NEW MEXICO LAW REVIEW

Volume 4
Issue 2 *Summer*

Summer 1974

Negotiable Instruments--A Cause of Action on a Cashier's Check Accrues from the Date of Issuance

James Jason May

Recommended Citation
James J. May, *Negotiable Instruments--A Cause of Action on a Cashier's Check Accrues from the Date of Issuance*, 4 N.M. L. Rev. 253 (1974).
Available at: https://digitalrepository.unm.edu/nmlr/vol4/iss2/8

This Notes and Comments is brought to you for free and open access by The University of New Mexico School of Law. For more information, please visit the *New Mexico Law Review* website: www.lawschool.unm.edu/nmlr

NEGOTIABLE INSTRUMENTS— A CAUSE OF ACTION ON A CASHIER'S CHECK ACCRUES FROM THE DATE OF ISSUANCE

Petitioner First National Bank in Albuquerque issued five cashier's checks, each for $1000, payable on demand to respondent Donald K. Allison on March 7, 1953. Fifteen years later, when Allison deposited the checks in a Mexican bank on September 23, 1968, the petitioner bank dishonored them. The respondent then brought suit alleging wrongful dishonor and consequential damages.

The trial court rendered a $5000 judgment for the respondent. On appeal the New Mexico Court of Appeals affirmed the decision and remanded for a determination of consequential damages.[1] The court held that under the Uniform Commercial Code (UCC) cashier's checks were similar to certificates of deposit for all practical purposes, that a cause of action on a certificate of deposit usually accrues on the date of presentment and demand for payment, and thus the action was timely.[2]

The Supreme Court of New Mexico reversed the decision adopting the dissenting opinion of the Court of Appeals.[3] It held that the UCC, adopted in New Mexico in 1961, was inapplicable to checks issued in 1953. In dictum, the court stated that even if the Code were applicable, the result would be the same. The court held that an action on cashier's checks accrues from the date of issuance rather than the date of presentment and demand,[4] and that the bank was not required to honor these checks under the applicable six year statute of limitations.[5]

Although *Allison* was decided under the Uniform Negotiable Instruments Law (UNIL) it has direct consequences on the interpretation of the UCC and the nature of cashier's checks in New Mexico because of the Court's dicta and because the Code does not directly specify the nature of a cashier's check. This comment will first discuss the definition of a cashier's check and its legal effect, and then

1. Allison v. First National Bank in Albuquerque, 85 N.M. 283, 511 P.2d 769 (Ct. App. 1973).
2. 85 N.M. at 286, 511 P.2d at 772.
3. First National Bank in Albuquerque v. Allison, 85 N.M. 511, 514 P.2d 30 (1973).
4. 85 N.M. at 511, 514 P.2d at 30; for the explanation in the dissenting opinion *see* 85 N.M. at 289, 511 P.2d at 775.
5. N.M. Stat. Ann. § 23-1-3 (1953).

turn to the question of when a cause of action on such an instrument accrues under the Code.

NATURE OF A CASHIER'S CHECK

A cashier's check is generally described as a "bill of exchange drawn by a bank upon itself, . . . accepted by the act of issuance."[6] The bank draws a check on its own funds and is both drawer and drawee of the instrument.[7] The check becomes a primary obligation of the bank and, furthermore, the bank cannot ordinarily countermand or stop its payment.[8]

The UCC contains no specific definition of cashier's checks, and their nature must be determined from the general description of the various kinds of commercial paper found in UCC § 3-104(2):

> A writing which complies with the requirements of this section is
> (a) a 'draft' ('bill of exchange') if it is an order;
> (b) a 'check' if it is drawn on a bank and payable on demand;
> (c) a 'certificate of deposit' if it is an acknowledgment by a bank of receipt of money with an engagement to repay it;
> (d) a 'note' if it is a promise other than a certificate of deposit.

The initial question is whether a cashier's check falls in one or more of these categories. In *Allison,* the majority of the Court of Appeals held that such instruments fell into the description both of a "draft" and a "certificate of deposit."[9] The "certificate of deposit" view was rejected by the Supreme Court.[10]

Under UCC § 3-104(2)(a) for an instrument to be a draft it must contain an order. An order is defined in UCC § 3-102(b) as:

> . . . a direction to pay and must be more than an authorization or request. It must identify the person to pay with reasonable certainty.

A cashier's check takes the form of a regular check but is drawn by the bank on itself rather than another bank. Since it directs that the bank will pay upon presentment and demand,[11] it certainly appears

6. 10 Am. Jur.2d *Banks* § 544; 2 R. Anderson, Uniform Commercial Code § 3:104:18 (2d ed. 1971); State of Pa. v. Curtiss National Bank, 427 F.2d 395 (5th Cir. 1970); National Newark & Essex Bank v. Giordana, 11 N.J. Super. 347, 268 A.2d 327 (1970).

7. F. Hart & W. Willier, Bender's U.C.C. Service, Commercial Paper § 1.09(3) (1972).

8. 10 Am. Jur.2d *Banks* § 643; by far the most litigation concerning cashier's checks has involved the right to stop payment or countermand; *see e.g.* State of Pa. v. Curtiss National Bank, 427 F.2d 395 (5th Cir. 1970); National Newark & Essex Bank v. Giordana, 11 N.J. Super. 347, 268 A.2d 327 (1970); Richardson Heights Bank and Trust v. Wertz, 495 S.W.2d 572 (Tex. 1973); Gillespie v. Riley Management Corporation, 301 N.E.2d 506 (Ill. Ct. App. 1973); *cf.* TPO Inc. v. Federal Deposit Insurance Corp., 487 F.2d 131 (3d Cir. 1973).

9. 85 N.M. at 286, 511 P.2d at 772.

10. 85 N.M. at 511, 514 P.2d at 30.

11. *See* figures 3 & 4, Hart & Willier, *supra* note 7, at § 1.09(3).

to qualify as a draft. A check under the Code is "a draft drawn on the bank payable on demand."[12] A cashier's check satisfies this requirement, and hence apparently is also a check as defined in UCC § 3-104(2).

The remaining two types of negotiable instruments are the note and certificate of deposit. Under UCC § 3-104(2), if a promise (rather than an order) to pay is present, then an instrument must be one or the other. A certificate of deposit is "an acknowledgment by a bank of receipt of money with an engagement to repay it."[13] A literal interpretation of this definition leads one to believe that a cashier's check also qualifies as a certificate of deposit, and the court of appeals in *Allison* thought there was little difference between a cashier's check and a certificate of deposit.[14] At first glance, a cashier's check does appear to be an acknowledgment of the receipt of the purchaser's money with an obligation to repay it on demand. However, the normal understanding of "certificate of deposit" is that it is an instrument which takes the form of a receipt after a depositer has placed some money in the bank.[15]

A bank's obligation with a certificate of deposit is similar to that of a maker of a promissory note.[16] "The difference between a certificate of deposit and a promissory note are merely formal. In substance and legal effect the two instruments are the same."[17] The certificate of deposit is essentially a type of note created by the deposit of funds in a bank and the ensuing obligation of the bank to repay the money at a specified time, with interest.[18]

Does the certificate of deposit differ from a cashier's check? In form it certainly does. A purchaser buys a cashier's check from a bank, and the check is payable on demand. A depositer places funds in a bank and in return can receive a certificate of deposit. Its payment is not immediate but at a specified time and allows a depositer to collect interest on the funds.[19]

Both the cashier's check and the certificate of deposit resemble promissory notes. The Code describes a draft drawn on a drawer as effective as a note.[20] This statement would apply to a cashier's

12. Uniform Commercial Code § 3-104(2)(b).
13. Uniform Commercial Code § 3-104(2)(c).
14. 85 N.M. at 286, 511 P.2d at 772.
15. 1 W. Hawkland, A Transactional Guide to the Uniform Commercial Code § 2.050102 (1964).
16. Hart & Willier, *supra* note 7, at § 5.02(5); *Id.* § 1.10(2).
17. 2 R. Anderson, Uniform Commercial Code § 3-104:25 (2d ed. 1971).
18. Hart & Willier, *supra* note 7, at § 1.10(2).
19. *Id.*
20. Uniform Commercial Code § 3-118(a); *see* Leo Syntax Auto Sales, Inc. v. People's Bank & Saving Co., 6 Ohio Misc. 226, 215 N.E.2d 68 (1965).

check. The drawer bank's liability changes from conditional to unconditional.[21] As mentioned above, a certificate of deposit also creates an obligation like a promissory note. However, the purpose of the two instruments is not the same. A purchaser of a cashier's check utilizes it as a convenient method of payment in the commercial world.[22] The payment is immediate upon presentment. A depositer generally obtains a certificate of deposit to earn interest on his money while retaining a receipt that can be transferred easily and used as collateral.[23] Payment is generally at a specified time, not on demand.[24] In short, the cashier's check is a "payment" instrument having a relatively short life, while a certificate of deposit is a "credit" instrument constituting a "loan" to the bank and having a longer life.

Therefore, a cashier's check readily qualifies as a draft, a check, and a type of note under UCC § 3-104(2). But in both purpose and form it differs from a certificate of deposit. The Court of Appeals in *Allison* thus appears incorrect when it classifies a cashier's check as both a draft and certificate of deposit under the UCC. As stated in dicta, the final decision in the case, although based on the UNIL, should be the same under the UCC.[25]

§ 3-122 AND THE CASHIER'S CHECK

The accrual of a cause of action against makers, acceptors, obligors, and drawers is specifically covered by the UCC.[26] In the case of makers and acceptors of time instruments, it accrues on the day after maturity.[27] With respect to demand instruments the cause of action accrues upon its date, or if none, on the date of issue.[28] A special rule applies to certificates of deposit. An action accrues from the date of demand.[29] The official comment to the UCC explains the reason behind this provision:

> An exception is made in the case of certificates of deposit for the reason that banking custom and expectation is that demand will be made before any liability is incurred by the bank, and the additional reason that such certificates are issued with the understanding that

21. Hart & Willier, *supra* note 7, at § 5.06.
22. 2 R. Anderson, *supra* note 17, at § 3-104:18.
23. Hart & Willier, *supra* note 7, at § 1.10(2) (1972).
24. *Id.*
25. 85 N.M. at 511, 514 P.2d. 30.
26. Uniform Commercial Code § 3-122.
27. *Id.* § 3-122(1)(a).
28. *Id.* § 3-122(1)(b).
29. *Id.* § 3-122(2).

> they will be held for a considerable length of time, which in many instances exceeds the period of the statute of limitations.[30]

Drawers of drafts, however, are liable upon demand following dishonor of the instrument.[31]

When does an action on a cashier's check accrue? The answer depends upon the nature of a cashier's check. If it is considered primarily a demand note, then the action accrues "immediately upon issue, without demand, since presentment is not required to charge the maker"[32] under the UNIL or the Code.[33] On the other hand, if the cashier's check is basically a draft, then under UCC § 3-122 an action accrues from the date of dishonor.[34] Certainly the cashier's check has attributes of both a note and a draft. The Supreme Court in *Allison* held that the five checks involved were demand notes under the UCC and the six year statute of limitations would apply to them.[35] Was this determination proper under the UCC?

Section 3-118 of the Code is the key to the problem. This provision states:

> (a) Where there is doubt whether the instrument is a draft or a note the holder may treat it as either. A draft drawn on the drawer is effective as a note.[36]

Since a cashier's check is drawn on the drawer, UCC § 3-118(a) asserts that the instrument should be treated as a note. If so, then under UCC § 3-112(1)(b) the liability of the bank as maker begins on the date of issue.

Even if the first sentence of UCC § 3-118(a) is read to the exclusion of the second sentence and the holder has an election to treat the cashier's check as a draft, the case law suggests that the statute of limitations runs not from the date of dishonor but rather from the date of issue. The leading case in this area is the pre-Code decision, *Dean v. Iowa-Des Moines Bank and Trust Company.*[37] The court was faced with four different types of instruments,[38] including a cash-

30. *Id.* § 3-122, Comment 1.

31. *Id.* § 3-122(3).

32. *Id. R* 3-122, Comment 1.

33. Uniform Negotiable Instruments Law §§ 60-62; Uniform Commercial Code § 3-413.

34. Uniform Commercial Code § 3-122(2).

35. 85 N.M. at 511, 514 P.2d 30.

36. It is significant that the draftsmen of the Code did not include "or certificate of deposit" at the end of § 3-118(a). If they had done so, the cashier's check could be classified as both a certificate of deposit and a note, and the distinctions drawn between the two instruments with reference to cashier's checks would be meaningless.

37. 227 Iowa 1239, 281 N.W. 714 (1938), modified on other grounds, 290 N.W. 664 (1940).

38. These instruments included an ordinary check, a cashier's check, a certified check and a certificate of deposit.

ier's check. It held that the defendant bank involved was liable "from and after issuance" of the check.[39] The court treated the check as a bill of exchange or draft, but still maintained that "at all times after the issuance defendant owed the debt, and there was a duty to pay. So far as the statute of limitations is concerned a cause of action had accrued."[40] The court in *Atlantic National Bank of West Palm Beach v. Havens*[41] also treated a cashier's check as a draft but held that the statute of limitations had begun to run from the date of issue.[42]

As yet there have been no cases in this area decided under UCC § § 3-122 and 3-118(a) of the Code. The cases above and *Allison* were decided under the UNIL. The UNIL did contain a provision almost identical to UCC § 3-118(a) and there is no reason to assume that under the Code cashier's checks would be regarded differently.[43] Thus, if a holder treats the check as a draft, liability will still run from the date of issue.

CONCLUSION

In the commercial world a cashier's check is used for a variety of purposes.[44] Often the purchaser does not have a checking account at the bank and needs a readily negotiable instrument. The purchaser may wish to assure a creditor of his good faith and thus he relies on the cashier's check of the bank to help accomplish this goal. Cashier's checks are often used in out-of-town and out-of-state transactions when the creditor is almost certain to accept an instrument drawn from the funds of a national bank.

The Code reflects these general purposes of a cashier's check. The bank is held to be primarily liable on cashier's checks and cannot normally countermand their payment. The Bank becomes the maker of a "note" in which it promises to pay the holder on demand. This comment has shown that the liability of the bank runs from the date of issue of a cashier's check just as in the case of a demand note. The

39. 227 Iowa at 1245, 281 N.W. at 720 (1938).

40. *Id.;* the special rule concerning accrual of a cause of action on certificates of deposit found in UCC § 3-122(2) was also taken from this court's ruling on that instrument.

41. 45 So.2d 342 (Fla. 1950).

42. A cashier's check was issued to a Mr. Havens who died soon thereafter. Afterwards his widow, as administratrix, could not find the check but demanded payment or stop payment on the outstanding check and reissue of a duplicate to her. The bank refused. The supreme court held that the bank should pay the cashier's check upon the administratrix agreeing to furnish an indemnity bond during the period of a five year statute of limitations. The court cited *Dean* and held the statute ran from the day of issuance.

43. Uniform Negotiable Instruments Law § 17(5).

44. A survey was made of the Albuquerque banks, including the First National Bank in Albuquerque, Albuquerque National Bank, and Bank of New Mexico. The purposes mentioned are standard practices throughout the national banking and business community.

cashier's check becomes a short-term highly negotiable instrument under the Code and the evidence suggests that this status reflects its normal use in the commercial world.[45] The court in *Allison* thus was correct.

JAMES JAY MASON

45. It might seem unjust that *Allison* is decided on the basis of a statute of limitations. However, the major policy consideration is whether the bank should be liable on cashier's checks not presented within six years. This appears to be a reasonable limitation on a short-term instrument. A bank could have great difficulty confirming the authenticity of a cashier's check presented after such a long time. *See* Appellant's Brief-in-Chief at 11-15, *Allison v. First National Bank in Albuquerque*, 85 N.M. 283, 511 P.2d 769 (Ct. App. 1973). Moreover, unjust enrichment of the bank is prevented by escheat statutes in most states. N.M. Stat. Ann. § 22-2-3 (Supp. 1970). Customers of the bank, however, should probably be informed by the bank at the purchase of the check that a cause of action accrues from the date of issue.