

#63

5/4/67

Memorandum 67-36

Subject: Study 63 - Evidence Code (Commercial Code Revisions)

I would like to suggest several revisions of the legislation contained in the Commission's recommendation relating to the Commercial Code. A copy of this recommendation is attached.

Section 1202

This section is not technically correct. Literally, the section makes a document admissible merely because it is in due form and purports to be a certain type of document. The document should be admissible only if it is found to be such a document. The language concerning the document being in due form and purporting to be a particular document goes to the foundation that gives rise to the presumption of authenticity and genuineness. This is a very technical point, but I believe that the section should be revised as set out in Exhibit I attached if it is to be technically correct.

Section 4103

I have given further thought to this section. I doubt that we carry out the intent of the Commercial Code drafters if the bank is not entitled to an instruction concerning the presumption in a case where the party against whom the presumption operates already has the burden of proof. In other words, the bank should be entitled to an instruction that the presumption can be rebutted only by proof that the standard established by clearinghouse rules and the like or by general banking usage is the exercise of ordinary care unless the party against whom the presumption operates establishes that such rules or usage is manifestly unreasonable.

Hence, I suggest that an additional sentence be added to subdivision (3) to read:

This presumption may be rebutted only by proof that the standards established by clearinghouse rules and the like or the general banking usage are manifestly unreasonable.

I have taken the phrase "manifestly unreasonable" from subdivision (1) of Section 4103. Note that subdivision (2) provides that clearinghouse rules and the like have the effect of agreements under subdivision (1). Such agreements establish the standards by which the responsibility of the bank is measured unless the rules are manifestly unreasonable. Thus, use of this phrase in subdivision (3) will avoid any inconsistency with subdivisions (1) and (2) so far as clearinghouse rules and the like are concerned.

In this connection, it should be noted that the official Commercial Code comment to Section 4103 states that "the prima facie rule [subdivision (3)] does, however, impose on the party contesting the standards to establish that they are unreasonable, arbitrary or unfair." I suggest that "manifestly unreasonable" be used instead of "unreasonable, arbitrary or unfair" in order to make subdivision (3) consistent with subdivisions (1) and (2).

The revised section and revised comment is set out as Exhibit II.

Respectfully submitted,

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Executive Secretary

## Section 1202 (amended)

SECTION 1. Section 1202 of the Commercial Code is amended to read:

1202. (1) ~~A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party shall be prima facie evidence is admissible as evidence of the facts stated in the document by the third party in any action arising out of the contract which authorized or required the document.~~

(deletion)

(2) In any action arising out of the contract which authorized or required the document referred to in subdivision (1):

(a) of its own authenticity and genuineness. ~~The document is presumed to be authentic and genuine. This presumption is a presumption affecting the burden of producing evidence.~~

(b) Unless the contract otherwise provides, if the document is found to be authentic and genuine, and of the facts stated in the document by the third party are presumed to be true. This presumption is a presumption affecting the burden of proof.

A document in due form purporting to be the document referred to in subdivision (1)

**Comment.** Section 1202 has been revised to indicate that it applies only in an action arising out of the contract which authorized or required the document referred to in the section. This revision is consistent with the intent of the drafters of the Uniform Commercial Code. UNIFORM COMMERCIAL CODE § 1-202 Comment 2 ("This section is concerned only with documents which have been given a preferred status by the parties themselves who have required their procurement in the agreement and for this reason the applicability of the section is limited to actions arising out of the contract which authorized or required the document.").

Paragraph (a) of subdivision (2) classifies the presumption of authenticity and genuineness as a presumption affecting the burden of producing evidence. Under Evidence Code Section 604, a presumption affecting the burden of producing evidence requires the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption. If contrary evidence is introduced, the presumption is gone from the case and the trier of fact must weigh the inferences arising from the facts that gave rise to the presumption against the contrary evidence and resolve the conflict. See Evidence Code Section 604 and the *Comment* to that section.

Paragraph (b) of subdivision (2) classifies the presumption as to the truth of the matters stated in the document by the third party as a presumption affecting the burden of proof. Under Evidence Code Section 606, the effect of this classification is to require the party against whom the presumption operates to prove by a preponderance of the evidence that the facts recited in the authenticated document are not true. See Evidence Code Section 606 and the *Comment* thereto.

## Section 4103 (amended)

Sac. 4. Section 4103 of the Commercial Code is amended to read:

4103. (1) The effect of the provisions of this division may be varied by agreement except that no agreement can disclaim a bank's responsibility for its own lack of good faith or failure to exercise ordinary care or can limit the measure of damages for such lack or failure; but the parties may by agreement determine the standards by which such responsibility is to be measured if such standards are not manifestly unreasonable.

(2) Federal Reserve regulations and operating letters, clearinghouse rules, and the like, have the effect of agreements under subdivision (1), whether or not specifically assented to by all parties interested in items handled.

(3) Action or nonaction approved by this division or pursuant to Federal Reserve regulations or operating letters constitutes the exercise of ordinary care, and, in the absence of special instructions, *proof of* action or nonaction consistent with clearinghouse rules and the like or with a general banking usage not disapproved by this division, *prima facie constitutes establishes a rebuttable presumption of* the exercise of ordinary care. *This presumption is a presumption affecting the burden of proof.*

(4) The specification or approval of certain procedures by this division does not constitute disapproval of other procedures which may be reasonable under the circumstances.

(5) The measure of damages for failure to exercise ordinary care in handling an item is the amount of the item reduced by an amount which could not have been realized by the use of ordinary care, and where there is bad faith it includes other damages, if any, suffered by the party as a proximate consequence.

This presumption may be rebutted only by proof that the standards established by the clearinghouse rules and the like or the general banking usage are manifestly unreasonable.

Comment. Subdivision (3) of Section 4103 has been revised to make it clear that this subdivision establishes a rebuttable presumption affecting the burden of proof. Under Evidence Code Section 606, a presumption affecting the burden of proof imposes upon the party against whom it operates the burden of proving by a preponderance of the evidence that the presumed fact is not true. See EVIDENCE CODE § 606 and the *Comment* thereto. Thus, under Commercial Code Section 4103, if a bank proves that it acted in accordance with clearinghouse rules or with a general banking usage not disapproved by the Commercial Code, the party asserting that the bank failed to exercise ordinary care has the burden of proving that the standards established by the rules or usage are manifestly unreasonable. The substitution of language expressly creating a presumption for the Uniform Code phrase "prima facie constitutes" will make clear the intent of the drafters of the Uniform Code. Uniform Commercial Code § 4-103 Comment 4 ("The *prima facie* rule does, however, impose on the party contesting the standards to establish that they are unreasonable, arbitrary or unfair.").

Of course, if the party asserting that the bank acted without exercising ordinary care already has the burden of proof on that issue, the presumption can have no effect on the case and no instruction in regard to the presumption should be given. See the *Comment* to Evidence Code Section 606. But even though the presumption can have no effect in such a case, evidence of the bank's compliance with clearinghouse rules or general banking usage may nevertheless be considered on the question whether the bank exercised due care.

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