IN THE SUPREME COURT
STATE OF FLORIDA

WARREN FINANCE, INC.,
a Florida corporation,

Petitioner,

vs.

BARNETT BANK OF JACKSONVILLE,
N.A., a national banking
association,

Respondent.

CASE NO. **73,350**

APPEAL FROM THE DISTRICT COURT OF APPEALS
FOR THE FIRST DISTRICT, STATE OF FLORIDA

ANSWER BRIEF OF BARNETT BANK OF JACKSONVILLE, N.A.

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STATEMENT OF THE CASE AND FACTS

Appellee, Barnett Bank of Jacksonville, N.A. ("Barnett Bank"), disagrees with certain areas of the statement of the case and facts contained in the initial brief of appellant, Warren Finance, Inc. ("Warren Finance"). Warren Finance misstates the holdings of the First District Court of Appeal and omits relevant facts as they are viewed in a light most favorable to Barnett Bank.

The First District Court of Appeal's opinion contains three separate holdings. First, the court held:

> It is our view that in a cashier's check an issuing bank makes a promise to the named payee that it will honor the check without reservation when presented by a payee who is a holder in due course. Where the payee participates in a fraud upon the bank in the check's issuance, then the payee would not be a holder in due course and the issuing bank could raise the defense of failure of consideration or other potential defenses available under sections 673.305-.306, Florida Statutes. Curtiss National Bank, 427 F.2d at 395; Sani-Serv, 244 So.2d at 509. However, any claim or defense of the check's purchaser can not be asserted to stop payment of a check presented by the named payee. In the hands of the payee, a cashier's check would be the next thing to cash as the bank could only defend on the basis of a fraud upon the bank itself. Any issues related to the underlying transaction between the purchaser and payee could not be raised in defense of dishonor.

Barnett Bank of Jacksonville, N.A. v. Warren Finance, Inc., 532 So.2d 676, 680 (Fla. 1st DCA 1988).

Second, the district court held:

> [T]hat a bank could upon the payee's request refuse to pay a cashier's check in the hands of a party who obtained the check by endorsement. . . . This result would insure the continuing treatment of the cashier's

> check as the equivalent of cash in the hands of a payee with the status of a holder in due course. Any other holder would take the check subject to certain defenses, of the bank, where the payee is not a holder in due course, and of a payee, where the endorsee is not a holder in due course. The defenses and claims of the original purchaser would never be available to deny payment.

Id.

Third, the district court held:

> Under section 673.306(4) [of the Florida Statutes], Barnett may, by naming Redan as a third party, assert certain claims Redan could assert against Warren, such as lack of consideration or fraud in the underlying transaction. Further, by issuing replacement cashier's checks to Redan, Barnett became subrogated to those claims which Redan had against Warren Finance and may therefore raise them as if Redan were in the litigation.

Id. at 680-81 (footnotes omitted).

The import of the district court's opinion is contained in the specificity of these holdings. First, the court found that a bank may assert its own defenses against a payee if the payee is not a holder in due course. However, a bank may not assert the defenses of a third party purchaser against the named payee. Second, a bank may assert both its own defenses and those defenses of a payee against a subsequent holder or endorsee when the subsequent holder or endorsee is not a holder in due course. Third, under section 673.306(4) of the Florida Statutes, an endorsee or holder who is not a holder in due course takes the instrument subject to the claim of any third person if that third person defends on behalf of the bank.

In this particular case, the First District Court of Appeal found that, if Warren Finance were not a holder in due course, Barnett Bank could raise both its own defenses and Redan Engineering, Inc.'s ("Redan") third person claims due to Barnett Bank's issuance of replacement checks to Redan. The court found Barnett Bank thereby became subrogated to Redan's claims against Warren Finance. Id. at 681-82.

Warren Finance's motion for rehearing was denied but the First District Court of Appeal certified the following question as one of great public importance: "May the issuing bank assert the defenses of a payee or endorsee against the right of a subsequent endorsee to receive payment on a cashier's check?'' This certified question does not encompass or distinguish all of the holdings of the district court. First, it does not address the bank's right to dishonor an instrument in the hands of a payee who is not a holder in due course. Second, the certified question makes no distinction concerning whether the subsequent holder or endorsee is a holder in due course or not. Third, the question makes no mention of the bank's right to assert its own defenses, in addition to the defenses of a payee or endorsee, against a subsequent holder who is not a holder in due course.

The First District Court of Appeal's opinion drew distinctions based upon both the status of the holder of the check and whose defenses were being asserted. As Barnett

Bank's brief will discuss, Florida's Uniform Commercial Code also makes the same distinctions that are contained in the district court holdings.

Warren Finance's statement of the facts is also deficient because it omits facts as they are viewed in a light most favorable to Barnett Bank. Since the trial court granted summary judgment in favor of Warren Finance, this court, as well as the trial court, is required to view the facts in a light most favorable to Barnett Bank. Warren Finance's statement of the facts is based almost entirely on the deposition of its principal, Ellis Warren. Omitted from Warren Finance's statement are Redan's allegations of fraud by Warren Finance in regard to obtaining the cashier's checks in return for its promise to advance funds to cover Redan's outstanding checks to suppliers, materialmen, and others. Also omitted are Redan's allegations that Warren Finance was charging criminal usury in the amount of 10% per month. Accordingly, Barnett Bank believes that it must restate the facts and that its statement of the facts should be accepted by this court for purposes of appeal of the trial court order granting summary judgment in Warren Finance's favor.

Redan had a financing arrangement with Warren Finance. Depo. of Janet Odom at 25. Janet Odom, Redan's bookkeeper, has claimed that Warren Finance was charging Redan and Johns & Sasser interest at 10% per month for financing, and that such interest was always paid in cash. Id. at 13.

On August 21, 1986, Blosam Contractors, Inc. ("Blosam"), and T. Butler Company ("Butler"), paid Redan a total of $221,443.35 for construction work Redan performed for Blosam and Butler. Id. at 35-36. Blosam delivered two checks to Janet Odom: (1) a check payable to Redan in the amount of $189,674.37; and (2) a check payable to Johns & Sasser, Inc., a predecessor of Redan, in the amount of $26,652.90. Id. at 13; Depo. of Ellis Warren at Exhibit 20. Butler delivered a check to Redan in the amount of $5,116.08. Id. at Exhibit 21.

Upon receipt of the checks from Blosam and Butler, Janet Odom and her husband, John Odom, who was one of the principal officers and owners of Redan, went to Warren Finance's offices in Jacksonville. Depo. of Janet Odom at 40. They met with Ellis Warren, the principal of Warren Finance. Id. at 41.

According to Janet Odom and John Odom, before any checks were handed over to him, Ellis Warren promised that in exchange for the Blosam and Butler checks he would immediately advance funds of an equivalent amount to Redan under their financing agreement. This would allow Redan to deposit those funds in its bank account with the Florida National Bank in order to cover checks Janet Odom had already written to suppliers, materialmen and others. Id. at 42. Redan endorsed the checks only after Ellis Warren had agreed to the advance of new funds. Id. at 42, 43.

Ellis Warren, after endorsing the checks on Warren Finance's behalf, decided the checks should be exchanged for

cashier's checks. Id. at 48. Accordingly, Ellis Warren and Janet Odom, along with John Odom, traveled in one vehicle to the downtown Jacksonville office of Barnett Bank, for the purpose of obtaining cashier's checks for those three checks. Id. at 49.

At Barnett Bank, Ellis Warren asked that the cashier's checks be made payable to Warren Finance, but Barnett Bank would not issue the checks in that manner because Warren Finance was not furnishing the money for the checks. Id. at 51. Instead, Barnett Bank made the cashier's checks totaling $221,443 payable exactly as the original checks had been made payable, i.e., to Redan and Johns & Sasser. Id. at 51, 52. Janet Odom then endorsed the cashier's checks in blank on behalf of Redan and Johns & Sasser and delivered them to Ellis Warren. Id. at 56.

Ellis Warren, Janet and John Odom immediately went to the Southeast Bank in Jacksonville where Ellis Warren deposited the cashier's checks into Warren Finance's account. Id. at 57. Then they all traveled back to Warren Finance's office. Id.

At Warren Finance's office, Janet and John Odom again asked Ellis Warren for the advance of funds which was needed to cover the checks she had written to suppliers, materialmen and others, and which Ellis Warren had previously agreed to advance. Id. at 58. Instead of advancing the funds under the financing agreement, Ellis Warren told the Odoms he would not

advance any more funds to Redan under any circumstances, even though an hour before he had agreed to do so. Id. at 59-60.

Shocked at the refusal of Warren Finance to advance funds to cover the outstanding checks that Janet Odom had already written on the Redan account at Florida National Bank, the Odoms immediately went to the office of their attorney, Francis Jerome Shea. Id. at 61.

While at their attorney's office in Jacksonville, Janet Odom telephoned Blosam's controller, Donald L. Smith, and explained the foregoing situation. Id. at 64. Mr. Smith called Barnett Bank and spoke to Ms. Lori Ann Rennhack, a bank officer, and explained the situation as he had learned it from Janet Odom. Depo. of Lori Ann Rennhack at 6; Depo. of Donald Smith, at 16, 17.

Ms. Rennhack called Janet Odom while she was in the office of her attorney and spoke with her at length. Depo. of Lori Ann Rennhack at 11. Janet Odom told her the same story as Blosam's controller, Mr. Smith, had. Id. Ms. Rennhack then ordered payment stopped on the cashier's checks because of the alleged fraud perpetrated against Redan by Warren Finance. Id. The Odoms provided all proper written requests that payment of the checks be stopped. Depo. of Kaye Hill at 16. However, Barnett Bank as issuer of the checks was the entity that dishonored the checks. Depo. of Lori Ann Rennhack at 13.

The cashier's checks were dishonored by Barnett Bank on the following Monday, August 25, 1986. Depo. of Janet Odom at 71.

On the next day, Barnett Bank issued three new cashier's checks in the same amounts and to the same payees as the previous checks which had been dishonored. Those checks were delivered to Janet Odom. Id. at 73. She deposited those checks in Redan's Florida National bank account to cover the checks she had written to Redan's suppliers. Id. at 73.

On October 3, 1986, Warren Finance sued Barnett Bank for damages for failure to pay the three cashier's checks it dishonored. (R. at 1-7)

On October 17, 1986, an involuntary petition for bankruptcy was filed against Redan. Redan is currently in bankruptcy.

Barnett Bank filed an answer and affirmative defenses to Warren Finance's amended complaint. (R. at 33-36) Among its affirmative defenses, Barnett Bank contended that Warren Finance: (1) was not a holder in due course of the cashier's checks; (2) used fraud to obtain the cashier's checks from Redan; (3) was charging a criminally usurious interest rate; and (4) failed to give consideration for the cashier's checks. (R. at 34-36)

The trial court granted Barnett Bank's motion to add Redan as a third party on March 6, 1987. (R. at 61) Redan did thereafter, and before the summary final judgment was entered in favor of Warren Finance, make an appearance in the case and agreed to defend Barnett. (R. at 62-63) Redan also filed an answer and affirmative defenses against Warren Finance. (R. at 65-66)

Ten days later, on March 16, 1987, without a written opinion, the trial court entered a summary final judgment for $236,294.55, the amount of the three cashier's checks plus interest, in favor of Warren Finance and against Barnett Bank. (R. at 71)

On appeal, the First District Court of Appeal reversed and remanded the case because issues of fact remained as to whether Warren Finance was a holder in due course and was entitled to have the checks honored. The First District Court of Appeal denied Warren Finance's motion for rehearing but certified the previously quoted question to this court.

SUMMARY OF ARGUMENT

Barnett Bank may dishonor the cashier's checks presented for payment by Warren Finance which was not a holder in due course. Because Warren Finance was not a holder in due course, subsections 673.306(1)-(3) of the Florida Statutes subject Warren Finance to the defenses Barnett Bank may assert against Redan or any other holder. In addition, because Warren Finance was not a holder in due course, subsection 673.306(4) of the Florida Statutes subjects Warren Finance to the defenses Redan may assert against Warren Finance if Redan defends on Barnett Bank's behalf.

Recent cases properly apply the Uniform Commercial Code to the issue of when a bank can dishonor its cashier's check. The analysis depends upon whether the holder is a holder in due course. The First District Court of Appeal properly limited a bank's right to dishonor its cashier's checks to those situations where the holder was not a holder in due course.

A bank may dishonor a cashier's check presented by a non-holder in due course if it can establish any of the defenses under section 673.306 of the Florida Statutes that it has against payment of the check to the payee. As a non-holder in due course, Warren Finance has no greater rights to payment on the cashier's checks than did Redan. In other words, if Redan cannot require Barnett Bank to pay the checks, Warren Finance also cannot. Redan could not require payment of the

cashier's checks that are subject to this appeal because it requested the checks to be dishonored and received replacement checks. Accordingly, Warren Finance also cannot require payment.

Under section 673.306(4) of the Florida Statutes, Redan may assert its defenses on Barnett Bank's behalf against Warren Finance, a non-holder in due course. Barnett Bank may name Redan as a third party and then, under principles of subrogation, assert Redan's claims against Warren Finance.

Warren Finance's policy argument should be rejected. The use of cashier's checks in the business world would not be severely altered if the district court's opinion were affirmed. The opinion was confined to the very narrow subset of situations where the holder of the cashier's check is not a holder in due course.

The best policy argument for allowing a bank to dishonor a cashier's check in the hands of one who is not a holder in due course is presented by the facts involved in this case. Neither the case law of Florida, the Florida Uniform Commercial Code nor Barnett Bank should countenance or assist a holder who has perpetrated a fraud and engaged in criminal activity in obtaining a cashier's check. In addition, numerous cases have rejected the policy arguments made by Warren Finance when the party involved is not an innocent holder in due course.

Warren Finance's acceptance argument should also be rejected. An issuing bank may dishonor the cashier's check in the hands of one who is not a holder in due course, even if issuance of a cashier's check constitutes acceptance under the Uniform Commercial Code. The stop payment provisions of section 674.303 of the Florida Statutes are inapplicable to a cashier's check. In addition, final acceptance has not taken place under section 673.418 of the Florida Statutes when the cashier's check is in the hands of a non-holder in due course. Finally, acceptance of a cashier's check does not deprive a bank from asserting its defenses under section 673.306 of the Florida Statutes.

Warren Finance was not entitled to summary judgment. The First District Court of Appeal properly reversed and remanded the trial court's grant of summary judgment in Warren Finance's favor. This court should affirm the First District Court of Appeal.

I. THE ISSUE OF WHETHER THE HOLDER (WARREN FINANCE) OF A CASHIER'S CHECK IS A HOLDER IN DUE COURSE OR NOT IS MATERIAL TO DETERMINING WHETHER A BANK (BARNETT BANK) MAY DISHONOR THE CHECK.

Warren Finance's brief and Judge Ervin's dissenting opinion on the denial of rehearing argue that the issue of whether the holder of a cashier's check is a holder in due course or not is immaterial to whether a bank may dishonor the check. The First District Court of Appeal's opinion, as stated previously, distinguished the right of a bank to dishonor a cashier's check based upon whether the holder was a holder in due course or not. The district court held that when the check was in the hands of a holder in due course, a bank could not dishonor a cashier's check. Barnett Bank of Jacksonville, N.A. v. Warren Finance, Inc., 532 So.2d at 680. Barnett Bank fully agrees with this position and argued in the district court that this was the proper interpretation of Florida's Uniform Commercial Code.

Barnett Bank also argued in the district court that the outcome was different when the holder of the cashier's check was not a holder in due course. Once again, the court agreed with Barnett Bank's position. Id.

Contrary to the continued assertions of Warren Finance, the First District Court of Appeal is not alone in making a distinction concerning a bank's right to dishonor a cashier's check based upon the status of the holder. Other jurisdictions have allowed a bank to dishonor (or, more imprecisely, stop

payment on) a cashier's check by asserting its own and the purchaser's defenses if the payee or subsequent holder is not a holder in due course. Recently, the Florida Fifth District Court of Appeal in Crosby v. Lewis, 523 So.2d 1154 (Fla. 5th DCA 1988), made this very point and cited to a number of cases in this regard. In its 1988 opinion, the Fifth District Court of Appeal stated:

> However, some other jurisdictions also applying the U.C.C. allow a bank to stop payment on a cashiers check issued by it, by asserting the purchaser's defenses if the payee or holder is not a holder-in-due course. See, e.g., Banco Ganadero v. Agricola, S.A. Agua Prieta, Sonora, Mexico v. Society National Bank of Cleveland, 418 F.Supp. 520 (N.D. Ohio 1976); Laurel Bank & Trust Co. v. City National Bank of Connecticut, 33 Conn. Sup. 641, 365 A.2d 1222 (1976); Santos v. First National State Bank of New Jersey, 186 N. J. Super. 52, 451 A.2d 401 (A.D. 1982). Since there is no clear authority in Florida on this point, it will be one of first impression when it is ultimately presented.

Id. at 1157.

The Fifth District Court of Appeal found that it need not address the issue at this time because the purchaser of the cashier's checks, instead of the issuing banks, had been sued. The bank had dishonored, at the request of the purchaser, cashier's checks totalling $100,000. The checks had been made payable to an individual operating a Ponzi or pyramid fraud scheme. The district court found that the purchaser was not liable on the cashier's checks and any action to enforce payment would have to be against the issuing banks. At that time, "the issuing banks may have defenses, as suggested

above." Id. at 1157. Judge Cowar,, however, in his concurrence in part and dissent in part, would have held that: "While certainly a bank cannot properly dishonor its cashier's check as against a holder in due course, a bank has the right, if not a duty, to assist a customer who has purchased its cashier's check in preventing the payee of a cashier's check from successfully perpetrating a fraud on the bank's customer." Id. (Cowart, J., concurring in part, dissenting in part).

Beside the cases cited by the Florida Fifth District Court of Appeal in its 1988 decision in Crosby v. Lewis, the United States Court of Appeals for the Ninth Circuit in its 1988 decision in Farmers & Merchant State Bank v. Western Bank, 841 F.2d 1433 (9th Cir. 1987), utilized an analysis identical to the one that has been advocated by Barnett Bank regarding the proper application of the Uniform Commercial Code to a cashier's check in the hands of a non-holder in due course. The United States Court of Appeals for the Third Circuit in TPO, Inc. v. Federal Deposit Insurance Corporation, 487 F.2d 131 (3d Cir. 1973), has also applied a similar analysis.

Barnett Bank will first set forth the proper statutory analysis under the Florida Uniform Commercial Code. Then Barnett Bank will discuss the relevant case law in support.

Section 673.302 of the Florida Statutes lists the prerequisites for a holder of an instrument to qualify as a

holder in due course. Section 673.302(1) provides:

> (1) A holder in due course is a holder who takes the instrument:
>
> (a) For value; and
>
> (b) In good faith; and
>
> (c) Without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person.

Warren Finance has the burden of proof to establish that it meets all of the prerequisites to qualify as a holder in due course. Section 673.307(3). If Warren Finance fails to meet any one of the requirements of section 673.302(1), it is not a holder in due course.

If Warren Finance were not a holder in due course, then section 673.306 of the Florida Statutes applies. Section 673.306 lists the defenses which are available against a person who is not a holder in due course. The section provides:

> Unless he has the rights of a holder in due course any person takes the instrument subject to:
>
> (1) All valid claims to it on the part of any person; and
>
> (2) All defenses of any party which would be available in an action on a simple contract; and
>
> (3) The defenses of want or failure of consideration, non-performance of any condition precedent, non-delivery, or delivery for a special purpose (s. 673.408); and
>
> (4) The defense that he or a person through whom he holds the instrument acquire it

> by theft, or that payment or satisfaction to such holder would be inconsistent with the terms of a restrictive indorsement. The claim of any third person to the instrument is not otherwise available as a defense to any party liable thereon unless the third person himself defends the action for such party.

If Warren Finance was not a holder in due course, subsections 673.306(1)-(3) subject Warren Finance to the defenses Barnett Bank may assert against Redan or any other holder. In addition, if Warren Finance was not a holder in due course, subsection 673.306(4) subjects Warren Finance to the defenses Redan may assert against it if Redan defends on Barnett Bank's behalf.

The United States Court of Appeals for the Third Circuit in TPO and the United States Court of Appeals for the Ninth Circuit in Farmers & Merchant State Bank have properly analyzed how the Uniform Commercial Code applies with respect to a cashier's check in the hands of one who is not a holder in due course.

The Third Circuit stated:

> We think that a correct analysis of the position of the parties here is that the Bank had engaged to pay the check but, if the plaintiff is not a holder in due course, under § 3-306 and § 3-408 [of the U.C.C.] the Bank or the FDIC is entitled to present all defenses which would be available on a simple contract including one of lack of consideration or fraud.

TPO, Inc. v. Federal Deposit Insurance Corporation, 487 F.2d at 136.

The Ninth Circuit stated:

> One who lacks holder-in-due-course status takes an instrument subject to all claims and defenses enumerated in § 3-306, including "all defenses of any party which would be available in an action on a simple contract." Id. at § 3-306(b).
>
> . . . .
>
> [O]ne who did not qualify as a holder in due course took the instrument "subject to all defenses which could be made against the original payee if he were still the holder of it." . . . We thus conclude that Western is entitled pursuant to U.C.C. § 3-306(b) to assert its defenses against OK, the payee of the cashier's check, unless F & M is a holder in due course.

Farmers & Merchant State Bank v. Western Bank, 841 F.2d at 1442.

These cases, together with the cases cited infra at 26-27, properly apply the Uniform Commercial Code to the issue of when a bank may dishonor its cashier's checks. The analysis depends upon whether the holder is a holder in due course or not. The First District Court of Appeal's holdings properly limited a bank's right to dishonor its cashier's checks to those situations where the holder was not a holder in due course.

11. BECAUSE WARREN FINANCE IS NOT A HOLDER IN DUE COURSE, BARNETT MAY ASSERT ITS DEFENSES OF LACK OF CONSIDERATION, RESCISSION, RELEASE, WAIVER AND ESTOPPEL.

Since this matter is before the court on review of a grant of summary judgment in favor of Warren Finance, Barnett Bank's allegations, as supported by deposition testimony, that Warren Finance was not a holder in due course and that Barnett Bank has valid defenses must be accepted for purposes of this appeal. For this reason, the First District Court of Appeal found that Barnett Bank was entitled to a trial on the merits of whether Warren Finance was a holder in due course and whether Barnett Bank's defenses are valid.

A bank may dishonor a cashier's check presented by a non-holder in due course if it can establish any of the defenses under section 673.306 of the Florida Statutes it has against payment of the instrument to the payee. See supra at 16-17. The defenses of lack of consideration, rescission, release, waiver and estoppel are defenses which may be asserted against a non-holder in due course. See Sani-Serv Division of Burger Chef Systems, Inc. v. Southern Bank of West Palm Beach, 244 So.2d 509, 511-12 (Fla. 4th DCA 1970); Locke v. Aetna Acceptance Corp., 309 So.2d 43, 44 (Fla. 1st DCA 1975).

Barnett Bank's contract in issuing the cashier's checks was with Redan and not Warren Finance. Barnett Bank refused to issue the cashier's checks directly to Warren Finance. As a non-holder in due course, Warren Finance has no greater rights

to payment of the checks han did Redan. In other words, if Redan cannot require Barnett Bank to pay the checks, Warren Finance also cannot. Redan could not require payment of the cashier's checks that are the subject of this appeal because it requested the cashier's checks to be dishonored and received replacement checks.

Recently, the Florida Third District Court of Appeal succinctly stated this principle:

> First, the plaintiffs Alarcon concede on this appeal that they are not holders in due course of the check in this cause. . . . This being so, the said plaintiffs stand in the shoes of the third party Salinas, to whom the said check was made out, and acquire no greater rights against the defendant Ferrari than Salinas would have had against Ferrari in collecting on the said check.

Alarcon v. Ferrari, 490 So.2d 1047, 1048 (Fla. 3d DCA 1986).

Warren Finance's argument, that because it was a holder of the cashier's check and has the right to enforce payment in its own name under section 673.301 of the Florida Statutes, does not eliminate the right of Barnett Bank to assert any defenses to payment it has under section 673.306 of the Florida Statutes. Warren Finance's argument, if it were correct, would result in a non-holder in due course not being subject to defenses against a prior holder once the prior holder has parted with possession of the instrument. This is wrong. If Warren Finance is a non-holder in due course, and if Barnett Bank could not be required to pay Redan if it presented the cashier's checks, then Barnett Bank also cannot be required to

pay Warren Finance. As a non-holder in due course, Warren Finance has no greater rights than those of Redan. This is an elementary principle of the Uniform Commercial Code.

As the First District Court of Appeal has stated, "unless a holder in due course, a person takes an instrument subject to all defenses available in an action on a simple contract, as well as the defenses of want or failure of consideration, non-performance of any condition precedent, or non-delivery." Locke v. Aetna Acceptance Corp., 309 So.2d at 44. If Redan cannot require payment of the cashier's check from Barnett Bank due to lack of consideration, rescission, release, waiver or estoppel, as a result of requesting the cashier's checks to be dishonored and receiving replacement checks, then neither can Warren Finance.

III. BECAUSE WARREN FINANCE IS NOT A HOLDER IN DUE COURSE, REDAN MAY ASSERT ITS DEFENSES ON BARNETT'S BEHALF.

The language of section 673.306(4) of the Florida Statutes is clear. It states: "The claim of any third person to the instrument is not otherwise available as a defense to any party liable thereon unless the third person defends the action for such party." Official Comment 5 to that subsection is equally clear: "Nothing in this section is intended to prevent the claimant from intervening in the holder's action against the obligor or defending the action for the latter, in asserting his claim in the course of such intervention or defense."

Even Warren Finance recognizes that Barnett Bank may use section 673.306(4) to file an interpleader action. However, interpleader is not the exclusive legal action that may be brought under that section. In fact, Official Comment 5 uses the words "defending" and "defense" which is precisely what Redan is doing in the instant action.

As noted in Barnett Bank's statement of the case and facts, Redan, prior to entry of summary judgment by the trial court, made an appearance and agreed to defend on behalf of Barnett Bank. (R. at 62-63). Redan has also filed an answer and affirmative defenses against Warren Finance. (R. at 65-66).

The First District Court of Appeal properly found that Barnett Bank may name Redan as a third party and then, under principles of subrogation, could assert certain claims Redan could assert against Warren Finance. Barnett Bank of

Jacksonville, N.A. v. Warren Finance, Inc., 532 So.2d at 680. In addition, the trial court has granted Redan's motion to allow it to directly bring claims on Barnett Bank's behalf. Redan has filed a third party complaint against Warren Finance. This is in accord with the express language of section 673.306(4) of the Florida Statutes.

IV. WARREN FINANCE'S POLICY AND ACCEPTANCE ARGUMENTS SHOULD BE REJECTED.

Warren Finance has raised only two arguments concerning why the straightforward application of the Florida Uniform Commercial Code should not be applied to the instrument, a cashier's check, at issue in this case. First, Warren Finance argues that for policy reasons, a cashier's check should be treated as cash. Second, Warren Finance argues that a cashier's check is deemed accepted within the meaning of the Uniform Commercial Code upon its issuance and, therefore, cannot be subsequently dishonored by the bank. Both of these arguments should be rejected.

Warren Finance has spent at least five pages of its brief arguing that the use of cashier's checks in the business world will be severely altered if the First District Court of Appeal's opinion were affirmed. This simply is not the case. The opinion was confined to the very narrow subset of situations where the holder of the cashier's check is not a holder in due course. Very few commercial transactions involve situations where the recipient of a cashier's check is a non-holder in due course.

The best policy argument for allowing a bank to dishonor a cashier's check in the hands of one who is not a holder in due course is presented by the facts involved in this case. Neither the case law of Florida, the Florida Uniform Commercial Code nor Barnett Bank should countenance or assist a holder who

has perpetrated a fraud and engaged in criminal activity in obtaining a cashier's check.

Warren Finance argues for an exception to the application of the Uniform Commercial Code's distinctions based upon the status of the holder of an instrument because the instrument is a cashier's check. Those courts that have followed that reasoning have ignored the Uniform Commercial Code. As the United States Court of Appeals for the Ninth Circuit stated in Farmers & Merchant State Bank: " While these courts justify their holdings as necessary to protect the public perception of cashier's checks as the equivalent of cash, nothing in the U.C.C. suggests that cashier's checks should be treated differently from other instruments subject to Articles 3 and 4." Id., 841 F.2d at 1440.

Numerous cases have rejected the policy arguments made by Warren Finance where an innocent holder in due course is not involved. In Pulaski Chase Cooperative v. Kellogg-Citizens National Bank, 130 Wis. 2d 200, 386 N.W.2d 510 (Wis. Ct. App. 1986), a bank stopped payment on its cashier's check because the plaintiff had purchased the cashier's checks with a check upon which the plaintiff had placed a stop payment order. The Wisconsin appellate court followed the United States Court of Appeals for the Third Circuit's decision in TPO and held:

> The Uniform Commercial Code recognizes general principles of law and equity unless displaced by particular provisions of the code. Section 401.103 [UCC § 1-1031, Stats. Where the rights of innocent third persons are not involved, there is no

> overpowering reason to compel a bank to pay its cashier's check without regard to defenses. "[T]he strong considerations of public policy favoring negotiability and reliability of cashier's checks are not germane." TPO, Inc. v. FDIC, 487 F.2d 131, 135 (3d Cir. 1973). . . . If an innocent third party takes the instrument for value, the result would obviously be different.
>
> Kellogg [the bank] has established its right to refuse payment. Failure of consideration is a proper defense against any person not having the rights of a holder in due course. Sections 403.408 [UCC § 3-408] and 403.306(2) [UCC § 3-306(2)], Stats.

Id., 386 N.W.2d at 512.

In Equitable Trust Co. v. G & M Construction Corp., 544 F. Supp. 736 (D. Md. 1982), a payee had allegedly participated in a fraud that led to the issuance of several cashier's checks upon which Equitable Trust later refused to pay. The Maryland federal district court stated:

> As that court noted [in TPO, Inc.], this action concerns no third parties or holders in due course. "The strong considerations of public policy favoring negotiability and reliability of cashier's checks are not germane." Id. at 135. Holders of instruments are of two classes under the U.C.C., holders in due course and others. To be a holder in due course, one must take for value, in good faith and without notice of any defense against or claim to it on the part of another.

Id., 544 F. Supp. at 746.

In Anderson, Clayton & Co. v. Farmers National Bank of Cordell, 624 F.2d 105, 110 (10th Cir. 1980), the United States Court of Appeals for the Tenth Circuit held:

> No rights of third party holders in due course of the check are involved in the dispute. Under these circumstances "the strong considerations of public policy favoring negotiability and reliability of cashier's checks" are not present. TPO, Inc. v.

Federal Deposit Insurance Corp., supra, 487 F.2d at 135. The bank can therefore assert the defense of fraud against Acco. If fraud was present, the stop order on the cashier's check was justified.

Many other cases have recognized that a bank has the right to assert defenses against paying cashier's checks under section 3-306 of the Uniform Commercial Code in appropriate circumstances. See, e.g., In re Johnson, 552 F.2d 1072, 1077-78 (4th Cir. 1977); State of Pennsylvania v. Curtiss National Bank of Miami Springs, Florida, 427 F.2d 395, 399 (5th Cir. 1970); Banco Ganadero y Agricola, S.A. v. Society Nat'l Bank of Cleveland, 418 F. Supp. 520, 524 (N.D. Ohio 1976); Gates v. Manufacturers Hanover Trust Co., 98 A.D.2d 829, 470 N.Y.S.2d 492, 493-94 (N.Y. App. Div. 1983); Rezapolvi v. First National Bank of Maryland, 296 Md. 1, 459 A.2d 183, 189 (Md. 1983); Banco Di Roma v. Merchants Bank, 92 A.D.2d 42, 459 N.Y.S.2d 592, 594 (N.Y. 1983); Santos v. First National State Bank of New Jersey, 186 N.J. Super. 52, 451 A.2d 401, 406 (N.J. Super. App. Div. 1982); Louis Falcigno Enterprises, Inc. v. Massachusetts Bank and Trust Company, 14 Mass. App. Ct. 92, 436 N.E.2d 993, 995 (Mass. App. Ct. 1982); International Furniture Distribs., Inc. v. First Ga. Bank, 163 Ga. App. 765, 294 S.E.2d 732, 733 (Ga. Ct. App. 1982); Travi Construction Co. v. First Bristol County National Bank, 10 Mass. App. Ct. 32, 405 N.E.2d 666, 669 (Mass. App. Ct. 1980); Moon Over The Mountain, Ltd. v. Marine Midland Bank, 87 Misc. 2d 918, 386 N.Y.S. 2d 974, 978 (N.Y. Civ. Ct. 1976); Wilmington Trust Co. v. Delaware Auto

Sales, 271 A.2d 41, 42 (Del. 1970). See also First National Bank of Mishawaka v. Associates Investment Co., 221 N.E.2d 684, 688 (Ind. Ct. App. 1966) (pre-U.C.C. decision); Leo Syntax Auto Sales, Inc. v. Peoples Bank & Savings Co., 6 Ohio Misc. 226, 35 Ohio Op.2d 330, 215 N.E.2d 68 (Tuscarawas Co. C.P. 1965) (same).

Even Minnesota has rejected Professor Lawrence's position in Making Cashier's Checks & Other Bank Checks Cost-Effective, 64 Minn. L. Rev. 275 (1980) that cashier's checks are the equivalent of cash. Minnesota follows the rule set forth in TPO, Inc. that a bank may stop payment on its own cashier's check if it is in the hands of a non-holder in due course. State Bank of Brooten v. American National Bank of Little Falls, 266 N.W.2d 496, 499 (Minn. 1978). As the court in Seman v. First State Bank of Eden Prairie, 394 N.W.2d 557 (Minn. App. Ct. 1986), stated:

> In Minnesota a cashier's check is "merely a bill of exchange . . . and even though negotiable in form . . . it is not the equivalent of money." Deones v. Zeches, 212 Minn. 260, 263, 3 N.W.2d 432, 433 (1942). A bank may refuse payment on its own cashier's check if it is not in the hands of a holder in due course. State Bank of Brooten v. American National Bank of Little Falls, 266 N.W.2d 496, 499 (Minn. 1978).

Id. at 560.

A cashier's check is not the equivalent of cash. In 1970, the Florida Fourth District Court of Appeal reversed and remanded a trial court's finding that a bank had successfully established a defense to dishonoring one of its cashier's checks. The court reviewed all of the defenses raised by the

bank and only then found them to be without merit. Sani-Serv Division of Burger Chef Systems, Inc. v. Southern Bank of West Palm Beach, 244 So.2d at 511-12. The important aspect of the Sani-Serv case is the court's refusal to rest its decision on a flat rule that cashier's checks are cash and may never be countermanded. In fact, the court went on to distinguish between a cashier's check presented by a holder in due course and one presented by a non-holder in due course. The court stated:

> As we have pointed out, the present case is controlled by the Uniform Commercial Code. It is well established in Florida that a cashier's check cannot be countermanded in the hands of a holder in due course. Tropicana Pools, Inc. v. First National Bank of Titusville and Riverside Bank v. Maxa, supra.

Id. at 513 (emphasis added).

The Fourth District Court of Appeal's previous decision in Tropicana Pools, Inc. v. The First National Bank of Titusville, 206 So.2d 48 (Fla. 4th DCA 1968), affirmed the trial court's grant of final summary judgment in favor of the issuing bank on a cashier's check presented for payment by a non-holder in due course. While Tropicana Pools was a pre-Uniform Commercial Code case, it was later cited as authority for the Uniform Commercial Code case, Sani-Serv. The district court stated: "Plaintiff is not a holder in due course, and it nowhere appears that he gave anything of value as consideration for the cashier's check. Accordingly, the decree of the trial court is Affirmed." Tropicana Pools, 206 So.2d at 50 (footnote omitted).

The Florida Second District Court of Appeal has also noted, in dicta, that a bank could dishonor a cashier's check while the person purchasing the cashier's check could not require the bank to stop payment. See Beach National Bank v. The Bank of Hollywood Hills, 256 So.2d 251, 252 (Fla. 2d DCA 1971).

Judge Cowart of the Fifth District Court of Appeal has summarized the policy arguments against treating a cashier's check as cash while in the hands of a non-holder in due course. In his 1988 concurrence and dissent in Crosby v. Lewis, he stated:

> While certainly a bank cannot properly dishonor its cashier's check as against a holder in due course, a bank has the right, if not a duty, to assist a customer who has purchased its cashier's check in preventing the payee of a cashier's check from successfully perpetrating a fraud on the bank's customer. After notice that the payee or bad faith holder of a cashier's check has obtained it from the purchaser (i.e. from the bank's customer) by fraud, the bank should not be required by law to act as an unwilling participant in the fraud. Neither morals, business and banking practices, the commercial code, nor good law requires this result.

Crosby v. Lewis, 523 So.2d at 1157 (Cowart, J., concurring in part, dissenting in part).

Next, Warren Finance argues that under the Uniform Commercial Code, the issuance of a cashier's check constitutes acceptance and that a bank may not dishonor a check after acceptance. Warren Finance argues that acceptance of the cashier's check precludes Barnett Bank from stopping payment under section 674.303 of the Florida Statutes. This same argument has recently been rejected by the United States Court

of Appeals for the Ninth Circuit in Farmers & Merchants State Bank v. Western Bank. The court dealt with this issue in detail, stating:

> In relevant part, § 4-303(1) provides that "[a]ny knowledge, notice or stop-order received by, legal process served upon or setoff exercised by a payor bank" comes too late to terminate "the bank's right or duty to pay an item or to charge its customer's account for the item," if the bank has "accepted or certified the item." (Emphasis added.) Observing that cashier's checks are widely perceived as substitutes for cash, the district court cited First National Bank v. Noble, 179 Or. 26, 168 P.2d 354 (1946) (en banc), for its reliance on authority characterizing a cashier's check as "'accepted in advance by the act of its issuance.'" Id. at 54, 168 P.2d at 366 (quoting Polotsky v. Artisans Sav. Bank, 37 Del. 151, 156-57, 188 A. 63, 65-66 (1936)). Concluding that Western accepted its cashier's check upon issuance, the district court held that § 4-303(1) is "[a]n additional reason [why] Western is not entitled to stop payment on its cashier's check."
>
> . . . .
>
> The comment accompanying § 4-303 notes that the section is a new uniform statutory provision, and we acknowledge that some courts have relied upon § 4-303(1) to prevent a bank from asserting its own defenses against its cashier's check. While these courts justify their holdings as necessary to protect the public perception of cashier's checks as the equivalent of cash, nothing in the U.C.C. suggests that cashier's checks should be treated differently from other instruments subject to Articles 3 and 4. Assuming a bank "accepts" its cashier's check upon issuance, § 3-418 expressly governs the significance of that acceptance. In any event, since Western would have been able to assert defenses available under § 3-418 had it paid cash to F & M in settlement for the thirteen Currey checks, a "cash equivalence" test actually militates against applying § 4-303(1) to absolutely preclude Western from dishonoring its cashier's check.
>
> U.C.C. § 4-303(1) was simply not intended to govern a bank's ability to assert its own defenses to liability on a cashier's check. As have other courts

> applying § 4-303(1) in this context, the district court triggered the section by characterizing Western's dishonorment of its cashier's check as a "stop payment." However, the reference in § 4-303(1) to a "stop order received by" a bank relates to a customer's effort to stop payment of an item drawn on the customer's account and has no application to an instrument drawn by a bank upon itself. It is apparent from the text of § 4-303 and the accompanying comments that the section was drafted for the purpose of settling the relative priorities of conflicting claims to a customer's account, and not for the purpose of cutting off a bank's right to assert its own defenses against an instrument.
>
> Those courts have applied § 4-303(1) to preclude a bank from asserting its own defenses against a cashier's check have also failed to appreciate the broader consequences of their reasoning. The language that triggers § 4-303(1) is similar to that which triggers § 4-213(1). In some instances, the bank's "duty to pay" an item under § 4-303(1) arises even sooner than the bank's accountability for an item under § 4-213(1). If acceptance of an instrument precludes a bank from asserting its own defenses, it follows that any other event giving rise to the "duty to pay'' under § 4-303(1) should also have the same effect. Such an interpretation of § 4-303(1) results in an even broader abrogation of a bank's common law right to recover mistaken payments than would be the case had we accepted the proposition that § 4-213(1) has such an effect.

Id., 841 F.2d at 1438-41 (emphasis in the original) (footnotes omitted).

Section 674.303 of the Florida Statutes was not intended to prevent a bank from dishonoring a cashier's check in the hands of a non-holder in due course. In Judge Barfield's concurrence on the denial of rehearing, he noted that Barnett Bank had not "stopped payment" but rather had refused to honor the claim of Warren Finance. Barnett Bank of Jacksonville, N.A. v. Warren Finance, Inc., 532 So.2d at 681 (Barfield, J., concurring).

His view of Barnett Bank's dishonoring of the checks is in accord with the Ninth Circuit's analysis.

To the extent Warren Finance argues that acceptance requires the maker to make payment on an instrument regardless of whether the holder is a holder in due course, Warren Finance is simply in error. According to section 673.418 of the Florida Statutes, "acceptance of any instrument is final in favor of a holder in due course, or a person who has in good faith changed his position in reliance on the payment." Once again, if Warren Finance was not a holder in due course and did not take in good faith, then final acceptance has not taken place. As the United States Court of Appeals for the Ninth Circuit in Farmers & Merchants State Bank v. Western Bank explained:

> U.C.C. § 3-418 makes acceptance of an instrument final in favor of a holder in due course. With exceptions not pertinent here, § 3-305(2) immunizes a holder in due course from "all defenses of any party to the instrument with whom the holder has not dealt." One who lacks holder-in-due-course status takes an instrument subject to the claims and defenses enumerated in § 3-306, including "all defenses of any party which would be available in an action on a simple contract." Id. at § 3-306(b).

Id. at 1442 (footnotes omitted); see Gates v. Manufacturer's Hanover Trust Co., 470 N.Y.S.2d at 493-94; Travi Construction Co. v. First Bristol County National Bank, 405 N.E.2d at 667-688. See generally Brady on Bank Checks, § 23.13 at 23-29 (6th ed. 1987).

Florida case law has also noted the distinction between a bank dishonoring a cashier's check presented for payment by a

holder in due course and one presented by a non-holder in due course. See Sani-Serv Division of Burger Chef Systems, Inc. v. Southern Bank of West Palm Beach, 244 So.2d at 513. This is in accordance with pre-Uniform Commercial Code case law in Florida. See Tropicana Pools, Inc. v. First National Bank of Titusville, 206 So.2d at 50.

Under section 673.118(1) of the Florida Statutes, a cashier's check is effective as a note. Parker v. Dudley, 527 So.2d 240, 242 n.1 (Fla. 5th DCA 1988). Because a cashier's check is a note, which is an instrument, the defenses of U.C.C. section 3-306 may be asserted against a non-holder in due course. See TPO, Inc. v. Federal Deposit Insurance Corp., 487 F.2d at 135-36; Banco Ganadero y Agricola, S.A. v. Society Nat'l Bank of Cleveland, 418 F.Supp. at 524. Under section 673.413 of the Florida Statutes, the contract of an acceptor of a draft is identical to the contract of a note. Because a maker of notes may assert defenses under section 3-306 of the Uniform Commercial Code against a non-holder in due course, a number of courts have concluded that a bank may dishonor a cashier's check in the hands of a non-holder in due course even if acceptance has taken place. See, e.g., TPO, Inc. v. Federal Deposit Insurance Corp., 487 F.2d at 135-36; Rezapolvi v. First National Bank of Maryland, 459 A.2d at 189; Santos v. First National State Bank of New Jersey, 451 A.2d at 407-08. The United States Court of Appeals for the Fifth Circuit in State of Pennsylvania v. Curtiss National Bank of Miami Springs, 427

F.2d **395** (5th Cir. 1970), followed this approach even though it found a cashier's check to be a draft accepted upon issuance. "Assuming arquendo that Bankers Allied [in whose shoes the State of Pennsylvania stood] was not a holder in due course, the Bank is entitled to defend on the ground of lack or failure of consideration. See U.C.C. §§ **3-306** and 3-408." Id. at **399** (footnote omitted).

Because issuance of a cashier's check may constitute acceptance under the Uniform Commercial Code, this does not result in an issuing bank being unable to dishonor the cashier's check in the hands of one who is not a holder in due course. The stop payment provisions of section **674.303** of the Florida Statutes are inapplicable to a cashier's check. In addition, final acceptance has not taken place under section **673.418** of the Florida Statutes when the cashier's check is in the hands of a non-holder in due course. Finally, acceptance of a cashier's check does not deprive a bank from asserting its defenses under section **673.306** of the Florida Statutes.

Finally, Warren Finance has made an argument concerning the purported absence of a rationale for the First District Court of Appeal's holding that where a cashier's check is issued directly by the bank to a payee who was not a holder in due course, then the bank may not assert a claim or defense of the check's third party purchaser. See Barnett Bank of Jacksonville, N.A. v. Warren Finance, Inc., **532** So.2d at **680**. The district court correctly noted that if the bank itself had

its own defenses against the payee, t could raise them presumably under subsections 673.306(1)-(3) of the Florida Statutes. Id. (The district court also correctly held that a bank could not dishonor a cashier's check presented by the payee where the payee was a holder in due course. Id.) With regard to direct payees who are not holders in due course, the district court's rationale is, for the most part, in accord with the Florida Uniform Commercial Code because, in this situation, the bank's obligation runs directly to the payee. The bank ordinarily has no defenses against the purchaser that it could assert against a non-holder in due course payee because the third party purchaser was not a prior holder of the check. But see Seman v. First State Bank of Eden Prairie, 394 N.W.2d 557 (Minn. Ct. App. 1986) (Bank may stop payment on cashier's check in hands of a non-holder in due course payee at the request of a third party purchaser). However, if the purchaser defends on behalf of the bank under subsection 673.306(4) of the Florida Statutes, then the purchaser may raise its own defenses against the payee. The purchaser may have an incentive to defend even though it cannot be sued directly on the check, see Crosby v. Lewis, 523 So.2d at 1157, if it had agreed to indemnify the bank concerning its action of dishonoring the check. A purchaser has a interest in the cashier's check, even if he is not the payee and has not been a holder. See Parker v. Dudley, 527 So.2d at 243. Under these circumstances, the defenses of a purchaser may be properly

raised when a non-holder in due course payee sues the issuing bank.

In any event, the district court's holding with respect to a payee is not the precise issue presented in this case since Warren Finance was a subsequent holder and not a payee. As a result, this holding of the First District Court of Appeal was merely dictum.

CONCLUSION

A cashier's check may be dishonored by a bank when it is in the possession of a non-holder in due course. The bank may assert any defenses it has against payment of the instrument to the named payee against a non-holder in due course. In addition, the bank may assert the defenses of the payee against a non-holder in due course when the payee defends on behalf of the bank, which Redan has agreed to do in this case.

Warren Finance was not entitled to summary judgment. The Florida First District Court of Appeal properly reversed and remanded the trial court's grant of summary judgment in Warren Finance's favor. This court should affirm the First District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to STEVEN A. WERBER, ESQUIRE, Commander, Legler, et al., 200 Laura Street, Jacksonville, Florida 32202, via Hand Delivery this 16th day of January, 1989.

Attorney

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