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N.Y.U.C.C. § 3-206: Depository Bank Prohibited from Attaining Holder in Due Course Status When It Pays Inconsistently with a Restrictive Indorsement the Bank Itself Supplied

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refusing to contradict the plain language of the statute.

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Article 3—Commercial Paper

N.Y.U.C.C. § 3-206(3): Depositary bank prohibited from attaining holder in due course status when it pays inconsistently with a restrictive indorsement the bank itself supplied

Under the Uniform Commercial Code (UCC),[120] a depositary bank[121] may acquire holder in due course status[122] if it establishes:

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quirement of showing 'unreasonable danger.'

Note, *supra* note 94, at 101-02 (footnotes omitted).

[120] The UCC was promulgated for the purpose of providing a uniform system of law, and as a means of "simplify[ing], clarify[ing], and modern[izing]" commercial transactions. N.Y.U.C.C. § 1-102(2)(a), (c) (McKinney 1964). New York was the 16th state to enact the UCC. *See* N.Y. Gov. Mess. of Approval of ch. 553, N.Y. Laws (Apr. 18, 1962), *reprinted in* [1962] N.Y. Laws 3638 (McKinney) [hereinafter cited as N.Y. Gov. Mess.]. The UCC was passed by the New York Legislature in 1962, but did not become effective until September 27, 1964. N.Y.U.C.C. § 13-05 (McKinney Supp. 1981-1982). In New York, the UCC superseded the uniform laws concerning "negotiable instruments, sales, warehouse receipts, bills of lading, stock transfers, conditional sales, and trust receipts," as well as New York laws regarding "bank collections, bulk sales, chattel mortgages, and factor's liens." *See* N.Y. Gov. Mess., *supra*, at 3638.

[121] *See* N.Y.U.C.C. § 4-105(a) (McKinney 1964). A depositary bank is "the first bank to which an item is transferred for collection even though it is also the payor bank." *Id.*

[122] *See id.* § 3-302(1). To be considered a holder in due course, a transferee must demonstrate his status as a holder, *see, e.g.*, United Overseas Bank v. Veneers, Inc., 375 F. Supp. 596, 602 (D. Md. 1973); National Bank of N. Am. v. Flushing Nat'l Bank, 72 App. Div. 2d 538, 538, 421 N.Y.S.2d 65, 66 (1st Dep't 1979), and that the instrument was a negotiable one, *see, e.g.*, Geiger Fin. Co. v. Graham, 123 Ga. App. 771, 772, 182 S.E.2d 521, 523 (1971); N.Y.U.C.C. § 3-102(1)(e) (McKinney 1964). In addition, the transferee must establish that he took the instrument: "for value; and . . . in good faith; and . . . without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person." N.Y.U.C.C. § 3-302(1)(a)-(c).

Identification as a holder in due course has been characterized as a question of "status." 2 F. HART & W. WILLIER, COMMERCIAL PAPER UNDER THE UNIFORM COMMERCIAL CODE § 11.01, at 11.4 (1982). The legal ramifications of holder in due course status are well established by the UCC. *See id.* Section 3-305 of the UCC provides that a holder in due course is insulated from "all claims" to the instrument by other persons and is not bound by defenses tendered by parties to the instrument with whom the holder has not dealt. N.Y.U.C.C. § 3-305(1)-(2) (McKinney 1964). Thus, a holder in due course takes free from "personal" defenses, *see* H. BAILEY, BRADY ON BANK CHECKS § 9.13, at 6 (5th ed. Supp. 1983), such as failure of consideration, *see, e.g.*, Chemical Bank v. Haskell, 51 N.Y.2d 85, 91, 411 N.E.2d 1339, 1341, 432 N.Y.S.2d 478, 480 (1980), fraud in the inducement, *see, e.g.*, Federal Deposit Ins. Corp. v. Kassel, 72 App. Div. 2d 787, 788, 421 N.Y.S.2d 609, 610-11 (2d Dep't 1979), conditional delivery, *see, e.g.*, Worthey v. First State Bank, 573 S.W.2d 279, 281 (Tex. Civ. App. 1978), and breach of fiduciary duty, *see, e.g., Chemical Bank*, 51 N.Y.2d at 91, 411

(1) it is a holder;[123] (2) of a negotiable instrument;[124] (3) taken for value;[125] (4) in good faith;[126] and, (5) without notice of defenses to it.[127] Ordinarily, in order to qualify as a holder, a transferee must take an instrument that is indorsed.[128] A bank, however, is permit-

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N.E.2d at 1341, 432 N.Y.S.2d at 480. A holder in due course, however, takes the instrument subject to " 'real' " defenses. H. BAILEY, *supra*, § 9.14, at 6. These defenses, as set out in the UCC, are infancy, incapacity, duress, illegality, fraudulent misrepresentation, bankruptcy, and defenses of which the holder had notice. *See* N.Y.U.C.C. § 3-305(2)(a)-(e) (McKinney 1964).

Prior to the enactment of the UCC, a depositary bank had great difficulty attaining holder in due course status. *See* Hawkland, *Depositary Banks as Holders in Due Course*, 76 COM. L.J. 124, 125 (1971). One barrier to such status was the rule that an instrument was not negotiable if it was restrictively indorsed. *See id.* The UCC, however, eliminated this difficulty by providing that a restrictive indorsement does not prevent further negotiation of the instrument. *See* N.Y.U.C.C. § 3-206(1) (McKinney 1964); Hawkland, *supra*, at 125. The notion that a depositary bank was an agent of the depositor and as such had imputed knowledge of all that was known by its principal further impeded depositary banks from attaining holder in due course status. Hawkland, *supra*, at 125-26. Although the UCC recognizes that an agency relationship exists between the depositary bank and its customer with respect to items deposited for collection, N.Y.U.C.C. § 4-201(1) (McKinney 1964), courts have not interpreted this provision as precluding a depositary bank from acquiring the status of a holder in due course, *see, e.g.*, Long Island Nat'l Bank v. Zawada, 34 App. Div. 2d 1016, 1017, 312 N.Y.S.2d 947, 950 (2d Dep't 1970); Hawkland, *supra*, at 126.

[123] *See* N.Y.U.C.C. § 1-201(20) (McKinney 1964). A holder is "a person who is in possession of a document of title or an instrument or an investment security drawn, issued or indorsed to him or to his order or to bearer or in blank." *Id.*

[124] *See id.* § 3-202(2). An instrument is negotiable only if there is a written indorsement on the instrument itself or securely attached thereto. *Id.* In addition, the indorsement must apply to the instrument as a whole. *Id.* § 3-202(3).

[125] *See id.* §§ 3-303(a)-(c), 4-208 to -209. Generally, a holder takes an instrument for value when the consideration for the instrument is performed, a security interest is attained, a lien on the instrument is acquired, the instrument is taken as consideration for a past debt, a negotiable instrument is given in exchange for it, or the instrument is taken as consideration for an irrevocable commitment to a third party. *Id.* § 3-303(a)-(c). When a depositary bank asserts the status of a holder in due course, bank credit is also considered to be value. *See id.* § 4-208(1)(a); *see generally* 2 F. HART & W. WILLIER, *supra* note 122, § 11.03[2], at 11-15 to -18.

[126] *See* N.Y.U.C.C. § 1-201(19) (McKinney 1964) (" 'good faith' means honesty in fact in the conduct or transaction concerned").

[127] *See id.* § 3-304(1)-(7). A person may attain notice of a claim or defense by taking an incomplete instrument, taking an instrument that appears to be altered, having notice that an obligation concerning the instrument is voidable, or knowing that a fiduciary negotiated the instrument for his own benefit. *See id.* § 3-304(1), (2). Additionally, notice is not effective unless it is "received at such time and in such manner as to give a reasonable opportunity to act on it." *Id.* § 3-304(6).

[128] *See supra* notes 122-24. The three categories of indorsements identified in the UCC are special, blank, and restrictive. *See* N.Y.U.C.C. §§ 3-204 to -205 (McKinney 1964). A special indorsement indicates with particularity the person to whom the instrument is payable. *Id.* § 3-204(1). A blank indorsement does not identify any person as the indorsee and is payable to the bearer. *Id.* § 3-204(2). A restrictive indorsement is defined as follows:

An indorsement is restrictive which either

ted under the UCC to supply a missing indorsement,[129] and even, in some cases, to attain the status of a holder in due course when an instrument has been taken without an indorsement.[130] Recently, however, in *Marine Midland Bank, N.A. v. Price, Miller, Evans & Flowers,*[131] the Court of Appeals held that under the UCC, a depositary bank was precluded from acquiring holder in due course status when the bank paid inconsistently on a restrictive indorsement which the bank itself had supplied.[132]

In *Marine Midland,* the defendant law firm drew two checks and delivered them to the payee, Leo Proctor Construction Co. (Proctor), as progress payments for construction work performed.[133] An employee of Proctor presented the checks, without indorsement, to the plaintiff bank, requesting that the plaintiff transfer the funds represented by the checks to an account maintained by Proctor in an out-of-state bank.[134] The plaintiff accepted

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(a) is conditional; or
(b) purports to prohibit further transfer of the instrument; or
(c) *includes the words "for collection," "for deposit," "pay any bank," or like terms signifying a purpose of deposit or collection*; or
(d) otherwise states that it is for the benefit or use of the indorser or of another person.

Id. § 3-205(1) (emphasis added).

[129] *See id.* § 4-205. Section 4-205(1) of the UCC authorizes a depositary bank that "has taken an item for collection . . . [to] supply any indorsement of the customer which is necessary to title. . . ." *Id.*

[130] *See* Bowling Green, Inc. v. State St. Bank and Trust Co., 425 F.2d 81, 84 (1st Cir. 1970); United Overseas Bank v. Veneers, Inc., 375 F. Supp. 596, 602 (D. Md. 1974); Nida v. Michael, 34 Mich. App. 290, 295, 191 N.W.2d 151, 154 (1971). While the official commentary to the UCC notes that the purpose of section 4-205(1) is to facilitate the collecting process, N.Y.U.C.C. § 4-205(1) Official Comment 1 (McKinney 1964), courts have permitted banks to supply the missing indorsement in order to attain holder in due course status, *see, e.g.,* United Overseas Bank v. Veeners, Inc., 375 F. Supp. 596, 602 (D. Md. 1974); Pazol v. Citizens Nat'l Bank, 110 Ga. App. 319, 321, 138 S.E.2d 442, 445 (1964).

[131] 57 N.Y.2d 220, 441 N.E.2d 1083, 455 N.Y.S.2d 565 (1982), *rev'g* 85 App. Div. 2d 903, 446 N.Y.S.2d 797 (4th Dep't 1981).

[132] *Id.* at 227-28, 441 N.E.2d 1087, 455 N.Y.S.2d at 569.

[133] *Id.* at 222-23, 441 N.E.2d at 1084, 455 N.Y.S.2d at 566. The defendant represented its clients on construction contracts entered into with Proctor. *Id.* at 222, 441 N.E.2d at 1084, 455 N.Y.S.2d at 566. A trust account was maintained by the defendant for its clients in connection with the construction projects. *Id.* at 223, 441 N.E.2d at 1084, 455 N.Y.S.2d at 566. The two checks at issue were drawn by the defendant on this trust account as progress payments to Proctor for work completed on the project. *Id.* at 222-23, 441 N.E.2d at 1084, 455 N.Y.S.2d at 566.

[134] *Id.* at 223, 441 N.E.2d at 1084, 455 N.Y.S.2d at 566. On six prior occasions, Proctor presented the progress payment checks to the plaintiff bank and requested that the funds be wired to one of Proctor's bank accounts in either Texas or Oklahoma. *Id.*, 441 N.E.2d at 1085, 455 N.Y.S.2d at 567. Of these checks, only one was presented without an indorsement.

the checks and stamped them "credited to the account of the payee herein named Marine Midland Chautaqua National Bank," and transferred the funds as requested by Proctor.[135] Proctor did not, however, maintain an account in the plaintiff bank.[136]

Upon receiving notice of Proctor's default on the construction contract, the defendant stopped payment on the checks.[137] Unable to recover the funds from Proctor, which had filed a petition in bankruptcy, the plaintiff bank brought an action against the drawer law firm after the firm refused the plaintiff's demand for payment.[138] The plaintiff asserted that its status as a holder in due course of the checks precluded the drawer's defense of lack of consideration.[139] The Appellate Division, Fourth Department, on an accelerated judgment, held[140] that as a depositary bank the plaintiff was capable of providing the indorsement necessary to establish itself as a holder in due course.[141]

On appeal, the Court of Appeals reversed.[142] Writing for a unanimous Court,[143] Judge Wachtler first addressed the plaintiff's

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Id. That one was stamped in the same manner as the two checks involved in the instant case. *Id.*; *see infra* text accompanying note 135.

[135] 57 N.Y.2d at 223, 441 N.E.2d at 1084, 455 N.Y.S.2d at 566.

[136] *Id.* Although Proctor did not maintain an account with the plaintiff bank, the plaintiff did cash payroll checks drawn on accounts maintained by Proctor in the other banks in Texas and Oklahoma. *Id.* at 224, 441 N.E.2d at 1085, 455 N.Y.S.2d at 567.

[137] *Id.* at 223, 441 N.E.2d at 1084, 455 N.Y.S.2d at 566.

[138] *Id.*

[139] *Id.* at 224, 441 N.E.2d at 1085, 455 N.Y.S.2d at 567; *see supra* note 122.

[140] 57 N.Y.2d at 222 n.1, 441 N.E.2d at 1084 n.1, 455 N.Y.S.2d at 566 n.1. The case was heard directly by the appellate division pursuant to section 3222 of the CPLR. *Id.*; *see* CPLR 3222(a), (b)(3) (1970). Under these provisions parties may submit an agreed statement of the facts and stipulate either the appellate division, special term, or a particular judge or referee (upon consent) to hear and decide the case. *See* CPLR 3222(a), (b)(3), commentary at 1081, 1085 (1970).

[141] 57 N.Y.2d at 222, 441 N.E.2d at 1084, 455 N.Y.S.2d at 566. The appellate division majority noted that section 4-205(1) of the UCC permits a depositary bank to provide any necessary indorsement of its customer. Marine Midland Bank, N.A. v. Price, Miller, Evans & Flowers, 85 App. Div. 2d 903, 904, 446 N.Y.S.2d 797, 799 (4th Dep't 1981), *rev'd*, 57 N.Y.2d 220, 441 N.E.2d 1083, 455 N.Y.S.2d 565 (1982). The court found that although the payee did not have an account in the plaintiff bank, it was not precluded from being a "customer" of the bank. *Id.* Thus, the court reasoned that the plaintiff was a holder, and, having satisfied the other requirements, was a holder in due course. *Id.*

Judges Callahan and Schnepp dissented, contending that section 4-205 of the UCC was designed only to facilitate the collection process and did not affect the bank's status as a holder. *Id.* at 905, 446 N.Y.S.2d at 800 (Callahan and Schnepp, JJ., dissenting). Moreover, the dissent maintained that the plaintiff bank supplied "an inappropriate indorsement" and that such an indorsement could not be used to attain holder in due course status. *Id.*

[142] 57 N.Y.2d at 228, 441 N.E.2d at 1087, 455 N.Y.S.2d at 569.

[143] Chief Judge Cooke and Judges Jasen, Gabrielli, Jones, Fuchsberg and Meyer joined

status as a holder.[144] The Court noted that although UCC section 4-205(1) permits a depositary bank to supply a *customer's* indorsement,[145] the definition of customer includes those maintaining accounts in the bank, as well as those for whom the bank "has agreed to collect items."[146] Thus, Judge Wachtler reasoned, the plaintiff bank was not precluded from supplying its own indorsement merely because the payee did not maintain an account with it.[147] More specifically, the Court found that the legend stamped by the bank on the reverse side of the check was in fact an indorsement.[148]

Turning to the holder in due course criteria, the Court concluded that the plaintiff did not meet the requirement of taking the instruments for value, and thus, was not a holder in due course.[149] Judge Wachtler reasoned that the plaintiff, by transferring the funds to another bank, had acted inconsistently with the restrictive indorsement it had itself provided.[150] The result, held the Court, was that the bank did not give value, since under section 3-206 of the UCC a transferee becomes a holder for value only to the extent that he acts consistently with a restrictive indorsement.[151] Finally, the Court rejected the plaintiff's contention that a

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in Judge Wachtler's opinion.

[144] 57 N.Y.2d at 224-27, 441 N.E.2d at 1085-86, 455 N.Y.S.2d at 567-68; *see supra* notes 123 & 128-30 and accompanying text.

[145] 57 N.Y.2d at 225, 441 N.E.2d at 1085, 455 N.Y.S.2d at 567; *see* N.Y.U.C.C. § 4-205(1) (McKinney 1964); *supra* note 129 and accompanying text.

[146] 57 N.Y.2d at 225, 441 N.E.2d at 1086, 455 N.Y.S.2d at 568; N.Y.U.C.C. § 4-104(1)(e) (McKinney 1964).

[147] 57 N.Y.2d at 225, 441 N.E.2d at 1086, 455 N.Y.S.2d at 568.

[148] *Id.* at 226, 441 N.E.2d at 1086, 455 N.Y.S.2d at 568. The Court noted that the UCC "expressly provides that 'a statement placed on the item by the depositary bank to the effect that the item was deposited by a customer or credited to his account is effective as the customer's indorsement . . . .'" *Id.* (quoting N.Y.U.C.C. § 4-205(1) (McKinney 1964)). Indeed, it is recognized that the bank practice of stamping similar legends "is specifically made effective as the customer's indorsement." B. CLARK & A. SQUILLANTE, THE LAW OF BANK DEPOSITS, COLLECTION, AND CREDIT CARDS 90 (1970).

[149] 57 N.Y.2d at 227-28, 441 N.E.2d at 1087, 455 N.Y.S.2d at 569; *see supra* note 125 and accompanying text.

[150] 57 N.Y.2d at 227, 441 N.E.2d at 1087, 455 N.Y.S.2d at 569. The indorsement stamped on the checks indicated that the funds represented by the checks were to be credited to the payee's account *in the plaintiff bank. See supra* text accompanying note 135. Thus, the plaintiff, by transferring the funds to the payee's account *in another bank*, acted inconsistently with the indorsement. 57 N.Y.2d at 227, 441 N.E.2d at 1087, 455 N.Y.S.2d at 569. Notably, it was impossible for the plaintiff bank to act consistently with the indorsement since the payee did not maintain an account in the plaintiff bank. *See supra* text accompanying note 136.

[151] 57 N.Y.2d at 227-28, 441 N.E.2d at 1087, 455 N.Y.S.2d at 569. Section 3-206(3) of

depositary bank need not comply with the terms of an indorsement, since it is not obligated, in the first instance, to provide one when the instrument is presented by the named payee.[152] Judge Wachtler, noting that some courts have labeled an indorsement a meaningless formality, held nonetheless that "sound banking practices" justify the requirement that a depositary bank supply an indorsement in order to attain the status of a holder in due course.[153]

It is submitted that the *Marine Midland* Court properly construed sections 4-205(1) and 3-206(3) of the UCC, and has delineated clearly the indorsement requirements for depositary banks. It appears that the Court's holding was prompted by a desire to repudiate definitively the *Bowling Green* decision, in which the First Circuit liberally construed section 4-205(1), holding that to satisfy holder in due course requirements, "a bank which takes an item for collection from a customer who was himself a holder need not establish that it took the item by negotiation."[154] The *Bowling Green* case has been extensively criticized, in particular for basing its holding upon the presumption that section 4-205(1) preempts the article 3 requirement that a holder take an instrument by negotiation in order to be a holder in due course.[155] While the bank-

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the UCC provides:

> Except for an intermediary bank, any transferee under an indorsement which is conditional or includes the words "for collection," "for deposit," "pay any bank," or like terms . . . *must pay or apply any value given by him for or on the security of the instrument consistently with the indorsement and to the extent that he does so he becomes a holder for value.* In addition such transferee is a holder in due course if he otherwise complies with the requirements of Section 3-302 on what constitutes a holder in due course.

N.Y.U.C.C. § 3-206(3) (McKinney 1964) (citation omitted) (emphasis added).

[152] 57 N.Y.2d at 228, 441 N.E.2d at 1087, 445 N.Y.S.2d at 569.

[153] *Id.*

[154] Bowling Green, Inc. v. State St. Bank and Trust Co., 425 F.2d 81, 84 (1st Cir. 1970); *accord* Nida v. Michael, 34 Mich. App. 290, 295, 191 N.W.2d 151, 154 (1971).

[155] *See, e.g.*, United Overseas Bank v. Veneers, Inc., 375 F. Supp. 596, 603-04 (D. Md. 1974); 2 F. HART & W. WILLIER, *supra* note 122, § 11.02, at 11-7. The *Bowling Green* conclusion, that because a transferee is granted all rights of a transferor under § 3-201, the bank would be a holder simply by virtue of taking the item from a holder, *see* 425 F.2d at 84, has been discountenanced, both for "misreading and misunderstanding" section 3-201, *see* 2 F. HART & W. WILLIER, *supra* note 122, § 11.02, at 11-12, and for being irreconcilable with precedent, *see* Security Pac. Nat'l Bank v. Chess, 58 Cal. App. 3d 555, 565-66, 129 Cal. Rptr. 852, 858-59 (1976). Indeed, it has been observed that "[t]he fatal flaw in the court's argument in this respect is its failure to distinguish *status* from *rights*; while the [b]ank acquired, from [the payee's] transfer of the check, the rights of a holder, it did not become a holder for the purpose of meeting the holder in due course requirements." Comment, Bowling Green: *The Bank as a Holder in Due Course*, 71 COLUM. L. REV. 302, 310 (1971) (emphasis in original).

ing provisions of article 4 take precedence over the article 3 commercial paper provisions they do so only to the extent that the two articles conflict.[156] Clearly, section 4-205(1) may be read consistently with the requirement for negotiation, since section 4-205(1) permits banks to provide the indorsement necessary for negotiation.[157] Thus, the better view is that a depositary bank must take an instrument by negotiation, but it may supply the indorsement necessary for negotiation.[158] The *Marine Midland* Court has adopted this view and taken it one step further by requiring a depositary bank, in order to become a holder for value, to comply with the requirements of section 3-206(3) that a transferee pay consistently with a restrictive endorsement.[159]

Further, it is suggested that the *Marine Midland* approach is commendable because it leads to the free flow of negotiable instruments. Indeed, by providing depositary banks that have taken unindorsed instruments with concrete rules for attaining holder in due course status, the *Marine Midland* holding enhances predictability.[160] The Court only requires that a depositary bank either

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[156] *See* N.Y.U.C.C. § 4-201(1) (McKinney 1964).

[157] United Overseas Bank v. Veneers, Inc., 375 F. Supp. 596, 605 (D. Md. 1974); Case Note, *Uniform Commercial Code Commentary*, 12 B.C. INDUS. & COM. L. REV. 282, 288-89 (1970).

[158] *See* B. CLARK & A. SQUILLANTE, *supra* note 148, at 189 (Supp. 1980) (discussing United Overseas Bank v. Veneers, Inc., 375 F. Supp. 596, 605 (D. Md. 1974)).

[159] *See* 57 N.Y.2d at 227, 441 N.E.2d at 1087, 441 N.Y.S.2d at 569. Apparently, the Court of Appeals has refused to permit banks to disregard the article 3 criteria for holder in due course status, *see supra* text accompanying notes 123-27, but will grant banks special status under article 4 in meeting the article 3 requirements. Thus, a bank may use bank credit to fulfill the requirement that the instrument be taken for value, *see* First Nat'l City Bank v. Skedelski, 17 U.C.C. Rep. Serv. (Callaghan) 803, 804 (N.Y. Sup. Ct. N.Y. County 1975); N.Y.U.C.C. §§ 4-208 to -209 (McKinney 1964), or as in the instant case, a depositary bank may supply a missing indorsement in order to establish that it has taken the instrument by negotiation, *see* 57 N.Y.2d at 226, 441 N.E.2d at 1086, 455 N.Y.S.2d at 568.

[160] *See infra* note 161 and accompanying text. It should be noted that Judge Wachtler's construction of sections 4-205(1) and 3-206(3) appears to promote the underlying purpose of the restrictive indorsement requirements—insuring that the conditions of transfer are enforced, *see* Underpinning & Found. Constructors, Inc. v. Chase Manhattan Bank, N.A., 61 App. Div. 2d 628, 630, 403 N.Y.S.2d 501, 502 (1st Dep't 1978), by compelling banks to supply a written indorsement and act according to the terms of the indorsement so supplied. In addition, Judge Wachtler's adherence to the technical requirements of the UCC comports with the view that holder in due course status should not be granted lightly, *see, e.g.*, Perini Corp. v. First Nat'l Bank, 553 F.2d 398, 418 (5th Cir. 1977), and is in accord with precedent, *see* Marine Midland Bank v. Graybar Elec. Co., 41 N.Y.2d 703, 709-10, 363 N.E.2d 1139, 1143-44, 395 N.Y.S.2d 403, 407 (1977) (depositary bank which indorsed a check was a holder under section 4-205(1)); Underpinning & Found. Constructors, Inc. v. Chase Manhattan Bank, N.A., 61 App. Div. 2d 628, 630-31, 403 N.Y.S.2d 501, 502 (1st Dep't 1978) (depositary

refuse to accept an unindorsed item, or supply the proper indorsement if the bank accepts the instrument.[161] Not only are bank tellers aware of the intended transaction,[162] but it is also common banking practice to instruct tellers to request indorsements before accepting any instrument.[163]

Although the First Circuit in *Bowling Green* doubted whether a bank's holder in due course status should depend upon "whether a clerk employed the appropriate stamp,"[164] *Marine Midland's* persuasive answer would be that it is hardly inequitable "to penalize the bank when it fails to perform such a simple act."[165]

Donna M. Morello

DEVELOPMENTS IN NEW YORK LAW

Search warrant may be issued to compel a suspect to supply a blood sample prior to arrest, provided probable cause exists and there is both a clear indication that relevant material evidence will be found and a safe, reliable means of obtaining the sample

The propriety of seizing physical or nontestimonial evidence from suspects in criminal investigations is an issue having substantial constitutional implications.[166] Indeed, the fourth amendment

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bank liable to drawer for loss resulting from payment inconsistent with restrictive indorsement).

[161] *See* 57 N.Y.2d at 227-28, 441 N.E.2d at 1087, 455 N.Y.S.2d at 569.

[162] It is clear that the teller involved in the *Marine Midland* case, by taking the checks for the express purpose of transferring them to another bank, was conscious of the special nature of the transaction. Thus, it is submitted that it would not have been unduly burdensome on the bank for the teller to provide an indorsement reflecting the special nature of the transaction.

[163] *See* D. GERMAN & J. GERMAN, THE BANK TELLER'S HANDBOOK: HOW TO BUILD YOUR BANKABILITY 134 (rev. ed. 1980) (teller is responsible for proper indorsement of every check); T. QUINN, QUINN'S UCC COMMENTARY AND LAW DIGEST § 4-205[A], at S4-25 (Supp. 1982) ("the teller's first instinct [to get indorsements] is the only safe rule"); Bell, *The Depositary Bank as a Holder in Due Course: A Case Study*, 8 IDAHO L. REV. 1, 30 n.122 ("tellers always make you indorse, whether needed for negotiation or not").

[164] *Bowling Green*, 425 F.2d at 84.

[165] 57 N.Y.2d at 228, 441 N.E.2d at 1087, 455 N.Y.S.2d at 569 (quoting B. CLARK & A. SQUILLANTE, *supra* note 148, at 189).

[166] *See, e.g.*, Davis v. Mississippi, 394 U.S. 721, 726-27 (1969); United States v. Harris, 453 F.2d 1317, 1323 (8th Cir. 1972), *cert. denied*, 412 U.S. 927 (1973). The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants