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Travelers Checks

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All section references are to the Uniform Commercial Code ("UCC").

A. Travelers Checks Defined

1. Courts have variously described travelers checks as certificates of deposit, negotiable instruments, securities, cash, and cashier's checks.
2. The most persuasive analysis seems to treat travelers checks as cashier's checks on which the issuer is both the drawer and the drawee, the purchaser — once he has countersigned — is the payee, and both the purchaser and the next recipient are indorsers.
 - a. For an excellent general analysis of travelers checks, see Hawkland, *American Travelers Checks*, 84 *BANKING L.J.* 377 (1967).

B. Counterfeiting and Alteration of Travelers Checks

1. In general under the UCC, no party is liable on an instrument unless his signature appears on it. §3-404(1).
 - a. Thus, the American Express Company would not be liable on a counterfeit check that appeared to be an American Express Travelers check.

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READER'S
ANNOTATIONS

2. The issuer of an instrument subsequently altered would be liable to a holder in due course according to the original tenor of the instrument. §3-407(3).

C. Travelers Checks Stolen from the Issuer or Selling Agent

1. One receiving a stolen instrument that had been completed could be a holder in due course and would have rights against the issuer in these circumstances. See §3-115; cf. *First National City Bank v. American Broadcasting Co.*, 68 Misc. 2d 861, 328 N.Y.S.2d 326 (Sup. Ct. 1971).
2. The issuer is also liable if travelers checks are stolen from the selling agent.
 - a. The UCC has adopted the position of *American Express Co. v. Anadarko Bank & Trust Co.*, 67 P.2d 55 (Okla. 1937), that the issuer is liable at least to a holder in due course. The UCC effects this position by allowing completion under sections 3-115 and 3-407(3). *Accord Ashford v. Thos. Cook & Son, Ltd.*, 471 P.2d 530 (Hawaii 1970).
 - b. Of course the person presenting the check may not be a holder in due course if the check exhibited irregularities when it was presented to that person. See *Venable v. American Express Co.*, 217 N.C. 548, 8 S.E.2d 804 (1940) (if the instrument was not countersigned at the time it was presented to the claimant, the claimant cannot recover); *Gray v. American Express Co.*, 34 N.C. App. 714, 239 S.E.2d 621 (1977) (payee who neglected to fill in his own name could not collect, when the payee apparently saw his customer, the thief, fill in both the signature and countersignature).
3. The issuer can shift the loss to the selling agent by agreement.
 - a. Some of these agreements are in the form of "trust receipts" and specify that the selling agent is liable for any loss or theft of the instruments. One of these agreements proved effective for the issuer in *Mellon National Bank v. Citizens Bank and Trust Co.*, 88 F.2d 128 (8th Cir. 1937).

b. Other documents treat the selling agent merely as a bailee subject to the normal rules concerning negligence in the bailment. In these cases, mere loss without a showing of negligence in the maintenance of the blank checks probably will not result in liability.

i. For a case in which the selling agent apparently would be liable because of its negligent maintenance of the blank instruments, see *First National City Bank v. American Broadcasting Co.*, 68 Misc. 2d 861, 328 N.Y.S.2d 326 (Sup. Ct. 1971) (agent kept the checks in an unlocked drawer for more than a year and did nothing more than inventory them on a periodic basis). See also *First National City Bank v. Frederics-Helton Travel Service, Inc.*, 209 N.Y.S.2d 704 (Sup. Ct. 1961).

D. Travelers Checks Lost by, or Stolen from, the Purchaser

1. When the purchaser has neither signed nor countersigned the lost or stolen checks, as a matter of practice the issuer will pay the instrument and has an obligation to pay them at least to holders in due course. See §§3-115, 3-407(3).

a. In this case, the person presenting for payment normally will be a holder in due course of the completed instrument and thus take free of any claim of theft.

b. Under Professor Hawkland's analysis, the instrument is a bearer instrument and the liability of the issuer will be discharged by payment to one who presents it in good faith. See §3-603.

i. Whether the issuer's replacement of the checks to the owner would be a matter of grace is unclear. Absent an established practice to make replacements in those circumstances, there is no legal obligation to do so. Both the discharge provision of section 3-603 and the typical contractual arrangements between the issuer and the purchaser, under which the purchaser agrees to sign and is warned about immediate signing prior to taking the check, ought to place the liability on the purchaser, not on the issuer.

2. If the checks have both been signed and countersigned by the purchaser at the time of the theft or loss, the issuer will pay on good faith presentment as a matter of practice.
 - a. Under Professor Hawkland's analysis, the issuer would have to do so if, when the check had been signed and countersigned and no name had been put on the payee line, the instrument was a bearer instrument and anyone who took it in good faith could, and often would, be a holder in due course entitled to payment.
 - b. The issuer will discharge the obligation upon payment to the one presenting it in good faith. *See Emerson v. American Express Co.*, 90 A.2d 236 (D.C. 1952) (issuer should pay a presenting holder in due course and would thus discharge its liability to its purchaser).

3. When travelers checks are lost by, or stolen from, the purchaser after they have been signed but not countersigned, the Hawkland analysis would consider them order paper. The issuer would have no liability to pay the presenter, and, having paid the check in good faith, the issuer could recover its payment under section 4-207 for breach of the warranties of good title.
 - a. The practice of the issuer is to pay the instruments. This practice is so widespread that Professor Hawkland suggests that a trade practice has developed that might impose liability on the issuer.
 - b. This payment does not discharge the liability of the issuer, for the payment has been made, not to a holder, but to one who took from a nonholder and is himself not a holder. Thus, the issuer would be liable to the owner of the instrument under section 3-419 and would possibly be liable as a drawer as well. *See Sullivan v. Knauth*, 161 A.D. 148, 146 N.Y.S. 583 (1914), *aff'd*, 220 N.Y. 216, 115 N.E. 460 (1917).
 - c. The issuer is liable to the owner even when the owner has been duped by a scheme to give up the travelers checks to

his defrauding cohort. *Fischer v. Citicorp Services, Inc.*, 107 Misc. 2d 307, 433 N.Y.S.2d 966 (Sup. Ct. 1980).

- d. Consider also the implications of the statement in cases such as *American Express Co. v. Anadarko Bank & Trust Co.*, 67 P.2d 55 (Okla. 1937), and *Ashford v. Thos. Cook & Son, Ltd.*, 471 P.2d 530 (Hawaii 1970), that travelers checks should be treated as "cash." Taken out of context, this might be read to mean that the issuer could pay anyone presenting the instrument and would have no liability to the owner from whom it was stolen. That result seems unlikely in view of the implicit and explicit promises of protection — "these are better than cash" — made to insure the sale of travelers checks.

- i. *Query*: To what extent should an issuer be bound by the practice of paying on an instrument when it would have no legal liability, for example, instruments bearing forged indorsements, when the issuer could give a refund to the true owner and then pursue the liability to the party who took it from the thief?

E. Conclusion

1. The best analysis is to treat travelers checks originally as cashiers checks issued in blank, the purchaser as the payee, and the issuer as both the drawer and the drawee.
 - a. The first signature by the purchaser converts the instrument to an order instrument payable to the order of the purchaser.
 - b. The purchaser's second signature converts it to a bearer instrument, and the filling in of the payee line again converts the check to an order instrument payable to the order of the merchant who will first take the instrument.
2. The analysis described above will produce the proper outcome in all cases except when the issuers routinely pay instruments bearing forged indorsements.

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