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THE UNIFORM NEW PAYMENTS CODE:
THE ESSENTIAL IDENTITY OF "PAY"
ORDERS AND "DRAW" ORDERS

Fairfax Leary, Jr.*
J. Stephen Pitcairn**

The proposed Uniform New Payments Code ("UNPC"),¹ as recently drafted for consideration by the Permanent Editorial Board of the Uniform Commercial Code ("UCC"), is an attempt to provide a "comprehensive legal framework for all types of noncash payments."² The UNPC would supersede or revise many of the provisions contained in articles 3 and 4 of the UCC.³ Its stated objective is "to systematize the legal framework governing all modes of non-cash payment . . . so that, to the greatest extent possible, the same legal consequences attach in a given transaction regardless of the method of payment used."⁴ Yet its drafters have proceeded as if a fundamental difference exists between what they term a "draw" order⁵ and what they designate a "pay" order.⁶ Careful analysis dem-

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1. All citations to the proposed code are to Permanent Editorial Board Draft No. 3 (1983). This draft has not been approved by the Permanent Editorial Board and is subject to change.
3. See Scott, supra note 2, at 1665.
4. Id. at 1665-66. See Brandel & Geary, supra note 2, at 1074. Wire transfers—electronic transfers of funds—vastly exceed the total amount of money transferred by cash, check or bank credit card. See Scott, supra note 2, at 1664. While articles 3 and 4 of the Uniform Commercial Code address paper-based modes of payment, wire transfers are, as some have observed, currently "governed by a poorly developed framework of legal rules." Id.
5. A draw order is an order initiated by the drawer and transmitted to the payee, if any, or initiated on behalf of the drawer by the payee and transmitted to an account.
onstrates that there should be no distinction, as to the manner in which payment is effected, in any legislation passed in response to new methods of transmitting messages that order deposit institutions to transfer credit.

The draftsmen of the proposed UNPC have apparently perceived an important difference between the "draw" order (basically, a draft, check or other message given a creditor to present to a payor account institution) and the "pay" order (a payment order presented directly to an account institution by its own customer). In a recent article, Professor Patricia B. Fry and Professor Leary took the position that the essential function of all payment modes was to effect a transfer of deposit institution credit from a debtor to a creditor. The authors suggested that there were eight stages common to all payment modes, which can be reduced to three levels in any payment transaction. The first level can be called the underlying transaction, the "deal" creating the obligation to pay, or the desire to make a gift. The second level is the message level, where the payor's deposit institution is directed to transfer deposit institution credit from the payor's account to the creditor's or donee's account in a deposit institution of the latter's selection. The third level is the implementation level, where the credit is transferred between deposit institutions or within one deposit institution.

6. "A pay order is an order initiated and transmitted by the drawer to the drawee directing the drawee to pay or to effect payment to the payee either directly or through transmitting or settling account institutions, and includes a 'wire transfer.'" Id. § 51(2).
7. The Uniform New Payments Code adopts the term "account institution" to refer not only to banks but to any business that maintains "accounts." Id. § 53(1) comment 2.
8. See Leary & Fry, supra note 2.
9. Id. at 286-7.
10. Id. at 288.
11. Id. The balance of the discussion concentrates on the payment of obligations. This is not meant to imply that the gift order should not be subject to the same rules.
12. Id. The selected deposit institution may or may not be the same as that of the debtor-donor.
13. Id. Implementation is merely the inter-institutional transfer of deposit credit as required by an order. This requires either mutual accounts or a common clearing house membership, or the use of an intermediary having mutual accounts or a common clearing house membership with the institution designated to receive the credit for its customer. Thus a Mississippi bank dealing with a North Carolina bank could request a remittance in Atlanta funds if it had a correspondent in Atlanta who could rapidly convert a draft on itself or any other Atlanta bank into finally collected funds in the North Carolina bank's account with it.
The purpose of this article is to explain, in some depth, whether and why differences in the routing of the message to the payor's deposit institution, at the message level, should create any differences in the applicable legal rules for implementation. The thesis of this article is that there should be no difference when a comparison is made to the appropriate paper based message. The starting point for this discussion is the article on Miscellaneous Banking Transactions in the May, 1950 Proposed Final Draft of the UCC. It was written by the late Karl N. Llewellyn, the Chief Reporter of the Uniform Commercial Code, and was designed to cover "Postal Remittances," "Mail, Cable and Wire Transfers," and "Remittance by Draft." Comment No. 2 to the section on Definitions stated:

It is proposed to include the regulation of all these forms of remittance in this Article and to put more emphasis on the similarity of the relationship between the original parties in all remittance transactions than has been done in the existing case law. Impressed by the reification of the promise of the seller of a foreign draft [i.e. the debtor's deposit institution] courts frequently have shown an inclination to overemphasize the difference between a remittance by draft and other forms of remittance.

Past concentration on the reification of obligations in the check or draft form of message should not be permitted to overshadow the essential identities in payment transactions. Llewellyn's emphasis on the substantial identity of payment transactions should be, it is suggested today, carried further and applied to all modes of payment without regard to the medium of the message. This article examines the apparent distinctions between "pay" orders and "draw" orders and concludes that differences in the identity of the presentor, actions after presentment, and manner of collection do not warrant differences in legal treatment. It then considers the problem of conflicting claims to the deposit balance and demonstrates with an illustrative example that the differences between "pay" orders and

15. See id. § 6-103 comment 1.
16. Id. comment 2. Where foreign remittances are involved, the necessity to convert one currency into another creates a "necessary peculiarity" in that type of remittance for which appropriate provision must be made. The basic tripartite similarity of transaction levels, however, is still present.
17. See infra notes 27-31 and accompanying text.
18. See infra notes 32-35 and accompanying text.
19. See infra notes 36-42 and accompanying text.
"draw" orders do not require different treatment for the termination of such claims.\textsuperscript{20} A solution is also suggested as a means of closing the gap in the coverage of the UCC with respect to remittances after a payor institution has completed its pay-processing procedures.\textsuperscript{21}

I. APPARENT DISTINCTIONS BETWEEN "PAY" ORDERS AND "DRAW" ORDERS

The generic term "order," used in the Proposed UNPC,\textsuperscript{22} is a good term for the payment direction or message whether the medium of transmission be in paper, electronic, or any other form or combination of forms. The term "order," however, does not necessitate a division between those orders that the payor gives to the creditor to deliver to the debtor's deposit institution\textsuperscript{23} and those that the debtor delivers directly to the payor institution.\textsuperscript{24}

The legal analysis could well be that the debtor has, in effect, made the creditor his or her agent to make presentment for payment to the debtor's deposit institution. There are many instances in which a debtor's checks or drafts are in fact drawn by an agent selected by the debtor, including those in which the creditor acts as the agent in creating the paper or electronic message.\textsuperscript{25} For its protection, the deposit institution will require advance notice of both the scope of the delegation and the identification symbol to be used by the agent.\textsuperscript{26} It should not make any fundamental difference, however, if the agent selected is the creditor itself, as in the case of the "pre-authorized check." This phrase is but a term used to describe a creditor-originated authorized written order. There should be no difference, in legal effect, between the "pre-authorized check" and any other agent originated order to pay, such as an electronic pre-authorized debit. More broadly, there should be no differences in legal effect between "pay" orders and "draw" orders, since the apparent differences between them are not significant.

\begin{itemize}
\item \textsuperscript{20} See infra notes 43-67 and accompanying text.
\item \textsuperscript{21} See infra notes 68-81 and accompanying text.
\item \textsuperscript{22} U.N.P.C. § 10(1) (1983).
\item \textsuperscript{23} A "[d]epository account institution is the first account institution to which a draw order is transmitted for collection and may also be the payor account institution." \textit{Id.} § 53(3).
\item \textsuperscript{24} A "[p]ayor account institution is the account institution which maintains the account directed to be debited by the drawer of an order." \textit{Id} § 53(4).
\item \textsuperscript{25} These items, if paper, are called "pre-authorized checks," and, if electronic, "pre-authorized debits."
\item \textsuperscript{26} The term "issuer's identification symbol" will be used in this article to cover the authorized signatures on checks and the identification codes in electronic messages.
\end{itemize}
A. The Identity of the Presentor

Whether the order to transfer credit is delivered to the payor bank by the originator or his creditor, the same legal consequences should attach. The fundamental similarity of the "draw" order and "pay" order can be seen by examining the two following hypothetical cases.

Case A. The creditor presents a pre-authorized check directly to the drawee deposit institution with a direction to remit the amount directly to an identified account at the creditor's specified institution. The check bears an issuer's identification symbol that the payor institution has agreed to honor.

Case B. The debtor presents a written order to its deposit institution to transfer the specified amount from its account to the named creditor's identified account in a specified institution, which the payor institution has agreed to do, and which the creditor and its institution have agreed to accept.

The only difference between Case A and Case B is that the delivery of the order to the debtor's account institution is by the debtor itself (Case B) or by a previously authorized agent (Case A) of whose agency the debtor's account institution has been appropriately informed.

The legal essentials are the same. In each case, the debtor has authorized the charge to its account, and the debtor's account institution has agreed to implement the instructions. Presumably, the creditor's institution has agreed to accept the credit and add it to the

27. The creditor has, by depositing the item in its bank, selected the recipient and has identified the account on its deposit slip. In this situation, it is not necessary that the particular account be identified by the debtor's bank.

28. The only difference here is that the debtor must give the name of the creditor and its account number therein to its deposit institution to pass on to the creditor's deposit institution in lieu of the creditor originated deposit slip, as if the debtor were the agent of the creditor with the ability to do this.

29. Thus the differences could be handled in a section of the UNPC dealing with required "authorizations." An issue to be settled is whether the UNPC should provide that all payment modes are authorized unless derived in the contract, or whether the UNPC should indicate specific modes only, with others to be authorized by contract. Where a creditor signals his debtor that payment may be made by a direct message to the debtor's bank, the creditor must warrant that the designated receiving bank has agreed to receive such payments. The current practice of requiring interbank communication limits the utility of Giro type payments to repetitive payments. (Giro systems are user initiated and controlled transfers of credit which are used throughout Europe. See Vergari, Electronic GIRO for the United States, 2 COMP. L.J. 101, 102 n.5, 102-104 (1980).) Otherwise the transactional cost per payment, in obtaining the necessary pre-authorizations, is too high compared to other modes for any but repetitive receipts, as in telephone bill paying.
creditor's account. In each case implementation will occur through debits and credits to deposit accounts, either within one institution, if both parties use the same one, or between two institutions, if the two institutions have mutual accounts.\textsuperscript{30} If the necessary mutual interbank accounts do not exist, then implementation will be through one or more intermediary institutions.

Both cases require the authority to debit the debtor's account, the agreement of the payor account institution to receive and implement the debtor's orders, the agreement of the creditor to accept, and the agreement of its financial institution to receive, payment in such a manner.\textsuperscript{31} Statutory specification may be needed to determine the legally available means of implementation, and which institution can designate the means in varying situations.

In the case of the pre-authorized check, Case A, the debtor's agreement is evidenced by its authorization notice to the payor account institution. The payor account institution's acceptance of the authorization constitutes its agreement to receive and act upon the order, and the creditor's origination of the check signifies its agreement. The open part of the transaction is the obligation of the creditor's deposit institution to accept a deposit in this fashion. It is, however, not too difficult to imply a representation by the creditor to all other participants that its deposit institution has so agreed. Possibly, the debtor's institution does not know the creditor, so it may want the agreement of the creditor's bank accepting the deposit to be directly communicated to it. The consent is clearly given when the creditor deposits the pre-authorized check in its own deposit institution and that institution forwards the item for payment, either directly to the payor bank or indirectly through an intermediary, thereby satisfying the Code warranties. It will then be presented to the payor deposit institution by a familiar institution whose warranty of authority the payor is willing to accept.

In Case B, the authority to debit the debtor's account is given directly to the payor by its customer. The open part of the transaction is the payor institution's agreement to receive and implement

\begin{itemize}
\item \textsuperscript{30} See generally H.J. Bailey, Brady on Bank Checks § 11 (5th ed. 1979) (general legal principles concerning bank deposits and collections).
\item \textsuperscript{31} The creditor must also receive, for its accounts receivable records, a designation of the originator of the payment message. In the check mode this is accomplished by returning a "turn-around" card or stub with the payment. Debtors are urged to place their identifying account numbers on the check itself. Hence, there is "no big deal" in having it on the "pay" order. It does, however, become one more series of numbers that must be transmitted through the banking systems when electronic messages are used.
\end{itemize}
the debtor’s order. The payor institution, presumably, accepts the implied warranty by its customer that the creditor and the creditor’s account institution have agreed to accept and receive payment in this manner. The liability for implementing the customer’s order will be nil, and the funds will be debited from the customer’s account. Where the payor institution has agreed to honor an order creating an overdraft, it has agreed to the credit risk of nonreimbursement by the customer. The customer must bear the risk that the receiving bank will be unwilling to accept payment, since the customer will have warranted that such agreement existed.

Based on the foregoing, the only difference between the “pay” order and the “draw” order, in our analysis, lies in the nature of the party presenting the order for payment to the payor account institution. This difference is not significant.

**B. Actions After Presentment**

The discussion thus far has considered the presenting party and found no significant difference between the two types of orders. We must next consider the actions taken by the payor deposit institution after presentment. The discussion will revolve around three cases.

**Case C.** The payor institution’s customer directs it to pay a specified sum to another deposit institution for the account of an identified customer of that institution. The customer delivers the instruction in writing or by telephone, telex or direct computer connection, authorizing payment in a manner satisfactory to the payor institution.

**Case D.** The payor institution’s customer accepts a draft drawn on the customer and made payable at the accepting customer’s account institution. The accepted draft is endorsed by the drawer-vendor to its account institution and is thus presented to the accepting account institution for payment by remittance.

In the above two cases, the payor deposit institution will take virtually the same action. It will examine the paying customer’s balance for sufficient finally collected funds and, if they are lacking, will determine whether to grant an overdraft or refuse payment. In Case C, notification of nonpayment will be given only to the payor account institution’s customer, while in Case D, notification generally will first be given to the payor institution’s own customer, but if cover is

32. For a definition of “draft”, see U.C.C. § 3-104(2)(a) (1978).
33. See generally Bailey, supra note 30, at § 17 (nature of overdrafts).
not promptly furnished, the item will be returned unpaid to the presenting institution.

In both cases, when payment is to be made the person handling the transaction for the payor institution will place a “hold” on the customer’s account by notifying the bookkeeping unit. If the order is presented in paper form, it will be sent to the processing center for encoding and then run through the reader sorter to make the necessary final debit entry to the account. If presented in some other form, an appropriate action will be taken in the daily account processing to create the same effect.

After placing the “hold” on the account, the person handling the transaction will prepare a remittance in the form of a cashier’s check, a draft drawn on a correspondent bank, or by telex or other electronic instruction to a correspondent bank where the payor institution and the collecting institution have mutual accounts. Where mutual accounts exist, the presenting institution will receive appropriate notice of the credit to its account.

As this discussion illustrates, there are no important distinctions between the two cases. In Case D the full identification of the ultimate recipient of the transferred deposit credit is given to its own institution by the payee of the draft, while in Case C, it is given to the payor account institution by its customer for transmission to the payee’s account institution. The difference does not seem significant and should not make any difference in loss allocations.

C. “Cash Items” versus “Collection Items”

The third case, Case E, does present an apparent difference between “pay” orders and “draw” orders. Close analysis illustrates, however, that the distinction does not lie in the nature of the order, but rather in whether the order is presented as a “cash item” or a “collection item.”

34. U.C.C. §§ 4-211(1)(a) and (b) place a limitation on remitting by an item drawn on itself. But § 4-211(2) makes the limitation a paper tiger by excusing the accepting institution from all liability if the unauthorized remittance is promptly forwarded for collection. Hence, in draft collections, the cashier’s check continues to be used.

35. See infra notes 43-65 and accompanying text.

36. Federal Reserve Regulation J defines “cash item” as:

(1) A check other than one classified as a noncash item under this section; or
(2) Any other item payable on demand and collectible at par that the Reserve Bank of the District in which the item is payable is willing to accept as a cash item.


37. Federal Reserve Regulation J defines “noncash item” as

An item that a receiving Reserve Bank classifies in its operating circulars as requir-
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Case E. The customer-drawer sends payment by check to the payee. The check will be presented, together with other cash items, to the payor account institution which will give same day provisional credit for the total of all items in the cash letter or clearing house net balance. Before midnight of the next banking day, it will reclaim the provisional credit for the 1% or so of “not good” items in the presented cash letters.

Here there is a distinction between the “pay order” and the “draw order.” The distinction, however, does not lie in whether we are dealing with a draw order or a pay order, but in whether the order is presented as a “cash item” or a “collection item.” The distinction originated a long time ago, when bankers agreed that cash items would be provisionally settled. Items found to be “good” would become final with an affirmative notice of payment through the sending of the remittance and items found to be “not good” after investigation would be returned with a negative notice of payment.

Where several collection items are presented by the same institution, each with its own “collection number,” the payor institution may make one remittance with a notice referring to the several “collection numbers” if it so chooses and if no banking custom prevents.

Analytically, the difference lies not in the nature of the order or in the fact that one is presented directly by the drawer customer and the other by an institution selected by the depositing owner of the order. The difference lies in the choice between affirmative notice of implementation of payment and negative notice of nonpayment for items handled in bulk with immediate provisional credit. Experience has shown that in the case of items handled in bulk the overwhelming majority are “good,” and that much expense can be saved by omitting notification of payment with respect to these. In any
event, since the difference lies in the manner in which the item is collected there is no reason to differentiate between "pay" orders and "draw" orders because the "pay" order is essentially a "collection item" presented by the customer instead of another deposit institution, as in the case of accepted drafts.

II. LOSS ALLOCATION

To demonstrate that there are no essential differences between "pay" orders and "draw" orders, this article now examines the question of whether there ought to be differences in the rules for loss allocation depending upon whether the order is delivered directly to the payor deposit institution by its customer or is presented for the account of the customer by the payee or other transferee through the latter's deposit institution. An analysis of the treatment of conflicting claims to the deposit balance illustrates that there should be no such difference.

The problem of conflicting claims to the deposit balance is one of determining when the order to pay takes priority over the conflicting claim. The Uniform New Payments Code proposes different rules for "pay" orders and "draw" orders, providing that each becomes final for this purpose at different points in the transaction. Because there are few real differences between the two types of items, however, the Code should treat them uniformly.

Discussions of the UCC have classified conflicting claims under four headings termed the "four legals": stop orders by the drawer, seizures of the account by legal process, knowledge of notices as to events having the effect of terminating the drawer's right to draw on the account, and the bank's right of set-off. Historically, the cut-off

and, ultimately, to the costs of bank customers. If the notice were applied only to "not on us" items, it would add approximately $12 billion to costs.

43. Analysis of wrongful intrusions in the order issuing process and of wrongful intrusions into the depositing process would similarly illustrate that there should be no differences in the rules of loss allocation that are dependent on whether the order is a "pay" order or a "draw" order.


45. The priority problem is handled by U.C.C. § 4-303 in terms of a series of fixed points in the payment process when the "legal" is made one that "comes too late."

46. The four legals are classified in U.C.C. § 4-303 (1978) which provides in part:

(1) Any knowledge, notice or stop-order received by, legal process served upon or setoff exercised by a payor bank, whether or not effective under other rules of law to terminate, suspend or modify the bank's right or duty to pay an item or to charge its customer's account for the item, comes too late to so terminate, suspend or modify such right or duty if the knowledge, notice, stop-order or legal process is received or served and a reasonable time for the bank to act thereon expires or the setoff is
point has been when the item was "finally paid," as compared with when the "legal" was activated, but as the comment to section 4-303 indicates, there was no pre-Code consistency as to when this had occurred. 47

A practical problem has always been present, since "legals" often are time-stamped when received but "items" 48 are not. The rules of law selected in the final draft of the UCC differ depending, not on the nature of the item or whether the direction to pay was given to the payor deposit institution directly by the drawer or by demand made on behalf of the payee, but on whether the item was a "demand" item (other than a documentary draft 49 ) or not. 50 Apparently, a consistent principle was never adopted.

To take an extreme case, let us suppose an item has been presented through the clearing house and provisional settlement has been made on Monday. Under the rules of this particular clearing house, the settlement is provisional until the return item clearing time, say at 2:00 p.m. on Tuesday.

For purposes of section 4-213(1)(d), comment 6 clearly states that the provisional statement made on Monday becomes final at

exercised after the bank has done any of the following:

(a) accepted or certified the item;
(b) paid the item in cash;
(c) settled for the item without reserving a right to revoke the settlement and without having such right under statute, clearing house rule or agreement;
(d) completed the process of posting the item to the indicated account of the drawer, maker or other person to be charged therewith or otherwise has evidenced by examination of such indicated account and by action its decision to pay the item; or
(e) become accountable for the amount of the item under subsection (1) (d) of Section 4-213 and Section 4-302 dealing with the payor bank's responsibility for late return of items.


47. See id. at comment 3 and the cases cited therein.
48. U.C.C. § 4-104 (1)(g) (1978) defines an "item" as "any instrument for the payment of money even though it is not negotiable but does not include money."
49. U.C.C. § 4-104 (1)(f) (1978) defines a "documentary draft" as "any negotiable or non-negotiable draft with accompanying documents, securities or other papers to be delivered against honor of the draft."
50. Analytically, this makes no sense. It has permitted unwarranted recovery on collection items. The real issue is whether the item was presented with a signal for a negative notice of implementation of the payment or whether it was presented with a signal for an affirmative notice of implementation. It should make no difference whether it was a time item or a demand item when issued, if it was immediately payable when the item was first presented. See infra note 61 for cases indicating different times when orders become revocable. The second or third re-presentation of a previously dishonored item presents other considerations, and should, as in Draft No. 3 of the UNPC, receive special treatment. See U.N.P.C. § 420 (1)(c).
2:00 p.m. on Tuesday absent a timely return of the item. The object of the rule is to ensure that the institution that has become “accountable” to the owner of the item is to be protected against later arriving legals. The negative implication is that a legal served at 1:50 p.m. takes priority (unless the bank can show that ten minutes is not a reasonable time for action) as to the balance over the claim of an institution which, for some reason not constituting an excuse, has not previously completed the process of posting. Yet it seems that the equities should favor the institution, especially if a decision had in fact been made to pay the item, but the mechanics of posting had not been completed. The problem created by this hiatus is indicated in what the UNPC would call a “pay” order case, Delbrueck & Co. v. Manufacturers Hanover Trust Co., in which the court ruled that the UCC was not applicable. In Delbrueck, the payor account institution, Manufacturers Hanover Trust Company (“Manufacturers”), was charged with breach of contract and negligence because it allegedly failed to revoke $12.5 million in credit transfers to the payee institution, Chase Manhattan Bank (“Chase”). Manufacturers notified Chase and the CHIPS computer that payment was being made, but under CHIPS rules, settlement of clearing house balances was not to occur until later in the day. The payor account institution’s customer maintained that the transfers were revokable until the settlement hour of 9:00 p.m., and that Manufacturers was negligent in failing to revoke. The court found that, under CHIPS rules, the transfers were final when the payor account insti-

51. U.C.C. § 4-303 (1)(d) (1978) is the same as section 4-213(1)(d) except that § 4-303 (1)(d) includes the words “or otherwise has evidenced by examination of such indicated amount and by action its decision to pay the item.” For a discussion of this “decision to pay” test, see Leary & Tarlow, Reflections on Articles 3 and 4 for a Review Committee, 48 TEMPLE L.Q. 919, 926-933 (1975).

52. U.C.C. § 4-303 (1) (1978) requires that there be a reasonable time for the bank to act thereon,” but does not indicate what is a reasonable time.

53. Ten minutes is probably not enough time. Where is the line to be drawn? The term “process of posting” has created some difficulties that might not have been created if the term used had been “process of payment.” Compare West Side Bank v. Marine Nat'l Exch. Bank, 37 Wis.2d 661, 155 N.W.2d 587 (1968) with Raymer v. Bay State Nat'l Bank, 384 Mass. 310, 424 N.E.2d 515 (1981). The UNPC, by eliminating the concept of the “process of posting” instead of changing its name, may do a disservice to banks that close down their pay processing operation before the midnight deadline, or even before the Federal Reserve or clearing house return item time. Technically, the item would still be subject to legals.

54. 609 F.2d 1047 (2d Cir. 1979).

55. Id. at 1049.

56. “CHIPS” is the acronym for Clearing House Interbank Payments System.

57. 609 F.2d at 1050.
tution had notified the payee deposit institution and the CHIPS computer. After this situation the clearing house changed its rules to allow revocation of transfers, but has since reverted to the former rule.

Operating on the distinction between revocable and irrevocable transfers, the Uniform New Payments Code proposes different rules for “pay” orders and “draw” orders in its section 420. In summary, it provides that payment is final for draw orders on: (1) payment in cash; (2) giving value without reserving the right to revoke; or (3) giving value without revoking before the midnight deadline with an exception for resubmitted orders. As to pay orders, payment becomes final on: (1) transmittal of a pay order or advising that a pay order will be transmitted without reserving the right to revoke; (2) transmitting or advising a transmittal will occur without revoking during the business day of transmitting or advising; or (3) agreeing to be liable. Are these differences significant when we break down the summary into concrete actions? Is there a difference between having “settled for the item without reserving a right to revoke the settlement and without having such right,” as the UCC describes it, and the equivalent language of the proposed Uniform New Payments Code for “pay-orders?”

If we consider that the purpose of both the “pay” order and the “draw” order is to transfer deposit institution credit from the debtor’s account institution to the creditor or its account institution, then is not the key stage when the debtor’s account institution determines to do just that in a final and not tentative fashion?

58. Id.
59. Id.
60. Id. at 1051.
61. The Delbrueck court selected the exact time when the sending bank released the pay order as the time that the transfer became irrevocable. Id. See Tenax S.S. Co. v. The Brimnes [1973] 1 All E.R. 769, 784 (order became irrevocable when the receiving bank credited the payee’s account); Guaranty Trust Co. v. Lyon, 124 N.Y.S.2d 680 (Sup. Ct. 1953) (irrevocable when payee receives notice of the credit). See also Bohlig v. First Nat’l Bank in Wadena, 233 Minn. 233, 48 N.W.2d 445 (1951) (item was revocable since defendant bank could have retrieved its remittance draft from the mails); see also Buffalo Insulation Distr. Co. v. Marine Midland Bank (N.Y. Sup. Ct. April 11, 1972), summarized in 89 BANKING L.J. 851 (1972) (transfer irrevocable when receiving bank receives notice of credit); discussion of change in the definition of “settle” as defined in U.C.C. § 4-104(1)(j) in Leary & Fry, supra note 2, at 309.
63. See id.
64. U.C.C. § 4-213 (1)(b) (1978).
65. The concept of the effectiveness of “notice” to an organization, as defined in U.C.C. § 1-201(27), should be applied, and when the individual handling the transaction has signalled...
doesn't the institution make this determination for both proposed
types of orders in essentially the same manner?

There is nothing wrong with statutory drafting that states a
general principle and follows that principle with illustrative but
nonexclusive specifics. The UNPC should treat both classes of or-
ders, “draw” orders and “pay” orders, uniformly, with a general
statement to the effect that final implementation of the order occurs
when the payor account institution has evidenced its final decision by
taking overt action to effect the implementation. The Code should
then delineate a list of acts that constitute such overt action, care-
fully indicating that the list is not exclusive. Uniform Commercial
Code sections 3-504(1) and (2) exemplify the type of drafting
intended. 66

A suggested treatment of the matter might be along the follow-
ing lines:

(1) An item is finally paid when a payor deposit institution, after
receipt of the item, evidences by examination of the indicated ac-
count and by overt action its decision to make final payment on the
item.

(2) Taking the following actions constitutes appropriate evidence of
such a decision:

(a) payment of the item in cash; or
(b) dispatch of notification of payment to the deposit institu-
tion which is the intended recipient of the payment without
qualification except for value dating; or
(c) directing the dispatch of a settlement for the item without
reserving a right to revoke it and without having such a right
under statute, clearing house rule or agreement; or
(d) making provisional settlement for the item, and complet-
ing its pay-processing procedures without making a decision
to reclaim the provisional credit; or
(e) placing a “hold” on an account in respect of an item
pending a completion of the mechanical pay-processing of the
item; or

a direction to make payment in an objective fashion, conflicting claims should be too late to
require the institution to reverse its payment process. For example, in the case of a stop order,
the duty to stop should be satisfied by the insertion of a direction in the process that would
reject the item, if the item had not yet passed the insertion point in the process.

66. U.C.C. § 3-504 (1978) provides in part: “(1) Presentment is a demand for accept-
ance or payment made upon the maker, acceptor, drawee or other payor by or on behalf of the
holder. (2) Presentment may be made . . . .” Id. § 3-504 (1)-(2) (emphasis added). Three
specifics follow, but the word “may” signifies the nonexclusive character of the specifics. See
id.
(f) other objective manifestations of an intention to make a final payment made by an authorized agent of the payor institution whether or not similar to any of the above.

Generally, the making of final payment by notification to the intended recipient of a payment will not be used in paper based payments, and need not be used in electronic payments, whether "draw" orders or "pay" orders, unless required either by clearing house or banking rules, or by direction of the presenter of the order to pay. The same rules for final payment should also be used to determine when conflicting claims to the balance come too late, with an additional rule to protect the payor institution which states that if such institution misses a statutorily prescribed time for action it will become accountable for the item as if it had made a timely payment. Thus it should not become accountable to either a payee of the item or an attaching creditor for a balance left erroneously excessive due to missing a deadline.

A similar analysis of the rules relating to wrongful intrusions into the payment process provided by articles 3 and 4 of the UCC for various types of forgeries of drawer's signatures and indorsements would also illustrate the desirability of identical results in allocating such losses between the customer and the payor account institution, although the terminology now used may need change.67

III. REMITTANCE DUTIES OF DEPOSIT INSTITUTIONS

It has heretofore been suggested that the proper analogy to use in deciding whether there is any distinction to be made between "draw" orders or "pay" orders is that of the accepted draft presented by the payee's institution for collection and remittance.68 A gap in the UCC applicable to both "pay" orders and "draw" orders is the absence of any specified duty to remit for a presented draft. The rules of payment set forth in UCC section 4-213 seem to apply.69 The draft is said to have been "paid," for example, when the

67. See, e.g. U.C.C. § 3-405 (1978) (imposing strict liability in all cases) and U.C.C. § 3-406 (1978) (negligence substantially contributing to alteration or forgery). Institutional liability for unauthorized implemented orders should be the same whether it is a "pay" order or a "draw" order.
68. See supra notes 23-35 and accompanying text.
69. U.C.C. § 4-213(1) (1978) provides that:
An item is finally paid by a payor bank when the bank has done any of the following, whichever happens first:
(a) paid the item in cash; or
(b) settled for the item without reserving a right to revoke the settlement
bank makes a settlement without a right to revoke.\textsuperscript{70} Uniform Commercial Code section 4-104(j) defines “settle” to mean a payment in cash, by clearing house settlement, by charge or credit, by “remittance” or as instructed.\textsuperscript{71} The UCC does not, however, tell us when a remittance is made. This gap in the pre-Code statutes opened the door for a lot of bad pre-Code law.\textsuperscript{72} The section on final payment, suggested above, partially closes the gap, but more is needed.

Uniform Commercial Code section 4-211 specifies the “settlements” that a “collecting” deposit institution may “take.”\textsuperscript{73} But there is a gap between when the item is considered “paid” by the payor via remittance, and when the collecting bank “takes.” Even UCC section 3-802\textsuperscript{74} requires that there be a voluntary “taking” for its rules to apply.\textsuperscript{75} The rules in any event are subject to “agreement otherwise”, and many creditors specify that only their receipt of actual and finally collected funds discharges the obligation to pay. May a collecting bank do the same? Legislation should preclude this, both in the case of “pay” orders and “draw” orders, but should permit the collecting bank to defer the availability of funds to its customer until it receives actual and finally collected credit in a satisfactory institution.

Articles 3 and 4 are quite unclear regarding the liability of a bank to its customer where the bank has made final payment from its customer’s account under UCC section 4-213 by completing its process of posting, or otherwise, and then either fails to send or mis-

\textsuperscript{70} Id. § 4-213(1) (a)-(d).
\textsuperscript{71} Id.
\textsuperscript{72} See U.C.C. § 4-104(j) (1978).
\textsuperscript{73} Many of the cases mentioned in the comment to section 4-303 as disapproved were, in fact, remittance cases. \textit{See}, e.g., Provident Sav. Bank & Trust Co. v. Hildebrand, 49 Ohio App. 207, 196 N.E. 790 (1934).
\textsuperscript{74} See U.C.C. § 4-211 (1978).
\textsuperscript{75} The section differentiates between a private item and an item on which a bank is primarily liable. Where a payor deposit institution has signalled its intent to hold its institutional credit for the payee, who has previously indicated its acceptance, then this should have the same effect as a bank obligation on paper has under U.C.C. § 3-802(1)(a). That effect is that the debtor’s obligation is pro tanto discharged unless otherwise agreed. \textit{See} U.C.C. § 3-802(1)(a).
\textsuperscript{76} \textit{See} id. at § 3-802(1).
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sends a remittance as requested, or the remittance message is destroyed or altered in transit through no fault of the sender's. The postamble to UCC section 4-213 makes the institution "accountable" for the item when pay processing is finished. This word has been interpreted as implying that the institution must remit the amount of the item to the customer of the depository bank or to that bank. But the collecting bank is not accountable to its customer until it receives a final settlement, and what constitutes receipt is not clear. Under section 3-802(1), the bank's obligation, if "taken" by the creditor, discharges pro tanto the underlying obligation "unless otherwise agreed," and this, therefore, implies a right to refuse discharge on the underlying obligation until receipt of final and actually collected funds. We know that many creditors "agree otherwise" requiring "actual and finally collected funds," i.e., a collected remittance draft. Legislation should provide that dispatch of a remittance, or a final order for such dispatch, whether by paper or by electronic message or credit to an account, cuts off conflicting claims to the deposit balance of the payor bank. The remittance may, however, be provisionally accepted by the receiving institution subject to receipt of deposit institution credit in an institution of its choice.

It seems that the payor deposit institution's liability to its customer should not be entirely terminated by "payment" as defined in the case of either the "draw" order or the "pay" order until the customer's debt is satisfied. As the UCC appears to be silent on this point, the proposed UNPC, or other appropriate amendments to the existing Uniform Commercial Code, should provide for both types of orders in the same manner.

It is proposed that Karl N. Llewellyn had indicated an appropriate solution in his draft of 1950 that was stricken from the Code. His section 6-105 contained the seeds from which the appro-

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77. See e.g., Templeton v. First Nat'l Bank of Nashville, 77 Ill. App. 3d 443, 448-49, 362 N.E.2d 33, 37 (1977) (In an action under UCC subsection 4-302(a), the bank was held "accountable for a demand item retained beyond its midnight deadline."); Rock Island Auction Sales, Inc. v. Empire Packing Co., 32 Ill. 2d 269, 273, 204 N.E.2d 721, 723 (1965) ("the statute provides that the bank is accountable for the amount of the item").
78. See U.C.C. § 3-802(1) (1978) (emphasis added).
79. Such a provisional acceptance rule would cover the problem of limits in large wire transfers for end of day or next day settlement. Withdrawal of funds after notice of the provisional nature of the receiving bank's credit to its customer and prior to receipt of final settlement would, of course, be permitted only on the credit of that customer.
80. See supra note 14, at 561.
appropriate rule may be drafted. With the few minor changes from the prior draft suggested for modernization, a section in article 4 of the UCC could read:

Section 4-215. Duty of Diligence and Good Faith in Remittances; Risks of Transmission; Responsibility for Correspondents.

(1) A deposit institution which has taken an order on itself for settlement by remittance must, whether or not there has been final payment on its part, use due diligence and good faith to arrange for the transfer of deposit institution credit to the intended recipient, and to effect its completion or to ascertain and inform its customer of any non-completion, whether due to the customer's lack of funds or to other reasons.

(2) Unless it has otherwise agreed, the deposit institution does not undertake an absolute obligation of completion nor responsibility for the conduct of any intermediary or transmission service. It does undertake to use due diligence and good faith to follow all instructions agreed upon by its acceptance of the order for payment, and to take prompt action to cure any known loss, delay or non-receipt of the transmission by a replacement remittance.

(3) Unless otherwise agreed, in the event of non-completion or delay, the customer bears the risk of any inability to obtain a refund from any intermediary or service whose use is not forbidden by instructions, but the deposit instruction must use due diligence and good faith in attempting to procure a voluntary refund on behalf of its customer, and in cooperating with its customer in any ensuing litigation.

(4) The customer bears the risk of non-completion or delay due to compliance with the requirements of any government, domestic or foreign, even though such acts prove to have been invalid.

(5) The obligation undertaken by a deposit institution accepting a remittance for the credit of or for forwarding to a designated recipient runs not only to the payor account institution sending the remittance, but also to the issuer of the order in respect of which remittance is being made, and consists of due diligence and good faith in executing instructions and reporting known non-completion or delay, but the availability for withdrawal of the funds remitted depends upon the contract between the deposit institution to which remittance was made and the designated recipient.

The foregoing is, of course, only a tentative draft, and refinements may be needed upon further discussion. It illustrates again the essential identity in the implementation stage between the "pay" order and the "draw" order, after each is received by the payor deposit institution. The required function is the appropriate transfer of de-
posit credit. The basic risk is a failure to completely effect the trans-
fer of credit available to the recipient. Following current practice in
large wire transfers, when there is delayed settlement a payee de-
posit institution should also be able to place a limitation on the ag-
gregate of the credits, both in total and from individual sources, that
it will receive for immediate disbursement by notice of an implemen-
tation. The delayed settlement may be on an end-of-day or next-day
basis under clearing house rules. The reason for these “caps” is that
until settlement, there is a credit risk of the potential failure of the
sending institution to effect a final settlement. This problem could be
handled by an appropriate section based on the current practices.
Legislation should not fix limits, but should give each bank the right
to refuse to handle for immediate disbursement any remittance noti-
fication or remittance instrument whether the order is a “pay” order
or a “draw” order. Such legislation would help close the existing
gap in the UCC concerning specified duties to remit credit for
presented drafts.

CONCLUSION

The “peculiarities” of “pay” orders, as compared with “draw”
orders, are very few indeed, both as to the mechanics of settlement
and as to basic concepts. Few differences arise from a change in the
medium of the pay order, whether on a physically delivered paper or
an electronically dispatched and received message. The problem in
each case is to find the most secure cost-effective method of identify-
ing the sender of the message, to expedite payment, and to frustrate
wrongful intrusions into the payment process. The function of legis-
lation in this area is to facilitate the transfer of deposit institution
credit by fixing appropriate cutoff points for conflicting claims, and
to allocate in a fair and equitable manner losses caused by wrongful
intrusions into the payment process.

While much can be left to private contract, an issue that still
remains is whether legislation should require specific contracts to be
made with respect to customer exercise of each of the available pay-
ment modes, or whether legislation should authorize all payment
modes subject to the rejection of certain modes by contract with cus-
tomers. In either event, a differentiation in the rules between “pay”
orders and “draw” orders for effecting payment or terminating con-

81. Appropriate modification of U.C.C. § 4-211(3) (1978) could accomplish this result
by allowing institutions to notify others of the limits placed, either before, or by prompt notifi-
cation on receipt, or a notice of remittance or a remittance instrument.
flicting claims does not seem warranted. The concept of a limitation on acceptance of notices of remittance for pre-settlement disbursement should receive legislative approval, but the extent of legislation is one of fixing acceptable credit risks and is best left to individual contracts. As this article demonstrates, such considerations do not seem to justify statutory distinctions creating fundamental differences between "pay" orders and "draw" orders.