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## Commercial Law

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# Commercial Law

*Mark Dupont\**  
*and Basil Godellas\*\**

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### I. INTRODUCTION

During the *Survey* year, the Illinois Courts addressed several issues in the area of commercial law. The cases discussed in this Article involve topics from the following areas: banks and banking,<sup>1</sup> corporations<sup>2</sup> and contracts.<sup>3</sup> Additionally, this Article will highlight important legislative changes to the Illinois Banking Act,<sup>4</sup> the Foreign Banking Office Act<sup>5</sup> and the Illinois Securities Law of 1955.<sup>6</sup>

### II. BANKS AND BANKING

The Illinois Supreme Court decided three cases involving banks and banking during the *Survey* year. In two cases, the court addressed issues arising under the Uniform Commercial Code.<sup>7</sup> In the third case, the court reviewed and declared unconstitutional

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1. *See infra* notes 7-106 and accompanying text.
2. *See infra* notes 107-142 and accompanying text.
3. *See infra* notes 143-180 and accompanying text.
4. *See infra* notes 181-184 and accompanying text.
5. *See infra* notes 185-187 and accompanying text.
6. *See infra* notes 188-192 and accompanying text.
7. *See infra* notes 9-75 and accompanying text.

section 3 of Illinois' Foreign Office Banking Act.<sup>8</sup>

In *National Bank of Monticello v. Quinn*,<sup>9</sup> the Supreme Court of Illinois outlined the duties owed by a drawee bank to its customer in determining whether a check is "properly payable,"<sup>10</sup> under Illinois' codification of the Uniform Commercial Code ("UCC") section 4-401.<sup>11</sup> The court held a drawee bank liable for charging against a drawer's account a check made "payable to order"<sup>12</sup> that had been endorsed in a manner that failed to indicate the named payee.<sup>13</sup>

The appellant, Quinn, issued a \$30,000 check payable to Lime-tree Beach Associates, Ltd. ("Limetree") to buy into an investment partnership.<sup>14</sup> Quinn personally delivered the check to the individual forming the partnership, Dan L. Wey.<sup>15</sup> Wey endorsed the check, in his individual capacity only, and deposited it into his personal business account rather than into the Limetree business account.<sup>16</sup> Both Limetree's account and Wey's personal business accounts listed Wey as an authorized signatory.<sup>17</sup> Additionally, both accounts were at Marine American State Bank, formerly the American State Bank of Bloomington ("American State").<sup>18</sup>

Quinn made a demand upon National Bank of Monticello ("National") to recredit his account for \$30,000 on the grounds that the check was not properly payable.<sup>19</sup> National refused and brought

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8. See *infra* notes 76-106 and accompanying text.

9. 126 Ill. 2d 129, 533 N.E.2d 846 (1989).

10. *Monticello*, 126 Ill. 2d at 134, 533 N.E.2d at 848.

11. Section 4-401 of the UCC provides that "[a]s against its customer, a bank may charge against his account any item which is otherwise properly payable from that account even though the charge creates an overdraft." ILL. REV. STAT. ch. 26, para. 4-401(1) (1987).

12. The UCC explains that "[a] negotiable instrument is payable to order when by its terms it is payable to the order or assigns of any person therein specified with reasonable certainty, or to him or his order, or when it is conspicuously designated on its face as 'exchange' or the like and names a payee." See ILL. REV. STAT. ch. 26, para. 3-100(1) (1987). The alternative to an instrument "payable to order" is an instrument "payable to bearer" that "is payable to . . . bearer or the order of bearer; or . . . a specified person or bearer; or . . . 'cash' or the order of 'cash', or any other indication which does not purport to designate a specific payee. . . ." *Id.* para. 3-111.

13. *Monticello*, 126 Ill. 2d at 139, 533 N.E.2d at 851.

14. *Id.* at 131, 533 N.E.2d at 847.

15. *Id.* at 131-32, 533 N.E.2d at 847. Wey was the sole individual general partner of the Limetree Beach partnership. *Id.* at 132, 533 N.E.2d at 848.

16. *Id.* at 132, 533 N.E.2d at 847. The endorsement read "Deposit 049 580," the number for Wey's personal business account. *Id.* There was no dispute as to the authenticity of Wey's endorsement. *Id.* at 132, 533 N.E.2d at 847-48.

17. *Id.* at 132, 533 N.E.2d at 848.

18. *Id.*

19. *Id.* at 131, 533 N.E.2d at 847.

an action for declaratory relief to determine whether it owed Quinn a duty to recredit his account.<sup>20</sup> Quinn initiated a counterclaim against National, and National responded by filing a third-party complaint against the depository bank, American State.<sup>21</sup>

Quinn argued that because Wey's endorsement was unauthorized, and the UCC equates an unauthorized signature with a forged signature,<sup>22</sup> National must recredit his account.<sup>23</sup> Quinn offered the Limetree partnership agreement and offering memorandum as evidence to support his allegation that Wey lacked proper authority.<sup>24</sup>

The trial court granted Quinn's motion for summary judgment against National, ruling that Wey's endorsement was invalid because he exceeded his authority as set forth in various Limetree partnership documents.<sup>25</sup> The appellate court reversed, holding that the check was "properly payable."<sup>26</sup> The court reasoned that the signature card evidenced a contract between American State and Wey and that Wey was the listed signatory on the signature card on file.<sup>27</sup> Thus, according to the appellate court, the trial court erred by considering the extraneous partnership documents.<sup>28</sup> American State, and through it National, could rely on the signature card to determine Wey's authority.<sup>29</sup>

In order to assess whether a check is "properly payable," the Illinois Supreme Court examined the scope of the duty owed by a drawee bank to its customer.<sup>30</sup> The court reiterated that the relationship between a drawer and a drawee is a contractual one.<sup>31</sup>

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20. *Id.* at 132, 533 N.E.2d at 848.

21. *Id.* at 132-33, 533 N.E.2d at 848. National sought an order requiring American State to compensate National if the court ruled in Quinn's favor. *Id.*

22. Under UCC section 1-201(43) an "[u]nauthorized" signature or endorsement means one made without actual, implied or apparent authority and includes a forgery." ILL. REV. STAT. ch. 26, para. 1-201(43) (1987).

23. *Monticello*, 126 Ill. 2d at 134, 533 N.E.2d at 848-49.

24. *Id.* at 134, 533 N.E.2d at 849.

25. *Id.* at 133, 533 N.E.2d at 848. The trial court looked at the offering memorandum for the limited partnership and the limited partnership agreement; it concluded that Wey had exceeded his authority in making the endorsement and in depositing the check payable to Limetree Beach, Ltd. into his personal business account. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* In the appellate court's view, the signature card was the sole evidence of the contract between Wey and American State, and as long as payment was made in accordance with the contract, National could not be liable. *Id.* The appellate court ruled that summary judgment should have been granted to National. *Id.* at 131, 533 N.E.2d at 847.

30. *Id.* at 134, 533 N.E.2d at 848.

31. *Id.* at 134, 533 N.E.2d at 849.

When a check is made payable to the order of a named payee, the drawee bank has an absolute contractual duty to pay only to that named payee or to the payee's order.<sup>32</sup> In this case, the drawee bank breached its duty to the drawer, Quinn, because it paid his check to someone other than the payee, Limetree, or to Limetree's order.<sup>33</sup> Thus, even though Wey would have been the person to deposit the check into the Limetree account, that Wey endorsed the check and deposited it into his personal account was "fatal to the bank's denial of liability."<sup>34</sup>

In holding the endorsement invalid, the Illinois Supreme Court relied on *Cosmopolitan State Bank v. Lake Shore Trust & Savings Bank*<sup>35</sup> and *Kosic v. Marine Midland Bank*.<sup>36</sup> In *Cosmopolitan*, the drawer, in order to purchase a car, delivered a check to an auto dealer.<sup>37</sup> The check was made payable to an auto supplier who supposedly had possession of the particular car.<sup>38</sup> The dealer endorsed the check and delivered neither the car nor the money.<sup>39</sup> Subsequently, the drawee bank recredited the drawer and sought reimbursement from the collecting bank.<sup>40</sup> The *Cosmopolitan* court held for the drawee bank, relying on the testimony of the automobile supply company manager, who said that he neither saw the check nor gave the automobile dealer the authority to endorse the check.<sup>41</sup> The court stated that the drawee bank cannot settle equities among various endorsers because "its only authority, where the check is payable to the order of the payee, is to pay it on such order according to its terms."<sup>42</sup>

The *Monticello* court explained that the key question in *Cosmopolitan* involved the type of information that either the drawer, customer, or the drawee bank may rely on in support of a section

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32. *Id.* at 135, 533 N.E.2d at 849 (citing *United States Cold Storage Co. v. Central Mfg. Dist. Bank*, 343 Ill. 503, 513, 175 N.E. 825, 829 (1931)).

33. *Id.*

34. *Id.* at 139, 533 N.E.2d at 851.

35. 343 Ill. 347, 175 N.E. 583 (1931). The court noted that *Cosmopolitan* predated Illinois' adoption of the UCC. *Monticello*, 126 Ill. 2d at 135, 533 N.E.2d at 849.

36. 76 A.D.2d 89, 430 N.Y.S.2d 175 (1980).

37. *Monticello*, 126 Ill. 2d at 136, 533 N.E.2d at 849.

38. *Id.* The drawer wanted a specific type of car so the dealer took the drawer directly to an automobile supplier to select a car. *Id.* at 135-36, 533 N.E.2d at 849. Afterwards, the dealer called the drawer and asked for payment on the car so that the dealer could pick it up. *Id.* at 136, 533 N.E.2d at 849.

39. *Id.* The dealer endorsed the check in the automobile company's name and took both the check's cash value and the automobile. *Id.*

40. *Id.* at 135, 533 N.E.2d at 849.

41. *Id.* at 136, 533 N.E.2d at 849-50.

42. *Id.* at 137, 533 N.E.2d at 850 (quoting *Cosmopolitan*, 343 Ill. at 352, 175 N.E. at 585).

4-401(1) (not properly payable) claim.<sup>43</sup> The answer was implicit in the *Cosmopolitan* court's reliance on parol evidence admitted by the supply company's manager.<sup>44</sup> Although the *Monticello* court found that in *Cosmopolitan* the dealer's lack of authority to endorse the check was obvious, it noted that in the present case, Wey's position as sole general partner made the lack of authority distinction less than "clear-cut."<sup>45</sup> The court asserted, however, that a signature card alone is insufficient to establish a general partner's authority to "deal with a check in any manner he so chooses."<sup>46</sup>

The court also relied on the *Kosic* case, in which a drawer made two checks payable to the order of a corporation that he and a co-venturer were forming.<sup>47</sup> The co-venturer, however, endorsed the checks in her own name and deposited them into her personal account, rather than the corporate account.<sup>48</sup> The *Kosic* court held for the drawer stating that "[b]ecause the two cashiers checks did not bear the endorsement of the payee, [the drawee bank] breached a duty owed to its customer in charging against his account items that were not 'properly payable.'"<sup>49</sup>

The Illinois Supreme Court's decision in *Monticello* broadly reaffirms the principle set forth in UCC section 4-401(1) that a bank must pay only checks that are properly payable.<sup>50</sup> The court focused upon the manner in which Wey had endorsed the check.<sup>51</sup> Noting that Quinn had made the check payable to the partnership rather than to Wey personally, the court reasoned that the drawee bank had breached its duty to pay the check in compliance with Quinn's instructions.<sup>52</sup> In this respect, Wey's authority to endorse the check was irrelevant because the drawee bank, National, paid

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43. 126 Ill. 2d at 136, 533 N.E.2d at 850.

44. *Id.* at 136-37, 533 N.E.2d at 850.

45. *Id.* at 136, 533 N.E.2d at 850.

46. *Id.* at 137, 533 N.E.2d at 850.

47. *Monticello*, 126 Ill. 2d at 138, 533 N.E.2d at 850. The checks were drawn according to the terms of an escrow agreement that called for all funds to be placed in an escrow account at Central Trust Company. *Id.*

48. *Id.* When the co-venturer received the checks, she opened both a personal savings account and a corporate checking account. *Id.* For the corporate checking account, she signed a temporary signature card as president of the corporation, but she never completed or returned the permanent signature cards or the corporate resolutions given to her by the bank. *Id.* She deposited the drawer's checks into her personal account by her personal endorsement. *Id.*

49. *Id.* (quoting *Kosic*, 76 A.D.2d at 91-92, 430 N.Y.S.2d at 177).

50. ILL. REV. STAT. ch. 26, para. 4-401(1) (1987). For the text of section 4-401(1), see *supra* note 11.

51. *Monticello*, 126 Ill. 2d at 137, 533 N.E.2d at 850.

52. *Id.* at 138-39, 533 N.E.2d at 851.

the check with only Wey's personal endorsement. Thus, *Monticello* merely highlights a bank's obligation to ensure that a check is cashed according to its customer's instructions.

Because summary judgment at the trial court level was granted in favor of Quinn against the drawee bank, National, the issue of whether the depository bank, American State, would have been held liable for reimbursement to National was not decided. Thus, this case did not address whether a depository bank should examine the records of a partnership or corporate entity to determine if the endorser has the authority to endorse the check. This question of a depository bank's duty will no doubt resurface in circumstances that do not render the customer's instructions dispositive.

In *Monticello*, it was a relatively simple task for the depository bank to determine in which account Quinn's check should be deposited. One account was Wey's personal account, and the other was the partnership account; the same bank held both. In cases that present facts involving multiple partnership or corporate accounts at multiple banks, determination of the proper account for deposit will not be as simple. The courts may be forced to rely less upon the customer's directions and more upon the endorser's authority. Therefore, the supreme court may be called upon to determine whether and to what extent the depository bank owes a duty to examine the endorser's authority.

For the time being, however, *Monticello* demonstrates that drawers ought to make their checks payable to order and to make their directions for payment as specific as possible. To the extent that the drawee bank can assess the endorsement's propriety from the customer's instructions for payment, under *Monticello*, the drawee bank will be liable for its failure to act in accordance with those instructions.

In *Spec-Cast, Inc. v. First National Bank & Trust Company*,<sup>53</sup> the Illinois Supreme Court recognized a bank's ability to raise as common law defenses benefit of the bargain and ratification when it pays an unsigned check in violation of UCC section 3-401(1).<sup>54</sup> On February 9, 1983, Jackson, the president of Spec-Cast, Inc. ("Spec-Cast"), gave Lundquist an unsigned corporate check for \$20,000 as a loan to help him through financial difficulties with his used-car

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53. 128 Ill. 2d 167, 538 N.E.2d 543 (1989).

54. *Id.* at 170, 538 N.E.2d at 543. UCC section 3-401(1) provides that "[n]o person is liable on an instrument unless his signature appears thereon." ILL. REV. STAT. ch. 26, para. 3-401(1) (1987).

dealership, Richard's Auto Sales.<sup>55</sup> Jackson did not receive any security for the loan because all of Lundquist's business assets were subject to a lien.<sup>56</sup> On the following day, however, Jackson accepted a \$20,000 unsecured demand note in favor of Jackson and Spec-Cast.<sup>57</sup> The defendant, First National Bank & Trust Company of Rockford, paid the unsigned check on February 11, 1983.<sup>58</sup> Jackson noted payment of the check in his checking account statement of March, 1983 and subsequently undertook to recover his money.<sup>59</sup> In May, 1983, Jackson accepted an interest payment on the note for \$589, but in March, 1984, when he made written demand on Lundquist for payment, Lundquist was unable to deliver.<sup>60</sup> On June 1, 1984, Lundquist filed for bankruptcy and Richard's Auto Sales went out of business.<sup>61</sup>

Spec-Cast argued that under UCC section 3-401(1), the Bank was liable for the \$20,000 because it paid an unsigned instrument.<sup>62</sup> The Bank contended that an action under section 3-401(1) did not preclude it from raising common law defenses.<sup>63</sup> Specifically, the Bank argued that Spec-Cast received the benefit of its bargain when Jackson accepted the promissory note from Lundquist because Jackson would not have received the note if Lundquist had not received the check.<sup>64</sup> Additionally, the Bank asserted that Jackson ratified the Bank's payment on the unsigned check when he accepted the interest payment on the note.<sup>65</sup>

The supreme court affirmed the lower courts' finding in favor of

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55. *Spec-Cast*, 128 Ill. 2d at 170-71, 538 N.E.2d at 543-44. The loan was to enable Lundquist to purchase inventory for his business. *Id.* at 170, 538 N.E.2d at 543. Jackson argued that he intended to leave the check unsigned until he received collateral. *Id.* at 178, 538 N.E.2d at 547. The trial court found, however, that Jackson had intended to sign the check and that the omission was accidental. *Id.*

56. *Id.* at 170-71, 538 N.E.2d at 544. Testimony conflicted as to whether Jackson would receive a security interest in the inventory that Lundquist purchased with the loan. *Id.* at 171, 538 N.E.2d at 544.

57. *Id.*

58. *Id.*

59. *Id.* When Jackson noticed that the Bank had paid his unsigned check, he requested his secretary to look into the matter. *Id.* The Bank's senior vice-president advised Jackson that nothing could be done and suggested that Jackson speak with Lundquist. *Id.*

60. *Id.* at 171-72, 538 N.E.2d at 544. The May 1983 payment was the only interest payment that Jackson ever received. *Id.* at 171, 538 N.E.2d at 544.

61. *Id.* at 172, 538 N.E.2d at 544. The assets of Richard's Auto Sales were used to pay its other business creditors. *Id.* Lundquist listed the \$20,000 as a personal debt in his own bankruptcy proceeding. *Id.*

62. *Id.* See *supra* note 54 for the relevant statutory provision.

63. 128 Ill. 2d at 172, 538 N.E.2d at 544.

64. *Id.* at 177, 538 N.E.2d at 546.

65. *Id.* at 177, 538 N.E.2d at 546-47.



the Bank.<sup>66</sup> The court noted that the language of UCC section 1-103 indicates that certain common law defenses may be raised against actions under the Code.<sup>67</sup> Additionally, the court commented that banks have raised common law defenses in other actions based on improper endorsements.<sup>68</sup> Further, the court rejected the plaintiff's argument that the present situation was analogous to cases in which banks paid on forged endorsements.<sup>69</sup>

Ruling that the Bank was not liable under UCC section 3-401(1),<sup>70</sup> the court reasoned that the note stated "for value received"; therefore it represented Jackson's benefit, for Jackson would not have received the note if the Bank had not paid the check.<sup>71</sup> Also, Jackson's actions in accepting an interest payment

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66. *Id.* at 179, 538 N.E.2d at 547.

67. *Id.* at 173, 538 N.E.2d at 545. Section 1-103 of the UCC states: "[u]nless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions." ILL. REV. STAT. ch. 26, para. 1-103 (1987).

68. *Spec-Cast*, 128 Ill. 2d at 174, 538 N.E.2d at 545-46. The court analogized the present case with two different situations in which common law defenses are raised by banks that have paid improperly signed checks. *Id.* at 174-177, 538 N.E.2d at 545-46. The first situation involves instruments that are not properly endorsed. *See Malley v. East Side Bank*, 361 F.2d 393 (7th Cir. 1966) (defendant bank, which had cashed improperly endorsed checks, argued that equity demands liability fall on the fraudulent third party); *United States Fidelity & Guar. Co. v. Peoples Nat'l Bank*, 24 Ill. App. 2d 275, 164 N.E.2d 497 (2nd Dist. 1960) (court recognized, but rejected bank's defense that plaintiff made the second payee's name illegible and that plaintiff was negligent); *Murray Walter, Inc. v. Marine Midland Bank*, 103 A.D.2d 466, 480 N.Y.S.2d 631 (1984) (bank argued that because the plaintiff was negligent in notifying the bank, the plaintiff should be estopped from asserting liability).

The second situation involves checks that do not show all the necessary signatures. *See Madison Park Bank v. Field*, 64 Ill. App. 3d 838, 381 N.E.2d 1030 (3rd Dist. 1978) (bank paid a check with only one of two required signatures and argued that the plaintiff was negligent for waiting too long to report the incident); *Phillip v. First Nat'l Bank*, 297 Ill. App. 498, 18 N.E.2d 57 (1st Dist. 1938) (court held that the plaintiff was grossly negligent for failing to note that thirty-three checks had been cashed without a signature during the prior three years).

69. *Spec-Cast*, 128 Ill. 2d at 176, 538 N.E.2d at 546. The court stated that "[i]n Illinois, payment on a check missing a necessary signature does not constitute payment on an 'unauthorized signature' within the meaning of section 4-406 of the Code." *Id.* (relying on *Nagle v. LaSalle Nat'l Bank*, 472 F. Supp. 1185 (N.D. Ill. 1979) and *Madison Park Bank v. Field*, 64 Ill. App. 3d 838, 381 N.E.2d 1030 (3rd Dist. 1978)).

70. *Id.* at 179, 538 N.E.2d at 547. The court concluded that the trial court's findings were not manifestly against the weight of the evidence. *Id.* at 177, 538 N.E.2d at 547. The court also determined that Lundquist's testimony that Jackson had forgotten to sign the check did not coincide with his behavior the day after he delivered the check, when he deposited \$20,000 into his checking account. *Id.* at 177-78, 538 N.E.2d at 547.

71. *Id.* at 178, 538 N.E.2d at 547.

on the note amounted to a ratification.<sup>72</sup>

The result in *Spec-Cast* stands apart in certain respects from the other banking cases decided during the *Survey* year. Although the court paid superficial deference to the unqualified language of UCC section 3-401(1) and the duty it imposes upon the drawee bank to pay checks, the court rejected *per se* liability for the breach of this duty by permitting the Bank to raise common law defenses to the breach. In particular, the court allowed the Bank to raise such defenses even though the Bank had not followed its own procedures for obtaining authorization to cash the unsigned check.<sup>73</sup>

Another significant aspect of the *Spec-Cast* decision is that the court looked not only to *Spec-Cast's* knowledge of and acquiescence in the bank's payment of the unsigned check, but also to *Spec-Cast's* relationship with Lundquist.<sup>74</sup> To relieve the bank of liability, the court relied in part upon the drawer's relationship with a third party, a relationship that has no direct bearing upon the bank's knowledge and exercise of due care in processing the check.

In light of the Illinois Supreme Court's decision in *Spec-Cast*, drawers must take steps to detect improper payments as quickly as possible and to affirmatively challenge such payments with comparable speed. Although the drawer in *Spec-Cast* brought payment of the unsigned check promptly to the bank's attention, he ultimately took a "wait and see" approach with respect to the payment. In doing so, the drawer ratified the payment and precluded his own recovery.<sup>75</sup>

In *National Commercial Banking Corp. v. Harris*,<sup>76</sup> the Illinois Supreme Court held section 3 of the Foreign Office Banking Act ("the Illinois Act")<sup>77</sup> unconstitutional because it violated the supremacy clause of the United States Constitution.<sup>78</sup> Section 3 of the Illinois Act imposes a non-reciprocal license fee on foreign

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72. *Id.*

73. The Bank's senior vice-president testified at trial that although it was a Bank requirement to obtain authorization from the customer to process an unsigned check, the bank had failed to obtain such authorization from Jackson. *Id.* at 171, 538 N.E.2d at 544.

74. *See id.* at 178, 538 N.E.2d at 547.

75. *See Spec-Cast*, 128 Ill. 2d at 178, 538 N.E.2d at 547, in which the court observed: "Though Jackson did initially object to the payment of the check, his actions ultimately were to accept its payment and to look to the payee."

76. 125 Ill. 2d 448, 532 N.E.2d 812 (1988).

77. ILL. REV. STAT. ch. 17, para. 2710 (1987). For a description of recent amendments to the Illinois Act, see *infra* notes 185-87 and accompanying text.

78. *Harris*, 125 Ill. 2d at 467, 532 N.E.2d at 821. *See* U.S. CONST. art. VI, cl. 2.

banks whose licensing nation does not provide reciprocal licensing authority to Illinois banks.<sup>79</sup> Under the authority of the International Banking Act,<sup>80</sup> the United States Comptroller of the Currency (Comptroller) authorized three Australian banks to open limited federal branches in Illinois.<sup>81</sup> The Commissioner of Banks and Trust Companies of the State of Illinois (Commissioner) demanded payment by each bank of the non-reciprocal license fee imposed by section 3 of the Illinois Act.<sup>82</sup> The banks refused to pay the fee and brought an action against the Commissioner challenging his authority to collect the fee.<sup>83</sup> The circuit court held the Illinois Act unconstitutional, and the Commissioner appealed directly to the Illinois Supreme Court pursuant to Supreme Court Rule 302(a)(1).<sup>84</sup>

The banks argued that the non-reciprocal license fee violated the federal Constitution's supremacy clause<sup>85</sup> because the fee's imposition attempts to regulate licensing of a limited federal branch.<sup>86</sup> As such, the fee provision conflicted with section 5(a)(1)<sup>87</sup> of the Inter-

79. *Harris*, 125 Ill. 2d at 451, 532 N.E.2d at 813. The portion of section 3 of the Act that was under review provides:

"A foreign banking corporation, upon receipt of a certificate of authority from the Commissioner, may establish and maintain a single banking office in the central business district of Chicago and may conduct thereat a general banking business . . . [I]f a foreign banking corporation shall be licensed by any banking supervisory authority of a jurisdiction other than the Commissioner, and the foreign nation within which a foreign banking corporation so licensed does not provide reciprocal licensing authority to Illinois State of [sic] National Banks, then such foreign banking corporation shall pay an annual 'non-reciprocal' license fee to the State of Illinois which shall be deposited in the General Revenue Fund. Such annual fee shall be in an amount of \$50,000."

ILL. REV. STAT. ch. 17, para. 2710 (1987).

80. 12 U.S.C. § 3102(a) (1988).

81. *Harris*, 125 Ill. 2d at 451, 532 N.E.2d at 813. Each bank opened a limited federal branch office in the downtown Chicago area. *Id.*

82. *Id.*

83. *Id.* at 451-52, 532 N.E.2d at 813.

84. *Id.* at 451, 532 N.E.2d at 813. Rule 302(a)(1) provides: "Appeals from final judgments of circuit courts shall be taken directly to the Supreme Court (1) in cases in which a statute of the United States or of this State has been held invalid . . ." ILL. REV. STAT. ch. 110A, para. 302(a)(1) (1987).

85. U.S. CONST. art. VI, cl. 2.

86. *Harris*, 125 Ill. 2d at 452, 532 N.E.2d at 813.

87. Section 5(a)(1) of the International Banking Act provides:

"(a) Except as provided by subsection (b) of this section, (1) no foreign bank may directly or indirectly establish and operate a Federal branch outside of its home State unless (A) its operation is expressly permitted by the State in which it is to be operated, and (B) the foreign bank shall enter into an agreement or undertaking with the Board to receive only such deposits at the place of operation of such Federal branch as would be permissible for a corporation organized

national Banking Act.<sup>88</sup> The banks further contended that the fee violated section 4(b) of the International Banking Act<sup>89</sup> and section 548 of the National Bank Act<sup>90</sup> because it constituted a discriminatory tax on foreign banks.<sup>91</sup>

The Commissioner argued that language in section 5(a)(1) of the International Banking Act allows the State of Illinois to impose the non-reciprocal license fee.<sup>92</sup> The Commissioner conceded that section 4(a) of the International Banking Act permits a state to prohibit only the establishment of a branch or agency.<sup>93</sup> He argued, however, that language in section 5(a), concerning limited federal branches subjects a limited federal branch to State regulations that could not be imposed on a federal branch or agency.<sup>94</sup> The Commissioner also urged the court to consider Illinois' regulatory interests in encouraging foreign countries to offer banking privileges to Illinois or national banks.<sup>95</sup>

The supreme court began its analysis by noting that the Comptroller had already published a rule stating that non-reciprocal licensing fees would be incompatible with the national approach

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under section 25(a) of the Federal Reserve Act . . . under rules and regulations administered by the Board."

12 U.S.C. § 3103(a)(1) (1988).

88. *Harris*, 125 Ill. 2d at 452, 532 N.E.2d at 813.

89. Section 4(b) of the International Banking Act provides in part:

"(b) In establishing and operating a Federal branch or agency, a foreign bank shall be subject to such rules, regulations, and orders as the Comptroller considers appropriate to carry out this section, which shall include provisions for service of process and maintenance of branch and agency accounts separate from those of the parent bank. Except as otherwise specifically provided in this chapter or in rules, regulations, or orders adopted by the Comptroller under this section, operations of a foreign bank at a Federal branch or agency shall be conducted with the same rights and privileges as a national bank at the same location and shall be subject to all the same duties, restrictions, penalties, liabilities, conditions, and limitations that would apply under the National Bank Act to a national bank doing business at the same location. . . ."

12 U.S.C. § 3102(b) (1988).

90. Section 548 of the National Bank Act is applicable because the International Banking Act grants federal branches or agencies the same rights and privileges accorded to national banks and provides that "[f]or the purposes of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located." 12 U.S.C. § 548 (1988).

91. *Harris*, 125 Ill. 2d at 453, 532 N.E.2d at 814.

92. *Id.* The Commissioner relied on the following language contained in section 5(a)(1) of the International Banking Act: "its operation is expressly permitted by the state." *Id.* See 12 U.S.C. § 3103(a)(1) (1988).

93. *Harris*, 125 Ill. 2d at 466, 532 N.E.2d at 820.

94. *Id.* at 453-54, 532 N.E.2d at 814.

95. *Id.* at 461, 532 N.E.2d at 818.

taken by the International Banking Act.<sup>96</sup> The court then looked to the Congressional intent underlying the International Banking Act's passage.<sup>97</sup> The court stated that Congress intended the Act to give foreign banks the option to choose between a state charter or a federal charter;<sup>98</sup> Congress also intended the Act to replace the state-by-state treatment of foreign banks with a cohesive national system.<sup>99</sup> The court explained that state statutes may have an incidental or indirect effect on foreign nations, however, the non-reciprocal license fee fell "on the impermissible side of the line of demarcation between incidental and unconstitutional intrusions into foreign affairs."<sup>100</sup> Because the Illinois Act's effect did not coincide with the full purposes and objectives of Congress, the court held that the International Banking Act preempts section 3 of the Illinois Foreign Office Banking Act.<sup>101</sup>

The court, in holding the Illinois Act unconstitutional, rejected the Commissioner's argument that section 5(a)(1) of the International Banking Act allows states to regulate a limited federal branch, but not a federal branch or agency. Instead, the court found that Congress' intent clearly established a "national posture" toward all foreign-chartered banks operating under the federal system.<sup>102</sup> The court determined that Illinois' license fee constituted a tax or fine prohibited by both section 4(b) of the International Banking Act and section 548 of the National Banking Act.<sup>103</sup> A foreign-chartered bank operating under the federal system cannot be taxed any differently than a State-chartered bank.<sup>104</sup> Because State banks are not subject to the non-reciprocal license fee, neither are foreign banks, and collection of the fee was

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96. *Id.* at 455, 532 N.E.2d at 815. The rule provides:

[I]n some States a foreign bank which applies for a branch or agency must be able to demonstrate that the country under whose laws it was organized permits free access to U.S. banks. Such a reciprocity approach would not be binding upon the Comptroller's Office because it is incompatible with the national theme of the IBA and, further, it is in the nature of a condition or limitation rather than a prohibition on foreign entry.

44 Fed. Reg. 27,431 (1979).

97. *Harris*, 125 Ill. 2d at 459-60, 532 N.E.2d at 817.

98. *Id.* Under the International Banking Act, foreign banks would have the same state-federal option as American banks. *Id.* at 460, 532 N.E.2d at 817.

99. *Id.* at 461, 532 N.E.2d at 818. The court explained that when states act in the field of foreign affairs the end result is a lack of uniformity. *Id.* (relying on *Springfield Rare Coin Galleries, Inc. v. Johnson*, 115 Ill. 2d 221, 503 N.E.2d 300 (1986)).

100. *Id.* at 462, 532 N.E.2d at 818.

101. *Id.*

102. *Id.* at 466, 532 N.E.2d at 820.

103. *Id.* at 466-67, 532 N.E.2d at 820.

104. *Id.* at 467, 532 N.E.2d at 820.

unlawful.<sup>105</sup>

As a consequence of the Illinois Supreme Court's decision in *Harris*, the State faces somewhat of an all or nothing proposition with respect to foreign banks.<sup>106</sup> *Harris* has invalidated the State's attempt to penalize such foreign banks by imposing a fee upon them. Thus, Illinois must choose between exercising its option under the International Banking Act and excluding foreign banks altogether or accepting all such banks that wish to open offices in Illinois, even if the countries from which these banks hail do not permit Illinois banks to open branches within their borders.

### III. CORPORATIONS

During this *Survey* year, the Illinois Supreme Court addressed an issue involving corporate shareholder derivative suits.<sup>107</sup> Additionally, the Illinois Appellate Court for the Fourth District decided a case utilizing the doctrine of piercing the corporate veil.<sup>108</sup>

In *Brown v. Tenney*,<sup>109</sup> the Illinois Supreme Court held that a shareholder of record in a holding company may bring a double derivative suit on behalf of a wholly owned subsidiary.<sup>110</sup> The plaintiff, Brown, was a 48.5% shareholder and director of the holding company that owned all of the subsidiary's stock.<sup>111</sup> He filed a complaint that alleged the defendants, shareholders in the holding company, engaged in a pattern of self-dealing and breached their fiduciary duties by abusing, manipulating, diverting and damaging

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105. *Id.* at 467, 532 N.E.2d at 820-21.

106. Illinois' attempt to exclude those foreign banks licensed by nations that do not provide reciprocal licensing authority to Illinois banks already has been invalidated. See Conference of State Bank Supervisors v. Heimann, No. 80-3284 (D.D.C. 1981), *aff'd in part and rev'd in part sub nom.*, Conference of State Bank Supervisors v. Conover, 715 F.2d 604 (D.C. Cir. 1983) (the district court held that Illinois was precluded from requiring that a foreign country extend reciprocity to Illinois state or national banks as a prerequisite to obtaining a certificate of authority to operate within Illinois).

107. See *infra* notes 109-130 and accompanying text.

108. See *infra* notes 131-142 and accompanying text.

109. 125 Ill. 2d 348, 532 N.E.2d 230 (1988).

110. *Id.* at 361, 532 N.E.2d at 235-36. In a double derivative suit, "a shareholder of a parent or holding company seeks to enforce a right belonging to a subsidiary of the parent or holding company." *Id.* at 352, 532 N.E.2d at 231. The suit can only be brought after due demand is made to, and rejected by, the subsidiary and the holding company. *Id.* at 361, 532 N.E.2d at 235-36.

111. *Id.* at 353, 532 N.E.2d at 232. The plaintiff was originally the vice president and chief operating officer of the subsidiary Pioneer Commodities, Inc. *Id.* In 1982, the plaintiff and the other three shareholders formed a holding company for Pioneer and exchanged their shares of Pioneer for an equal percentage of the holding company. *Id.* Both Brown and Tenney were 48.5% shareholders in the holding company until 1983, when Tenney obtained the proxies to vote for the remaining 3%. *Id.*

the holding company's assets.<sup>112</sup> The trial court dismissed the complaint; the appellate court reversed and the defendants appealed.<sup>113</sup>

In the Illinois Supreme Court, the defendants first argued that the weight of authority did not support plaintiff's double derivative suit.<sup>114</sup> The supreme court disagreed, finding that the concept of a double derivative action has been widely accepted.<sup>115</sup> The defendants further argued that the legislature did not explicitly provide for a double derivative action; therefore, the court's recognition of such an action would amount to judicial legislation.<sup>116</sup> The court also rejected this argument, stating that its decision merely extended the principles of equity inherent in the shareholder-corporation context.<sup>117</sup> Corporate officers and directors are fiduciaries of the corporation and its shareholders.<sup>118</sup> The court explained that when these fiduciaries fail to act in the interests of their beneficiaries, such interests go completely unrepresented.<sup>119</sup> When the directors of a parent corporation are also the directors of a subsidiary, the lack of representation is even greater.<sup>120</sup> The court explained that because the subsidiary was controlled by the holding corporation, which in turn was controlled by the alleged wrongdoers, the subsidiary was not accountable to anyone.<sup>121</sup> The holding company, in this context, became a shield against liability.<sup>122</sup>

The court continued noting that the real owners of the subsidiary were the holding company's shareholders, including the plain-

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112. *Id.* at 354, 532 N.E.2d at 232.

113. *Id.* at 352, 532 N.E.2d at 231.

114. *Id.* at 357, 532 N.E.2d at 234.

115. *Id.* at 359, 532 N.E.2d at 234. See *Kennedy v. Nicastro*, 517 F. Supp. 1157, 1162 (N.D. Ill. 1981); *Gadd v. Pearson*, 351 F. Supp. 895, 900-901 (M.D. Fla. 1972); *Kaufman v. Wolfson*, 1 A.D.2d 555, 557, 151 N.Y.S.2d 530, 532-534 (1956); see also 2 MODEL BUSINESS CORP. ACT ANN. § 7.40, at 761-62 (3d ed. Supp. 1987); PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS & RECOMMENDATIONS § 7.02, at 48-49 (Tent. Draft No. 8, 1988) ("The more frequent and better practice has been to limit the doctrine to situations where the shareholder's corporation holds at least a de facto controlling interest in the injured corporation"). The cases cited by the defendants were unpersuasive because they did not deal with a holding company-subsiary relationship. *Brown*, 125 Ill. 2d at 359, 532 N.E.2d at 234-35.

116. *Id.* at 360, 532 N.E.2d at 235.

117. *Id.*

118. *Id.* (relying on *Shlensky v. South Parkway Bldg. Corp.*, 19 Ill. 2d 268, 166 N.E.2d 793 (1960)).

119. *Id.* (relying on *Winger v. Chicago City Bank & Trust Co.*, 394 Ill. 94, 109, 67 N.E.2d 265, 276 (1946)).

120. *Id.*

121. *Id.* at 361, 532 N.E.2d at 235.

122. *Id.*

tiff.<sup>123</sup> Because both the subsidiary and the holding company blocked the plaintiff, he had no other recourse but to resort to the courts.<sup>124</sup> According to the court, whether the shareholder's suit is single, double or triple, the principles underlying a derivative suit are still equitable in nature.<sup>125</sup> Furthermore, the court rejected the defendant's policy reasons for condemning the double derivative action.<sup>126</sup> The court was more concerned with not letting "defalcating, abusive and manipulative" directors and officers abuse their fiduciary capacities by committing wrongs against a subsidiary.<sup>127</sup> As a result of the court's decision, a double derivative action now may be maintained by a shareholder of a corporation, on behalf of a wholly owned or dominated subsidiary, if due demand is made to, and rejected by, the subsidiary and the holding company.<sup>128</sup>

*Brown* represents a logical extension of the derivative suit in circumstances involving a complete identity of interests between a holding corporation and the company whose stock it holds. In this respect, the result is consistent with the doctrine of piercing the corporate veil, and indeed, the court cites this doctrine to support its holding.<sup>129</sup> It is not entirely clear how far the *Brown* rationale may be extended beyond its facts to holding companies' shareholders who hold less than a total or majority interest in other corporations. Although the court did not expressly limit the double derivative suit to circumstances of complete identity, there is considerable language in the court's opinion limiting the right to bring such a suit to circumstances in which the holding company owns at least a controlling interest in the subsidiary.<sup>130</sup>

In *Webb v. Webb*,<sup>131</sup> the Illinois Appellate Court for the Fourth District held an officer/principal shareholder of a corporation not

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123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 362, 532 N.E.2d at 236. The defendant argued that the court's recognition of a double derivative suit would result in a "loss of corporate franchise tax revenue, a dearth of directors' indemnity insurance, corporations besieged by requests for information from all sources, and a flood of shareholder actions." *Id.*

127. *Id.*

128. *Id.* at 361, 532 N.E.2d at 235-36.

129. *Id.* at 358, 532 N.E.2d at 234. The court states that "[i]t is a well-settled principle that the court will look behind and beneath the corporate veil to view the substance and face of the corporate body, and that it will disregard corporate legal fictions when used as a shield for wrongful acts." *Id.*

130. See, e.g., *id.* at 361, 532 N.E.2d at 236 ("plaintiff is entitled to bring a derivative suit on behalf of the subsidiary company that the holding company, in which he is a shareholder of record, controls") (emphasis added).

131. 180 Ill. App. 3d 619, 536 N.E.2d 206 (4th Dist.), *appeal denied*, 545 N.E.2d 134 (1989).



liable for an unsatisfied worker's compensation award obtained against the corporation.<sup>132</sup> The plaintiff, Richard Webb, obtained a worker's compensation award against Macon County Speedway, Inc. ("Speedway").<sup>133</sup> Plaintiff alleged that the corporation had become insolvent.<sup>134</sup> Consequently, the plaintiff brought suit against Wayne Webb, Speedway's alleged "principal shareholder" and "principal operating officer," for failing to obtain worker's compensation insurance or to qualify as a self-insurer as required by section 4 of the Workers' Compensation Act ("the Act").<sup>135</sup> The circuit court granted the defendant's motion to dismiss the complaint for failing to state a cause of action.<sup>136</sup>

The plaintiff argued on appeal that defendant caused Speedway to fail to meet the Act's requirements; therefore, the court should pierce Speedway's corporate veil in order to hold the defendant personally liable.<sup>137</sup> The plaintiff cited an Oregon case<sup>138</sup> for the proposition that the corporate veil may be pierced if a plaintiff alleges and proves that the shareholder actually controlled the corporation and that the shareholder's improper conduct caused the plaintiff's inability to collect worker's compensation.<sup>139</sup>

Nevertheless, the *Webb* court ruled that the plaintiff failed to state a cause of action because the complaint did not allege that the defendant was the corporation's alter ego corporation.<sup>140</sup> The court explained that in Illinois, the corporate entity will be disregarded only when it becomes an obstacle to private rights or when it is the alter ego of the defendant's personality.<sup>141</sup> In addition, the

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132. *Id.* at 621, 536 N.E.2d at 207.

133. *Id.* at 620, 536 N.E.2d at 207.

134. *Id.*

135. *Id.* at 620-21, 536 N.E.2d at 207 (citing ILL. REV. STAT. ch. 48, para. 138.4 (1987)). The plaintiff did not sue under section 19(g) of the Worker's Compensation Act, ILL. REV. STAT. ch. 48, para. 138.19(g) (1987) because Illinois courts have not allowed judgments to be obtained against parties not named in the original action. *Webb*, 180 Ill. App. 3d at 621, 536 N.E.2d at 207.

136. 180 Ill. App. 3d at 621, 536 N.E.2d at 207.

137. *Id.* The plaintiff recognized that no Illinois precedent existed to support holding a corporation's officer or principal shareholder liable for a worker's compensation award obtained against the corporation. *Id.*

138. *Amfac Foods, Inc. v. International Sys. & Controls Corp.*, 294 Or. 94, 654 P.2d 1092 (1982) (en banc).

139. *Webb*, 180 Ill. App. 3d at 621, 536 N.E.2d at 207.

140. *Id.* at 622, 536 N.E.2d at 208.

141. *Id.* The court relied on *Gallagher v. Reconco Builders, Inc.*, 91 Ill. App. 3d 999, 415 N.E.2d 560 (1st Dist. 1980), which enumerated the following factors that should be considered when deciding to pierce the corporate veil: "(1) inadequate capitalization; (2) failure to issue stock; (3) failure to observe corporate formalities; (4) nonpayment of dividends; (5) insolvency of the debtor corporation at the time; (6) nonfunctioning of other

court reasoned that any attempt to alter the scheme of the Worker's Compensation Act should come from the legislature, not the courts.<sup>142</sup>

*Webb* honors the alter ego doctrine as applied to liability for Worker's Compensation claims. The opinion represents a considerable shield for principals of corporations that become financially unable to honor Worker's Compensation claims and arguably, by analogy, claims for other employment benefits. To the extent that privately-sponsored benefits such as health care and retirement pension plans have become increasingly important to individuals in the work force, the appellate court's decision imposes an extremely significant limitation upon the ability of employees to enforce their rights to such benefits. Under *Webb*, an employee can recover from the principal of an insolvent corporation only if the employee can prove that the principal in question qualifies as the corporation's alter ego. The standard *Webb* rejected would have benefited employees by requiring only a showing that a principal controlled a corporation and engaged in improper conduct that resulted in an inability to make payment.

#### IV. CONTRACTS

The Illinois Supreme Court decided one significant case involving contracts during the *Survey* period. It involved the assignment of an express warranty.<sup>143</sup> The first district decided a case that involved the issue of when the statute of limitations begins to run on an oral contract for a demand loan.<sup>144</sup>

In *Collins Co., Ltd. v. Carboline Co.*,<sup>145</sup> the Illinois Supreme Court held that because the valid assignment of an express warranty places the assignee in contractual privity with the warrantor, the express warranty extends to the assignee's right to sue for purely economic loss and consequential damages.<sup>146</sup> Carboline

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officers or directors; (7) absence of corporate records; and (8) whether in fact the corporation is only a mere facade for the operation of the dominant stockholders." *Webb*, 180 Ill. App. 3d at 622, 536 N.E.2d at 208.

142. *Webb*, 180 Ill. App. 3d at 623, 536 N.E.2d at 208. The court noted that other states have found officers and directors liable for failing to insure their Worker's Compensation liability. *Id.* at 622-23, 536 N.E.2d at 208. In those cases, however, the cause of action was either a tort claim for the defendant's failure to provide compensation or a statutory claim that provided for officer's or director's liability. *Id.*

143. See *infra* notes 145-170 and accompanying text.

144. See *infra* notes 171-180 and accompanying text.

145. 125 Ill. 2d 498, 532 N.E.2d 834 (1988), *later proceeding*, 864 F.2d 560 (7th Cir. 1989).

146. *Id.* at 507-08, 352 N.E.2d at 837-38.

Company ("Carboline") manufactured a roofing system for a warehouse and guaranteed the roof for ten years in an express warranty.<sup>147</sup> Four years later, Collins Company, Ltd. ("Collins") acquired the building and when the roof began to leak, the original owners assigned their rights under the warranty to Collins, in exchange for a covenant not to sue.<sup>148</sup> Carboline refused to act under the warranty, claiming that the warranty did not extend to Collins.<sup>149</sup> Collins subsequently brought a diversity suit against Carboline for breach of warranty in the United States District Court for the Northern District of Illinois.<sup>150</sup>

The district court concluded that Collins was not in privity with Carboline and granted Carboline's motion for judgment on the pleadings.<sup>151</sup> The case came before the Illinois Supreme Court on a question of Illinois law certified by the United States Court of Appeals for the Seventh Circuit.<sup>152</sup> The certified question was "[i]n the absence of original contractual privity, does an express warranty extend to an assignee's right to sue for purely economic loss and consequential damages?"<sup>153</sup>

The supreme court held that an assignee of an express warranty stands in privity with the warrantor so long as the actual assignment is valid.<sup>154</sup> The court began its analysis by noting that "an express warranty is a creature of contract" and it is "willed . . . into being" by the warrantor.<sup>155</sup> Privity of contract is the relationship that exists between contracting parties.<sup>156</sup> The court explained that

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147. *Id.* at 502, 532 N.E.2d at 835. Although the warranty alleged to limit claims for consequential damages, the court noted that the effect of any limiting clause in the warranty was not an issue for decision. *Id.* at 502-03, 532 N.E.2d at 835.

148. *Id.* at 504, 532 N.E.2d at 836. Chicago Title and Trust, as trustee, and Wachovia Bank and Trust Company originally owned the warehouse. *Id.* at 501, 532 N.E.2d at 835.

149. *Id.* at 504-05, 532 N.E.2d at 836.

150. *Id.* at 504, 532 N.E.2d at 836.

151. *Id.* at 505, 532 N.E.2d at 836. Carboline raised four affirmative defenses and filed a motion for judgment on the pleadings. *Id.* First, Carboline argued that because the warranty was unassignable, there never was an assignment to Collins. *Id.* Second, Carboline argued that the warranty never was issued to Collins. *Id.* Third, Collins argued that the terms of the warranty limited any damages caused. *Id.* Finally, Carboline argued that forces beyond Carboline's control caused the damage. *Id.*

152. *Id.* at 507, 532 N.E.2d at 837.

153. *Id.* at 501, 532 N.E.2d at 834.

154. *Id.* at 507-08, 532 N.E.2d at 837. Privity gives the assignee all the rights that the assignor previously held. *Id.* at 508, 532 N.E.2d at 837. According to the majority of courts that have addressed this issue, the court's holding is consistent with UCC section 2-210. *Id.* See ILL. REV. STAT. ch. 26, para. 2-210 (1987).

155. *Collins*, 125 Ill. 2d at 509, 532 N.E.2d at 838.

156. *Id.* at 511, 532 N.E.2d at 839.

when one party to a contract assigns his rights to the contract, the assignee steps into the shoes of the assignor and stands in privity with the other party to the contract.<sup>157</sup> Thus, because an express warranty is a creature of contract and privity accompanies the assignment of a contract, it follows that the assignee of an express warranty stands in privity with the warrantor.<sup>158</sup>

The court noted that the assignability of express warranty rights has been recognized explicitly in some states and implicitly assumed and even upheld in Illinois.<sup>159</sup> Additionally, no term in the warranty forbade assignment of rights or obligations by any party.<sup>160</sup> Thus, the court found it "logical" to permit the assignment of the rights under the warranty, as long as they did not fall within one of the UCC's exceptions to assignability.<sup>161</sup>

Although the Illinois Supreme Court previously had held, in *Szajna v. General Motors Corp.*,<sup>162</sup> that implied warranties did not extend to nonprivity buyers of new automobiles, the court ruled that *Szajna* was "in harmony" with the *Collins* decision.<sup>163</sup> The court explained that "there is a qualitative difference between the

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157. *Id.* at 512, 532 N.E.2d at 839. The court noted that the UCC encourages free assignability of contract rights and has only four exceptions. *Id.* at 512, 532 N.E.2d at 840. Section 2-210(2) of the UCC provides:

[u]nless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance. A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation can be assigned despite agreement otherwise.

ILL. REV. STAT. ch. 26, para. 2-210(2) (1987).

158. *Collins*, 125 Ill. 2d at 512, 532 N.E.2d at 840.

159. *Id.* at 513-16, 532 N.E.2d at 840-41. The assignability of a warrantee's rights has been recognized explicitly in Indiana and Minnesota and implicitly in California, Florida, and Pennsylvania. *Id.* at 513-14, 532 N.E.2d at 840. The court cited to three Illinois cases for support. *Id.* at 514-15, 532 N.E.2d at 841. *See Morrow v. L.A. Goldschmidt Assocs., Inc.*, 112 Ill. 2d 87, 492 N.E.2d 181 (1986) (one express-warranty plaintiff was an original purchaser's assignee, though warranty assignment was not at issue); *Dillman & Assocs., Inc. v. Capitol Leasing Co.*, 110 Ill. App. 3d 335, 442 N.E.2d 311 (4th Dist. 1982) (assignment of rights for breach of warranties was contemplated by lease); *People ex rel. Resnik v. Curtis & Davis, Architects & Planners, Inc.*, 58 Ill. App. 3d 28, 373 N.E.2d 772 (4th Dist. 1978) *aff'd and remanded on other grounds*, 78 Ill. 2d 381, 400 N.E.2d 918 (1980) (assignment to lessee of all lessor's rights in guarantees and warranties was an effective assignment of lessor's right to sue for breach of contract).

160. *Collins*, 125 Ill. 2d at 504, 532 N.E.2d at 836.

161. *Id.* at 515, 532 N.E.2d at 841. *See supra* note 157 (UCC exceptions). The court recognized that whether the assignment violated one of the UCC's exceptions would be for the federal court to decide. 125 Ill. 2d at 518, 532 N.E.2d at 842.

162. 115 Ill. 2d 294, 503 N.E.2d 760 (1986).

163. *Collins*, 125 Ill. 2d at 515, 532 N.E.2d at 841.

burden of implied warranties, which are imposed by law, and the nature of express warranties [such as here] freely given by warrantors and purporting to promise future performance for a stated number of years."<sup>164</sup>

The *Collins* court held that a valid assignment creates contractual privity, but the decision leaves unanswered whether a subsequent property owner may, in the absence of contractual privity,<sup>165</sup> enforce a warranty made to the original property owner.<sup>166</sup> This question is particularly important against the backdrop of the line of Illinois cases beginning with the *Moorman Mfg. Co. v. National Tank Co.*,<sup>167</sup> which held that an injured party cannot sue in tort for purely economic losses. *Collins* opens the door part way to such recovery through its holding that express warranties may be assigned when the warrantor has not specifically prohibited or restricted assignment.<sup>168</sup> Although the court acknowledged that prior Illinois case law<sup>169</sup> precludes subsequent nonprivity owners from recovering under implied warranties, the court expressly noted that there may be room in the future for the extension of "some warranties" to nonprivity buyers in "appropriate circumstances."<sup>170</sup> Thus, although the court expressly left open questions as to nonprivity buyers' ability to enforce express warranties, the enforceability of express limitations on warranties and the applicability of the exceptions to assignability set forth in UCC section 2-210(2), the court's rationale suggests that in future cases it may retreat from the bright lines it drew against recovery in cases such as *Moorman* and *Szajna*.

In light of *Collins*, purchasers of property should obtain assign-

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164. *Id.* at 516, 532 N.E.2d at 841-42. The court did not address whether the assignment to Collins was valid, but it did note circumstances surrounding the assignment that might bear on its validity. For example, Collins alleged that it had relied upon the express warranty in purchasing the property in question; the assignment, however, did not take place until two years after the sale to Collins and *after* the leakage occurred. *Id.* at 504, 532 N.E.2d at 836. Furthermore, Chicago Title, the original owner, assigned the warranty at that time in exchange for a covenant not to sue. *Id.* Thus, it is at least arguable that Collins had not in fact relied upon the warranty in purchasing the property, and it obtained the assignment after the damage incurred simply in an attempt to circumvent the bar against recovery in tort for its economic losses. *Id.* at 505, 532 N.E.2d at 836.

165. Thus, in the court's analysis, either no assignment was made or the assignment was invalid.

166. 125 Ill. 2d at 507, 532 N.E.2d at 837.

167. 91 Ill. 2d 69, 435 N.E.2d 443 (1982)

168. *Collins*, 125 Ill. 2d at 515, 532 N.E.2d at 841.

169. *See, e.g., Szajna v. General Motors Corp.*, 115 Ill. 2d 294, 503 N.E.2d 760 (1986).

170. *Collins*, 125 Ill. 2d at 516, 532 N.E.2d at 842.

ments of express warranties to protect themselves against future economic losses. Although the *Collins* court did not address the assignment's validity, prudence would dictate that the purchaser obtain the assignment as part of the bargain to buy the property. In contrast, sellers who wish to protect themselves against future litigation should incorporate language strictly limiting assignability in express warranties made to buyers.

In a case involving the statute of limitations in an oral contract for a demand loan, *Schreiber v. Hackett*,<sup>171</sup> the Illinois Appellate Court for the First District decided that the statute does not begin to run until an actual demand has been made.<sup>172</sup> The case arose when two commodities brokers entered into a contract on September 22, 1980 whereby the plaintiff loaned the defendant \$2500 in exchange for the defendant's oral promise to repay the loan on demand.<sup>173</sup> On October 10, 1985, the plaintiff made a demand for repayment of the loan and the defendant refused to pay.<sup>174</sup>

On a motion to dismiss, the defendant argued that the statute of limitations began to run on the day plaintiff made the loan.<sup>175</sup> Thus, because the plaintiff filed his action on February 27, 1986, more than five years after the date of the original transaction, the trial court granted the defendant's motion to dismiss.<sup>176</sup> The plaintiff appealed, arguing that the statute of limitations started to run when he first demanded repayment, on October 10, 1985.<sup>177</sup>

The appellate court reversed the trial court's ruling and held that the statute of limitations began to run when, upon plaintiff's demand, the defendant refused repayment.<sup>178</sup> The court asserted that a promise to repay on demand "is an express condition precedent to the duty of performance."<sup>179</sup> Thus, the plaintiff did not have an action until demand was made and refused on October 10, 1985, only four months before he brought his suit.<sup>180</sup>

*Schreiber* demonstrates the importance of imposing a reasonable outer time limit on loans payable upon demand. The result in

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171. 173 Ill. App. 3d 129, 527 N.E.2d 412 (1st Dist. 1988).

172. *Id.* at 131-32, 527 N.E.2d at 413.

173. *Id.* at 130, 527 N.E.2d at 412.

174. *Id.*

175. *Id.* The statute of limitations provides in pertinent part that "actions on unwritten contracts, express or implied, . . . shall be commenced within 5 years next after the cause of action accrued." ILL. REV. STAT. ch. 110, para. 13-205 (1987).

176. *Schreiber*, 173 Ill. App. 3d at 130, 527 N.E.2d at 412-13.

177. *Id.* at 130-31, 527 N.E.2d at 412-13.

178. *Id.* at 131, 527 N.E.2d at 413.

179. *Id.*

180. *Id.* at 131-32, 527 N.E.2d at 413.

*Schreiber*, however, is unremarkable. The conclusion for which the defendant argued, that the statute of limitations began to run when the loan was made, necessarily relies upon the premise that defendant breached the loan agreement the moment it was made. Such a premise is plainly untenable in the absence of a demand for repayment.

## V. LEGISLATION

### A. Banks and Banking Legislation

An amendment to paragraph 321, section 14 of the Illinois Banking Act now permits a state bank to acquire or resell its own shares of treasury stock without a change in the bank's charter.<sup>181</sup> The treasury stock may be held for any purpose that unissued shares of capital stock may be held for, under subsection (5) of section 14.<sup>182</sup> The stock may be resold under reasonable terms determined by the bank's board of directors so long as the Commissioner is given notice by the board prior to the resale of the stock.<sup>183</sup> In addition, the Illinois Banking Act was amended to authorize a bank to disclose the financial records of a customer when the bank is attempting to collect an obligation owed to the bank and the bank complies with the provisions of section 2I of the Consumer Fraud and Deceptive Business Practices Act.<sup>184</sup>

Section 6 of the Foreign Banking Office Act was amended to authorize foreign banks to establish and maintain banking offices outside Chicago's central business district under certain conditions.<sup>185</sup> The office must be located in a building that the World Trade Centers Association and the Illinois Export Council designate as a World Trade Center and that is within the corporate boundaries of the City of Chicago.<sup>186</sup> The offices may only conduct activities that are incidental to international or foreign business as determined by regulations the Commissioner promulgates.<sup>187</sup>

### B. Securities Legislation

The legislature also amended the Illinois Securities Law of

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181. ILL. ANN. STAT. ch. 17, para. 321 (Smith-Hurd Supp. 1989).

182. *Id.*

183. *Id.*

184. ILL. ANN. STAT. ch. 17, para. 360 (Smith-Hurd Supp. 1989). See The Consumer Fraud and Deceptive Business Practices Act, ILL. REV. STAT. ch. 121.5, para. 262I (1987).

185. ILL. ANN. STAT. ch. 17, para. 2713 (Smith-Hurd Supp. 1989).

186. *Id.*

187. *Id.*

1953<sup>188</sup> and made several important substantive changes.<sup>189</sup> Amendments to section 3 liberalized the exemptions from securities registration for entities that do not require special investor protection.<sup>190</sup> Section 8 was amended to add new consumer protection pertaining to the registration of dealers, salespersons, and investment advisers.<sup>191</sup> Finally, section 11 was amended to increase the Secretary of State's enforcement powers.<sup>192</sup>

## VI. CONCLUSION

During the *Survey* year, the courts addressed many issues in the field of commercial law. The holding in *Spec-Cast*, which allows banks to raise common law defenses in defense of a UCC section 3-401(1) claim, should prove to be a valuable tool for banks. Furthermore, shareholders scored a victory in *Brown* which extended their right as shareholders of a parent corporation to sue derivatively on behalf of a holding company "controlled" by the parent corporation. Finally, the court's use of black letter contract law in *Collins* has cleared up any confusion surrounding the valid assignment of an express warranty.

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188. ILL. REV. STAT. ch. 121.5, para. 137.1 -.19 (1987).

189. For a detailed discussion all the 1988 amendments to the Illinois Securities Law of 1953, see Fein and Sosin, *1988 Amendments to the Illinois Securities Law*, 3 CHI. B. A. REC. 3 (spec. supp. 1989).

190. ILL. ANN. STAT. ch. 121.5, para. 137.3 (Smith-Hurd Supp. 1989).

191. *Id.* para. 137.8.

192. *Id.* para. 137.11.



