

1986

Johnny Haig v. Orrice McShane : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOHNNY HAIG,

Plaintiff/Respondent,

vs.

ORRICE McSHANE,

Defendant/Appellant.

CASE NO. 860265

ORRICE McSHANE,

Third Party Plaintiff,

vs.

RONALD DAVEY,

Third Party Defendant.

RESPONDENT'S BRIEF

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OCT 16 1986

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Plaintiff/Respondent,)	
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vs.)	
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ORRICE McSHANE,)	
)	CASE NO. 860265
Defendant/Appellant.)	
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STATEMENT OF FACTS

The Appellant, McShane, signed a check in the amount of \$11,763.49, which was given to the Respondent, Haig, for services rendered to the Jay Welch Chorale (R16-18). The check was deposited and returned unpaid (R18). Haig brought the action below pursuant to Utah Code Annotated 7-15-1 et seq. (1953, as amended 1981) (hereafter the Utah Bad Check Statute) (R2-7). McShane answered that he had signed the check, but asserted affirmative defenses (R15-19). Haig filed a Motion for Summary Judgment, alleging that McShane's Answer, having admitted signing the check, raised no issue of material fact (R24-31). The trial court agreed with Haig (R62-63).

SUMMARY OF ARGUMENT

The Utah Bad Check Statute is a strict liability statute. Some defenses are available to persons signing checks which are returned unpaid, but no such defense was raised by McShane. The defenses which were raised are those which were allowed in old cases interpreting a repealed statute.

McShane's argument of unconstitutionality is without merit because 1) he failed to raise it in the trial court, and 2) he was denied no constitutional right.

McShane must pay Haig's attorney's fees below and in

this Court.

ARGUMENT

I.

HOWELLS, INC. V. NELSON DOES NOT CONTROL.

McShane relied in the lower court and relies in this Court on Howells, Inc. v. Nelson, 565 P.2d 1147 (Utah, 1977) as controlling. Howells was decided prior to the enactment of the current Utah Bad Check Statute. The old law was repealed and the current law enacted in 1981. A copy of the repealed statute is contained in the Addendum to this Brief. The statute which Howells interpreted was a fraud statute. That statute invoked liability upon "any person who willfully, with intent to defraud, makes ... any check" Howells turned upon the absence of required elements of fraud. The court determined,

... the Plaintiff was not induced to give anything of value, nor was it in any way cheated or adversely effected by the giving of the check. Id. at 1149.

Inducement is an element of Common Law Fraud in Utah. See Pace v. Parrish, 122 Utah 141 247 P.2d 273 (1952).

The court further held that because the plaintiff in Howells had specifically agreed to take a post-dated check, the instrument did not come within the definition of a check. It was therefore not covered by the then existing fraudulent check statute.

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463 P. 110-
507 P. 849
212 NW 21 656

29 APR 21 11:11
52 APR 31 46
16 APR 4 631

1970 U.L.R. 122

The 1981 version of the Utah Bad Check Statute expanded the class of documents covered. The old statute covered checks, drafts and orders. The new statute added "other instrument[s]." An instrument may be subject to collateral agreements; see Utah Code Annotated 70A-3-119 (1953, as amended 1965).

The 1981 Utah Bad Check Statute is, by its terms, not limited to checks, nor does it require fraud to invoke liability. It covers checks, drafts, orders or other instruments drawn upon depository institutions, and invokes liability when that instrument is not honored upon presentment and is marked "Refer to Maker." There is no requirement for fraud. The Statute is a strict liability statute.

This Statute is the subject of the article found at 12 Utah Bar Journal, Fall-Winter 1984, page 63. The author of that article also concludes that the Statute is a strict liability statute.

The original bad check law contained in Utah Code Annotated §7-15 (1953) presumed an intent to defraud when a check was dishonored. The presumption of fraud could be overcome by showing that the check was intended to clear. In 1979, the section was amended. The new section removed the issue of fraud, and placed absolute liability on the issuer of a dishonored check as well as the signing agent. Id. at 66. (emphasis added)

The article in the Utah Bar Journal discusses the Bad

Check Statute in light of provisions of the Uniform Commercial Code which would otherwise control (Utah Code Annotated 70A-3-403 (1953, as amended 1965)). It concludes that the Utah Bad Check Statute should be amended. It does not conclude that this amendment should be by judicial fiat. If the Statute is to be amended, the appropriate method of amendment would be by the Legislature, who created it in the first place.

The clear public policy behind the current Utah Bad Check Statute is to transfer the burden for bad corporate checks from the holder of the check to the person who issued the check, regardless of his status as a corporate officer or otherwise. Had the Legislature wished to allow the defenses available under the previous Utah Bad Check Statute or under the Uniform Commercial Code, it could easily have done so. The Legislature obviously did not wish to allow these defenses because of the broad scope of documents which are made subject to the Statute, and because of the simple manner in which liability is invoked.

The Utah Bad Check Statute is a strict liability statute which was drafted by the Legislature for an obvious business purpose, and which should not be amended, nor defeated, by this Court.

II.

APPELLANT MAY NOT RAISE HIS CLAIM OF UNCONSTITUTIONALITY FOR THE FIRST TIME ON APPEAL.

McShane argues at length in his Brief that the Utah Bad Check Statute is unconstitutional in that it denies him procedural and substantive due process. The very brief record in this case indicates that at no time was this issue raised as a defense to Haig's Motion for Summary Judgment before the lower court.

Issues not presented to the trial court for decision are not reviewable by this Court
Trayner v. Cushing, 688 P.2d 856, 857 (Utah, 1984).

The fact that the issue being raised for the first time on appeal is a constitutional issue does not necessarily vitiate this rule of review.

Issues not raised at trial cannot be raised on appeal. This general rule applies equally to constitutional issues, with the limited exception of where a person's liberty is at stake. Pratt v. City Council of City of Riverton, 639 P.2d 172, 173-174 (Utah, 1981).

The provision of the Utah Constitution McShane relies upon is Article 1 Section 7 which provides,

No person shall be deprived of life, liberty or property, without due process of law.

Despite the fact that McShane refers, in his Brief, to his loss as a loss of liberty, it is clear that the Judgment subjects him to a loss of property. Even if the Utah Bad

Check Statute were unconstitutional, arguendo, he may not raise that issue at this late date.

III.

THE UTAH BAD CHECK STATUTE IS NOT
UNCONSTITUTIONAL.

Without waiving his primary defense to McShane's constitutionality argument shown in the preceeding section, Haig specifically shows that the Utah Bad Check Statute is not unconstitutional.

Article 1 Section 7 of the Utah Constitution provides,

No person shall be deprived of life, liberty or property, without due process of law.

The operative language of this Section of the Utah Constitution is identical to the operative language of Section 1 of the Fourteenth Amendment of the Constitution of the United States. Cases interpreting the Fourteenth Amendment should therefore be instructive of this language.

In Parratt v. Taylor, 451 U.S. 527, 68 L.Ed. 2d 420, 101 S.Ct. 1908 (1981), the Supreme Court discussed the due process provisions of the Fourteenth Amendment.

Nothing in that Amendment protects against all deprivations of life, liberty or property by the State. The Fourteenth Amendment protects only against deprivations "without due process of law." Id. at 68 L.Ed. 2d 430.

In Parratt, the Supreme Court reviewed many of its due process decisions for the twenty-one years preceding the decision.

In some cases, this Court has held that due process requires a pre-deprivation hearing before the State interferes with any liberty or property interest enjoyed by its citizens. In most of these cases, however, the deprivation of property was pursuant to some established State procedure and "process" could be offered before any actual deprivation took place. Id.

The gravamen of all of these cases was that a hearing was required.

In all these cases, deprivations of property were authorized by an established State procedure and due process was held to require predeprivation notice and hearing in order to serve as a check on the possibility that a wrongful deprivation would occur. Id.

All that is required is a hearing. Article 1 Section 7 of the Utah Constitution was previously so interpreted; see Jensen v. Union Pacific Railway Company, 6 Utah 253, 21 Pacific 994 (1889). McShane had his hearing at the time the court awarded summary judgment.

McShane confuses due process with a supposed right to present defenses which the Statute has removed. McShane had his day in court. He had the opportunity to establish any defenses which remain, following the Legislature's implementation of strict liability in this matter. He could have presented numerous defenses which would have

not been removed by the new Statute, had those defenses been factually available to him. Had he alleged and shown by affidavit that he did not sign the check or that he signed the check under duress, those defenses would certainly have avoided summary judgment. No such defenses were factually available. The Legislature's removal of defenses which existed prior to the repealing of the former Statute does not rise to level of unconstitutionality.

IV.

THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WAS NOT OPPOSED BY A PROPER AFFIDAVIT.

Rule 56(c), Utah Rules of Civil Procedure, requires,

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

McShane refers, both in his Brief in this Court and in his Memorandum in the lower court, to a conversation supposedly had between Haig and the Third-Party Defendant, Ronald Davey, whereby Haig acknowledged that there was no money in the account or that the check would be held for an unspecified period of time before being negotiated. The record is notably devoid of any affidavit from any person testifying to this alleged conversation. Rule

56(e), Utah Rules of Civil Procedure, provides,

When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial.

Even if the alleged conversation between Haig and Davey had taken place and was material, McShane's failure to properly present it through affidavits in the lower court makes the summary judgment in the lower court well-taken.

Parenthetically, Haig notes that such an affidavit should not have avoided summary judgment because of the arguments made in section one of this Brief.

V.

HAIG IS ENTITLED TO ATTORNEY'S FEES IN THE LOWER COURT, AS WELL AS ON APPEAL.

The lower court granted summary judgment on Haig's Bad Check claim, pursuant to Utah Code Annotated 7-15-1 (1953, as amended 1981). Utah Code Annotated 7-15-1(3) (1953, as amended 1981) provides for the payment of attorney's fees by persons in McShane's position. Fees were properly awarded below.

Similarly, because of the statute authorizing attorney's fees to Haig, he is entitled to recover those attorney's fees reasonably expended in defending this appeal; see Christensen v. Abbott, 671 P.2d 121 (Utah,

1983).

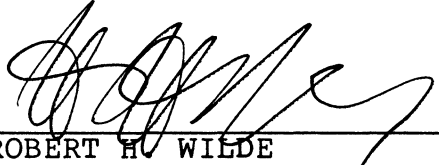
CONCLUSION

The decision of the lower court was legally correct,
and the appeal should be dismissed.

DATED this 16th day of October, 1986.

Respectfully submitted,

COOK & WILDE, P.C.



ROBERT H. WILDE
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of October,
1986, four (4) true and correct copies of the foregoing
RESPONDENT'S BRIEF were deposited in the United States
Mail, postage prepaid, addressed to the following:

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University Club Building
Salt Lake City, Utah 84111



Catherine Peterson

ADDENDUM 1

FRAUDULENT CHECKS

7-15-1

7-14-3. Immunity from liability.—Any commercial, national, or state bank making any report or communication of information authorized by this act shall not be liable to any person for disclosing such information to any recipient authorized under the provisions of this act, or for any error or omission in such report or communication.

History: L. 1967, ch. 15, § 3.

7-14-4. Reciprocal exchange of information authorized.—One or more commercial, national, or state banks may jointly agree with one or more other banks or other financial institutions for the reciprocal exchange of any information authorized to be reported by the provisions of this act. Such reciprocal exchange of information or the acts or refusals to act of one or more recipients because of such information shall not constitute a boycott or blacklist, or otherwise be a basis for liability to any person on the part of any participant in the reciprocal exchange of information authorized by this act.

History: L. 1967, ch. 15, § 4.

7-14-5. “Financial institution” and “credit reporting agency” defined.—As used in this act:

(1) the term “financial institution” means any institution subject to the supervision of the state banking department;

(2) the term “credit reporting agency” shall include any co-operative credit reporting agency maintained by an association of financial institutions or one or more associations of merchants.

History: L. 1967, ch. 15, § 5.

CHAPTER 15

FRAUDULENT CHECKS

Section 7-15-1. Drawing or issuing against nonexistent account or insufficient funds—Intent to defraud—Civil liability—Damages.

7-15-2. Civil action—Evidence of intent.

7-15-3. Notice of nonpayment or dishonor—When presumed.

7-15-1. Drawing or issuing against nonexistent account or insufficient funds—Intent to defraud—Civil liability—Damages.—(1) Any person who willfully, with intent to defraud makes, draws or issues any check, draft or order upon any bank, banking association or other depository for the purpose of obtaining from any person, firm, partnership or corporation any money, merchandise, property or other thing of value or paying for any services, wages, salary or rent, which check, draft or order is not honored upon presentment because the maker, drawer or issuer does not have the account with the depository upon which the check, draft or order has been made or drawn, or does not have sufficient funds in such account or sufficient credit with such depository for payment of the check, draft or order in full, shall be liable to the holder of the check, draft or order in a civil action as provided in this section.

(2) In such civil action the person making, drawing or issuing the check, draft or order shall be liable to the holder of it for the amount thereon, for interest and all costs of collection, including all court costs and reasonable attorney's fees.

History: L. 1969, ch. 240, § 1.

Title of Act.

An act relating to checks, drafts or orders issued against nonexistent account or insufficient funds; providing for civil liability to the holder and for damages in actions based on this liability; and providing for presumptions regarding willfulness and intent and for notice.

Cross-Reference.

Change of name of state banking department and bank commissioner to department of financial institutions and commissioner of financial institutions, 7-1-1.1, 7-1-1.2.

Collateral References.

Overdrafts, 10 Am. Jur. 2d 625, Banks § 655.

Postdated checks, construction and effect of "bad check" statute with respect to, 29 A. L. R. 2d 1181.

Pre-existing debt, construction and effect of "bad check" statute with respect to check in payment of, 59 A. L. R. 2d 1159.

Law Review.

Criminal and Civil Liability for Bad Checks in Utah, 1970 Utah L. Rev. 122.

7-15-2. Civil action—Evidence of intent.—In any such civil action any of the following shall be prima facie evidence that the person making, drawing or issuing the check, draft or order did so willfully with an intention to defraud:

(1) Proof that at the time of issuance, the maker, drawer or issuer did not have the account with the depository upon which the check, draft or order was made or drawn or did not have sufficient funds in his account or credit with the depository for payment in full of the check, draft or order, and that he failed within ten days after receiving notice of nonpayment or dishonor to pay the check, draft or order; or

(2) Proof that when presentment was made within a reasonable time, the maker, drawer or issuer did not have the account with the depository upon which the check, draft or order was drawn or made or did not have sufficient funds in such account or credit with such depository for payment in full of the check, draft or order, and that he failed within ten days after receiving notice of nonpayment or dishonor to pay the check, draft or order.

History: L. 1969, ch. 240, § 2.

7-15-3. Notice of nonpayment or dishonor—When presumed.—"Notice" as used in this act means notice given to the maker, drawer or issuer of the check, draft or order, either in person or in writing. Such notice in writing shall be conclusively presumed to have been given when properly deposited in the United States mails, postage prepaid, by certified or registered mail, return receipt requested, and addressed to such maker, drawer or issuer at his address as it appears on the check, draft or order or at his last-known address.

History: L. 1969, ch. 240, § 3.



Liability of Agents on Corporate Checks: The Conflicting Coverage of the Uniform Commercial Code and the Bad-Check Remedy Statute

By Eric G. Jorgenson

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Corporations conduct many business transactions requiring the use of negotiable instruments. These instruments must be signed on the corporation's behalf by an authorized agent. In most transactions involving a corporate check, the parties intend that only the corporation be bound by the instrument. Nevertheless, when a corporate check is dishonored a question of liability arises. Who should be held liable — the corporation, the agent, or both? Two Utah statutes address this question: UTAH CODE ANN. §70A-3-403 (1965) (the Uniform Commercial Code) and UTAH CODE ANN. §7-15-1 (1981) (the Bad-Check Remedy Statute). This article will discuss the operation and effect of these statutes and reveal the greater burden of liability placed on corporate agents¹ by the Bad-Check Remedy Statute regardless of the agent's satisfaction of the Uniform Commercial Code

requirements which free the agent from personal liability.

I. The Uniform Commercial Code

Article Three of the Uniform Commercial Code establishes a set of rules to determine the liability of signers of corporate instruments. The general rule for liability on a negotiable instrument is that "[n]o person is liable on an instrument unless his signature appears thereon."²

The general rule regarding agent liability on commercial paper is that an agent is not liable if the principal's name and the agency relationship appear on the instrument. RESTATEMENT (SECOND) OF AGENCY §342(2) on "Negotiable Instruments" provides:

An agent is not liable as a party to a negotiable instrument on which the name of the principal appears as if it is interpreted as being executed by the agent only on behalf of such principal and if the agent has power to bind the principal.

¹Although the scope of this article specifically deals with the agency relationship in the corporate setting, Article Three of the Uniform Commercial Code and the principles set forth in this article are applicable to any agency relationship.

²UTAH CODE ANN. §70A-3-401(1) (1965).

This rule was adopted by UTAH CODE ANN. §70A-3-403 (1965)³ (hereinafter "70A-3-403"). Thus, on a dishonored corporate check the corporation is liable while the authorized agent avoids personal liability provided the following 70A-3-403 requirements are met: (1) the agent names the corporation on the instrument and (2) the agent demonstrates his agency relationship. The remainder of the discussion of 70A-3-403 will deal with the personal liability of corporate agents.

The corporate agent who signs a corporate check without naming the corporation or disclosing his agency relationship will be personally liable on the instrument and is precluded from introducing parol evidence to deny liability. 70A-3-403(2)(a) provides:

An authorized representative who signs his own name to an instrument (a) is personally obligated if the instrument neither names the person represented nor shows that the representative signed in a representative capacity.

³UTAH CODE ANN. §70A-3-403 (1965) provides:

(1) A signature may be made by an agent or other representative, and his authority to make it may be established as in other cases of representation. No particular form of appointment is necessary to establish such authority.

(2) An authorized representative who signs his own name to an instrument

(a) is personally obligated if the instrument neither names the person represented nor shows that the representative signed in a representative capacity;

(b) except as otherwise established between the immediate parties, is personally obligated if the instrument names the person represented but does not show that the representative signed in a representative capacity, or if the instrument does not name the person represented but does show that the representative signed in a representative capacity.

(3) Except as otherwise established the name of an organization preceded or followed by the name and office of an authorized individual is a signature made in a representative capacity.

In the Utah case of *Sterling Press v. Pettit*,⁴ a printing firm sued two corporate officers of a magazine publishing business. The plaintiff received a check for services rendered to the business drawn on the corporate account and signed by the defendants. The defendants failed to designate their agency relationship on the check. The check was dishonored and returned to the plaintiff marked return to maker. The defendants argued that they should not be personally liable because the plaintiff should have known he was dealing with a corporation. This argument was based on two grounds: first, the initial checks in payment for the printing were drawn on a corporate account; and second, further investigation by the plaintiff into mailing permits and bank accounts would have shown that a corporation stood behind the magazine. The Utah Supreme Court rejected these arguments and stated that "70A-3-403 requires that an agent or representative must show he actually is representing someone. Where the instrument neither names the entity represented nor shows the representative capacity, the person who signed is personally obligated."⁵

U.C.C. §3-403 problems most frequently involve instruments which name the corporate entity but fail to disclose the agency relationship.⁶ 70A-3-403(2)(b), which applies to this situation, provides:

(2) An authorized representative who signs his own name to an instrument. . .

⁴580 P.2d 599 (Utah 1978).

⁵*Id.* at 600.

⁶Holland, *Corporate Officers Beware — Your Signature on a Negotiable Instrument May Be Hazardous to Your Economic Health*, 13 IND. L. REV. 893, 904 (1980).

(b) except as otherwise established between the immediate parties, is personally obligated if the instrument names the person represented but does not show that the representative signed in a representative capacity, or if the instrument does not name the person represented but does show that the representative signed in a representative capacity.

The characterization of the holder of the instrument is critical to the determination of the agent's liability. If the holder is an immediate party to the instrument (the payee of the check), the agent and the corporation may introduce parol evidence to demonstrate that the agent was not intended to be held liable. If the holder of the instrument is a third party transferee, parol evidence is not permitted and the agent will be personally liable on the instrument.

In *Highfield v. Lang*,⁷ the plaintiff, an employee of Orbit Postal Systems, brought action against Orbit's vice-president who had signed the plaintiff's dishonored payroll check. The corporate name appeared on the check but the defendant failed to designate her representative capacity. Since the plaintiff was the payee of the check, the court allowed the defendant to produce parol evidence indicating that the plaintiff knew he was being paid by the corporation and the defendant was acting merely as an agent. Consequently, the court held that the defendant was not personally liable.

When the corporate name is printed on the check but the signature on the instrument does not specifically include the corporate name or show the agency relationship, there is some dispute as to

whether U.C.C. §3-403(2)(a) or U.C.C. §3-403(2)(b) applies. In *American Exchange Bank v. Cessna*,⁸ the Oklahoma Federal District Court applied U.C.C. §3-403(2)(b). The defendant signed the corporate check without indicating his representative capacity, but the name of the corporation appeared in the left-hand corner along with a corporate address and telephone number. Since the plaintiff was a third party transferee, the defendant was not allowed to introduce parol evidence to show his agency relationship. Thus, the court held for the plaintiff.⁹ In a case with a similar fact pattern,¹⁰ the Georgia Supreme Court applied U.C.C. §3-403(2)(a) and found the corporate agent liable.¹¹

70A-3-403(2)(b) also applies to the situation where the agent clearly demonstrates his agency relationship but fails to name the corporation.¹² Thus, the agent will be precluded from using parol evidence and will be personally obligated to pay the dishonored corporate check if the holder of the check is a third party transferee. The agent may

⁸386 F. Supp. 494 (N.D. Okl. 1974).

⁹See also, *Pollin v. Mindy Mfg. Co.*, 211 Pa. Super. 87, 236 A.2d 542 (1967). The court held that defendant's signature was in a representative capacity where no capacity was specifically designated, but the check was designated a payroll check and the corporation's name appeared at top and in maker's position, above lines for manual signature.

¹⁰*Southern Oxygen Supply Co. v. Golan*, 230 Ga. 405, 197 S.E. 2d 374 (1973).

¹¹See also, *Griffin v. Ellinger*, 538 S.W.2d 97 (Tex. 1976).

¹²See Holland, *Corporate Officers Beware — Your Signature on a Negotiable Instrument May be Hazardous to Your Economic Health*, 13 IND. L. REV. 893, 904 n. 55 (1980), where Mr. Holland states that "[r]esearch has revealed two cases which the representative capacity but not the corporate identity was shown." The two cases are: *Giaccalone v. Bernstein*, 348 So.2d 679 (Fla. Dist. Ct. App. 1977) and *National Bank of Georgia v. Ament*, 127 Ga. App. 838, 195 S.E.2d 202 (1973).

⁷394 N.E.2d 204 (Ind. App. 1979).

introduce parol evidence only if the holder is the payee of the check.

Where the name of the corporation is preceded or followed by the authorized signature which shows the agency relationship, the corporation is usually the only entity bound by the instrument. 70A-3-403(3) provides:

Except as otherwise established the name of an organization preceded or followed by the name and office of an authorized individual is a signature made in a representative capacity.

The exception under 70A-3-403(3) to the general rule of corporate liability allows the holder of a dishonored instrument to use parol evidence to establish the agent's personal liability by demonstrating that the intent of the parties was to bind both the agent and the corporation.¹³ Nevertheless, courts generally have denied the use of parol evidence if the instrument is unambiguous.¹⁴

In summary, under the Uniform Commercial Code, an authorized agent who signs a corporate check will not be personally liable if he (1) names his principal and (2) demonstrates his agency relationship. If the signer completes only one of the requirements, he will be personally liable unless the holder of the instrument is the original payee and the signer can produce parol evidence which shows that the intent of the parties was to bind only the corporation. Thus, 70A-3-403 gives the corporate agent the mechanism to insulate himself from personal liability on a dishonored negotiable instrument.

II. The Bad-Check Remedy Statute and its Impact on the Uniform Commercial Code

The original bad check law contained in UTAH CODE ANN. §7-15 (1953) presumed an intent to defraud when a check was dishonored. The presumption of fraud could be overcome by showing that the check was intended to clear. In 1979 the section was amended.¹⁵ The new section removed the issue of fraud and placed absolute liability on the issuer of a dishonored check as well as the signing agent. The 1981 amendment¹⁶ of UTAH CODE ANN. §7-15-1 (1981)¹⁷ (hereinafter "7-15-1") is very similar to the 1979 version. 7-15-1(1) provides:

Any person who makes, draws, signs or issues any check, draft, order, or other instrument upon any depository institution, whether as corporate agent or otherwise, for the purpose of obtaining from any person, firm, partnership or corporation any money, merchandise, property or other thing of value or paying for any service,

¹⁵1979 Utah Laws ch. 92 §1.

¹⁶1981 Utah Laws ch. 16 §1.

¹⁷UTAH CODE ANN. §7-15-1 (1981) provides:

(1) Any person who makes, draws, signs or issues any check, draft, order, or other instrument upon any depository institution, whether as corporate agent or otherwise, for the purpose of obtaining from any person, firm, partnership or corporation any money, merchandise, property or other thing of value or paying for any service, wages, salary or rent, which check, draft, order, or other instrument is not honored upon presentment and is marked "refer to maker" or the account with the depository upon which the check, draft, order, or other instrument has been made or drawn, does not exist, has been closed or does not have sufficient funds or sufficient credit with such depository for payment of the check, draft, or other instrument in full, shall be liable to the holder thereof.

(2) The holder of the check, draft, order, or other instrument which has been dishonored may give

¹³See, e.g., *Trenton Trust Co. v. Klausman*, 222 Pa. Super. 400, 296 A.2d 275 (1972).

¹⁴See *Phoenix Air Conditioning Co. v. Pound*, 123 Ga. App. 523, 181 S.E.2d 719 (1971).

wages, salary or rent, which check, draft, order, or other instrument is not honored upon presentment and is marked "refer to maker" or the account with the depository upon which the check, draft, order, or other instrument has been made or drawn, does not exist, has been closed or does not have sufficient funds or sufficient credit with such depository for payment of the check, draft, or other instrument in full, *shall be liable to the holder thereof.* (Emphasis added).

The purpose of 7-15-1 is to protect the holder of a dishonored check. It imposes personal liability on any person who signs a dishonored check, including the authorized agent who properly signs a corporate check by naming the corporation represented and disclosing the agency relationship. In the case of a corporate check, the holder may seek recovery from both the corporation and the agent who signed the instrument.

Prior to filing an action to collect on an instrument, the holder is required to give "written notice of intent to file civil ac-

written or verbal notice thereof to the person making, drawing, signing, or issuing the check, draft, order, or other instrument and may impose a service charge not to exceed \$5 in addition to any contractual agreement between the parties. Prior to filing an action based upon this section, the holder of a dishonored check, draft, order, or other instrument shall give the person making, drawing, signing, or issuing the dishonored check, draft, order, or other instrument written notice of intent to file civil action, allowing the person seven days from the date on which the notice was mailed to tender payment in full, plus a service charge is imposed for the dishonored check, draft, order, or other instrument.

(3) In a civil action the person making, drawing, signing or issuing the check, draft, order, or other instrument shall be liable to the holder of it for the amount thereon, for interest and all costs of collection, including all court costs and reasonable attorney's fees.

tion, allowing the person seven days . . . to tender payment in full."¹⁸ This gives the drawer the opportunity to pay the dishonored check before costly litigation is commenced.

The scope and purposes of 70A-3-403 (Uniform Commercial Code) and 7-15-1 (Bad-Check Remedy Statute) are distinct; 70A-3-403, when properly followed, insulates the authorized agent from personal liability on a dishonored corporate instrument, while 7-15-1 protects the holder of a dishonored check. Yet, the two statutes overlap because 7-15-1 imposes absolute personal liability on any person who signs a dishonored check, including the corporate agent who complies with the 70A-3-403 non-liability requirements of naming the principal and demonstrating the agency relationship.

The burden of collecting a dishonored corporate check is shifted by 7-15-1 from the holder to the signing agent. The agent is not a party to the business transaction; his role is to sign the corporate check because the corporation is unable to do so. Thus, the agent receives no direct personal benefit from the transaction. On the other hand, the holder receives a benefit from the business transaction. For example, the holder may be a businessman who extends credit to the corporation for goods sold, a craftsman who performs services for pay, or an employee. The holder who is not an original payee bargains with the payee in an arms length transaction when he accepts the check.¹⁹ Since the agent is not a party to the business

¹⁸UTAH CODE ANN. §7-15-1(2) (1981).

¹⁹Also, 70A-3-403 provides more protection to the holder who is a third party transferee than the holder who is an original payee. An agent may use

transaction and does not receive any direct benefit from the transaction it is inequitable to force the agent to collect the bad check for the holder.

It may be argued that an agent who signs a corporate check is or should be aware of the status of the corporate account when the check is drawn. But courts have refused to impute knowledge of the status of the corporate account to an agent simply because of the agent's position as a corporate officer.²⁰ Even if this knowledge is imputed to the corporate officer, it is debatable whether the same standard of knowledge should be imposed on a salaried clerk, secretary, or other agent who has no control over the corporate account or knowledge of its status.

III. Conclusion

Although 7-15-1 zealously protects holders of dishonored negotiable instru-

ments, it is too broad in its scope because it encroaches upon established principles of commercial and agency law. The burden of collecting a dishonored check is shifted by 7-15-1 from the holder who is a party to the business transaction and receives the benefit of the transaction to the corporate agent who may have little or no control over corporate affairs and receives no personal benefit from the transaction.

The rights of all parties could be more equitably protected if 7-15-1 incorporated the principles of agency liability as set out in 70A-3-403. The statutes could be harmonized by changing 7-15-1 to require a rebuttable presumption of fraud in lieu of imposing absolute liability on the authorized agent who signs a negotiable instrument on behalf of the principal. This will protect the authorized agent who, in the course of his or her duties, is required to sign a negotiable instrument which is subsequently dishonored. The holder will still receive adequate protection because he can look to the corporation and the agent if the agent does not rebut the presumption of fraud or fails to comply with the 70A-3-403 non-liability requirements set out in subsection I of this article. This alternative will equitably balance the interests of the agent and holder.

parol evidence to avoid personal liability on a dishonored negotiable instrument only if (1) he complies with at least one of the non-liability requirements (name the corporation and show the agency relationship) and (2) the holder is the original payee. Thus, an agent will be personally liable on a dishonored negotiable instrument to a third party transferee unless the agent complies completely with 70A-3-403.

²⁰Highfield v. Lang, 394 N.E.2d 204 (Ind. App. 1979).



Grant us grace fearlessly to contend against evil and to make no peace with oppression; and, that we may reverently use our freedom, help us to employ it in the maintenance of justice among men and nations.

— Book of Common Prayer

FILMED

JUDGEMENT

FILED IN CLERK'S OFFICE
Salt Lake County Utah

APR 3 1986

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H. Dixon Hindley, Clerk Salt Lake County
By Kurt Busch
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JOHNNY HAIG,
Plaintiff,

vs.

ORRICE McSHANE,
Defendant.

ORRICE McSHANE,

Third Party Plaintiff,

vs.

RONALD DAVEY,

Third Party Defendant.

ORDER OF
SUMMARY JUDGMENT

BA 205 NO. 3810
4-8-86 - 8:34 a.m.

Civil No. C85-8070

Judge Scott Daniels

This matter came on regularly before the Court on the 21st day of March, 1986 at the hour of 2:00 p.m., the Honorable Scott Daniels presiding. Plaintiff was represented by Robert H. Wilde; Defendant was represented by J. Ray Barrios. The parties had previously submitted memoranda on the issues raised in the Motion before the Court which memoranda had been reviewed by the Court. The Court heard argument from counsel, and, being fully

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advised in the premises, ruled that the statute in consideration, Utah Code Annotated §7-15-1 (1953, as amended) is a strict liability statute, and that even if the Defendant, or another party, had advised the Plaintiff that there were not sufficient funds to allow the check to clear at the time the check was provided to the Plaintiff, the provisions of the statute establish the liability of the Defendant. Court being fully advised in the premises and good cause appearing therefore,

NOW THEREFORE it is hereby ordered that the Plaintiff is awarded summary judgment against the Defendant in the principal amount of \$10,563.49, with interest thereon of \$3,433.13, and attorney's fees of \$770.00.

DATED this 3 day of April, 1986.

ATTEST

H. ENRIQUE MORALES
Clerk

By Karen Bush
Clerk of Court

BY THE COURT:

Scott Daniels
JUDGE SCOTT DANIELS
District Court Judge

MAILED, postage prepaid, a copy of the foregoing Order for Summary Judgment to J. Ray Barrios, Attorney for Defendant, 136 East South Temple, Suite 900, University Club Building, Salt Lake City, Utah 84111 on this 26th day of March, 1986.

Calvin P. Peterson

ADDENDUM 4

7-14-4

FINANCIAL INSTITUTIONS

or credit reporting agency the following: (1) that an account maintained to effect third party payment transactions has been closed out by the institution, the reasons therefor, and the identity of the depositor or account holder; (2) upon the request of another financial institution any other information in the files of the institution relating to the credit experience of the reporting institution with respect to a particular person as to whom inquiry is made; and (3) any information concerning attempted or potential activity to defraud a financial institution or to obtain funds from a financial institution by fraudulent or other unlawful means or other information relating to individuals sought by law enforcement authorities for alleged violations of criminal laws.

History: C. 1953, 7-14-3, enacted by L. 1981, ch. 16, § 12.

7-14-4. Immunity from liability. No depository institution making any report or communication of information authorized by this chapter shall be liable to any person for disclosing such information to any recipient authorized to receive this information under this chapter, or for any error or omission in such report or communication.

History: C. 1953, 7-14-4, enacted by L. 1981, ch. 16, § 12.

7-14-5. Reciprocal exchange of information authorized. One or more financial institutions may jointly agree with one or more other financial institutions for the reciprocal exchange of any information authorized to be reported by the provisions of this chapter. Such reciprocal exchange of information or the acts or refusals to act of one or more recipients because of such information shall not constitute a boycott or blacklist, or otherwise be a basis for liability to any person on the part of any participant in the reciprocal exchange of information authorized by this chapter.

History: C. 1953, 7-14-5, enacted by L. 1981, ch. 16, § 12.

CHAPTER 15

FRAUDULENT CHECKS

Section

7-15-1. Civil liability of issuer — Notice.

7-15-2. Notice form.

7-15-1. Civil liability of issuer — Notice. (1) Any person who makes, draws, signs or issues any check, draft, order, or other instrument upon any depository institution, whether as corporate agent or otherwise, for the purpose of obtaining from any person, firm, partnership or corporation any money, merchandise, property or other thing of value or paying for

any service, wages, salary or rent, which check, draft, order, or other instrument is not honored upon presentment and is marked "refer to maker" or the account with the depository upon which the check, draft, order, or other instrument has been made or drawn, does not exist, has been closed or does not have sufficient funds or sufficient credit with such depository for payment of the check, draft, or other instrument in full, shall be liable to the holder thereof.

(2) The holder of the check, draft, order, or other instrument which has been dishonored may give written or verbal notice thereof to the person making, drawing, signing, or issuing the check, draft, order, or other instrument and may impose a service charge not to exceed \$5 in addition to any contractual agreement between the parties. Prior to filing an action based upon this section, the holder of a dishonored check, draft, order, or other instrument shall give the person making, drawing, signing, or issuing the dishonored check, draft, order, or other instrument written notice of intent to file civil action, allowing the person seven days from the date on which the notice was mailed to tender payment in full, plus a service charge is imposed for the dishonored check, draft, order, or other instrument.

(3) In a civil action the person making, drawing, signing or issuing the check, draft, order, or other instrument shall be liable to the holder of it for the amount thereon, for interest and all costs of collection, including all court costs and reasonable attorney's fees.

History: C. 1953, 7-15-1, enacted by L. 1981, ch. 16, § 13.

Compiler's Notes.

Laws 1981, ch. 16, § 1 repealed old sections 7-15-1, 7-15-3 (L. 1969, ch. 240, §§ 1, 3; 1977, ch. 15, §§ 1, 3; 1979, ch. 92, §§ 1, 2), relating to fraudulent checks. New sections 7-15-1 and 7-15-2 were enacted by § 13 of the act. Former section 7-15-2 was repealed by Laws 1979, ch. 92, § 3.

Cross-References.

Criminal penalties for issuing bad check, 76-6-505.

Collateral References.

10 CJS Bills and Notes §§ 35, 380.

12 AmJur 2d 147, Bills and Notes § 1119.

Necessity of pleading that maker or drawer of check was given notice of its dishonor by bank, 6 ALR 2d 985.

Personal liability of officers or directors of corporation on corporate checks issued against insufficient funds, 47 ALR 3d 1250.

Law Reviews.

Criminal and Civil Liability for Bad Checks in Utah, 1970 Utah L. Rev. 122.

DECISIONS UNDER FORMER LAW

Fraud.

There was no fraudulent issuance of a check, and plaintiff was not entitled to attorney fees in an action on the check, where the check was issued to pay on a past due

account, plaintiff accepted it with knowledge that there were insufficient funds to cover it and agreed to hold it for two weeks before presenting it to the bank. *Howells, Inc. v. Nelson* (1977) 565 P 2d 1147.

7-15-2. Notice form. (1) "Notice" means notice given to the person making, drawing, or issuing the check, draft, order, or other instrument either in person or in writing. Such notice, in writing, shall be conclusively presumed to have been given when properly deposited in the United States mails, postage prepaid, by certified or registered mail, return receipt

requested, and addressed to such signer at his address as it appears on the check, draft, order, or other instrument or at his last-known address.

(2) Written notice as applied in subsection 7-15-1 (2) shall take the following form:

Date: _____

To: _____ You are hereby notified that check(s) described below issued by you has been returned to us unpaid:

Instrument date: _____

Instrument number: _____

Originating institution: _____

Amount: _____

Reason for dishonor (marked on instrument): _____

The foregoing instrument together with a service charge of \$5 must be paid to the undersigned within seven days from the date of this notice in accordance with section 7-15-1, Utah Code Annotated 1953, or appropriate civil legal action may be filed against you for the amount due and owing together with service charges, interest, court costs, and attorney's fees as provided by law.

In addition, the criminal code provides in section 76-6-505, Utah Code Annotated 1953: Any person who issues or passes a check for the payment of money, for the purpose of obtaining from any person, firm, partnership, or corporation, any money, property, or other thing of value or paying for any services, wages, salary, labor, or rent, knowing it will not be paid by the drawee and payment is refused by the drawee, is guilty of issuing a bad check. The foregoing civil action does not preclude the right to prosecute under the criminal code of the State of Utah.

(Signed) _____

Name of Holder: _____

Address of Holder: _____

Telephone Number: _____

History: C. 1953, 7-15-2, enacted by L. 1981, ch. 16, § 13.

cumstance, is held invalid, the remainder of this act shall not be affected thereby."

Separability Clause.

Section 14 of Laws 1981, ch. 16 provided: "If any provision of this act, or the application of any provision to any person or cir-

Effective Date.

Section 16 of Laws 1981, ch. 16 provided: "This act shall take effect on July 1, 1981."

CHAPTER 16

CONSUMER FUNDS TRANSFER FACILITIES ACT

Section

7-16-1. Legislative findings and purpose of act — Short title.

7-16-2. Definitions.

7-16-3. Application of act — Restrictions on use of facilities.

7-16-4. Consumer funds transfer facilities board created — Members — Appointment — Terms — Vacancies — Disclosure statement — Per diem allowance and travel expenses — Executive secretary — Staff.