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Commercial Transactions

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Commercial Transactions; industrial loan companies

Financial Code § 18170, 18171, 18172, 18173, 18174, 18175 (new).
SB 1995 (Davis); 1992 STAT. Ch. 517

Existing law regulates industrial loan companies incorporated under California state law. Chapter 517 permits the Commissioner of Corporations (Commissioner) to authorize a state or federal depository corporation to engage in the industrial loan business. Chapter 517 requires the Commissioner to investigate the state or federal depository corporation.

Existing law provides for the denial of an application to engage in the industrial loan business as specified. Chapter 517 additionally authorizes the denial of the application of a state or federal depository corporation if the applicant is the subject of any state or federal

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2. CAL. FIN. CODE § 18100 (West 1989); see id. §§ 18000-18999 (West 1989 & Supp. 1992) (establishing rules and regulations concerning the formation and operation of industrial loan companies).
4. See CAL. FIN. CODE § 18170 (enacted by Chapter 517) (defining state or federal depository corporation).
5. Id. § 18171 (enacted by Chapter 517). The application must be accompanied by a $2000 filing fee. Id. § 18172(b) (enacted by Chapter 517); cf. id. § 18115 (West 1989) (requiring a $400 filing fee for all other applications to engage in the industrial loan business). See generally Kenneth E. Scott, Symposium: Striking the Right Balance: Federal and State Regulation of Financial Industries, 53 BROOK. L. REV. 27 (1987) (suggesting that there are appropriate roles for state and federal regulation).
6. CAL. FIN. CODE § 18173 (enacted by Chapter 517); see 12 U.S.C. § 1816 (1992) (providing factors to be considered for approval by the Federal Deposit Insurance Corporation). The Commissioner must investigate the capital, quality of assets, liquidity, and earnings of the corporation for the previous 36 months and the corporation’s history with regard to actions by any regulatory agency. CAL. FIN. CODE § 18173(a)(1)-(2) (enacted by Chapter 517). The applicant must pay the cost of any investigation. Id. § 18173(b) (enacted by Chapter 517). The Commissioner may examine any books, accounts, papers, records and files of the corporation. Id. § 18173(c) (enacted by Chapter 517).
7. CAL. FIN. CODE § 18117 (West 1989). The Commissioner may deny the application if public convenience will not be promoted, the proposed capital structure is inadequate, or the company is being formed for illegitimate purposes. Id. § 18117(a)-(c) (West 1989).
regulatory agency restrictions, or if the assets, capital, liquidity and earning history of the applicant indicate that the corporation's potential is inadequate to afford reasonable promise of successful operation.

Existing law permits any industrial loan company which has been in operation for more than thirty-six months to apply for authorization to comply with the capital adequacy requirements of the Federal Deposit Insurance Corporation (FDIC). Chapter 517 permits a state or federal depository corporation which has been in operation for more than thirty-six months prior to becoming an industrial loan company to apply for authorization to comply with the capital adequacy requirements of the FDIC.

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11. Id. § 18174(a)-(b) (enacted by Chapter 517). The Commissioner may, in lieu of denial, impose any requirements as are necessary for the assets to comply. Id. § 18174(c) (enacted by Chapter 517).


13. CAL. FIN. CODE § 18175 (enacted by Chapter 517).
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COMMERCIAL TRANSACTIONS; REVISION OF DIVISIONS 3 AND 4

COMMERCIAL CODE DIVISION 3 (COMMENCING WITH SECTION 3101) (REPEALED AND NEW); §§ 4205, 4207, 4211, 4406 (REPEALED AND NEW); §§ 4106, 4110, 4111, 4208, 4209, 4213 (NEW); §§ 1201, 1207, 2511, 4101, 4102, 4103, 4104, 4105, 4201, 4202, 4203, 4204, 4206, 4301, 4302, 4303, 4401, 4402, 4403, 4404, 4405, 4407, 4501, 4502, 4503, 4504 (AMENDED); §§ 4106, 4107, 4108, 4208, 4209, 4210, 4212, 4213, 4214 (AMENDED AND RENUMBERED); BUSINESS AND PROFESSIONS CODE § 17538.6 (NEW); EVIDENCE CODE § 670 (NEW).

SB 833 (BEVERLY); 1992 STAT. CH. 914

TRUNCATION

Under prior law, for a depository bank to collect on a check, it was required to physically present the check to the payor bank. Generally, the payor bank would then send the cancelled check and

1. See 1963 Cal. Stat. ch. 819, sec. 1, at 1918 (enacting CAL. COM. CODE § 4105(a)) (defining depository bank as the first bank that receives an item for collection); cf. CAL. COM. CODE § 4105(2) (amended by Chapter 914) (defining depository bank as the first bank that receives an item for collection, unless the item is presented for immediate payment over the counter).

2. See 1963 Cal. Stat. ch. 819, sec. 1, at 1892 (enacting CAL. COM. CODE § 3104) (defining check as a draft drawn on a bank and payable on demand); cf. CAL. COM. CODE § 3104(f) (repealed and enacted by Chapter 914) (defining check as a draft drawn on a bank and payable on demand, or as a cashier’s check or teller’s check). But see William D. Hawkland, Uniform Commercial Code Series, § 4-101:14 (1992) (providing a definition of check as bankers use the term, and indicating that the § 3104 definition of a check is inadequate because under the present system, checks must be on a single thickness of paper, payable in United States currency, and must be payable unconditionally).

3. See 1963 Cal. Stat. ch. 819, sec. 1, at 1909 (enacting CAL. COM. CODE § 3504(1)) (defining presentment as a demand for acceptance or payment made upon the maker, acceptor, drawee, or other payor or on behalf of the holder); cf. CAL. COM. CODE § 3501(a) (enacted by Chapter 914) (redefining presentment).

4. 1963 Cal. Stat. ch. 819, sec. 1, at 1920 (enacting CAL. COM. CODE § 4204). Prior law required a collecting bank to send items for presentment by reasonably prompt means to the payor bank taking various factors into consideration such as any relevant instructions and the nature of the item. Id.; see 1963 Cal. Stat. ch. 819, sec. 1, at 1909 (enacting CAL. COM. CODE § 3504(1) (defining presentment); 1963 Cal. Stat. ch. 819, sec. 1, at 1907 (enacting CAL. COM. CODE § 3501(1)(a)) (providing that a drawer or endorser of a draft not be charged unless presentment for acceptance has occurred).

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bank statement to the person who wrote the check.\(^5\) Chapter 914 permits truncation\(^6\) at two points in the check collection process.\(^7\) First, Chapter 914 allows the depository bank to transmit the information needed by the payor bank in order to charge the customer/drawer's account by any commercially reasonable means.\(^8\) Second, Chapter 914 permits payor bank truncation by allowing a payor bank to provide only the information in a bank statement sufficient to allow a customer/drawer to reasonably identify the items paid, instead of requiring a physical delivery of the check.\(^9\)

5. Robert G. Ballen & Paul Homrighausen, Revised Articles 3 and 4: Selected Topics, 24 U.C.C. L.J. 3, 22 (1991). The rationale behind the banks forwarding this information was so that the banks could gain the protections provided to them under § 4406. Id.; see Edward L. Rubin, Policies and Issues in the Proposed Revision of Articles 3 and 4 of the UCC, 43 Bus. Law. 621, 633 (1988) (noting that under the prior system, banks would forward the cancelled check to the customer to gain the protections of § 4406 even though the banks were not required to do so); see also 1963 Cal. Stat. ch. 819, sec. 1, at 1917 (enacting CAL. COM. CODE § 4104(e)) (defining customer as any person having an account with a bank or for whom a bank has agreed to collect items and includes a bank carrying an account with another bank); CAL. COM. CODE § 4104(5) (repealed and enacted by Chapter 914) (providing a virtually identical definition of customer); 1963 Cal. Stat. ch. 819, sec. 1, at 1929 (enacting CAL. COM. CODE § 4406(1)) (providing that a customer's obligation to review his or her account was not triggered until the cancelled check and a statement has been returned); HAWKLAND, supra note 2, at § 4-101:14 (explaining that the previous check collection system which involved multiple handling of checks was inefficient in terms of costs, time involved, and labor required to process).

6. See Rubin, supra note 4, at 633 (defining check truncation as any change in the collection process that shortens the check's physical journey from depository bank to payor bank to customer); HAWKLAND, supra note 2, at § 4-101:14 (discussing check truncation generally); Ballen & Homrighausen, supra note 4, at 22-32 (discussing the impact of the revised Uniform Commercial Code Articles 3 and 4 on check truncation). Truncation is possible at three distinct points in check collection process. HAWKLAND, supra note 2, at § 4-101:14. The first point at which truncation can occur is at the “first bank” that receives the check. Id. The second point, called “intercept truncation,” is at an intermediary or “payable through” bank. Id. The last point is called “payor bank” truncation. Id. In this scenario, the payor bank would keep the cancelled paper and only send the drawer a statement describing the drawer’s account information. Id.

7. CAL. COM. CODE § 3501(b)(1) (repealed and enacted by Chapter 914) (permitting truncation between the depository bank and the payor bank); Id. § 4406(a) (repealed and enacted by Chapter 914) (permitting truncation between the payor bank and the drawer).

8. Id. § 3501(b)(1) (repealed and enacted by Chapter 914). Chapter 914 provides that presentment may be made by written, electronic, or oral means. Id. Presentment is effective upon receipt of the demand for payment or upon acceptance. Id.

9. CAL. COM. CODE § 4406(g) (amended by Chapter 914). A payor bank need only provide the customer with a statement describing the item number, amount, and date of payment. Id.; see Ballen & Homrighausen, supra note 4, at 23 (stating that revised § 4406 only requires payor banks to provide these three pieces of information because it can be obtained by a bank's computer from the check's magnetic ink character recognition line (MICR), and thus, no manual examination of the item is necessary).
Prior law provided that an unauthorized signature on a negotiable instrument was wholly inoperative against the person whose name was signed unless that person ratified it or was precluded from denying it. Under Chapter 914, an unauthorized signature is ineffective except as the signature of an unauthorized signer in favor of a person who in good faith pays the instrument or takes it for value. Chapter 914 further specifies that a drawer or maker can be precluded from asserting a material alteration or unauthorized signature in various situations as described below.

The first situation involves someone who impersonates a payee or a payee's agent and induces an issuer to issue an instrument to the impostor in the name of the payee or the payee's agent. Under prior law, an imposter could not negotiate an instrument where the imposter impersonated an agent and then induced the issuer to issue the instrument to the impostor in the name
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of the agent. Chapter 914, however, permits an imposter to negotiate an instrument that is issued in the name of either the impersonated payee or payee’s agent.

The second situation involves employees vested with authority to draw out instruments who then steal those instruments. Division 3 has divided this situation into two cases. The first is where an employee draws out an instrument payable to a fictitious person. Chapter 914 does not change the result in this case. The second case occurs where an employee draws out an instrument payable to a real person, but the employee has no intention of giving an interest in the instrument to that person. Under prior law, whether an employer was precluded from asserting fraud depended upon when the employee formed the intent to steal the check. If the employee intended to steal the check before he drew the check out to the real person, then the employer was precluded. If, however, the employee drew the check out to the real person with the intent that the person receive an interest in the instrument, and then later formed the intent to steal the check, the employer was not precluded.

21. CAL. COM. CODE § 3404(a) (repealed and enacted by Chapter 914); see SELECTED COMMERCIAL STATUTES § 3-404, cmt. 1, at 377 (West 1992).
22. CAL. COM. CODE § 3404(b), 3405(b) (repealed and enacted by Chapter 914).
23. Id. § 3404(b), 3405(b) (repealed and enacted by Chapter 914); see SELECTED COMMERCIAL STATUTES § 3-404, cmt. 2, at 377 (West 1992).
24. CAL. COM. CODE § 3404(b) (repealed and enacted by Chapter 914).
25. Compare 1963 Cal. Stat. ch. 819, sec. 1, at 1903 (enacting CAL. COM. CODE §3405(1)(b)) (providing that an endorsement by any person in the payee’s name is effective in the case where a person signs an instrument on the drawer’s or maker’s behalf and has no intention of giving the payee any interest in the instrument) with CAL. COM. CODE § 3404(b)(2) (repealed and enacted by Chapter 914) (providing that any person who endorses the payee’s name on an instrument paid or taken in good faith is effective in the case where the person drawing out the instrument has no intention of giving the payee any interest in the instrument). The result under either code § is that an employer is precluded from asserting fraud. 1963 Cal. Stat. ch. 819, sec. 1, at 1903 (enacting CAL. COM. CODE §3405(1)(b)); CAL. COM. CODE § 3404(b)(2) (repealed and enacted by Chapter 914).
26. CAL. COM. CODE § 3404(b) (repealed and enacted by Chapter 914); see SELECTED COMMERCIAL STATUTES § 3-404, cmt. 2, at 377 (West 1992).
28. Id.; see SELECTED COMMERCIAL STATUTES § 3-404, cmt. 2, at 377 (West 1992).
Chapter 914 changes the result where the employee formed the intent to steal the instrument after the instrument was drawn. In this situation, Chapter 914 specifies that the employer is precluded from asserting fraud.

The last situation, where a drawer can be precluded, occurs where a drawer's negligence contributes to a forged signature or alteration of an instrument. Under prior law, an endorsement by a person in the name of the payee was effective in favor of a good faith payor even if the drawer did not intend the person identified as a payee to have an interest. Under prior law the payor bank was entitled to assert the endorsement's effectiveness regardless of the bank's use of ordinary care. Chapter 914 provides that the drawer may recover the percentage that the bank's failure to use ordinary care contributed to the loss. Chapter 914 defines ordinary care as the observance of reasonable commercial standards in the community.
in which the bank is located.\textsuperscript{37} Thus, if a person's negligence causes a fraudulent check to be issued, and the payor bank is negligent in paying that check, the loss will be allocated between the two parties based upon their respective amount of fault.\textsuperscript{38}

Under prior law, some courts required that an endorsement be in the exact name of the payee in order to act as a preclusion against the negligent drawer or maker.\textsuperscript{39} Chapter 914 provides that a negligent drawer or maker is precluded if the endorsement is substantially similar to the name of the payee, or the instrument, with or without an endorsement, is deposited in a depository bank.\textsuperscript{40}

Chapter 914 further provides for the allocation of the burden of proof between parties.\textsuperscript{41} Chapter 914 specifies that the party asserting the preclusion has the burden of proving that the loss was caused by the other party's negligence.\textsuperscript{42} For example, if a plaintiff is trying to prove that the defendant payor bank failed to use ordinary care in paying a fraudulent check and that such failure contributed to the loss, the burden is on the plaintiff to prove the payor bank's negligence.\textsuperscript{43}

Under existing law, every contract or duty within the scope of the California Commercial Code imposes an obligation of good faith in its performance.\textsuperscript{44} Chapter 914 further defines good faith, as used

\begin{footnotesize}
37. \textit{CAL. COM. CODE} § 3103(a)(7) (repealed and enacted by Chapter 914). Reasonable commercial standards do not require a bank, which processes instruments through automated means, to examine the instrument if such failure to examine does not violate the bank's established procedures. \textit{Id.}; see Rhode Island Hosp. Trust Nat'l Bank v. Zapata Corp., 848 F.2d 291, 293 (1st Cir. 1988) (holding that evidence that a bank used practices considered reasonable in the area was prima facie evidence of ordinary care); see also American Sec. Bank v. American Motorists Ins. Co., 538 A.2d 736, 741 (D.C. 1988) (holding that a bank which failed to follow its own highly meticulous practices failed to use ordinary care even though its practices were much more stringent than practices used by other banks in the area).

38. \textit{CAL. COM. CODE} § 3406 (repealed and enacted by Chapter 914); see \textit{SELECTED COMMERCIAL STATUTES} § 3-406, cmt. 4, at 386 (West 1992).

39. \textit{See SELECTED COMMERCIAL STATUTES} § 3-404, cmt. 1, at 377 (West 1992) (noting that some courts had interpreted former § 3405(1)(a)-(b) as requiring endorsement in the exact name of the payee in order to preclude a negligent drawer or maker).

40. \textit{CAL. COM. CODE} § 3404(c) (repealed and enacted by Chapter 914).

41. \textit{Id.} § 3406(c) (repealed and enacted by Chapter 914).

42. \textit{Id.}

43. \textit{Id.}

44. \textit{Id.} § 1203 (West 1964). \textit{Compare id.} § 1201(19) (amended by Chapter 914) (defining good faith in general) \textit{with id.} § 3103(a)(4) (repealed and enacted by Chapter 914) (defining good faith with respect to Division 3 of the Commercial Code).
\end{footnotesize}
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in Divisions 3 and 4, as honesty in fact and the observance of reasonable commercial standards of fair dealing.45

Prior law provided that an employer was liable for losses incurred in padded payroll situations46 where an employer’s agent or employee prepared instruments for signature or gave the signing officer the name of the payee.47 Chapter 914 provides that an employer is responsible48 for losses incurred as a result of an employee’s fraudulent endorsement of an employer’s check if the employer entrusted the employee with the power of handling the employer’s check.49 Chapter 914 further provides that an employer may escape liability for an employee’s fraudulent endorsement if the employer did not entrust the employee with the authority to care for

45. Id. § 3103(a)(4) (repealed and enacted by Chapter 914); id. § 4104(c) (amended by Chapter 914); cf. id. § 2103(1)(b) (West 1964) (defining good faith in the case of a merchant as honesty in fact and the observance of reasonable commercial standards); Ballen & Homrighausen, supra note 4, at 10 (suggesting that the reasonable commercial standards definition only applies to sections of Divisions 3 and 4 which specifically call for good faith, whereas all other sections continue to be subject to the general good faith requirement as defined in Division 1). See generally Rigby Corp. v. Boatmen’s Bank & Trust Co., 713 S.W.2d 517, 527 (Mo. App. 1986) (finding that early drafts and versions of the Uniform Commercial Code contained a general definition of good faith which was a subjective standard while the definition incorporated into later versions has required an objective standard).

46. See Danje Fabrics Div. v. Morgan Guar. Trust Co., 409 N.Y.S. 2d 565, 567 (N.Y. Sup. Ct. 1978) (defining padded payroll situations as instances where a drawer’s agent or employee prepares the checks, presumably drawn for the payroll, for signature by furnishing the signing officer with the name of the payee).

47. 1963 Cal. Stat. ch. 819, sec. 1, at 1903 (enacting CAL. COM. CODE § 3405(l)(c)); see Danje Fabrics, 409 N.Y.S. 2d at 568 (holding that an employee did not supply the employer with the names of the payee where the payees were bona fide creditors of the employer and payees had submitted invoices for work performed to the employer).

48. See CAL. COM. CODE § 3405(a)(3) (repealed and enacted by Chapter 914) (defining responsibility). Chapter 914 changes the definition of responsibility to include employer-employee relationships that the employer can obtain insurance coverage for by purchasing employee fidelity bonds. SELECTED COMMERCIAL STATUTES § 3-405, cmt. 1, at 381 (West 1992).

49. CAL. COM. CODE § 3405(b) (repealed and enacted by Chapter 914); see Donald J. Rapson, Loss Allocation in Forgery and Fraud Cases: Significant Changes under Revised Articles 3 & 4, 42 ALA. L. REV. 435 (1991) (stating that the rationale for placing the loss on the employer is that the employer is in a much better position to avoid the loss by exercising care in choosing its employees, supervising them, developing procedures to avoid fraudulent acts by its employees, and by insuring itself against this type of loss); see also Danje Fabrics, 409 N.Y.S. 2d at 569 (holding that drawee bank was liable where an employee fraudulently endorsed payees’ names on checks and the employee did not supply the employer with the payees’ names); Snug Harbor Realty Co. v. First Nat’l Bank of Toms River, 253 A.2d 581, 582 (N.J. Sup. Ct. 1969) (holding that a bank could be held liable under U.C.C. § 3405 where the employee fraudulently endorsed the payees’ names and deposited the checks in his own account).

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the employer's check, the bank handling the check failed to exercise ordinary care in paying or taking the instrument, or the bank did not act in good faith.  

Under prior law, where an employer's name was fraudulently endorsed on instruments made payable to an employer, the employer was responsible for any loss incurred if the loss was caused by the employer's negligence. Chapter 914 imposes liability on the employer for losses resulting from fraudulent endorsements whether or not the employer was negligent.  

Under prior law, a negligent drawer or maker was precluded from asserting a forgery or lack of authority against a holder in due course. Prior law further precluded a negligent drawer or maker from bringing a cause of action against a party who contributed to the loss by failing to exercise ordinary care in taking or paying the instrument. Chapter 914 changes this result by expanding the class

50. CAL. COM. CODE § 3405(b) (repealed and enacted by Chapter 914). Section 3405 covers employer-employee relationships that were not covered under former U.C.C. § 3405(1)(e). SELECTED COMMERCIAL STATUTES § 3-405, cmt. 2, at 381 (West 1992). In particular, Chapter 914 includes independent contractors as employees. CAL. COM. CODE § 3405(1) (repealed and enacted by Chapter 914). Chapter 914 favors employers more than former U.C.C. § 3405 did since it makes banks responsible for losses caused by the banks' negligence. SELECTED COMMERCIAL STATUTES § 3-405, cmt. 2, at 381 (West 1992). When California adopted Chapter 914, it deleted the word "substantially" from the provisions relating to a party's contributory negligence. Compare Ark. Code Ann. § 4-3-405(b) (1991); Ill. Stat. Ann. ch. 26, para. 3-405(b) (Smith-Hurd 1992); Kan. U.C.C. Ann. § 84-3-405(b) (1991) (providing that the person who bears the loss can recover against a person who substantially contributed to the loss) with CAL. COM. CODE § 3405(b) (repealed and enacted by Chapter 914) (providing that the person who bears the loss can recover against a person who contributed to the loss).  


52. CAL. COM. CODE § 3405(b) (repealed and enacted by Chapter 914); see SELECTED COMMERCIAL STATUTES § 3-405, cmt. 1, at 381 (West 1992) (explaining that § 3-405 imposes the loss on the employer without proof of negligence).  

53. 1963 Cal. Stat. ch. 819, sec. 1, at 1903 (enacting CAL. COM. CODE § 3406); see id., sec. 1, at 1900 (enacting CAL. COM. CODE § 3302) (defining holder in due course); see CAL. COM. CODE § 3302 (amended by Chapter 914) (redefining holder in due course).  

54. 1963 Cal. Stat. ch. 819, sec. 1, at 1903 (enacting CAL. COM. CODE § 3406). The drawer is precluded from asserting the forgery against a good faith payor if the drawer's lack of ordinary care substantially contributes to the making of the forged signature. Id.; see CAL. COM. CODE § 3103(a)(7) (repealed and enacted by Chapter 914) (defining ordinary care); Ed Stinn Chevrolet, Inc. v. National City Bank, 503 N.E.2d 524, 530 (Ohio 1986) (stating that the risk of loss is allocated to the party in the best position to avoid the loss); Annotation, Commercial Paper: What Amounts to "Negligence Contributing to Alteration or Unauthorized Signature" Under UCC § 3-406, 67 A.L.R. 3d 144, 151 (1975) (suggesting that a causal connection must exist between the drawer's negligence and the loss). Compare Chicago Heights Sec. Exch. v. Par Steel Prods., 463 N.E.2d 829, 830 (Ill.
of instruments covered by the provision to include all instruments as opposed to drafts only.\textsuperscript{55} Chapter 914 also expands the class of people protected by the rule to cover any holder as opposed to holders in due course only.\textsuperscript{56} Thus, if a drawer’s or maker’s negligence contributes to a material alteration of an instrument or lack of authority for a signed instrument, the maker or drawer is precluded from asserting the material alteration or lack of authority against any holder.\textsuperscript{57}

\textbf{Failure To Review Statements}

Existing law precludes a drawer who does not examine his or her statement of account\textsuperscript{58} within a reasonable time from asserting that certain payments were unauthorized.\textsuperscript{59} Under prior law, the drawer was precluded from asserting an unauthorized signature against the bank so long as the bank exercised reasonable care.\textsuperscript{60} Under Chapter 914, if both the drawer and the party asserting the preclusion fail to use ordinary care, the loss must be allocated between the two.\textsuperscript{61}

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\textsuperscript{55} CAL. COM. CODE § 3406(a) (repealed and enacted by Chapter 914); see SELECTED COMMERCIAL STATUTES § 3-406, cmt. 1, at 384 (West 1992).

\textsuperscript{56} CAL. COM. CODE § 3406(a) (repealed and enacted by Chapter 914); see SELECTED COMMERCIAL STATUTES § 3-406, cmt. 1, at 384 (West 1992).

\textsuperscript{57} SELECTED COMMERCIAL STATUTES § 3-406, cmt. 1, at 385 (West 1992).

\textsuperscript{58} See CAL. COM. CODE § 4104(a)(1) (amended by Chapter 914) (defining account).

\textsuperscript{59} Id. § 4406(d) (amended by Chapter 914). If the drawer does not report the unauthorized payment with reasonable promptness, the drawer is precluded from asserting the signature is unauthorized if the bank proves that it suffered a loss. Id. § 4406(d)(1) (amended by Chapter 914). The drawer is additionally precluded from asserting any forgery or alteration by the same wrongdoer on any other item paid in good faith by the bank before receiving notice and after the drawer has had a reasonable time to inspect the statement. Id. § 4406(d)(2) (amended by Chapter 914). Compare CAL. COM. CODE § 4406(d)(2) (amended by Chapter 914) (providing that a reasonable period of time is not to exceed 30 days) with U.C.C. § 4-406(2)(b) (West 1964) (providing that a reasonable period of time is not to exceed 14 days).

\textsuperscript{60} 1963 Cal. Stat. ch. 819, sec. 1, at 1929 (enacting CAL. COM. CODE § 4406(b)(2)).

\textsuperscript{61} CAL. COM. CODE § 3406(b) (repealed and enacted by Chapter 914); id. § 4406(e) (amended by Chapter 914). The loss must be allocated according to the extent to which each party’s failure to use ordinary care contributed to the loss. Id. See generally Li v. Yellow Cab, 13 Cal. 3d 804, 813, 532 P.2d 1226, 1232, 119 Cal. Rptr. 858, 864 (1975) (introducing comparative negligence.


ACCORD AND SATISFACTION

Existing case law provides that if a debtor, 62 whose debt is the subject of an honest dispute, sends a payment on the express condition that acceptance 63 will constitute full payment, acceptance by the creditor 64 is settlement of the debt even if the creditor notifies the debtor of the intention to accept only as a payment on account. 65 Chapter 914 provides that if the condition is written and conspicuous, 66 and subject to good faith dispute, acceptance by the creditor is an accord and satisfaction. 67 Chapter 914 additionally provides that a creditor may avoid application of accord and satisfaction under specified circumstances. 68

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63. See CAL. COM. CODE § 3409(a) (amended and enacted by Chapter 914) (defining acceptance).
64. See id. § 1201(12) (amended by Chapter 914) (defining creditor).
66. See CAL. COM. CODE § 1201(10) (amended by Chapter 914) (defining conspicuous).
67. Id. § 3311(a)-(b) (repealed and enacted by Chapter 914).
68. Id. § 3311(c) (repealed and enacted by Chapter 914). If an organization has sent a conspicuous statement to debtors asserting that communications concerning disputed debts must be sent to a specified address and the check was not sent to that place, the claim is not discharged. Id. § 3311(c)(1) (repealed and enacted by Chapter 914). The debt is not discharged if the claimant tenders repayment of the instrument within 90 days after payment. Id. § 3311(c)(2) (repealed and enacted by Chapter 914); see id. § 1201(28) (amended by Chapter 914) (defining organization); see also Connecticut Printers, Inc. v. Gus Kroesen, Inc., 134 Cal. App. 3d 54, 61, 184 Cal. Rptr. 436, 439 (1982) (upholding the rule in Potter v. Pacific Coast Lumber Co., but only applying it where there is a bona fide dispute between the parties). Compare Miller v. Jung, 361 So. 2d 788, 789 (Fl. App. Ct. 1978) (holding that a creditor who cashed a check over disputed debts, where the check
PAYMENT ON A POSTDATED CHECK

Under prior law a payor bank was not permitted to charge a customer's account for a postdated check before the stated date on the check because the check was not properly payable. Chapter 914 permits a bank to immediately charge a customer's account when a postdated check is paid early unless the customer gives notice to the bank of the postdating.

STOP PAYMENT

Under prior law, there were no express provisions regarding stop payments as they relate to teller's or cashier's checks. Under Chapter 914, a customer who buys a teller's or cashier's check has no right to stop payment.

SELECTED COMMERCIAL STATUTES § 4-403, cmt. 3, at 466 (West 1992). Thus, the customer does not fall under § 4-403(a) which allows a customer to stop payment on any item drawn on the customer's account. Id.
damages if the obligated bank is first notified of the circumstances creating the damages.\footnote{72}

Chapter 914 requires an obligated bank\footnote{73} to issue a replacement check or supply a refund to a claimant\footnote{74} who has provided a declaration of loss\footnote{75} when the claim is asserted or ninety days after the date of the original check, whichever is later.\footnote{76}

**COLLECTION OF ITEMS**

Chapter 914 permits a depository bank\footnote{77} to become a holder of a check whether or not the customer has endorsed the check.\footnote{78} Chapter 914 additionally provides that the person who encodes a magnetic ink character recognition (MICR)\footnote{79} amount on a check is liable for misencoding the amount if it is less than or greater than the amount that was to be encoded.\footnote{80}

\footnotesize
\begin{itemize}
\item 72. CAL. COM. CODE § 3411(b)(3) (repealed and enacted by Chapter 914).
\item 73. See id. § 3312(a)(4) (repealed and enacted by Chapter 914) (defining obligated bank).
\item 74. See id. § 3312(a)(2) (repealed and enacted by Chapter 914) (defining claimant with respect to § 3312).
\item 75. See id. § 3312(a)(3) (repealed and enacted by Chapter 914) (defining declaration of loss).
\item 76. Id. § 3312(b)(1) (repealed and enacted by Chapter 914). The claimant must provide identification if requested and the communication containing the declaration must describe the check with reasonable certainty and afford the bank reasonable time to act on the matter. Id. § 3312(b) (repealed and enacted by Chapter 914). Payment within 90 days of the original date of the check to the person entitled to enforce the check discharges the bank of any liability. Id. § 3312(b)(2) (repealed and enacted by Chapter 914); see id. § 3301 (repealed and enacted by Chapter 914) (defining person entitled to enforce the check); see also Ballen & Homrighausen, supra note 4, at 16 (suggesting that banks previously required an indemnity bond as a condition to issuance of a replacement check).
\item 77. See CAL. COM. CODE § 4105(2) (amended by Chapter 914) (defining depository bank).
\item 78. See id. § 4205(a) (repealed and enacted by Chapter 914). Compare Bowling Green, Inc. v. State Street Bank & Trust Co., 425 F.2d 81, 84 (1st Cir. 1970) (providing that a bank can be a holder on checks that have not been endorsed) with United Overseas Bank v. Venceen, Inc., 375 F. Supp. 596, 602 (D. Md. 1973) (ruling that a bank becomes a holder when it receives an item that has been endorsed or when the bank adds its depositor's endorsement to the item it received).
\item 79. See HAWKLAND, supra note 2, at § 4-101:14 (discussing the technical aspects of how checks encoded with MICR numbers are transmitted through the system).
\item 80. CAL. COM. CODE § 4209(a) (enacted by Chapter 914); see Port City State Bank v. American Nat'l Bank, 486 F.2d 196, 201 (10th Cir. 1973) (holding that where a check for $72 dollars was encoded for $72,000, the drawee is not liable until it accepts or pays the instrument); First Nat'l Bank of Boston v. Fidelity Bank, Nat'l Ass'n, 724 F. Supp. 1168, 1172 (E.D. Pa. 1989) (holding that where a payor bank paid only $10,000 on a $100,000 check due to an encoding error, the payor bank was not liable to the depository bank because the encoder was estopped from claiming more than the encoded amount).
\end{itemize}
TRANSFER AND NEGOTIATION

Under prior law, a holder could not sue on an instrument where the holder knew a fiduciary had negotiated the instrument for his or her personal benefit or breached his or her fiduciary duty. However, prior law did not preclude a holder from becoming a holder in due course just because the holder was aware that a fiduciary relationship existed. Chapter 914 clarifies prior law by specifying when a taker is subject to a claim on an instrument. In particular, Chapter 914 provides that a taker is subject to a claim on an instrument where the taker has knowledge that a fiduciary has a duty to a represented person, and the fiduciary has deposited an instrument drawn on the represented person’s account made out to the fiduciary. Conversely, Chapter

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81. See CAL. COM. CODE § 3104(b) (repealed and enacted by Chapter 914) (defining instrument as a negotiable instrument); see id. § 3104(e) (repealed and enacted by Chapter 914) (specifying when an instrument is a note and when an instrument is a draft).

82. See id. § 3307(a)(1) (repealed and enacted by Chapter 914) (defining fiduciary as an agent, trustee, partner, corporate officer or director, or other representative owing a fiduciary duty with respect to an instrument).

83. See id. § 3201(a) (repealed and enacted by Chapter 914) (defining negotiation as a transfer of possession of an instrument).

84. 1963 Cal. Stat. ch. 819, sec. 1, at 1900 (enacting CAL. COM. CODE § 3304(2)).

85. Id., sec. 1, at 1900 (enacting CAL. COM. CODE § 3304(4)(e)).

86. CAL. COM. CODE § 3307(b) (repealed and enacted by Chapter 914); see id. § 3104 (repealed and enacted by Chapter 914) (defining instrument as a negotiable instrument). Chapter 914 specifies that a taker cannot be a holder in due course where a taker has notice of a claim to an instrument. Id. § 3302(a)(2)(e) (repealed and enacted by Chapter 914); see id. § 3306 (repealed and enacted by Chapter 914) (specifying when a person can be subject to a claim on an instrument).

87. See id. § 1201(25)(c) (amended by Chapter 914) (defining knowledge). Existing law provides that the taker’s knowledge has to be actual knowledge, or that given the totality of circumstances, the taker should have been put on notice. Id. § 1201(25)(a)-(c) (amended by Chapter 914).

88. See id. § 3307(a)(2) (repealed and enacted by Chapter 914) (defining represented person as principal, beneficiary, partnership, corporation, or other person to whom the duty stated in 3307(a)(1) is owed).

89. Id. § 3307(b)(2) (repealed and enacted by Chapter 914). The rationale behind section 3307(b)(2) is that it is not within the normal course of business for a fiduciary to deposit to the fiduciary’s personal account an instrument made out to the represented person and endorsed by the fiduciary. SELECTED COMMERCIAL STATUTES § 3-307, cmt. 3, at 357 (West 1992). Compare Smith v. Olympic Bank, 693 P.2d 92, 95 (Wash. 1985) (holding that a bank was placed on notice that a fiduciary breached his duty where a father received a life insurance check as guardian to a minor, endorsed the check as guardian, and deposited it in his personal account) with In re Knox, 477 N.E.2d 448, 451 (N.Y. 1985) (holding that a bank was not on notice where a guardian placed assets

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914 provides that where the fiduciary has authority to write checks on the represented person's account and the fiduciary writes an instrument out to the fiduciary personally, the taker is not put on notice.\(^9\)

Under prior law, a buyer's obligation was discharged on the instrument and on the underlying obligation where a holder had a check certified.\(^9\) In this case, while prior law permitted the holder to sue the certifying bank on the acceptor's contract for payment,\(^9\) the holder had no right of recourse against the drawer on the underlying obligation or on the instrument.\(^9\) Furthermore, prior law provided that where the check was not certified, the holder's right of recourse against the drawer on the instrument was suspended until the instrument came due, or until presentment in the case where the instrument was payable on demand.\(^9\) If the instrument was dishonored, then the holder could sue the drawer on the instrument or the underlying obligation.\(^9\) Under Chapter 914, it does not matter who has the check certified because a drawer is discharged when a bank accepts the check.\(^9\) Chapter 914 further provides that where a certified check,\(^9\) cashier's check,\(^9\) or teller's check\(^9\) is

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of a minor into the guardian's personal bank account); Eldon's Super Fresh Stores, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 207 N.W.2d 282, 289 (Minn. 1973) (holding that a brokerage did not meet the actual knowledge requirement under U.C.C. § 1201(25) to be placed on notice where the brokerage simply received a check in payment of a transaction for the personal account of corporate officer who paid for brokerage services with a corporate check).

90. CAL. COM. CODE § 3307(b)(3) (repealed and enacted by Chapter 914). The rationale for not placing the taker on notice in this situation is that this is not an unusual type of transaction. SELECTED COMMERCIAL STATUTES § 3-307, cmt. 4, at 357 (West 1992).

91. 1963 Cal. Stat. ch. 819, sec. 1, at 1904 (enacting CAL. COM. CODE § 3802(1)(a)).
92. See id., sec. 1, at 1906 (enacting CAL. COM. CODE § 3413(a)). Section 3413 provided that an acceptor agrees to pay the instrument). Id.
93. Id.
94. Id., sec. 1, at 1915 (enacting CAL. COM. CODE § 3802(1)(b)).
95. Id.
96. CAL. COM. CODE § 3414(e) (repealed and enacted by Chapter 914).
97. See id. § 3409(d) (repealed and enacted by Chapter 914) (defining certified check as a check accepted by a bank upon which the check is drawn).
98. See id. § 3104(g) (repealed and enacted by Chapter 914) (defining cashier's check as a draft in which the drawer and drawee are the same bank).
99. See id. § 3104(h) (repealed and enacted by Chapter 914) (defining teller's check as a draft drawn by one bank on another bank or payable at another bank).
furnished as payment for an obligation, the obligation is discharged, unless there is an agreement to the contrary.\textsuperscript{100}

Chapter 914 expands the scope of Division 3 to include situations where a check given to a payee is stolen, the payee’s name is forged, and the forger receives payment.\textsuperscript{101} In this case, Chapter 914 provides that the drawer’s obligation is suspended on the underlying obligation because a forger cannot be a holder in due course, and therefore the payor bank did not pay a holder.\textsuperscript{102} If the payor bank pays a forger, the underlying obligation continues to be suspended.\textsuperscript{103} Thus, the payee can attempt to obtain the amount due on the instrument either through a cause of action in conversion against the bank\textsuperscript{104} or against the drawer.\textsuperscript{105}

\textbf{STATUTE OF LIMITATIONS}

Prior law specified when various causes of action accrued.\textsuperscript{106} Chapter 914 specifies the statute of limitations that apply under Division 3 in various actions to enforce a party’s obligations on an

\begin{footnotes}
\item[100] \textit{id.} § 3310(a) (repealed and enacted by Chapter 914). Under former U.C.C. section 3802(1)(a), if there was a right of recourse, then the obligation could not be discharged. \textit{Selected Commercial Statutes} § 3-310, cmt. 2, at 361 (West 1992). However, under Chapter 914, the obligation is discharged while a right of recourse is retained. \textit{Id.} Under prior law, teller’s checks and cashier’s checks were not expressly defined. \textit{Compare} 1963 Cal. Stat. ch. 819, sec. 1, at 1892 (enacting \textit{Cal. Com. Code} § 3104) (defining certified check, but providing no definition for either teller’s check or cashier’s check) \textit{with} \textit{Cal. Com. Code} § 3104(g), (h) (repealed and enacted by Chapter 914) (providing definitions for cashier’s check and teller’s check); \textit{id.} § 3409(d) (repealed and enacted by Chapter 914) (defining certified check). However, Chapter 914 expressly defines these types of instruments. \textit{Id.} § 3104(g)-(h) (repealed and enacted by Chapter 914).


\item[102] \textit{Cal. Com. Code} § 3310(b)(4) (repealed and enacted by Chapter 914).

\item[103] \textit{Id.} § 3602(a) (repealed and enacted by Chapter 914).

\item[104] \textit{Id.} § 3420 (repealed and enacted by Chapter 914). Section 3420 provides that an action in conversion exists where a person not entitled to enforce the instrument takes the instrument and receives payment for it. \textit{Id.} § 3420(a) (repealed and enacted by Chapter 914).

\item[105] \textit{Id.} § 3309(a) (repealed and enacted by Chapter 914). Section 3309 provides that where a payee’s check is stolen, the payee can still enforce the instrument. \textit{Id.} § 3309(a) (repealed and enacted by Chapter 914). Under § 3414, the drawer’s obligation is triggered due to dishonor resulting from the unpaid check. \textit{Id.} § 3414(b) (repealed and enacted by Chapter 914).

\item[106] 1963 Cal. Stat. ch. 819, sec. 1, at 1896 (enacting \textit{Cal. Com. Code} § 3122) (specifying the time at which a cause of action accrued against a maker or acceptor, the obligor of a demand or time certificate of deposit, and a drawer of a draft or an endorser of any instrument).

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instrument to pay the instrument, or where conversion or warranty is at issue.\textsuperscript{107}

\textit{TRF/LGC}

\textbf{Commercial Transactions; telephone solicitations}

Business and Professions Code §§ 17539.5, 17539.55, 17539.6 (new).
AB 2746 (Speier); 1992 \textsc{Stat. Ch.} 944

Existing law requires telephonic sellers\textsuperscript{1} to register with the State Attorney General.\textsuperscript{2} Existing law further requires telephonic sellers to disclose specified information\textsuperscript{3} to potential buyers, and forbids telephonic sellers from engaging in specified unlawful activities.\textsuperscript{4}

\textsuperscript{107} \textsc{Cal. Com. Code} § 3118 (repealed and enacted by Chapter 914). Listed below are some examples of these statutes of limitation. In actions where a party is enforcing the obligation of another party to pay a note payable at a definite time, the statute of limitations is six years from the due date or dates stated in the note. \textit{Id.} § 3118(a) (repealed and enacted by Chapter 914). In actions involving notes payable on demand, the statute of limitations for bringing a cause of action to enforce the demand is within six years from the time that demand for payment was made to the maker. \textit{Id.} § 3118(b) (repealed and enacted by Chapter 914). In the case of a breach of warranty or conversion of an instrument for money had and received, the statute of limitations is three years from when the cause of action accrues. \textit{Id.} § 3118(g) (repealed and enacted by Chapter 914).

\begin{itemize}
  \item 1. \textit{See Cal. Bus. & Prof. Code} § 17511.1 (West 1987) (defining telephonic seller as a person who causes or attempts to cause a telephone solicitation to occur either by his own efforts, by sales people, or by automatic dialing machines).
  \item 3. \textit{See Cal. Bus. & Prof. Code} § 17511.5 (West 1987) (requiring telephonic sellers to inform prospective purchasers of such things as the seller's complete name and address).
  \item 4. \textit{Id.} Section 17511.7 prohibits telephonic sellers from mentioning to prospective purchasers that the seller must comply with various requirements relating to telephonic sellers such as telling the purchaser of the seller's complete name and address. \textit{Id.} § 17511.7 (West 1987). Section 17511.8 further prohibits telephonic sellers from soliciting prospective purchasers unless the sellers are registered with the Department of Justice. \textit{Id.} § 17511.8 (West 1987). Section 17511.9 prohibits anyone from wilfully violating any provision relating to telephonic sellers, or from engaging in a business practice involving a telephonic seller that would constitute fraud or deception. \textit{Id.} § 17511.9 (West 1987).
\end{itemize}
Under Chapter 944, information providers are prohibited from engaging in specified activities if the activities are designed to solicit callers to use an information-access service. Additionally, Chapter 944 requires information providers to disclose specified information in all advertisements. Chapter 944 prohibits information providers from engaging in certain activities if their business involves a sweepstakes, unless they comply with

5. See id. § 17539.5(a)(5) (enacted by Chapter 944) (defining information provider as a person who sells or advertises for his or her own benefit an information-access service). An information-access service is a telecommunications service which charges users more than the standard cost of transmitting the call to access the service's telephone number. Id. § 17539.5(a)(6) (enacted by Chapter 944).

6. See id. § 17539.5(b) (enacted by Chapter 944) (specifying prohibited activities). Chapter 944 forbids the following: (1) Using automatic dialing devices or a live or recorded outbound telephone message; (2) using signals or tones provided by the telephone solicitation service to access the information-access service; (3) using one telephone number to connect callers directly with a 900 number; (4) referring a caller from one 900 number to another; (5) requiring callers to call more than one 900 in order to receive goods or services; (6) advertising that the information-access service is free; and (7) advertising in such a way that implies the ad came from such entities as the government, a public utility, or insurance company. Id.

7. See id. § 17539.5(a)(11) (enacted by Chapter 944) (defining solicitation).

8. See id. § 17539.5(a)(2) (enacted by Chapter 944) (defining caller).

9. Id. § 17539.5(b) (enacted by Chapter 944); see SENATE FLOOR ANALYSIS OF AB 2746, at 2-3 (Aug. 10, 1992) (stating that the apparent reason for implementing this law is to prevent fraudulent and misleading practices involving the use of "900" numbers, particularly those "900" numbers which involve contest, sweepstake, investment, credit card, and job referral scams).

10. See CAL. BUS. & PROF. CODE § 17539.5(c) (enacted by Chapter 944) (specifying information required to be disclosed). Chapter 944 requires information providers to disclose the following: (1) A description of the information-access service; (2) the information provider's name, address, and non-900 telephone number; (3) the cost of the call to be calculated depending on the type of information-access service provided; and (4) for information-access services likely to attract callers under the age of 18, a warning that children should obtain parental consent before using the service. Id.; cf. ILL. STAT. ch. 134, para. 160A (1992) (mandating that telecommunications carriers who provide pay-per-call telephone information services furnish the name, address, and telephone number of the actual provider of the information service); LA. REV. STAT. ANN. § 1731 (West 1992) (specifying that advertisements for telecommunications services must state the cost of calling the service); ARIZ. REV. STAT. ANN. § 13-2920 (West 1991) (providing that an information access telephone service provider must state the cost of each call). Arizona Revised Statutes Annotated § 13-2920 additionally requires information access telephone service providers to: (1) reimburse the telephone carriers for any costs incurred associated with blocking the information access service; (2) arrange with telephone carriers to make a one time fee adjustment for telephone calls made to the information access service by minors who call the service without authorization or involve fraudulent calls; and (3) restrict any sexually explicit information access services to persons over the age of eighteen. Id.

11. CAL. BUS. & PROF. CODE § 17539.5(c) (enacted by Chapter 944).

12. See id. § 17539.5(a)(12) (enacted by Chapter 944) (defining sweepstakes).
specified provisions. Under Chapter 944, any information provider who operates an information-access service that involves a sweepstakes is required to register with the Department of Justice and provide the Department with certain information. Last, Chapter 944 provides that any advertisement for a 900 number, whether broadcast or in print, be written or spoken in the same language that the 900 number uses in its recorded messages or with live operators.

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13. Id. § 17539.5(d) (enacted by Chapter 944). Chapter 944 requires information providers to comply with a variety of requirements if their information-access services engage in a sweepstakes. Id. These requirements include providing a free-alternative method of entering the sweepstakes that is prominently disclosed on all solicitations, prohibiting minors from participating, and making a list available of all winners of major prizes to anyone who asks for the list. Id.

14. Id. § 17539.55(a) (enacted by Chapter 944); see id. § 17539.55(b) (enacted by Chapter 944) (requiring that the registration contain specified information). Chapter 944 specifies that information providers must furnish the Department of Justice with such information as each 900 number used in the sweepstakes, the information provider's name, address, and corporate identity, a copy of the sweepstakes rules, and copies of each type of solicitation that the information provider has used. Id.

15. Id. § 17539.6 (enacted by Chapter 944).