes

HOUSE COMMITTEE ON COMMERCE AND CONSUMER AFFAIRS

PUBLIC HEARING ON HB 299

BILL TITLE: prohibiting banks from requiring blood samples, fingerprints, and DNA samples in order to complete a banking transaction.

DATE: February 11, 2009

LOB ROOM: 302 **Time Public Hearing Called to Order:** 1330

Time Adjourned: 1420

(please circle if present)

Committee Members: Reps. Reardon, Butler, DeStefano, Kopka, McEachern, Hammond, Nord, Winters, Meader, Gidge, Schlachman, Bunt, Quandt, Belanger, D. Flanders, R. Holden, Dowling, Headd, Nevins and Palfrey.

Bill Sponsors: Reps. Sapareto and Kurk

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

Rep. Frank Sapareto, prime sponsor – Bank of America advised customers that finger-printing was required; wants practice stopped. Cleaning lady had lots of problems

Q; Rep. Rip Holden – Bank told her other banks did the same thing. They were one of the last to continue practice.

Jerry Little, NH Bankers Assn. – Opposes the bill. Banking Commissioner opposes. Summarized written testimony. Should not be our purpose to amend the UCC. Thumb prints are acceptable and proven method of identifying only deals with non customers. See pg. 16 of Check Fraud handout in file.

Q: Rep. Edward Butler – Were you aware of Bank of America saying it was a way to keep the rif raf out?

A: No. I'm not sure where heard that before; they do have groups of people who line up out the door and their own customers can't get in.

Q: Rep. Donna Schlachman – You say only applies to people cashing checks?

A: Yes.

Q: Seems to me that more is involved here. Why isn't my ID just as good?

A: That is addressed in another bill you will be hearing this afternoon. Not all states have the same technology as New Hampshire. Alabama has non-photo ID.

Q: Rep. Joel Winters – Is reasonable identification defined any where?

A: It is fairly broad; I left undefined; left it up to the institution.

Q: Rep. David Palfrey – Why aren't other banks demanding the same thing...just BOA?

Q: Rep. Rip Holden - What are they comparing my thumb print to?

A: Nothing. If the check is no good or the bank determines fraud; your print will be given to the police. It is a good deterrent.

Rep. Ed Butler – Do you have statistics to determine how many fraudulent chares are made?

A: No, I've not seen a breakdown. Bank fraud is an equal opportunity crime. Kind of bank, state or federal; makes no difference.

Q: Rep. Holden – How many fraudulent acts have occurred in ???

A: I don't know; stats are kept by FBI. It is a rapidly growing problem for years; recession does increase number.

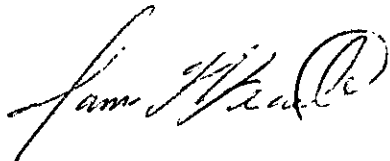
Mr. Little – NO definition of fingerprint in statute; thumb print biometrics are on the way.

Q: Rep. Gidge – Would you object if fingerprints were removed from the bill and just leave DNA and blood samples.

A: Yes, but UCC is wrong place to address these issues.

Rep. Neal Kurk, co-sponsor – I support this bill. What happens to the finger prints? Does this create a data base that BOA can sell; store, sue, etc.? Ownership changes hands. Suggests use biometric program that is produced; use modern technologies and eliminate intrusion into peoples' lives. Pay attention to cultural values of the people in this area. What's the right approach for New Hampshire?

Respectfully Submitted:



James F. Headd, Clerk

HOUSE COMMITTEE ON COMMERCE AND CONSUMER AFFAIRS

PUBLIC HEARING ON HB 299

BILL TITLE: prohibiting banks from requiring blood samples, fingerprints, and DNA samples in order to complete a banking transaction.

DATE: February 11, 2009

LOB ROOM: 302

Time Public Hearing Called to Order: 1330

Time Adjourned: 1420

(please circle if present)

Committee Members: Reps. Reardon, Butler, DeStefano, Kopka, McEachern, Hammond, Nord, Winters, Meader, Gidge, Schlachman, Hunt, Quandt, Belanger, D. Flanders, R. Holden, Dowling, Headd, Nevins and Palfrey.

Bill Sponsors: Reps. Sapareto and Kurk

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

Sapareto - Bank of America - advised customer that finger printing was required - wants practice stopped. - ~~steering~~ lady had lots of ~~experience~~

Q Holden. Bank told her other banks did the same thing - they were one of the last to continue practice

* 2) Very Little. Banking Commission - Opposer²
Summarized written testimony - should not be our purpose to amend the UCC

Thumb prints are acceptable + proven method
and deals with non customers
see pg 16 of CHECK FRAUD in File

2) HB 299

2-11-09

Q. Butler Where you aware of B of A saying
it was a way to keep the RIF RIF out
A. No - I'm not sure where
heard that before - They do have
groups of people who line up out the
door at their own customers can't get
in -

Q. Sublakman - you say only applies
to people cashy checks

A. yes -

Q. Recently heard out further
seems to me that more is involved
here. why isn't it just as
as good.

Q. Sublakman - why isn't RINH
business sufficient -

A. That is additional information
Bill you will be hearing this afternoon
Not all states have the same
technology as NH - Massachusetts has
non photo FD

Q. Winters - is Reasonable definition
defined anywhere?

A. It is fairly broad I left
undefined - left up to the inst. test.

2-11-09

3 HB 299

Q Pal Fay - Why aren't other Banks demanding the same thing - Just BOA

Q Holders - What are they accomplishing thru print to

A - Nothing if the check is no good on the Bank determine if your print will be given to the police - it is a good deterrent -

Q - Butler - do you have statistics to ~~say~~ determine how many fraudulent charges are made.

A - No I've not seen a break down - Bank fraud is ever and opportunity crime - Kind of Bank = STATE - Fed. etc makes no difference

Q Holders - how many fraudulent ACTs have occurred in 2008.

A - I don't know. STATE are kept by FBI - it is a rapidly ^{growing program} growing program credit cards are greater than checks.

Q Kyska - do you think the necessary is petering increase in fraud

A - Fraud has been an increasing problem for years - Recession does increase number

4- HB 299

Very little - No definition of
fingerprint in statute - Thumb
print and Bio Metrics are on the way

Q Madsen - would you object if
fingerprint were removed from the
Bill and just leave DNA & Blood
samples -

A No yes - But UCC
is a way place to address these
issues

H 3 Rep KUKK -

What happens to the finger
prints - does this create a data
base that B O B can sell - store
use - etc - ownership change hands
Suggest use Bio Metrics
program that is Proactive - use modern
technologies and eliminate intrusions into
people lives. Pay attention to cultural
values of the people in the area
What's the right approach for this

Sub-Committee Actions

HOUSE COMMITTEE ON COMMERCE AND CONSUMER AFFAIRS

SUBCOMMITTEE WORK SESSION ON HB 299

BILL TITLE: prohibiting banks from requiring blood samples, fingerprints, and DNA samples in order to complete a banking transaction.

DATE: 3-12-09

Subcommittee Members: Reps. Butler, Hammond, Palfrey

Comments and Recommendations: Court decisions were presented that reaffirm a banks right to ask for fingerprints.

Amendments:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Motions: OTP, OTP/A, ITL, Retained (Please circle one.)

Moved by Rep.

Seconded by Rep.

Vote:

Motions: OTP, OTP/A, ITL, Retained (Please circle one.)

Moved by Rep. Palfrey

Seconded by Rep. Hammond

Vote: 3-0

Respectfully submitted,

Rep. Ed Butler
Subcommittee Chairman/Clerk

HOUSE COMMITTEE ON COMMERCE AND CONSUMER AFFAIRS

SUBCOMMITTEE WORK SESSION ON HB 299

BILL TITLE: prohibiting banks from requiring blood samples, fingerprints, and DNA samples in order to complete a banking transaction.

DATE: 3-12-07

Subcommittee Members: Reps.

Batler, Hammond, Palfrey

Comments and Recommendations:

Amendments

Best decisions were presented that reaffirm a bank's right to ask for fingerprints.

Sponsor: Rep.

OLS Document #:

Sponsor: Rep.

OLS Document #:

Sponsor: Rep.

OLS Document #:

Motions: OTP, OTP/A, ITL, Retained (Please circle one.)

Moved by Rep.

Palfrey

Seconded by Rep.

Hammond

Vote:

3 - 0

Motions: OTP, OTP/A, ITL, Retained (Please circle one.)

Moved by Rep.

Seconded by Rep.

Vote:

Respectfully submitted,

Rep. {Type NAME}
Subcommittee Chairman/Clerk

Sub-Committee Minutes

HOUSE COMMITTEE ON COMMERCE AND CONSUMER AFFAIRS

SUBCOMMITTEE WORK SESSION ON HB 299

BILL TITLE: prohibiting banks from requiring blood samples, fingerprints, and DNA samples in order to complete a banking transaction.

DATE: October 14, 2009

Subcommittee Members: Reps. Dowling, Schlachman, and Palfrey

Comments and Recommendations: ITL - 2-1

Amendments:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Motions: OTP, OTP/A, ITL, Retained (Please circle one.)

Moved by Rep.

Seconded by Rep.

Vote:

Motions: OTP, OTP/A, ITL, Retained (Please circle one.)

Moved by Rep.

Seconded by Rep.

Vote:

Respectfully submitted,

Rep. Dowling
Subcommittee Chairman/Clerk

HOUSE COMMITTEE ON COMMERCE AND CONSUMER AFFAIRS

SUBCOMMITTEE WORK SESSION ON HB 299

BILL TITLE: prohibiting banks from requiring blood samples, fingerprints, and DNA samples in order to complete a banking transaction.

DATE: October 14, 2009

Subcommittee Members: Reps. Dowling, Schiackman, Palfrey

Comments and Recommendations: 10/14/09 ITL 2-1

Amendments:

Sponsor: Rep.

OLS Document #:

Sponsor: Rep.

OLS Document #:

Sponsor: Rep.

OLS Document #:

Motions: OTP, OTP/A, ITL, Retained (Please circle one.)

Moved by Rep.

Seconded by Rep.

Vote:

Motions: OTP, OTP/A, ITL, Retained (Please circle one.)

Moved by Rep.

Seconded by Rep.

Vote:

Respectfully submitted,

Rep.
Subcommittee Chairman/Clerk

Neb.Rev.St. § 72-1268

West's Revised Statutes of Nebraska Annotated Currentness

Chapter 72. Public Lands, Buildings, and Funds

Article 12. Investment of State Funds

(B) Nebraska Capital Expansion Act

→72-1268. Depositories; eligibility for funds; bond or bond alternatives

(1) Notwithstanding any other provision of law, every bank, capital stock financial institution, and qualifying mutual financial institution shall be eligible for the maximum investment provided for in section 72-1263. The bank, capital stock financial institution, or qualifying mutual financial institution shall give a bond or, in lieu of a bond, may give security for any investment under the Nebraska Capital Expansion Act as provided in sections 72-1268.01 to 72-1268.04. Any bank, capital stock financial institution, or qualifying mutual financial institution may apply for the privilege of keeping on deposit such funds.

(2)(a) Every bank, capital stock financial institution, and qualifying mutual financial institution shall, as a condition of accepting state funds, agree to cash free of charge state warrants which are presented by payees of the state without regard to whether or not such payee has an account with such bank, capital stock financial institution, or qualifying mutual financial institution, and such bank, capital stock financial institution, or qualifying mutual financial institution shall not require such payee to place his or her fingerprint or thumbprint on the state warrant as a condition to cashing such warrant.

(b) The condition of accepting state funds in subdivision (2)(a) of this section shall not preclude any bank, capital stock financial institution, or qualifying mutual financial institution from refusing to cash a state warrant presented to the bank, capital stock financial institution, or qualifying mutual financial institution if (i) a stop-payment order has been placed on the state warrant, (ii) the state warrant has been reported as unregistered, voided, lost, stolen, or destroyed or a duplicate state warrant has been issued in its place, (iii) the state warrant is incomplete or is forged or altered in any manner, (iv) the state warrant lacks any necessary indorsement or an indorsement is illegible, unauthorized, or forged, (v) the state warrant is stale-dated, or (vi) the bank, capital stock financial institution, or qualifying mutual financial institution has a reasonable belief that the individual presenting the state warrant is not the payee named on the state warrant.

Laws 1978, LB 258, § 8; Laws 1985, LB 614, § 4; Laws 1996, LB 1274, § 24; Laws 1999, LB 217, § 1; Laws 2003, LB 175, § 8.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CUOMO, ATTORNEY GENERAL OF NEW YORK *v.*
CLEARING HOUSE ASSOCIATION, L. L. C., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

No. 08–453. Argued April 28, 2009—Decided June 29, 2009

To determine whether various national banks had violated New York's fair-lending laws, the State's Attorney General, whose successor in office is the petitioner here, sent them letters in 2005 requesting "in lieu of subpoena" that they provide certain nonpublic information about their lending practices. Respondents, the federal Office of the Comptroller of the Currency (Comptroller or OCC) and a banking trade group, brought suit to enjoin the information request, claiming that the Comptroller's regulation promulgated under the National Bank Act (NBA) prohibits that form of state law enforcement against national banks. The District Court entered an injunction prohibiting the Attorney General from enforcing state fair-lending laws through demands for records or judicial proceedings. The Second Circuit affirmed.

Held: The Comptroller's regulation purporting to pre-empt state law enforcement is not a reasonable interpretation of the NBA. Pp. 2–15.

(a) Evidence from the time of the NBA's enactment, this Court's cases, and application of normal construction principles make clear that the NBA does not prohibit ordinary enforcement of state law. Pp. 2–11.

(i) The NBA provides: "No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts . . . , or . . . directed by Congress." 12 U. S. C. §484(a). Among other things, the Comptroller's regulation implementing §484(a) forbids States to "exercise visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records," or, as here pertinent, "prosecuting enforcement actions" "except in limited circumstances authorized by

Syllabus

federal law.” 12 CFR §7.4000(a)(1). There is some ambiguity in the NBA’s term “visitorial powers,” and the Comptroller can give authoritative meaning to the term within the bounds of that uncertainty. *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837. However, the presence of some uncertainty does not expand *Chevron* deference to cover virtually any interpretation of the NBA. Pp. 2–3.

(ii) When the NBA was enacted in 1864, scholars and courts understood “visitation” to refer to the sovereign’s supervisory power over the manner in which corporations conducted business, see, e.g., *Guthrie v. Harkness*, 199 U. S. 148, 157. That power allowed the States to use the prerogative writs to exercise control if a corporation abused its lawful power, acted adversely to the public, or created a nuisance. Pp. 3–4.

(iii) This Court’s consistent teaching, both before and after the NBA’s enactment, is that a sovereign’s “visitorial powers” and its power to enforce the law are two different things. See, e.g., *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 676, 681; *Guthrie, supra*, at 159, 157; *First Nat. Bank in St. Louis v. Missouri*, 263 U. S. 640, 660. *Watters v. Wachovia Bank, N. A.*, 550 U. S. 1, 21, distinguished. And contrary to the Comptroller’s regulation, the NBA pre-empts only the former. Pp. 4–7.

(iv) The regulation’s consequences also cast its validity into doubt: Even the OCC acknowledges that the NBA leaves in place some state substantive laws affecting banks, yet the Comptroller’s rule says that the State may not *enforce* its valid, non-pre-empted laws against national banks. “To demonstrate the binding quality of a statute but deny the power of enforcement involves a fallacy made apparent by the mere statement of the proposition, for such power is essentially inherent in the very conception of law.” *St. Louis, supra*, at 660. In contrast, channeling state attorneys general into judicial law-enforcement proceedings (rather than allowing them to exercise “visitorial” oversight) would preserve a regime of exclusive administrative oversight by the Comptroller while honoring in fact rather than merely in theory Congress’s decision not to pre-empt substantive state law. This reading is also suggested by §484(a)’s otherwise inexplicable reservation of state powers “vested in the courts of justice.” And on a pragmatic level, the difference between visitation and law enforcement is clear: If a State chooses to pursue enforcement of its laws in court, its targets are protected by discovery and procedural rules. Pp. 7–9.

(b) The Comptroller’s interpretation of the regulation demonstrates its own flaw: the Comptroller is forced to limit the regulation’s sweep in areas such as contract enforcement and debt collection, but those

Syllabus

exceptions rest upon neither the regulation's nor the NBA's text. Pp. 9–11.

(c) The dissent's objections are addressed and rejected. Pp. 11–13.

(d) Under the foregoing principles, the Comptroller reasonably interpreted the NBA's "visitorial powers" term to include "conducting examinations [and] inspecting or requiring the production of books or records of national banks," when the State conducts those activities as supervisor of corporations. When, however, a state attorney general brings suit to enforce state law against a national bank, he is not acting in the role of sovereign-as-supervisor, but rather sovereign-as-law-enforcer. Because such a lawsuit is not an exercise of "visitorial powers," the Comptroller erred by extending that term to include "prosecuting enforcement actions" in state courts. In this case, the Attorney General's threatened action was not the bringing of a civil suit, or the obtaining of a judicial search warrant based on probable cause, but the issuance of subpoena on his own authority if his request for information was not voluntarily honored. That is not the exercise of the law enforcement power "vested in the courts of justice," which the NBA exempts from the ban on the exercise of supervisory power. Accordingly, the injunction below is affirmed as applied to the Attorney General's threatened issuance of executive subpoenas, but vacated insofar as it prohibits the Attorney General from bringing judicial enforcement actions. Pp. 13–15.

510 F. 3d 105, affirmed in part and reversed in part.

SCALIA, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed an opinion concurring in part and dissenting in part, in which ROBERTS, C. J., and KENNEDY and ALITO, JJ., joined.

Testimony

HB 299, an act prohibiting banks from requiring blood samples, fingerprints and DNA samples in order to complete a banking transaction.

**Testimony of Gerald H. Little, President
New Hampshire Bankers Association
Before the
House Commerce and Consumer Affairs Committee
February 11, 2009**

Chairwoman Reardon and members of the Commerce and Consumer Affairs Committee, you have before you this afternoon three separate bills that all propose to amend the Uniform Commercial Code, or "UCC". The UCC has been adopted nationwide and focuses on a limited number of instances where more than 300 Uniform Law Commissioners representing every state in the nation determine after years of debate that the good of the nation and commerce would be served by state-to-state uniformity of law.

Amending the UCCs is a difficult proposition, fraught with unintended consequences and, by design, diminishes the positive value of the UCCs when we change them in pursuit of unrelated social policy. The NHBA believes that none of the three issues brought to you today should be addressed through amendment of the Uniform Commercial Code.

HB 299 would prohibit banks from taking all reasonable steps to protect their customers from identity theft and their institution from becoming victims of fraud. Therefore, the New Hampshire Bankers Association also opposes the bill generally.

HB 299 would amend the section of Uniform Commercial Code Article 3 relative to the presentment of negotiable instruments. Therefore, and to be clear, the proposed limits of HB 299 would only apply to efforts to identify individuals attempting to cash checks. The proscribed data could still be collected by a financial institution in the process of completing any other transaction.

We are not aware of any bank currently stocking syringes and cheek swabs at the teller line for collection of blood or DNA, and have no knowledge of plans to do so. Fingerprints, on the other hand, are collected at times in some institutions.

Banks are required to honor properly presented negotiable instruments, but not, immediately. They are, under Part 5 of UCC Article 3, granted up to a day to honor or pay the check or note. One of the activities this time can be used for is to confirm the identity of the presenter. The Thumbprint Signature Program has been used nationwide for many years to avoid this delay.

Thumbprints are a proven mechanism for deterring fraud, as well as investigating and prosecuting cases of identity theft and check fraud.

Indeed, the Thumbprint Signature Program has long been recognized as an effective measure for protecting consumers and banks. The publication Check Fraud, A Guide to Avoiding Losses was issued in 1999 by the interagency Bank Fraud Working Group. (The group included representatives of the FBI, the Department of Justice, the FDIC, Federal Reserve Board, IRS, OCC, OTS, NCUA, U.S. Postal Inspection Service and the Secret Service.)

Absent use of the Thumbprint program, a financial institution may ask the person presenting the check to step aside and wait for their transaction to be completed until identity is confirmed. Most consumers find the thumbprint program to be a much more acceptable option.

TITLE XXXIV-A UNIFORM COMMERCIAL CODE

CHAPTER 382-A UNIFORM COMMERCIAL CODE

ARTICLE 3 NEGOTIABLE INSTRUMENTS

Part 5 Dishonor

Section 382-A:3-502

382-A:3-502 Dishonor. – (a) Dishonor of a note is governed by the following rules:

(1) If the note is payable on demand, the note is dishonored if presentment is duly made to the maker and the note is not paid on the day of presentment.

(2) If the note is not payable on demand and is payable at or through a bank or the terms of the note require presentment, the note is dishonored if presentment is duly made and the note is not paid on the day it becomes payable or the day of presentment, whichever is later.

(3) If the note is not payable on demand and paragraph (2) does not apply, the note is dishonored if it is not paid on the day it becomes payable.

(b) Dishonor of an unaccepted draft other than a documentary draft is governed by the following rules:

(1) If a check is duly presented for payment to the payor bank otherwise than for immediate payment over the counter, the check is dishonored if the payor bank makes timely return of the check or sends timely notice of dishonor or nonpayment under Section 4-301 or 4-302, or becomes accountable for the amount of the check under Section 4-302.

(2) If a draft is payable on demand and paragraph (1) does not apply, the draft is dishonored if presentment for payment is duly made to the drawee and the draft is not paid on the day of presentment.

(3) If a draft is payable on a date stated in the draft, the draft is dishonored if (i) presentment for payment is duly made to the drawee and payment is not made on the day the draft becomes payable or the day of presentment, whichever is later, or (ii) presentment for acceptance is duly made before the day the draft becomes payable and the draft is not accepted on the day of presentment.

(4) If a draft is payable on elapse of a period of time after sight or acceptance, the draft is dishonored if presentment for acceptance is duly made and the draft is not accepted on the day of presentment.

(c) Dishonor of an unaccepted documentary draft occurs according to the rules stated in subsection (b) (2), (3), and (4), except that payment or acceptance may be delayed without dishonor until no later than the close of the third business day of the drawee following the day on which payment or acceptance is required by those paragraphs.

(d) Dishonor of an accepted draft is governed by the following rules:

(1) If the draft is payable on demand, the draft is dishonored if presentment for payment is duly made to the acceptor and the draft is not paid on the day of presentment.

(2) If the draft is not payable on demand, the draft is dishonored if presentment for payment is duly

made to the acceptor and payment is not made on the day it becomes payable or the day of presentment, whichever is later.

(e) In any case in which presentment is otherwise required for dishonor under this section and presentment is excused under Section 3-504, dishonor occurs without presentment if the instrument is not duly accepted or paid.

(f) If a draft is dishonored because timely acceptance of the draft was not made and the person entitled to demand acceptance consents to a late acceptance, from the time of acceptance the draft is treated as never having been dishonored.

Source. 1993, 346:1, eff. Jan. 1, 1994.



CHECK FRAUD

a guide to avoiding losses

This booklet was prepared by the Check Fraud Working Group, a subgroup of the interagency Bank Fraud Working Group. That working group includes representatives from the Federal Bureau of Investigation, the Department of Justice, Federal Deposit Insurance Corporation, Federal Reserve Board, Internal Revenue Service, Office of the Comptroller of the Currency, Office of Thrift Supervision, U.S. Postal Inspection Service, National Credit Union Administration, and U.S. Secret Service. The Check Fraud Working Group was convened to provide a forum to explore ways to combat check fraud perpetrated against insured depository institutions.

Check Fraud:

A Guide to Avoiding Losses

February 1999

Background

Check fraud is one of the largest challenges facing financial institutions. Technology has made it increasingly easy for criminals, either independently or in organized gangs, to create increasingly realistic counterfeit and fictitious checks as well as false identification that can be used to defraud financial institutions.

The scope of the problem can be shown by some recent statistics. According to the U.S. Department of the Treasury, Financial Crimes Enforcement Network's (FinCEN) 18 Month Analysis of the Suspicious Activity Reporting System (SARS), 43 percent¹ of SARS reported for criminal referral between April 1996 and September 1997 related to check fraud, counterfeit checks, and check kiting. Financial institutions lost an estimated \$1 billion to those check fraud related schemes during that time.

To protect the banking industry and its customers from check fraud, financial institutions must become familiar with common check fraud schemes. This booklet describes some of those

schemes and presents tactics for use in combating check fraud. It cannot describe comprehensively all types of check fraud or check fraud schemes, because the variations are limitless. Although this booklet is a general guide, financial institutions should look to state and local laws for other guidance. It can, however, get bankers, tellers, operations personnel, and security officers to think about the problem and show how they can help protect their institutions from check fraud.

Significant Terms

Some technical terms relating to checks and drafts² are worth defining.

Customer – a person with an account at the financial institution.

Drawee – a party, typically a financial institution, that is required to pay out the money when a check or draft is presented. The drawee is usually the payer financial institution.

Drawer – a person writing a check. The drawer is typically a customer of the drawee.

¹ This figure does not include Bank Secrecy Act reported violations.

² In credit unions, these instruments are referred to as share drafts.

MICR (Magnetic Ink Character Recognition) – numbers at the bottom of a check, printed in magnetic ink, that can be read by machines. The numbers usually are encoded with the name and address of the drawee financial institution, the account number, and the check number. The dollar amount is added to the MICR line during check processing.

Payee – a party entitled, by the creation of a draft or check, to receive funds from a drawee.

Presentment – the delivery of a check or draft to the drawee or the drawer for payment.

Check Fraud Schemes

Fraud schemes involving checks take many forms. Checks may be:

- Altered, either as to the payee or the amount.
- Counterfeited.
- Forged, either as to signature or endorsement.
- Drawn on closed accounts.
- Used in a variety of schemes.

Check fraud criminals may be financial institution insiders, independent operators, or organized gangs. The methods they use to further check fraud include:

- Getting customer information from financial institution insiders.
- Stealing financial institution statements and checks.
- Working with dishonest employees of merchants who accept payments by check.
- Rifling through trash for information about financial institution relationships.

Descriptions of some common check fraud schemes follow, with information on what makes them successful, and what bankers can do to avoid them.

Altered Checks

Altered checks are a common fraud that occurs after a legitimate maker creates a valid check to pay a debt. A criminal then takes the good check and uses chemicals or other means to erase the amount or the name of the payee, so that new information can be entered. The new information can be added by typewriter, in handwriting, or with a laser printer or check imprinter, whichever seems most appropriate to the check.

Example 1:

A door-to-door salesman sells a set of encyclopedias for \$69.99. The customer pays by check, writing \$69.99 to the far right on the line for the amount in figures, and the words "sixty-nine and 99/100" to the far right of the amount in the text line. The criminal uses the blank spaces on both lines to alter the check by adding "9" before the numbers line, and the words "Nine Hundred" before the text line. The \$69.99 check is now a fraudulent check for \$969.99, which the criminal cashes.

Example 2:

A small company that provides service to several small clients is paid by checks payable to "Johnson CO." or "Johnson Company." Criminals steal a number of those payment checks and use a chemical solution to erase the word Co. or Company. They then type in the word Cooper, and subsequently cash the checks using false identification.

Example 3:

A criminal steals a wallet, with a check in it, from the glove

compartment of a car. The criminal uses the signatures on the identification in the wallet to forge the endorsement. Then, using the identification in the wallet, altered, if necessary, the criminal cashes the check at the payee's financial institution.

Altered check schemes can be successful when customers are careless and financial institutions fail to check payee identification properly.

To protect against such frauds, customers should:

- Avoid leaving large blank spaces in the number or amount lines on checks they write.
- Report to drawee or payer financial institutions when their checks are stolen.

Financial institutions should:

- Review checks to ensure that the handwriting or print styles are consistent, and that no signs of erasure or alteration show.
- Compare the signatures on items and the appearance of the presenter with the signature and picture on the identification.

Counterfeit Checks

Counterfeit checks are presented based on fraudulent identification or are false checks drawn on valid accounts.

Example 1:

A group of criminals open checking accounts, cash counterfeit checks, and file false tax returns, using fraudulent drivers' licenses, social security cards, and other identification. They use information from personal and corporate trash to produce the identification with computer technology.

Example 2:

A financial institution insider identifies corporate accounts that maintain large balances, steals genuine corporate checks, counterfeits them, and returns the valid checks to the financial institution. The financial institution insider is associated with a group of criminals that distributed the counterfeit checks throughout the area and cashes them using fictitious accounts.

Counterfeit check schemes can be successful when criminals are skillful in their use of technology to create false documents or

have access to information and supplies from financial institution insiders.

To protect against such frauds, customers should protect their personal information, including account records.

Financial institutions should:

- Review customer identification thoroughly.
- Maintain separation of functions, so that no one person has account information and access to controlled supplies, such as commercial check stock.
- Use mailings and other methods to warn customers about check fraud and the need to protect their information.

Identity Assumption

Identity assumption in check fraud occurs when criminals learn information about a financial institution customer, such as name, address, financial institution account number, social security number, home and work telephone numbers, or employer, and use the information to misrepresent themselves as the valid financial institution customer. These schemes may involve changing account information, creating fictitious transactions

between unsuspecting parties, or preparing checks drawn on the valid account that are presented using false identification.

This fraud is made easier when organizations, such as state departments of motor vehicles, use social security numbers on drivers' licenses as identification. In such states, because those numbers are more available, financial institutions must be especially careful.

Example 1:

A financial institution customer pays a bill in the normal course of business. An employee of the payee copies the check and provides it to a partner in crime who contacts the financial institution and, using information from the check, pretends to be the account holder. The criminal tells the financial institution that he or she has moved and needs new checks sent to the new address quickly. When the financial institution complies, the forged checks are written against the customer's account.

Example 2:

A gang member steals a statement for an account at financial institution A, and another steals a box of new checks for a different person's account at financial institution B. The gang pre-

pares the stolen checks to be payable to the valid account at financial institution A. Using fraudulent identification, one of the criminals poses as the payee to cash the checks at drive-through windows at financial institution A. Because the criminals know that sufficient cash exists in the account to cover the check, they can ask safely for immediate cash.

Example 3:

A criminal uses customer information, sometimes from a financial institution insider, to order checks from a check printer or to create counterfeit checks and false identification. The criminal then writes fraudulent checks and presents them for deposit into the customer's account, requesting part of the deposit back in cash. The cash-out from the transaction represents the proceeds of the crime. This is also known as a split-deposit scheme.

Identity assumption schemes can be successful when a financial institution:

- Accepts account changes over the telephone.
- Is careless in requiring and reviewing identification presented for cash-out transactions.
- Does not limit the size of cash transactions, especially at temporary or remote locations, such as drive-through windows.

To protect against such frauds, financial institutions should:

- Ensure that changes to accounts are secure, by requiring customers to request changes in writing or in some other way, such as password identification, that guarantees the identity of the customer.
- Train personnel, including all tellers, to:
 - Check identification carefully, particularly in split/deposit transactions.
 - Require two forms of identification.
 - Record the identification information on the back of the item presented.
 - Inspect checks carefully to ensure that they are not counterfeit. Such checks are often printed on lower quality paper, which tends to feel slippery or are produced using desktop publishing equipment, which smudges when rubbed with a moist finger.
- Limit the size of cash transactions at temporary or remote locations to require people presenting large items to complete the transaction inside the financial institution office.
- Use cameras.

Closed Account Fraud

Closed account frauds are based on checks being written against closed accounts. This type of fraud generally relies upon the float time involved in interfinancial institution transactions.

Example 1:

A fraud ring provides “role players” with business checks drawn on closed accounts at a financial institution. The “role players” deposit the checks into a new account at a different financial institution through one or more ATMs operated by other financial institutions. The float time between the ATM deposits and the checks drawn on the closed accounts reaching the issuing financial institution for payment allows the criminals to withdraw funds from the new account.

Closed account frauds can be successful when customers do not destroy checks from unused accounts or do not inform their banks properly of account status.

To protect against such frauds, customers should:

- Keep their financial institutions informed of the status of accounts.
- Actively close unneeded accounts rather than merely abandon the account.
- Destroy checks from dormant/inactive or closed accounts.

Financial institutions should:

- Place special holds on checks drawn on accounts that have been inactive for some time.
- Send a letter to customers of dormant/inactive accounts asking if the account should be closed.
- Advise customers to destroy checks from closed accounts and to notify the financial institution when they intend to close an account.

Fraud by Bank Insiders

Often check fraud schemes depend on information provided by

bank insiders. In addition to schemes discussed elsewhere, which may involve access to information about one account or relationship, frauds based on insider knowledge are often broader because they are based on the knowledge of the bank's operations and access to many accounts.

Example 1:

A former bank employee obtains legitimate bank account numbers and uses them with fictitious corporate names to order company payroll checks. He and several cohorts then use false identification to open bank accounts and cash the checks.

Fraud by insiders can be successful when customer account information is not kept secure and if insiders know when checks are read by automatic check processing equipment. Checks processed automatically, unlike those processed manually, are not checked for agreement of MICR and account information. To protect against frauds, financial institutions should:

- Conduct thorough and complete background investigations of its employees.
- Maintain a separation of functions, so that no one person has access to customer account information and check stock.

Telemarketing Fraud

Telemarketing frauds are based on the creation of "demand drafts," rather than checks. A demand draft resembles a personal check, but carries no signature. In place of a signature, it reads that the account holder has given permission to have money withdrawn from his or her checking account to pay bills for goods and services.

Example 1:

The criminal calls a consumer and announces that the consumer has won a cash prize. The criminal explains that, to deposit the prize into the "winner's" account, he or she needs the account information. Once the consumer provides the account information, the criminal prepares demand drafts and withdraws funds from the account. (A common variant is for the criminal to offer the consumer something for sale, such as a magazine subscription, in order to get the necessary account information).

Example 2:

A representative of a criminal organization contacts potential credit card users and promises to arrange for them to get VISA

or MasterCard credit cards. The representative asks for checking account information to issue the card and, when the information is provided, prepares demand drafts against the consumer's accounts.

Telemarketing frauds can be successful when customers reveal confidential account information.

To protect against such frauds, financial institutions should:

- Warn customers about them, either through direct mail or advertising in the financial institution.
- Check a customer's file when a demand draft is presented to see if he or she has provided written authorization for the financial institution to pay those drafts.

Check Fraud by Gangs

Some gangs have become actively involved in check fraud. These gangs typically go after corporate accounts and have received a measure of notoriety because of their successes and failures.

Example 1:

Gangs have traveled throughout the country cashing counterfeit payroll checks obtained by gang members in targeted corporations or financial institutions. They use sophisticated counterfeiting techniques to capture the company's logo and a company executive's signature by scanning them and to prepare payroll checks using account information from a company check or a bank insider. They use the same information and techniques to prepare false identification for the people who will cash the checks.

If insider information is not available, such gangs sometimes call the targeted company's accounts receivable department, tell them that they have funds to wire into the company's account and get its financial institution account number to accomplish the transfer. The deposit never materializes. Such gangs move into a city or town around payday and cash the checks at local institutions that have check cashing agreements with the targeted corporation.

Example 2:

A fictitious foreign company sends a letter to a person or U.S.

company claiming to have a large quantity of money that must be transferred out of the foreign home country immediately. The foreign company asks the targeted person or company to help set up a financial institution account into which the money can be transferred. They offer a sizable commission, while asking for the target's checking account information. The foreign company's representative then uses the account information to withdraw money from the target's checking account using financial institution drafts.

Financial institutions should remember that, although the individual or U.S. company acted negligently, the financial institution may be liable for honoring the fraudulent drafts.

Gang frauds can be successful when customers are careless and financial institutions fail to secure account information.

To protect against such frauds, financial institutions should:

- Warn customers about such schemes.
- Verify new employees' backgrounds.
- Require proper identification from customers before cashing checks.
- Be aware that gangs obtain account information from finan-

cial institution insiders, who process checks, copy payee checks, and use discarded receipts and/or statements.

- Be aware that gangs will recruit account holders in good standing and request people to open accounts or fictitious accounts (to deposit checks).
- Be aware that gangs also will obtain genuine identification issued by the state, in which they are negotiating the checks (be cognizant of the issuance date of the identification).

Preventative Measures

General Internal Controls

Strong organizational controls can reduce the likelihood of check fraud. A sound organizational strategy should require the financial institution to:

- Monitor, classify, and analyze losses, and potential losses to identify trends.
- Report findings from monitoring activities to the audit, risk-management, and security divisions, and to senior management.
- Ensure communication among departments about check fraud concerns.
- Assess operating procedures regularly and implement changes.
- Target check fraud awareness training to specific check fraud schemes—note how they occur, and how to prevent them.

Internal Controls to Prevent Check Fraud by Insiders

Unfortunately, dishonest financial institution employees can be involved in check frauds. Internal controls that can help prevent check fraud by financial institution insiders include:

- Ensuring that account changes, such as adding names or changing addresses and/or other information, are authorized by the customer in writing, or in a way that guarantees that the customer is requesting the change.
- Establishing special protections for dormant accounts, such as requiring extra approvals and mandatory holds and maintaining special security for signature cards.
- Maintaining permanent signature cards for each account and keeping files and appropriate documentation for business accounts (e.g., a certificate of incorporation and recent federal tax return).
- Separating duties to ensure that no one person in the financial

institution, acting alone, can commit check fraud.

- Ensuring that persons other than those who open accounts or prepare statements handle night depository, ATM, automatic clearing house (ACH), and mail deposits.
- Ensuring that customer complaints and discrepancy reconciliements are directed to staff who are not account openers, tellers, or bookkeepers.
- Conducting thorough and complete background investigations of new hires.
- When opening accounts with \$50 or \$100 deposits, holding the initial deposit checks for the time allotted by Regulation CC, or until they clear.

Education and Training

Alert and well-trained front line personnel, managers, and operations personnel are essential to effective check fraud prevention programs. Before beginning their positions, new employees should be trained in financial institution procedures concerning:

- Acceptable identification.
- Opening new accounts.
- Cashing checks and accepting deposits.

- Detecting counterfeit checks.
- Cash-back transactions.
- Back room operations.

Effective training and education are important in preventing check fraud losses. Suggested training for specific financial institution positions follows.

Teller Training

Financial institutions must emphasize to all tellers the importance of being alert to check fraud. One way to focus on preventing check fraud is to include a separate section on the subject in teller manuals. That section can emphasize typical check fraud schemes and warning signs. Some common warning signs include:

- A check that does not have a MICR line at the bottom.
- A routing code in the MICR line that does not match the address of the drawee financial institution.
- MICR ink that looks shiny or that feels raised. Magnetic ink is dull and legitimate printing produces characters that are flat on the paper.

- A check on which the name and address of the drawee financial institution is typed, rather than printed, or that includes spelling errors.
 - A check that does not have a printed drawer name and address.
 - A personal check that has no perforated edge.
 - A check on which information shows indications of having been altered, eradicated, or erased.
 - A check drawn on a new account that has no (or a low) sequence number or a high dollar amount.
 - A signature that is irregular-looking or shaky, or shows gaps in odd spots.
 - A check printed on poor quality paper that feels slippery.
 - Check colors that smear when rubbed with a moist finger. (This suggests they were prepared on a color copier).
 - Checks payable to a corporation that are presented for cashing by an individual.
 - Corporate or government checks which show numbers that do not match in print style or otherwise suggest that the amount may have been increased.
 - Checks presented at busy times by belligerent or distracting customers who try to bypass procedures.
 - Checks that have dollar amounts in numbers and in words that do not match.
- Items marked "void" or non-negotiable," that are presented for cash or deposit.

Guidelines to Consider When Cashing Checks

Although this list is not exhaustive, it provides a useful starting point when someone presents a check for payment.

Properly identify customers, either through personal recognition or signature and other personal picture identification. If in doubt, refer the customer to an account representative.

Be careful when paying customers, especially new customers, split checks for deposit and cash.

Require two forms of identification and list them on the back of the check. Carefully review the identification to ensure it is genuine. Be alert for people who try to distract you while you review his or her identification.

Be careful when accepting official checks drawn on another financial institution. Such items are sometimes counterfeit. The date of issue may indicate possible fraud, i.e., issued the same day or one day prior, especially if a payroll check is involved.

Refer all questionable transactions to a supervisor for a second opinion.

Be sure the customer's account is open and has a positive balance.

Remember: A financial institution may delay cashing a check for a reasonable amount of time to verify that a signature is genuine and to make sure that it has properly identified the person presenting it. A short delay may cause a criminal to leave the financial institution without the forged or altered check rather than risk being arrested.

New Accounts Representative Training

A significant amount of check fraud begins at the new accounts desk. A new accounts representative should remember it is possible that a new customer may intend to defraud the financial institution. Financial institutions should monitor new accounts diligently and reconcile promptly any discrepancies or problems they identify. The few extra steps it takes to become familiar with a customer can prevent significant losses.

New accounts representatives should be alert to the following signs that an account **may** be fraudulent. These situations may not indicate a problem, but should signal to the new accounts representative that further information may be required.

The new accounts representative should be alert when a new customer provides:

- A telephone number or exchange that does not match the address or that has been disconnected.
- A home address that is outside of the financial institution's geographic area, is a major highway, or is not a street mailing address. Such addresses include those identified by post office box, suite, or drawer identifiers.
- No employer name or an employee with no telephone number. This includes new customers who identify themselves as self-employed.
- No driver's license.
- Identification with a birth date (particularly the year) that does not match the birth date on the new account application.
- Information that is in any way insufficient, false, or suspicious.

Guidelines to Consider When Opening Accounts

Although the following list is not exhaustive, it provides some procedures that a financial institution representative should consider when opening new accounts:

Request two forms of personal identification. Acceptable identification includes:

- Driver's license.
- U.S. passport or alien registration card.
- Certified copy of birth certificate.
- Government, company, or student identification card.
- Credit card.

Note: Be aware that all forms of identification can be counterfeited.

Request documents on corporate accounts. Such documentation may include copies of:

- State incorporation certificate.
- Corporate resolution.

- Recent corporate federal tax return.
- List of major suppliers and customers, with their geographic locations.

Require complete information. The new account card should show street address, date of birth, driver's license number, and social security number or tax identification number.

Verify information provided.

- Compare the date of birth on the application with that on the driver's license, passport, or alien registration card.
- Check employment by telephoning the employer identified on the application.
- Look up the customer's name, address, and telephone number in the telephone directory or obtain a copy of a utility bill sent to the customer's address.

Check the new customer's banking history. Contact the financial institution(s), with which the customer reports having had prior relationships, if any, and ask for the customer's:

- Type of account(s) and balances.
- Listed address(es).
- Taxpayer identification number.

Use the address provided. Write a thank you letter to the new customer using the street address provided. If the letter is returned, the bank knows to investigate the account.

Visually inspect business premises. Drive by the business address to verify that it represents the type of business reported.

Determine whether the business is consistent with the account activity.

New accounts representatives should refer all inconsistencies identified and any difficulties in the new account opening process to a supervisor.

Other Preventative Measures

Positive Pay

Positive pay allows a company and its financial institution to work together to detect check fraud by identifying items presented for payment that the company did not issue. In the usual case, the company transmits electronically to the financial institution a list of all checks it issued on a particular day. The financial institution verifies checks received for payment against

that list and pays only those on the list. The financial institution rejects:

- Checks not on the company's list.
- Checks that exceed a specific dollar amount.
- Checks that carry dates long past due (stale checks).

The financial institution investigates rejected checks to find out if the items are fraudulent or in error. The financial institution pays only exception items approved by the company.

Reverse Positive Pay

Reverse positive pay is similar to positive pay, but the process is reversed. The company, not the financial institution, maintains the list of checks issued. When checks are presented for payment and clear through the Federal Reserve System, the Federal Reserve prepares a file of the checks' account numbers, serial numbers, and dollar amounts, and sends it to the financial institution.

In reverse positive pay, the financial institution sends that file to the company. The company compares the information with its internal records. The company lets the financial institution

know which checks match its internal information. The financial institution pays those items.

The financial institution then researches the checks that do not match, corrects any misreading or encoding errors, and determines if any items are fraudulent. The financial institution pays only the "true" exceptions, that is, those that can be reconciled with the company's files.

Fingerprints

Some financial institutions have seen a reduction in check fraud by inkless fingerprinting of non-customers who seek to cash checks. Generally, the program requires all persons presenting checks for payment, who do not have an account with the financial institution (i.e., non-customers), to provide a fingerprint or thumbprint.

The teller explains the process whenever a non-customer presents a check for payment. The teller will not accept the item if the person objects. A person who does not object to providing a fingerprint is asked to ink his or her thumb on a small pad and place the imprint in the space between the memo line and the signature line of the check being presented.

If the financial institution later discovers that the check was fraudulent or altered, it can provide the check, with the fingerprint, to law enforcement officials.

Any financial institution that implements this type of plan should adopt procedures to help ensure that it is **not** applied on a selective basis.

Electronic Check Presentment

Electronic check presentment (ECP) is an electronic/paper method of expediting check collection. Participating financial institutions exchange check payment information before physically presenting the checks for payment.

The depository financial institution captures payment information from the MICR line of incoming checks and immediately transmits the information electronically to the paying financial institution. Later, the depository financial institution sends the actual check according to its normal paper deadlines. During check posting, the paying financial institution identifies checks that should be returned and immediately notifies the depository financial institution.

ECP supporters believe that early notification of return items speeds up processing, controls cost, and reduces fraud.

Data Sharing: Cooperation between Check Manufacturers and Financial Institutions

In 1993, the American Bankers Association and the National Retail Federation sponsored an inter-industry task force, known as the BankCheck Fraud Task Force, to examine solutions to check fraud problems. The task force has developed a data sharing program for closed accounts. This program prevents people who have outstanding checks due to retailers from opening new accounts.

Participating financial institutions report all checking accounts closed for cause to a central database, called ChexSystems. ChexSystems transmits the closed account information to the shared check authorization network (SCAN) database. Participating financial institutions use the SCAN information before opening new accounts to spot repeat offenders. A participating financial institution can also use MICR information from a check presented with the applicant's drivers license number to check the SCAN file for any previous fraudulent account activity.

Check Security Features

Check manufacturers help deter check fraud by making checks difficult to copy, alter, or counterfeit. Some useful security measures include:

Watermarks. Watermarks are made by applying different degrees of pressure during the paper manufacturing process. Most watermarks make subtle designs on the front and back of the checks. These marks are not easily visible and can be seen only when they are held up to light at a 45-degree angle. This offers protection from counterfeiting, because copiers and scanners generally cannot copy watermarks accurately.

Copy Void Pantograph. Pantographs are patented designs in the background pattern of checks. When photocopied, the pattern changes and the word "VOID" appears, making the copy non-negotiable.

Chemical Voids. Chemical voids involve treating check paper in a manner that is not detectable until eradicator chemicals contact the paper. When the chemicals are applied, the treatment causes the word "VOID" to appear, making the item nonnegotiable. Checks treated with chemical voids cannot be altered without detection.

High Resolution Microprinting. High-resolution microprinting is very small printing, typically used for the signature line of a check or around the border, in what appears to be a line or pattern to the naked eye. When magnified, the line or pattern contains a series of words that run together or become totally illegible if the check has been photocopied or desktop scanned.

Three-dimensional Reflective Holostripe. A holostripe is a metallic stripe that contains one or more holograms, similar to those on credit cards. Those items are difficult to forge, scan, or reproduce, because they are produced by a sophisticated, laser-based etching process.

Security Inks. Security inks react with common eradication chemicals. These inks reduce a forger's ability to modify the printed dollar amount or alter the designated payee, because when solvents are applied, a chemical reaction with the security ink distorts the appearance of the check. This makes such items difficult to alter without detection.

Sources

Bruce P. Brett, "Information-based Strategies to Prevent Check Fraud," *Journal of Retail Banking*, Vol. XVII, No. 2, pp. 33-36 (Summer 1995).

J.D. Carreker, "Electronic Check Presentment: Capturing New Technology," *Bank Management*, pp. 33-40 (March/April 1995).

James Clark, "Taking Positive Steps Against Check Fraud," *TMA Journal*, Vol. 15, No. 2, pp. 53-56 (March/April 1995).

Dean Karkazis, "Using Technology Enhancements to Fight Check Fraud," *TMA Journal*, Vol. 15, No. 2, pp. 47-49 (March/April 1995).

John P. Mello Jr., "You Must Protect Yourself," *CFO*, Vol. 11, No. 5, pp. 98-101.

Gary Robins, "Check Fraud Defense," *Stores* (April 1994).

Check Fraud, *Fraud Prevention and Detection Series*, Bank Administration Institute (First National Bank of Chicago, 1989).

Check Fraud Prevention, American Bankers Association (1995).
"1994 ABA Check Fraud Survey," American Bankers Association (1994).

Check Fraud Prevention, *Bank Security Desk Reference*, Chapter 14, August 1995.

Comptroller of the Currency
Administrator of National Banks

The Key to Stopping Identity Theft Is at the Tip of our Fingers

When people think of theft, they usually envision material things being stolen. However, imagine if someone stole your identity. They could charge on your credit cards, withdraw funds from your bank accounts, steal your mail, apply for credit in your name and eventually ruin your life. Identity theft occurs when a fraud artist assumes someone's identity for the purpose of purchasing goods and services, obtaining funds and gaining access to private information. This type of fraud is not difficult. It is relatively easy to obtain fraudulent paper and plastic identification along with knowledge of social security numbers and other personal identification information.

It's hard to believe, but with alarming frequency, criminals are assuming the identity of law-abiding citizens by misappropriating their personal information. Identity theft has become the Nation's fastest growing financial crime. The U.S. Public Interest Research Group, a private consumer advocacy group, estimates that up to 500,000 to 750,000 people are victims of identity theft each year.

Fraud is one of the fastest growing crimes in the United States and worldwide today. For example, bank robbery with a gun is minimal compared to bank robbery with a pen. In fact, based on the American Bankers Association year 2000 Fraud Survey Report, fraud losses among community banks increased almost 20 percent, while 100 percent of large institutions reported losses. In check fraud losses amount to approximately \$2.2 billion a year, twice the amount in 1997 according to the A.B.A.

Who Pays for Fraud?

We all do – in higher fees and growing costs of goods. However, the individual who suffers identity theft pays an even greater price in losing his/her identity and then trying for months to regain it. The US Public Interest Research Group says, “ the average amount of time it took victims to resolve their cases was nearly 2 years (23 months). Victims who have not resolved their cases have been dealing with the problem for an average of 44 months and spend an average 175 hours and \$808 out-of-pocket (not including lawyer's fees) trying to fix the problem.

There are also the high administrative investments of designing and implementing systems that are used in the reduction of fraud exposure. At the same time that we need to eliminate fraud in financial institutions we also need to make it easier for the honest person to use the various financial delivery systems. We all know how difficult it is for a consumer to cash a check unless he/she has a deposit relationship with the financial institution.

Yet, fraud affects not only today's checks and credit cards but also tomorrow's electronic commerce and interactive banking. One solution would be to eliminate the acceptance of checks and credit cards across the board and only accept financial instruments from people we know. However, this solution is unrealistic.

We Ourselves Can Stop Identity Theft

Through the use of positive biometric user authentication systems, identity theft can be virtually eliminated. Yes, positive user authentication through the use of biometrics is the key for our payment systems. Without it, the financial industry can and will suffer substantial fraud losses in the electronic delivery systems of the future. Likewise, consumers will suffer irretrievable damage through identity theft. In the past, a consumer completed his or her transaction in person through a teller or clerk in a store. That was a form of biometric identification. That teller knew you. However, in the future, most transactions will be faceless, completed without human interface, making it open season for the fraud artist.

Today, the consumer relies upon bankcards, PINs, passwords, possession of identity cards, a Driver's License, a key or knowledge of his/her social security number as a means to authenticate himself/herself. Unfortunately, every one of these can be compromised through identity theft. But, nobody can steal your biometrics. After all, only you are you.

The Best Biometric Authentication Solution

Although positive user authentication through biometrics is the key, it must be easy to use and cost-effective: Therefore, finger imaging is the efficient solution.

Finger imaging is the logical choice because –

- ? Fingerprints are an Internationally recognized form of Identification
- ? Fingerprints do not change over time.
- ? Fingerprints can stop unauthorized access.
- ? All fingers are totally unique to each person and we all have these ten identifiers.
- ? Fingers are quick and easy to use. We don't leave our fingers at home or in the car.
- ? Law enforcement uses and respect fingerprinting systems. Thieves are afraid of them.
- ? Fingerprints are a low cost solution.
- ? Fingerprints protect privacy. They tell nothing about an individual other than who they belong to.

Finger Image Systems are Popular

Fingerprinting systems are already used in a myriad of applications worldwide. You will find them at Banks, the FBI's Criminal Justice Information Services Center, many state Department of Motor Vehicles, business, government facilities and on personal computers. In 1973, several banks in California implemented a fingerprinting program with positive results. At the height of the program in the late 1970s, banks in 20 states were using some form of identity verification for non-customers. The practice lasted through the mid-1980s and, then, began to decline. However, with the ever-present threat of fraudulent checks and identity theft, many banks re-instituted their fingerprinting policies. The reason was simple.

Several years ago, the American Bankers Association (ABA) identified a substantial increase in fraudulent checks. They investigated several technology alternatives that would reduce fraud for their association member's depositors. They quickly determined that a fingerprint would be their most effective deterrent in stopping check fraud losses. Thus, they implemented a program called Touch Signature®. The Identicator Touch Signature finger imaging system has been implemented nationally in most banks that require verification of non-customers. These Identicator finger pads differ from the days of old in that they leave a black print on the check but not on the fingers. Customers can easily remove any remaining residue by rubbing the thumb and index finger together.

The Touch Signature program is simple. When a non-customer presents a check for payment, in addition to the regular forms of identification, the individual is asked to place a fingerprint on the front of the check. Of course, criminals don't want to supply their fingerprint because it can be used as evidence against them if the check is fraudulent. They are deterred from writing bad checks.

"Using thumbprinting is a tremendous deterrent to criminals cashing benefits checks," said John Hall, a spokesman for the American Bankers Association (ABA). "It's been highly successful." Several banks have reported measurable results as high as 72 percent loss reduction in the first year of implementing the program. The program has been such a deterrent in several banks that there was an overt migration of thieves to non-participating financial institutions. Banks previously unscathed by check fraud found themselves experiencing rapidly rising losses. Subsequent implementation of the program by some of these banks almost immediately reduced losses to near zero.

Identification isn't the issue. It's a matter of deterrence and verification. By having the Touch Signature system, banks and merchants are not attempting to identify everyone who comes in; rather they are attempting to deter would-be fraud artists and verify identity of the person only if a fraud has been committed.

The results of the programs are astounding:

- Eighty-five percent of the banks that monitored check fraud losses by non-customer transactions reported a reduction in losses.
- Twenty-one percent of banks reported a reduction of up to 20%, 43% of banks reported a 20-50% reduction, and 21% of banks reduced losses by more than 50%.
- Banks reporting reduction in losses- 85%
- Banks implementing bank wide (as opposed to selected branches) 100%
- Banks providing notice of fingerprint requirement 94%
- Banks receiving ten or fewer complaints 94%

The Touch Signature program is simple. When a non-customer presents a check for payment, in addition to the regular forms of identification, the individual is asked to place a fingerprint on the front of the check. Of course, criminals don't want to supply their fingerprint because it can be used as evidence against them if the check is fraudulent. They are deterred from writing bad checks.

"Using thumbprinting is a tremendous deterrent to criminals cashing benefits checks," said John Hall, of the ABA. "It's been highly successful." Several banks have reported measurable results as high as 72 percent loss reduction in the first year of implementing the program. The program has been such a deterrent in several banks that there was an overt migration of thieves to non-participating financial institutions. Banks previously unscathed by check fraud found themselves experiencing rapidly rising losses.

The pads have proven very valuable to other types of merchants as well. Identifier customers now include grocery stores like Kroger, Winn-Dixie, Ralph's; retailers like Wal-Mart and Lowes Home Improvement Stores, and many others such as casinos, check cashing stores, warehouses, convenient stores, anywhere checks are cashed. According to Franchise Coordinator Terry Giancaterino, "These small compact inkless pads have been the most efficient of the various types of print identification products. They are simple to use and very inexpensive. The unique inkless method of Touch Signature thumbprinting really does act as a deterrent to the bad check artist. It reduces losses, offers protection to our honest customers and is recognized by law enforcement officials for providing protection to our owners."

Why it Works

According to the Bank Security and Fraud Prevention publication of the ABA: *The fingerprinting system is seen both as a deterrent and a method of simplifying banks' responsibilities when it comes to prosecution. Anyone who has ever had their identity taken knows that you're in a position of proving you're innocent, rather than guilty. Having prints on these documents serves this purpose. We have major fraud groups that are highly mobile moving throughout this country. This program is a proactive, joint effort that has the true relationships: to know with whom we are dealing and to have positive proof that we are dealing with the right person.*

The Touch Signature Program is simple, low-cost and saves time for the government, the financial industry and the consumer. Best of all, it works. Law Enforcement Law enforcement agencies have greeted the fingerprint program with enthusiasm. Though banks take it upon themselves to implement a fingerprinting program, law enforcement agencies have become increasingly supportive since their beginning. Many have placed added pressure on banks by expressing a greater willingness to accept check cases in which a fingerprint is present. In fact, 89% of reporting banks said that law enforcement agencies were supportive of their fingerprinting programs. Several measures have been implemented into law in order to prevent the theft of personal identities. Previously, the person whose identity was stolen was not recognized as a crime victim by the law.

An "Identity Theft" bill recently passed in Congress makes identity theft a federal crime and provides penalties for those who engage in it. This bill, introduced by Senator Jon Kyl (R-Arizona), extends the current federal prohibition against theft of personal documents to theft of the information itself, since, in the electronic age, much personal information is accessible via computer and the Internet. This bill also allows restitution for victims for identifiable losses as well as for expenses related to clearing their name and credit rating. In his testimony before Chairman Kyl's Senate Subcommittee, James Bauer of the Secret Service stated, "Currently, law enforcement must wait for an overt fraudulent act or creation of a fraudulent document before it can intercede in a case solely involving identity fraud. Establishing identity theft as a criminal violation, as the Kyl bill does, would enable law enforcement to prevent the fraud before it starts. It would be a proactive answer to what is now being handled in a reactive manner."

The Identity Theft and Assumption Deterrence Act of 1998 was passed through Congress on October 30, 1998. Steve Berry, Cellular Telecommunications Industry Association (CTIA) senior vice president of congressional affairs, said, "The new Identity Theft Law will make it easier for the American justice system to find and punish those criminals who steal other people's names and identification information in order to reap financial gain. With the force of the federal criminal justice system behind the law, new penalties of up to three years imprisonment and fines up to \$250,000 will protect innocent consumers."

However, it remains more important and less expensive to stop identity theft before it happens than to prosecute it afterwards. That's why businesses must proactively guard against it. With e-commerce becoming more and more prevalent, today's need is minute in comparison to the future's.

The Move Toward Electronic Money

The financial industry is definitely moving towards electronic transfers. There is a significant increase in the use of smart cards, especially in Europe, which is just now coming into the United States. Relationship smart cards are not only used for payment but for other uses as well. For instance, the U.S. General Services Administration (GSA) initiative calls for one card to be used for travel, payment, data access and physical access. In the GSA initiative, there is also the option to use biometrics in place of PINs. Of the five financial institutions that were recently selected as integrators, three offered finger imaging and the others integrated no biometrics at all. If the key is to produce positive user authentication to reduce fraud and eliminate identity theft, while at the same time expanding customer services, there is little or no reason not to include finger imaging. User authentication links the transaction to the legitimate customer.

Put our Finger on the Solution

The bottom line is that we need protection from fraud and identity theft. This is important, not only to ensure that one's good name is not damaged, but also to ensure that one's financial resources and personal data cannot be attacked. This protection is easily achieved with finger imaging, which provides essential protection for law-abiding citizens, government and business. We will not successfully move into the future of electronic cash without it.



5 of 5 DOCUMENTS



Caution

As of: Mar 11, 2009

JEFF E. MESSING v. BANK OF AMERICA, N.A.

No. 27, September Term, 2002

COURT OF APPEALS OF MARYLAND

373 Md. 672; 821 A.2d 22; 2003 Md. LEXIS 155; 50 U.C.C. Rep. Serv. 2d (Callaghan) 1

April 7, 2003, Filed

SUBSEQUENT HISTORY: As Corrected April 8, 2003.

PRIOR HISTORY: [***1] Certiorari to the Court of Special Appeals (Circuit Court for Baltimore City). Case # 24-C-00-004998. Thomas E. Noel, JUDGE. *Messing v. Bank of Am., N.A.*, 143 Md. App. 1, 792 A.2d 312, 2002 Md. App. LEXIS 40 (2002)

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant check holder sued appellee bank in the circuit court for a declaratory judgment that the bank violated the Maryland Uniform Commercial Code and for injunctive relief. The circuit court entered summary judgment for the bank. The Maryland Court of Special Appeals concluded that the circuit court was legally correct, but remanded the case for entry of a proper declaratory judgment. The holder filed a petition for a writ of certiorari.

OVERVIEW: The holder gave a check to the bank's teller to cash. The teller's computer printed data on the back of the check. When the holder informed the teller that he was not an account holder with the bank, she gave the check back to him to place his thumbprint signature on the check in accordance with bank policy. The holder refused to do so, and left the bank with the un-

cashed check. The holder contended that the bank violated the Maryland Uniform Commercial Code and his personal privacy. The circuit court's order was a one page form order without elaboration. On appeal, the court found that the bank had no duty to the holder, a non-customer and a stranger to the bank, and that nothing in the Code allowed the holder to force the bank to act as a depository bank and cash the check for the holder. The mere fact that the teller's computer printed information on the back of the check did not amount by itself to an acceptance. As a result, there was never acceptance, and thus the bank, never was obligated to pay the check. Further, the bank did not dishonor the check when it refused to accept it over the counter. The circuit court should have made a declaration of the parties' rights.

OUTCOME: The judgment of the intermediate appellate court was affirmed, the circuit court's judgment was ordered to be vacated, and the case was remanded to the circuit court to enter a proper written declaration of the rights of the parties.

LexisNexis(R) Headnotes

Commercial Law (UCC) > Negotiable Instruments (Article 3) > General Provisions & Definitions > Characteristics > Payable on Demand or at Definite Time

Commercial Law (UCC) > Negotiable Instruments (Article 3) > General Provisions & Definitions > Definitions > Checks**Contracts Law > Negotiable Instruments > Types > General Overview**

[HN1] A check is defined as a draft payable on demand and drawn on a bank. Md. Code Ann., Com. Law § 3-204(f)(i) (1974, 2002 Repl. Vol.).

Civil Procedure > Summary Judgment > Standards > Materiality

[HN2] Summary judgment is only appropriate where, when viewing the motion and response in a light most favorable to the non-moving party, there are no genuinely disputed issues of material fact, and the moving party is entitled to judgment as a matter of law. Md. R. 2-501(e).

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review**Civil Procedure > Appeals > Standards of Review > De Novo Review**

[HN3] The standard of review of a trial court's grant of a motion for summary judgment on the law is de novo, that is, whether the trial court's legal conclusions were legally correct. Under this standard, an appellate court will review the trial court's ruling on the law, considering the same material from the record and deciding the same legal issues as the circuit court.

Banking Law > Directors & Officers > Duty of Care**Civil Procedure > Declaratory Judgment Actions > State Judgments > General Overview****Civil Procedure > Summary Judgment > Partial Summary Judgments**

[HN4] Although granting summary judgment in a declaratory judgment action is the exception rather than the rule, circumstances may warrant the entry of a full or partial summary judgment even in such a context.

Commercial Law (UCC) > General Provisions (Article 1) > Definitions & Interpretation > General Overview**Commercial Law (UCC) > General Provisions (Article 1) > Policies & Purposes > General Overview****Governments > Legislation > Interpretation**

[HN5] Although courts are directed by the Maryland General Assembly to construe the Uniform Commercial Code (U.C.C.) in a manner which makes uniform the law among the various states adopting it, Md. Code Ann., Com. Law § 1-102(1), (2)(c) (1975), courts nonetheless utilize, in interpreting the Code, the same principles of

statutory construction that courts would apply in determining the meaning of any other legislative enactment. These well settled principles require ascertainment of the legislative intent, and if construction becomes necessary because the terminology chosen is not clear, then courts must consider not only the significance of the literal language used, but the effect of the courts proposed reading in light of the legislative purpose sought to be accomplished. Unlike most state statutory enactments, the U.C.C. is accompanied by a useful aid for determining the purpose of its provisions -- the official comments of the Code's draftsmen. While these comments are not controlling authority and may not be used to vary the plain language of the statute, they are an excellent place to begin a search for the Maryland Legislature's intent when it adopted the Code.

Commercial Law (UCC) > Negotiable Instruments (Article 3) > Dishonor & Presentment > Presentment**Contracts Law > Negotiable Instruments > Discharge & Payment > Payment > Methods & Places**

[HN6] See Md. Code Ann., Com. Law § 3-111 (1974, 2002 Repl. Vol.).

Commercial Law (UCC) > Negotiable Instruments (Article 3) > Dishonor & Presentment > Presentment**Commercial Law (UCC) > Negotiable Instruments (Article 3) > Enforcement > Person Entitled to Enforce****Contracts Law > Negotiable Instruments > Enforcement > Duties & Liabilities of Parties > Types of Parties > Drawees & Payors**

[HN7] See Md. Code Ann., Com. Law § 3-501 (1974, 2002 Repl. Vol.).

Commercial Law (UCC) > Negotiable Instruments (Article 3) > Party Liabilities > Signatures

[HN8] See Md. Code Ann., Com. Law § 3-401 (1974, 2002 Repl. Vol.).

Commercial Law (UCC) > Negotiable Instruments (Article 3) > Negotiation, Transfer & Indorsement > Indorsement

[HN9] Md. Code Ann., Com. Law § 3-409(a) (1974, 2002 Repl. Vol.) states the generally recognized rule that the mere signature of the drawee on an instrument is a sufficient acceptance. Customarily the signature is written vertically across the face of the instrument, but since the drawee has no reason to sign for any other purpose a signature in any other place, even on the back of the instrument, is sufficient. It need not be accompanied by such words as "Accepted," "Certified," or "Good."

Commercial Law (UCC) > Negotiable Instruments (Article 3) > Negotiation, Transfer & Indorsement > Negotiation

Commercial Law (UCC) > Negotiable Instruments (Article 3) > Party Liabilities > Signatures

[HN10] The last sentence of Md. Code Ann., Com. Law § 3-409(a) (1974, 2002 Repl. Vol.) states the generally recognized rule that an acceptance written on a draft takes effect when the drawee notifies the holder or gives notice according to instructions.

Commercial Law (UCC) > Negotiable Instruments (Article 3) > Discharge & Payment > General Overview

Contracts Law > Negotiable Instruments > Enforcement > Duties & Liabilities of Parties > Types of Parties > Acceptors

[HN11] See Md. Code Ann., Com. Law § 3-413(a) (1974, 2002 Repl. Vol.).

Commercial Law (UCC) > Negotiable Instruments (Article 3) > Dishonor & Presentment > Presentment

Contracts Law > Negotiable Instruments > Dishonor & Presentment > Presentment

Contracts Law > Negotiable Instruments > Enforcement > Duties & Liabilities of Parties > Types of Parties > Acceptors

[HN12] See Md. Code Ann., Com. Law § 3-502(d)(1) (1974, 2002 Repl. Vol.).

Commercial Law (UCC) > Negotiable Instruments (Article 3) > Discharge & Payment > General Overview

Contracts Law > Negotiable Instruments > Enforcement > Duties & Liabilities of Parties > Types of Parties > Acceptors

[HN13] See Md. Code Ann., Com. Law § 3-414(c) (1974, 2002 Repl. Vol.).

Commercial Law (UCC) > Negotiable Instruments (Article 3) > Discharge & Payment > General Overview

Contracts Law > Negotiable Instruments > Discharge & Payment > Discharge

Contracts Law > Negotiable Instruments > Discharge & Payment > Payment > General Overview

[HN14] See Md. Code Ann., Com. Law § 4-601 (1974, 2002 Repl. Vol.).

Commercial Law (UCC) > Negotiable Instruments (Article 3) > General Overview

[HN15] See Md. Code Ann., Com. Law § 4-102(a) (1974, 2002 Repl. Vol.).

Commercial Law (UCC) > Negotiable Instruments (Article 3) > Party Liabilities > Conversion

Contracts Law > Negotiable Instruments > Discharge & Payment > General Overview

Contracts Law > Negotiable Instruments > Enforcement > Duties & Liabilities of Parties > Conversion of Instruments

[HN16] See Md. Code Ann., Com. Law § 3-420(a) (1974, 2002 Repl. Vol.).

Commercial Law (UCC) > Negotiable Instruments (Article 3) > General Provisions & Definitions > Characteristics > Payable on Demand or at Definite Time

Contracts Law > Negotiable Instruments > Enforcement > Duties & Liabilities of Parties > Types of Parties > Drawees & Payors

Contracts Law > Negotiable Instruments > Enforcement > Duties & Liabilities of Parties > Types of Parties > Drawers & Makers

[HN17] Under the Uniform Commercial Code, a check is simply an order to the drawee bank to pay the sum stated, signed by the makers and payable on demand. Receipt of a check does not, however, give the recipient a right against the bank. The recipient may present the check, but if the drawee bank refuses to honor it, the recipient has no recourse against the drawee. This is because receipt of a check gives the recipient no right in the funds held by the bank on the drawer's account.

Banking Law > Depository Institutions > Customer-Bank Relations > General Overview

Commercial Law (UCC) > Negotiable Instruments (Article 3) > Enforcement > General Overview

Contracts Law > Negotiable Instruments > Transfers

[HN18] Absent a special relationship, a non-customer has no claim against a bank for refusing to honor a presented check. A transient, non-contractual relationship is not enough to establish a duty. It is also well settled that a check does not operate as an assignment of funds on deposit, and the bank only becomes obligated upon acceptance of the instrument.

Commercial Law (UCC) > Negotiable Instruments (Article 3) > Dishonor & Presentment > Presentment

Commercial Law (UCC) > Negotiable Instruments (Article 3) > Party Liabilities > Acceptance

Contracts Law > Negotiable Instruments > Enforcement > Duties & Liabilities of Parties > Types of Parties > Drawees & Payors

[HN19] See Md. Code Ann., Com. Law § 3-408 (1974, 2002 Repl. Vol.).

Commercial Law (UCC) > Negotiable Instruments (Article 3) > General Overview**Contracts Law > Negotiable Instruments > Discharge & Payment > Payment > General Overview****Contracts Law > Negotiable Instruments > Types > General Overview**

[HN20] Once a bank accepts a check, under Md. Code Ann., Com. Law § 3-409 (1974, 2002 Repl. Vol.), it is obliged to pay on the check under Md. Code Ann., Com. Law § 3-413 (1974, 2002 Repl. Vol.).

Commercial Law (UCC) > Negotiable Instruments (Article 3) > Discharge & Payment > General Overview**Contracts Law > Negotiable Instruments > Enforcement > Duties & Liabilities of Parties > Forgery, Fraud & Mistake****Contracts Law > Negotiable Instruments > Transfers**

[HN21] A check does not operate as an assignment pro tanto of the fund upon which it is drawn, until it is accepted, or certified to be good, by the bank holding the funds. It is true, a bank, if in funds of the drawer, is ordinarily bound to take up his checks; but it can only be held liable to the holder for its refusal to do so, upon the ground of fraud, whereby he loses the money or some part of it, for which the check is drawn.

Contracts Law > Defenses > Fraud & Misrepresentation > General Overview**Contracts Law > Negotiable Instruments > Types > Bills of Exchange****Contracts Law > Types of Contracts > General Overview**

[HN22] A drawee who refuses to accept a bill of exchange cannot be held liable on the bill itself; nor to the holder for the refusal to accept, except it be upon the ground of fraud and loss to the latter. A bank upon which a check is drawn occupies in this respect a similar position to that of the drawee of a bill of exchange. It is but the agent of the depositor, holding his funds upon an implied contract to honor and take up his checks to the extent of the funds deposited. The obligation to accept and pay is not to the holder of the check, but to the drawer. If, therefore, the depositor should direct that a check should not be paid, the bank would be bound to observe the direction, unless it had previously accepted the check by certifying it to be good, in which case it

would be bound to pay; at any rate to a subsequent holder. The bank, therefore, ordinarily, owes no duty to the holder of a check drawn upon it, nor is it bound, except to the depositor, to accept or pay the check, though it may have sufficient funds of the drawer with which to do it.

Commercial Law (UCC) > Negotiable Instruments (Article 3) > Negotiation, Transfer & Indorsement > Indorsement**Commercial Law (UCC) > Negotiable Instruments (Article 3) > Party Liabilities > Acceptance****Contracts Law > Negotiable Instruments > Enforcement > Duties & Liabilities of Parties > Types of Parties > Drawees & Payors**

[HN23] See Md. Code Ann., Com. Law § 3-409(a) (1974, 2002 Repl. Vol.).

Torts > Intentional Torts > Conversion > Elements

[HN24] Conversion requires not merely temporary interference with property rights, but the exercise of unauthorized dominion and control to the complete exclusion of the rightful possessor.

Commercial Law (UCC) > Negotiable Instruments (Article 3) > Dishonor & Presentment > General Overview

[HN25] See Md. Code Ann., Com. Law § 3-502(b) (1974, 2002 Repl. Vol.).

Contracts Law > Negotiable Instruments > Discharge & Payment > General Overview**Contracts Law > Negotiable Instruments > Dishonor & Presentment > Presentment****Contracts Law > Negotiable Instruments > Enforcement > Proof of Signature**

[HN26] See Md. Code Ann., Com. Law § 3-501(b)(2), (3) (1974, 2002 Repl. Vol.).

Commercial Law (UCC) > Negotiable Instruments (Article 3) > Dishonor & Presentment > General Overview**Commercial Law (UCC) > Bank Deposits & Collections (Article 4) > Customer-Bank Relations > General Overview**

[HN27] A cause of action for wrongful dishonor sounds in tort, not contract. Md. Code Ann., Com. Law § 4-402 (1974, 2002 Repl. Vol.).

Banking Law > Criminal Offenses > Check Fraud > Elements

373 Md. 672, *, 821 A.2d 22, **;
2003 Md. LEXIS 155, ***; 50 U.C.C. Rep. Serv. 2d (Callaghan) 1

Commercial Law (UCC) > Negotiable Instruments (Article 3) > General Overview

Evidence > Authentication > General Overview

[HN28] Nowhere does the language of Md. Code Ann., Com. Law § 3-501(b)(2) (1974, 2002 Repl. Vol.) suggest that reasonable identification is limited to information a drawee bank can authenticate at the time presentment is made. Rather, all that is required is that the person making presentment must give reasonable identification. Md. Code Ann., Com. Law § 3-501(b)(2). While providing a thumbprint signature does not necessarily confirm identification of the checkholder at presentment -- unless of course the drawee bank has a duplicate thumbprint signature on file -- it does assist in the identification of the checkholder should the check later prove to be bad. It therefore serves as a powerful deterrent to those who might otherwise attempt to pass a bad check. That one method provides identification at the time of presentment and the other identification after the check may have been honored, does not prevent the latter from being reasonable identification for purposes of § 3-501(b)(2).

**Banking Law > Bank Activities > Expenses & Income
Commercial Law (UCC) > Negotiable Instruments (Article 3) > General Overview
Contracts Law > Breach > Causes of Action > Breach of Warranty**

[HN29] The transfer of a check for consideration creates both transfer warranties (Md. Code Ann., Com. Law § 3-416 (1974, 2002 Repl. Vol.)) and presentment warranties (Md. Code Ann., Com. Law § 3-417 (1974, 2002 Repl. Vol.)) which cannot be disclaimed. The warranties include, for example, that the payee is entitled to enforce the instrument and that there are no alterations on the check. The risk to banks is that these contractual warranties may be breached, exposing the accepting bank to a loss because the bank paid over the counter on an item which was not properly payable. Md. Code Ann., Com. Law § 4-401 (1974, 2002 Repl. Vol.). In such an event, the bank would then incur the expense to find the presenter, to demand repayment, and legal expenses to pursue the presenter for breach of his warranties. In short, when a bank cashes a check over the counter, it assumes the risk that it may suffer losses for counterfeit documents, forged endorsements, or forged or altered checks. Nothing in the Maryland Commercial Law Article forces a bank to assume such risks. Md. Code Ann., Com. Law § 3-408 (1974, 2002 Repl. Vol.). To the extent that banks are willing to cash checks over the counter, with reasonable identification, such willingness expands and facilitates the commercial activities within the State.

Commercial Law (UCC) > General Provisions (Article 1) > Policies & Purposes > General Overview

[HN30] See Md. Code Ann., Com. Law § 1-102 (1974, 2002 Repl. Vol.).

Banking Law > Criminal Offenses > Check Fraud > General Overview

Commercial Law (UCC) > Negotiable Instruments (Article 3) > Dishonor & Presentment > Presentment

[HN31] A bank's requirement of a thumbprint placed upon a check presented over the counter by a non-customer is reasonable.

Civil Procedure > Declaratory Judgment Actions > Federal Judgments > Appellate Review

[HN32] Where a suit includes requests for declaratory judgment, a circuit court must enter a written declaration of the rights of the parties.

Civil Procedure > Declaratory Judgment Actions > General Overview

Civil Procedure > Summary Judgment > Appellate Review > General Overview

Civil Procedure > Summary Judgment > Partial Summary Judgments

[HN33] While a declaratory decree need not be in any particular form, it must pass upon and adjudicate the issues raised in a proceeding, to the end that the rights of the parties are clearly delineated and the controversy terminated.

HEADNOTES

COMMERCIAL LAW - NEGOTIABLE INSTRUMENTS - CHECKS - PRESENTMENT AND DISHONOR - REASONABLE IDENTIFICATION - THUMBPRINTS - Without dishonoring the instrument, a bank may refuse to accept a check drawn upon it and presented over the counter by a non-customer where the presenter refuses the bank's request to place a thumbprint identification on the instrument. Bank's request of thumbprint upon the instrument constitutes a request for "reasonable identification" within the meaning of Md. Code, Commercial Law Article, § 3-502(b)(2).

COUNSEL: ARGUED BY Jeff E. Messing (Marc H. Bessing, on brief) of Baltimore, MD FOR PETITIONER.

ARGUED BY Dennis P. Mc Glone (Brian L. Moffet of Gordon, Feinblatt, Rothman, Hoffberger & Hollander, LLC, on brief) of Baltimore, MD FOR RESPONDENT.

JUDGES: ARGUED BEFORE Bell, C.J.; Eldridge, Raker, Wilner, Cathell, Harrell, and Battaglia, JJ. Opinion by Harrell, J. Concurring and Dissenting Opinion by Eldridge, J., in which Bell, C.J., Joins.

OPINION BY: Harrell

OPINION

[*678] [**25] Opinion by Harrell, J.

I.

The case *sub judice* involves a bank check. [HN1] A check is defined as a draft payable on demand and drawn on a bank. Maryland Code (1974, 2002 Repl. Vol.), Commercial Law Article, § 3-204. ¹ The circumstances which gave rise to the case before us are, in terms of its genesis, reminiscent of those described in the case of *Board of Inland Revenue v. Haddock*. ² In that case, the protagonist, Mr. Haddock, after some [*679] dispute involving uncollected income-taxes owed, elected to test the limits of the law of checks as it existed at British common law at the time. Operating on the proposition that a check was only an order to a bank to pay money to the person in possession of the check or a person named on the check, and observing that there was nothing in statute or custom [***2] at the time specifying that a check must be written on paper of certain dimensions, or even paper at all, Haddock elected to tender payment to the tax collector by a check written on the back of a cow. The Collector of Taxes at first attempted to endorse the check, but, we are informed, the check "appeared to resent endorsement and adopted a menacing posture" at which point the Collector abandoned the attempt and refused to accept the check. Mr. Haddock then led the check away and was subsequently arrested in Trafalgar Square for causing an obstruction, upon which he was said to have observed that "it was a nice thing if in the heart of the commercial capital of the world a man could not convey a negotiable instrument down the street without being arrested." He subsequently was summoned by the Board of Inland Revenue for non-payment of income-tax.

¹ Unless otherwise provided, all statutory references are to the Maryland Code (1974, 2002 Repl. Vol.), Commercial Law Article.

² *Board of Inland Revenue v. Haddock*, known commonly as "The Negotiable Cow" case, is, in fact, a fictitious case which originally appeared in the pages of the British humor magazine *Punch*, and since has been re-printed in A.P. Herbert, *Uncommon Law: Being sixty-six Misleading Cases revised and collected in one volume*, 201-206 (Dorset Press, 1991)(1935).

[***3] The case *sub judice* arises from Petitioner's irritation with the Bank of America's Thumbprint Signature Program. Under the Thumbprint Signature Program, a bank requests non-customer presenters of [**26] checks over the counter to place an "inkless" thumbprint or fingerprint on the face of the check as part of the identification process. The program was developed, as the Court of Special Appeals informs us in its opinion in this case, by the American Bankers Association, working with the Federal Deposit Insurance Corporation (FDIC), the Federal Reserve Banks, the Office of the Comptroller of the Currency, the Federal Bureau of Investigation, and other law enforcement officials and banking trade associations across the county in response to rising instances of check fraud. *Messing* [*680] *v Bank of America*, 143 Md. App. 1, 15-16, 792 A.2d 312, 320-21 (2002). It is undisputed that the Bank of America's Thumbprint Signature Program uses an inkless fingerprinting device that leaves no ink stains or residue.

II.

At some point in time prior to 3 August 2000, Petitioner, as a holder, came into possession of a check in the amount of Nine Hundred Seventy-Six Dollars (\$ 976.00)(the [***4] check) from Toyson J. Burruss, the drawer, doing business as Prestige Auto Detail Center. Instead of depositing the check into his account at his own bank, Petitioner elected to present the check for payment at a branch of Mr. Burruss' bank, Bank of America, the drawee. ³ On 3 August 2000, Petitioner approached a teller at Bank of America's 10 Light Street Banking Center in Baltimore City and asked to cash the check. The teller, by use of a computer, confirmed the availability of funds on deposit, and placed the check into the computer's printer slot. The computer stamped certain data on the back of the check, including the time, date, amount of the check, account number, and teller number. The computer also effected a hold on the amount of \$ 976.00 in the customer's account. The teller gave the check back to the Petitioner, who endorsed it. The teller then asked for Petitioner's identification. Petitioner presented his driver's license and a major credit card. The teller took the endorsed check from Petitioner and manually inscribed the driver's license information and certain credit card information on the back of the check.

³ Petitioner's choice could be viewed as an attempt at risk shifting. Petitioner, an attorney, may have known that he could have suffered a fee charged by his own bank if he deposited a check into his own account and the bank on which it was drawn returned it for insufficient funds, forged endorsement, alteration, or the like. Petitioner's action, viewed against that backdrop,

would operate as a risk shifting strategy, electing to avoid the risk of a returned-check fee by presenting in person the check for acceptance at the drawee bank.

[***5] At some point during the transaction, the teller counted out \$ 976.00 in cash from her drawer in anticipation of completing [*681] the transaction. She asked if the Petitioner was a customer of Bank of America. The Petitioner stated that he was not. The teller returned the check to Petitioner and requested, consistent with bank policy when cashing checks for non-customers, that Petitioner place his thumbprint on the check. ⁴ Petitioner refused and the teller informed him that she would be unable to complete the transaction without his thumbprint.

4 The writing surface at each teller station at the branch was posted with a sign relating to the FDIC. Clearly visible in the lower right quadrant of each sign were the following words: "Thumbprint Signature Participating Member. For the protection of our customers, Thumbprint Signatures will be obtained from all non-account holders seeking to cash checks."

Petitioner requested, and was referred to, the branch manager. Petitioner presented [**27] the check to the branch manager [***6] and demanded that the check be cashed notwithstanding Petitioner's refusal to place his thumbprint on the check. The branch manager examined the check and returned it to the Petitioner, informing him that, because Petitioner was a non-customer, Bank of America would not cash the check without Petitioner's thumbprint on the instrument. After some additional exchanges, Petitioner left the bank with the check in his possession. The branch manager advised the teller that Petitioner had left the bank with his check. In response, the teller released the hold on the customer's funds, voided the transaction in the computer, and placed the cash back in her teller drawer.

Rather than take the check to his own bank and deposit it there, or returning it to Burruss, the drawer, as dishonored and demanding payment, Petitioner, two months later, on 10 October 2000, filed a declaratory judgment action against Bank of America (the Bank) in the Circuit Court for Baltimore City. Petitioner claimed that the Bank had violated the Maryland Uniform Commercial Code (UCC) and had violated his personal privacy when the teller asked Petitioner to place an "inkless" thumbprint on the face of the check at issue. [***7] Petitioner asked the trial court to declare that: 1) Petitioner had provided "reasonable identification" without his thumbprint; [*682] 2) under § 3-501(b)(2), a thumbprint is not reasonable identification; 3) requiring a thumbprint of non-customers to cash a check is illegal,

inappropriate, and unnecessary; 4) requiring non-customers to provide a thumbprint is a violation of the personal privacy of non-customers; 5) the Bank be required to cease requiring thumbprints in Maryland; 6) the Bank had "accepted" the check when presented by Petitioner; 7) the Bank "wrongfully dishonored" the check; and 8) the Bank wrongfully converted the check. Petitioner also sought injunctive relief directing Bank of America to cease participation in the Thumbprint Signature Program.

On 15 November 2000, the Bank filed a Motion to Dismiss or, in the alternative, for Summary Judgment. Petitioner opposed the Bank's Motion and filed a "cross" Motion for Summary Judgment. After the Circuit Court heard oral arguments on the pending motions, it denied Petitioner's request for injunctive relief and entered summary judgment in favor of the Bank, dismissing the Complaint with prejudice. ⁵

5 The Circuit Court's Order consisted of a one page form "order" without elaboration.

[***8] Petitioner appealed on 17 January 2001. The Court of Special Appeals concluded that the Circuit Court's decision in favor of the Bank was legally correct, but remanded the case for entry of a proper declaratory judgment as to the rights of the parties consistent with its opinion. *Messing v. Bank of America*, 143 Md. App. 1, 792 A.2d 312 (2002).

Petitioner petitioned this Court for a writ of certiorari. On 10 June 2002, we granted the petition. *Messing v. Bank of America*, 369 Md. 301, 799 A.2d 1262 (2002).

III.

Six questions are presented for our consideration. They are:

"1. Did the Court of Special Appeals err in construing the requirement of giving "reasonable identification" under the Annotated Code of Maryland, Commercial Law [*683] Article, Section 3-501(b)(2), to require a thumbprint if demanded by a drawee to whom presentment of a check is made, notwithstanding the proffer [**28] of reasonable and customary documentary forms of identification?

"2. Did the Court of Special Appeals err in finding the [Respondent] did not accept the particular check at issue, as "acceptance" is defined in the Annotated Code [***9] of Maryland, Commercial Law Article, Section 3-409(a)

"3. Did the Court of Special Appeals err in finding that the [Respondent] did not dishonor the particular check at issue, as "dishonor" is defined in the Annotated

373 Md. 672, *; 821 A.2d 22, **;
2003 Md. LEXIS 155, ***; 50 U.C.C. Rep. Serv. 2d (Callaghan) 1

Code of Maryland, Commercial Law Article, Section 3-502(d)(1)

"4. Did the Court of Special Appeals err in finding the [Respondent] did not convert the cash proceeds of the particular check at issue, as "conversion" is set out in the Annotated Code of Maryland, Commercial Law Article, Section 3-420

"5. Did the Court of Special Appeals err in not giving full effect to the plain language of the Annotated Code of Maryland, Commercial Law Article, Section 3-111, that states that when no address is stated in an instrument, "The place of payment is the place of business of the drawee or maker. If the Drawee or maker has more than one place of business, the place of business is any place of business of the drawee or maker chosen by the person entitled to enforce the instrument"?

"6. Did the Court of Special Appeals err in vacating the [***10] judgment of the Circuit Court for Baltimore City and remanding the case to the Circuit Court for the entry of a written declaration of the rights of the parties consistent with the Court of Special Appeals' opinion?"

IV.

[HN2] Summary judgment is only appropriate where, when viewing the motion and response in a light most favorable to [*684] the non-moving party, there are no genuinely disputed issues of material fact, and the moving party is entitled to judgment as a matter of law. *Beatty v. Trailmaster Prods., Inc.*, 330 Md. 726, 737, 625 A.2d 1005, 1010-11(1993); Md. Rule 2-501(e). [HN3] The standard of review of a trial court's grant of a motion for summary judgment on the law is *de novo*, that is, whether the trial court's legal conclusions were legally correct. *Tyma v. Montgomery County*, 369 Md. 497, 504, 801 A.2d 148, 152 (2002); *Lippert v. Jung*, 366 Md. 221, 227, 783 A.2d 206, 209 (2001); *Heat & Power Corp. v. Air Products & Chemicals, Inc.*, 320 Md. 584, 591, 578 A.2d 1202, 1205-06 (1990). Under this standard, we review the trial court's ruling on the law, considering the same material from the record and deciding [***11] the same legal issues as the circuit court. *Green v. H&R Block, Inc.*, 355 Md. 488, 502, 735 A.2d 1039, 1047 (1999). Where, as here, the material facts are undisputed, the reasonableness of the Bank's actions are for the court to decide. *Gillen v. Maryland Nat'l Bank*, 274 Md. 96, 102-03, 333 A.2d 329, 334 (1975)(question of bank's duty of care is one of law when the facts are undisputed). [HN4] Although granting summary judgment in a declaratory judgment action is the exception rather than the rule, circumstances may warrant the entry of a full or partial summary judgment even in such a context. *Megonnell v. United States Auto Ass'n*, 368 Md. 633, 642, 796 A.2d 758, 764 (2002); *Nationwide Mut. Ins. Co. v.*

Scherr, 101 Md. App. 690, 695, 647 A.2d 1297, 1299 (1994); *Loewenthal c.Security Ins. Co.*, 50 Md. App. 112, 117, 436 A.2d 493, 496 (1981).

[**29] Making a determination in this case will involve a considerable amount of statutory analysis. With that in mind, we reiterate the rules set forth in *Jefferson v. Jones*, 286 Md. 544, 547-48, 408 A.2d 1036, 1039 (1979)(citations omitted), where we stated: [***12]

[HN5] Although we are directed by the General Assembly to construe the Uniform Commercial Code in a manner which "makes uniform the law among the various [states]" adopting it, Md. Code (1975), Commercial Law Art., §§ § 1-102(1), -102(2) (c), we nonetheless utilize, in interpreting the Code, the same principles of statutory construction that we [*685] would apply in determining the meaning of any other legislative enactment. These well settled principles require ascertainment of the legislative intent, and if, as is the case here, construction becomes necessary because the terminology chosen is not clear, then we must consider not only the significance of the literal language used, but the effect of our proposed reading in light of the legislative purpose sought to be accomplished. Unlike most state statutory enactments, the U.C.C. is accompanied by a useful aid for determining the purpose of its provisions -- the official comments of the Code's draftsmen. While these comments are not controlling authority and may not be used to vary the plain language of the statute, they are an excellent place to begin a search for the legislature's intent when it adopted the Code.

V.

[***13] A. Petitioner's Arguments:

Petitioner argues initially that he properly presented the check to the drawee bank and that the bank accepted the check. In Petitioner's view, the Bank's request for thumbprint identification was unreasonable as it would not aid the Bank in identifying the Petitioner as the proper person to pay at the time payment was made, but would be useful only at some later date, if at all. Petitioner's argument is fairly straight forward, adopting a "follow the bouncing ball" approach to the application of Maryland Code (1957, 2002 Repl. Vol.), Commercial Law Article, Title 3, to the facts of this case. ⁶ Petitioner's argument is that § 3-111 instructs that the correct location for him to present the check at issue for payment was at the offices of the bank named on the check as the drawee. ⁷ According to § 3-111:

[HN6] [*686] Except as otherwise provided for items in Title 4 [Bank Deposits and Collections], an instrument is payable at the place of payment stated in the instrument. If no place of payment is stated, an instru-

ment is payable at the address of the drawee or maker stated in the instrument. If no address is stated, the place of payment is the place of business [***14] of the drawee or maker. If a drawee or maker has more than one place of business, the place of payment is any place of business of the drawee or maker chosen by the person entitled to enforce the instrument. If the drawee or maker has no place of business, the place of payment is the residence of the drawee or maker.

In short, Petitioner's position is that, assuming all else is in order, § 3-111 requires Bank of America to pay a check drawn on one of its customer's accounts if presentment is made over the counter at [**30] the Bank. * Petitioner then argues why his presentment was in order, according to the relevant code provisions, thus, in his view, requiring the Bank to pay the check.

Petitioner cites § 3-501, which states:

(a) [HN7] "Presentment" means a demand made by or on behalf of a person entitled to enforce an instrument (i) to pay the instrument made to the drawee or a party obliged to pay the instrument or, in the case of a note or accepted draft payable at a bank, to the bank, or (ii) to accept a draft made to the drawee.

(b) The following rules are subject to Title 4, agreement of the parties, and clearinghouse rules and the like:

(1) Presentment may be made at the place [***15] of payment of the instrument and must be made at the place of payment if [*687] the instrument is payable at a bank in the United States; may be made by any commercially reasonable means, including an oral, written, or electronic communication; is effective when the demand for payment or acceptance is received by the person to whom demand for payment or acceptance is received by the person to whom presentment is made; and is effective if made to any one of two or more makers, acceptors, drawees, or other payors.

(2) Upon demand of the person to whom presentment is made, the person making presentment must (i) exhibit the instrument, (ii) give reasonable identification and, if presentment is made on behalf of another person, reasonable evidence of authority to do so, and (iii) sign a receipt on the instrument for any payment made or surrender the instrument if full payment is made.

(3) Without dishonoring the instrument, the party to whom presentment is made may (i) return the instrument for lack of a necessary indorsement, or (ii) refuse payment or acceptance for failure of the presentment to comply with the terms of the instrument, an agreement of the parties, or other applicable law or [***16] rule.

(4) The party to whom presentment is made may treat presentment as occurring on the next business day

after the day of presentment if the party to whom presentment is made has established a cutoff hour not earlier than 2 p.m. for the receipt and processing of instruments presented for payment or acceptance and presentment is made after the cutoff hour.

Petitioner argues that he correctly made "presentment" of the check to the Bank pursuant to § 3-111 and § 3-501(a), and demands that, as the person named on the instrument and thus entitled to enforce the check, the drawee Bank pay him. Petitioner further argues that his presentment was in the proper form set forth in § 3-501(b)(2). Petitioner points out that he exhibited the instrument when he arrived at the counter and that, upon request, he provided reasonable identification in the form of his driver's license and a major credit card, and that he surrendered the check to the teller, who [*688] stamped it in her computer. The subsequent request for Petitioner to place his thumbprint on the check was, in Petitioner's view, not "reasonable" and therefore improper under [**31] § 3-501(b)(2)(ii). Petitioner argues that the rightness [***17] of his view is because the purpose of providing reasonable identification at the time of presentment is so that a bank can assure itself that it is making payment to the proper person at the time payment is made. Petitioner argues that a thumbprint will not provide that information at the time payment is made over the counter, but only at some later date. While we shall address the reasonableness of the thumbprint identification, *infra*, the issue is not dispositive as to Petitioner's claims against the Bank, and is, in fact, largely collateral.

6 Definitions for the terms used for the parties to the check and their various actions in negotiating the check are found in § 3-103.

7 See also Federal Reserve Board Regulation CC, 12 C.F.R. 229.36(b).

8 Petitioner is incorrect. Section 3-111 merely requires the Bank to receive the presentment of a check for payment, return, or dishonor. Put another way, § 3-111 identifies the location where the check ultimately is to be sent so that the drawee Bank may have notice of the order to pay and make a decision with regards to that order. As is discussed *infra*, § 3-111 does not require the Bank to accept the check (§ 3-409), or to pay the check (§ 3-413 and § 4-215). Thus, the answer to Petitioner's fifth question presented is "no."

[***18] In a continuation, Petitioner contends that the teller, by placing the check in the slot of her computer, and the computer then printing certain information on the back of the check, accepted the check as defined by § 3-409(a), which states:

(a) "Acceptance" means the drawee's signed agreement to pay a draft as presented. It must be written on the draft and may consist of the drawee's signature alone. Acceptance may be made at any time and becomes effective when notification pursuant to instructions is given or the accepted draft is delivered for the purpose of giving rights on the acceptance to any person.

Relying on § 3-401(b), Petitioner argues that the act of the Bank's computer printing information on the back of the check constitutes the Bank's signature, and thus effectuates acceptance of the check on the part of the Bank. Section 3-401 states:

(a) [HN8] A person is not liable on an instrument unless (i) the person signed the instrument, or (ii) the person is represented by an agent or representative who signed the instrument and the signature is binding on the represented person under § 3-402.

(b) A Signature may be made (i) manually or by means of a device or machine, [***19] and (ii) by the use of any name, including a trade or assumed name, or by a word, mark or [*689] symbol executed or adopted by a person with present intention to authenticate a writing.

In support, Petitioner points to part of the Official Comment 2 attached to § 3-409, as follows:

[HN9] Subsection (a) states the generally recognized rule that the mere signature of the drawee on the instrument is a sufficient acceptance. Customarily the signature is written vertically across the face of the instrument, but since the drawee has no reason to sign for any other purpose a signature in any other place, even on the back of the instrument, is sufficient. It need not be accompanied by such words as "Accepted," "Certified," or "Good."⁹

9 Among other things, Petitioner omits the last sentence of Comment 2, which reads: [HN10] "The last sentence of subsection (a) states the generally recognized rule that an acceptance written on the draft takes effect when the drawee notifies the holder or gives notice according to instructions."

[***20] Thus, according to Petitioner, because the Bank's computer printed information on the back of the check, under § 3-401(b) the Bank "signed" the check, said "signature" being sufficient to constitute acceptance under § 3-409(a).

Petitioner's remaining arguments line up like so many dominos. According to Petitioner, having established that under his reading of § 3-409(a) the Bank accepted the check, Petitioner advances that the Bank is obliged to pay him, pursuant to § 3-413(a) which states:

(a) [HN11] The acceptor of a draft is obliged to pay the draft (i) according to its terms at the time it was accepted, even though the acceptance states that the [**32] draft is payable "as originally drawn" or equivalent terms, (ii) if the acceptance varies the terms of the draft, according to the terms of the draft as varied, or (iii) if the acceptance is of a draft that is an incomplete instrument, according to its terms when completed, to the extent stated in §§ 3-115 and 3-407. The obligation is owed to a person entitled to enforce the draft or to the drawer or an indorser who paid the draft under § 3-414 or § 3-415.

[*690] Petitioner continues that because Bank of America accepted the check, but [***21] then failed to make payment, by the terms of § 3-502(d)(1) the Bank dishonored the check and became solely liable to Petitioner for payment. Section 3-502(d)(1) states:

(d) [HN12] Dishonor of an accepted draft is governed by the following rules:

(1) If the draft is payable on demand, the draft is dishonored if presentment for payment is duly made to the acceptor and the draft is not paid on the day of presentment.

Petitioner claims that the drawee Bank of America solely would be liable as the acceptor because, under § 3-414(c), the drawer of the check is discharged upon acceptance by the Bank. Section 3-414(c) states: [HN13] "If a draft is accepted by a bank, the drawer is discharged, regardless of when or by whom acceptance was obtained."¹⁰

10 Petitioner, however, overlooks § 3-601 which states:

(a) [HN14] The obligation of a party to pay the instrument is discharged as stated in this title or by an act or agreement with the party which would discharge an obligation to pay money under a simple contract.

(b) Discharge of the obligation of a party is not effective against a person acquiring rights of a holder in due course of the instrument [§ 3-302] without notice of the discharge.

No one was discharged on the instrument at the time Petitioner acquired rights in it. § 3-102(a) states:

[HN15] To the extent that items within this title are also within Titles 3 and 8, they are subject to those titles. If there is conflict, this title governs Title 3, but Title 8 [Investment Securities] governs this title.

[***22] Petitioner extends his line of reasoning by arguing that the actions of the Bank amounted to a con-

version under § 3-420, which states, in allegedly relevant part:

(a) [HN16] The law applicable to conversion of personal property applies to instruments. An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment. An action for conversion of an instrument may not be [*691] brought by (i) the issuer or acceptor of the instrument or (ii) a payee or indorsee who did not receive delivery of the instrument either directly or through delivery to an agent or co-payee.

Based on this, Petitioner argues that because the Bank accepted the check, an act which, according to Petitioner, discharged the drawer, he no longer had enforceable rights in the check and only had a right to the proceeds.¹¹ Petitioner's position is that the Bank exercised unauthorized dominion and control over the proceeds of the check to the complete exclusion of the Petitioner after the Bank accepted the check and refused [***23] to distribute the proceeds, counted out by the teller, to him.

¹¹ See *supra* n.10, however.

B. Acceptance under § 3-409(a).

Predictably, Bank of America argues that Petitioner's interpretation of Maryland's U.C.C. is incorrect. Our intermediate [**33] appellate court brethren largely agreed with the Bank's point of view. Setting aside for the moment the Bank's arguments as to the reasonableness of requiring a thumbprint, we turn to the Bank's obligations, or lack thereof, with regard to the presentation of a check by someone not its customer. Bank of America argues, correctly, that it had no duty to the Petitioner, a non-customer and a stranger to the Bank, and that nothing in the Code allows Petitioner to force Bank of America to act as a depository bank [§ 3-105] and cash a check for a non-customer. As the Supreme Court pointed out in *Barnhill v. Johnson*, 503 U.S. 393, 398-99, 118 L. Ed. 2d 39, 112 S. Ct. 1386 (1992):

[HN17] Under the U.C.C., a check is simply an order to the drawee bank [***24] to pay the sum stated, signed by the makers and payable on demand. Receipt of a check does not, however, give the recipient a right against the bank. The recipient may present the check, but if the drawee bank refuses to honor it, the recipient has no recourse against the drawee.

[*692] * * * * *

This is because . . . receipt of a check gives the recipient no right in the funds held by the bank on the drawer's account.

[HN18] Absent a special relationship, a non-customer has no claim against a bank for refusing to honor a presented check. *City Check Cashing, Inc. v. Manufacturers Hanover Trust Co.* 166 N.J. 49, 764 A.2d 411, 417 (N.J. 2001). A "transient, non-contractual relationship" is not enough to establish a duty. *Id.* (quoting *FMC Corp v. Fleet Bank*, 641 N.Y.S.2d 25, 26, 226 A.D.2d 225 (N.Y. App. Div. 1996)). It is also well settled that a check does not operate as an assignment of funds on deposit, *Ward v. Federal Kemper Ins. Co.*, 62 Md. App. 351, 357-58, 489 A.2d 91, 94 (1985), and the bank only becomes obligated upon acceptance of the instrument. This is made clear by § 3-408, which states:

[HN19] A check or other draft does not of itself operate [***25] as an assignment of funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until the drawee accepts it.

[HN20] Once a bank accepts a check, under § 3-409, it is obliged to pay on the check under § 3-413.¹² Thus, the relevant question [*693] in [**34] terms of any rights Petitioner had against the Bank turns not on the reasonableness of the thumbprint identification, but rather upon whether the Bank accepted the check when presented as defined by § 3-409. As will be seen *infra*, the question of the thumbprint identification is relevant only to the issue of whether the Bank's refusal to pay the instrument constituted dishonor under § 3-502, a determination which has no impact in terms of any duty allegedly owed by the Bank to the Petitioner.

¹² These rules of commercial practice are of considerable long standing. In *Moses v. President & Directors of Franklin Bank*, 34 Md. 574, 580-81 (1871), the Court stated:

[HN21] A check does not, as contended by the appellant, operate as an assignment *pro tanto* of the fund upon which it is drawn, until it is accepted, or certified to be good, by the bank holding the funds. It is true, a bank, if in funds of the drawer, is ordinarily bound to take up his checks; but it can only be held liable to the holder for its refusal to do so, upon the ground of fraud, whereby he loses the money or some part of it, for which the check is drawn. It is certainly a general rule, that [HN22] a drawee who refuses to accept a bill of exchange cannot be held liable on the bill itself; nor to the holder for the refusal to accept, except it be upon the ground of fraud and loss to the latter. A bank upon which a check is drawn occupies in this respect a similar position

to that of the drawee of a bill of exchange. It is but the agent of the depositor, holding his funds upon an implied contract to honor and take up his checks to the extent of the funds deposited. The obligation to accept and pay is not to the holder of the check, but to the drawer. If, therefore, the depositor should direct that a check should not be paid, the bank would be bound to observe the direction, unless it had previously accepted the check by certifying it to be good, in which case it would be bound to pay; at any rate to a subsequent holder. The bank, therefore, ordinarily, owes no duty to the holder of a check drawn upon it, nor is it bound, except to the depositor, to accept or pay the check, though it may have sufficient funds of the drawer with which to do it.

[***26] Respondent Bank of America argues that the intermediate appellate court correctly found that it did not "accept" the check as that term is defined in § 3-409(a). *Messing*, 143 Md. App. at 16-19, 792 A.2d at 321-23 (2002). We agree. The mere fact that the teller's computer printed information on the back of the check does not, as Petitioner contends, amount by itself to an acceptance. Section 3-409(a) states:

(a) [HN23] "Acceptance" means the drawee's signed agreement to pay a draft as presented. It must be written on the draft and may consist of the drawee's signature alone. Acceptance may be made at any time and becomes effective when notification pursuant to instructions is given or the accepted draft is delivered for the purpose of giving rights on the acceptance to any person.

Petitioner relies on the first two sentences of the statute, while ignoring the balance. The statute clearly states that acceptance becomes effective when the presenter is notified of that fact. The facts demonstrate that at no time did the teller notify Petitioner that the Bank would pay on the check. Rather, the facts show that:

The check was given back to [Petitioner] by the teller so that [***27] he could put his thumbprint signature on it, not to notify or give him rights on the purported acceptance. [*694] After appellant declined to put his thumbprint signature on the check, he was informed by both the teller and the branch manager that it was against bank policy to honor the check without a thumbprint signature. Indignant, [Petitioner] walked out of the bank with the check.

143 Md. App. at 19, 792 A.2d at 323. As the intermediate appellate court correctly pointed out, the negotiation of the check is in the nature of a contract, and there can be no agreement until notice of acceptance is received.¹³ *Id.* As a result, there was never acceptance as defined by § 3-409(a), and thus the Bank, pursuant to § 3-408 never

was obligated to pay the check under § 3-413(a). Thus, the answer to Petitioner's second question presented is "no."

13 Where a check is presented for payment over the counter, it is hard, given general business practices, to imagine where acceptance would be effective before the funds paying the check were handed over to the presenter, except where a certified or cashier's check was involved. *Rezapolvi v. First Nat. Bank of Maryland*, 296 Md. 1, 6, 459 A.2d 183, 186 (1983).

[***28] C. "Conversion" under § 3-420.

Because it never accepted the check, Bank of America argues that the intermediate appellate court also correctly concluded that the Bank did not convert the check or its proceeds under § 3-420. Again, we must agree. The Court of Special Appeals stated:

[HN24] "Conversion," we have held, "requires not merely temporary interference with property rights, but the exercise of unauthorized dominion and control to the complete exclusion of the rightful possessor." *Yost v. Early*, 87 Md. App. 364, 388, [*35] 589 A.2d 1291 (1991)(citations omitted)(quotations omitted). At no time did [Respondent] exercise "unauthorized dominion and control [over the check] to the complete exclusion of the rightful possessor," [Petitioner].

[Petitioner] voluntarily gave the check to [respondent's] teller. When [Petitioner] indicated to the teller that he was not an account holder, she gave the check back to him for a thumbprint signature in accordance with bank policy. After [*695] being informed by both [Respondent's] teller and branch manager that it was [Respondent's] policy not to cash a non-account holder's check without a thumbprint signature, [***29] [Petitioner] left the bank with the check in hand.

Because [Petitioner] gave the check to the teller, [Respondent's] possession of that check was anything but "unauthorized." and having returned the check, within minutes of its receipt, to [Petitioner] for his thumbprint signature, [Respondent] never exercised "dominion and control [over it] to the complete exclusion of the rightful possessor," [Petitioner]. In short, there was no conversion.

Messing, 143 Md. App. at 21, 792 A.2d at 324.

Nor was there a conversion of the cash proceeds. As we set forth *supra*, under § 3-409(a), Bank of America never accepted the check, and thus never became obligated under § 3-413(a) to pay on the check. Pursuant to § 3-408, Petitioner never had a right to the funds on de-

posit, and Bank of America cannot convert funds to which Petitioner has no right in the first instance.

Similarly, as Bank of America never accepted the check, Petitioner's argument that he no longer has rights in the instrument is incorrect.¹⁴ Because Bank of America did not accept the check pursuant to § 3-409, the drawer was not, as Petitioner alleges, discharged under § 3-414(c). [***30] ¹⁵ At the time Petitioner left the Bank, he retained all of his rights in the instrument, and was free to either present the check again and provide a thumbprint as requested, negotiate the check to some other third party, or to deposit the check in his own bank. As we will discuss *infra*, were the Bank's refusal to [*696] accept the check to amount to dishonor, Petitioner even may proceed against the drawer under § 3-414(b). See *Ward*, 62 Md. App. at 357-58, 489 A.2d at 94. The answer to Petitioner's fourth question presented is "no."

14 See § 3-601(b) *supra*, at n.10. As an aside, pursuant to § 15-804(a), Petitioner would not have recourse to the provisions concerning the recovery of "bad checks" as set forth in §§ 15-801 through 15-804, as under these facts, if the check is dishonored, it nevertheless does not meet the definition of a "bad check" as set forth in Maryland Code (1974, 2002 Repl. Vol.), Criminal Law Article, § 8-103.

15 The same result would occur had Petitioner argued that the facts of this case fell under § 3-410(a).

[***31] **D. "Reasonable Identification" under § 3-501(b)(2)(ii) and "Dishonor" under § 3-502**

We now turn to the issue of whether the Bank's refusal to accept the check as presented constituted dishonor under § 3-501 and § 3-502 as Petitioner contends. Petitioner's argument that Bank of America dishonored the check under § 3-502(d) fails because that section applies to dishonor of an accepted draft. We have determined, *supra*, that Bank of America never accepted the draft. Nevertheless, the question remains as to whether [**36] Bank of America dishonored the draft under § 3-502(b), which states:

(b) [HN25] Dishonor of an unaccepted draft other than a documentary draft is governed by the following rules:

(1) If a check is duly presented for payment to the payor bank otherwise than for immediate payment over the counter, the check is dishonored if the payor bank makes timely return of the check or sends timely notice of dishonor or nonpayment under § 4-301 or § 4-302, or becomes accountable for the amount of the check under 4-302.

(2) If a draft is payable on demand and paragraph (1) does not apply, the draft is dishonored if presentment for payment is duly made to the drawee and the [***32] draft is not paid on the day of presentment.

The reason that § 3-502(b)(2) potentially is relevant to the case *sub judice* is because of § 3-501(b)(2) and (3), which state:

(2) [HN26] Upon demand of the person to whom presentment is made, the person making presentment must (i) exhibit the instrument, (ii) give reasonable identification and, if presentment is made on behalf of another person reasonable evidence of authority to do so, and (iii) sign a receipt on the [*697] instrument for any payment made or surrender the instrument if full payment is made.

(3) Without dishonoring the instrument, the party to whom presentment is made may (i) return the instrument for lack of a necessary indorsement, or (ii) refuse payment or acceptance for failure of the presentment to comply with the terms of the instrument, an agreement of the parties, or other applicable law or rule.

The question is whether requiring a thumbprint constitutes a request for "reasonable identification" under § 3-501(b)(2)(ii). If it is "reasonable," then under § 3-501(b)(3)(ii) the refusal of the Bank to accept the check from Petitioner did not constitute dishonor. If, however, requiring a thumbprint is not "reasonable" [***33] under § 3-501(b)(2)(ii), then the refusal to accept the check may constitute dishonor under § 3-502(b)(2). The issue of dishonor is arguably relevant because Petitioner has no cause of action against any party, including the drawer, until the check is dishonored.¹⁶ *Ward*, 62 Md. App. at 358, 489 A.2d at 95; *Stewart v. Citizens & Southern Nat'l Bank*, 138 Ga. App. 209, 225 S.E.2d 761 (Ga. App. 1976).

16 [HN27] A cause of action for wrongful dishonor sounds in tort, not contract. See § 4-402; *Wright v. Commercial & Sav. Bank*, 297 Md. 148, 159, 464 A.2d 1080, 1086 (1983); *Siegman v. Equitable Trust Co.*, 267 Md. 309, 313, 297 A.2d 758 (1972); *Boggs v. Citizens Bank & Tr. Co.*, 32 Md. App. 500, 501, 363 A.2d 247 (1976).

Respondent Bank of America argues that its relationship with its customer is contractual, *University Nat'l Bank v. Wolfe*, 279 Md. 512, 514, 369 A.2d 570, 571 (1977); *Kiley v. First Nat'l Bank of Maryland*, 102 Md. App. 317, 326-27, 649 A.2d 1145, 1149 (1994), [***34] and that in this case, its contract with its customer, the drawer, authorizes the Bank's use of the Thumbprint Signature Program as a reasonable form of identification. The pertinent part of that Deposit Agreement states:

You [customer] agree that we [Bank of America] may impose additional requirements we deem necessary or desirable on a payee or other holder who presents for cashing an [*698] item drawn on your account which is otherwise properly payable and if that person fails or refuses to satisfy such requirements, our refusal to cash the item will not be considered wrongful. You [customer] agree that, subject to applicable law, such requirements [**37] may include (but are not necessarily limited to) physical . . . identification requirements

According to Respondent, this contractual agreement allowed it to refuse to accept the check, without dishonoring it pursuant to § 3-501(b)(3)(ii), because the Bank's refusal was based upon the presentment failing to comply with "an agreement of the parties." The intermediate appellate court agreed. *Messing*, 143 Md. App. at 19-20, 792 A.2d at 323. We, however, do not.

The reason why the Bank's contract with its customer [***35] is not controlling on the issue of the reasonableness of requiring a thumbprint as identification is because the terms of § 3-501 are not modified by the terms of that contract. The terms of § 3-501(b) require an "agreement of the parties." The term "parties" does not refer to the parties of the Deposit Agreement, but rather, according to § 3-103(a), refers to the parties to an instrument. While Petitioner is a party to the instrument, he is not a party to the Deposit Agreement, nor may he be deemed properly a third party beneficiary thereof. To be effective against the Petitioner, *Messing*, as the party entitled to enforce the instrument, would have to have been a party to the agreement. § 3-117. Thus, while the Deposit Agreement protects the Bank from a suit for wrongful dishonor brought by its customer, the drawer, as a result of the Bank's potential dishonor of the check because the Bank's demand for a thumbprint was not met, [§ 4-402], the contract has no impact on the determination of the "reasonableness" of the requirement for purposes of § 3-501(b), and subsequently whether the instrument was dishonored for purposes of § 3-502(b)(2). In other words, the Bank and [***36] its customer cannot through their contract define the meaning of the term "reasonable" and impose it upon parties who are not in privity with that contract. Whether requiring a thumbprint constitutes [*699] "reasonable identification" within the meaning of § 3-501(b)(2)(ii) is therefore a broader policy consideration, and not, as argued in this case, simply a matter of contract. We reiterate that the contract does not apply to Petitioner and, similarly, does not give him a cause of action against the Bank for refusing to accept the check. *Papadopoulos v. Chase Manhattan Bank*, 791 F. Supp. 72, 74-75 (S.D.N.Y. 1990). This also means that the Bank cannot rely on the contract as a defense against the Petitioner, on the facts presented here, to say that it did not dishonor the check.

Petitioner, as noted, argues that requiring a thumbprint violates his privacy,¹⁷ and further argues that a thumbprint is not a reasonable form of identification because it does not prove contemporaneously the identity of an over the counter presenter at the time presentment is made. According to Petitioner, the purpose of requiring "reasonable identification" is to allow the drawee bank to determine [***37] that the presenter is the proper person to be paid on the [**38] instrument. Because a thumbprint does not provide that information at the time presentment and payment are made, Petitioner argues that a thumbprint cannot be read to fall within the meaning of "reasonable identification" for the purposes of § 3-501(b)(2)(ii).

17 *Homo Sapiens* possesses a truly opposable thumb. An opposable thumb is a necessary adaptation for a creature whose survival depends on having a firm grasp on the tools and instruments encountered in daily life. In the case *sub judice*, the instrument being grasped was a check. Because when grasping and transferring or receiving a paper, such as a check, one does so normally by holding the paper against the side of the index finger with the assistance of a firmly down pressed thumb, we deduce that on multiple occasions during the passing back and forth of the check while Petitioner attempted to cash it, he inevitably and repeatedly placed his thumbprint upon it. At best, therefore, Petitioner's objection appears not to be to placing his thumbprint on the check, but rather to placing a thumbprint on the check which would be longer lasting and more clearly identifiable over time than would otherwise be the case given normal handling conditions.

[***38] Bank of America argues that the requirement of a thumbprint has been upheld, in other non-criminal circumstances, not to be an invasion of privacy, and is a reasonable and [*700] necessary industry response to the growing problem of check fraud. The intermediate appellate court agreed, pointing out that the form of identification was not defined by the statute, but that the Code itself recognized a thumbprint as a form of signature, § 1-201(39)), and observing that requiring thumbprint or fingerprint identification has been found to be reasonable and not to violate privacy rights in a number of non-criminal contexts. Those observations and authorities are set forth in the opinion of that Court and need not be repeated here. *Messing*, 143 Md. App. at 10-16, 792 A.2d at 318-321.

More compelling in terms of determining the issue of "reasonableness" is the reasoning of the intermediate appellate court in rejecting Petitioner's argument that § 3-

501(b)(2)(ii) implicitly contains a present tense temporal element, stating:

We agree with [Petitioner] that a thumbprint cannot be used, in most instances, to confirm the identity of a non-account checkholder at the time that the [***39] check is presented for cashing, as his or her thumbprint is usually not on file with the drawee at that time. We disagree, however, with [Petitioner's] conclusion that a thumbprint signature is therefore not "reasonable identification" for purposes of C.L. § 3-501(b)(2).

[HN28] Nowhere does the language of C.L. § 3-501(b)(2) suggest that "reasonable identification" is limited to information [Respondent] can authenticate at the time presentment is made. Rather, all that is required is that the "person making presentment must . . . give reasonable identification." C.L. § 3-501(b)(2). While providing a thumbprint signature does not necessarily confirm identification of the checkholder at presentment -- unless of course the drawee bank has a duplicate thumbprint signature on file -- it does assist in the identification of the checkholder should the check later prove to be bad. It therefore serves as a powerful deterrent to those who might otherwise attempt to pass a bad check. That one method provides identification at the time of presentment and the other identification after the check [***40] may have been honored, does not prevent the [*701] latter from being "reasonable identification" for purposes of C.L. § 3-501(b)(2).

143 Md. App. at 16, 792 A.2d at 321. We agree, and find this conclusion to be compelled, in fact, by our State's Commercial Law Article.

The reason has to do with warranties. [HN29] The transfer of a check for consideration creates both transfer warranties (§ 3-416(a)-(c)) and presentment warranties (§ 3-417(a)-(e)) which cannot be disclaimed. The warranties include, for example, that the payee is entitled to enforce the instrument and that there are no alterations on the check. The risk to banks is that these contractual warranties may be breached, exposing the accepting bank to a loss because the bank paid over the counter on an item which was not properly payable. *See* § 4-401; *C.S. Bowen Co., Inc. v. Maryland Nat. Bank*, 36 Md. App. 26, 36-38, 373 A.2d 30, 36-37 (1977). In such an event, the bank would then incur the expense to find the presenter, to demand repayment, and legal expenses to [**39] pursue the presenter for breach of his warranties.

In short, when a bank cashes a check over [***41] the counter, it assumes the risk that it may suffer losses for counterfeit documents, forged endorsements, or forged or altered checks. Nothing in the Commercial Law Article forces a bank to assume such risks. *See Barnhill*, 503 U.S. 393, 398-99, 118 L. Ed. 2d 39, 112 S.

Ct. 1386 (1992); § 3-408. To the extent that banks are willing to cash checks over the counter, with reasonable identification, such willingness expands and facilitates the commercial activities within the State. In interpreting the Commercial Law Article, we are guided by § 1-102, which states in relevant part:

(1) [HN30] Titles 1 through 10 of this article shall be liberally construed and applied to promote its underlying purposes and policies.

(2) Underlying purposes and policies of Titles 1 through 10 of this article are

(a) to simplify, clarify and modernize the law governing commercial transactions;

[*702] (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;

(c) to make uniform the law among the various jurisdictions.

Because the reduction of risk promotes the expansion of commercial practices, we believe that the direction of § 1-102(2)(b) [***42] requires that we conclude that [HN31] a bank's requirement of a thumbprint placed upon a check presented over the counter by a non-customer is reasonable. *Barclays Bank D.C.O. v. Mercantile National Bank*, 481 F.2d 1224, 1230-31(5th Cir. 1973); *DaSilva v. Sanders*, 600 F. Supp. 1008, 1013 (D.C. 1984). As the intermediate appellate court well documented, the Thumbprint Program is part of an industry wide response to the growing threat of check fraud. *Messing*, 143 Md. App. at 15-16, 792 A.2d at 320-21. Prohibiting banks from taking reasonable steps to protect themselves from losses could result in banks refusing to cash checks of non-customers presented over the counter at all, a result which would be counter to the direction of § 1-102(2)(b).

As a result of this conclusion, Bank of America in the present case did not dishonor the check when it refused to accept it over the counter. Under § 3-501(b)(3)(ii), Bank of America "refused payment or acceptance for failure of the presentment to comply with . . . other applicable law or rule." The rule not complied with by the Petitioner-presenter was § 3-502(b)(2)(ii), in that he refused to give [***43] what we have determined to be reasonable identification. Therefore, there was no dishonor of the check by Bank of America's refusal to accept it. The answer to Petitioner's third question is therefore "no," as is the answer to Petitioner's first question, though our reasoning differs somewhat from that of the Court of Special Appeals.

E. Declaratory Judgment.

373 Md. 672, *, 821 A.2d 22, **;
2003 Md. LEXIS 155, ***; 50 U.C.C. Rep. Serv. 2d (Callaghan) 1

As a final matter, we agree with the intermediate appellate court's conclusion that, [HN32] because Messing's suit included requests for declaratory judgment, the circuit court [*703] must enter a written declaration of the rights of the parties. *Messing*, 143 Md. App. at 23, 792 A.2d at 325; *See Jackson v. Millstone*, 369 Md. 575, 594-95, 801 A.2d 1034, 1045-46 (2002).

Although a summary judgment in a declaratory judgment action is the exception rather than the rule, circumstances may warrant the entry of a full or partial summary judgment. *See Pennsylvania Nat. Mut. v. Gartelman*, 288 Md. 151, 416 A.2d 734 (1980); *National* [**40] *Grange Mut. Ins. v. Pinkney*, 284 Md. 694, 399 A.2d 877 (1979). As the Court of Appeals stated in *Dart Drug Corp. v. Hechinger Co.*, 272 Md. 15, 29, 320 A.2d 266 (1974), [***44] [HN33] "while a declaratory decree need not be in any particular form, it must pass upon and adjudicate the issues raised in the proceeding, to the end that the rights of the parties are clearly delineated and the controversy terminated"

Loewenthal, 50 Md. App. at 117, 436 A.2d at 496. Because the circuit court granted summary judgment without a declaration of the parties' rights, the intermediate appellate court is correct that the trial court's judgment must be vacated¹⁸ and the case remanded to the circuit court to enter a proper written declaration of the rights of the parties consistent with this opinion. The answer to Petitioner's sixth and final question is therefore, no.

18 The trial court's denial of Messing's injunctive relief prayer was correct. The lack of a declaration of rights, however, requires a vacation. This does not mean that any part of Petitioner's Complaint may be re-litigated. The mandate fashioned in this case is designed such that the end

result is solely to have the circuit court enter a proper declaration of rights, consistent with this opinion, as well as to deny the injunctive relief it previously denied.

[***45] **JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED; COSTS TO BE PAID BY PETITIONER .**

CONCUR BY: Eldridge (In Part)

DISSENT BY: Eldridge (In Part)

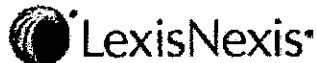
DISSENT

Eldridge, J., concurring in part and dissenting in part.

I agree that the Circuit Court erred in failing to render a declaratory judgment. I cannot agree with the majority's holding that, after the petitioner presented his driver's license [*704] and a major credit card, it was "reasonable" to require the petitioner's thumbprint as identification.

Today, honest citizens attempting to cope in this world are constantly being required to show or give drivers' licenses, photo identification cards, social security numbers, the last four digits of social security numbers, mothers' "maiden names," 16 digit account numbers, etc. Now, the majority takes the position that it is "reasonable" for banks and other establishments to require, in addition, thumbprints and fingerprints. Enough is enough. The most reasonable thing in this case was petitioner's "irritation with the Bank of America's Thumbprint Signature Program." (Majority opinion at p. 2).

Chief Judge Bell [***46] has authorized me to state that he joins this concurring and dissenting opinion.



2 of 2 DOCUMENTS



Caution

As of: Mar 11, 2009

BILL COCKRELL, Plaintiff, vs. FIRST TENNESSEE BANK, et al., Defendants.

No. 98-2497-D/A

**UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF
TENNESSEE, WESTERN DIVISION**

1998 U.S. Dist. LEXIS 13756

June 29, 1998, Decided

June 29, 1998, Filed, Entered

SUBSEQUENT HISTORY: [*1] Motion for Reconsideration Denied July 16, 1998, Reported at: 1998 U.S. Dist. LEXIS 13757.

DISPOSITION: Plaintiff's motion for remand DENIED; Plaintiff's motion for extension of time DENIED; Plaintiff's motion to disqualify DENIED; Defendant's motion to dismiss GRANTED; CERTIFIED appeal not taken in good faith.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff non-deposit customer filed an action against defendant banks for conversion, breach of fiduciary duty, and impairment of his ability to make a contract. The banks filed a motion to dismiss.

OVERVIEW: The customer did not have a bank account with the banks, but had cashed checks at the banks over many years. The banks instituted a thumbprint signature policy whereby any non-deposit account holder had to place a thumbprint on the check upon presentment to receive payment. When the customer refused to do so, the banks refused to cash the checks. The court granted the banks' motion and dismissed the customer's action alleging that the policy was unauthorized and illegal. The court held that because the checks were not contracts, the customer's allegations failed to establish any violation of

U.S. Const. art. I or for common law breach of contract, and even if the customer had been an account holder, the banks owed him no fiduciary duty. Because the checks were not taken from the customer and he retained them in his possession, the claim for conversion was also without merit. The customer proved no injury and had no standing to file his action, and he could not prove any set of facts entitling him to relief. Further, the customer's complaint was frivolous, and thus the court certified that any appeal by the customer, proceeding in forma pauperis, would not be taken in good faith.

OUTCOME: The court granted the motion to dismiss.

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Motions to Dismiss

[HN1] When considering a motion to dismiss, the court must treat all of the well-pleaded allegations of the complaint as true. The court must construe all the allegations in the light most favorable to the plaintiff. A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. It must appear beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.

Commercial Law (UCC) > Negotiable Instruments (Article 3) > General Overview

Contracts Law > Negotiable Instruments > Negotiation > Indorsement > Accommodation Indorsements Torts > Intentional Torts > Conversion > Elements

[HN2] Tenn. Code Ann. § 47-3-420, Conversion of instrument, states: (a) The law applicable to conversion of personal property applies to instruments. An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment. An action for conversion of an instrument may not be brought by (i) the issuer or acceptor of the instrument or (ii) a payee or endorsee who did not receive delivery of the instrument either directly or through delivery to an agent or a co-payee. (b) In an action under subsection (a), the measure of liability is presumed to be the amount payable on the instrument, but recovery may not exceed the amount of the plaintiff's interest in the instrument. (c) A representative, including a depository bank, who has in good faith dealt with an instrument or its proceeds on behalf of one who was not the person entitled to enforce the instrument is not liable in conversion to that person beyond the amount of any proceeds that it has not paid out.

Commercial Law (UCC) > Negotiable Instruments (Article 3) > Dishonor & Presentment > General Overview Securities Law > Self-Regulating Entities > National Securities Exchanges > New York Stock Exchange

[HN3] Banks are entitled to impose the requirement of reasonable identification upon any person making a presentment. Tenn. Code Ann. § 47-3-501(b)(2). Fingerprinting has long been recognized as a reasonable, valuable, and reliable means of identification. Fingerprinting has been upheld even when the persons involved had no choice in the matter.

Civil Procedure > Parties > Self-Representation > General Overview

Civil Procedure > Appeals > Frivolous Appeals

[HN4] 28 U.S.C.S. § 1915(a)(3) provides that an appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith. The good faith standard is an objective one. An appeal is not taken in good faith if the issue presented is frivolous.

COUNSEL: BILL COCKRELL, plaintiff, Pro se, Southaven, MS.

For FIRST TENNESSEE BANK, defendant: John C. Speer, Esq., Robert C. McConkey, III, BAKER DONELSON BEARMAN & CALDWELL, Memphis, TN.

For UNION PLANTERS NATIONAL BANK, defendant: Robert L. Crawford, Esq., J. Richard Buchignani, Esq., WYATT, TARRANT & COMBS, Memphis, TN.

For NATIONAL BANK OF COMMERCE, defendant: Larry H. Montgomery, Esq., GLANKLER BROWN GILLILAND CHASE ROBINSON & RAINES, Memphis, TN.

JUDGES: BERNICE B. DONALD, UNITED STATES DISTRICT JUDGE.

OPINION BY: BERNICE B. DONALD

OPINION

ORDER DENYING PLAINTIFF'S MOTION FOR REMAND, ORDER DENYING PLAINTIFF'S MOTION FOR EXTENSION, ORDER DENYING PLAINTIFF'S MOTION TO DISQUALIFY, ORDER GRANTING DEFENDANTS' MOTION TO DISMISS, ORDER DISMISSING CASE, ORDER CERTIFYING APPEAL NOT TAKEN IN GOOD FAITH AND ORDER ASSESSING APPELLATE FILING FEE

Plaintiff, Bill Cockrell, filed this complaint alleging the defendants, First Tennessee Bank, Union Planters Bank, and National Bank of Commerce, [*2] engaged in unauthorized and illegal practices in connection with the implementation of a policy requiring non-deposit customers to place their thumbprint on checks that they seek to cash, and in declining to cash checks for plaintiff when he failed to comply with such policy. Plaintiff characterizes his lawsuit as an action for "conversion." Plaintiff originally filed his action in the Circuit Court of Shelby County, but the action was removed by the defendants pursuant to 28 U.S.C. §§ 1331, 1367(a) and 1441(c).

Plaintiff does not have a bank account with any of the defendant banks. Plaintiff alleges that he had done business with the defendants for many years, was well known, and had reasonable identification. Plaintiff also alleges that in some instances in the past, the defendants had cashed checks for him without identification.

During the month of December, 1997, Plaintiff tendered numerous checks to the defendants for cash. Plaintiff was the payee on the checks and each check was presented for payment at the defendant bank upon which it was drawn. Plaintiff was informed that defendants had instituted a policy called "thumbprint signature" whereby

any nondeposit account holder [*3] must place a thumbprint on the check upon presentment to receive payment. Plaintiff refused to place his thumbprint on the checks and defendants refused to cash his checks.

Plaintiff contends defendants have breached their contractual and fiduciary duty to him, converted or stolen his property, and impaired his ability to make a contract.

The defendants collectively have filed a motion to dismiss. Grounds for their motion are:

- 1) plaintiff has suffered no injury and has no standing to bring suit;
- 2) plaintiff has no rights in funds on deposit with defendants;
- 3) defendants do not owe any fiduciary to plaintiff;
- 4) plaintiff has failed to state a claim for conversion;
- 5) defendants have not failed to exercise ordinary care;
- 6) defendants have a right to require reasonable identification under the Uniform Commercial Code (UCC);
- 7) plaintiff fails to state a claim for criminal conversion;
- 8) plaintiff fails to state a claim for procurement of breach of contract;
- 9) plaintiff fails to establish that he is a holder in due course;
- 10) no destruction of valuable property has occurred; and
- 11) plaintiff's claims are without merit.

Plaintiff has responded to the [*4] transfer with written objections. The Court construes the pleading as a motion to remand. Plaintiff contends that his case does not raise any federal question, but rather only questions of Tennessee law. Plaintiff attempts to downplay his very framing of the issue of impairment of right of contract under Article I of the United States Constitution. Notwithstanding the federal question, the Court properly has jurisdiction of this case pursuant to 28 U.S.C. § 1332, diversity of citizenship and amount in controversy, as plaintiff is a resident of Mississippi and the defendant banks are located in Tennessee. Plaintiff's motion for remand is DENIED.

Plaintiff has failed to respond to the substantive issues presented by the motion to dismiss. Plaintiff has filed an irregular document styled "petition to hold in abeyance time to file responsive pleading pending jurisdictional decision." The Court construes the document as a motion for extension of time and DENIES the motion based upon its determination that the action is frivolous and fails to state a claim on which relief may be granted. Under 28 U.S.C. § 1915(e) the Court has the authority to dismiss the case at any time if the court [*5] determines that the action is frivolous or fails to state a claim on which relief may be granted.

Plaintiff has also filed an "AFFIDAVIT OF FACTS 28 USC [sic] § 144 REQUEST FOR INFORMATION PETITION FOR RECUSAL." The Court construes this request as a motion to disqualify pursuant to 28 U.S.C. § 144. For § 144 to apply, a party must file an affidavit as specified by that statute. Plaintiff's filing does not comply with the technical requirements for an affidavit nor does it contain facts or reasons documenting any bias or prejudice on the part of this judge. The document constitutes nothing more than a fishing expedition by plaintiff. Therefore, regardless of any alleged grounds asserted for disqualification, the court need not consider the applicability of 28 U.S.C. § 144, and the court is not obliged to disqualify itself under that statute. *See United States v. Sammons*, 918 F.2d 592, 598 (6th Cir. 1990); *Easley v. University of Michigan Bd. of Regents*, 853 F.2d 1351, 1357 (6th Cir. 1988) Plaintiff's motion to disqualify is DENIED.

The Court finds that it is not necessary to analyze all grounds presented by defendants to resolve the motion to dismiss and for summary [*6] judgment. Therefore, the Court will only address grounds found to be most dispositive.

[HN1] When considering a motion to dismiss, the Court must "treat all of the well-pleaded allegations of the complaint as true." *Miree v. DeKalb County*, 433 U.S. 25, 27 n.1, 53 L. Ed. 2d 557, 97 S. Ct. 2490 (1977). *See also Saylor v. Parker Seal Co.*, 975 F.2d 252, 254 (6th Cir. 1992). The Court must construe all the allegations in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974). "A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984). It must appear beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).

Breach of Contract/Impairment of Right to Make Contracts

Plaintiff has no contract nor has he attempted to make any contract with the defendants. A contract generally is "an agreement [*7] between two parties, based on adequate consideration to do or not to do a particular thing." *Bill Walker & Associates, Inc. v. Parrish*, 770 S.W.2d 764, 771 (Tenn. Ct. App. 1989). Plaintiff has presented checks for payment to drawee banks. A check is a written instruction by the bank depositor to pay money. Tenn. Code Ann. §§ 47-3-103(5) and 47-3-104(e) and (f). As a check is not a contract, plaintiff's allegations fail to establish any violation of Article I of the Constitution or for common law breach of contract.

Breach of Fiduciary Duty

Plaintiff is not an account holder or customer with the defendants. Even had plaintiff been a customer of the banks, the banks owed no fiduciary duty. *Macon County Livestock Market v. Kentucky State Bank*, 724 S.W.2d 343, 350 n.9 (Tenn. Ct. App. 1986). See generally *First Tennessee Bank National Association v. C.T. Resorts Co.*, 1995 Tenn. App. LEXIS 580, No. 03 A019503-CH00102, 1995 WL 511884 *1 (Tenn. Ct. App. 1995).

Conversion/Injury

Plaintiff attempts to invoke Tenn. Code Ann. § 47-3-419 to state a claim of conversion. Section 47-3-419 is inapplicable to his claim, however as it governs instruments signed for accommodation. Plaintiff obviously miscited [*8] the statute and intended to invoke [HN2] Tenn. Code Ann. § 47-3-420, Conversion of instrument, which states:

(a) The law applicable to conversion of personal property applies to instruments. An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment. An action for conversion of an instrument may not be brought by (i) the issuer or acceptor of the instrument or (ii) a payee or endorsee who did not receive delivery of the instrument either directly or through delivery to an agent or a copayee.

(b) In an action under subsection (a), the measure of liability is presumed to be the amount payable on the instrument, but

recovery may not exceed the amount of the plaintiff's interest in the instrument.

(c) A representative, including a depository bank, who has in good faith dealt with an instrument or its proceeds on behalf of one who was not the person entitled to enforce the instrument is not liable in conversion to that person beyond the amount of any proceeds [*9] that it has not paid out.

The checks have neither been taken from plaintiff, nor have they been paid on a forged endorsement. Plaintiff retains the checks in his possession. Thus, there has been no conversion.

The [HN3] banks were entitled to impose the requirement of reasonable identification upon any person making a presentment. Tenn. Code Ann. § 47-3-501(b)(2). Fingerprinting has long been recognized as a reasonable, valuable, and reliable means of identification. See *Iacobucci v. City of Newport, Kentucky*, 785 F.2d 1354, 1356 (6th Cir. 1986); *Thom v. New York Stock Exchange*, 306 F. Supp. 1002, 1009 (S.D.N.Y. 1969), *Perkey v. Department of Motor Vehicles*, 42 Cal. 3d 185, 721 P.2d 50, 228 Cal. Rptr. 169 (Cal. Ct. App. 1983). As the defendant points out, in the foregoing cases, fingerprinting was upheld even when the persons involved had no choice in the matter. Plaintiff was not forced to submit to the thumbprinting. He retained various other alternative methods to cash the checks. Defendant makes no rational argument that thumbprinting is not reasonable.

In conclusion, and quoting from defendants' memorandum:

Defendants are not forcing Plaintiff to do anything [*10] which he does not choose to do. Plaintiff still has possession of the checks and has numerous options available to him to cash the checks that do not require giving a thumbprint. He can (i) deposit the checks with his own financial institution; (ii) negotiate the checks to a third party who could cash the checks; (iii) open an account with any of the Defendants and deposit the items in that account; (iv) cash the checks at a check cashing service or other similar facility which does not require a thumbprint, or (v) ask his customers to pay him in cash.

Plaintiff has simply proved no injury and has no standing to bring this claim. Clearly plaintiff can not prove any set of facts which would entitle him to relief in this matter and no further determinations are necessary for disposition of this matter. Plaintiff has failed to state a claim upon which relief may be granted. The motion to dismiss is hereby GRANTED.

Additionally the Court finds that plaintiff's complaint lacks an arguable basis either in law or in fact and is, therefore, frivolous. See *Denton v. Hernandez*, 504 U.S. 25, 31, 118 L. Ed. 2d 340, 112 S. Ct. 1728 (1992); *Neitzke v. Williams*, 490 U.S. 319, 325, 104 [*11] L. Ed. 2d 338, 109 S. Ct. 1827 (1989). As the complaint is frivolous and fails to state a claim upon which relief may be granted, it is DISMISSED pursuant to 28 U.S.C. § 1915(e)(2)(B)(i) and (ii).

The final issue to be addressed is whether plaintiff should be allowed to appeal this decision *in forma pauperis*. [HN4] Twenty-eight U.S.C. § 1915(a)(3) provides that an appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith.

The good faith standard is an objective one. *Coppedge v. United States*, 369 U.S. 438, 445, 8 L. Ed. 2d 21, 82 S. Ct. 917 (1962). An appeal is not taken in good faith if the issue presented is frivolous. *Id.* The same considerations that lead the Court to dismiss this case as frivolous also compel the conclusion that an appeal would be frivolous.

It is therefore CERTIFIED, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal in this matter by plaintiff, proceeding *in forma pauperis*, is not taken in good faith.

The Sixth Circuit Court of Appeals decisions in *McGore v. Wrigglesworth*, 114 F.3d 601 (6th Cir. 1997), and *Floyd v. United States Postal Service*, 105 F.3d 274 (6th Cir.), [*12] apply to any appeal filed by the plaintiff in this case.

If plaintiff files a notice of appeal, he must pay the entire \$ 105 filing fee required by 28 U.S.C. §§ 1913 and

1917. ¹ The entire filing fee must be paid within thirty days of the filing of the notice of appeal.

¹ The fee for docketing an appeal is \$ 100. See Judicial Conference Schedule of Fees, P 1, Note following 28 U.S.C. § 1913. Under 28 U.S.C. § 1917, a district court also charges a \$ 5 fee:

Upon the filing of any separate or joint notice of appeal or application for appeal or upon the receipt of any order allowing, or notice of the allowance of, an appeal or of a writ of certiorari \$ 5 shall be paid to the Clerk of the district court, by the appellant or petitioner.

By filing a notice of appeal the plaintiff becomes liable for the full amount of the filing fee, regardless of the subsequent progress of the appeal. If the plaintiff fails to comply with the above assessment of the appellate filing fee within thirty [*13] days ² of the filing of the notice of appeal or the entry of this Order, whichever occurred later, the district court will notify the Sixth Circuit, who will dismiss the appeal. If the appeal is dismissed, it will not be reinstated once the fee is paid. *McGore*, 114 F.3d at 610.

² The district court may extend this deadline one time by thirty days if the motion to extend is filed within the meaning of *Houston v. Lack*, 487 U.S. 266, 101 L. Ed. 2d 245, 108 S. Ct. 2379 (1988), and Fed. R. App. P. 4(c) before the expiration of the original deadline. *McGore*, 114 F.3d at 610.

IT IS SO ORDERED this 29th day of June, 1998.

BERNICE B. DONALD

UNITED STATES DISTRICT JUDGE

111XMD

***** Print Completed *****

Time of Request: Wednesday, March 11, 2009 18:09:18 EST

Print Number: 1841:145314881

Number of Lines: 247

Number of Pages:

Send To: KOCH, KATHLEEN
BANK OF AMERICA-GEN BANK -TAMPA
400 N ASHLEY DR
TAMPA, FL 33602-4300

Voting Sheets

HOUSE COMMITTEE ON COMMERCE AND CONSUMER AFFAIRS

EXECUTIVE SESSION on HB 299

BILL TITLE: prohibiting banks from requiring blood samples, fingerprints, and DNA samples in order to complete a banking transaction.

DATE: 3-12-09

LOB ROOM: 302

Amendments:

Sponsor: Rep.

OLS Document #:

Sponsor: Rep.

OLS Document #:

Sponsor: Rep.

OLS Document #:

Motions: OTP, OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep. Butler

Seconded by Rep. Hammond

Vote: 6-12 (Please attach record of roll call vote.)

Motions: OTP, OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep.

Seconded by Rep.

Vote: (Please attach record of roll call vote.)

RETAINED

CONSENT CALENDAR VOTE:

(Vote to place on Consent Calendar must be unanimous.)

Statement of Intent: Refer to Committee Report

Respectfully submitted,

Rep. James F. Headd, Clerk

HOUSE COMMITTEE ON COMMERCE AND CONSUMER AFFAIRS

EXECUTIVE SESSION on HB 299

BILL TITLE: prohibiting banks from requiring blood samples, fingerprints, and DNA samples in order to complete a banking transaction.

DATE: 3-12-09

LOB ROOM: 302

Amendments:

Sponsor: Rep. OLS Document #:
Sponsor: Rep. OLS Document #:
Sponsor: Rep. OLS Document #:

Motions: OTP, OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep.

Butler

Seconded by Rep.

Hammond

Vote: *6-12* (Please attach record of roll call vote.)

FAILED

Motions: OTP, OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep.

Seconded by Rep.

Vote: (Please attach record of roll call vote.)

6-12

Retained

CONSENT CALENDAR VOTE:

(Vote to place on Consent Calendar must be unanimous.)

Statement of Intent: Refer to Committee Report

Respectfully submitted,

Rep. James F. Headd, Clerk

COMMERCE AND CONSUMER AFFAIRS

Bill #: HB 299 Title: Banks Requiring Blood Samples etcPH Date: 1/12/09Exec Session Date: 3/12/09Motion: ITL

Amendment #: _____

MEMBER	YEAS	NAYS
Reardon, Tara G, Chairman		✓
Butler, Edward A, V Chairman	✓	
DeStefano, Stephen T	✓	
Kopka, Angeline A		
McEachern, Paul		✓
Hammond, Jill Shaffer	✓	
Nord, Susi		✓
Winters, Joel F		✓
Meador, David R		✓
Gidge, Kenneth N		✓
Schlachman, Donna L		✓
Hunt, John B	✓	
Quandt, Matt J		✓
Belanger, Ronald J		✓
Flanders, Donald H		✓
Holden, Rip		
Dowling, Patricia A		✓
Headd, James F, Clerk		✓
Nevins, Chris F	✓	
Palfrey, David J	✓	
	6	12
	6-12	

FAILS-

Retain - 3-12-09

HOUSE COMMITTEE ON COMMERCE AND CONSUMER AFFAIRS

EXECUTIVE SESSION on HB 299

BILL TITLE: prohibiting banks from requiring blood samples, fingerprints, and DNA samples in order to complete a banking transaction.

DATE: November 12, 2009

LOB ROOM: 302

Amendments:

Sponsor: Rep. R. Holden OLS Document #: 2009 2479h

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Motions: OTP, OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep. Holden

Seconded by Rep. Nord

Vote: 11-6 (Please attach record of roll call vote.)

Motions: ~~OTP~~, OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep. Holden

Seconded by Rep. Nord

Vote: 10-7 (Please attach record of roll call vote.)

CONSENT CALENDAR VOTE: NO

(Vote to place on Consent Calendar must be unanimous.)

Statement of Intent: Refer to Committee Report

Respectfully submitted,

Rep. James F. Headd, Clerk

HOUSE COMMITTEE ON COMMERCE AND CONSUMER AFFAIRS

EXECUTIVE SESSION on HB 299

BILL TITLE: prohibiting banks from requiring blood samples, fingerprints, and DNA samples in order to complete a banking transaction.

DATE: ~~October 28, 2009~~ 11/12/09

LOB ROOM: 302

Amendments: 2479h

Sponsor: Rep. Holden

OLS Document #:

11-6 passed

Sponsor: Rep. Nord

OLS Document #:

Sponsor: Rep.

OLS Document #:

Motions: OTP, OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep. Holden

Seconded by Rep. Nord

Vote: (Please attach record of roll call vote.)

10-7 passed

Motions: OTP, OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep.

Seconded by Rep.

Vote: (Please attach record of roll call vote.)

CONSENT CALENDAR VOTE:

(Vote to place on Consent Calendar must be unanimous.)

Statement of Intent: Refer to Committee Report

Respectfully submitted,

Rep. James F. Headd, Clerk

Rep. Cal.

COMMERCE AND CONSUMER AFFAIRS

Bill #: HD 299 Title: Blood & DNA Sample.

PH Date: 1/1 Exec Session Date: 11/12/09

Motion: OTP Amendment #: 2479h

MEMBER	YEAS	NAYS
Butler, Edward A, Chairman	✓	✓
DeStefano, Stephen T	—	
Kopka, Angeline A	—	
McEachern, Paul	✓	
Hammond, Jill Shaffer		✓
Nord, Susi	✓	
Winters, Joel F	✓	
Meador, David R		✓
Gidge, Kenneth N	✓	
Schlachman, Donna L, V Chairman	✓	
Hunt, John B		✓
Quandt, Matt J	—	
Belanger, Ronald J	✓	
Flanders, Donald H		✓
Holden, Rip	✓	
Dowling, Patricia A	✓	
Headd, James F, Clerk	✓	
Nevins, Chris F		✓
Palfrey, David J	✓	
EATON, David	✓	6
	11	

COMMERCE AND CONSUMER AFFAIRS

Bill #: HB 299A Title: Blood & DNA Sample

PH Date: 1/1/

Exec Session Date: 11/12/09

Motion: OTP/A

Amendment #: _____

MEMBER	YEAS	NAYS
Butler, Edward A, Chairman		✓
DeStefano, Stephen T	✓	
Kopka, Angeline A	✓	
McEachern, Paul	✓	
Hammond, Jill Shaffer		✓
Nord, Susi	✓	
Winters, Joel F		✓
Meador, David R		✓
Gidge, Kenneth N	✓	
Schlachman, Donna L, V Chairman	✓	
Hunt, John B		✓
Quandt, Matt J	✓	
Belanger, Ronald J	✓	
Flanders, Donald H		✓
Holden, Rip	✓	
Dowling, Patricia A	✓	
Headd, James F, Clerk	✓	
Nevins, Chris F		✓
Palfrey, David J	✓	
<u>EATON, DANIEL</u>	✓	
	10	7

Committee Report

REGULAR CALENDAR

November 24, 2009

HOUSE OF REPRESENTATIVES

REPORT OF COMMITTEE

**The Committee on COMMERCE AND CONSUMER
AFFAIRS to which was referred HB299,**

**AN ACT prohibiting banks from requiring blood
samples, fingerprints, and DNA samples in order to
complete a banking transaction. Having considered the
same, report the same with the following amendment,
and the recommendation that the bill OUGHT TO PASS
WITH AMENDMENT.**

Rep. Rip Holden

FOR THE COMMITTEE

COMMITTEE REPORT

Committee:	COMMERCE AND CONSUMER AFFAIRS
Bill Number:	HB299
Title:	prohibiting banks from requiring blood samples, fingerprints, and DNA samples in order to complete a banking transaction.
Date:	November 24, 2009
Consent Calendar:	NO
Recommendation:	OUGHT TO PASS WITH AMENDMENT

STATEMENT OF INTENT

The majority of the Committee felt that the stigma of being fingerprinted connotes criminality. Although the committee applauds the industry's efforts to protect against fraud, the majority feels to require people to be fingerprinted in order to cash a check, for services rendered, is too intrusive.

Vote 10-7.

Rep. Rip Holden
FOR THE COMMITTEE

Original: House Clerk
Cc: Committee Bill File

REGULAR CALENDAR

COMMERCE AND CONSUMER AFFAIRS

HB299, prohibiting banks from requiring blood samples, fingerprints, and DNA samples in order to complete a banking transaction. **OUGHT TO PASS WITH AMENDMENT.**

Rep. Rip Holden for COMMERCE AND CONSUMER AFFAIRS. The majority of the Committee felt that the stigma of being fingerprinted connotes criminality. Although the committee applauds the industry's efforts to protect against fraud, the majority feels to require people to be fingerprinted in order to cash a check, for services rendered, is too intrusive. **Vote 10-7.**

Original: House Clerk

Cc: Committee Bill File

Ebbs, Heather

From: EdooftheNotch@aol.com
Sent: Thursday, November 12, 2009 9:06 PM
To: Ebbs, Heather
Cc: Holden, Rip
Subject: HB299 blurb

HB 299 OTPA

The majority of the Committee felt that the stigma of being fingerprinted connotes criminality. Although the committee applauds the industry's efforts to protect against fraud, the majority feels to require people to be fingerprinted in order to cash a check, for services rendered, is too intrusive.

Rep Rip Holden

11/13/2009