

# Insufficient Fund Check Charges: The Need for Legislative Action

## I. INTRODUCTION

The banking industry has undergone drastic changes since the passage of the Depository Institutions Deregulation Act of 1980.<sup>1</sup> The pricing of services to banks by the Federal Reserve<sup>2</sup> and the deregulation of interest rates have resulted in a more competitive environment requiring stricter bank management.<sup>3</sup> Because of these changes, the public's attention has been drawn to the increased service charges imposed by banks,<sup>4</sup> particularly charges on insufficient fund checks.<sup>5</sup> Several depositors have filed suits against their banks in opposition to NSF check charges,<sup>6</sup> sparking both legislative and administrative reactions. For example, the New York Legislature has enacted a schedule of maximum fees, specifically designed to deter the writing of NSF checks.<sup>7</sup> The Office of the Comptroller of the Currency has released an "Interpretive Ruling,"<sup>8</sup> stating its position that "state law which interferes with the ability of national banks to establish service charges is preempted."<sup>9</sup> While this ruling was intended to put to rest much of the litigation over NSF check fees, it has instead fueled the controversy. The Conference of State Bank Supervisors, an association of state officials responsible for regulating state chartered banks, has challenged the comptroller's ruling on both administrative and substantive grounds.<sup>10</sup> Finally, the Chairman of the United States House of Representatives Banking Committee, Fernand St. Germain, has called for congressional hearings on

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1. 12 U.S.C. §§ 3501-3509 (1982).

2. See Mayer, *The Fed Goes Into Business*, FORTUNE, Apr. 4, 1983, at 167.

3. See *It May be Too Late to Stop the "Nonbank" Banks*, BUS. WK., July 25, 1983, at 73; *The Brave New World of Superbanks*, NEWSWEEK, July 18, 1983, at 61; *Revolution in Banking: Has it Gone Too Far?*, U.S. NEWS & WORLD REP., May 16, 1983, at 69; Weberman & McGough, *Nearer, My God, to Thee?* (1983 Annual Banking Survey), FORBES, Apr. 11, 1983, at 128; *What Will Your Bank Think of Next?*, CHANGING TIMES, Jan. 1983, at 62; Lipp, *The Financial Service Industry*, VT. SPEECHES DAY, Apr. 15, 1982, at 413.

4. According to syndicated columnist Jane Bryant Quinn, "A recent Federal Reserve Board study of commercial banks found that income from service charges on deposits rose 82% from 1979 to 1982, to \$4.6 million; income from other fees and charges rose 71%, to \$6.2 million." Quinn, *At Many Banks and Savings and Loans, Higher Fees Go Along With Higher Rates*, Chi. Tribune, Feb. 3, 1984, § 3, at 1, col. 2.

5. Insufficient fund checks are commonly known in the banking industry as "NSF" checks, an abbreviation for "nonsufficient funds." According to one source, "About two fifths of all banks charge at least \$10, with a substantial number charging as much as \$25." *Bankers: Everybody's Favorite Target*, U.S. NEWS & WORLD REP., Apr. 11, 1983, at 27, 28-29.

6. See cases cited in Comment, *Bank Charges for Insufficient Funds Checks*, 69 CALIF. L. REV. 599, 599 n.3 (1981).

7. N.Y. BANKING LAW § 108(8)(c) (McKinney Supp. 1983).

8. Interpretive Ruling Concerning National Bank Service Charges, 48 Fed. Reg. 54,319 (1983) (to be codified at 12 C.F.R. pt. 7).

9. *Id.* A national bank is a bank that is "incorporated and doing business under the laws of the United States, as distinguished from a state bank." BLACK'S LAW DICTIONARY 923 (5th ed. 1979) (emphasis in original).

10. *State Bank Officials Challenge OCC Rule on States Curbing Service Fees*, [Jan.-June] WASH. FIN. REP. (BNA) No. 42, at 234 (Jan. 30, 1984).

bank service charges,<sup>11</sup> stating, "[i]t is clear the American consumer cannot rely on the bank regulators for any protection from unconscionable service charges."<sup>12</sup>

The inadequacies of the courts in resolving the NSF check fee controversy have been demonstrated by an awkward handling of depositors' suits.<sup>13</sup> In addition, the inefficiency of multiple class actions is evident, in terms of both social and legal costs. Finally, the independence of national banks has rendered state banking regulation largely ineffectual.<sup>14</sup> Thus, the stage for federal legislative action has been set. The core issue, whether a segment of society needing consumer protection most heavily bears the burden of the cost of banking, can be resolved only through careful legislative analysis. The issues requiring consideration include fundamental principles of contract law and the proper purpose and application of NSF check fees and other bank service charges.<sup>15</sup>

## II. APPLICABILITY OF FUNDAMENTAL CONTRACT LAW

### A. *Is There a Contract?*

The controversy surrounding bank service charges is governed by the same contract principles that affect all transactions involving goods and services. The bank-depositor relationship is based upon a contract that generally arises from a signature card. The agreement between the parties also includes implied terms stemming from usage of trade and course of dealing.<sup>16</sup>

When opening an account, the depositor is typically asked to sign a signature card to provide the bank with a handwriting sample. The signature card often contains a promissory statement, whereby the depositor's signature represents an acquiescence to the "rules, regulations, practices and charges"<sup>17</sup> of the bank.<sup>18</sup> This language constitutes the core of the agreement upon which the banking relationship stands. Thus, when the promissory language is absent the terms of the contract may be called into question. Banks may argue that depositors have reasonable expectations of

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11. *St. Germain Calls for Hearings on Service Fees Charged by Banks*, [Jan.-June] WASH. FIN. REP. (BNA) No. 42, at 13 (Jan. 2, 1984).

12. *Id.*

13. *See infra* notes 55-114 and accompanying text.

14. *See supra* notes 8-9 and accompanying text.

15. The Uniform Commercial Code (U.C.C.) 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." U.C.C. § 4-401(1) (1978). The official comment adds that "the draft itself authorizes the payment for the drawer's account and carries an implied promise to reimburse the drawee." *Id.* comment 1. Thus, although overdrafts were clearly contemplated by the U.C.C.'s drafters, no provision is specifically applicable to fees imposed by banks as a result of overdrafts.

The U.C.C. does, however, address the issue of charges for stopping payment on a check: "stopping payment is a service which depositors expect and are entitled to receive from banks notwithstanding its difficulty, inconvenience and expense." U.C.C. § 4-403 comment 2 (1978). Yet, despite this seemingly clear provision, virtually all banks charge substantial fees for stopping payment on a check.

16. U.C.C. § 1-205 comment 1 (1978). "A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question." *Id.* § 1-205(2). "A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." *Id.* § 1-205(1).

17. *Perdue v. Crocker Nat'l Bank*, 141 Cal. App. 2d 200, 203, 190 Cal. Rptr. 204, 207 (1983) (emphasis omitted).

18. *See, e.g., id.*

incurring service charges in certain instances. However, the consumers that need the most protection in this area are those with a lack of sophistication in banking practices. If the concept of a contract is to have any meaning at all, a term imposing NSF check fees should not become part of the bank-depositor agreement without at least a general understanding of the term by the depositor.

A bank may attempt to remedy the absence of contractual terms in its signature card by giving the depositor a copy of a "checking account agreement"<sup>19</sup> after the signature card has been executed. This, however, ignores the common-law rule that hinges the enforceability of contract terms on whether they were assented to as part of the offer and acceptance process.<sup>20</sup> Because the law presumes an equality of consideration at the time of offer and acceptance, the imposition of subsequent obligations upon the depositor lacks consideration and should be unenforceable.<sup>21</sup>

If a depositor signs a signature card with the understanding that it signifies no more than a handwriting sample, no express contractual obligation can result. Yet, regardless of the elementary nature of this concept, banks persist in omitting words of assent from their signature cards, and many times even fail to provide the depositor with a copy of the purported agreement.

Less litigation between banks and depositors probably would result if banks placed more emphasis on the importance of contract formation. For example, a copy of the checking account agreement and fee schedule should be given to the depositor before the signature card is subscribed. In addition, these documents should be referred to in the signature card and explained to the depositor by a bank official. These procedures would eliminate the element of surprise that may result from the imposition of certain contract terms, thus avoiding dissatisfied customers, and adverse legal consequences.

### B. *Contracts of Adhesion and Unconscionability*

Standardized contracts have long been a barrier to freedom of contract.<sup>22</sup> Yet, their value in modern society is difficult to deny.<sup>23</sup> The negative ramification of a

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19. See, e.g., BancOhio National Bank, Checking Account Agreement, Form 510002 (rev. Nov. 1982), which reads as follows:

CUSTOMER AGREEMENT—When you open a BancOhio Checking Account and sign a signature card, you promise to abide by this Agreement and the rules and regulations in it. This account is subject to all applicable Federal and Ohio laws and regulations and to all banking customs and practices. BancOhio reserves the right to change or modify this Agreement at any time. Any and all changes and modifications will become effective upon proper notice from BancOhio as provided by law. This Agreement supersedes all previous agreements related to your checking account.

....

OVERDRAWN ACCOUNTS—If you issue a check for more money than you have in your account we will return that check due to insufficient funds and charge your account the current fee. You agree that we are not liable for the return of any item due to insufficient funds which may result from the deduction of current service charges or special handling fees.

....

SERVICE CHARGES AND SPECIAL HANDLING FEES—Your account is subject to certain monthly maintenance fees, activity fees and special handling fees. These fees are described in a fee schedule you received when you opened your account. We will give you notice by mail prior to any increase in service charges.

20. J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 2-22, at 68-70 (2d ed. 1977).

21. See *id.*

22. See generally Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943).

23. *Id.* at 631-32.

standardized contract is that it may constitute a contract of adhesion, or one that, "imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it."<sup>24</sup> A bank signature card is clearly a contract of adhesion. This, however, does not render the contract invalid as long as the standardized contract terms are within the "reasonable expectations" of the depositor and are not unconscionable.<sup>25</sup>

Whether a depositor reasonably expects the imposition of an NSF check fee may depend upon the bank's compliance with the requisites of contract formation previously discussed.<sup>26</sup> Thus, banks may protect themselves by disclosing all aspects of the agreement before the signature card is subscribed.

Unconscionability has been said to consist of "both a 'procedural' and a 'substantive' element."<sup>27</sup> The procedural element includes the elements of "oppression" and "surprise."<sup>28</sup> Lack of "real negotiation" and "absence of meaningful choice," the hallmarks of freedom of contract, may indicate oppression.<sup>29</sup> Surprise, on the other hand, may be present when the terms of the contract are unascertainable to the depositor, either because they are "hidden in a prolix printed form"<sup>30</sup> or because they simply were not part of the offer and acceptance process.<sup>31</sup>

The substantive element of unconscionability is much more difficult to define,<sup>32</sup> at least partly because it requires an examination of the adequacy of consideration as a matter of law,<sup>33</sup> something courts seek to avoid.<sup>34</sup> Whether substantive unconscionability exists is determined by examining the circumstances surrounding contract formation.<sup>35</sup> The difficulty arises in deciding whether the bargain is a product of freedom of contract or control over the contract terms by a stronger party.

Depositors' suits challenging NSF check fees have not been successful.<sup>36</sup> One possible explanation for this is highlighted in *Patterson v. Walker-Thomas Furniture Co.*<sup>37</sup> In this case, the District of Columbia Court of Appeals refused to order the

24. *Perdue v. Crocker Nat'l Bank*, 141 Cal. App. 3d 200, 205, 190 Cal. Rptr. 204, 208 (1983) (quoting *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 817, 623 P.2d 165, 171, 171 Cal. Rptr. 604, 610 (1981)).

25. *See id.* at 206, 190 Cal. Rptr. at 209.

26. *See supra* text accompanying notes 16-21.

27. *Perdue v. Crocker Nat'l Bank*, 141 Cal. App. 3d 200, 207, 190 Cal. Rptr. 204, 209 (1983) (quoting *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 486, 186 Cal. Rptr. 114, 121 (1982)).

28. *Id.* at 207, 190 Cal. Rptr. at 210 (quoting *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 486, 186 Cal. Rptr. 114, 121-22 (1982)).

29. *Id.*; *see* U.C.C. § 2-302 comment 1 (1978).

30. *Perdue v. Crocker Nat'l Bank*, 141 Cal. App. 3d 200, 207, 190 Cal. Rptr. 204, 210 (1983) (quoting *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 486, 186 Cal. Rptr. 114, 121-22 (1982)).

31. *See supra* text accompanying notes 19-21.

32. As stated in one famous unconscionability case, "deciding the issue is substantially easier than explaining it." *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 192, 298 N.Y.S.2d 264, 266 (1969).

33. The law presumes that the parties to a contract have had the freedom to bargain over the contract terms. Thus, in the absence of evidence indicating a substantial disparity in bargaining power, a court will presume that each party exchanged consideration with a subjective personal value less than or equal to that of the consideration received in return. *J. CALAMARI & J. PERILLO, supra* note 20, § 4-3, at 136-39; *see* *Perdue v. Crocker Nat'l Bank*, 141 Cal. App. 3d 200, 207-08, 190 Cal. Rptr. 204, 210 (1983).

34. Because the issues of substantive unconscionability and contracts of adhesion are subjective, they can easily be applied in favor of banks by the present judicial climate.

35. U.C.C. § 2-302 comment 1 (1978); *see also* *Perdue v. Crocker Nat'l Bank*, 141 Cal. App. 3d 200, 207-08, 190 Cal. Rptr. 204, 210 (1983).

36. *See infra* text accompanying notes 55-114.

37. 277 A.2d 111 (D.C. 1971).

defendant merchant to divulge pricing policies solely on the basis of the plaintiff's assertions that the price was excessive.<sup>38</sup> According to the court, "a sufficient factual predicate for the [claim] must be alleged before wholesale discovery is allowed."<sup>39</sup> Thus, a depositor presumably must demonstrate a rationale for believing that a bank's NSF fees are unconscionably high. Yet, since banks have acknowledged their failure to conduct cost analyses in this area,<sup>40</sup> depositors hardly can be held to pleading that which is unknown.<sup>41</sup>

Banks have wisely sought to frame the unconscionability issue in terms of the competitive structure of the banking industry.<sup>42</sup> As pointed out by the attorneys for the defendant bank in *Perdue v. Crocker National Bank*, "the price/cost theory advocated . . . is the breaking point between unconscionability analysis—an individual contract remedy—and pure judicial ratemaking affecting an entire industry. *No court has ever held the market prices in an entire industry to be unconscionable.*"<sup>43</sup> Although this conclusion may be true in the absence of price-fixing, it ignores the banking industry's preferential treatment of business and other "high-balance" customers.<sup>44</sup> This bias emphasizes the need for consumer protection. While checking and other deposit accounts are virtual necessities in today's society, the average depositor simply lacks the bargaining power to affect bank policies. As a result, the benefits of deregulation are being distributed unevenly to the detriment of small depositors.

### C. Penalties for Breach

The challenges to NSF check fees on a penalty theory presuppose the existence of a bank-depositor agreement that is breached when the depositor writes an NSF check.<sup>45</sup> The courts, however, have declined to recognize an express or implied promise on the part of the depositor to refrain from writing NSF checks.<sup>46</sup> Instead,

38. *Id.* at 114.

39. *Id.*

40. See *infra* text accompanying notes 77 & 84.

41. See *Jacobs v. Citibank*, 61 N.Y.2d 869, 873, 462 N.E.2d 1182, 1184, 474 N.Y.S.2d 464, 466 (1984) (Cooke, C.J., dissenting).

42. See Kessler, *supra* note 22, at 640-42.

43. *Banks Fight Class Actions on Surcharges*, 3 CAL. LAW. 14, 15 (Jan. 1983) (emphasis in original).

44. This favoritism is demonstrated, for example, by the establishment of a "business window" at most banks. Undoubtedly, the underlying rationale is that business customers must be treated with extra care to maintain the banking relationship. Indeed, this attitude has crept into the area of fees. According to a banking trade association study, "If the account is very profitable, many banks do not wish to endanger the relationship by charging for [NSF checks]." W. STAFEL, *THE IMPACT OF EXCEPTION ITEMS ON THE CHECK COLLECTION SYSTEM* 28 (1974). One commentator noted the trend of "[h]igher fees for the poor and lower fees for the rich [as] one solution" to the banks' attempts to "discourage lower-income people and small accounts while encouraging the well-to-do." Quinn, *At Many Banks and Savings and Loans, Higher Fees Go Along with Higher Rates*, Chi. Tribune, Feb. 3, 1984, § 3, at 1, col. 2.

45. See *Perdue v. Crocker Nat'l Bank*, 141 Cal. App. 3d 200, 209, 190 Cal. Rptr. 204, 211 (1983); *Jacobs v. Citibank*, 92 A.D.2d 786, 787, 459 N.Y.S.2d 781, 782 (1983), *aff'd*, 61 N.Y.2d 869, 462 N.E.2d 1182, 474 N.Y.S.2d 464 (1984); *Hoffman v. Security Pac. Nat'l Bank*, 121 Cal. App. 3d 964, 967, 176 Cal. Rptr. 14, 15-16 (1981).

46. See, e.g., *Perdue v. Crocker Nat'l Bank*, 141 Cal. App. 3d 200, 209, 190 Cal. Rptr. 204, 211 (1983); *Jacobs v. Citibank*, 92 A.D.2d 786, 787, 459 N.Y.S.2d 781, 782 (1983), *aff'd*, 61 N.Y.2d 869, 462 N.E.2d 1182, 474 N.Y.S.2d 464 (1984); *Shapiro v. United Cal. Bank*, 133 Cal. App. 3d 256, 263, 184 Cal. Rptr. 34, 39 (1982); *Hoffman v. Security Pac. Nat'l Bank*, 121 Cal. App. 3d 964, 969, 176 Cal. Rptr. 14, 16 (1981).

they have chosen to characterize an NSF check as "an application for advance credit."<sup>47</sup>

If the courts recognize an implied promise by a depositor not to write NSF checks, the question remains whether NSF check fees constitute valid liquidated damages for the breach of a contract. A liquidated damages clause seeks to compensate the victim for losses resulting from a breach of contract.<sup>48</sup> Parties to an agreement may set a reasonable measure of damages in advance of a breach, or liquidated damages, provided (1) the intent is to compensate the victim of a breach for actual damages, not to penalize the breaching party, and (2) the injury resulting from a breach is difficult to estimate with reasonable accuracy.<sup>49</sup>

Much has been said concerning the great disparity between a bank's costs in processing NSF checks and the charges levied upon NSF check writers. According to E. Robert Wallach, who has served as counsel in several class action suits challenging NSF charges, the actual cost incurred by a bank in processing an NSF check ranges from twenty-five to thirty cents.<sup>50</sup> Yet, in defense of its six dollar NSF check charges, California's Crocker National Bank, through its attorneys, has stated that if required to do so at trial it can prove costs equal to or in excess of its NSF fees.<sup>51</sup> Similarly, a Bank One official claims that the bank's costs of processing an NSF check equal or exceed its fifteen dollar fee.<sup>52</sup> Thus, the question whether NSF fees have a substantial relationship to a bank's costs and, therefore, may constitute valid liquidated damages remains unanswered. However, it is clear that notwithstanding its intention to do so, the Federal Reserve Board has failed to implement a separate fee schedule providing for charges to banks on return items deposited for collection in the Clearinghouse system.<sup>53</sup> Therefore, a bank's marginal costs in processing an NSF check are limited to its internal functions of posting and notification.<sup>54</sup>

### III. DEVELOPMENT OF THE CONTROVERSY

The limited case law concerning the legality of bank charges on NSF checks consists of several New York and California decisions. Two major claims have been

47. See, e.g., *Perdue v. Crocker Nat'l Bank*, 141 Cal. App. 3d 200, 209, 190 Cal. Rptr. 204, 211 (1983); *Shapiro v. United Cal. Bank*, 133 Cal. App. 3d 256, 263, 184 Cal. Rptr. 34, 38 (1982); *Hoffman v. Security Pac. Nat'l Bank*, 121 Cal. App. 3d 964, 969, 176 Cal. Rptr. 14, 16 (1981).

48. See J. CALAMARI & J. PERILLO, *supra* note 20, § 14-31, at 565.

49. *Id.*

50. *Banks Fight Class Actions on Surcharges*, 3 CAL. LAW. 14, 15 (Jan. 1983). This estimate of a bank's costs is supported by a previous study by a banking trade association. W. STAFEL, *supra* note 44, at 25. According to this survey, of all returned items, 71.7% of which were NSF checks, the average cost of processing per institution was \$.29. *Id.* at 25 & fig. 21. Since an average of 2.6 institutions handled each item, the average total cost per returned item was \$.75. *Id.* at 25.

51. *Banks Fight Class Actions on Surcharges*, 3 CAL. LAW. 14, 15 (Jan. 1983).

52. Telephone interview with Al Green, Returns Department of Bank One, Columbus, Ohio (Jan. 30, 1984).

53. D. JACOBSON, N. PETERSEN & B. LONG, *FEDERAL REGULATION OF BANKING: THE DEPOSITORY INSTITUTIONS ACT C-208* (Banking Law Journal 1983). The Clearinghouse system, maintained by the Federal Reserve Board, provides the mechanism through which checks are deposited and collected by U.S. financial institutions.

54. Banks undoubtedly include an allocation of fixed expenses in their estimates of NSF check processing costs. The law of contracts, however, has shown a tendency to disallow the consideration of fixed expenses in determining the damages resulting from a breach. As the United States Third Circuit Court of Appeals stated, "since overhead expenses are not affected by the performance of the particular contract, there should be no need to deduct them in computing lost profits." *Vitex Mfg. Corp. v. Caribtex Corp.*, 377 F.2d 795, 798 (3d Cir. 1967). Likewise, a bank incurs its fixed expenses regardless of whether any particular depositor writes an NSF check.

advanced by the plaintiff depositors in cases involving NSF check fees: first, that NSF check fees constitute a penalty for the breach of a promise by depositors to refrain from writing NSF checks,<sup>55</sup> and second, that unconscionably excessive NSF check fees are imposed pursuant to contracts of adhesion.<sup>56</sup>

Courts have consistently declined to recognize an implied promise by depositors to refrain from writing NSF checks, and thus have not reached the penalty issue.<sup>57</sup> Instead, the writing of an NSF check has been characterized as “an application for advance credit.”<sup>58</sup> At the same time, courts have rejected the claims of unconscionability on the basis of express statutory authority as well as judicial findings that the NSF check fees were expected, assented to, and avoidable.<sup>59</sup>

In the earliest New York decision involving NSF check fees, *Clark v. Marine Midland Bank*,<sup>60</sup> the plaintiffs claimed that a four to five dollar charge was “grossly disproportionate to the actual costs, if any, incurred by the defendant banks in connection with returned items,”<sup>61</sup> and thus constituted a penalty.<sup>62</sup> Additionally, the plaintiffs alleged that because the checking account agreements signed by them did not authorize a service charge, the banks had breached their bank-depositor agreements by imposing the fees.<sup>63</sup> In a memorandum decision, the Appellate Division Supreme Court refused to grant the defendant’s motion to dismiss the claims for failure to state a cause of action.<sup>64</sup> The court noted the arguable ambiguity of the complaint, which claimed, *inter alia*, violations of “other applicable laws and regulations.”<sup>65</sup> However, the cure, according to the court, was not dismissal, but rather a motion by the defendant and a court order to amend the complaint.<sup>66</sup>

In response to claims substantially similar to those in *Clark*, the Special Term Supreme Court in *Dietrich v. Chemical Bank*<sup>67</sup> ruled in favor of the defendant bank on the basis of New York statutory law<sup>68</sup> and the contract between the parties.<sup>69</sup> The court noted that section 108(8)(c) of the state’s Banking Law<sup>70</sup> “specifically authorizes the banking board to fix a fee that will act as a deterrent to customers who create overdrafts or present items subsequently dishonored.”<sup>71</sup> In addition, the plaintiff’s acknowledgement of receipt of the bank’s rules and regulations led the court to conclude that “unlike the case in *Clark*, . . . the imposition of service charges for dishonored items was contained in a writing comprising the contract.”<sup>72</sup>

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55. See *supra* notes 45–54 and accompanying text.

56. See *supra* notes 22–44 and accompanying text.

57. See *infra* notes 60–114 and accompanying text.

58. *Id.*

59. See *infra* notes 67–72, 103–06 and accompanying text.

60. 67 A.D.2d 846, 413 N.Y.S.2d 9 (1979), *appeal dismissed*, 80 A.D.2d 761, 436 N.Y.S.2d 711 (1981).

61. *Id.* at 846, 413 N.Y.S.2d at 11.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* *Clark v. Marine Midland Bank* was ultimately dismissed on appeal for the failure of the class action representatives to typify the class. 80 A.D.2d 761, 436 N.Y.S.2d 711 (1981).

67. 115 Misc. 2d 713, 454 N.Y.S.2d 490 (Sup. Ct. 1981).

68. *Id.* at 714, 454 N.Y.S.2d at 491.

69. *Id.* at 715, 454 N.Y.S.2d at 491.

70. N.Y. BANKING LAW § 108(8)(c) (McKinney Supp. 1983).

71. 115 Misc. 2d 713, 714, 454 N.Y.S.2d 409, 491 (Sup. Ct. 1981).

72. *Id.*

The Appellate Division Supreme Court in *Jacobs v. Citibank*<sup>73</sup> determined that the plaintiffs' case had no merit as a matter of law.<sup>74</sup> In a memorandum decision, the court characterized the plaintiffs' claim that the NSF check fee constituted a penalty as similar to an attempt by a "purchaser of a commodity . . . to recoup the difference between . . . [an] agreed price [and] the market price" on the theory that the excess amount paid constituted a penalty.<sup>75</sup> The court also discredited the plaintiffs' objection that the bank's NSF fee was in excess of the statutorily prescribed maximum, noting that "a federally chartered bank . . . [is] not subject to the strictures of the New York Banking Law."<sup>76</sup> The dissent recognized, however, that "[t]he banks themselves concede that they have no analysis of costs in this area and proceed by intuition."<sup>77</sup> It further noted that the contract governing the bank-customer relationship only provided for fees "necessary to compensate [the bank] for service,"<sup>78</sup> and thus concluded that the fairness of the service charge was a question of fact precluding summary judgment.<sup>79</sup>

Recently, the result in *Jacobs* was affirmed in a memorandum decision by the New York Court of Appeals.<sup>80</sup> The court based its decision partly on the plaintiff's failure to show "that the charges imposed were grossly disproportionate to processing costs usually incurred by banks in the community or otherwise imposed in bad faith."<sup>81</sup> In addition, the plaintiff's argument that the imposition of an NSF check charge constituted an illegal penalty was rejected on the dubious ground that the writing of an NSF check does not breach an agreement since "the use of overdrafts is expressly contemplated by and provided for in subdivision (1) of section 4-401 of the Uniform Commercial Code. . . ."<sup>82</sup> As in the lower court, a dissenting opinion focused on the contractual provision allowing for fees "necessary to compensate [the bank] for services rendered."<sup>83</sup> Chief Justice Cooke argued that the bank, "which has exclusive control of the information that might establish plaintiff's cause of action, does not itself know what is the cost per transaction for processing returned checks. Defendant should not be permitted to exploit this exclusivity and self-created ignorance to defeat plaintiff's action. . . ."<sup>84</sup>

The California Courts that have addressed the legality of NSF fees have been more detailed in their treatment of the available claims and defenses. *Hoffman v.*

73. 92 A.D.2d 786, 459 N.Y.S.2d 781 (1983), *aff'd*, 61 N.Y.2d 869, 462 N.E.2d 1182, 474 N.Y.S.2d 464 (1984).

74. *Id.* at 787-88, 459 N.Y.S.2d at 782-83.

75. *Id.* at 787, 459 N.Y.S.2d at 782-83.

76. *Id.* at 787, 459 N.Y.S.2d at 783. The maximum fees set by the Banking Board which may be imposed upon drawers and payees of NSF's were \$7.00 and \$1.25, respectively. *Id.* at 788 n.\*, 459 N.Y.S.2d at 783 n.\* (Kupferman, J.P., dissenting). The court's recognition of the independence of national banks from state regulation dramatizes the necessity of federal legislation regulating NSF check fees.

77. *Id.* at 788, 459 N.Y.S.2d at 783 (Kupferman, J.P., dissenting).

78. *Id.*

79. *Id.* at 789, 459 N.Y.S.2d at 783-84.

80. 61 N.Y.2d 869, 462 N.E.2d 1182, 474 N.Y.S.2d 464 (1984).

81. *Id.* at 871, 462 N.E.2d at 1183, 474 N.Y.S.2d at 465.

82. *Id.* at 872, 462 N.E.2d at 1184, 474 N.Y.S.2d at 466. It is perhaps more accurate to say that the U.C.C. contemplates the *occurrence* of overdrafts rather than their "use." However, regardless of the favored terminology, it must be recognized that the U.C.C. also contemplates forgery, fraud, and theft. Yet, these acts are in no way legitimized.

83. *Id.* at 871, 462 N.E.2d at 1183, 474 N.Y.S.2d at 465.

84. *Id.* at 873, 462 N.E.2d at 1184, 474 N.Y.S.2d at 466 (Cooke, C.J., dissenting).

*Security Pacific National Bank*<sup>85</sup> went to trial on the issue of “whether there was an implied covenant in the depositors’ contracts with [the] Bank that the depositors would not write overdrafts.”<sup>86</sup> The Los Angeles County Superior Court directed a verdict for the defendant bank, holding that since no implied covenant was shown, an NSF fee could not be termed a penalty for breach of contract.<sup>87</sup> The Second District Court of Appeal affirmed this decision, ruling that the writing of an NSF check is to be treated as “an application for advance credit.”<sup>88</sup>

In *Shapiro v. United California Bank*,<sup>89</sup> the Second District Court of Appeal conceded that the testimony of the plaintiffs’ expert “may have been sufficient to establish that [the bank] considered it an obligation of plaintiffs not to write NSF checks,”<sup>90</sup> yet refused to recognize “plaintiffs’ implied promise not to write NSF checks.”<sup>91</sup> Although the court did not explain this reasoning, it appears to have defined and differentiated between the bank’s reasonable expectations and those of the depositors, thus reforming the existing contract to suit the bank’s present needs. If the bank actually recognized an obligation of depositors to refrain from writing NSF checks, then testimony by a depositor that this obligation was expected and assented to at the time of contract formation would demonstrate a “meeting of the minds”<sup>92</sup> sufficient to establish an implied promise not to write NSF checks.

In *Perdue v. Crocker National Bank*,<sup>93</sup> a depositor advanced the claim that the bank’s charge for NSF checks constituted a penalty for breach of contract.<sup>94</sup> In addition, the complaint outlined several other causes of action, all of which were dismissed by the First District Court of Appeal.<sup>95</sup> The first claim for relief set forth in *Perdue* was that the signature card agreement<sup>96</sup> did not “constitute a valid contract to serve as a basis for imposing NSF charges.”<sup>97</sup> The court rejected this claim, noting that “the bank’s rules and regulations specifying the charges [we]re incorporated into the signature card agreement.”<sup>98</sup> This conclusion, of course, denotes the court’s presumption that the bank complied with the requisites of contract formation.<sup>99</sup>

85. 121 Cal. App. 3d 964, 176 Cal. Rptr. 14 (1981).

86. *Id.* at 968, 176 Cal. Rptr. at 16.

87. *Id.*

88. *Id.* at 969, 176 Cal. Rptr. at 16.

89. 133 Cal. App. 3d 256, 184 Cal. Rptr. 34 (1982).

90. *Id.* at 262, 184 Cal. Rptr. at 38.

91. *Id.* (emphasis in original).

92. The “meeting of the minds” required to make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which from all the circumstances should be known.

BLACK’S LAW DICTIONARY 886 (5th ed. 1979).

93. 141 Cal. App. 3d 200, 190 Cal. Rptr. 204 (1983). *Perdue v. Crocker National Bank* is currently pending before the California Supreme Court.

94. *Id.* at 209, 190 Cal. Rptr. at 211; see also *supra* text accompanying notes 60–92.

95. 141 Cal. App. 3d 200, 209, 190 Cal. Rptr. 204, 211 (1983).

96. See generally *supra* notes 16–26 and accompanying text (When opening an account, the depositor is typically asked to sign a signature card to provide the bank with a handwriting sample. The signature card often contains a promissory statement, whereby the depositor’s signature represents an acquiescence to the “rules, regulations, practices, and charges” of the bank.).

97. 141 Cal. App. 3d 200, 203, 190 Cal. Rptr. 204, 207 (1983).

98. *Id.* at 204, 190 Cal. Rptr. at 207.

99. See *supra* text accompanying notes 16–35.

The plaintiff next challenged the signature card as an unenforceable contract of adhesion,<sup>100</sup> claiming that “depositors receive inadequate notice that execution of the signature card subjects them to NSF charges.”<sup>101</sup> In addition, the plaintiff asserted that “the great disparity between the NSF charge and the bank’s actual cost of processing NSF checks” resulted in substantive unconscionability.<sup>102</sup> The court rejected these arguments, finding that the NSF fee provision was within the “reasonable expectations” of the depositor,<sup>103</sup> and that “as a matter of law . . . the alleged disparity between the cost of processing and the charges actually imposed d[id] not rise to the level of substantive unconscionability.”<sup>104</sup> These conclusions were reached based upon the plaintiff’s conceded knowledge of the fee before writing an NSF check<sup>105</sup> and upon a recognition that the “[a]ppellant could have easily avoided the NSF charge by simply refraining from writing checks on an account with insufficient funds.”<sup>106</sup> This reasoning, as well as the characterization of an NSF check as “an application for advance credit,”<sup>107</sup> ignores what is acknowledged even within the banking industry as the main cause of NSF checks—inadvertence.<sup>108</sup> A realistic look at NSF check writing compels a recognition that it is seldom done consciously. Typically, a check is written on insufficient funds *by mistake* and a fee is assessed by the bank, both to cover its costs and punish the depositor.<sup>109</sup> Describing an NSF check as an “application for advance credit” might be appropriate when a depositor, because of a personal relationship with a banker providing a reasonable expectation that the check will be honored, writes a check on funds known to be insufficient.<sup>110</sup> Otherwise, the writer of an NSF check has no reason to believe that the bank will grant any credit by honoring the check.<sup>111</sup> Instead, credit in an NSF transaction

100. 141 Cal. App. 3d 200, 205, 190 Cal. Rptr. 204, 208 (1983). The term “contract of adhesion” was coined in Patterson, *The Delivery of a Life Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919). Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 n.11 (1943). It describes a “‘standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.’” Perdue v. Crocker Nat’l Bank, 141 Cal. App. 3d 200, 205, 190 Cal. Rptr. 204, 208 (1983)(quoting Graham v. Scissor-Tail, Inc., 28 Cal. 3d 807, 817, 623 P.2d 165, 171, 171 Cal. Rptr. 604, 610 (1981)).

101. 141 Cal. App. 3d 200, 205, 190 Cal. Rptr. 204, 208 (1983).

102. *Id.*

103. *Id.* at 206, 190 Cal. Rptr. at 209.

104. *Id.* at 208, 190 Cal. Rptr. at 210–11.

105. *Id.* at 208, 190 Cal. Rptr. at 210. Presumably, a different case would be presented if a depositor was unaware that the subscription of a signature card constituted acquiescence to a bank’s fee schedule. *See supra* text accompanying notes 19–21.

106. 141 Cal. App. 3d 200, 208, 190 Cal. Rptr. 204, 210 (1983).

107. *Id.* at 204, 190 Cal. Rptr. at 208; Shapiro v. United Cal. Bank, 133 Cal. App. 3d 256, 263, 184 Cal. Rptr. 34, 38 (1982); Hoffman v. Security Pac. Nat’l Bank, 121 Cal. App. 3d 964, 969, 176 Cal. Rptr. 14, 16 (1981).

108. Telephone interview with Al Green, Returns Department of Bank One, Columbus, Ohio (Jan. 30, 1984).

109. The “deterrent” argument advanced by banks in support of their fees acknowledges the punitive nature of NSF check charges. As stated by one banker, “overdraft fees are not strictly charges for service, but ‘character building’ punishments—so that is probably why we feel much more righteous about pushing them up high enough to more than cover our costs.” Goldberg, *Researching Banking Fee Services*, 151 BANKERS MAG. 83, 84 (No. 2 1968). *But see supra* text accompanying notes 51–52.

110. Many banks offer overdraft privileges that allow a depositor to write a check on insufficient funds for a prepaid fee. Under this type of program, an interest charge based on the amount of the overdraft is assessed on the account. If NSF check fees are determined to be at an unconscionable level, their imposition may be considered a bad faith attempt by banks to force consumers to purchase overdraft protection.

111. According to an official of Bank One, that bank has a policy of honoring overdrafts of less than \$25 to reduce its costs of processing. However, since this policy is not generally made public, it does not serve to generate consumer expectations that NSF checks will be honored. In addition, the customer is still assessed a \$12 service charge. Telephone interview with Al Green, Returns Department of Bank One, Columbus, Ohio (Jan. 30, 1984).

comes most often, albeit unwillingly, from the person to whom the NSF check is given.<sup>112</sup>

Another factor demonstrating the dissimilarity between an NSF check and an application for credit is the large amount of the "application fee" levied on the NSF check writer. It is difficult to believe that a depositor purposely would write an NSF check in an effort to obtain credit, with the knowledge that, notwithstanding the minute chance of the check being honored, a substantial forfeiture disguised as an "application fee" will be assessed.<sup>113</sup> Only a very large check amount or desperate need could justify this action by a depositor.<sup>114</sup> Thus, the characterization of an NSF check as "an application for advance credit" is ill-founded.

The courts, in the wake of a legislative movement toward deregulation of the banking industry, have shown a clear reluctance to disturb the way banks establish service charges. Perhaps this wariness extends from confidence in the competitive forces in the marketplace. However, assuming a particularly onerous fee premised upon a weak contractual arrangement, a depositor might well triumph in a suit against a bank. In summary, although there is yet life in the controversy surrounding NSF check fees and other bank service charges, an equitable and timely resolution of this controversy will probably depend on federal legislative action.

#### IV. POLICIES FOR LEGISLATIVE CONSIDERATION

##### A. *Competition in Banking as it Relates to Consumer Behavior*

Few would dispute that the banking industry has grown increasingly competitive in recent years.<sup>115</sup> Yet, despite legislative efforts to deregulate banking and improve its efficiency, the industry continues to retain a somewhat "localized" appearance. According to one commentator, "Most of us shop for a bank the way we look for a mailbox—the nearest one will do. . . . 'Convenience' is so important to us that we will follow it blindly down the path to poor service and investment."<sup>116</sup> Not-

112. The credit extended to an NSF check writer by the check's payee consists of the purported value of the check until it is finally honored.

113. Considering the short-term nature of a credit transaction that may arise from the writing of an NSF check, the relatively large amount charged as an "application fee" may implicate unconscionability. *See supra* text accompanying notes 22–44. If an NSF check charge is instead characterized as a "finance charge," it must satisfy state usury laws and the Federal Truth-in-Lending Act. *See infra* note 118.

114. The only other reasonable explanation for the writing of an NSF check to obtain credit is that the depositor was unaware of the fee that would be imposed. This, however, would indicate a breakdown in the supposed contractual understanding between the bank and its customer.

115. *See* articles cited *supra* note 3.

116. Blyskal, *How Good is Your Bank?*, N.Y., Mar. 7, 1983, at 28, 31. When depositors were asked in a recent survey the primary reason for establishing a specified banking relationship, they gave the following responses:

##### *Among Bank Customers*

1st	location of facility	33.2%
2nd	variety of services	22.9%
3rd	general convenience	18.8%
4th	established previously	11.6%
5th	had contact there—friend or co-worker	5.1%
6th	interest rates	3.0%
7th	other/not sure	5.4%

withstanding this phenomenon of typical consumer behavior, the industry should be susceptible to cost comparisons by consumers. Therefore, consumer protection legislation is necessary to inject an equality of bargaining power into the bank-depositor relationship.

A legislative study would determine whether NSF check fees provide a greater than reasonable profit to banks. If this is the case, the economic effect may be either (1) a windfall profit for banks or (2) an excess revenue that is used to offset the costs of other banking services.<sup>117</sup> The former is undesirable as a matter of economic efficiency, and the latter, while not inherently objectionable, may become so if the burden is not proportionately distributed among the users of banking services. For example, the cost of consumer checking and other banking functions should not be borne by those having the least opportunity to protect themselves in the marketplace.<sup>118</sup>

Through consumer protection legislation requiring banks to price services in

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*Among Thrift Customers*

1st	interest rates	25.6%
2nd	established previously	22.1%
3rd	location of facility	19.1%
4th	variety of services	14.2%
5th	general convenience	11.9%
6th	had contact there—friend or co-worker	3.5%
7th	other/not sure	3.6%

Unidex Corporation, Customer Service Usage Survey (Part II) (June 1982), *reprinted in* AMERICAN BANKERS ASSOCIATION, STATISTICAL INFORMATION ON THE FINANCIAL SERVICES INDUSTRY 205 (2d ed. 1983).

117. *See, e.g.*, Diamond Savings & Loan Co., Supercheck Checking and Pay-by-Phone Disclosure (May 1983). Interestingly, while Diamond offers free checking, its NSF fee is \$15 "per item, per each time returned." *Id.* This method of pricing disguises the costs of checking for purposes of interbank comparison. Thus, an unsuspecting consumer might be induced to take advantage of a "bargain" rate for the basic service of checkwriting privileges only to later become a victim of a predatory method of revenue production. This result demands justification in the form of a cost accounting analysis by the banking industry.

118. Consumer protection has long been rationalized as necessary to remedy the inequality of bargaining power that often confronts consumers in business dealings. Usury statutes have been enacted to prevent the extraction of excessive interest rates. The Federal Consumer Credit Protection Act (CCPA), alternatively, provides guidelines for several other aspects of credit transactions including some which may be applicable to NSF check fees. 15 U.S.C. §§ 1601-1693 (1982).

A bank charge for an "overdraft item" (an NSF check that is paid by the bank upon which it is written) that exceeds the fee for a "returned item" (an NSF check upon which payment is refused) would constitute a finance charge within the meaning of Title I of the CCPA, "Truth-in-Lending." *See* 12 C.F.R. § 226.4(b)(2) (1984); 1 CONSUMER CRED. GUIDE (CCH) ¶ 3222.11 comment 4(b)(2) (1984). Thus, a bank would have to comply with the specific disclosure provisions of the Act, a particularly burdensome task. 12 C.F.R. §§ 226.5-226.9 (1984).

Courts have consistently agreed that an NSF check is to be treated as "an application for advance credit." *See* cases cited *supra* note 107. Thus, Title VII of the CCPA, the Equal Credit Opportunity Act (ECOA), may be relevant to a bank's decision to honor or dishonor an NSF check. 15 U.S.C. § 1691 (1982). According to Regulation B, which explains the ECOA, a credit decision may not be made "on a prohibited basis." 12 C.F.R. § 202.6(a) (1984). This means, *inter alia*, that a bank may not consider "race, color, religion, national origin, sex, marital status, . . . age," or "the fact that all or part of the applicant's income derives from any public assistance program." 12 C.F.R. § 202.2(z) (1984). Regulation B further defines the Act's scope by noting that "[t]he legislative history of the Act indicates that the Congress intended an 'effects test' concept . . . to be applicable to a creditor's determination of creditworthiness." *Id.* § 202.6(a) n.7 (1984). In other words, a violation of the Act may be proved merely by showing a disproportionate effect on a group possessing a characteristic which constitutes a prohibited basis for a credit decision. A pre-trial discovery examination of the NSF checks honored and dishonored by a bank might well show an impermissible relationship between credit refusals and one or more of the factors outlined as prohibited bases by the ECOA. For example, an empirical study might indicate that minority depositors are less likely than Caucasian depositors to have NSF checks honored. In summary, the characterization of NSF checks as credit applications may backfire on the banking industry.

relation to their costs, consumers would be given an opportunity to compare alternatives on a level that is visible to them. When opening a checking account, consumers rarely inquire about the charges levied upon NSF checks.<sup>119</sup> Instead, they typically limit their decisionmaking criteria to monthly service charges<sup>120</sup> and convenience.<sup>121</sup> Thus, the imposition of an NSF check fee often comes in the form of a rude awakening—few depositors anticipate the fee because of the accidental nature of most NSF checks.<sup>122</sup> The failure of banks to provide and explain fee schedules to depositors when they open checking accounts often compounds the problem.<sup>123</sup>

### B. Fees as a Deterrent

One of the main claims that has been advanced in justification of bank NSF check fees is that these charges provide a necessary deterrent to the writing of NSF checks. Both the Comptroller of the Currency and the New York Legislature have adopted this policy.<sup>124</sup> The effectiveness of a large fee as a deterrent, however, remains questionable. According to an official of Bank One, there is “absolutely [no]” deterrent effect provided by the bank’s fifteen dollar NSF check fee.<sup>125</sup> Similarly, most respondents to a banking trade association’s survey stated that “higher fees would not reduce the number of return items.”<sup>126</sup>

According to Manuel Abascal, a Berkeley attorney who has been active in his opposition to NSF check fees, the banks “keep the charges at the optimal level. . . . At \$100, no one would write NSF checks, while at a dollar or less, the banks wouldn’t make any money.”<sup>127</sup> Indeed, it is evident from the number of checks accidentally drawn on insufficient funds that the fees charged by most banks for NSF checks are not high enough to frighten depositors into taking the extra precautions necessary to avoid them.

It is not entirely clear that a deterrent to writing NSF checks is even necessary. Arguably, the desire of depositors to maintain good relations with their payees provides them with sufficient incentive to avoid writing NSF checks. In addition, many merchants impose their own handling charges on writers of NSF checks, independent of bank charges. Finally, most states provide criminal penalties for the intentional

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119. Telephone interview with Al Green, Returns Department of Bank One, Columbus, Ohio (Jan. 30, 1984). Syndicated columnist Jane Bryant Quinn characterizes the situation as follows:

Many institutions emphasize low fees on the matters you care about, while raising the fees you don’t pay attention to. “When offering NOW accounts,” a Charleston Federal [Savings & Loan] official told *S&L News*, “remember that customers do not look at bad-check fees. They’re looking for the best deal in a minimum balance and monthly charges.” Therefore, he concludes, “there is a substantial amount” of money to be made in high fees for bad checks and similar backroom services.

Quinn, *At Many Banks and Savings and Loans, Higher Fees Go Along with Higher Rates*, Chi. Tribune, Feb. 3, 1984, § 3, at 1, col. 2.

120. See sources cited *supra* note 119.

121. See *supra* note 116 and accompanying text.

122. See *supra* note 108 and accompanying text.

123. See *supra* text accompanying notes 16–22.

124. N.Y. BANKING LAW § 108(8)(c) (McKinney Supp. 1983); Interpretive Ruling Concerning National Bank Service Charges, 48 Fed. Reg. 54,319, at 54,320 (1983) (to be codified at 12 C.F.R. pt. 7); see *supra* notes 6, 70–71 and accompanying text.

125. Telephone interview with Al Green, Returns Department of Bank One, Columbus, Ohio (Jan. 30, 1984).

126. W. STAFEL, *supra* note 44, at 28.

127. *Banks Fight Class Actions on Surcharges*, 3 CAL. LAW. 14, 15 (Jan. 1983).

writing of NSF checks, intent often being presumed if the check is not covered within a specified period of time following notification.<sup>128</sup> In conclusion, there is obviously little to be gained through the writing of NSF checks; thus, the need for bank fees as a deterrent is overestimated.

It has been suggested that an alternative to the current system that allows bank charges for NSF checks might be a statutorily prescribed civil penalty to be collected by banks and submitted to the state.<sup>129</sup> An economic analysis of this approach would be necessary to determine its propriety. If banks are now gaining windfalls as a result of their NSF charges, society would probably experience greater benefits if the government received this money in the form of a civil penalty. On the other hand, if competition among banks forces them to redistribute NSF check fees to cover the costs of other services,<sup>130</sup> a statutory penalty would constitute a marginal cost to society by simply increasing the aggregate costs of banking. In essence, the penalty would amount to another form of taxation.

## V. CONCLUSION

While the cost to an individual of an NSF check fee or other bank service charge is seemingly insignificant, the collective cost to society is staggering. The imposition of high NSF check fees constitutes an unconscionable penalty, generating unreasonably great profits for banks, usually at the expense of customers with little bargaining power in the marketplace.

Judicial, legislative, and administrative attempts to resolve the controversy surrounding these fees have been largely unsuccessful. Thus, the time is ripe for a definitive ruling by Congress. As the creator of much of the regulatory scheme for financial institutions in this country, our Federal Legislature has assumed the responsibility for our banking system's proper maintenance. While deregulation has brought increased competition to the banking industry, safeguards are necessary to assure that the benefits of deregulation accrue to all.

*Daniel K. Weiss*

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128. Comment, *Insufficient Funds Checks in the Criminal Area: Elements, Issues, and Proposals*, 38 Mo. L. Rev. 432, 442-43 (1973).

129. Comment, *Bank Charges for Insufficient Funds Checks*, 69 CALIF. L. REV. 599, 609 (1981).

130. Of course, a bank's use of NSF fees to attract and maintain the accounts of high-balance depositors that are largely exempt from these charges should be prohibited. See *supra* text accompanying note 117.