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NOTES

PUNITIVE DAMAGES FOR WRONGFUL DISHONOR OF A CHECK

Prior to the general adoption of the Uniform Commercial Code¹ (UCC) appellate litigation dealing with punitive damages² as a remedy for the wrongful dishonor of a check was common.³ However, as the states began to adopt the UCC, such cases became less frequent.⁴ Yet the UCC does not expressly concern itself with punitive damages in connection with wrongful dishonor. This leads to the question of whether punitive damages are recoverable under the UCC, and, if so, what restrictions limit their recovery.

Although there are several sections of the UCC which discuss dishonor,⁵ only section 4-402⁶ deals with the measure of damages for

¹The first jurisdiction to adopt the UCC was Pennsylvania. PA. STAT. ANN. tit. 12A, § 1-101 *et seq.* (1970) (effective July 1, 1954). The last state to adopt the UCC was Mississippi. MISS. CODE ANN. § 41A: 1-101 *et seq.* (Spec. UCC Supp. 1967) (effective March 31, 1968).

²Four jurisdictions, Louisiana, Massachusetts, Nebraska, and Washington, do not generally allow punitive damages. *Angeloz v. Humble Oil*, 196 La. 604, 199 So. 656 (1941); *Boott Mills v. Boston & M. R.R.*, 218 Mass. 582, 106 N.E. 680 (1914); *Riewe v. McCormick*, 11 Neb. 261, 9 N.W. 88 (1881); *Ulvestad v. Dolphin*, 158 Wash. 629, 292 P. 106 (1930). *See generally*, C. MCCORMICK, DAMAGES § 78, n.2 (1935); H. OLECK, DAMAGES TO PERSONS AND PROPERTY § 269 (1961).

Among those jurisdictions allowing punitive damages, it is universally held that punitive damages are granted at the discretion of the jury and are not awarded as a matter of right. *E.g.*, *First Nat'l Bank v. Stewart*, 204 Ala. 199, 85 So. 529 (1920); *Clark v. McClung*, 215 Cal. 279, 9 P.2d 505 (1932); *Hurst v. Southern Ry.*, 184 Ky. 684, 212 S.W. 461 (1919). It follows that a jury is justified in refusing to award punitive damages even when malice is shown. *McCurdy v. Hughes*, 63 N.D. 435, 248 N.W. 512 (1933).

³*E.g.*, *Third Nat'l Bank v. Ober*, 178 F. 678 (8th Cir. 1910); *American Nat'l Bank v. Morey*, 113 Ky. 857, 69 S.W. 759 (1902); *Deposit Guar. Bank & Trust Co. v. Silver Saver Stores, Inc.*, 166 Miss. 882, 148 So. 367 (1933); *Thomas v. American Trust Co.*, 208 N.C. 653, 182 S.E. 136 (1935); *Woody v. National Bank*, 194 N.C. 549, 40 S.E. 150 (1927); *Meadows v. First Nat'l Bank*, 149 S.W.2d 591 (Tex. Civ. App. 1941); *Wood v. American Nat'l Bank*, 100 Va. 306, 40 S.E. 931 (1902).

⁴Since adopting the UCC, only two jurisdictions have addressed the question of whether to allow punitive damages for wrongful dishonor. *Bank of Louisville Royal v. Sims*, 435 S.W.2d 57 (Ky. 1968) (dictum); *Loucks v. Albuquerque Nat'l Bank*, 76 N.M. 735, 418 P.2d 191 (1966).

⁵*E.g.*, UNIFORM COMMERCIAL CODE §§ 2-403(1)(b), 2-511(3), 3-122(3), 3-412, 3-501 to 3-511, 3-802(1)(b), 4-202(1)(b), 4-210(2), 4-211(2), 4-301.

⁶The following are the state statutes containing the language of UNIFORM COMMERCIAL CODE § 4-402: ALA. CODE tit. 7A § 4-402 (1966); ALASKA STAT. § 45.05.456 (1962); ARIZ. REV. STAT. § 44-2628 (1967); ARK. STAT. ANN. § 85-4-402 (1961); CAL. COMM. CODE § 4402 (West 1964); COLO. REV. STAT. ANN. § 155-4-402 (1965); CONN. GEN.

wrongful dishonor.⁷ Section 4-402 provides:

A payor bank is liable to its customers for damages proximately caused by the wrongful dishonor of an item. When the dishonor occurs through mistake liability is limited to actual damages proved. If so proximately caused and proved damages may include damages for an arrest or prosecution of the customer or other consequential damages. Whether any consequential damages are proximately caused by the wrongful dishonor is a question of fact to be determined in each case.⁸

The language of this section does not expressly provide for punitive damages. In determining the measure of damages permitted, it is necessary to interpret the terms "actual damages," and "consequential

STAT. REV. § 42a-4-402 (1960); DEL. CODE ANN. tit. 5A, § 4-402 (Spec. UCC Pamphlet 1967); D.C. CODE ANN. § 28:4-402 (1967); FLA. STAT. ANN. § 674.4-402 (1966); GA. CODE ANN. § 109A-4-402 (1962); HAWAII REV. LAWS § 490:4-402 (1968); IDAHO CODE ANN. § 28-4-402 (1967); ILL. ANN. STAT. ch. 26, § 4-402 (Smith-Hurd 1963); IND. ANN. STAT. § 19-4-402 (repl. vol. 1964); IOWA CODE ANN. § 554.4402 (1967); KAN. STAT. ANN. § 84-4-402 (1965); KY. REV. STAT. ANN. § 355.4-402 (1969); ME. REV. STAT. ANN. tit. 11, § 4-402 (1964); MD. ANN. CODE art. 95B, § 4-402 (1963); MASS. GEN. LAWS ANN. ch. 106, § 4-402 (1963); MICH. STAT. ANN. § 19.4402 (rev. vol. 1964); MINN. STAT. ANN. § 336.4-402 (1966); MISS. CODE ANN. § 41A:4-402 (Spec. UCC Supp. 1967); MO. REV. STAT. § 400.4-402 (1965); MONT. REV. CODES ANN. § 87A-4-402 (1964); NEB. REV. STAT. UCC § 4-402 (1964); NEV. REV. STAT. § 104.4402 (1967); N.H. REV. STAT. ANN. § 382A:4-402 (1961); N.J. REV. STAT. § 12A:4-402 (1962); N.Y. U.C.C. § 4-402 (McKinney 1964); N.C. GEN. STAT. § 25-4-402 (repl. vol. 1965); N.D. CENT. CODE § 41-04-29 (1965); OHIO REV. CODE ANN. § 1304.25 (Baldwin 1964); OKLA. STAT. ANN. tit. 12A, § 4-402 (1963); ORE. REV. STAT. § 74.4020 (1963); PA. STAT. ANN. tit. 12A, § 4-402 (1970); R.I. GEN. LAWS ANN. § 6A-4-402 (1961); S.C. CODE ANN. § 10.4-402 (1966); S.D. CODE § 57-21-3 (1969); TENN. CODE ANN. § 47-4-402 (repl. vol. 1964); TEX. BUS. & COMM. CODE § 4-402 (1968); UTAH CODE ANN. § 70A-4-402 (repl. vol. 1968); VT. STAT. ANN. tit. 9A, § 4-402 (1966); VA. CODE ANN. § 8.4-402 (1965); WASH. REV. CODE ANN. § 62A.4-402 (Supp. (1970)); W. VA. CODE ANN. § 46-4.402 (1966); WIS. STAT. ANN. § 404.402 (1964); WYO. STAT. ANN. § 34-4-402 (Supp. 1969). Louisiana has not adopted the UCC. Both California and Nevada omit the last sentence of UCC § 4-402.

⁷The drafters of the UCC provided that section 4-103(5) covering liability for "failure to exercise ordinary care in handling an item" is not applicable in cases of wrongful dishonor, thus making it clear that UCC section 4-402 was to be the sole provision of the UCC governing damages for wrongful dishonor. UNIFORM COMMERCIAL CODE § 4-402, comment 4.

⁸UNIFORM COMMERCIAL CODE § 4-402. Under UNIFORM COMMERCIAL CODE § 3-104 a check is an instrument for the payment of money and thus is an item under UNIFORM COMMERCIAL CODE § 4-104(g). Hence, UNIFORM COMMERCIAL CODE § 4-402 applies to checks.

One commentator has offered several reasons why banks dishonor checks. Among them are: not sufficient funds; account attached in legal proceedings; checks dated ahead; payment stopped; incomplete or suspicious signature; death of drawer; check drawn against uncollectable checks; account closed. F. WHITNEY, THE LAW OF MODERN COMMERCIAL

damages" according to the "sense given them by the leading cases."⁹ Under section 4-402 a "bank is liable for damages proximately caused by the wrongful dishonor."¹⁰ Proximately caused damages are those injuries¹¹ which are the proximate result of the tortfeasor's conduct.¹² Due to the necessity of an injury, the measure of damages allowable under the general rule of section 4-402 is clearly compensatory in nature. On the other hand, punitive damages serve to punish¹³ or deter¹⁴ the defendant and only incidentally benefit the plaintiff. They are not compensatory in nature,¹⁵ and are therefore only indirectly related to the injuries caused by the tortfeasor's conduct. Hence, punitive damages are clearly distinct from the compensatory damages proximately caused by the tortfeasor's conduct.

Section 4-402 elaborates its general rule of liability so as to limit the measure of damages recoverable to "actual damages" in cases where the dishonor is made through mistake;¹⁶ and the cases make it clear that punitive damages are distinct from actual damages.¹⁷ Similarly, punitive

PRACTICES § 339 (2d ed. 1865).

A dishonor is wrongful whenever there is no justification for it. UNIFORM COMMERCIAL CODE § 4-402, comment 2; B. CLARK & A. SQUILLANTE, *THE LAW OF BANK DEPOSITS, COLLECTIONS AND CREDIT CARDS*, 32-35 (1970). Evidently a dishonor is wrongful if the dishonor would ordinarily be justified but the wrong reason is given for the dishonor, *Robbins v. Bankers Trust Co.*, 4 Misc. 2d 347, 157 N.Y.S.2d 56 (Sup. Ct. 1956).

⁹UNIFORM COMMERCIAL CODE § 1-106, comment 3.

¹⁰UNIFORM COMMERCIAL CODE § 4-402.

¹¹It is widely held that the term "damage" is synonymous with the term "injury." *E.g.*, *Yazoo & M.V. R.R. v. Fields*, 188 Miss. 725, 195 So. 489 (1940); *A.F. Johnson & Son v. Atlantic Coast Line R.R.*, 140 N.C. 574, 53 S.E. 362 (1906); *see, e.g.*, *State v. Griswold*, 8 Ariz. App. 361, 446 P.2d 467 (1968). *But see* *Carroll v. Rye Township*, 13 N.D. 458, 101 N.W. 894 (1904) (injury is misconduct and damage is loss resulting from misconduct).

¹²*United States v. Chicago, B. & Q. R.R.*, 82 F.2d 131 (8th Cir. 1936); *Sweany v. Wabash Ry.*, 229 Mo. App. 393, 80 S.W.2d 216 (1935); *Pielke v. Chicago M. & St. P. Ry.*, 5 Dak. 444, 41 N.W. 669 (1889). In *Bank of Louisville Royal v. Sims*, 435 S.W.2d 57 (Ky. 1968), the court held that under section 4-402 proximately caused damages "would be those [damages] which could be reasonably foreseeable by the parties as the natural and probable result . . ." 435 S.W.2d at 58.

¹³*Phillip v. United States Lines Co.*, 240 F. Supp. 992 (E.D. Pa. 1965), *aff'd per curiam*, 355 F.2d 25 (3d Cir. 1966); *Southern Farm Bureau Cas. Ins. Co. v. Daniel*, 246 Ark. 813, 440 S.W.2d 582 (1969); *General Fin. Corp. v. Sexton*, 155 So. 2d 159 (Fla. App. 1963).

¹⁴*Chappell v. City of Springfield*, 423 S.W.2d 810 (Mo. 1968); *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 134 S.E.2d 206 (1964).

¹⁵*Rosenberg v. Ryder Leasing, Inc.*, 168 So. 2d 678 (Fla. Ct. App. 1964); *United States Fidelity & Guar. Co. v. State ex rel. Stringfellow*, 254 Miss. 812, 182 So. 2d 919 (1966); *Ingle v. Mark*, 58 Misc. 2d 895, 296 N.Y.S.2d 664 (1969); *see* cases cited notes 12-13 *supra*.

¹⁶UNIFORM COMMERCIAL CODE § 4-402.

¹⁷*Bowers v. Charlestown & W.C. Ry.*, 210 S.C. 367, 42 S.E.2d 705 (1947); *Langford v. Vanderbilt Univ.*, 199 Tenn. 389, 287 S.W.2d 32 (1956).

damages are distinct from "consequential damages,"¹⁸ which in certain circumstances can be recovered under the provisions of section 4-402.¹⁹

Since proximately caused damages, both actual and consequential, are distinct from punitive damages, the provisions of section 4-402 do not expressly allow an exemplary award. If the section is read with the premise that it purports to create the exclusive remedy for wrongful dishonor, then it must be concluded that because of the omission of any provision for punitive damages in that section, the UCC precludes recovery of such damages for wrongful dishonor. At least one jurisdiction apparently has reached this conclusion.²⁰

However, this restrictive interpretation of section 4-402 is not the only interpretation possible. While punitive damages are not mentioned under the express provisions of that section, neither is there any language expressly precluding their recovery. Thus a liberal interpretation of the section, which might allow a customer to avail himself of a remedy outside the UCC, would not appear inappropriate. In furtherance of this view, section 1-106 of the UCC offers the possibility of recovering punitive damages outside the UCC by providing that "penal damages may [not] be had except as specifically provided in this Act or by other rule of law."²¹ Pursuant to this section, if a customer can recover punitive damages for wrongful dishonor under the common law of his jurisdiction he will not be precluded from their recovery by section 4-402. Some jurisdictions have impliedly sanctioned such a result in their adoption of the UCC.²² In other jurisdictions, this result has been reached by judicial determination.

In *Loucks v. Albuquerque National Bank*,²³ the plaintiff Loucks was a partner in a paint and body shop. The defendant bank charged the partnership checking account an amount owed the bank by Loucks'

¹⁸See cases cited note 14 *supra*.

¹⁹Section 4-402 expressly provides that consequential damages may be recovered if they are proximately caused by the wrongful dishonor. UNIFORM COMMERCIAL CODE § 4-402.

²⁰See N.H. REV. STAT. ANN. § 382-A:4-402 (1961), New Hampshire Comment.

²¹UNIFORM COMMERCIAL CODE § 1-106.

²²*E.g.*, VA. CODE ANN. § 8.4-402 (1967). The Virginia Comment states:

Although worded differently, the UCC is in accord with Code 1950, § 6-71, repealed by the act enacting the UCC The Virginia statute limited the liability of a bank for *nonmalicious refusal* to pay a check of a depositor to proven "actual damages," without specifying what actual damages are. (emphasis added)

As an example, the Virginia Comment cited *Wood v. American Nat'l Bank*, 100 Va. 306, 40 S.E. 931 (1902), which stated that punitive damages may be recovered for wrongful dishonor of a check in cases where there is fraud, malice, oppression or other special motives of aggravation. The language of the Indiana and North Carolina comments accompanying section 4-402 implies a similar result.

²³76 N.M. 735, 418 P.2d 191 (1966).

partner, Martinez. As a result of the charge, several of the partnership checks were overdrafts and the bank dishonored them. The Supreme Court of New Mexico dealt with plaintiffs' claim for compensatory damages under the provisions of section 4-402.²⁴ In dismissing the plaintiffs' additional claim for punitive damages, the court relied on the absence of malice, which was required at common law,²⁵ rather than on the restrictions of section 4-402.²⁶ Thus it can be inferred that had the malice requirement been satisfied the court would have allowed recovery of punitive damages based on the common law rules.

In accordance with this view is language in *Bank of Louisville Royal v. Sims*.²⁷ While the Court of Appeals of Kentucky did not have to consider the question whether punitive damages could be recovered under section 4-402, it expressed the opinion that

[h]ad the action of the bank been willful or malicious, justifying a punitive award, damages of this kind [punitive] might have been recoverable as naturally flowing from this type of tortious misconduct²⁸

Again it was implied that if the common law prerequisites had been met, recovery of punitive damages might have been allowed notwithstanding the provisions of section 4-402.²⁹

It then appears that even though punitive damages are not expressly recoverable under the UCC, they may be obtained based on a common law action either in tort or contract. Under modern pleading it is not necessary to specify a particular tort or contract theory for a cause of

²⁴*Id.*

²⁵*Id.* at 199. The court did not cite any authority for reverting to the common law to adjudicate the claim for punitive damages.

²⁶*Id.*

²⁷435 S.W.2d 57 (Ky. 1968).

²⁸*Id.* at 58.

²⁹Pre-UCC cases dealing with statutes similar to section 4-402 carry the same inferences. For example, in *Woody v. National Bank*, 194 N.C. 549, 140 S.E. 150 (1927), the North Carolina court held that the statute in question applied only in cases where the dishonor was made through mistake or error. The statute read in part:

No bank shall be liable to a depositor because of the nonpayment, through mistake or error, and without malice of a check which should have been paid . . . except for the actual damage by reason of such nonpayment that the depositor shall prove, and in such event the liability shall not exceed the amount of damage so proven.

Id. at 154. Since the statute was silent as to malicious dishonor, the court held that the common law, rather than the statute, applied. The comment to the North Carolina UCC indicates that the same result would be reached under the UCC. N.C. GEN. STAT. § 25-4-402 (repl. vol. 1965), North Carolina Comment.

action;³⁰ however, the measure of damages recoverable in contract or tort constitutes an important consideration in electing a cause of action when punitive damages are sought.

The *Restatement of Contracts* reflects the general rule that punitive damages are not recoverable for breach of contract.³¹ With reference to wrongful dishonor, the Restatement position is:

The fact that damages are sometimes awarded in spite of uncertainty in the extent of the harm does not make them punitive. Thus where a bank commits a breach of contract with a depositor by failing to honor his checks or drafts, the jury is allowed to award substantial damages to the depositor for the harm to his credit, even though he can prove no definite monetary loss. These damages are compensatory only, however; and it would be error to instruct the jury to award damages by way of punishment.³²

While the Restatement position is in accord with a number of jurisdictions,³³ some courts have limited it when faced with wrongful dishonor causes of action based on contract. In *Weiner v. Pennsylvania Co.*,³⁴ the court reasoned that since a bank's liability with respect to handling checks was not predicated on negligence, as in the case of payment of forged checks, its liability was based on an implied contract.³⁵ However, the court stated that the plaintiff could recover punitive damages for breach of contract, although no authorities were cited in support of this conclusion.³⁶ Other cases have held that a customer may recover punitive damages for a bank's breach of contract in wrongfully dishonoring a check if the breach is malicious³⁷ or fraudulent.³⁸ And in a case³⁹ decided since the adoption of the UCC it was held that a plaintiff could not recover punitive damages for breach of a bank's implied

³⁰See W. BLUME, *AMERICAN CIVIL PROCEDURE* 38-41 (1965).

³¹RESTATEMENT OF CONTRACTS § 342 (1932); see generally C. MCCORMICK, *DAMAGES* § 81 (1935).

³²RESTATEMENT OF CONTRACTS § 342, comment (b) (1932).

³³*E.g.*, *White, Inc. v. Metropolitan Merchandise Mart, Inc.*, 48 Del. 526, 107 A.2d 892 (1954); *Mabery v. Western Cas. & Sur. Co.*, 173 Kan. 586, 250 P.2d 824 (1952); *Smyth v. Fleischmann*, 214 S.C. 263, 52 S.E.2d 199 (1949); *White v. Benkowski*, 37 Wis. 2d 285, 155 N.W.2d 74 (1967).

³⁴160 Pa. Super. 320, 51 A.2d 385 (1947).

³⁵*Id.* at 386. The UCC does not predicate liability for wrongful dishonor on negligence. *UNIFORM COMMERCIAL CODE* § 4-402. Hence, the reasoning here is applicable to cases involving wrongful dishonor.

³⁶51 A.2d at 386.

³⁷*Thomas v. American Trust Co.*, 208 N.C. 653, 182 S.E. 136 (1935) (since dishonor was not malicious, plaintiff customer limited to actual damages).

³⁸See *Bank of New Mexico v. Rice*, 78 N.M. 170, 429 P.2d 368 (1967); cf. *Wheeler v. Bank of Edenton*, 209 N.C. 258, 183 S.E. 269 (1936).

³⁹*Bank of New Mexico v. Rice*, 78 N.M. 170, 429 P.2d 368 (1967).

contract unless the breach was accompanied by a "fraudulent act, wanton in character and maliciously intentional."⁴⁰

Although some courts have permitted recovery of punitive damages in contract actions, the availability of such recovery is limited.⁴¹ It would thus appear advantageous to a plaintiff to use the more conventional route of a cause of action sounding in tort.

Originally there was no distinction between tort and contract.⁴² However, with the advent of causes of action a distinction arose.⁴³ Nevertheless, the gap between tort and contract was never so wide that it could not be bridged, as was recognized as early as 1844:

[W]here there is a contract, there may be an action of tort founded on the neglect to perform that duty, as such neglect amounts to deceit. The contract creates a duty, and the neglect to perform that duty is a misfeasance and a tort.⁴⁴

This reasoning can be applied to the bank-depositor relationship;⁴⁵ and the view, that there is an implied contract between the bank and its customer and out of this contract arises a duty to pay the customer's checks, has been adopted in this country.⁴⁶ A duty to pay has also been imposed on the bank based on the debtor-creditor aspects of the bank-customer relationship.⁴⁷

The imposition on the bank of a duty to pay a check is perhaps best grounded on policy reasons. In *Valley National Bank v. Witter*,⁴⁸ the Supreme Court of Arizona noted that the bank-depositor relationship was essentially one of debtor-creditor and therefore contractual in nature.

⁴⁰*Id.* at 378. The court further stated that these requirements were disjunctive.

⁴¹Notes 24-30 *supra*.

⁴²Prosser, *The Borderland of Tort and Contract*, in *SELECTED TOPICS ON THE LAW OF TORTS*, 381 (1953).

⁴³*Id.* at 381-87.

⁴⁴*Brown v. Boorman*, 11 Cl. & F. 1, 8 Eng. Rep. 1003, 1012 (1844).

⁴⁵It was further stated in the case:

There is no reason for taking this case out of the general rule, that where agents and servants are entrusted with property of other persons for any purpose, it is fault in them to act contrary to their engagement; and though assumpsit may be maintained against them in respect of a particular contract, case may also be maintained against them for a breach of their general duty.

Id. at 1013.

⁴⁶*First Nat'l Bank v. Stewart*, 204 Ala. 199, 85 So. 529 (1920) (liability arises out of the bank's implied contract, and out of the contract a duty to pay its depositor's checks on demand); *First Nat'l Bank v. Shoemaker*, 117 Pa. St. 94, 11 A. 304 (1887).

⁴⁷*Woody v. National Bank*, 149 N.C. 549, 140 S.E. 150, 152 (1927) (bank-depositor relationship, a long-standing exception to the general rule that a creditor cannot maintain a tort action against his debtor for failure to pay a debt).

⁴⁸58 Ariz. 491, 121 P.2d 414 (1942).

Nonetheless, the court stated that a tort action could be brought for wrongful dishonor because a wrongful dishonor amounted to "imputation of wrong-doing against the depositor and an attack upon his character."⁴⁹ The concept of an implied duty arising out of the bank-depositor relationship has gained acceptance until it is now supported by the weight of authority.⁵⁰

Aside from a violation of some general duty, some courts have seen fit to find specific torts in certain cases of wrongful dishonor. In *Marcum v. Security Trust & Savings Co.*,⁵¹ the court held that defamation was an acceptable cause of action in cases of wrongful dishonor. It was reasoned that the dishonor by the bank could be construed as a claim that the depositor acted dishonestly and in bad faith.⁵² Wrongful dishonor also gave rise to a cause of action in slander in *Schaffner v. Ehrman*.⁵³ In this case the Illinois court noted that slander required malice, and that the requirement would be satisfied if the plaintiff could show that the bank wrongfully refused to pay the check and the dishonor was intentional. In this situation, the court did not require intent on the part of the bank to injure the drawer.⁵⁴ Similarly, libel has been held to be an appropriate cause of action when a bank wrongfully dishonored an attorney's check.⁵⁵

The importance of defamation to the recovery of punitive damages for wrongful dishonor has diminished with the adoption of section 4-402 and its broad base of liability.⁵⁶ However, these theories may be helpful in

⁴⁹*Id.* at 418.

⁵⁰*Weaver v. Bank of America Nat'l Trust & Sav. Ass'n*, 59 Cal. 2d 428, 380 P.2d 644, 30 Cal. Rptr. 4 (1963); *Waggoner v. Bank of Bernie*, 220 Mo. App. 165, 281 S.W. 130 (1926).

⁵¹221 Ala. 419, 129 So. 74 (1930).

⁵²*Id.* at 77-78. The court stated that:

[t]he conduct of the bank could be construed as a claim that plaintiff in a representative or official capacity had thus drawn a check of the depositor which had no funds subject to it, and was therefore an act of dishonesty and bad faith on his part, as an individual. If this is a defamation by conduct of the depositor, the jury could infer that it was such of plaintiff also.

Id. at 78.

⁵³139 Ill. 109, 28 N.E. 917 (1891).

⁵⁴*Id.* at 919. A dissenting opinion suggested that tort was inappropriate and that the correct action was in contract. *Id.*

⁵⁵*Nealis v. Industrial Bank of Commerce*, 200 Misc. 406, 107 N.Y.S.2d 264 (Sup. Ct. 1951).

On the other side of the spectrum is the movement to impose liability for negligent use of language. See, e.g., Smith, *Liability for Negligent Language*, in SELECTED ESSAYS ON TORTS, 325 (1924). However, this would have little or no application to recovery of punitive damages because malice is a requisite to such a recovery. Notes 58-67 and accompanying text *infra*.

⁵⁶The measure of damages set forth in UNIFORM COMMERCIAL CODE § 4-402 is not

characterizing the cause of action as one in tort, thereby possibly avoiding denial of a claim for punitive damages due to its contractual nature.⁵⁷

As a part of his tort cause of action, a customer is required to establish malice before he can recover punitive damages.⁵⁸ This requirement is almost universally recognized, by both the writers⁵⁹ and the courts.⁶⁰ This rule has been extended to cases involving wrongful dishonor.⁶¹ Although the requirement of malice is uniform, the interpretation of what constitutes malice varies with the jurisdiction. Various courts have interpreted malice to include: a fraudulent act, wanton in character and maliciously intentional;⁶² "actual malice, oppression, or bad motive";⁶³ "fraud, malice, oppression, or other special motives of aggravation";⁶⁴

dependent on what theory the cause of action is brought on. See note 8 and accompanying text *supra*.

⁵⁷Notes 1-7 and accompanying text *supra*.

⁵⁸Notes 60-68 *infra*.

⁵⁹*E.g.*, C. McCORMICK, DAMAGES § 81 (1935); C. MORRIS, TORTS 48 (1953); *see, e.g.*, F. BOHLEN, STUDIES IN THE LAW OF TORTS 2-7 (1926); 2 F. HARPER & F. JAMES, LAW OF TORTS § 25.1 (1956).

⁶⁰*Eshelman v. Rawalt*, 298 Ill. 192, 131 N.E. 675, 677 (1921).

The malice requirement has been formulated both in terms of legal malice and actual malice. *See, e.g.*, *Pashalian v. Big-4 Chevrolet Co.*, 348 S.W.2d 628 (Mo. Ct. App. 1961) (legal or actual malice required); *Kirby v. Gulf Ref. Co.*, 173 S.C. 224, 175 S.E. 535 (1934) (legal malice required); *Cook v. Patterson Drug Co.*, 185 Va. 516, 39 S.E.2d 304 (1946) (actual or express malice required in legal libel action). *See also Smithhisler v. Dutter*, 157 Ohio St. 454, 105 N.E.2d 868, 871 (1952) (acknowledged division of authorities as to where legal or actual malice required for punitive damages).

Some jurisdictions have expanded the malice requirement to include such alternate requirements as willfulness, wantonness, oppression, outrageous conduct, and fraud. *E.g.*, *Clark v. McClurg*, 215 Cal. 279, 9 P.2d 505 (1932) (fraud, malice, or oppression); *Ross v. Gore*, 48 So. 2d 412 (Fla. 1950) (malice, moral turpitude, wantonness or outrageous conduct); *Home Fin. Co. v. Ratliff*, 374 S.W.2d 494 (Ky. 1964) (willful, wanton, malicious or grossly negligent actions); *Dennis v. Baltimore Transit Co.*, 189 Md. 610, 56 A.2d 813 (1948) (malicious or wanton); *Wooton v. Shaw*, 205 Okla. 283, 237 P.2d 442 (1951) (fraud, malice or oppression accompanied by evil intent or such gross negligence in disregard of another's rights as to be equivalent to such intent). It follows that no punitive damages can be awarded when a tort is committed by mistake or in the belief that the act is lawful. *Thomas v. Commercial Credit Corp.*, 335 S.W.2d 703 (Mo. Ct. App. 1960); *Pittsburgh, C. & St. L. Ry. v. Lyon*, 123 Pa. St. 140, 16 A. 607 (1889). It has also been held that the mere proof of an intentional tort does not of itself entitle a party to punitive damages. *Bryson v. Swank*, 168 So. 2d 833 (Fla. Dist. Ct. App. 1964).

In establishing various standards for the malice requirement, the courts have treated them as disjunctive and have required proof of only violation of one standard. *See, e.g.*, *Norton v. Bumpus*, 221 Ala. 167, 127 So. 907 (1930).

For a specific discussion of how the courts have interpreted the malice requirement in relation to wrongful dishonor, see notes 62-66 and accompanying text *infra*.

⁶¹Cases cited notes 56-62 *infra*.

⁶²*Bank of New Mexico v. Rice*, 78 N.M. 170, 429 P.2d 368 (1967).

⁶³*American Nat'l Bank v. Morey*, 113 Ky. 857, 69 S.W. 759, 760 (1902).

⁶⁴*Wood v. American Nat'l Bank*, 100 Va. 306, 40 S.E. 931, 934 (1902).

and reckless or wanton actions.⁶⁵ It appears that malice generally can be characterized as an intentional wrongful dishonor or a dishonor which is wrongful and effected wantonly or recklessly. It follows that if a bank dishonors a check, believing the dishonor to be rightful, no malice is implied.⁶⁶ Such a holding is consistent with the provisions of section 4-402 which limit damages to "actual damages proved" in cases where dishonor occurs through mistake.⁶⁷

Assuming a plaintiff has established that the bank acted with malice within the meaning given the term in his jurisdiction, he may still be faced with major obstacles before any recovery of punitive damages is allowed. A plaintiff must show that he is entitled to actual damages before punitive damages can be recovered. The doctrine has its roots in the rule that there can be no cause of action for punitive damages alone.⁶⁸ A derivative of the rule is that punitive damages must always be incidental to an independently sufficient cause of action.⁶⁹ It follows, therefore, that before a plaintiff is entitled to recover punitive damages, he must be able to recover actual damages in order to establish his independent cause of action.⁷⁰ Nominal damages alone generally are sufficient to sustain a recovery of punitive damages,⁷¹ and are compatible with the theory requiring a plaintiff to have an independent cause of action.

The rule that a plaintiff must prove actual damage before recovering punitive damages prohibits a plaintiff from ignoring the UCC in an attempt to recover punitive damages for wrongful dishonor of a check, since section 4-402 controls the award of actual damages for wrongful dishonor.⁷² Hence, a plaintiff must establish his right to recovery under

⁶⁵First Nat'l Bank v. Stewart, 204 Ala. 199, 85 So. 529 (1920).

⁶⁶See Wood v. American Nat'l Bank, 100 Va. 306, 40 S.E. 931 (1902). See also Gonsalves v. Bank of America Nat'l Trust & Sav. Ass'n, 96 P.2d 391 (Cal. Dist. Ct. App. 1939) *rev'd on other grounds*, 16 Cal. 2d 169, 105 P.2d 118 (1940).

⁶⁷UNIFORM COMMERCIAL CODE § 4-402.

⁶⁸See, e.g., Crawford v. Taylor, 58 N.M. 340, 270 P.2d 978 (1954).

⁶⁹See, e.g., Clark v. McClurg, 215 Cal. 279, 9 P.2d 505 (1932); Hilbert v. Roth, 395 Pa. 270, 149 A.2d 648 (1959).

⁷⁰See, e.g., Theo v. Crawford 119 Ga. App. 81, 166 S.E.2d 368 (1969); Clemmons v. Life Ins. Co., 274 N.C. 416, 163 S.E.2d 761 (1968).

⁷¹E.g., Coonis v. Rogers, 429 S.W.2d 709 (Mo. 1968); Crawford v. Taylor, 58 N.M. 340, 270 P.2d 978 (1954). In *Hinson v. A.T. Sistare Const. Co.*, 236 S.C. 125, 113 S.E.2d 341, 345 (1960), the court allowed a verdict for punitive damages alone to stand on the theory that there was a merger of nominal and punitive damages. However, this approach is not universally accepted. For example, in *Hilbert v. Roth*, 395 Pa. 270, 149 A.2d 648 (1959), the plaintiff was not permitted to recover punitive damages from second joint tortfeasor even though he recovered compensatory damages from first tortfeasor, thereby implying that the court would not infer that nominal or actual damages merged with punitive damages.

⁷²See note 8 and accompanying text *supra*.

this section in order to recover the actual damages necessary for recovery of punitive damages.⁷³

Before a plaintiff can recover punitive damages from a bank for wrongful dishonor, the plaintiff must further show that the bank, as a corporate entity, is an appropriate party to hold liable. While it is generally accepted that corporations can be held liable for punitive damages,⁷⁴ there is a split of authority as to what circumstances must exist before they are recoverable from a corporation.⁷⁵ Some courts require that the corporation ratify the acts of its agent before it can be held liable for punitive damages.⁷⁶ However, the prevailing rule⁷⁷ does not appear to

⁷³In establishing his right to recovery under UNIFORM COMMERCIAL CODE § 4-402, a plaintiff should be careful to maintain that his recovery is based on tort. See notes 17-18 and accompanying text *supra*.

⁷⁴The theory allowing assessment of punitive damage against a corporation is usually grounded on policy reasons. For example, in *Jeffersonville R.R. v. Rogers*, 28 Ind. 1 (1867), the Supreme Court of Indiana stated:

It is argued that a corporation cannot be supposed to act willfully or maliciously, and that therefore the damages cannot go beyond the point of actual compensation. This reason is too metaphysical to be applied in testing the civil liability of a corporation. Practically, there is a human intelligence and volition which controls the affairs of a corporation, just like those of an individual, and which may act wilfully, maliciously or recklessly, thus laying the basis for exemplary damages; and therefore whatever rule of damages would apply in a suit against a natural person ought to apply in a suit against a corporation. Any discrimination in that regard would shock the public sense of impartial justice, and would be an unjustifiable innovation.

Id. at 7.

⁷⁵See notes 76-78 *infra*.

⁷⁶*Lake Shore & M.S. Ry. v. Prentice*, 147 U.S. 101 (1893); *Lightner Mining Co. v. Lane*, 161 Cal. 689, 120 P. 771 (1912); *Gulf, C. & S.F. Ry. v. Reed*, 80 Tex. 362, 15 S.W. 1105 (1891); *Freeman v. Sproles*, 204 Va. 353, 131 S.E.2d 410 (1963).

The requirement of ratification has been substantiated to a certain extent on the theory that punitive damages are not compensation to the injured party and in the absence of malice on the part of the employer they should not be awarded because the employer is not deserving of punishment. *Lake Shore & M.S. Ry. v. Prentice*, 147 U.S. 101, 107 (1893).

The courts have sometimes gone to extreme lengths to find ratification. In *Norfolk & W. R.R. v. Anderson*, 90 Va. 1, 17 S.E. 757 (1893), a conductor maliciously and wrongfully demanded the surrender of a passenger's ticket. The conductor subsequently turned the ticket over to a ticket agent. The court deemed the retention of the ticket by the ticket agent to constitute a ratification by the defendant corporation of the conductor's malicious acts.

In some jurisdictions, retention of the employee committing the wrongful act constitutes ratification *per se*. See, e.g., *Ricketts v. Chesapeake & O. Ry.*, 33 W. Va. 433, 10 S.E. 801 (1890). Other jurisdictions treat the retention of the employee as an indication of ratification. E.g., *Voves v. Great N. Ry.*, 26 N.D. 110, 143 N.W. 760 (1913); *Dillingham v. Anthony*, 73 Tex. 47, 11 S.W. 139 (1889).

⁷⁷10 W. FLETCHER, CYCLOPEDIA CORPORATIONS § 4906 at 371 (perm. ed. rev. 1970).

require any ratification;⁷⁸ the only requirement seems to be that the agent be acting within the apparent scope of his authority.⁷⁹

While in certain instances it may be difficult to show that a bank is an appropriate party to hold liable for punitive damages because of a ratification requirement,⁸⁰ the relative ease of showing ratification, if it exists,⁸¹ and the large number of jurisdictions not requiring ratification,⁸² mitigate the severity of this problem. Furthermore, the courts discussing punitive damages for wrongful dishonor ordinarily have not addressed the issue of whether banks in general may properly be held liable,⁸³ which may imply that the problem is not serious or difficult to circumvent.

From the foregoing it appears that a court confronted with the question whether, as a matter of law, to allow punitive damages for wrongful dishonor has two alternatives: the court may preclude punitive damages by a restrictive reading of section 4-402, or it may allow punitive damages by a liberal interpretation which admits a common law remedy.⁸⁴

Any interpretation of the UCC should be made in light of the underlying purposes and policies of the Code and the specific section involved.⁸⁵ In evaluating the relative merits of policy arguments, it is

⁷⁸E.g., *Smith's Adm'x v. Middleton*, 112 Ky. 588, 66 S.W. 388 (1902); *Kurn v. Radencic*, 193 Okla. 126, 141 P.2d 580 (1943).

⁷⁹*Louisville & N. R.R. v. Whitman*, 79 Ala. 328 (1885); *Miller v. Blanton*, 213 Ark. 246, 210 S.W.2d 293 (1948).

⁸⁰Note 76 and accompanying text *supra*.

⁸¹*Id.*

⁸²Note 77 *supra*.

⁸³Cases cited notes 3-4 *supra*. *But see* *Deposit Guar. Bank & Trust Co. v. Silver Saver Stores, Inc.*, 166 Miss. 382, 148 So. 367 (1933) (bank's knowledge of teller's actions, when teller acting in own interests, constituted ratification).

⁸⁴An alternative to punitive damages may be found in recovery of damages approximating punitive damages but in the form of actual damages. As an example, in *Galloway v. Vivian State Bank*, 168 La. 691, 123 So. 126 (1929), the plaintiff's commercial credit was at such a low ebb prior to dishonor that the defendant's wrongful dishonor did not noticeably injure the plaintiff's credit. The court noted, however, that the dishonor subjected the plaintiff to the annoyance and humiliation of having to explain the matter to his creditors; and recovery was allowed for the annoyance and humiliation as actual damages. And in *Weaver v. Bank of America Nat'l Trust & Sav. Ass'n*, 59 Cal. 2d 428, 380 P.2d 644, 30 Cal. Rptr. 4 (1963), the Supreme Court of California allowed damages to reputation and health to be recovered as actual damages. But in a case decided since the UCC, *Bank of Louisville Royal v. Sims*, 435 S.W.2d 57 (Ky. 1968), the court held that humiliation and a "nervous chill" were not actual damages as contemplated by section 4-402. Thus it appears that the prospect of recovery of punitive damages in the guise of actual damages is uncertain at best.

⁸⁵UNIFORM COMMERCIAL CODE § 1-102, comment 1. The pertinent part of the comment states:

The Act should be construed in accordance with its underlying purposes and policies. The text of each section should be read in the light of the purpose and policy of the rule or principle in question, as also of the

important to consider section 1-103,⁸⁶ which provides in part that “[u]nless displaced by the particular provisions of this Act [the UCC], the principles of law and equity . . . shall supplement its provisions.”⁸⁷ Therefore, unless a purpose or policy in the UCC against allowing recovery of punitive damages is so clear as to be equated with “particular provisions” of the Code, section 1-103 will allow recovery of punitive damages under a supplemental rule of law.⁸⁸

The general purposes and policies of the UCC, as enumerated in section 1-102,⁸⁹ apparently do not indicate any policy against the recovery of punitive damages through actions at common law. Furthermore, while there is no place in the UCC where punitive damages are expressly made recoverable, section 1-106 provides that punitive damages may be recovered where specifically provided for by the UCC or by “other rule of law.”⁹⁰ Since punitive damages for wrongful dishonor cannot be recovered under specific provisions of the UCC, they must be recovered, if at all, under the “other rule of law” provision. Hence, if there were a general policy or purpose against recovery of punitive damages under the common law, portions of section 1-106 would be rendered meaningless. It follows that to maintain the integrity of that section, no general policy against the recovery of punitive damages should be inferred from section 1-102.⁹¹

While there is nothing in the current version of section 4-402 to indicate a specific policy with respect to punitive damages, a comparison with earlier versions of the same section indicates that the drafters may have intended to preclude punitive damages under the current section. The 1950 version⁹² of section 4-402 stated:

The bank is liable to its customer for any wrongful dishonor of an item but where the dishonor occurs through mistake the liability

Act as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.

⁸⁶UNIFORM COMMERCIAL CODE § 1-103.

⁸⁷UNIFORM COMMERCIAL CODE § 1-103 (emphasis added).

⁸⁸See *In re Mel Golde Shoes, Inc.*, 403 F.2d 658 (6th Cir. 1968); *National Shawmut Bank v. Vera*, 352 Mass. 11, 223 N.E.2d 515 (1967).

⁸⁹UNIFORM COMMERCIAL CODE § 1-102. The section states in part:

- (2) Underlying purposes and policies of this Act are
- (a) to simplify, clarify and modernize the law governing commercial transactions;
 - (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
 - (c) to make uniform the law among the various jurisdictions.

⁹⁰UNIFORM COMMERCIAL CODE § 1-106.

⁹¹The argument applied to the purposes and policies of the UCC collectively can, of course, be applied to them individually.

⁹²UNIFORM COMMERCIAL CODE § 4-204 (1950 Proposed Final Draft and Comments).

is limited to the actual damages proved including damages for any arrest or prosecution of the customer.⁹³

In the comments to this section the drafters expressly distinguished the actual damages recoverable for dishonor by mistake from punitive damages,⁹⁴ implying that the latter could be recovered in circumstances where the dishonor occurs other than through mistake.⁹⁵

Arguably, the drafters of the current section 4-402 intended to prohibit punitive damages, which were evidently recoverable under the earlier version of this section, by restricting recovery to damages "proximately caused."⁹⁶ However, this argument loses some of its force when it is considered that the earlier version of section 4-402⁹⁷ was never enacted by the states.⁹⁸ This raises the difficulty of imputing the intentions of the drafters, who added the restrictive language to the current section, to the legislatures, which adopted only the current version. Due to the speculative nature of imputing intent to the drafters of the UCC in changing the language of this section, and in light of the further difficulty of imputing their intent to the state legislatures, it appears that the change in language does not constitute a "particular provision" displacing the common law as contemplated by section 1-103.⁹⁹

If the drafters of the UCC had intended to make section 4-402 the exclusive remedy, thereby precluding punitive damages, they easily could have done so by inserting language indicative of that intention. However, with the exception of the situation in which dishonor is made by mistake,¹⁰⁰ no such intention is indicated. Absent such an indication and absent any clear UCC policy to the contrary, it appears that punitive damages for wrongful dishonor of a check may be recovered under the common law.

JOHN A. PARKINS, JR.

⁹³UNIFORM COMMERCIAL CODE § 4-204 (1950 Proposed Final Draft and Comments).

⁹⁴UNIFORM COMMERCIAL CODE § 4-204, comment 4 (1950 Proposed Final Draft and Comments). The comment states in part: ". . . and actual damages occasioned [by arrest and criminal prosecution] (as distinguished from punitive damages) are specifically made recoverable."

⁹⁵UNIFORM COMMERCIAL CODE § 4-204 (1950 Proposed Final Draft and Comments). The pertinent part of the section states: "[t]he bank is liable to its customers for any wrongful dishonor of an item . . ."

⁹⁶UNIFORM COMMERCIAL CODE § 4-402.

⁹⁷UNIFORM COMMERCIAL CODE § 4-204 (1950 Proposed Final Draft and Comments).

⁹⁸The first state to adopt the UCC, Pennsylvania, adopted the current version of section 4-402. Law of April 6, 1953, P.L. 3, § 4-402 (re-enacted 1959).

⁹⁹Notes 87-88 and accompanying text *supra*.

¹⁰⁰UNIFORM COMMERCIAL CODE § 4-402.