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Adopting Article IV: Can Consumers Afford To Rely On The Banks' Good Faith?

by Robert Abney Fricks*

I. INTRODUCTION

In 1990 the National Conference of Commissioners on Uniform State Laws and the American Law Institute approved comprehensive changes to Articles 3 and 4 of the Uniform Commercial Code ("U.C.C.").¹ These changes will greatly impact consumer transactions and alter the

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¹ For an excellent overview of these and other U.C.C. revisions, see generally Michael D. Sabbath, U.C.C. Revisions: Promises and Pitfalls, 43 MERGER L. REV. 789 (1992).
relationship between banks and their customers. As of December 1994, thirty-six states had adopted the revised Articles. While most states adopted them as written, some have made changes which provide the consumer with greater protection. The Georgia General Assembly will soon address the issue of whether to adopt the new Articles. At issue is whether the revisions warrant added consumer protection.

Part Two of this Article examines the proposed changes in Article 4 that have the greatest impact on consumers and explores the ways other states have dealt with the consumer issues arising from those changes. Part Three addresses the standards that govern the customer-bank relationship and discusses whether legislative amendments to Article 4 are really necessary to protect consumers.

II. THE MAJOR CHANGES OF ARTICLE 4

A. Postdated Checks

The ability to postdate a check is important to many consumers. However, without legislative action, Georgia's adoption of Revised Article 4 may greatly impede that ability.

Under current Georgia law, a bank may not properly pay a postdated check before the date written on the check. A bank that prematurely pays a postdated check is liable to its customer for the resulting harm.

Under Revised Article 4, however, a bank may pay a postdated check prior to the date of the check unless the customer has given the bank timely notice of the postdating. This is a reasonable requirement given the technology utilized by most banks and contemplated by the


3. While this Article is primarily concerned with the effects of Revised Article 4 on consumer-bank relations, it makes some reference to Article 3 as it applies to bank deposits and collections.

4. O.C.G.A. § 11-3-114(2) (1994). Under current law, postdating an instrument does not affect its negotiability. See id. § 11-3-114. The time for payment is fixed by the date on the check. Id.


6. U.C.C. § 4-401(c) (1990). The Revised Article requires the customer to give the bank notice of postdating by "describing the check with reasonable certainty." Id.
Revision. What may be unreasonable for consumers is that Revised Article 4 does not require banks to inform their customers of the need to notify. In addition, Revised Article 4 "does not regulate fees banks charge their customers for a notice of postdating."

One commentator suggests this change in the law "may result in subjecting consumers to 'unspecified unscrupulous practices.'" This commentator believes Georgia's adoption of the Revised Article 4 should be "an invitation to individual legislators to determine whether their unfair and deceptive practices laws are adequate to protect consumers in these circumstances." In fact, several states have chosen to alter the language of Revised Article 4 and regulate fees that banks may charge for a notice of postdating.

Some states require banks to accept a specified number of notices without charge. Others simply deny banks the right to charge their customers any fee for notice of postdating. Yet the majority of states adopted the revision as written, leaving courts to review fees in light of "principles of law such as unconscionability or good faith and fair dealing . . . ."

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7. See Louis F. Del Duca, What the General Practitioner Needs to Know About the New Negotiable Instruments and Bank Deposits and Collections Amendments to the Uniform Commercial Code, 64 PA. B.A.Q. 70, 80-81 (1993). For years banks have utilized microline magnetic ink character recognition ("MICR"). The MICR line includes the account number of the check. The receiving bank encodes the amount of the check and then electronically transfers the information to the collecting bank for payment. The payor bank then pays the item without knowledge of the payee or the date of the check. Id.

8. Mark Budnitz, Consumer Issues in Revised Articles 3 and 4, 47 CONSUMER FIN. L.Q. REP. 119, 120 (1993). Professor Budnitz argues that "few consumers will be able to take advantage of this procedure [postdating], at least initially, because the bank is not required to notify consumers" of the change in the law of postdating. Id. Note, as of December 1994, no states specifically require banks to inform customers of the need to give notice to effectively postdate a check.


10. See Budnitz, supra note 8, at 120 (quoting U.C.C. § 4-101 (1990), Official Comment 3 (1994)).

11. Id.

12. See, e.g., infra notes 13 and 14 and accompanying text.

13. W. Va. Code § 46-4-401(c) requires banks to "accept nine such notices each year for each account without charge for acceptance of the notice or monitoring of the postdated check." W. VA. CODE § 46-4-401(c) (1994).

14. See, e.g., WASH. REV. CODE ANN. § 62A.4-401(c). "A bank may not collect a fee from a customer based on the customer's giving notice to the bank of a postdating." Id.

15. See U.C.C. § 4-401, Official Comment 3, and generally Budnitz, supra note 8.
B. Bank Statements . . . Or A Lack Thereof Under 4-406

Consumers are quite accustomed to receiving a thick envelope from their bank in the mail each month. This envelope usually contains a bank statement along with the month's canceled checks. While some consumers never even open their bank statement, others rely heavily upon it. Regardless of its utility, sending paid items along with a statement in the mail comes at a substantial expense to banks.16

Under Revised Article 4, it is unlikely that consumers will continue to receive their canceled checks in the mail. Automated check processing makes the physical transfer of checks unnecessary.17 The collecting bank merely retains the check and transfers the pertinent information electronically.18 While not receiving a copy of canceled checks may be unsettling to some consumers, the drafters thought this concern was outweighed by the decreased cost to the check collection system as a whole.19

Thus, in lieu of returning the actual items to the customer, banks are only required to maintain the capacity to furnish a copy of any canceled check for seven years.20 However, the revision is silent about both the fee a bank may charge its customer for a copy and the time in which to honor the customer's request.21

While current Georgia law does not require banks to return paid items to the customer,22 the retention of checks is, perhaps, the most controversial of the Article 4 revisions. Despite the controversy, a majority of

16. The physical transfer of checks between banks added to the cost of mailing checks back to the customer is eliminated by truncation. The collecting or depository bank merely retains the check, transferring all information to the payor bank electronically. See generally Del Duca, supra note 7.
17. Id.
20. U.C.C. § 4-406(b). At least one state, through non-uniform amendments, has altered the period of time a bank must retain copies of paid items. See 1994 Iowa Legis. Serv. 2279 (West) (banks must maintain copies for eleven years).
21. See U.C.C. § 4-406 (1990), Official Comment 3. Revised Article 4 refers only to a reasonable time. The principles of unconscionability and good faith and fair dealing govern the regulation of fees. Id.
22. See O.C.G.A. § 11-4-406(1) (1994). Currently, Georgia law does not require banks to return items so long as they have a check retention agreement with their customers (e.g., a truncated account). Most consumers, however, opt for the traditional account which provides them with a monthly statement along with their canceled checks.
states have adopted the revised section as written. A number of states
have, however, enacted legislation requiring banks to produce a specified
number of canceled checks to customers free of charge.\textsuperscript{23} Other states
require banks to provide a telephone number for customers to call and
request copies of canceled checks.\textsuperscript{24} And one state requires banks to
offer at least one account, at a reasonable charge, that provides for the
return of all items or legible copies to the customer.\textsuperscript{25}

C. Discovering Forgeries and Alterations Under 4-406

Current Georgia law places a duty on bank customers to exercise
reasonable care and promptness in examining their bank statements and
canceled checks for unauthorized signatures or alterations.\textsuperscript{26} A
customer's failure to notify the bank precludes recovery.\textsuperscript{27} Further, if
the unauthorized signature or alteration was made by the same
wrongdoer and the customer fails to report it within fourteen days after
receiving the statement, recovery against the bank may also be
precluded.\textsuperscript{28} Current law does, however, afford consumers some
protection if they can establish lack of ordinary care on the part of the
bank.\textsuperscript{29}

Without regard to care or lack of care by the customer or bank,
Georgia law places an absolute statute of limitations of sixty days for
unauthorized signatures or alterations on the front of the check\textsuperscript{30} and
one year for unauthorized endorsements on the back of the check.\textsuperscript{31} A

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{23}See, e.g., CAL. COM. CODE § 4406(b) (West 1994) (banks must furnish free of charge
two items per statement to customers upon request); COLORADO REV. STAT. ANN. § 4-4-
406(a) (1994) (banks must provide two copies per statement free of charge); N.H. REV.
STAT. ANN. § 382-A:4-406(a) (1994) (banks shall provide upon request and without charge
10 items or copies of items per statement); WASH. REV. CODE 62A. 4-406(b) (1994) (banks
must furnish five copies free of charge); and W. VA. CODE § 46-4-406(g) (1994) (customers
may request 18 checks per year free of charge).
\item Colorado and New Hampshire. COLORADO REV. STAT. ANN. § 4-4-406(a) (1994);
N.H. REV. STAT. ANN. § 382-A:4-406(a).
\item W. VA. CODE § 46-4-406(g).
\item O.C.G.A. § 11-4-406(1). The customer must notify the bank in the event of
unauthorized signatures or alterations; the statute does not require written notification.
\item O.C.G.A. § 11-4-406(2)(a). Note, however, that the bank must also establish it
suffered a loss as a result of the customer's failure to examine. Id.
\item Id. § 11-4-406(2)(b).
\item Id. § 11-4-406(3).
\item Id. § 11-4-406(4)(a).
\item Id. § 11-4-406(4)(b).
\end{enumerate}
\end{footnotesize}
customer’s failure to notify the bank within the applicable statute of limitations precludes recovery. 32

Adopting the Revised Article 4 will represent a major change in this area of Georgia law. Under the revision, the bank must provide a statement of account with “sufficient information” for its customers to reasonably identify the items paid. 33 A statement of account is sufficient if it provides the item number, amount, and date of payment. 34 Thus, a customer will be unable to identify the payee or date of the check from the information provided by the bank. Yet, like current Georgia law, the revision imposes a duty on the consumer to exercise reasonable care in examining the information provided by the bank and to promptly notify the bank of any unauthorized signatures or alterations. 35

Fortunately, Revised Article 4 may give consumers some added protection. If enacted as written, it would extend the time for reporting alterations by the same wrongdoer from fourteen to thirty days. 36 It would also extend the statute of limitations on unauthorized signatures or alterations on the face of the check from sixty days to one year. 37

In the event of unauthorized signatures or alterations, Revised Article 4 introduces the concept of comparative negligence to bank deposits and collections. 38 Under current Georgia law, if a customer establishes lack of ordinary care on the part of the bank, the loss is shifted to the bank,

33. U.C.C. § 4-406(a).
34. Id. § 4-406(a). This “safe harbor” rule requires banks to provide only the information computers can readily obtain from the check’s MICR line. This procedure allows banks to process checks without physical examination of individual items. See U.C.C. § 4-406, Official Comment 1; and generally Del Duca, supra, note 7.
35. U.C.C. § 4-406(c) (1994). This duty of reasonable care is based upon examination of the information provided. U.C.C. § 4-406, Official Comment 1. If the bank provides only the item number, amount, and date of payment, the customer will be unable to detect an altered check where the payee’s name is changed. Id. In that case, because the customer could not have reasonably discovered such an alteration, there will be no preclusion. See id.
37. Compare U.C.C. § 4-406(f) and O.C.G.A. § 11-4-406(4). The time for reporting unauthorized endorsements on the back of the check would remain one year. U.C.C. § 4-406(f). Note, Georgia’s current statute of limitations (14 days/60 days) is shorter than that of any other state. Most likely Georgia’s shorter limitations period will remain intact through non-uniform amendment by the General Assembly. Such an amendment would work to deprive consumers of one of the few benefits afforded them by the revision.
38. See U.C.C. § 4-406(e) & Comment 5.
even in circumstances where the customer might normally be precluded.\textsuperscript{39} In similar situations under the revision, however, the loss would be allocated between the "customer precluded and the bank asserting the preclusion . . . .\textsuperscript{40}

While comparative negligence may seem to improve a consumer's position, one commentator suggests it may actually make it "infeasible" for consumers to assert their rights.\textsuperscript{41} Because a customer must show damages under this standard, it will be more difficult to prevail against a bank that has nothing to lose by litigating.\textsuperscript{42} Further, while the revision is designed to encourage settlements, without the "all or nothing" approach of current Georgia law, "at best consumers will obtain settlements far less favorable" under the revision.\textsuperscript{44}

Despite these concerns, most states adopting the revised section have done so without substantial change.\textsuperscript{45} The Committee on Consumer Affairs of the New York City Bar, however, has proposed a "carve-out" of the comparative negligence standard. Under its proposal, comparative negligence would not apply to retail consumer accounts when the dispute involves an amount less than the jurisdictional amount for New York Small Claims Court.\textsuperscript{46} In such a case, the loss allocation rules of the current code would apply.\textsuperscript{47}

\begin{footnotes}
\footnote{39. See O.C.G.A. § 11-4-406(3).}
\footnote{40. U.C.C. § 4-406(e).}
\footnote{42. Id. Professor Budnitz also argues that in addition to litigation being infeasible in most situations, the likelihood of settlement will also decrease under the revision. \textit{Id.}}
\footnote{43. The "all or nothing" approach of current Georgia law allows the customer to avoid preclusion upon establishing a lack of ordinary care on the part of the bank. See Alvin C. Harrell and Fred H. Miller, Checking and Savings Accounts, Deposits, and Payment Transactions, 47 CONSUMER FIN. L.Q. 283, 304 (1993).}
\footnote{44. See Budnitz, \textit{supra} note 41, at 839.}
\footnote{45. At least one state has statutorily increased the time for reporting unauthorized signatures and alterations. \textit{See, e.g.}, 1994 Iowa Legis. Serv. S.F. 2279 (West) (extending time of U.C.C. § 4-406(d)(2) from 30 to 60 days).}
\footnote{46. Recommendation on S.5144 (Revised Articles 3 and 4), The Association of the Bar of the City of New York, Committee on Consumer Affairs, 6-7, September 28, 1994. The Committee correctly recognizes that, without legislative guidance, it may be economically infeasible for consumers to assert their rights. "[I]n most consumer disputes, where relatively modest sums are involved and legal and other costs involved in apportioning fault through litigation would approximate or exceed the amount in dispute, the comparative fault principle will not produce results equitable to consumers . . . ." \textit{Id.}}
\footnote{47. \textit{Id.}}
\end{footnotes}
D. The Revision May Increase the Number of Returned Checks

Returned or "bounced" checks create problems for both consumers and banks. If an account has insufficient funds to cover a check at the time it is presented, the check bounces and creates an overdraft. This results in increased cost to the collection process, with the bank passing that cost (plus bank profit) along to its customers. There is significant variation in the fees Georgia banks charge their customers for bounced checks. Smaller banks in rural areas of the state tend to charge lower fees than banks in urban areas, but even their fees can exceed twenty dollars.

Unfortunately for the consumer, adoption of Revised Article 4 may increase the number of returned check charges. Currently, most banks decide whether to pay a check after they credit daily deposits to the customer's account. At that point, as long as there are sufficient funds to cover the draft, the check is paid. The revision, however, does not require banks to credit daily deposits prior to debiting checks. Banks can thus determine whether to pay a check based on

48. See Fed Survey Of Retail Bank Fees Shows Consumers Paying Higher Prices (House Banking Committee's Consumer Credit Subcommittee), 62 BBR 1098, 1099, June 27, 1993. The ABA admits that the cost of handling a bad check is only about $2. Id. Yet, some banks charge up to $30 for a bounced check. Id.

49. Based on an extensive survey of banks statewide, the average fee for a returned check is $20.71. With the exception of banks with branches statewide, there is a direct relationship between the size of the town and the fee charged for returned checks. Middle Georgia Bank in central Georgia charges its customers $18 for a returned check, while First Union charges its customers $24. Most towns the size of Thomasville and Blairsville charge their customers around $20. The national average in 1993 was $19.35. See generally David Wichner, Banks Defend Fees On Rubber Checks, THE PHOENIX GAZETTE, KNIGHT-RIDDER/TRIBUNE BUSINESS NEWS, November 3, 1993. The 1992 figure was $18.58, up from $15 in 1987. Id. In 1993 Los Angeles had the lowest fees ($11.05), while Philadelphia had the highest ($28.90). Id.

50. Though current Georgia law does not specify the order of processing, standard bank practice in Georgia and other states is to credit daily deposits prior to posting any debits. See Gall K. Hillebrand, Revised Articles 3 and 4 of the Uniform Commercial Code: A Consumer Perspective, 42 ALA. L. REV. 678, 684-85 (1991).

51. Id.

52. U.C.C. § 4-402(c) (1990). This section provides in pertinent part: "A payor bank's determination of the customer's account balance on which a decision to dishonor for insufficient funds may be made at any time between the time the item is received by the payor bank and the time that the payor bank returns the item or gives notice in lieu of return, and no more than one determination need be made." Id. The section does give banks the discretion to make a "subsequent balance determination." Id. However, if the bank makes a second determination, the decision to pay an item must be made based on the subsequent balance determination. Id.
an account balance that does not include same-day deposits. The Official Comment to Revised Article 4 suggests this change in the law “eliminates the uncertainty” whether the bank has wrongfully dishonored an item when sufficient funds would have been available if the bank had credited deposits first.53

One commentator argues this “uncertainty” should be resolved in favor of consumers and not banks.54 She believes Revised Article 4 violates the “commonsense expectation” that a deposit made on the day a check is presented would cover the check and keep it from bouncing.55 Despite this concern, nearly every state enacting U.C.C. section 4-402 has done so as written.56 Perhaps the legislatures of the adopting states were unaware of the ramifications of this section.57 Unfortunately for the consumer, the revised section, as written, may serve as an invitation for banks to return more checks and collect more fees.

53. See U.C.C. § 4-402, Comment 4.
54. See Hillebrand, supra note 50, at 685.
55. Id.
56. Note, however, that California has added the following language to its Official Comment:

[T]he prevailing banking practice is to first credit the customer’s account for deposits made on the day of presentment. If that credit represents funds available for withdrawal as of right, it is taken into account in determining whether the check presented for payment will or will not create an overdraft. A bank failing to follow that practice would not be acting in good faith if the failure caused the customer’s account to be considered withdrawn.


57. The justification for U.C.C. § 4-402(c) is confusing to this author. At the extreme, it seems to be an invitation for banks to charge more fees by basing decisions to pay checks on pre-deposit balances. One commentator attempts to explain the section by suggesting that a check presented on Monday evening against insufficient funds is properly dishonored even if a deposit is made the following morning which would cover the amount of the check.

See Henry J. Bailey, New 1990 Uniform Commercial Code: Article 3, Negotiable Instruments, and Article 4, Bank Deposits and Collections, 29 WILLAMETTE L. REV. 409, 555 (1993). Mr. Bailey's example misses the mark. Certainly, it is reasonable to conclude that a deposit made the following day would not be included in a bank's decision to pay a check presented the day before. However, § 4-402(c) appears to allow a bank to base its decision to pay on pre-deposit balances which do not include deposits made the very same day. See U.C.C. §4-402(c).
III. DESPITE NEW STANDARDS, ARE CHANGES NECESSARY?

A. Higher Standards Govern Conduct Under the Revision

When opening a checking account, consumers are required to sign an agreement which governs their relationship with the bank. Current Georgia law requires banks to exercise ordinary care in conducting that relationship.

Revised Article 4, however, sets forth a higher standard of care in customer-bank relations, defining ordinary care as the "observance of reasonable commercial standards, prevailing in the area in which the [bank] is located, with respect to the business in which the [bank] is engaged." Coupled with an expanded, more objective definition of good faith, consumers may have substantially more protection under the revision.

Revised section 3-103(4) defines good faith as "honesty in fact and the observance of reasonable commercial standards of fair dealing." Although "fair dealing" is a broad term, it concerns the fairness of conduct rather than the care with which an act is performed.

Despite what appears to be a favorable change for consumers, one commentator notes the new standards may be difficult to apply, leaving courts to resort to simple negligence or subjective tests. If this

58. These agreements often contain waivers of consumers' rights. One commentator argues that the U.C.C. counterpart to O.C.G.A. § 11-4-103 "was not designed with consumer transactions in mind" and urges legislators to enact an "explicit limitation on waivers of consumers' rights." See Hillebrand, supra note 50, at 708-09.

59. O.C.G.A. § 11-4-103(1) (1994). No definition is given for the term ordinary care. Courts have, however, construed the language to suggest that a bank cannot enforce agreements that violate reasonable commercial standards. See, e.g., Perini Corp. v. First Nat'l Bank, 553 F.2d 398 (5th Cir. 1977).

60. U.C.C. § 3-103(a)(7) (1990) (incorporated into Article 4 by U.C.C. § 4-104(c) (1990)).

61. Currently, "good faith" is defined as "honesty in fact in the conduct or transaction concerned." O.C.G.A. § 11-1-201(19) (1994).


63. U.C.C. § 3-103, Official Comment 4. See also Budnitz, supra note 41.

64. See Patricia L. Heatherman, Comment, Good Faith In Revised Article 3 Of The Uniform Commercial Code: Any Change? Should There Be?, 29 WILLAMETTE L. REV. 567, 584-85 (1993). By analogy, Ms. Heatherman refers to fair dealing as "playing by the rules." Id. at 585. The rules are set according to the sophistication level of the player (bank) as well as commercial community standards. Id. This results in a sliding scale of fair dealing with less sophisticated players (small banks) having a lower threshold for meeting the standard. Id. She warns that courts will abandon the new test because it is "perched on an intellectual tightrope" and difficult to apply. Id. at 585-86.
assumption is correct, consumers will be in no better position under the revision.

B. Notice and Good Faith Under the Revision

The adoption of Revised Article 4 in Georgia will represent a sweeping change in the law governing customer-bank relations. Perhaps one of the more pressing questions is how will the average consumer learn of these important changes? Should it be left to the banks? Or should the legislature take affirmative steps to ensure that banks notify their customers? Regardless of the method employed, adequate notice is necessary to protect consumers from being blind-sided by the revision.

In particular, U.C.C. section 4-401(c), which governs postdating, could have devastating effects on even the most wary consumer. Under the revision, a bank may pay a postdated check unless the customer gives sufficient notice of postdating to the bank.\textsuperscript{65} It is easy to see how fees could snowball if the bank pays a postdated item while the unknowing customer continues to write checks on an account which, as a result of the bank's paying the postdated check, now has insufficient funds.\textsuperscript{66} Therefore, can consumers rely on the banks' good faith in notifying them of these changes?

Current Georgia law defines good faith as "honesty in fact in the conduct or transaction concerned."\textsuperscript{67} This subjective test essentially shields the bank from liability so long as it believes it is acting in good faith. When notifying customers of the changes to Article 4, banks may be held, at least initially, to this lower standard. As such, it is logical to assume that banks will exploit the least expensive method of giving customers notice (i.e., typing in a few informative lines on the bottom of the bank statement informing customers of Article 4 changes). Surely this is not enough in light of the substantial impact the revision will have on consumers. Yet even under the revision's enhanced definition of good faith, such minimal notice may be sufficient.\textsuperscript{68}

One commentator believes the revision's standard of good faith encourages a "race to the bottom" because it could be read to allow minimally acceptable conduct as long as all banks in the area are

\textsuperscript{65} U.C.C. § 4-401(c); \textit{supra} notes 4-14 and accompanying text.
\textsuperscript{66} Similar results may occur if the customer lacks knowledge of the changes to Revised U.C.C. § 4-402. \textit{See supra} notes 50-55 and accompanying text.
\textsuperscript{67} O.C.G.A. § 11-1-201(19) (1994).
\textsuperscript{68} U.C.C. § 4-104(c). \textit{See supra} note 60 and accompanying text. \textit{See also generally} Heatherman, \textit{supra} note 64, at 583-86.
behaving the same way.\textsuperscript{69} While this argument may seem a bit extreme, it should alert legislators to the potential for abuse.

Of the numerous ways to give consumers notice of changes to Article 4, one alternative would require banks to send notification of all major changes by separate "mailer."\textsuperscript{70} A small bank can send a quarter page information card for less than forty-four cents per customer.\textsuperscript{71} Larger banks who deal in greater bulk could significantly reduce that figure.

Another option would require banks to include an information card in each bank statement, which could be done for only a few cents per customer. To be adequate, however, banks should place inserts in three consecutive bank statements. And, to supplement these alternatives, banks might also post informational signs to alert customers of their new policies under the revision.\textsuperscript{72}

Whatever the alternative, it is vital for consumers to receive adequate notice. And regardless of the cost, banks should be required to give them such notice. Any expenditure becomes less significant considering that automated check processing saves banks at least forty cents per customer per month.\textsuperscript{73} The cost of giving notice is easily offset by the substantial reduction in monthly processing fees. But, will banks foot the bill for adequate initial notice?

Of the numerous banks interviewed in preparation for this Article, most have plans to properly notify their customers.\textsuperscript{74} Still, a general notice provision in Georgia's Revised Article 4 would serve to protect consumers and help banks identify what constitutes sufficient notice.\textsuperscript{75}

\textsuperscript{69} See Budnitz, \textit{supra} note 41, at 833.
\textsuperscript{70} The examples given by the author are by no means exhaustive. Rather, they are introduced to show various ways banks might notify their customers of the changes to Article 4.
\textsuperscript{71} Interview with Bill Gresham, President of Middle Georgia Bank, in Fort Valley, GA. For small rural banks, a 1/4 page flyer costs the bank approximately 15 cents per customer. Added to the cost of postage ($ .29), a small bank can notify its customers for about 44 cents each. \textit{Id.}
\textsuperscript{72} Most larger banks have marketing departments which produce signs and public notices in house. Many small banks utilize the services of community bank associations. These associations send preprinted notices to banks that inform consumers of holidays. All the bank does is post the signs. Perhaps, these associations could perform similar services to notify customers of the changes to Article 4.
\textsuperscript{73} Even a small bank of about 4000 checking customers saves approximately 23 cents in mailing and 17 cents in handling costs per customer per month by bulk filing checks. See interview with Bill Gresham, \textit{supra} note 71.
\textsuperscript{74} Of the banks interviewed, the majority plan to send the customer a separate mailer, include information cards in bank statements, and post signs at each branch office.
\textsuperscript{75} The revision could include, for example, "A bank has an affirmative duty to give sufficient notice to its customers of the changes in policies and fees resulting from the adoption of this Article. Notice is sufficient if it is reasonably calculated to inform the
C. Legislative Guidance or Good Faith Reliance

The majority of states adopting Revised Article 4 have left issues of notice, fees, and procedures to the banks. Unfortunately, while the revision requires them to act in good faith, that, without more, may leave the consumer holding the proverbial bag.

In particular need of legislative attention is Revised U.C.C. section 4-401(c), discussed above. To protect the consumer, the General Assembly should add language which either prohibits banks from charging a fee for postdating or specifies the number of postdate notices a customer may make free of charge. Another, but less practical alternative, would be to deny banks the right to charge a fee unless they could prove the customer had actual knowledge of the duty to notify when postdating. Regardless of the option chosen, consumers need legislative protection from the fees banks charge for notice of postdating.

In addition, consumers would benefit from a legislative statement regarding loss allocation in the event a postdated check is prematurely paid. The General Assembly should amend the revised section so as to shift the resulting loss to the person who presents a postdated check for payment before its date. Such an amendment makes sense because

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76. See supra notes 4-12 and accompanying text.
77. Washington has enacted such a statute. See supra note 14.
78. See supra note 13. West Virginia requires banks to accept nine notices per year without charge. W. VA. CODE § 46-4-401(c) (1994).
79. This option is not practical because proving the customer had actual knowledge of the duty to notify would likely force the application of a subjective test. This may spawn increased litigation if customers choose (and can afford) to assert their rights.
80. Three notices would strike a fair balance between competing bank-customer interests. The following sentence should be added to the Revised § 4-401(c) in Georgia: "A bank shall accept three such notices per year without charge to the customer for acceptance of notice and monitoring of the postdated check." Similar language has been codified in West Virginia. See supra note 13.
81. The Association of the Bar of the City of New York, Committee on Consumer Affairs recommended to the Law Revision Committee on September 29, 1994, that such an alternative be considered. See supra note 46. The Committee recommended the following language to Revised U.C.C. § 4-401:

A customer who has suffered a loss as the result of a bank's charge against the account of its customer of a check that is otherwise properly payable from such account but is paid before the date of the check may recover the loss, together with consequential damages, costs and fees, from a transferor who, with actual knowledge of claims or defenses to the payment of the check, presented the check
the burden would be placed on the person in the best position to avoid the loss resulting from premature payment of a postdated check—the payee or subsequent transferor of the check.

Postdating rules, however, may not be the greatest problem regarding consumer reliance on the banks’ good faith. Under Revised U.C.C. section 4-402, a bank can post debits before credits received on the same day. The inevitable result is a substantial increase in the number of returned checks and insufficient funds (“NSF”) charges to the consumer. Given the bank’s obvious economic motivation to handle accounts in this way (it costs the bank less than $2.00 to process a bad check), legislative guidance over this section of the revision is imperative. By adding an Official Comment stating that Revised section 4-402 is not intended to permit banks to post debits before credits made the same day, the legislature could easily solve the problem. Historically, however, the Georgia General Assembly has chosen not to publish Official Comments to U.C.C. provisions. Perhaps it is time the legislature reconsidered this “no comment” policy.

No less substantial, but more difficult to regulate, is the issue of fees. Banks are in business to make money. Moreover, at least a portion of

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82. Relating to the discussion of Revised § 4-402(c) and of particular concern to a number of consumer groups is the order in which banks pay checks. A bank can maximize the number of bounced checks by paying the largest check first. This practice creates an insufficient balance, causing smaller subsequent checks to create further overdrafts. See supra notes 48-57 and accompanying text. Chris Lewis, the Director of Banking and Housing Policy for the Consumer Federation, told the Associated Press that “[b]ounced check fees are a raw grab for profits.” See Wichner, supra note 49. Many banks justify high returned check fees because they deter customers from writing bad checks. Id. A better argument for paying the largest checks first is that it actually helps the consumer because big checks are usually for rent or car payments. Id.

83. See supra note 48.

84. California has adopted similar language. See supra note 56. See generally Hillebrand, supra note 56, at 124. One commentator argues that banks should make a “second balance inquiry and refrain from dishonoring [a] check if deposits adequate to cover it were received and credited before the midnight deadline the prior day.” Hillebrand, supra note 50, at 685. While this method would eliminate the problem, this author believes the language of the California comment, discussed supra note 41, is more effective. See also Edward Rubin, Efficiency, Equity and the Proposed Revision of Articles 3 & 4, 42 ALA. L. REV. 551 (1991). Professor Rubin suggests that banks “could be required to pay all checks presented on a given day in an order that minimized the number of returns.” Id. at 572.


86. Official Comments would serve the best interest of both consumers and banks. Enactment of Revised Article 4, absent some official statement of policy, would place consumers at the mercy of banks.
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the money they make comes from service charges. Yet as written, Revised Article 4 creates an economic paradox, forcing the consumer to rely on the banks' good faith in setting their fees.

Fees have increased dramatically in the last few years while banks' processing costs have decreased due to technological advances. According to the Federal Deposit Insurance Corporation ("FDIC"), in 1980 banks collected around five billion dollars in fees. By 1993 that figure had exploded, with banks earning over $15.2 billion in fees alone, more than the 1982 net income of all United States banks combined.

Georgia banks have followed this nationwide trend. In 1981, state banks collected approximately $1.3 million in fees. By 1993, that figure approached $5.4 million. As ironic as it may seem, one of the manifest purposes of Revised Article 4 is to reduce the cost of the check collection process as a whole. Unfortunately for the consumer, the revision will likely spawn an even greater increase in both the number and level of fees. Hopefully, if the drafters of Revised Article 4 are correct, fees should actually decrease over time.

So, is there need for legislative guidance over the issue of fees? Perhaps. Notice of postdating is a new concept and banks should not be permitted to charge substantial fees for the service until the customer has adequate notice of the new rules. Legislative guidance may also be necessary for the fees banks charge for producing copies of canceled checks. In some consumer transactions, the canceled check serves as the receipt. In the case of checks used to pay installments on homes or cars, most consumers prefer to have a copy of the canceled check for their records. The legislature could easily address these concerns.

87. Rep. Joseph Kennedy, a Massachusetts Democrat, (D-Mass) expressed his concern to the House Banking Committee's consumer credit subcommittee that banks might be price-gouging their customers. See supra note 48, at 1098.
89. Compiled from FDIC Bank Operating Statistics. This represents an increase of almost 15% from 1989 figures and almost 100% from 1985. Id.
90. Compiled from FDIC Bank Operating Statistics.
91. Id. Note, however, this figure does not include all Georgia banks. The FDIC does not require banks with assets less than $100,000,000 to report service fee income.
92. See U.C.C. § 4-406, Official Comment 1.
93. See, e.g., U.C.C. § 4-406, Official Comment 1. While the adoption of Revised Article 4 should reduce the cost of the check collection process, this author doubts those savings will be passed along to the customer.
94. See supra notes 4-9.
Some states have adopted an alternative which sets a minimum number of copies the bank must provide free of charge every month.\textsuperscript{95} Other alternatives include setting a maximum fee for obtaining copies and providing customers with a telephone number to call and request copies of canceled checks.\textsuperscript{96}

Perhaps the best alternative is to follow the lead of several banks that presently offer truncated accounts.\textsuperscript{97} For example, if the bank elects not to return the items to the customer, the bank must provide carbon copy checkbooks at a reasonable fee.\textsuperscript{98} Bank customers are then able to match their retained copies with the items listed on their monthly bank statement.

While this would not completely alleviate the problem of alterations and unauthorized signatures, consumers alerted to nonpayment by a creditor would have some proof they wrote the check. If the carbon copy was deemed insufficient, at worst, the consumer would know the item number and be able to request a copy of the check from the bank for examination. Thus, furnishing carbon copy checks, along with a rule requiring banks to provide their customers with a specified number of copies of paid items free of charge, would make the revision more equitable to consumers.\textsuperscript{99}

95. See supra note 23.
96. See supra notes 24-25 and accompanying text.
97. Several banks which currently offer truncated accounts require their customers to purchase carbon-copy checks. The lower cost of truncated accounts offsets the higher cost of carbon copy checks. The cost to the customer is approximately the same.
98. The following could be added to the statute or as a comment: "In order to assist the customer in discovering unauthorized signatures and alterations, a bank which elects not to return actual paid items to the customer must provide the customer with carbon copy or other NCR-type checks." NCR checks produce an instant copy of the check without the need for traditional carbon paper.
99. Georgia law should require banks to provide (without charge) three copies of canceled checks per account, per month. Almost every bank customer has a mortgage or rent payment, most likely a substantial expenditure for the average consumer. A copy of the check gives them peace of mind because they have a record of the transaction. In addition, an automobile represents the livelihood of a substantial number of consumers. Certainly, many place a great deal of importance on having actual proof of monthly payments. Finally, most every consumer, at one time or another, is involved in a dispute with a creditor. To charge a customer upwards of $20 to get proof of payment on an account may place the consumer in a "catch-22" situation. For example, a consumer's monthly department store payment may only be $20. Why should the consumer spend an equal or greater amount to prove payment? A consumer on a tight budget may opt to just send in another payment, jeopardizing both his financial well-being and his credit rating.
IV. CONCLUSION

Overall, Revised Article 4 lays the foundation for a more efficient check collection process that "must be adopted to accommodate modern practices." 100 While this author questions a permanent editorial board member's assertion that Revised Article 4 is a "pretty balanced product," it is certainly a dramatic improvement over its predecessor. 101 As such, most of the sections should be adopted as written. Some, however, are in great need of legislative attention. 102 In addition to the amendments suggested, an official statement of policy (e.g., Official Comment) would provide excellent guidelines for consumers and banks alike. 103 Historically, however, Georgia has not published Official Comments to Article 4 or any other U.C.C. articles. 104 Yet the dramatic effect the Revised Article 4 will have on consumers warrants an official statement of policy, especially in the areas of notice, fees, and procedures. This Article addresses those issues that most affect the consumer. The General Assembly, however, should carefully examine all sections of the

100. Sabbath, supra note 1, at 795.
101. Telephone Interview with Donald Rapson, senior Vice President and Assistant General Counsel, CIT Group, Inc., Adjunct Professor of Law, New York University Law School, Member, Permanent Editorial Board for the Uniform Commercial Code (Oct. 11, 1994). In a recent article, Mr. Rapson defends the drafting process of Articles 3 and 4 in response to Professor Rubin's attacks. Donald Rapson, Who Is Looking Out for the Public Interest? Thoughts About The U.C.C. Revision Process In The Light (And Shadows) of Professor Rubin's Observations, 28 LOYOLA L.A. L. REV. 601 (1994). Mr. Rapson rejects Professor Rubin's "characterization of the process for the Articles 3 and 4 revisions as a 'disgrace.'" Id. at 603. He believes Professor Rubin's "failure to be wholly objective and fair must be noted." Id. at 606. Mr. Rapson argues that the Articles contain "important substantive changes that generally benefit" consumers and offers an example: the new, expanded definition of "good faith" and the "recognition that a bank has a duty to exercise ordinary care." Id. at 606-07. While this author agrees with Mr. Rapson that the Revision is by no means a "banker's enterprise," Revised Article 4 is tilted in favor of the banks and requires some legislative attention.
102. According to the Official Comments, Revised Article 4 does not "prescribe what constraints different jurisdictions may wish to impose on [the bank-customer] relationship in the interest of consumer protection." See U.C.C. § 4,103, Comment 3 (1990). Still, the revision raises a number of consumer issues that the Georgia General Assembly "may wish to address in individual legislation." See id.
103. Professor Budnitz questions the weight of Official Comments. He believes the Official Comments to Article 4 are good, but he poses a hypothetical to demonstrate the potential for confusion: if there is no Georgia Law on a particular issue and the law of Alabama and the Georgia Comment differ, which should courts follow? Telephone Interview with Professor Mark E. Budnitz (Sept. 22, 1994). Professor Budnitz makes a valid point. However, Official Comments would serve as important guidelines for Georgia courts interpreting the revised Articles.
104. See supra note 86.
revision which have a direct impact on consumers. Without legislative help, consumers may not be able to afford to rely on the banks' good faith.