

SUBJECT: [Selected Check / Share Draft Issues Under the UCC](#)

Introduction.....	1	Form available.....	9
Executive Summary	1	What about accepting a cashier's check for deposit?.....	9
Definitions	2	Counterfeit cashier's checks.....	9
Credit union share drafts are checks.....	3	Ordinary care in processing.....	10
Encoding errors	3	Accountholder's duty to discover and report unauthorized	
Truncation validated	4	signature or alteration.....	10
Joint accountholder's liability for overdraft.....	4	Demand drafts	10
Stop payment of checks	4	Telemarketing	11
Electronic stop payment orders	4	"Payment in full" checks.....	11
Postdated checks	5	Checks written by decedent.....	11
Refusal to pay cashier's checks, tellers checks and certified checks....	5	Statute of limitations	11
Lost, stolen, or destroyed cashier's checks, teller's checks, or		For more information	11
certified checks	6	Exhibit A – Lobby Notice	13

INTRODUCTION

This release applies to all credit unions, state or federal. It addresses important issues regarding credit union official checks and member share drafts [under the Wisconsin version of the Uniform Commercial Code \(UCC\) Articles 3 and 4](#). The [release describes the results when Wisconsin law applies](#), except where clearinghouse rules, account agreements, etc., provide otherwise. [Each state may adopt variations from the "Uniform" Commercial Code. Since checks often cross state lines, they will sometimes be affected by the laws of other states.](#)

The League offers other [ii Releases](#) which describe important laws and regulations applicable to checks and share drafts, including:

- [ii Release No. 0099 - Reg. CC – Check Returns; Indorsements,](#)
- [ii Release No. 0100 - Reg. CC – Expedited Funds Availability,](#)
- [ii Release No. 0101 - Truth in Savings,](#)
- [ii Release No. 0133 - Check Fraud - A Guide to Avoiding Losses,](#)
- [ii Release No. 0163 - Reg. CC – Substitute Checks,](#)
- [ii Release No. 0169 - Overdraft Protection Programs, and](#)
- [ii Release No. 0172 - Worthless Check Information Requests.](#)

EXECUTIVE SUMMARY

[Credit union share drafts](#) are officially classified as checks under the UCC, [despite](#) objections from banks. However, Truth in Savings requires [account](#) disclosures to reference the term [share draft account](#), at least once.

The UCC says revisions clarify that [when a credit union's own check is payable through another financial institution](#), the proper legal term for the item is *teller's check*, not *cashier's check*. That said, there [are few if any](#) difference in how the two are treated under the law.

The UCC provides that the party that encodes the MICR line warrants the accuracy of the encoded amount. An injured party may sue the encoder, recovering damages in the amount of the loss plus expenses and loss of interest.

The UCC specifically authorizes truncation of checks. If cancelled checks are not to be returned to the accountholder, the account statement must provide sufficient information to reasonably allow the accountholder to identify the checks or items paid. It provides sufficient information if each item is described by item number, amount, and date of payment.

The UCC [provides](#) that a joint accountholder is not liable for the amount of an overdraft if the person neither signed the check nor benefited from the proceeds. However, account agreement cards may include language whereby the joint owner agrees to be responsible for overdrafts, regardless of who wrote the check.

An account holder has the legal right to order the credit union to stop payment on checks they write on their share draft account. The UCC also clarifies that any person authorized to write checks on an account is also authorized to stop payment of any check written on the account or close the account. Thus, a joint account holder may stop payment on any check the other holder(s) wrote. Likewise, where an organization has authorized two different agents to write checks, one may stop payment on an item the other has written. The payee of a check has no right to stop payment.

The UCC provides that a financial institution may pay postdated checks without liability, unless the drawer (account holder) gives proper advance notice of the postdating. The advance notice must describe the check with reasonable certainty.

The credit union is generally obligated to pay its cashier's checks, teller's checks, and certified checks. The credit union, rather than the account holder, is directly liable on those instruments. Regular stop payments are prohibited. To discourage financial institutions from stopping payment on these checks at the request of the account holder or the payee, the UCC imposes liability for damages for wrongful stop payment.

While it is necessary to steer clear of account holder disputes when the credit union is liable on the above instruments, it is a separate matter when the item is lost, stolen, or destroyed. It is understandable that the account holder will want to recover the value of the missing check. The credit union may want to do everything possible to help the account holder. However, there are risks.

The law in Wisconsin provides the drawer, payee, or remitter with the right to file a "declaration of loss" with the credit union, such as The League's *Claim and Declaration of Loss for Lost, Stolen, or Destroyed Credit Union Cashier's Check or Teller's Check form*, in many such cases. The declaration of loss becomes "enforceable" (so the account holder or other claimant can be reimbursed) the later of (1) the time the declaration of loss is provided, or (2) 30 days after the cashier's or teller's check was issued. In the case of a certified check, the 30 days starts on the date the check was certified by the credit union. The declaration of loss has no legal effect during that period. (The 30-day component of the period is set by Wisconsin law. If a cashier's check is governed by the law of another state, a different period may apply – typically 90 days.)

- If the claim becomes "enforceable" before the check is presented for payment, the credit union is not obliged to pay the check.
- Until the claim becomes "enforceable," it has no legal effect and the credit union may pay the cashier's check or, in the case of a teller's check, may permit the drawee to pay the check. Payment to a person entitled to enforce the check discharges all liability of the credit union with respect to the check. When the claim becomes enforceable, the credit union becomes obliged to pay the amount of the check to the claimant only if payment of the check has not been made to a person entitled to enforce the check.

A credit union has a duty to exercise "ordinary care" in the payment of member checks, to attempt to detect forgeries on member share drafts. The law clarifies that this duty does not require it to examine each signature on each check it processes for payment, so long as the credit union does not violate its own prescribed procedures and those procedures do not unreasonably vary from general banking usage.

The time limit for the account holder to examine statements and report an unauthorized check in order to hold the credit union liable for later forgeries or alterations by the same wrongdoer is 30 days after the time the statement is provided to the account holder.

Account holders disputing the amount they owe to a credit union sometimes send a check for only the amount they admit owing, labeling it as "payment in full." If it is a bona fide dispute and the payment in full label is conspicuous, a credit union cashing the check is generally deemed to have agreed to the proposed settlement. However, the UCC now provides that if a payment in full check is accepted by mistake, staff not having noticed the special notation, the credit union may separately refund the amount of the check within 90 days. The account holder will prevail if it is proven that the credit union was aware that the check was labeled "payment in full" when presented.

A three-year statute of limitations applies to most lawsuits regarding checks.

DEFINITIONS

There is sometimes confusion over the terminology used for credit union checks. Changes to the UCC provide clarifications. Be sure to determine the proper terminology for checks issued by your credit union.

The *drawer* is the party whose signature appears on the face of the check, ordering payment to be made. The *drawee* is the institution ordered in a draft to make a payment. This is the institution on which the check is drawn, typically a credit union, bank, S&L, or savings bank.

Cashier's check. A cashier's check is a draft with respect to which drawer and drawee are the same bank (credit union) or branches of the same bank. Thus, a credit union's official check drawn on the credit union itself, as opposed to another institution, is a cashier's check. § 403.104(7)

Certified check. A certified check is a check "accepted" by the institution on which it is drawn, by virtue of its signed agreement to pay the check as presented. The procedure is not common anymore. By certifying a check, the credit union obligates itself to pay the item. Acceptance is typically shown by the drawee's signed agreement on the check indicating acceptance or certification, such as this:

CERTIFIED	
No. _____	Amount \$ _____.
_____	_____, 20_____
By: _____	Credit Union
(Authorized Signature)	

Demand draft. A demand draft is a writing that is not signed by a customer, that is created by a 3rd party under the purported authority of the customer for the purpose of charging the customer's account with a bank, that contains the account number of that account, and that contains at least one of the following:

1. The customer's name.
2. A notation that the customer authorized the demand draft.
3. The statement "No signature required," "Authorization on file," or "Signature on file," or words to that effect.

Money order. This term is not defined in the UCC. A check labeled as a money order is still a check.

- *Bank Money Order.* If the credit union is the drawer (signing the check), it is essentially considered to be a cashier's check (or teller's check). Treat it as such if lost, stolen, or destroyed, because the credit union is liable on the instrument.
- *Personal Money Order.* If the purchaser is the drawer, signing the check, most courts treat it as a personal check, allowing that the purchaser has the right to stop payment. The purchaser, and generally not the credit union (though exceptions are possible), is liable on the instrument.

Teller's check. A teller's check is a draft drawn by a bank (credit union) on another bank, or payable at or through a bank. Thus, the technical term for a typical credit union's "payable through" check is teller's check. The UCC treats teller's checks essentially the same as cashier's checks.

CREDIT UNION SHARE DRAFTS ARE CHECKS

Credit union share drafts are checks under the UCC. The law provides that a check is a draft that is "drawn on a bank" and payable on demand. But the law defines bank, under the UCC, as "a person engaged in banking, including a...credit union...." Wis. Stat. § 404.105(1).

The NCUA Truth in Savings rule treats the term *checking account* as a permissible synonym for the "correct legal term," *share draft account*, when the account is owned by a credit union member. But in account disclosures the synonym must be used in conjunction with the term *share draft account*. 12 CFR Section 707.2(a), Commentary.

ENCODING ERRORS

Automated check processing requires magnetic ink character recognition (MICR) encoding of the amount of a check along the bottom of the instrument. The institution that encodes the check occasionally makes errors, overstating or understating the amount of the check. Since the encoded characters are relied on by other banks in the collection process, the error is carried forward. The UCC provides that the encoder warrants the accuracy of the encoded amount. An injured party may sue the encoder, recovering damages in the amount of the loss plus expenses and loss of interest. § 404.209.

TRUNCATION VALIDATED

The “truncation” of checks is an idea that was pioneered by credit unions. [Now banks also use checks](#) with duplicate copies in order to avoid the expense of returning cancelled checks to the accountholder. [Electronic presentation brings much greater speed and cost savings.](#) [The UCC authorizes both practices.](#)

If cancelled checks are [not returned](#) to the accountholder, the account statement must provide sufficient information to reasonably allow the accountholder to identify the checks or items paid. It provides sufficient information if each item is described by item number, amount, and date of payment. The [UCC requires](#) that the credit union be capable of furnishing the original check or a legible copy for a period of seven years after the check is received for payment. The accountholder has a right to request the check. If it has been destroyed, a legible copy may be provided instead. § 404.406.

Electronic presentation of checks is permitted if authorized by agreement, clearinghouse rule, Federal Reserve regulation, or operating circular. Presentment is deemed to take place when the presentation notice (transmission of an image of the item or information describing the item) is received. Agreements would set procedures for retention, presentment, payment, dishonor, and other matters. § 404.110.

JOINT ACCOUNTHOLDER'S LIABILITY FOR OVERDRAFT

The [UCC clarifies](#) that a joint accountholder is not liable for the amount of an overdraft if the person neither signed the check nor benefited from the proceeds. § 404.401(2). Account agreement cards may include language whereby the joint owner agrees to be responsible for overdrafts, regardless of who wrote the check.

STOP PAYMENT OF CHECKS

Accountholders have the right to order the credit union to stop payment on checks they write on their accounts, under Wis. Stats. § 404.403. The [UCC also](#) clarifies that any person authorized to write checks on an account is also authorized to stop payment of any check written on the account or close the account. [A joint](#) accountholder may stop payment on any check the other holder(s) wrote. Likewise, where an organization has authorized two different agents to write checks, one may stop payment on an item the other has written. The payee of a check has no right to stop payment on a regular member check.

The credit union cannot deny the accountholder's right to stop payment merely because it happens to disagree with the accountholder's decision. For example, the accountholder may stop payment on checks made payable to cash. Of course, when the accountholder action in stopping payment on a check does not necessarily settle matters with the payee. The payee may still be able to sue the accountholder on any underlying debt.

[A stop](#) payment order must be provided to the credit union in such time and manner that the credit union has a reasonable opportunity to act on it. It is not enforceable if received so shortly before presentation of a check for payment (or certification) that there was not [reasonable](#) time to post the stop payment order on the system. [Of](#) course, it is not enforceable if received after the credit union has already paid or certified the check.

[A stop](#) payment order must describe the check with “reasonable certainty.” Reasonable certainty does not necessarily require that the accountholder provide the exact check number or the exact amount of the check.

[If a stop](#) payment order is given orally, it is good for 14 calendar days unless confirmed in writing. If [confirmed](#) in writing, it is valid for a total of six months, unless renewed.

If the credit union improperly pays over a stop payment order, it [may be](#) liable to the accountholder for damages. However, the accountholder has the burden of proving the damages. Damages are not allowed if it turns out the accountholder in fact has a duty to pay the third party to whom the check is payable.

The accountholder's right to stop payment as described here applies to checks signed by the accountholder as drawer, not to the credit union's teller checks or cashier's checks.

Electronic stop payment orders

If the order is received electronically (such as via an electronic banking system or an automated telephone teller service), a signed form cannot be required for the order to be considered “in writing.” However, the NCUA says that the credit union needs to have a system to retain the electronic record of the order in accordance with its records retention policy.

In Legal Opinion Letter No. 08-1122 (January 2009), the NCUA said that according to federal laws on electronic signatures, entering a share account number, personal identification number, or both into an electronic system can create an enforceable

agreement in place of a signed form. In addition, an electronic signature may not be denied legal effect, validity, or enforceability solely because it is in electronic form.

The NCUA said that a federally-insured credit union should retain a stop payment order that was created using an automated system as an electronic record in accordance with its record retention policy.

For more information on electronic signatures, see The League's *ii Release No. 0175*.

POSTDATED CHECKS

The revised UCC provides that a financial institution [may pay](#) postdated checks without liability, unless the drawer (accountholder) gives proper advance notice of the postdating. The advance notice must describe the check with reasonable certainty. § 404.401.

The postdating notice must be provided to the credit union in such time and manner that the credit union has a reasonable opportunity to act on it. If the notice is given orally, it is good for 14 calendar days unless confirmed in writing. If the notice is provided in writing, it lasts for six months.

If the credit union improperly pays a postdated check before the stated date, it is liable to the accountholder for damages. Damages include those that result from dishonoring subsequent checks (because the account has insufficient funds remaining due to early payment of the postdated check). In some cases the credit union may avoid liability by proving that the accountholder in fact owed the money to the payee of the check, so actually suffered no loss.

REFUSAL TO PAY CASHIER'S CHECKS, TELLERS CHECKS AND CERTIFIED CHECKS

If the accountholder pays a merchant with the credit union's *cashier's check*, *teller's check*, or a *personal check that the credit union has certified*, the accountholder does not have the legal right to stop payment on the item. The accountholder is not the party obligated on check; the credit union is. It is very risky to stop payment on cashier's checks, teller's checks, and certified checks due to an accountholder's dispute. The merchant, or its financial institution, could normally sue the credit union if it refuses to honor its own cashier's check, teller's check or a personal check that it has certified. [The credit union could be held liable for the face amount of the check plus attorney fees and other damages.](#)

Every credit union encounters situations where accountholders has a dispute with a merchant and want to stop payment on the check they have delivered for payment.

As discussed earlier in this release, if the accountholder pays a merchant with their *personal check* (that the credit union has not certified), the accountholder is the drawer of the check. The drawer of a check has the right (at their own risk) to order the credit union to stop payment. By law, the credit union must honor the drawer's stop payment order (even though the accountholder might get sued by the merchant if they legally owe the merchant the money).

But the situation is different for a credit union's official check. A credit union (or bank) is normally obligated to pay the cashier's checks and teller's checks it issues, as well as any accountholder share [drafts](#) that it certifies ("certified checks"). (Those terms are defined earlier in this release.) The credit union is directly liable on those instruments [because they are signed by a credit union official](#). The credit union is *not* generally excused from liability on the check if it honors an accountholder's stop payment request. [Cashier's checks](#) instruments are generally "as good as cash" (assuming they are not counterfeit or forged).

Wisconsin law provides that *if* the credit union:

- wrongfully refuses to pay its cashier's check or certified check,
- wrongfully stops payment of its teller's check, or
- wrongfully refuses to pay a dishonored teller's check,

...*then* the person asserting the right to enforce the check generally:

- is entitled to compensation for [expenses](#) and loss of interest resulting from the nonpayment, *and*
- may recover (not only the face amount of the check but) [consequential damages](#) if the credit union refuses to pay after receiving notice of particular circumstances giving rise to the damages. (Wis. Stats. § 403.411)

The credit union will not be subject to the above expenses or consequential damages when the refusal of the obligated credit union to pay occurs because of any of the following:

- The credit union suspends payments;
- The obligated credit union asserts a claim or defense that it has reasonable grounds to believe is available against the person entitled to enforce the instrument. This includes a claim or defense that arises from accepting an instrument as payment for the cashier's check or teller's check, where the instrument accepted as payment for the check was stolen, forged, drawn on a fictitious account, drawn on an account with insufficient funds, or otherwise fraudulent or worthless;
- The obligated credit union has a reasonable doubt as to whether the person demanding payment is the person entitled to enforce the instrument; or
- When payment is prohibited by law. (Wis. Stats. § 403.411(3))

Lost, stolen, or destroyed cashier's checks, teller's checks, or certified checks

The risks described above for refusing to pay an official check **may apply even if the accountholder says** that the cashier's check, teller's check, or certified check issued by the credit union was lost, stolen, or destroyed. If the credit union honors **the request to stop payment without following the claim and declaration of loss procedure described below**, it would normally **still be** liable on the cashier's check **if presented** for payment.

The **remitter or payee** does not have a **general** right to stop payment, even if they lost the check. However, they have the right to follow a very specific procedure provided by law and described below, which includes a waiting period.

Claim and declaration of loss procedure

The tool that **may** help **protect parties** in the event of a lost, stolen or destroyed cashier's check is a properly drafted claim and declaration of loss form. It can protect the credit union from liability on the original check after a waiting period.

The claim "becomes enforceable" at the later of:

1. the time that the claim is asserted, *or*
2. the 30th day following the date of the check in the case of a cashier's check or teller's check (or the 30th day following the date of the acceptance in the case of a certified check).

If there is reason to believe the law of another state may apply to a declaration of loss, consult your attorney.

During that time the original cashier's check must normally be honored if validly presented for payment.

Wis. Stats. § 403.312 provides the procedure in this state for the drawer, payee, or remitter (depending on the type of check) to file a claim and declaration of loss with the credit union. The League offers a form for credit unions to use, but it is only designed for their cashier's checks or teller's checks - not their certified checks.

Please note that this procedure is available to the persons described below, even if they are not accountholders at the credit union. For example, the credit union must allow it to be used by a payee of a cashier's check, such as a merchant or creditor, even if they are not an accountholder.

- A person may assert a *claim* to the amount of a cashier's, teller's, or certified check by a communication to the credit union (or bank) that issued it or certified it by describing the check with reasonable certainty and requesting payment of the amount of the check, if all of the following apply:
 1. The claimant is the remitter or payee of a cashier's check or teller's check (or the drawer or payee of a certified check) – regardless of membership,
 2. The communication contains or is accompanied by a "declaration of loss" of the claimant with respect to the check,
 3. The communication is received at a time and in a manner affording the obligated bank (e.g., credit union) a reasonable time to act on it before the check is paid, *and*
 4. The claimant provides reasonable identification if requested by the obligated bank.

This claim procedure is not available to the endorsee of a covered check. The procedure is available only to the persons identified above.

- The *declaration of loss* is a written statement made under penalty of perjury to the effect that:
 1. The declarer lost possession of the check,
 2. The declarer is the *drawer or the payee* (in the case of a certified check) *or the remitter or payee* (in the case of a cashier's or teller's check),
 3. The loss of possession was not the result of a transfer by the declarer *or* a lawful seizure, *and*
 4. The declarer cannot reasonably obtain possession of the check because (1) the check was destroyed, (2) its whereabouts cannot be determined, *or* (3) it is in the wrongful possession of an unknown person *or* of a person that cannot be found *or* is not amenable to service of process.

Effects of the claim and declaration of loss

When the cashier's check is subject to Wisconsin law, Wis. Stats. § 403.312(c) sets forth the rules that apply if a claim is asserted in compliance with the statute. The claim "becomes enforceable" at the later of:

3. the time that the claim is asserted, *or*
4. the 30th day following the date of the check in the case of a cashier's check or teller's check (or the 30th day following the date of the acceptance in the case of a certified check).

If another state's law governs the declaration of loss, a longer time period will usually apply - most often 90 days.

Before the claim becomes enforceable

Until the claim becomes enforceable (as described above), it has no legal effect. The credit union may pay the cashier's check (or, in the case of a teller's check, may permit the drawee to pay the check). Payment to a person entitled to enforce the check discharges all liability of the credit union with respect to the check. (Recall the earlier discussion of how the credit union is generally liable for refusing to pay its cashier's checks!)

If the credit union refunds the amount of the check to the claimant before the claim becomes enforceable the claim has no legal effect. It does not protect the credit union. The credit union is still liable on the original check and is subject to paying out on the check again if presented by a person entitled to enforce the check. This means that it is very important to delay reimbursement to the claimant (even if it is an accountholder) until the claim has become enforceable.

After the claim becomes enforceable

If the claim and declaration of loss become enforceable before the cashier's check is presented for payment, the credit union is not obliged to pay the check.

When the claim becomes enforceable, the credit union becomes obliged to pay the amount of the check to the claimant if payment of the check has not already been made to a person entitled to enforce the check.

Subject to the UCC's midnight deadline for returns/notices of dishonor under Wis. Stats. § 404.302(1)(a), payment to the claimant discharges all liability of the credit union with respect to the check.

The Wisconsin law provides that if the credit union pays the amount of the check to the claimant under the claim when it becomes enforceable and the missing cashier's check is later presented to the credit union for payment by a person having rights of a holder in due course, the claimant is obliged to:

- Refund the payment to the credit union if the check is paid, *or*
- Pay the amount of the check to the person having rights of a holder in due course if the check is dishonored.

Areas of caution

Please note that there are times when this claim and declaration of loss procedure does not apply or protect the credit union, such as:

- *When the credit union refunds the check proceeds without waiting until the later of the completion of the claim/declaration of loss form, or 30 days after the cashier's or teller's check was issued.*

The declaration of loss procedure does not relieve the credit union from liability on the original check until this time period has passed.

- *When the check was lost or stolen but the claimant knows who has the check, the person can be found, and the person is amenable to service of process.*

The law and form do not apply to this situation. They would not protect the credit union if used. The accountholder may seek legal guidance for what remedies they may have against the person who has their check.

- *When the claim/declaration of loss is filed by an endorsee.*

The declaration of loss procedure is not available to an endorsee of the payee on the check. If the payee of a credit union's cashier's check endorses it over to a third person who loses the check, the third person has no rights under this procedure. The law was written to exclude an endorsee because they are not an original party to the check or a remitter. The credit union would not have their name in their records. The endorsee may be able to use a different procedure, such as the one under Wis. Stats. § 403.309.

Can the credit union waive the 30-day waiting period and pay the claimant sooner?

Failing to wait the 30 days from issue of a cashier's check to ease hardship for an accountholder may be tempting. But it exposes the credit union to risk if the missing check, later - within the 30 day-period - surfaces in the hands of a person entitled to enforce the check. The claim and declaration of loss only becomes enforceable *at the later of*:

- the time that the claim is asserted, or
- the 30th day following the date of the cashier's check.

Some institutions will offer to refund the amount of a missing cashier's check to the claimant in less than 30 days if the claimant provides an *indemnification agreement* or an *indemnification bond*. But as pointed out above, the credit union remains obligated to pay a person entitled to enforce the check until at least 30 days after the check was issued. An indemnification agreement or indemnification bond does not actually shield the credit union from liability. It provides some hope that the credit union will recover a loss, from the claimant in the case of an indemnity agreement, or from an insurance company in the case of an indemnity bond.

If considering either of the above indemnification tools, please note that under the law, the remitter or payee of a cashier's check or teller's check (or the drawer or payee of a certified check) has the right to file a declaration of loss without indemnification.

- The credit union cannot require indemnification as a condition of accepting a declaration of loss. Thus, The League's *Claim and Declaration of Loss for Lost, Stolen, or Destroyed Credit Union Cashier's Check or Teller's Check* does not include an indemnification agreement.
- Be sure that any indemnification tool you may use is conditioned on waiving the 30-day waiting period, and not conditioned on acceptance of a declaration of loss.
- An indemnification agreement or bond for only the face amount of the check may still leave the credit union exposed to bear any loss of interest, consequential damages, and expenses (including attorney fees) owed to a person entitled to enforce the check.

Can the credit union reduce the risks involved with official checks getting lost, stolen, or destroyed?

There is no doubt that credit unions are at risk when their official checks are lost stolen or destroyed. The Declaration of Loss procedure is difficult to apply properly, requires a 30-day waiting period to take effect, and still leaves the claimant exposed to risk.

Some financial institutions try to reduce or avoid some of these risks to some extent by:

- Delivering checks by certified mail or express delivery service, or
- Using wire transfers whenever possible, instead of official checks.

Record retention

Credit unions should consider retaining completed claim and declaration of loss forms as a permanent record, since it may be the credit union's best defense if the check in question is ever presented for payment.

Form available

The League offers a *Claim and Declaration of Loss for Lost, Stolen, or Destroyed Credit Union Cashier's Check or Teller's Check* form (rev. 01/20) specifying the 30 day time frame for use as described in this release under Wisconsin law.

- The form can be used for cashier's checks and teller's checks but, in the interest of simplification, The League's version of the form is *not* designed for use with certified checks.

Most institutions do not certify checks. If the credit union is in the practice of certifying accountholder checks or share drafts it should obtain a different form to use when it is claimed that one was lost, stolen, or destroyed.

- The League form does not include an indemnification clause. An indemnification clause or indemnification bond may not be required as a condition of a claim and declaration of loss.

The credit union might offer to waive the 30-day period if the claimant supplies an indemnification bond or agreement, if it has sound procedures and documentation. Please consult your attorney if considering whether an indemnification clause or indemnification bond is appropriate and effective.

What about accepting a cashier's check for deposit?

Cashier's checks and teller's checks are generally thought of as being as good as cash – if they are not counterfeit. But the claim and declaration of loss procedure creates a risk for credit unions that accept a cashier's check that is subject to Wisconsin law for deposit *if* the check is not presented to the payor bank within 30 days of issue of the check.

The declaration of loss procedure applies to banks as well as credit unions. So it is important to consider the ramifications of those procedures when a credit union accepts a cashier's check for deposit.

Suppose an accountholder *deposits* a cashier's check that was issued 30 days prior. If the bank received a proper claim and declaration of loss, it is relieved from the obligation to pay the cashier's check 30 days after it was issued. The bank might still honor it *but don't count on it*. You may find that the cashier's check is no longer enforceable. Even an honest accountholder may happen to be in a situation where the cashier's check they deposit has been reported as lost, stolen, or destroyed.

Cashier's checks, teller's checks, and certified checks are generally entitled to next-day availability under the Expedited Funds Availability Act (Regulation CC), so you cannot generally place extended holds if the item is deposited into a transaction account. See The League's *ii Release No. 0100* for more information on Reg. CC.

Credit unions should consider the risks in accepting large-dollar cashier's checks for deposit into a checking account if they are approaching or exceeding 30 days past the date of issue. Credit unions may be able to reduce those risks by adopting approaches such as these:

- Accepting them only as collection items (also called a noncash items), rather than as "demand items" or cash items, under which the bank credits the depositor's account immediately;

A collection item does not get credited to the depositor's account until and unless the check is honored by the issuer. Fees are generally imposed on collection items due to the special handling which they require;

- Accepting them for deposit but only in a non-transaction account (so the credit unions can place a funds availability hold on the account for a reasonable period); or
- Not accepting such checks above a prudent specified dollar amount.

COUNTERFEIT CASHIER'S CHECKS

Counterfeit cashier's checks are used in scams that may target credit union members. In one such scam, the member may offer an item for sale on-line. A buyer responds, but says he owes money to someone overseas. He talks the member into taking a cashier's check for far more than the purchase price and then asks the member to forward the excess to a third party. In another variation, the buyer claims the cashier's check was mistakenly issued for an incorrect amount, and asks the member to return the excess.

In either situation, the member then deposits the cashier's check, thinking it is a good check. After the check hold expires, the member wires the excess funds to the third party or buyer. Later, the counterfeit check is returned.

The member typically bears the loss on such a scam. However, the credit union bears the risk of difficulty in collecting the funds if the member has already spent them.

Credit union staff should take care not to refer to cashier's checks as "guaranteed" since they can be counterfeited as easily as other checks. Point out to members that the expiration of a hold period does not necessarily mean the check has cleared and that members are responsible for counterfeit checks they deposit. Credit union staff should be trained on this issue.

Attached to this release as Exhibit A is a lobby notice that can be used to alert members of this fraud.

ORDINARY CARE IN PROCESSING

Must a credit union examine each signature on each check it processes for collection or payment, to attempt to detect forgeries? In this day of automation the UCC says no, so long as the failure to examine does not violate the bank's prescribed procedures and the bank's procedures do not unreasonably vary from general banking usage. § 403.103(g)

ACCOUNTHOLDER'S DUTY TO DISCOVER AND REPORT UNAUTHORIZED SIGNATURE OR ALTERATION

When the credit union sends a checking account statement to its accountholder, the accountholder must be reasonably prompt in examining the statement to detect unauthorized or altered checks. Wis. Stats. § 404.406. As mentioned above, a credit union that does not return checks with the statement must provide the check or a legible copy of it when requested.

If the accountholder detects an alteration, forgery or other unauthorized check, prompt notification to the credit union is required. The time limit for this notification is one year from the time the statement is made available to the accountholder. The credit union should require an affidavit of forgery to document the accountholder's claim. Assuming the claim is credible, and the credit union had no valid defense, the credit union would typically recredit the accountholder's account.

There may be further protection for the credit union within the one year time frame:

- The credit union may be able to avoid liability if it can prove that the accountholder failed to promptly examine the statement and report an unauthorized payment, and if it can also prove that it suffered a loss due to that failure.
- If the credit union can prove that the accountholder failed to promptly examine the statement and report an unauthorized payment within 30 days of when the statement was provided, the credit union is not liable for any later unauthorized checks by the same wrongdoer, up until the accountholder does finally notify the credit union.

There are many court cases trying to apply the above standards to particular situations. Other rules of law may complicate the situation. For example, if the accountholder proves that the credit union failed to exercise "ordinary care" in paying an item, then liability may be shared by the credit union and the accountholder, despite the accountholder's failure to promptly report unauthorized items.

When faced with an accountholder claiming an unauthorized check was paid, a sworn affidavit of forgery will be required of the accountholder and turned over to the local police. Contact your bondholder to provide notice of the accountholder's claim and to obtain guidance on dealing with the particular circumstances.

DEMAND DRAFTS

A demand draft (also known as a "remotely created check,") is an instrument like a check that is created by a third party (often a merchant). It has account and routing information, but it does not bear the account holder's signature. Instead, it has a statement such as "No signature required" or "Authorization on file," meaning the third party that created the demand draft claims to be acting under the account holder's authorization.

Many legitimate parties present demand drafts to credit unions. For example, a consumer can authorize a credit card company to create a demand draft by phone. This may let the consumer pay on time and avoid a late charge. But demand drafts are also vulnerable to fraud because they do not bear a signature or other verifiable information.

Under the Federal Reserve's Reg. CC and Wis. Stats. § 403.416:

- Liability for unauthorized demand drafts falls on the financial institution where the check is first cashed or deposited;

- A claim for a breach of transfer and presentment warranties must be brought by the paying bank within one year after the violation (although if the paying bank does not make the claim within 30 days after learning of the breach, the warranting bank is discharged to the extent of any loss caused by the delay in giving notice of the claim); and
- A “remotely created check” is defined as a check that is not created by the paying bank and does not bear a signature applied, or purported to be applied, by the person on whose account the check is drawn (whether it’s a consumer or non-consumer account). So, a typical forged check, such as a stolen personal check fraudulently signed by a person other than the drawer, is not covered by the definition since it bears a signature “purported to be” of the accountholder.

For more information, see The League’s ii Release No. 0100, “Reg. CC – Expedited Funds Availability.”

Telemarketing

The acceptance of demand drafts by certain telemarketers is regulated under federal law and under rules of the Wisconsin Department of Agriculture, Trade and Consumer Protection. Generally, the rules require telemarketers to have “express verifiable authorization” when a payment is made by a demand draft. The 2003 Wisconsin Act discussed above has no effect on those regulations. *For more information, see ii Release No. 0162, “Telemarketing and Related Consumer Protections.”*

“PAYMENT IN FULL” CHECKS

Sometimes an accountholder who disputes a loan balance will send a check for the amount they claim is remaining, and label the check as “payment in full.” The accountholder is attempting to invoke the legal doctrine of accord and satisfaction. Under that doctrine, if the credit union cashes the check, the loan balance would indeed be considered paid in full under the law.

[The UCC provides guidance](#) on the issue. Under Wis. Stats. § 403.311, the entire loan balance will be discharged if all of the following apply:

- The accountholder in good faith offered the check to the credit union as full payment of the debt.
- The check (or an accompanying note or letter) contained a conspicuous statement that the payment is offered as full satisfaction of the debt.
- The amount of the debt was unliquidated (that is, undetermined) or was subject to a bona fide dispute.

Thus, the credit union should not accept [payment-in-full](#) checks unless it is willing to give up any right it may have had to additional payments.

If a payment in full check was accepted by mistake, staff not having noticed the special notation, the credit union may separately refund the amount of the check within 90 days. However, the accountholder will prevail if it is proven that the credit union was aware that the check was labeled “payment in full” when presented.

CHECKS WRITTEN BY DECEDENT

[The credit union can accept checks written by the decedent](#) for ten days after the date of death, unless ordered to stop payment by a person claiming an interest in an account. In any case, the credit union is no longer authorized to pay the check more than 10 days after the death, if it has knowledge of the death. The 10-day period does *not* protect the credit union from liability if an unauthorized party writes checks in the decedent’s name.

STATUTE OF LIMITATIONS

Two statute of limitations provisions [are provided](#), setting limits on how long a party may wait before commencing a lawsuit to enforce their rights regarding a check. In most cases, the limit is three years after the event giving rise to the lawsuit. §§ 403.118, 404.111.

This should not be confused with the time limits an accountholder has to detect and report forged drawer signatures.

FOR MORE INFORMATION

Other *ii Releases* related to checks include:

- | | |
|---|--|
| <ul style="list-style-type: none">• No. 0099: Reg. CC – Check Returns; Indorsements• No. 0100: Reg. CC – Expedited Funds Availability• No. 0101: Truth in Savings | <ul style="list-style-type: none">• No. 0133: Check Fraud - A Guide to Avoiding Losses• No. 0163: Reg. CC – Substitute Checks• No. 0169: Overdraft Protection Programs |
|---|--|

- [No. 0172: Worthless Check Information Requests](#)

* * * * *

League publications are designed to provide accurate information with regard to the subject matter covered, with the understanding that The League does not render legal services. If you have general questions regarding this release, please call The League at (608) 640-4050 if local or (800) 242-0833. For specific legal advice, please consult your credit union's attorney.

Legal Affairs Department

JCE/jb

© 2020 Wisconsin Credit Union League

EXHIBIT

Exhibit A – Lobby Notice

EXHIBIT A – LOBBY NOTICE

WARNING

Beware of Scams When Selling Items Over the Internet

There have been many recent reports of a new scam against people, in Wisconsin and nationwide, who sell a vehicle or other goods over the Internet:

- The victim is paid with a cashier's check that is over the amount of the agreed sale price, and then is asked to send a check for the difference to a third party.
- Perhaps weeks later, the check sent for the vehicle is returned as counterfeit and is totally worthless.
- The victim is held liable for the counterfeit check when it is returned and must reimburse the financial institution. Many times the perpetrators of these frauds are overseas, so there is little hope of the victim recovering from them.

DON'T BE A VICTIM

- Your credit union cannot tell you when a check you deposit will clear.
- Even when the credit union lifts its "hold" on funds from a deposited check that does not mean that the check has cleared.
- If the check is later returned, you will be held liable for the bad check.
- If funds are to be held by a third party, or escrowed, be sure it is a party you can trust.
- **Exercise Extreme Caution When Selling Goods Over the Internet!**



©2009 Wisconsin Credit Union League