which of his parents he wishes to live. The attorney can presumably delve into this deeply, and hopefully the child will have confidence in his attorney and will express his hopes, his fears and desires. Only when the attorney is fully satisfied that he understands the true wishes of his client as to custodian, will the attorney then present his case accordingly. If the child is of sufficient age and intelligence, his choice, if made without influence, should be a strong factor in helping the attorney decide which parent should have custody of his client.

Although an investigator does not represent the child as would an attorney or guardian ad litem, he should still be a neutral party in the case. Such neutrality should place him in a similar position where he can win the confidence of the child, the why's and the wherefore's, and include in his report a complete analysis of the child's choice of custodian and the role that the choice should play in the ultimate outcome of the custody issue.

VII. CONCLUSION

The time has come to recognize the right of a child to be represented in divorce or dissolution litigation. This would not diminish in any way the rights of his parents. The child is a person independent of his parents and as such he has standing in litigation which is vital to him and to his welfare. In our adjudicatory system, we purport to accord due process to all the parties litigant. Let us acknowledge the child as a party or litigant in such actions, and provide him with the same due process accorded others. This can best be done by appointing an attorney or a guardian ad litem to represent him.

Additionally, weight should be given to the choice of a child regarding his custodian. The appointment of an attorney to represent the child or of a guardian ad litem to protect his interests, or of an investigator to make an investigation as to custody, facilitates this. However, even in the absence of such an appointment, the role of the child should have real impact. His participation should not be a mere formality, but rather it should be a living and vital factor. In this way, the guiding principle of serving the child's best interests will itself be advanced. A judge is either authorized by statute or has inherent power to interview the child. This power he should utilize fully. The interview should be considered a critical element in the custody determination process. A child of sufficient age and intelligence can make his own choice; he need not be a mental giant to know where he wants to be and with whom. Obviously, the matter should be an important factor in awarding custody. In an appropriate case, it can be controlling. It is as sound a basis upon which to decide the issue of custody as any. Nothing less than the child's future happiness and welfare are at stake. His choice, his wishes, are terribly meaningful if those goals are to be achieved.

FORGERY AND GOVERNMENT CHECKS

Francis H. Fox†

I. PRELIMINARY DISCUSSION

This Article deals with the rights and duties of collecting banks and presenting banks which have the misfortune to handle checks[1] issued by the United States Treasury which bear forged signatures. The situations discussed herein for the most part concern attempts by the Government to recover payments made by the Treasury when it is subsequently learned that the check in question bore a forged drawer's signature or a forged endorsement. In the typical case the check will be deposited in a bank by the wrongdoer or someone who took the instrument from the wrongdoer, will wend its way through one or more collecting banks, and will be presented by the presenting bank[2] to the Treasury, which will then pay the instrument. When the forgery is subsequently discovered, the United States will attempt to recover the payment from the presenting bank or one of the other banks in the chain. This Article will examine the ability of the United States to make such a recovery and compare with it the ability of a bank, acting as payor, to recover in similar situations involving private paper.

This Article does not cover the rights of private parties among themselves with respect to government checks,[3] nor does it address the rights and obligations of the United States as a payee or holder of private commercial paper.[4]

In *Clearfield Trust Co. v. United States*,[5] the United States Supreme Court held that federal law governs the rights and obligations of the

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†B.A. 1955, Holy Cross College; LL.B. 1963, Harvard Law School. Member, Bingham, Dana & Gould, Boston, Massachusetts.

1. A government check, as referred to herein, is a draft drawn on the Treasury. It is not drawn on a bank and thus does not meet the Uniform Commercial Code definition of "check." *See* U.C.C. § 3-104(2)(b). Such an item is commonly referred to as a government check, however, and this Article therefore adopts that terminology.

2. "Collecting banks," "presenting banks" and similar terms are defined in U.C.C. § 4-105 and are used in this Article as having the same meaning.

3. The indications are that the rights among themselves of such persons as successive holders or joint payees are governed by state law, since they do "not touch the rights and duties of the United States." Bank of America Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29, 33 (1956).

4. *See, e.g.*, D'Oench, Duhme & Co. v. F.D.I.C., 315 U.S. 447 (1942).

5. 318 U.S. 363 (1943).

United States on government drafts. The Court reasoned in *Clearfield* that since the United States issues checks on such a "vast scale," uniformity is imperative in the treatment to be afforded the United States on such instruments, and such uniformity could best be achieved by fashioning a federal rule.[6] Thus the United States would be spared the vagaries of different substantive rules of law being applied to its own checks dependent upon which state's law might otherwise be deemed applicable to the particular transaction. The Court specifically held that *Erie Railroad Co. v. Tompkins*[7] has no applicability.

Since the *Clearfield* decision, all fifty states, the District of Columbia and the Virgin Islands have adopted the Uniform Commercial Code; thus Articles 3 and 4 of the Code govern all rights and obligations concerning private commercial paper. The Supreme Court has not questioned the continued validity of the *Clearfield* decision, however, and it still states the law. Thus the courts continue to apply a kind of federal common law to United States checks. In some fact situations the result is the same as it would be were private parties litigating and the U.C.C was applicable. In other situations, however, the result differs from what the U.C.C. would prescribe. This Article will examine these similarities and differencs.

II. FORGED DRAWER'S SIGNATURE

In the situation where the Treasury—having paid the presenting bank—subsequently learns that the signature of the purported government disbursing officer, as drawer, has been forged, and thus sues the presenting bank to recover the funds erroneously paid, the Government will lose. This is the federal common law position, as it was enunciated in *United States v. Chase National Bank.*[8]

The result which would be reached if the Uniform Commercial Code was applicable rather than federal common law is the same. It is a well-settled principle that payments made under a mistake of fact may be recovered, even in situations where the person making the payment was negligent, unless the payment has caused a change of position on the part of the person receiving the money so that it would be inequitable to require him to make repayment.[9] Clearly a bank paying an instrument which it believes to be a legitimately drawn check, but which is actually a forgery, has made payment under a mistake of fact. Since the *Price v.*

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6. Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943).
7. *Id.* at 366, *citing* Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).
8. 252 U.S. 485 (1920).
9. *See, e.g.*, Lake Gogebic Lumber Co. v. Burns, 331 Mich. 315, 49 N.W.2d 310 (1951); Pilot Life Ins. Co. v. Cudd, 208 S.C. 6, 36 S.E.2d 860 (1945). *See generally* RESTATEMENT OF RESTITUTION § 20 (1937).

Neal[10] decision in 1762, however, most courts have recognized an exception to this rule of restitution in the instance of a drawee bank attempting recovery of a payment by reason of the forgery of its own customer's signature. *Price v. Neal*,[11] which held that a drawee will be held to know the signature of the drawer and thus will not be allowed to recover its payment, has been followed by American decisions under the common law,[12] under the Negotiable Instrument Law,[13] and now is codified in the U.C.C.[14] The Government, as drawer and drawee of the check, would certainly be held to know its own signature under the U.C.C.[15]

III. DOUBLE FORGERY

If a government check bears a forged drawer's signature and also bears a forged endorsement, the United States is in no better position in its action against the presenting bank.[16] *United States v. Chase National Bank*[17] was a double forgery case. In this case, the dishonest government agent forged the drawer's signature and the payee's signature as well. The presenting bank, having obtained the money from the Treasury, was able to resist repayment. The Court held that the Government, having paid a forged government check despite its presumed knowledge of its own signature, cannot recover by showing that still another signature, with which it was not familiar, was also forged. The Court pointed out that the forged endorsement put the drawee in no worse position than it would have been had the endorsement been genuine. Apparently the Court concluded that a drawee which makes two mistakes should not be in any better position than a drawee which makes only one mistake.

Whether a drawee, paying a private check containing such double forgeries, could recover is not certain under the U.C.C. A Georgia case indicates that the drawee can recover.[18] Under the pre-Code law, however, there was a split of authority, with some courts denying recovery and others allowing it.[19]

It seems likely that in most instances where a so-called double forgery is found, the person forging the drawer's signature will have in-

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10. 97 Eng. Rep. 871 (K.B. 1762).
11. *Id.*
12. *E.g.*, South Boston Trust Co. v. Levin, 249 Mass. 45, 143 N.E. 816 (1924).
13. *E.g.*, Fidelity & Cas. Co. v. Planenscheck, 200 Wis. 304, 227 N.W. 387 (1929).
14. U.C.C. §§ 3-417, 3-418, 4-207.
15. *See, e.g.*, U.C.C. § 4-207(1)(b)(ii), which provides that a collecting bank's warranty of lack of knowledge of an unauthorized drawer's signature is not made to the drawer, whether or not the drawer is also the drawee.
16. United States v. Chase Nat'l Bank, 252 U.S. 485 (1920).
17. 252 U.S. 485 (1920).
18. Bank of Thomas County v. Dekle, 119 Ga. App. 753, 168 S.E.2d 834 (1969).
19. *See* J.E. BRADY, THE LAW OF BANK CHECKS § 15.16 (4th ed. H.J. Bailey 1969) [hereinafter referred to as BRADY] and the cases cited there.

tended the "payee" to have no interest in the instrument and the presenting bank will not have broken its warranty as to the genuineness of endorsements since an endorsement by any person will be effective.[20] If this is so, the result applicable under the Code to private paper will not differ in practical effect from the result under *United States v. Chase National Bank*.[21] In this situation, then, the law governing private and public paper would appear to be compatible.

IV. Altered Instruments

Where the amount of a properly executed government check is fraudulently increased and the check is paid by the Treasury in the increased amount, it would appear that the Government will lose if it sues the presenting bank to recover the excess amount paid. This is the holding in *United States v. National Exchange Bank*.[22] In *National Exchange Bank*, the Government sued to recover money paid under a mistake of fact. Justice Holmes, for the Court, denied recovery on the basis that the drawer and drawee were the same, the United States, and the drawer "is bound to know his own checks."[23]

The same result would obtain under the Code, although perhaps the principle may be articulated differently. Under the Code the duties of collecting banks are generally set forth in terms of warranty. The collecting bank warrants that the item has not been materially altered but such a warranty does not, in the usual circumstances, extend to the drawer "whether or not the drawer is also the drawee."[24] The Code thus conforms to "federal common law."

V. Simple Forged Endorsement

Perhaps the most commonly litigated forgery situation concerns endorsements which are alleged to have been forged. In the government check context, the Treasury will have paid the presenting bank and subsequently a claim will be made that the signature upon the back of the instrument is not that of the named payee. While special considerations apply with respect to the applicability of the imposter or fictitious payee rules, those matters are covered hereafter. The present topic concerns the "simple" situation where the payee of the check claims his endorsement was forged and the Treasury attempts to recover its payment from a collecting bank. This area is covered by government regulations.

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20. U.C.C. § 3-405(1)(b). *See, e.g.*, Aetna Life & Cas. Co. v. Hampton State Bank, 497 S.W.2d 80 (Tex. Civ. App. 1973). This approach was argued by the bank in *Chase National Bank*. The Court found for the bank but did not address this point.
21. 252 U.S. 485 (1920).
22. 270 U.S. 527 (1926).
23. United States v. National Exch. Bank, 270 U.S. 527, 534 (1926).
24. U.C.C. § 4-207(1)(c)(ii). *See* § 3-417(1)(c)(ii).

The innocent payee whose check was stolen or forged may recover from the United States through the so-called Check Forgery Insurance Fund.[25] This is a revolving fund composed of moneys not otherwise appropriated, which the Treasurer may use to settle with payees or special endorsees whose losses have not occurred through their own fault.

The Treasury, in turn, may recover from the presenting bank upon that bank's guaranty of prior endorsements,[26] pursuant to the following regulations:

> *Guaranty of indorsements:*
>
> The presenting bank and the indorsers of a check presented to the Treasury for payment are deemed to guarantee to the Treasury that all prior indorsements are genuine, whether or not an express guaranty is placed on the check. When the first indorsement has been made by one other than the payee personally, the presenting bank and the indorsers are deemed to guarantee to the Treasury, in addition to other warranties, that the person who so indorsed had unqualified capacity and authority to indorse the check in behalf of the payee.[27]
>
> *Reclamation of amounts of paid checks:*
>
> The Treasury shall have the right to demand refund from the presenting bank of the amount of a paid check if after payment the check is found to bear a forged or unauthorized indorsement or an indorsement by another for a deceased payee where the right to the proceeds of such check terminated upon the death of the payee, or to contain any other material defect or alteration which was not discovered upon first examination. If refund is not made, the Treasury shall take such action against the proper parties as may be necessary to protect the interests of the United States.[28]

Thus in the usual conflict between the United States and the presenting bank on this issue the United States will prevail.[29]

The result under the U.C.C would be the same, since the collecting bank warrants to the payor bank its own title to the instrument regardless of whether or not its stamp purports by express terms to guarantee the genuineness of endorsements.[30] Here again, the Code result and the "federal common law" result are consistent.

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25. 31 U.S.C. §§ 561-64 (1970).

26. Recoveries reimburse the Check Forgery Insurance Fund. 31 U.S.C. § 563 (1970).

27. 31 C.F.R. § 240.4 (1976).

28. *Id.* § 240.5.

29. Clearfield Trust Co. v. United States, 318 U.S. 363 (1943); United States v. City Nat'l Bank & Trust Co., 491 F.2d 851 (8th Cir. 1974); United States v. First Nat'l Bank, 441 F.2d 906 (5th Cir. 1971); United States v. National Bank of Commerce, 438 F.2d 809 (5th Cir.), *cert. denied*, 404 U.S. 828 (1971). *See* BRADY, *supra* note 19, at § 15.30.

30. *See* U.C.C. §§ 4-207(1)(a) and 4-207(3). Section 4-207 warranties are intended to give the same effect as the familiar "prior endorsements guaranteed" language often contained in bank endorsements. U.C.C. § 4-207, Comment 2. *See* BRADY, *supra* note 19, at § 5.19.

VI. The "Pure" Imposter Rule

In the "pure" imposter situation someone successfully impersonates another and induces the drawer to issue a check to the imposter, made payable to the impersonated individual. Under pre-Code law the so-called "imposter" rule was widely recognized and enabled the drawee bank to defend against the claim of its customer, the drawer, that the instrument was paid over a forged endorsement.[31] Perhaps upon the ground that the gullible drawer who dealt with the crook should bear the loss, rather than the bank which would have less means of knowing the payee's signature, the drawee bank was protected when it paid such an instrument. The prevailing rationale was that the signature was not a forgery. The drawer intended the person with whom he dealt to have the instrument and negotiate it. That person, using the assumed name, is in fact the one who endorsed and thus there is no forgery.[32]

The federal case law has applied this concept to the United States. Where the Government, as drawer, issues a check to an imposter and the check is ultimately paid by the Treasury, the Government, acting in its capacity as drawee, cannot recover from the presenting bank under the latter's guaranty of endorsements.[33] There being no "forgery," there is no breach by the presenting bank. This same result would obtain under the express language of the Code, § 3-405(a).

VII. Imposter By Mail

There was a split of authority under pre-Code state law as to whether the same rule applied where the imposter duped the drawer through the mails rather than in a face-to-face encounter. The principle that it was the flesh and blood human being standing before the drawer who was intended, by the drawer, to receive the check and that thus the "right" person received and signed the check is more difficult to articulate when the scheme is a complicated one accomplished at long distance by mail or telephone. Some courts found the difference crucial, although others di not.[34]

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31. *E.g.*, Schweitzer v. Bank of America N.T. & S.A., 42 Cal. App. 2d 536, 109 P.2d 441 (1941); McCornack v. Central State Bank, 203 Iowa 833, 211 N.W. 542 (1926); General Amer. Life Ins. Co. v. National Bank of Commerce, 348 S.W.2d 393 (Tex. Civ. App. 1961).

32. Numerous cases so hold. *E.g.*, Santa Maria v. Indus. City Bank & Banking Co., 326 Mass. 440, 95 N.E.2d 176 (1950). *See* Brady, *supra* note 19, at § 15.17. The imposter rule was a case law development and was not found in the text of the N.I.L. itself.

33. Continental-American Bank & Trust Co. v. United States, 161 F.2d 935 (5th Cir. 1947); United States v. First Nat'l Bank, 131 F.2d 985 (10th Cir. 1942). The action would be brought under 31 C.F.R. §§ 240.4 and 240.5 (1976), quoted in the text accompanying notes 27 and 28 *supra*.

34. For a discussion of the cases discussing this issue, *see* Brady, *supra* note 19, at § 15.17. *See also* 10 Am. Jur. 2d *Banks* § 638 (1963), which compiles many of the cases. As an example of the perceived significance of this difference, in Russell v. Second Nat'l Bank, 136

The cases concerning government checks have not considered a face-to-face encounter between drawer and imposter to be indispensable. In *Atlantic National Bank v. United States*[35] and *United States v. Bank of America National Trust & Savings Association*,[36] the courts dealt with claims by the Government for reimbursement from collecting banks which had received payment on Internal Revenue Service refund checks. In each case the scheme was perpetrated upon the check-issuing person by spurious tax returns delivered through the mails, although in one case it happened to be a crooked tax collector who used the mails to dupe a fellow government official. In each case the court expressly treated the situation as appropriate for the imposter rule. This result would be the same under the Code. Section 3-405(a) expressly negates any difference between face-to-face and long-range imposters.

VIII. FICTITIOUS PAYEE: PADDED PAYROLL

The differences between Uniform Commercial Code results and federal common law results are most pronounced in the "fictitious payee" setting. In the typical "padded payroll" situation, a dishonest employee prepares phony payroll information or invoices and persuades the person with check-signing authority to issue checks in the names of the payees thus submitted. The persons thus named may be nonexistent or they may be real, but the common factor is that the person bringing about the fraud does not intend the named payees to have any interest in the checks. A variant of this scheme is found where the dishonest employee himself has check-signing authority and issues checks in the names of persons whom he does not intend to have an interest in the checks.

Under the Negotiable Instruments Law as originally enacted, an instrument was deemed to be bearer paper, and thus properly payable by the drawee even where the endorsement was made improperly in the payee's name by the crook, if the instrument was, to the knowledge of the person signing as drawer, made payable to a "ficititious or nonexisting person."[37]

This was deemed too narrow by a number of states and, over the years, the N.I.L. was amended in various jurisdictions to accord the same bearer paper status to checks issued either to fictitious or nonexisting

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N.J.L. 270, 55 A.2d 211 (1947), the same victim was swindled in two similar but not identical ways, both entailing fraudulent telephone solicitations. The victim prevailed against the drawee bank in one situation but the bank prevailed in the other situation which was closer to the "pure" imposter context.

35. 250 F.2d 114 (5th Cir. 1957).

36. 274 F.2d 366 (9th Cir. 1959).

37. N.I.L. § 9 (3), which read: "The instrument is payable to bearer . . . (3) When it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable . . . ."

persons or real persons intended to have no interest in the checks, and the "knowledge" that the check was so payable could be possessed by either the person actually signing as drawer or the dishonest employee who submitted the name to the signer.[38] There was, then, no unanimity under the N.I.L. and its case law concerning the extent of the fictitious payee rule.

During a fairly early stage of the state law development of the fictitious payee concept, cases pertaining to government checks were decided by the federal courts. The ficitious payee concept was not held applicable; indeed, it was barely adverted to by the parties or the courts. These cases have not been overruled and may accurately reflect the present status of federal common law, although the commercial law, as found in the Uniform Commercial Code, has for years now adopted the "expanded" version of the fictitious payee rule.[39]

In *Washington Loan & Trust Co. v. United States,*[40] one of the federal court decisions, a dishonest government employee induced an authorized Finance Officer to issue a large number of government checks to nonexistent Civilian Conservation Camp employees. Subsequent to making payment on the checks to the presenting bank, the Treasury sued the presenting bank upon its guaranty of endorsements. The major issue argued concerned the alleged negligence of the Government and the availability of estoppel. The court ruled for the Government on these issues and then briefly addressed the "fictitious payee" question. The court pointed out that while some jurisdictions had amended the N.I.L. to broaden the concept, the District of Columbia had not and thus it was a requisite that the person signing on behalf of the drawer intend the payee to have no interest. Here that person himself was duped by the dishonest employee who presented him with the fraudulent documents; as a result the fictitious payee rule did not apply.[41] This case was decided the same day the Supreme Court decided *Clearfield* and thus it purported to reach its decision on the basis of the District of Columbia statute rather than on *Clearfield*-mandated federal common law.

Subsequently the Supreme Court decided *National Metropolitan Bank v. United States.*[42] There the dishonest government clerk procured the issuance of military checks by presenting fraudulent documentation to the disbursing officer. There were 144 such checks, each payable to an ex-

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38. The amended version of N.I.L. § 9 (3) reads:

> the instrument is payable to bearer . . . when it is payable to the order of a fictitious person, or a non-existent person, or an existing person not intended to have any interest in it, and any such fact was known to the person making it so payable, or known to his employee or other agent who supplied the name of such payee.

39. U.C.C. § 3-405(1)(c).
40. 134 F.2d 59 (D.C. Cir. 1943).
41. Washington Loan & Trust Co. v. United States, 134 F.2d 59, 63-64 (D.C. Cir. 1943).
42. 323 U.S. 454 (1945).

isting Marine Corps officer intended, by the dishonest employee, to have no interest in the check. These checks were paid, having been "endorsed" by the dishonest clerk. The Court held in favor of the Government in its suit against the presenting bank on the guaranty of endorsements. The court ruled that the signature of the officers were forged and held that the presenting bank was liable on its guaranty of endorsements.[43] The case does not discuss the fictitious payee rule, but only addresses the issue of the negligence of the Government. The Supreme Court has not spoken in this area since *National Metropolitan Bank*. The following is an analysis of where the law appears to be, in terms of predictability of results, at this time.

A. *Checks Issued in Name of Existing Persons Intended to Have No Interest in Them*

Where the government agent perpetrating the fraud makes use of the names, and perhaps the records, of existing persons and causes checks to be issued in those names, the courts will treat any endorsements appearing on these checks in the name of the payee as forgeries. Since there is an actual person whose name appears on the face of the check, and since someone other than that person has endorsed the check, the endorsement is forged and the presenting bank will be held liable to the United States on its guaranty under the *Code of Federal Regulations*.[44] While the fictitious payee defense was not specifically addressed in the opinion, the holding in *National Metropolitan Bank*, on its facts, is too direct a precedent to overcome where the fraudulent scheme entails the use of existing persons' names.

The result under the U.C.C. would be different. Section 3-405 adopts an expansive concept of the "fictitious payee" rule which covers instruments payable to persons, real or fictitious, who are not intended, by the drawer or the inducing employee, to have an interest therein.[45] While the method chosen by the Code (allowing an endorsement in the name of the payee to be effective) is different from the N.I.L. method of shielding a bank in a fictitious payee situation (rendering the check bearer paper and therefore causing the check to be properly payable to whomever holds the check), the resulting protection is nonetheless equally effective. It is not available, however, where the check is a government check and the plaintiff is the United States.

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43. National Metropolitan Bank v. United States, 323 U.S. 454, 456-59 (1945).

44. 31 C.F.R. § 240.5 (1976). *See* National Metropolitan Bank v. United States, 323 U.S. 454 (1945); United States v. Bank of America Nat'l Trust & Sav. Ass'n, 438 F.2d 1213 (9th Cir.), *cert. denied*, 404 U.S. 864 (1971).

45. U.C.C. §3-405 states: "(1) An indorsement by any person in the name of a named payee is effective if . . . an agent or employee of the maker or drawer had supplied him with the name of the payee intending the latter to have no such interest."

B. *Checks Issued in the Name of Nonexistent Persons*

As the discussion above indicates, the original N.I.L. enunciation of the fictitious payee doctrine required that the named payee be "fictitious or nonexisting," and that the intention that the payee have no interest be the intention of the person signing as drawer.[46] *Washington Loan & Trust Co. v. United States*[47] held that statutory authority was required to go beyond that point in the evolutionary development of the "fictitious payee" concept.[48] The Supreme Court in *National Metropolitan Bank v. United States*[49] did not address the applicability of the fictitious payee concept.[50] Since *National Metropolitan Bank* did not involve nonexistent persons as payees, and furthermore did not purport to decide anything with respect to the fictitious payee concept, the way may be clear for lower court adaptation of so much of the fictitious payee defense as does not directly conflict with the facts in *National Metropolitan Bank*.[51]

A recent Ninth Circuit case appears to have done this, although the theory articulated is the imposter rule rather than the fictitious payee rule. In *Bank of America National Trust & Savings Association v. United States*,[52] an unknown person working at a Marine Corps disbursing office had procured checks payable to nonexisting military personnel. False military records and pay orders had been utilized. Presumably the dishonest employee or a confederate endorsed these checks in the names of the named payees and the Treasury ultimately paid them. The United States sued the presenting bank on its guaranty of endorsements. The lower court found for the Government but the Court of Appeals reversed.

The facts present a classic "padded payroll" or "expanded fictitious payee" situation. Under the U.C.C. there would be no doubt that the bank would prevail. Section 3-405(c) would expressly cover the case. The Government argued that because the Supreme Court had never recognized any version of the fictitious payee concept as being applicable to government checks, the bank should be held liable, this being a "padded payroll" case rather than an "imposter" case. The Ninth Circuit, per former Supreme Court Associate Justice Tom C. Clark, sitting by designation, rejected this argument. The court held that while the line

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46. *See* text accompanying note 37 *supra*.
47. 134 F.2d 59 (D.C. Cir. 1943).
48. *See* text accompanying notes 40-41 *supra*.
49. 323 U.S. 454 (1945).
50. *See* text accompanying notes 42-43 *supra*.
51. In some early cases, the fact situation may have been such as to give rise to a possible argument along the line of the more expansive version of the fictitious payee doctrine which was later adopted in the amended version of the Negotiable Instruments Law. *See, e.g.*, United States v. National Exch. Bank, 214 U.S. 302 (1909), wherein checks were made out to deceased persons. It does not appear that the person signing on behalf of the drawer knew this, although the employee inducing the signing obviously did.
52. 552 F.2d 302 (9th Cir. 1977).

between "forger" and "imposter" is less than precise, the fact situation was similar to that which had been present in those cases which had found the imposter rule to be applicable to I.R.S. refund check frauds perpetrated by mail.[53] The court ruled that this was an "imposter" situation, the signatures were therefore not "forged," and thus there was no breach by the presenting bank of its guaranty of endorsements.[54]

The Court, constrained by precedent to fashion a common law rule, stretched the common law "imposter" concept beyond its logical boundaries, but was unable to utilize the precisely fitting "expanded fictitious payee" concept because it was deemed to be a creature of state statutory law. While the result achieves a measure of harmony between the federal common law and the U.C.C., as far as results are concerned, it also introduces a degree of uncertainty. Under the U.C.C. it does not matter where the "imposter" concept leaves off and the "fictitious payee" concept picks up, because the result is the same: there is no breach of warranty as to the genuineness of endorsements. With United States checks, however, inconsequential differences in the exact manner of the perpetration of the fraud may turn out to be of crucial significance.

C. *Summary of Present State of the Law in the Fictitious Payee Area*

Generalizations are risky, given the sparse and quite dated case law, but the following summary appears to delineate the present state of the case law.

Where the fraud takes on the aspects of a "padded payroll" situation, with internal agents of the drawer accomplishing the issuance of checks based upon false documentation, it appears that the result may depend upon whether the dishonest employee utilizes the names of existing or nonexisting persons in perpetrating his scheme. If the former, the chances are the checks will be treated as bearing forged endorsements and the presenting bank will be held liable to the United States. If the latter, the presenting bank may well prevail, upon an analogy to the imposter rule. The flexibility here derives from the fact that there is no applicable authority from the Supreme Court in the situation where the names of nonexisting persons are used, but *National Metropolitan Bank v. United States*[55] will probably be deemed controlling where the names of existing persons are chosen.

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53. *See* text accompanying notes 35-36 *supra*.

54. Bank of America Nat'l Trust & Sav. Ass'n v. United States, 552 F.2d 302, 304-05 (9th Cir. 1977).

55. 323 U.S. 454 (1945).

IX. Negligence of the United States as Providing a Defense to the Collecting Bank

The negligence of the United States in failing to detect a fraudulent scheme prior to the time the presenting bank guarantees the endorsements on the check will not relieve the bank of its guaranty.[56] Neither has any case allowed the presenting bank to escape its guaranty of the genuineness of endorsements by proving any negligence or delay after the instrument has been returned to the Government, although *Clearfield Trust Co. v. United States*[57] hinted that in some circumstances the Government's delay in notifying the presenting bank might preclude the United States from recovery.[58] In fact, an analysis of the facts in the case law in this area almost invariably indicates negligence on the part of the Government. For example, in *United States v. City National Bank & Trust Co.*,[59] the United States was able to recover, from the presenting bank, the payments of seventy-two disability checks issued over a six year period[60] after the death of a retired soldier whose next of kin had already received a burial allowance from the Veterans Administration. Similar patterns are repeated throughout the case law but the Government nonetheless prevails.

Negligence is treated quite differently under the Code. Section 4-406 requires a bank's customer to exercise reasonable diligence in examining statements and returned checks.[61] In addition, under section 3-406, anyone whose negligence contributes to a forgery is precluded from asserting the forgery against the drawee or a holder in due course. Furthermore, a claim for breach of warranty must be made within a reasonable time after the claimant learns of the breach, or the person liable is discharged to the extent of any loss caused by the delay.[62]

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56. National Metropolitan Bank v. United States, 323 U.S. 454 (1945).

57. 318 U.S. 363 (1943).

58. Clearfield Trust Co. v. United States, 318 U.S. 363, 369-70 (1943). Clearly it would have to be shown that the delay had caused damage.

59. 491 F.2d 851 (8th Cir. 1974).

60. The checks had continued to come for a longer period than that, but the United States sued only for those checks presented within the previous six years. This was probably due to the six-year statute of limitations. 31 U.S.C. § 129 (1970).

61. No case holds that there is any similar duty imposed upon the Government to examine its returned checks, although *Clearfield* hints at a possible duty. *See* text accompanying note 58 *supra*. The situation is complicated because the Government is both drawer and drawee and such a duty is usually deemed owed by the drawer to the drawee. There is also the practical consideration that paid government checks do not return to the issuing agency as they would in the case of the normal private checks.

62. U.C.C. § 4-207(4).

X. THE CLEARFIELD DOCTRINE REEXAMINED

Clearfield Trust Co. v. United States[63] identified the need for uniformity of treatment as paramount in assessing the rights and obligations of the United States on its own checks. With the passage of thirty-five years it may be asked how well the *Clearfield* decision serves that need and also whether there are now other factors which should prompt a reexamination of the *Clearfield* holding.

Clearfield was decided many years before the U.C.C was drafted. The U.C.C. is now truly the American Commercial Code. It is the law in every state. It would seem obvious that the U.C.C. itself, if made applicable to government checks, would aptly serve the need for uniformity pointed out by *Clearfield*. If the federal courts were writing on a clean slate, they might follow the express mandate of *Clearfield* and fashion a federal common law by applying the principles or even the precise text of the Code, as the best exemplar of both sound commercial principles and uniformity.[64] After all, "Uniform" is the Code's first name.

The federal courts are not writing on a totally clean slate, however. Where the Supreme Court, or perhaps courts of appeal, have already rendered specific holdings on certain aspects of the federal commercial law prior to the universal acceptance of the Code, subsequent courts deem themselves bound by those precedents. If the fact situation can be respectably characterized a little differently so as to escape a precedent, the courts will probably so characterize the situation and move closer to the U.C.C. principles which surround them on all sides.

This tension does not serve uniformity of result. Anyone reading *National Metropolitan Bank v. United States*,[65] *United States v. Bank of America National Trust & Savings Association*,[66] *Atlantic National Bank v. United States*,[67] and *Bank of America National Trust & Savings Assoication v. United States*[68] will be struck by the dissimilarity of treatment given essentially similar fact situations.

The differences in treatment apparent in the imposter-fictitious payee cases decided under the U.C.C and those decided under federal common law cannot be justified by public policy. The concept behind U.C.C. section 3-405—that the loss from any variation of the imposter-fictitious payee scheme should be borne by the drawer, who is in the best position

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63. 318 U.S. 363 (1943).

64. *See* Judge Learned Hand's similar utilization of the N.I.L. as an apt source of "federal law" in New York, N.H. & H.R. Co. v. Reconstruction Fin. Corp., 180 F.2d 241, 244 (2d Cir. 1950).

65. 323 U.S. 454 (1945). *See* text accompanying notes 42-43 *supra*.

66. 438 F.2d 1213 (9th Cir.), *cert. denied*, 404 U.S. 864 (1971). *See* text accompanying note 44 *supra*.

67. 250 F.2d 114 (5th Cir. 1957). *See* text accompanying note 35 *supra*.

68. 552 F.2d 302 (9th Cir. 1977). *See* text accompanying note 52 *supra*.

to prevent it—is clearly right. Similarly, the merit in placing an enforceable duty of due care upon the drawer, found in sections 3-406 and 4-406, is not lessened merely because the drawer is the Government.[69] The Supreme Court sought uniformity in treatment for the United States in *Clearfield*, but it specifically did not seek a privileged status. As Justice Holmes said in *United States v. National Exchange Bank*,[70] "The United States does business on business terms."[71] Any rules tending to make it more expensive or burdensome for banks to process United States checks will tend to discourage banks from handling them at all.

Furthermore, as this Article has attempted to show, even where the results under the U.C.C. and the results reached under "federal common law" are similar, they are often arrived at by different routes utilizing different conceptual approaches. This makes for uncertainty. As new fact situations occur, giving rise to questions not precisely answered by precedent, it is not certain whether the courts would attempt to decide the questions consistently with their own obsolescent "federal common law" principles or whether they would tend to follow the more immediately handy U.C.C. This uncertainty may invite litigation which would be unnecessary if it were clear from the outset that Code principles would be applicable.

The best solution would be for Congress to enact legislation making the U.C.C. applicable to government checks. The late Associate Justice Clark called for this in the following language:

> The commercial interests of our country would be better served if interested parties could expect uniformity in the federal and state courts' application of commercial law. To this end, we would urge Congress to adopt, in the not distant future, the UCC for federal application, as our fifty states have already done for local application.[72]

If this solution is not forthcoming, it is hoped that the Supreme Court will accept a government check case and reexamine the command of *Clearfield*. The need for uniform treatment of government checks is as great now as it was in 1943 when *Clearfield* was decided. It is anomalous that it is the *Clearfield* decision which now stands in the way of greater

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69. Literally, U.C.C. § 3-406 imposes a duty of due care only enforceable by a drawee or a holder in due course. Arguably, a presenting bank, having acquired an instrument by means of a forged endorsement, might not be a holder in due course and thus be unable to take advantage of § 3-406. This Article does not address specific problems of interpretation of the U.C.C. It is the point of this Article that uniformity is better served by the U.C.C. than by resort to obsolescent case law, although admittedly the U.C.C. itself requires interpretation and perhaps even occasional amendments.

70. 270 U.S. 527 (1926).

71. United States v. National Exch. Bank, 270 U.S. 527, 534 (1926). *See* text accompanying notes 22-23 *supra*.

72. Bank of America Nat'l Trust & Sav. Ass'n v. United States, 552 F.2d 302, 303 n.1 (9th Cir. 1977).

uniformity in this area of the law. With its mandate to the federal courts to create and follow a common law, case-by-case treatment of government rights and duties, the *Clearfield* decision now commands allegiance to concepts which, though perhaps once widely accepted, have now been left behind by the statutory developments found in the U.C.C.

The *Clearfield* decision, if reexamined, would not have to be overruled. The Court could reaffirm the need for uniformity in this field, but clarify that the federal courts, in seeking just and uniform results, should be guided by the principles embodied in the U.C.C. The law as expounded by the federal courts would continue to be federal, but the source looked to for determination as to what that law should be would be the Uniform Commercial Code.

In the delicate interplay between federal and state law in this country, there is no lack of examples for such a marriage of convenience. A decision of the Third Circuit, *Three Rivers Motor Co. v. Ford Motor Co.*,[73] holds that state law should be looked to in resolving questions as to the validity and interpretation of releases concerning substantive federal rights under the antitrust laws. The court recognized that uniformity was most desirable but pointed out that uniformity in a federal common law context can only be assured by the Supreme Court itself, which is so burdened with work as to be unlikely, as a practical matter, to police the case law and accomplish uniformity.[74]

In *United States v. Hext*,[75] the Fifth Circuit recognized that the rights and obligations of the United States under FHA mortgages are governed by federal law because of the need for uniformity in this nationwide enterprise. The court found, however, that "it is evident that the principal fount of general commercial law governing secured transactions is now Article 9 [of the Code]," and therefore the federal courts should be guided by the U.C.C. in determining what those rights and obligations are.[76]

Similarly, Judge Learned Hand years ago found the Negotiable Instruments Law, which had then been enacted in all states and the District of Columbia, to be a source of "federal law" . . . "more complete and more certain, than any other which can conceivably be drawn from those sources of 'general law' to which we were accustomed to resort in the days of *Swift v. Tyson*."[77] The U.C.C. is a far more cohesive and per-

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73. 522 F.2d 885 (3d Cir. 1975).

74. Three Rivers Motor Co. v. Ford Motor Co., 522 F.2d 885, 890 (3d Cir. 1975).

75. 444 F.2d 804 (5th Cir. 1971).

76. United States v. Hext, 444 F.2d 804, 809-10 (5th Cir. 1971).

77. New York, N.H. & H.R. Co. v. Reconstruction Fin. Corp., 180 F.2d 241, 244 (2d Cir. 1950). *See* note 64 *supra* and accompanying text. It is true that the Supreme Court in *Clearfield* did not look to the N.I.L. as a source of guidance for federal law, but the question before the Court was not one specifically addressed by the text of the N.I.L. (the drawer's

vasive source of general law than the N.I.L. was, and Judge Hand's comments apply with greater force to the U.C.C. today.

Lacking either federal legislation or further Supreme Court guidance, the lower federal courts might, on their own, determine that the best way to follow the basic mandate of *Clearfield* — that a coherent and uniform body of federal law be developed — would be to follow the U.C.C. principles even if this meant departing from results which would otherwise be dictated by some existing federal precedents.

XI. CONCLUSION

In many respects, the legal results of disputes surrounding forgery of government checks are consistent with what legal results would follow were the instruments private checks. Usually, however, the reasoning and legal concepts leading to those results are somewhat different from those found in private law. In other respects, different results, as well as different legal concepts, obtain.

The law governing forgery and government checks should be brought into complete harmony with the general commercial law in this country. Today this means that the Uniform Commercial Code should expressly be made applicable. The best way would be for Congress to so mandate. Short of that, the courts themselves should take steps to bring the private and public law together.

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duty of care and requirement of prompt notification of forged endorsements). Therefore, its failure to look to the N.I.L. could not be construed as a statement that it or any other uniform law should not be looked to for guidance.

PROCEDURES FOR COLLECTIVE BARGAINING UNDER THE IOWA PUBLIC EMPLOYMENT RELATIONS ACT

†*Nancy D. Powers*

I. INTRODUCTION

The Iowa Public Employment Relations Act[1] (hereinafter referred to as the Act) became effective July 1, 1974. The Act is a comprehensive statute which provides for and regulates collective bargaining for all public employees, including employees of the state, counties, municipalities, school districts and other special purpose districts. It provides procedures for determining appropriate bargaining units, for conducting representation elections, for protecting specific rights of both employers and employees against specific "prohibited practices," and for resolving bargaining contract impasses under a complex three-tiered system. Under this system, if the parties are at "impasse"—that is, if they have not reached agreement—the Act provides as a first step a period of mediation to assist in a voluntary agreement. Mediation is followed by fact finding, a quasi-legal proceeding which results in a non-binding recommendation for an agreement. The final step, absent voluntary agreement, is binding arbitration by which an arbitrator decides the contents of the collective bargaining agreement.

The Act is administered by a three-member Board and staff of labor relations examiners who act as hearing officers in contested case proceedings and mediators in the impasse procedures. During the three years that the Act has been effective, over 1200 cases have been processed, nearly 1100 requests for mediation have been filed, and over 650 employee organizations have been certified as bargaining agents. Bargaining units have been determined, rules promulgated, declaratory rulings issued and prohibited practices heard and decided. In addition, a small number of Board decisions have been appealed to District Court.

The purpose of this Article is to explain the procedures for resolution of collective bargaining impasses under the Act. Other issues will be discussed preliminarily only to the extent that they affect the bargaining process.

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1. IOWA CODE ch. 20 (1977).