The Discontinuance of the Certified Check—An Arkansas Study

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THE DISCONTINUANCE OF THE CERTIFIED CHECK—AN ARKANSAS STUDY

Arthur G. Murphey, Jr.*

INTRODUCTION

At one time in the United States a certified check was a well-known and often used instrument. However, the author conducted several surveys described below, and as a result concluded that banks in Arkansas seldom certify checks, that there is little demand for certified checks, and that there is no need for them because a cashier’s check gives the same rights and protection as a certified check and is simpler to process.

Many people today probably do not know what a certified check is, though they are familiar with a cashier’s check. When a customer purchases a cashier’s check from a bank, an officer of the bank signs the check. The check is drawn on the bank itself and is payable out of a special fund at the institution. The issuance of the check obligates the bank to pay it. When a certified check is used, however, the customer signs one of his own checks; the check is drawn on the customer’s own account. Subsequently, a person in authority at the bank uses a stamp to mark the check “Certified” and then signs and dates the certification. The amount of the check may also be specified. The certification obligates the bank to pay the check.

I. PROLOGUE

The surveys described here arose out of a telephone conversation between the author and Professor Allan Farnsworth of the School of Law of Columbia University in April of 1993. At the time, Arkansas had recently adopted revised Article 3 of the Uniform

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Commercial Code (UCC), but New York had not. The conversation was focused on revised section 3-413(b), which provides that if (a) the certification on a check does not state an amount, (b) the amount of the check is later raised, and (c) the check is then acquired by a holder in due course, the bank will be liable for the amount of the check at the time the holder in due course took it. This is a new rule, and Professor Farnsworth wondered if Arkansas banks had altered their certification stamps (to show the amount) as a result of the change in the law. The author set out to find the answer by asking officers of banks in Little Rock if they had changed the certification stamp, and, if so, to obtain an impression of the new stamp to send Professor Farnsworth. The responses to the questions were so surprising to the author that he performed further surveys to see if the practice in Little Rock was widespread. The approaches to the officers of the banks are described below for any reader who wishes to evaluate the author’s methods.

Several Arkansas laws require the use of certified checks. Thinking that it would be a short trip that would produce a certification stamp reflecting the change in section 3-413(b), the author questioned a bank employee who was in charge of such matters. The author first explained the change in the law and then asked whether or not the bank’s certification stamp had been changed. In reply, that employee said that the bank no longer certified checks. The author then went to another bank, again explained his mission to an employee, and was told that to the best of the employee’s knowledge

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1. U.C.C. § 3-413(b) (1990). This section provides in relevant part:
   (b) If the certification of a check or other acceptance of a draft states the amount certified or accepted, the obligation of the acceptor is that amount. If (i) the certification or acceptance does not state an amount, (ii) the amount of the instrument is subsequently raised, and (iii) the instrument is then negotiated to a holder in due course, the obligation of the acceptor is the amount of the instrument at the time it was taken by the holder in due course.

2. This is true in other states as well. “Nevertheless, certified checks continue in use due mostly to various statutes that call for them.” Larry Lawrence, Making Cashier’s Checks and Other Bank Checks Cost-Effective: A Plea for Revision of Articles 3 and 4 of the Uniform Commercial Code, 64 MINN. L. REV. 275, 321 (1980). “The elimination of check certification is not yet possible. Many statutes and official regulations provide for the acceptance of such checks but not cashiers’ checks.” Roy N. Freed, Some Legal Implications of the Use of Computers in the Banking Business, 19 BUS. LAW. 355, 362 (1964).

3. The term “employee” here is used in a generic sense. Some of the people consulted were officers in positions of more responsibility than others. However, no attempt was made during this first questioning to determine the title of the person consulted.
the bank had not certified a check in twenty years. This caused the author to wonder if the same was true throughout the Little Rock area, for Professor Farnsworth had made it plain that New York banks still certified checks.

II. THE FIRST SURVEY

Still hoping to find a changed stamp somewhere, the author personally visited ten Little Rock commercial banks, two North Little Rock commercial banks, and two banks which are in the category formerly classified as savings and loan associations. At each bank the author used the same approach, hoping that it would save time by addressing the certified check question directly. The author first explained the change in the law, then asked whether there had been changes in the wording of the certification. The answers were unanimous: the institutions did not certify checks.4

The reactions of the bank employees varied. When told that the purpose of the visit concerned certified checks, some asked, "Don't you mean cashier's checks?" Some employees understood what a certified check was but had not seen one the entire time they had been bank employees, this duration ranging usually from three to five years. Others said that they had been bank employees for more than ten or more than twenty years. This prompted the author to pursue the matter further and determine the situation outside the Little Rock area.

The author next sought help at the Arkansas Bankers' Bank, an organization that performs services for small town banks and has among its officers people who were formerly employed by commercial banks around the state. During an interesting discussion, one of its officers told the author that in the past it was usual to include the amount of the check in the certification (a point later conveyed to Professor Farnsworth). The officer also said that some banks will still certify a check in theory, but that at bankers' meetings the question arises as to how to determine the charge for this service, which is a puzzle in itself. Following the officer's suggestion, the

4. Other states may be experiencing a similar situation. "Certified checks have been used in this country for over 130 years, but in recent years their use has steadily decreased because of the rise of computerized check processing systems." Lawrence, supra note at 320-21. This represents a continuation of a trend. A similar result was revealed in a comment thirty years ago. "But in any event, as a practical matter, banks in various regions in the United States presently refuse to certify checks for anyone but the drawer-customer and count the loss as a net gain." W. T. Windsor, Jr., The Certified Check: A Special Handling Item in Automation, 81 Banking L. J. 480, 484 (1964).
author went to Benton, Arkansas. An officer at the Union Bank in that city said that occasionally they did certify checks if a customer was dealing with a businessman who would accept nothing less. A subsequent interview revealed that checks were very seldom certified—probably only one in 1993—and those payees who demanded payment by certified check were from out of state.

III. THE LONGER SURVEY

Since the Union Bank interview showed that some checks were still being certified, the author decided to learn the extent of their use by writing selected banks throughout the state. He sent letters to officers of ninety-one commercial banks throughout the state, including every bank in the Little Rock metropolitan area, and at least one bank in each of the seventy-five counties in Arkansas. Forty-three bank officers responded. Five more (with commercial banks) who had been interviewed orally in the first survey did not respond to the written one. The smallest town represented was Ash Flat with a population of 667. The largest was Little Rock. Of these forty-eight banks, only four still certify checks.

The letters sent to the bank officers contained four questions. Hoping to get as many answers as possible, the author suggested writing the answers on the letter itself and enclosed a stamped return envelope. Some of the bankers responded with personal letters and others added helpful comments.

The first question was: If a customer really had to have a certified check, and a cashier’s check would not do, would you certify one?

5. For this survey the “metropolitan area” meant Little Rock, North Little Rock, and Jacksonville.

6. The population of the city is about 175,000, but the area served by the banks also includes Jacksonville, North Little Rock, and Sherwood, which bring the total to about 285,000.

7. For instance, indicative of what must be the general situation, one who had been with his bank for almost thirty years wrote, “I am one of the few persons in the bank who knows what a certified check is and probably the only one who knows how to process one. We have not certified a check in at least fifteen years. We do not even have a certified check account on our general ledger.” Another wrote, “At this time, there is no account set aside on our general ledger for issuing certified checks.” Another wrote, “I would imagine that over 60% of our staff wouldn’t recognize or know what to say when asked about a certified check.” Another wrote, “Our [Executive Vice President] has been with this bank for 30 years, and he can vaguely remember their use when he was new here.” Another wrote, “To my knowledge no state agency has refused a cashier’s check on our bank.” And another wrote, “It is my belief that only Alabama uses certified checks as a common practice now.” On this last remark, see the reference to an early Alabama case in footnote 55, infra.
Four of the banks replied that they still certify checks. The First National Bank of Fort Smith still does so, though infrequently. A subsequent letter revealed that most of these certified checks are payable to the Arkansas State Highway Department, some to the State of Oklahoma, and one in recent history to the State of Michigan.

The First National Bank of Sharp County in Ash Flat still certifies “maybe six a year.” In reply to a subsequent letter, the bank officer stated that he did not know whether the payees were residents of Arkansas or of another state. He did suggest that the bank’s customer base was mostly retirees and that the older people just might be more familiar with certified checks. Also, people are moving into that area from all over the United States, which presents the possibility that some of these customers are from states where certified checks are used more frequently. He also thought that moving companies may request certified checks.

The Commercial Bank & Trust Company in Monticello occasionally certifies a check. The requests in Monticello come from two customers who do business outside the state.

These banks and the Union Bank in Benton, mentioned above, are the only four of those surveyed, according to the responses, that still certify checks.

Of the other forty banks, sixteen officers indicated that they would certify checks if the customer had to have one. In some cases this was modified with statements such as, “depending on the customer . . . .” But the answers to the third and fourth questions, discussed below, indicated that, because of the absence of requests, these should be considered hypothetical answers to a hypothetical question. Eight officers did not say what they would do if a customer had to have a certified check; some did not answer the question, and others stated they did not know. The remaining sixteen officers indicated that they would not certify a check.

The second question, connected to the first, was: If not, what practice would you follow?

Of the sixteen who indicated that they would certify a check if absolutely necessary, six also mentioned alternative methods of payment that they had suggested in the past or would suggest if they were requested to certify a check. The preferred alternative was the cashier’s check, with all six officers mentioning it. Two officers also mentioned a letter of credit and one officer suggested a wire transfer. The other ten officers did not answer this question.

Of the eight officers who did not answer the first question either way, three did not answer the second. All three indicated that
they had never had the request put to them. Four officers indicated a preference for a cashier's check—they had recommended one or would do so—and one would recommend wiring funds.

Of the sixteen who indicated that they would not certify a check, one did not answer the question. One answered that he did not know what we would do. One answered that he would try to make other arrangements but was not specific, while another gave a similar answer, illustrating it with "a letter of guarantee, etc." One would offer a bank draft. One would supply a letter saying that the funds were available. Two officers replied that the customer would have to go to a bank that did certify checks. Eight officers indicated that they would offer a cashier's check.

The responses to the third question were more enlightening than those to the second. The third question was: Do you recall the last time your bank certified a check?

As stated above, the Benton bank certified a check probably in 1993. The Fort Smith bank last certified one on July 2, 1991. The officer in Ash Flat did not recall the date of the last one. The officer in Monticello had not issued one "in the last twelve months." However, those dates were very recent compared to the rest of the banks.

Of the officers of the other banks, four replied that their banks had never certified a check, but did not add any relevant time reference to their response. Seven could not recall the last time they issued a certified check. Four others did not mention any time, two saying "several years," one "many years," and one saying that she had certified only one check in her twenty-five year career, without indicating how recent that had been. The rest of the answers referred either to the last time the officer had certified a check or to the last time the officer had seen one. The times were "over eight years," not "in the past ten years," "more than ten years," "approximately twelve years" (two officers), "at least fifteen years," "fifteen years," seventeen years (not since "1976"), "over seventeen years," "eighteen years of banking (thirty-three years of related financial experience)," "at least twenty years," "not in past twenty years," "twenty years," "twenty years or more," "twenty + years,"

8. The fact that the author did not include a question as to the length of time the officer had been with the bank was perhaps a shortcoming. For instance, one of these banks was founded in 1934, but the employee could have been a new employee who was speaking from personal experience. On the other hand, another was founded in 1990. The length of time of employment would not have mattered in that case.
"twenty-two years," "twenty-three years," "twenty to twenty-five years," "twenty-five years or more," "over twenty-five years," "over twenty-nine years so far as I know," "thirty years," "over thirty years," "I do not recall ever certifying a check (I have been here thirty-six years)," and "to my knowledge, in the forty-five years I have been in this bank, we never have."

The fourth question, connected to the third, was: If recently, does the bank have a call for one often?

Very few answered this question separately. Instead, the answers to the third question were usually written so that the last time a check was certified was also the last time one was called for. However, four officers specifically answered the question "no" and three said "never." Two officers could not recall the last time a customer requested a certified check. One replied "very seldom" and one "infrequently." Two officers replied "occasionally," and both added that the customers always accepted a cashier's check after an explanation.

IV. CONCLUSIONS AS TO CERTIFICATION

These surveys cannot be said to give a truly accurate answer as to how many banks in the state still certify checks, because not all Arkansas banks were questioned. Nor did all of those questioned respond. But, the surveys did show that very few Arkansas banks still certify checks, and those that do are varied in the location and the size of their towns. One bank is in the small town of Ash Flat with a population of 667 in the northern part of the state. Another is in Benton, which has a population of 18,177 and is located in central Arkansas. Still another is in Fort Smith, which has a population of 72,798 and is second only to Little Rock in size. Fort Smith is in western Arkansas near the Oklahoma border. The fourth bank that still certifies checks is in Monticello, which has a population of 8,116 and is located in the southern part of the state near the Louisiana border. Apparently there is similarity in neither size nor location to account for the practice.

One might suppose that the older banks would have been more likely than the newer banks to have responded that they still certified checks. The oldest bank in the surveys was The First National Bank.

9. This result is satisfactory to the author and hopefully to bankers who would like to see certification abolished.

10. As pointed out above, banks in Little Rock do not certify checks, though some people might have expected institutions in the larger city to be more likely to do so.
of Fort Smith, founded in 1872, which still certifies checks; the newest, Citizens First Bank in Little Rock, was founded in 1991 and does not certify checks. Two of the other banks that certify checks, The First National Bank of Sharp County and Commercial Bank & Trust Company, were both founded in 1912. However, the surveys showed that the Union Bank of Benton, founded in 1954, still certifies checks while most Arkansas banks which are older than that no longer do so.

The answers also gave some indication as to how long the process of certification has been waning. Out of the forty-four banks which no longer certify checks, the times given for not having done so range from over 8 years to 45 years. Also notable are the several banks that have never certified checks.

V. The Last Survey—The Recipients

As is true of the law in other states, some Arkansas statutes require the use of a certified check.11 There are twelve sections of the Arkansas Code specifying when the use of a certified check is required. Because of the years during which use of the certified check was apparently rising and waning (discussed below), the date of the passage of the laws may be important. Nine of the twelve sections allow other methods of payment or security as well, so only three require the use of certified checks exclusively. Under one of the three sections,12 if someone wishes to bid on a highway bridge over a navigable stream, the bid must be accompanied by a “certified bank check in the sum of five thousand dollars ($5,000).” No alternate method of payment is allowed. This act dates from 1891,13 which may explain why it requires a certified “bank” check. The other two sections are part of the Motor Carrier Act. According to one section,14 an application for a certificate “of public convenience and necessity” must be accompanied by a certified check made payable to the Arkansas Transportation Commission for $50. According to the other section,15 an application for permits for contract carriers by motor vehicles must be accompanied by a certified check made payable to the Arkansas Transportation Commission for $50.

11. This could also be true of municipal ordinances, but ordinances were not researched for this article.
15. Id. § 23-13-223.
Both of these sections are from a 1955 act, and neither section provides an alternative method of payment.

Regarding the nine sections which provide for other methods of payment, five allow cash or a "postal money order." Of these five sections, four come from an act passed in 1935. The fifth section is from an act passed in 1971. In a sixth section, derived from a 1955 act, the other choice is a "money order." The alternative method of payment in one section is the use of a surety check.

17. If a person applies for a permit to be either a distiller or manufacturer, Ark. Code Ann. § 3-4-602 (Michie 1987), a rectifier, Id. § 3-4-603, a retailer, Id. § 3-4-604, or a wholesaler, Id. § 3-4-605, of alcoholic beverages, the application permit must be accompanied by "a certified check, cash, or postal money order" (the wording is identical in each of the four sections) for the amount required for the permit.
21. Ark. Code Ann. § 23-13-232 (Michie 1987). This statute, which is also part of the Motor Carrier Act, pertains to the transfer of "certificates, permits, and licenses" and state that an application for transfer "shall be accompanied by a certified check or money order" for $50 payable to the Arkansas Transportation Commission. Oddly, this section is derived from the same 1955 act—Act 397—as the two sections above which do not provide for an alternative instrument of payment. It may have been that in the two sections above, the omission of an alternative method of payment was through an oversight. Or perhaps the legislators of that time were in the same age group as the retirees who bank in Ash Flat and familiar with the certified check. Judging by the responses of the bank officers in the surveys, only in a few instances had banks ceased dealing with the instrument as early as 1955.
23. Former Ark. Code Ann. § 19-11-403 (Michie 1987), repealed by 1993 Ark. Acts 645, § 2, pertained to bids submitted on public construction contracts for the state or any subdivision of the state and for furnishing of commodities or services to political subdivisions. Every bid was "absolutely void unless accompanied by a certified check or by a written bid or proposal bond of a responsible surety." The section set out requirements for the bond, but set out no requirements as to the bank on which the check was drawn—that it be solvent or responsible, for instance. Though it was surely not meant as a gesture to consign the certified check to oblivion by ignoring it as a requirement, the Arkansas Supreme Court, when recently citing the statute, said only that it provided that the bid "must be accompanied by a surety bond." Conway Corp. v. Construction Eng'rs Inc., 300 Ark. 225, 229, 782 S.W.2d 36, 38 (1989). This causes one to reflect on a statement by Professor Lawrence, "Considering that banks are phasing out the use of certified checks and replacing them with cashier's checks, perhaps the courts and the draftsmen of the Code should simply assume that certified checks will fade out of use."
bond. The first section is from an act passed in 1949, and the other is from an act passed in 1965. In the eighth section the alternative instrument is a bank draft. Its source is an act of 1957. In the final section, which derives from a 1959 act, the choices other than a certified check are "certificates of deposit, or any combination of securities."

To what extent are the three sections of the Arkansas Code that require exclusively the use of a certified check strictly enforced? All three regulate to an extent certain actions taken by the Arkansas Highway and Transportation Department. The Fort Smith bank officer's reply shows that some customers requested certified checks to pay that department. The author had conversations with several people at the highway department who would receive the checks in question. A person in the department that receives applications for a certificate "of public convenience and necessity" stated that the department accepts a cashier's check or money order in place of a certified check when offered. Likewise, a cashier's check or money order could be used with an application for permits for contract carriers. As to the contracts for county bridges, a representative said that practically all these contracts go through their department because the state supplies part of the money. In this case the certified check in essence amounted to a bid bond, and the department did not demand a certified check. An actual bid bond substituted for it.

This final survey indicates that in the eyes of the state officials involved, the spirit of the law is more important than the letter. A cashier's check grants the state the same protection as the certified check. A similar example can be found at the national level. An

Lawrence, supra note 2, at 332.

The one section is Ark. Code Ann. § 14-22-108 (Michie 1987). The section applies to bids to make certain contracts with a county. The bid must be accompanied by a "certified check or surety bond."

26. Ark. Code Ann. § 23-110-403 (Michie 1992). This section pertains to horse racing and provides that franchise holders must file an application to hold a racing meet; the application shall be delivered with a "certified check or bank draft." This section presents a second problem since bank drafts are also being discontinued because of problems in processing. They are being replaced by either cashier's checks or teller's checks.


old federal statute required that customs duties be paid in cash.\textsuperscript{30} Because of a later change, the law now allows the use of a certified check, and only a certified check, in the alternative.\textsuperscript{31} However, a federal regulation enforcing these statutes allows the use of a cashier's check or a bank draft, an uncertified check if certain procedures are followed, or (for non-commercial entries) a credit or charge card as well as cash or a certified check.\textsuperscript{32} Also, travelers returning to this country from abroad are greeted at some ports of debarkation with signs announcing that customs duties may be paid using a credit card.

There have been calls for laws that would allow the cashier's check as a substitute for the certified check.\textsuperscript{33} In states where revised Article 3 of the U.C.C. has been adopted, now is an excellent time to pass such a law. For, as will be shown next, the holder of a certified check does not, under the revised article, enjoy any advantage over the holder of a cashier's check.

VI. CERTIFIED CHECK LAW IN THE ARKANSAS UNIFORM COMMERCIAL CODE

Eleven sections of the Arkansas Uniform Commercial Code\textsuperscript{34} concern certified checks. For the purpose of this discussion some can be overlooked,\textsuperscript{35} but six sections are worth examining and their...
effects considered. The first is section 4-3-409,36 which defines "certified check." Importantly, this section provides that a bank has no obligation to certify a check, so the Arkansas banks that do certify checks do so only as a service to customers. The second section is section 4-3-411,37 a new section which provides for the recovery of damages, including consequential damages, for refusal to pay a certified check in certain circumstances. The third section is section 4-3-413,38 which was the subject of Professor Farnsworth's conversation. This section concerns the obligation of the certifying bank (as acceptor of a draft) and provides in subsection (b) that, if the certification stamp does not state the amount of the check, the certifying bank may be held liable for a larger amount if the check is altered. The fourth section is section 4-3-414,39 which provides that a drawer who obtains certification of a check is no longer liable on it. This changed a former rule, which provided that, if the holder procured certification, the drawer was discharged.40 By implication, if the drawer obtained certification, the drawer was not discharged. The fifth section is section 4-3-602,41 which excepts a certified check from the instruments whose payment may be stayed by the acceptance of indemnity from a claimant to the instrument. The sixth section is section 4-4-404,42 which gives a bank the option to pay or not pay a check if it is presented more than six months after its date, but which excepts a certified check from that rule. Banks may not refuse to pay a certified check based on the fact that six months have passed since the time of issuance.

The new U.C.C. sections take away any advantage that the holder of a certified check may have had (under the prior Article 3 of the U.C.C.) over the holder of a cashier's check. Sections 4-3-310 (discharge of the obligation), 4-3-411 (recovery of consequential damages for dishonor), and 4-3-602 (disallowing indemnity as a way same for a teller's check, a cashier's check, or a traveler's check. Id. § 4-3-118. Section 4-3-310 provides that if a certified check, cashier's check, or teller's check is used to pay an obligation, the obligation is discharged the same as if cash had been used. Id. § 4-3-310.

36. Id. § 4-3-409.
37. Id. § 4-3-411.
38. Id. § 4-3-413.
39. Id. § 4-3-414. Subsection c states, "If a draft is accepted by a bank, the drawer is discharged, regardless of when or by whom acceptance was obtained."
40. Ark. Code Ann. § 4-3-411(1) (Michie 1987). "Certification of a check is acceptance. Where a holder procures certification the drawer and all prior indorsers are discharged."
42. Id. § 4-4-404.
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of procuring dishonor), make the same provisions for cashier’s checks.

The change in revised section 3-413 to favor the holder in due course in certain cases of alteration does not mean that the holder in due course of a certified check has an advantage over one with a cashier’s check. In parallel situations, the bank’s liability is the same in the case of the cashier’s check as in the case of the certified check. If a cashier’s check is altered, the bank is liable only for the original amount; the check would have been issued for that amount (it would “state the amount” due at that time). The comparable situation in the case of the certified check would be post-certification alteration of the amount for which the check had been certified (because upon certification, the check—like the cashier’s check—has the bank’s credit backing it). When the bank “states the amount” of its obligation in the certification in order to be protected, it is doing nothing more than it does when issuing the cashier’s check. Because the bank can avoid the alteration problem by using a certification stamp that states the amount, the section does not give the holder more rights. It simply requires one more step by the certifying bank to avoid possible liability, which is another reason for certified checks to be unpopular with banks.

Under revised Article 3, section 4-3-414 makes the liability of a person who has a check certified the same as that of one who purchases a cashier’s check. If the recipient now wishes the drawer of a certified check to remain liable, he must require the drawer to indorse the check. However, he can obtain the same result by demanding a cashier’s check and requiring the purchaser to indorse it.

Section 4-4-404, concerning a check that has been outstanding for more than a short time, applies to checks issued by a bank’s customer, so the section does not cause a cashier’s check (which is issued by the bank itself) to be stale after six months. When a certified check is originally issued, however, it is the check of a customer, so when this section provides that a certified check is a check “of the customer” which is not to be considered stale, it puts the certified check on equal footing with a cashier’s check. Neither is stale after six months.

In summary, a cashier’s check should always be an adequate substitute in law for a certified check. This is even more true now than when it was pointed out long ago. The disadvantages of

43. "In automated systems, processing certified checks becomes an unnecessarily
certifying a check are several. One disadvantage, as mentioned above, is that the new rule on alteration will require extra care and work when stamping the certification.

Another disadvantage is that, as a result of computer processing of checks, the certified check presents a special problem.44 Along the bottom edge of the modern check, printed in magnetic ink, are numbers that control how the computer processes it. These numbers conform to the Magnetic Ink Character Recognition Code adopted by the American Bankers Association. When the check is deposited, a computer scans a number that sends the check to the payor bank represented by that number. At the payor bank, another computer scans a second number at the bottom and deducts the amount from the account represented by that second number.

When the customer issues a check to be certified, the customer will use his own check, which indicates that the amount is to be deducted from his account. However, upon certification, that amount will immediately be deducted from the customer’s account by the bank. The reason is that the bank becomes liable on the instrument, so this withdrawal pays the bank for assuming the liability. But, when the check is presented for payment, the computer charges the account shown by that second number. Unless the line at the bottom has been altered, the customer’s account is debited a second time. Therefore, the bank, at the time of certification, must go to the trouble of altering the check so the computer will charge the bank’s, not the customer’s, account.

No such problem exists in the case of a cashier’s check because the proper account number to be charged, the bank’s account number, already appears at the bottom when the check is issued. This means that the certified check is more difficult to process. Because certified checks are rarely issued and require special handling, it is difficult to calculate the extra processing cost to the bank, and thus it is difficult for the bank to determine a fair charge for this service.

VII. SOME BACKGROUND ON CERTIFIED CHECKS

In spite of its disadvantages and its disfavor in Arkansas, elsewhere the certified check is still used regularly45 and is still involved

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44. Bailey & Hagedorn, supra note 43; Freed, supra note 2, at 362; Windsor, supra note 4, at 481-82.
in litigation. As pointed out above, some of the Ash Flat customers may come from states where certified checks are still popular, so they would be accustomed to using them. An investigation into the source of the certified check, and perhaps the reason for any widespread popularity that it once enjoyed, led to an improvement in the author’s perspective about the instrument. Several articles on the certified check explain its history and importance. Two articles were written by the late Professor Roscoe Turner Steffen. The earlier one, written in 1929, discussed responses to questionnaires concerning negotiable instruments which were sent to 250 banks, other financial institutions, lawyers, and law professors. “Replies were received from all sections of the country. Both the large city bank and the country bank viewpoint is represented.” Only a few of the questions and a few pages of the article were devoted to certified checks. After reporting that banks in most states would certify checks, the article added an interesting statement: “But in several states a practice is developing of refusing to certify checks altogether, or only at the instance of the drawer.” There is no mention of the practice in Arkansas at the time.


47. Lawrence, supra note 2; Freed, supra note 2; Windsor, supra note 4; Lord, supra note 45; Paul O. Roberts & William O. Morris, The Effect of a Stop Payment Order on a Certified Check, 5 Wyo. L.J. 170 (1951).


49. Turner, supra note 48, at 1047.

50. Turner, supra note 48, at 1060. Hopefully, the reader will not by now think of the present article as déjà vu. Nor is this article meant to bring Professor
Professor Steffen's second article, co-authored with Professor William F. Starr, gives a history of the certified check. The instrument did not, as might be supposed, develop from the use of the accepted draft. The latter is a much more useful instrument, which can involve a person with the colorful title of 'referee in case of need.' Rather, the certified check can be traced to a practice in England of 'marking' checks, the effect of which was to cause the checks to be paid in preference to other checks by the same drawer. In 1842, in the earliest American case found involving a certified check,

Turner's work up-to-date. Both the focus of the topics and the area covered are smaller in the present article, and the questions asked in the former article about certified checks were different.

Professor Turner's (Steffen's) second article also alluded to the decline in use of the check in some areas. "A large number [of banks], in less commercial sections of the country, found that they could refuse certification entirely, except at the request of the drawer..." Steffen & Starr, supra note 48, at 453.

51. Part of the reason for this conclusion might be that in the pre-revision Article 3, § 3-411(1) began, "Certification of a check is acceptance." In revised Article 3, § 3-409 addresses both acceptance of drafts and certification of checks. However, a certified check has been described as sui generis, being neither a certificate of deposit nor an accepted draft. Minot v. Russ, 31 N.E. 489, 490 (Mass. 1892).

52. For those with a romantic bent, the accepted draft (or bill of exchange as it is known in England) is the negotiable instrument that could be used to lend money before promissory notes were made negotiable by the Statute of Anne, ch. 5, enacted in 1704. It was the instrument in a documentary exchange used to buy silk, coffee, spices from the orient, and other exotic things. (A splendid one appears in William E. Britton, Cases on Bills and Notes xxviii (4th ed. 1951), drawn to pay the Banco de Brasil, for 250 bags of coffee.)

The present author would have argued that the instruments are definitely different because a check, which is a demand draft drawn on a bank, can be certified, but a sight (or demand) draft that is not drawn on a bank cannot be accepted. The draft which is accepted is a time draft, drawn to be paid in the future and not on demand. However, although First Nat'l Bank v. Leach, 52 N.Y. 350 (1873), said that a demand draft could not be accepted, it is possible that one has been accepted occasionally. Steffen and Starr state that there is little "law" on this subject, but they cite three situations in which such an acceptance might occur:

(1) A demand accommodation draft might be accepted;
(2) a drawee may wish to accept the draft rather than give a check to pay for it; and
(3) a banker's draft may be accepted during the collection process while indorsements are being completed.

Steffen & Starr, supra note 48, at 474-75.

53. This title sounds like that of someone summoned by the professional football clubs to settle a dispute concerning a doubtful play, employed after the instant television replay was abolished. In fact, this person is provided for in U.C.C. § 4-503 as someone designated in a documentary draft to be notified in case of the draft's dishonor.

a New York court held that marking a check was considered "equivalent to acceptance." The certified check really became a useful instrument following the Civil War, when monetary conditions were unsettled; by 1873 (the "greenback era") "certified checks, registered and payable in gold, circulated as a medium superior to that of the national currency."

Checks were certified either by the drawer or by the holder and for different reasons. The holder procured certification instead of electing to be paid in cash perhaps because after the check was certified the holder believed that he had an instrument which was as sure of value as cash, but was in a sense better to possess than cash. Unlike currency, title to a certified check not payable to the bearer could not be obtained by a thief who stole it. In such a case the holder had willingly taken the personal check of his debtor. On the other hand, the drawer procured certification to add the bank's name to his own in order to encourage the payee/holder to accept the check instead of cash. Certification would satisfy a holder who would not willingly take the personal check of his debtor.

Formerly, if the holder had a check certified, the drawer was discharged from any obligation on the check. However, if the drawer had the check certified, the drawer was not discharged. The importance of these two rules was apparent in cases involving banks that suspended payments between the time of certification and the time of presentment for payment. If the drawer chose the bank to certify the check, and the bank closed its doors before payment, the drawer (not having chosen a stronger bank), should stand behind the check. But when the holder had the check certified instead of

55. Steffen & Starr, supra note 48, at 465. The case was Phoenix Bank v. Bank of America, 1 N.Y. Leg. Obs. 26 (1842). The earliest (uncertified) check that has been preserved is dated April 12, 1671. Steffen & Starr, supra note 48, at n.131. The authors also refer to an Alabama case, Smith v. Branch Bank, 7 Ala. 880 (1845), as one of the earliest involving a certified check. Steffen & Starr, supra note 48, at 465. This adds interest to the above noted statement by one of the bank officers in the survey that "only Alabama uses certified checks as a common practice now." See supra note 7.

56. Steffen & Starr, supra note 48, at 467. The authors point out that it was not explained what was meant by "registered."

57. Roberts & Morris, supra note 47, at 172; Lawrence, supra note 2, at 321.

58. Without the holder's indorsement a later taker could not be a holder. U.C.C. § 1-201 (1990); U.C.C. § 1-201 (1990). Hence, the later taker could not be a holder in due course. U.C.C. § 3-302. Thus, the victim of the theft retained title to the stolen instrument. U.C.C. § 3-306(a).


60. For a case holding the drawer liable where the drawer's bank failed shortly after certification, see Born v. First Nat'l Bank, 24 N.E. 173 (Ind. 1890).
taking the available cash, this was not the drawer's choice but the holder's, so the drawer should in all fairness be discharged. If the holder has the check certified and negotiates it further, the certification does not release him from his obligation as an indorser anymore than it would a drawer who procured certification before transfer. 61

CONCLUSION AND EPILOGUE

The Steffen and Starr article contains citations to certified check cases dating from the 1880s to the 1920s on what were then current problems. It is easy to conclude from the article that this period must have been the heyday of certified checks, which would explain the 1891 Arkansas statute allowing the use of a certified check only. It is also easy to conclude that one thing that brought the instrument into disfavor in the 1920s was a negotiable instruments law which held that banks which certified checks were liable for alterations made after the customer drew the check and before the certification. 62

The certified check fell into further disfavor with the adoption of computerized collections. Both of these reasons could account for the decline of check certification in Arkansas during the last forty years. Of course, since trusted greenbacks were plentiful during those years, the instrument was not needed as a substitute for them so the decline in its use in Arkansas is understandable.

Now, finally, in those states that have adopted the revised Article 3, a certified check confers no more rights on its holder than a cashier's check. This may in time contribute to the instrument's disappearance in other states as well. In the meantime, these conclusions support an argument for enacting a law to discourage further use of the certified check by providing that whenever a statute requires the use of a certified check exclusively, a cashier's check may be substituted for it.

On a personal note, the author cannot remember when he last saw a certified check. He has never to his knowledge seen a referee in case of need. 63 And, to bring matters full circle, so far he has not been able to find a new certification impression to send to Professor Farnsworth.

63. See supra note 53.