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SHOULD AN AIR CARRIER BE LIABLE FOR FAILING TO VERIFY A FORGED CERTIFIED CHECK UNDER A C.O.D. CONTRACT?

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A COLLECT ON DELIVERY (C.O.D.) contract requires a carrier to collect upon delivery from the consignee a specified amount for the shipper.[1] In addition, a carrier must collect its own delivery charges from the consignee.[2] In the event that a carrier does not collect payment, it is required to return the goods to the shipper.[3] A C.O.D. shipment can only arise by an express or implied contract.[4] A carrier is never under a common law duty to

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[1] BLACK'S LAW DICTIONARY 233 (5th ed. 1979). "'Collect on delivery.' These letters import the carrier's liability to the consignor [shipper] to collect the cost of the goods from the consignee, and, if not collected, to return the goods to the consignor [shipper]." *Id.*

[2] 13 AM. JUR. 2D *Carriers* § 454 (1964). Section 454 states:

> A c.o.d. (collect on delivery) shipment is made under a contract whereby the carrier undertakes to collect from the consignee, upon delivery, a specified amount for and on behalf of the consignor [shipper], in addition to the carrier's own charges. Thus, a carrier receiving goods on a c.o.d. shipment acts in two capacities - as a bailee to transport the goods and as agent to collect the price of goods. To act as the collecting agent of the consignor [shipper] is not a duty imposed upon the carrier by the common law, but is a matter of private contract, express or implied, which the carrier may enter into or refuse at its option.

Id.; *see* Justin v. Delta Motor Line, 43 So. 2d 53, 55 (La. Ct. App. 1949) (carrier is required to collect the purchase price of the goods and the transportation charges).

[3] *See supra* note 1 for the definition of C.O.D.

[4] 13 C.J.S. *Carriers* § 186a (1939). Section 186a states:

> The peculiarity of shipment of goods c.o.d. (meaning collect on delivery), which is usually undertaken only by express companies, is that a condition is attached that the carrier on delivery to the con-

act as the shipper's collecting agent.[5] At all times, a carrier has complete discretion in determining whether to enter into a C.O.D. contract.[6]

In general, a carrier that receives goods under a C.O.D. contract acts in two capacities: as a bailee in transporting the goods, and as an agent in collecting the price.[7] A carrier's transportation duty is governed by common law.[8] Accordingly, when a carrier breaches its duty to carry and deliver goods, it is liable to the shipper for the value of

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> signee shall collect a specified sum of money, usually the purchase price of the goods (and other than transportation charges), shall return the sum thus collected to the consignor [shipper]. Since it is well settled that there is no common-law duty devolving on an express company or other common carrier to act as the collecting agent of the shipper, such obligation arises only contract express or implied, and is one which the carrier may enter into or refuse at its option.

Id.; see Rolla Produce Co. v. American Ry. Express, 205 Mo. App. 646, 226 S.W. 582, 582 (1920) (the express terms of the shipment were C.O.D.); Anthony v. American Express Co., 188 N.C. 407, 124 S.E. 753, 754 (1924) (a carrier's collection obligation arises only by an express or implied contract).

[5] *Justin*, 43 So. 2d at 55 (there is no common law duty on a carrier to act as the shipper's collecting agent); *see supra* note 2 for a discussion of section 454; *see also supra* note 4 for a discussion of section 186a.

[6] *Justin*, 43 So. 2d at 55 (a carrier may enter into or refuse to enter into a C.O.D. contract); *Anthony*, 124 S.E. at 754 (a carrier has the option of deciding whether to enter into a C.O.D. contract); *see supra* note 2 for a discussion of section 454; *see also supra* note 4 for a discussion of section 186a.

[7] The following cases have held that when a carrier enters into a C.O.D. contract, it acts in two capacities: as a bailee in transporting the goods, and as an agent in collecting the C.O.D. charges. Littleton Stamp & Coin Co. v. Delta Airlines, Inc., 778 F.2d 53, 55 (1st Cir. 1985); Cermetek, Inc. v. Butler Avpak, Inc., 573 F.2d 1370, 1375 (9th Cir. 1978); Mountain States Waterbed Distrib. Inc. v. O.N.C. Freight Sys. Corp., 44 Colo. App. 433, 614 P.2d 906, 907 (1980); Bond Rubber Corp. v. Oates Bros., Inc., 136 Conn. 248, 70 A.2d 115, 117 (1949); Willer v. Railway Express Agency, 86 A.2d 104, 107 (D.C. 1952); Tyler Refrigeration Corp. v. IML Freight, Inc., 427 N.E.2d 718, 720 (Ind. Ct. App. 1981); *Justin*, 43 So. 2d at 55; Barnhart v. Henderson, 147 Neb. 689, 24 N.W.2d 854, 861 (1947); Okin v. Railway Express Agency, 24 N.J. Misc. 8, 44 A.2d 896 (1945); Joseph Mogul, Inc. v. C. Lewis Lavine, Inc., 247 N.Y. 20, 159 N.E. 708, 709 (1928); *Anthony*, 124 S.E. at 754; Nuside Metal Prod., Inc. v. Eazor Express, Inc., 189 Pa. Super. 593, 152 A.2d 275, 279 (1959); Crown Displays, Inc. v. Calore Freight Sys., Inc., 115 R.I. 483, 348 A.2d 373, 374 (1975); Herrin Transp. Co. v. Robert E. Olson Co., 325 S.W.2d 826, 827 (Tex. Civ. App. 1959).

[8] Nuside Metal Prod., Inc. v. Eazor Express, Inc., 189 Pa. Super. 593, 152 A.2d 275, 279 (1959) ("the carrier's liability for proper transportation does not arise from contract, but is cast upon it by the common law.").

those goods.[9] By comparison, a carrier's collection duty is governed by agency principles.[10] Accordingly, when a carrier breaches its duty to collect the price it is liable to the shipper for whatever could have been collected.[11]

Under agency principles, a carrier has the duty to use either reasonable or ordinary care in making its collection efforts.[12] It is important to recognize, however, that a carrier's duty of reasonable care applies only in accordance with the shipper's directions.[13] If a carrier fails to abide

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[9] Joseph Mogul, Inc. v. C. Lewis Lavine, Inc., 247 N.Y. 20, 159 N.E. 708, 709 (1928) ("for breach of its duty as bailee to carry and deliver to the person and on the conditions stated by the shipper, it [the carrier] is liable, as in the case of any other misdelivery, for the value of the goods.").

[10] *See supra* note 7 for a list of cases which have held that a carrier's collection duty is governed by agency principles.

[11] *Joseph Mogul*, 159 N.E. at 709; ("for breach of its duty to act as agent for the shipper in collection of the price, it [the carrier] is liable, like any other collection agent, for whatever could have been collected if the duty had been fulfilled.").

[12] RESTATEMENT (SECOND) OF AGENCY § 426 (1957). Section 426 states: "Unless otherwise agreed, an agent employed to collect from others goods or money due the principal has a duty of using reasonable care and skill in making such collections in accordance with the directions of the principal." *Id.*; *see also* 3 C.J.S. *Agency* § 304a (1973). Section 304a states:

> An agent to collect a debt or claim must exercise ordinary care, skill, and diligence in the performance of all the duties incident to the undertaking, and will be liable to his principal for any loss which his negligence in this respect may occasion. If the agent has acted in good faith and with ordinary care, skill, and diligence he will not be liable, except in cases where he has guaranteed the collection; nor will he be liable if the principal himself has prevented him from collecting.
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> What will amount to due care on the part of the agent will depend upon the nature of the undertaking and all the circumstances in the particular case. If the agent is unable to make a collection intrusted to him, it is his duty to notify the principal, and he must return the note or other obligations intrusted to him or furnish a sufficient excuse for not doing so. A mere offer to return them after a lapse of time is not sufficient to relieve him from liability unless he shows that he has used due care and diligence in endeavoring to collect them.

Id.

[13] Littleton Stamp & Coin Co. v. Delta Airlines, Inc., 778 F.2d 53, 55 (1st Cir. 1985). A carrier is under a duty to use reasonable care in collecting payments in accordance with the directions of the principal. Oftentimes a principal directs the carrier to accept cash, certified check, money order, traveler's check, company check, or a combination of one or more. Under agency laws, it is the responsibiltiy of the carrier to use reasonable care in complying with the principal's direc-

by the shipper's directions, the issue of reasonable care is irrevelant and the carrier has unquestionably breached its C.O.D. contract.[14] Consequently, in a situation where a carrier enters into a C.O.D. contract with a shipper, courts will follow the general rule that a carrier will be held to strict compliance with its agreement.[15]

This comment will begin by providing a history on how courts have analyzed and applied this general rule between the period 1875 and 1967 in eight significant C.O.D. cases.[16] The second section of this comment will discuss the principles of waiver and ratification as it affects the general rule.[17] Finally, this comment will analyze two contemporary issues involving C.O.D. contracts.[18] The first issue concerns the standard of care required of a carrier when undertaking to perform collection activities pursuant to a C.O.D. contract.[19] The second issue concerns whether a carrier should be liable for failing to verify a forged certified check that it accepted as payment pursuant to a C.O.D. contract.[20]

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tions. *Id.* at 55-56; *see* RESTATEMENT (SECOND) OF AGENCY § 426 (1957); *see also supra* note 12 for a discussion of section 426.

[14] *Littleton*, 778 F.2d at 56.

[15] Annotation, *Liability of Carrier for Delivering Goods Sent C.O.D. Without Receiving Cash Payment*, 27 A.L.R.3D 1320, 1327 (1969).

> It has been generally held or recognized . . . that a carrier who enters into an express c.o.d. contract with a consignor [shipper], or otherwise expressly or impliedly agrees to transport certain goods on the condition that he will receive payment from the consignee prior to delivery, will be held to a strict compliance with his agreement. Thus where a carrier violates his contract and delivers the goods without collecting the price from the consignee, the carrier will be held liable to the consignor [shipper].

Id.

[16] *See infra* notes 21-94 and accompanying text for a discussion of cases that have adopted the general rule.

[17] *See infra* notes 95-149 and accompanying text for a discussion of waiver and ratification.

[18] *See infra* notes 150-264 and accompanying text for a discussion of contemporary C.O.D. issues.

[19] *See infra* notes 154-202 and accompanying text for a discussion of the modern standard of due care.

[20] *See infra* notes 203-264 and accompanying text for a discussion of the verification issue.

I. A CARRIER'S CONTRACTUAL LIABILITY UNDER A C.O.D. CONTRACT

In a situation where a carrier enters into a C.O.D. contract with a shipper, courts will follow the general rule that a carrier will be held to strict compliance with its agreement.[21] This means that a carrier has agreed to transport certain goods on the condition that it will collect payment from the consignee prior to delivery.[22] If a carrier delivers the goods without collecting payment, the carrier will be liable to the shipper for damages.[23]

A. *Early Cases Establishing the General Rule of Strict Compliance*

One of the first early cases that discussed the nature and importance of the letters "C.O.D." was *State v. Intoxicating Liquors*.[24] In 1882, the Maine Supreme Court stated that the initials C.O.D. mean "collect on delivery, or more fully stated, deliver upon payment of the charges due the seller for the price, and the carrier for the carriage of the goods. These initials have acquired a fixed and determinate meaning which courts and juries may recognize from their general information."[25] As such, both the shipper and consignee have a qualified right to possession of a C.O.D. shipment.[26] The shipper has the right to possession upon the consignee's neglect or refusal to pay for the goods.[27] Conversely, the consignee has the right to possession by paying for the goods.[28]

Another late nineteenth century case that established the general rule of strict compliance was *Murray v.*

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[21] *See supra* note 15 at 1327; *see also infra* notes 24-94 and accompanying text for a discussion of cases that have adopted this general rule.

[22] *See supra* note 15 at 1327; *see also infra* notes 24-94 and accompanying text for a discussion of cases that have adopted this general rule.

[23] *See supra* note 15 at 1327.

[24] 73 Me. 278 (1882).

[25] *Id.* at 279.

[26] *Id.*

[27] *Id.*

[28] *Id.* at 279-80.

Warner.[29] In *Murray*, the shipper instructed the carrier to deliver a coat and vest to the consignee, and in return receive six spring bed-bottoms.[30] The carrier subsequently made delivery, but did not collect the bed-bottoms or their value in money.[31] In 1875, the New Hampshire Supreme Court held the carrier liable for negligent misdelivery of the goods.[32] The court reasoned that a carrier could not disregard the conditions upon which the delivery was authorized.[33] When the consignee refused to make payment to the carrier, the carrier could have discharged itself from liability by placing the goods in storage, notifying the shipper for further instructions, or returning the goods to the shipper.[34] In any case, the carrier cannot, after having undertaken to carry the goods on a C.O.D. basis, relieve itself of liability by simply abandoning the goods with the consignee.[35]

One of the first early twentieth century cases that established the general rule was *Anthony v. American Express Co.*[36] In *Anthony*, the carrier contractually agreed to collect payment from the consignee upon delivery of the goods, and to remit the charges to the shipper.[37] The carrier made

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[29] 55 N.H. 546 (1875).

[30] *Id.*

[31] *Id.* In *Murray*, the consignee was a boarder in an Amesbury, New Hampshire, hotel. When the carrier attempted to make delivery, the consignee was no where to be found. The carrier left the goods with the hotel clerk but did not collect payment. Several days later the consignee received the goods from the hotel clerk without making payment. Eventually, the shipper sued the carrier for negligent misdelivery. *Id.* at 546-48.

[32] *Id.* at 548. The New Hampshire Supreme Court entered a judgment on the verdict in favor of the shipper. *Id.* at 551.

[33] *Id.* at 549.

[34] *Id.* In *Murray*, the carrier did not place the goods in storage, ask for further instructions, or return the goods to the shipper when the consignee was not present to accept delivery. Instead, the carrier left the goods with the clerk of the hotel where the consignee was staying and stated that he had "nothing to do with them." *Id.*

[35] *Id.*

[36] 188 N.C. 407, 124 S.E. 753 (1924).

[37] *Id.* at 754. The contract between the shipper and the carrier was evidenced by the carrier's receipts. These receipts contained the name of the shipper, the name and address of the consignee, a description of the goods, the letters "C.O.D.", and figures showing the amounts to be collected. *Id.*

delivery and collected payment, but failed to remit the payment back to the shipper.[38] In 1924, the North Carolina Supreme Court held the carrier liable for breach of contract in failing to remit the payment to the shipper.[39] The court reasoned that a C.O.D. obligation arises only by contract, and is one which the carrier can enter into or refuse.[40] Accordingly, if a carrier chooses to enter into a C.O.D. contract, it will be bound to strict compliance with the agreement.[41]

In *Joseph Mogul, Inc. v. C. Lewis Lavine, Inc.*,[42] the carrier made delivery of goods under a C.O.D. contract to the consignee.[43] The carrier failed to collect cash; instead, accepting the consignee's certified check.[44] Subsequently, the shipper discovered that the certified check was a worthless forgery.[45] In 1928, the New York Court of Appeals held the carrier liable.[46] The court reasoned that a carrier who receives goods under a C.O.D. contract acts in two capacities: as a bailee to transport the goods, and as an agent to collect the price.[47] In general, when a carrier breaches its duty to transport the goods under C.O.D. contract, it will be liable to the shipper for the value of those goods.[48] In addition, when a carrier breaches its duty to collect the price, it will be liable to the shipper for

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[38] *Id.*

[39] *Id.* The North Carolina Supreme Court affirmed the judgment of the lower court. *Id.* at 755.

[40] *Id.* at 754-55.

[41] *Id.* at 755.

[42] 247 N.Y. 20, 159 N.E. 708 (1928).

[43] *Id.* at 709.

[44] *Id.*

[45] *Id.* The shipper sued the carrier on the theory that the carrier, by the acceptance of the check as a substitute for cash, made the consignee's debt its own. *Id.*

[46] *Id.* The New York Court of Appeals reversed the lower court's summary judgment verdict for the shipper. The court held that the shipper's measure of recovery is based upon the loss that it suffered, not because the carrier assumed the consignee's debt. *Id.*

[47] *Id.*; *see supra* note 7 for a list of cases that have cited this principle.

[48] *Joseph Mogul*, 159 N.E. at 709; *see* Fowler v. Chicago R.I. & P. Ry. Co., 98 Mo. App. 210, 71 S.W. 1077, 1078 (1903) (carrier will be liable for the full value of the goods if it does not make delivery to the correct party).

whatever could have been collected.[49] The law is settled that, in the absence of an agreement or custom to the contrary, a carrier must collect money and nothing else under a C.O.D. contract.[50]

B. *Modern Cases Interpreting the General Rule of Strict Compliance*

One of the first modern cases that interpreted the general rule of strict compliance was *Okin v. Railway Express Agency*.[51] In *Okin*, the carrier agreed to deliver a diamond ring from the shipper to the consignee on a C.O.D. basis.[52] The carrier breached the C.O.D. agreement by making delivery, and failing to collect payment.[53] In 1945, the New Jersey Supreme Court held the carrier liable for breach of contract.[54] The court reasoned that since there was not any common law duty on a carrier to act as the shipper's collecting agent, such obligation arose only by express or implied contract.[55] When a carrier makes a contract to collect on delivery and later breaches the contract, the carrier is liable to the shipper for whatever the carrier would have collected.[56] This is because the underlying purpose of C.O.D. contract is to prevent the carrier from making delivery without collecting payment.[57]

Another modern case that interpreted the general rule

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[49] *Joseph Mogul*, 159 N.E. at 709. The court stated, "[f]or breach of its duty to act as agent for the shipper in the collection of the price, it is liable, like any other collection agent, for whatever could have been collected if the duty had been fulfilled." *Id.*

[50] *Id.* at 709; *see* Federal Reserve Bank v. Malloy, 264 U.S. 160, 165 (1923) (it is settled law that a collecting agent is without authority to accept for the debt of his principal anything but that which the law declares to be a legal tender).

[51] 24 N.J. Misc. 8, 44 A.2d 896 (1945).

[52] *Id.* at 897.

[53] *Id.*

[54] *Id.* at 896. The New Jersey Supreme Court struck out the carrier's answer and entered judgment for the shipper. *Id.* at 898.

[55] *Id.* at 897; *see supra* note 4 for a discussion of section 186a.

[56] *Okin*, 44 A.2d at 897; *see supra* notes 42-50 and accompanying text for a discussion of *Joseph Mogul*.

[57] *Okin*, 44 A.2d at 897.

was *Nuside Metal Products, Inc. v. Eazor Express, Inc.*[58] In *Nuside*, the shipper delivered two shipments of steel to an initial carrier under a C.O.D. contract.[59] The initial carrier delivered the steel to a connecting carrier, which collected payment from the consignee.[60] The connecting carrier deposited the consignee's check, and sent two of its own checks to the shipper, which were subsequently dishonored.[61] In 1959, the Superior Court of Pennsylvania held the initial carrier liable for the value of the two C.O.D. shipments.[62] The court reasoned that a carrier handling a C.O.D. shipment acts in two capacities: as a bailee to transport the goods and as an agent to collect the price.[63] Generally, the carrier's liability to transport the goods arises by common law; while its liability to collect the price arises by contract.[64] Accordingly, when a carrier makes a contract to collect on delivery it is bound to strict compliance with its agreement.[65]

In *Herrin Transportation Co. v. Robert E. Olson Co.*,[66] the shipper delivered a C.O.D. shipment to Gulf Coast Express, Inc. for delivery to a consignee.[67] Gulf Coast Express, Inc. delivered the shipment to Herrin Transportation Co., which failed to place the C.O.D. no-

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[58] 189 Pa. Super. 593, 152 A.2d 275 (1959).

[59] *Id.* at 277.

[60] *Id.*

[61] *Id.* The connecting carrier filed a petition of bankruptcy shortly after it had sent its two checks to the shipper. Upon receiving notice of the connecting carrier's bankruptcy petition, the shipper filed a claim to collect under the C.O.D. contract with the connecting carrier's bankruptcy trustee. At the time of the shipper's suit against the initial carrier, it had not received any payment from the trustee of the bankrupt connecting carrier. *Id.*

[62] *Id.* at 279. The Superior Court of Pennsylvania affirmed the judgment of the lower court. *Id.*

[63] *Id.*; *see supra* note 7 for a list of cases which have held a carrier's collection duty is governed by agency principles.

[64] *Nuside*, 152 A.2d at 279; *see* Robinson Elec. Co. v. Capitol Trucking Corp., 168 Pa. Super. 430, 79 A.2d 123, 125 (1951) (a carrier's liability to transport goods arises by common law); 13 C.J.S. *Carriers* § 186a (1939); *see also supra* note 4 for a discussion of section 186a.

[65] *Nuside*, 152 A.2d at 279.

[66] 325 S.W.2d 826 (Tex. Civ. App. 1959).

[67] *Id.* at 827.

tation on its waybills.[68] Herrin Transportation Co. delivered the shipment, without the C.O.D. notation, to Five Transportation Co.[69] Five Transportation Co. subsequently made delivery of the shipment but failed to collect payment.[70] In 1959, the Texas Court of Civil Appeals granted recovery to the shipper against the first two carriers.[71] In so holding, the court reasoned that a carrier that receives goods on a C.O.D. basis acts in two capacities: as a bailee to transport the goods and as an agent to collect the price.[72] If a carrier breaches its duty to deliver the goods it is liable for the value of those goods.[73] If, however, the carrier breaches its duty to collect the price, it is liable for whatever could have been collected had the duty been fulfilled.[74]

Finally, in *National Van Lines v. Rich Plan Corp.*,[75] the carrier delivered twelve refrigerators to the consignee under a C.O.D. contract that required the carrier to collect cash.[76] The carrier, instead of collecting cash, collected the consignee's company check as payment.[77] The following day the consignee stopped payment on the company check claiming that the value of the refrigerators was mis-

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[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.* at 828. The Texas Court of Civil Appeals also granted recovery to the initial carrier against the second carrier; and affirmed the judgment of the lower court. *Id.* at 828-29.

[72] *Id.* at 827; *see supra* note 7 for a list of cases which have held that a carrier's collection duty is governed by agency principles.

[73] *Herrin*, 325 S.W.2d at 827; *see supra* notes 42-50 and accompanying text for a discussion of Joseph Mogul, Inc. v. C. Lewis Lavine, Inc.

[74] *Herrin*, 325 S.W.2d at 827; *see supra* notes 42-50 and accompanying text for a discussion of Joseph Mogul, Inc. v. C. Lewis Lavine, Inc.

[75] 385 F.2d 800 (5th Cir. 1967).

[76] *Id.* at 801. The C.O.D. contract stated that, "[t]he carrier will not deliver or relinquish possession of any property transported by it until all tariff rates and charges thereon have been paid in cash, money order (other than a personal money order), traveler's check, cashier's check, bank treasurer's check or certified check. . . " *Id.* at 802.

[77] *Id.* In addition to executing delivery of a company check to the carrier, the consignee also signed the carrier's bill of lading in the box marked, "Consignee's Acknowledgment of Delivery." *Id.*

represented.[78] The carrier repossessed the refrigerators and informed the shipper of the consignee's contention.[79] The shipper, however, refused to alter the sales price or accept the return of the goods.[80] Consequently, the carrier placed the refrigerators in storage and sued the shipper for its freight and storage charges.[81] The shipper counterclaimed seeking recovery of the contract price.[82] The Fifth Circuit Court of Appeals awarded nothing to the carrier on its original claim and full recovery to the shipper on its counterclaim.[83] The court reasoned that a carrier under a C.O.D. contract has a dual function: as a bailee to transport the goods, and as the shipper's agent to collect the price from the consignee.[84] Moreover, the duty imposed on the carrier to act as the shipper's collecting agent does not arise out of common law.[85] Rather, this collection duty is created by contract.[86] Accordingly, the carrier was bound to strict compliance with its C.O.D.

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[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.* At the time of this suit, the refrigerators still remained in storage. *Id.*

[82] *Id.*

[83] *Id.* at 801-02. The Fifth Circuit affirmed the judgment of the lower court. The court also stated that the parties entered a pretrial stipulation as follows: The issue is

> Whether . . . the act of the plaintiff [carrier], in accepting the check . . . constituted such a violation of the tariff and contract of carriage as to make plaintiff liable to the defendant [shipper] for the amount of the C.O.D. charges. If so defendant is entitled to recover on its counterclaim. If not, plaintiff is entitled to recover its freight and storage charges.

Id. at 802. Because the parties' pretrial stipulation is couched in "either/or" language, and there was no attempt by the carrier to show that the shipper could have mitigated its damages, the Fifth Circuit awarded full recovery to the shipper. *Id.* at 803-04.

[84] *Id.* at 802; *see supra* note 7 for a list of cases that cite this principle.

[85] *National Van Lines*, 385 F.2d at 802; *see also* Young v. Santa Fe Trail Corp., 179 Kan. 678, 298 P.2d 235, 237 (1956) (a C.O.D. contract creates a special service outside the scope of the carrier's public service duty so that liability rests upon a contractual basis).

[86] *National Van Lines*, 385 F.2d at 802. For a discussion of the rule that a carrier's duty to collect under a C.O.D. contract is created by contract, see Justin v. Delta Motor Lines, Inc., 43 So. 2d 53, 55 (La. Ct. App. 1940); Joseph Mogul, Inc. v. C. Lewis Lavine, Inc., 247 N.Y. 20, 159 N.E. 708, 709 (1928); and Herrin Transp. Co. v. Robert E. Olson Co., 325 S.W.2d 826, 827 (Tex. Civ. App. 1959);

contract, and thus accepted the consignee's personal check at its own risk.[87] Because the carrier breached its contractual duty to the shipper, it was liable for whatever could have been collected.[88]

C. *Summary*

This section provided a history on how courts have analyzed eight significant C.O.D. cases.[89] The fact patterns in each of these eight cases were basically the same. The shipper entered into a C.O.D. contract with the carrier, the carrier delivered the goods, but failed to remit full payment back to the shipper. As a result, the court held the carrier liable for breach of contract.[90]

In so holding, courts rationalized their decisions using a four step procedure. This procedure can be summarized as follows: (1) a carrier who receives goods under a C.O.D. contract acts in two capacities: as a bailee to transport the goods and as an agent to collect the price;[91] (2) a carrier's liability to transport the goods arises by common law, while a carrier's liability to collect the price arises by contract;[92] (3) a carrier has complete discretion in deter-

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[87] *National Van Lines*, 385 F.2d at 802; *see* Channing v. Riddle Aviation Co., 203 Misc. 844, 119 N.Y.S.2d 552, 554 (1953) (if a carrier accepts a check in lieu of cash, it does so at its own risk); Joseph Mogul, Inc. v. C. Lewis Lavine, Inc., 220 App. Div. 287, 221 N.Y.S. 391, 395 (1927) (a C.O.D. shipment of goods contemplates that a carrier will collect the amount specified in cash, and, if a check is accepted in lieu thereof, it is done at the peril of the carrier), *rev'd on other grounds*, 247 N.Y. 20, 159 N.E. 708 (1928).

[88] *National Van Lines*, 385 F.2d at 802; *see Herrin*, 325 S.W.2d at 827 (when the carrier breaches its duty to act as agent for the shipper in collection of the price, it is liable for whatever could have been collected if the duty had been fulfilled); *Justin*, 43 So. 2d at 57 (carrier is liable, like any other collection agent, for whatever could have been collected); *Joseph Mogul*, 159 N.E. at 709 (for breach of its duty to act as agent for the shipper in the collection of the price, the carrier is liable, like any other collection agent, for whatever could have been collected if the duty had been fulfilled).

[89] *See supra* notes 24-88 and accompanying text for a discussion of these eight C.O.D. cases.

[90] *See supra* notes 29-88 and accompanying text for examples of when the courts held the carrier liable for breach of contract.

[91] *See supra* note 7 for a list of cases which have held that a carrier's collection duty is governed by agency principles.

[92] *See National Van Lines*, 385 F.2d at 802; *see also supra* notes 75-88 and accompa-

mining whether to enter into a C.O.D. contract;[93] and (4) if a carrier decides to enter into a C.O.D. contract, it will be held to strict compliance with its agreement.[94] Consequently, in a situation where a carrier enters into an express C.O.D. contract with a shipper, courts will follow the general rule that a carrier will be held to strict compliance with its agreement.

II. WAIVER AND RATIFICATION

In contrast to Section I that analyzed cases in which only the carrier violated the terms of the C.O.D. contract,[95] Section II analyzes cases in which both the carrier and the shipper violate the terms of the C.O.D. contract.[96] Normally, the carrier violates the terms of the C.O.D. contract by accepting payment in a form other than that authorized in the contract. Correspondingly, the shipper violates the terms of the C.O.D. contract by accepting this unauthorized payment. In this situation, the issue becomes whether the shipper ratified the carrier's act, and thus waived its opportunity to contest.

A. *Waiver and Ratification Established*

The first major case to utilize the principles of waiver and ratification in a C.O.D. context was *Rathbun v. Citizens Steamboat Co.*[97] In *Rathbun*, the shipper sent articles of per-

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nying text for a discussion of *National Van Lines*; *see* Okin v. Railway Express Agency, 24 N.J. Misc. 8, 44 A.2d 896, 897 (1945); *see also supra* notes 51-57 and accompanying text for a discussion of *Okin*; *see* Nuside Metal Prod., Inc. v. Eazor Express, Inc., 189 Pa. Super. 593, 152 A.2d 275, 279 (1959); *see also supra* notes 58-65 and accompanying text for a discussion of *Nuside*.

[93] *See* Anthony v. American Express Co., 188 N.C. 407, 124 S.E. 753, 754-55 (1924); *see also supra* notes 36-41 and accompanying text for a discussion of *Anthony*.

[94] *See National Van Lines*, 385 F.2d at 802; *see also supra* notes 75-88 and accompanying text for a discussion of *National Van Lines*; *see Anthony*, 124 S.E. at 755; *see also supra* notes 36-41 and accompanying text for a discussion of *Anthony*; *see Nuside*, 152 A.2d at 279; *see also supra* notes 58-65 and accompanying text for a discussion of *Nuside*.

[95] *See supra* notes 21-94 and accompanying text for a discussion of Section I.

[96] *See infra* notes 96-149 and accompanying text for a discussion of Section II.

[97] 76 N.Y. 376 (1879).

sonal property to the consignee on a C.O.D. basis with the understanding that the carrier was to deliver the goods and accept only cash.[98] The carrier subsequently delivered the goods, but accepted the consignee's check as payment for the C.O.D. order.[99] The carrier then gave this check to the shipper, who deposited it into its bank account.[100] A short time later, the check was returned to the shipper because of insufficient funds, and the shipper sued the carrier.[101] The carrier defended this action by claiming that the shipper waived the cash only requirement by unconditionally accepting the consignee's check.[102] In 1879, the New York Court of Appeals found that the shipper adopted and ratified the carrier's acts by the unqualified acceptance of the consignee's check.[103] The court reasoned that knowledge of all material facts was indispensable in order to bind the shipper by ratification.[104] In this case, the shipper unconditionally accepted the consignee's check, instead of cash.[105] Therefore, the shipper ratified and adopted the carrier's act.[106] Moreover, if the shipper intended to merely aid the carrier in getting the money, the shipper should have made a qualified acceptance or refused to accept the check.[107]

Bond Rubber Corp. v. Oates Bros., Inc.,[108] also involved a

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[98] *Id.* at 378.

[99] *Id.*

[100] *Id.*

[101] *Id.* The New York Court of Appeals stated the issue as follows, "whether the unconditioned acceptance of the check did not amount to a waiver of the requirement to collect the money or a ratification of the act of receiving the check in lieu of the money." *Id.*

[102] *Id.*

[103] *Id.* at 380-81. The New York Court of Appeals affirmed the judgment of the lower court. *Id.* at 381.

[104] *Id.* at 379; *see* Nixon v. Palmer, 8 N.Y. 398, 401 (1853) (in order to make the ratification of an unauthorized act binding, it must be made with full knowledge of the facts affecting the rights of the principal).

[105] *Rathbun*, 76 N.Y. at 379.

[106] *Id.* at 380. The shipper assumed the risk that the consignee's check would be returned for insufficient funds when it accepted and deposited the check. *Id.* at 379-80.

[107] *Id.* at 380

[108] 136 Conn. 248, 70 A.2d 115 (1949).

shipper ratifying the unauthorized acts of a carrier. In *Bond* the shipper sent two C.O.D. shipments to the consignee.[109] For each shipment the carrier was contractually bound to accept either cash or certified checks.[110] On each shipment, however, the carrier accepted an uncertified check from the consignee and mailed that check to the shipper.[111] The shipper accepted and deposited this uncertified check into its bank account without objection.[112] Later, this check was returned to the shipper because of insufficient funds.[113] The shipper sued, and the carrier defended the action by claiming that the shipper waived its right to collect cash or a certified check when it accepted the consignee's uncertified check.[114] In 1949, the Supreme Court of Connecticut held for the carrier.[115] The court reasoned that the shipper ratified the acts of the carrier by accepting the consignee's uncertified checks.[116] A ratification results when the shipper accepts the carrier's act with an intent to ratify and with full knowledge of all material circumstances.[117] Here, the

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[109] *Id.* at 116.

[110] *Id.* at 117. The carrier's bills of lading stated that the shipper required either cash or certified check. *Id.*

[111] *Id.* at 116.

[112] *Id.*

[113] *Id.* In addition to the fact that the checks were uncertified, they were also postdated. On September 12 and 16, 1947, the shipper turned over to the carrier two C.O.D. shipments of goods for delivery to consignee in New York. On September 17, the carrier made its first delivery and accepted an uncertified check dated September 19. On September 22, the carrier made its second delivery and accepted an uncertified check dated September 26. The carrier mailed each of these checks to the shipper on the day following delivery. Attached to the check was the C.O.D. remittance slip showing the date of delivery. On each occasion the shipper's bookkeeper marked the accounts as "Paid" and deposited the checks. Later, all the checks were returned to the shipper as unpaid because of insufficient funds. *Id.*

[114] *Id.* at 116-17.

[115] *Id.* at 118. The Supreme Court of Connecticut did not find error in the conclusion of the trial court that the shipper ratified the carrier's acceptance of the uncertified checks. *Id.*

[116] *Id.* at 117.

[117] *Id.*; *see* Cyclone Fence Co. v. McAviney, 121 Conn. 656, 186 A. 635, 638 (1936) (the acceptance of the results of the act with an intent to ratify, and with full knowledge of all material circumstances, is a ratification); *see also* Meriden Trust & Safe Deposit Co. v. Miller, 88 Conn. 157, 162, 90 A. 228, 229 (1914) (a

shipper unconditionally accepted two uncertified checks with full knowledge that these checks were uncertified.[118]

In *Mountain States Waterbed Distributors, Inc. v. O.N.C. Freight Systems Corp.*,[119] the carrier contractually agreed to deliver goods on a C.O.D. basis and to accept only a cashier's check as payment from the consignee.[120] The carrier subsequently delivered the goods and accepted the consignee's company check, rather than a cashier's check, as payment.[121] The carrier then remitted the company check to the shipper who deposited the check into its bank account.[122] Later the company check was dishonored and the shipper sued the carrier for failure to obtain payment by means of a cashier's check.[123] The Colorado Court of Appeals held that the carrier was not liable to the shipper because the shipper ratified the actions of the carrier by depositing the consignee's company check.[124] The court reasoned that the shipper's unconditional acceptance of a form of payment not authorized by the C.O.D. contract constituted a ratification of the carrier's act.[125] As such, the shipper waived its claim against the carrier for breach of contract.[126]

In 1972, the Civil Court of the City of New York considered, in *Compuknit Industries v. Mercury Motors Express, Inc.*,[127] whether the 93 year old holding in *Rathbun v. Citi-*

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question of intent is a question of fact, the determination of which is not reviewable unless the conclusion drawn by the trier is one which cannot reasonably be made).

[118] *Bond*, 70 A.2d at 117.

[119] 44 Colo. App. 433, 614 P.2d 906 (1980).

[120] *Id.* at 906.

[121] *Id.*

[122] *Id.*

[123] *Id.* In the lower court decision, the Superior Court of the City and County of Denver entered an order in favor of the shipper on its claim for damages because the carrier failed to obtain payment in the form of a cashier's check. *Id.*

[124] *Id.* at 908. The Colorado Court of Appeals reversed the judgment of the lower court. *Id.*

[125] *Id.* at 907; *see* Rathbun v. Citizens Steamboat Co., 76 N.Y. 376 (1879); *see also supra* notes 97-107 and accompanying text for a discussion of *Rathbun*.

[126] *Mountain States*, 614 P.2d at 906.

[127] 72 Misc. 2d 55, 337 N.Y.S.2d 918, 919 (N.Y. Civ. Ct. 1972).

zens Steamboat Co.,[128] still controlled. The fact situation in *Compuknit* closely matched the one described in *Rathbun*.[129] The Civil Court of the City of New York held that the *Rathbun* doctrine still stands as valid precedent despite its venerable age.[130] The court stated, "this Court sees no necessity to change its applicability merely because of its age."[131] The shipper "made its bed and now it must sleep in it."[132]

Consequently, *Rathbun*, *Bond*, *Mountain States*, and *Compuknit*, stand for the rule that if a shipper unconditionally accepts payment in a form other than that authorized by the C.O.D. contract, such acceptance constitutes ratification.[133] In which case, the shipper will be prohibited from successfully collecting the C.O.D. payment from the carrier. The underlying rationale in ratification cases is that the shipper must accept the consequence of its action.[134]

B. *Waiver and Ratification Not Established*

As previously stated, if a shipper unconditionally accepts payment in a form other than that authorized by the C.O.D. contract, such acceptance constitutes ratification.[135] What happens, however, when the shipper conditionally accepts an unauthorized form of payment. This was the issue that the New Jersey Supreme Court addressed in *S.B. Penick & Co. v. Triple "M" Transport Co.* [136] In *S.B. Penick*, the carrier, in delivering a C.O.D. shipment,

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[128] 76 N.Y. at 378; *see supra* notes 97-107 and accompanying text for a discussion of *Rathbun*.

[129] *Compuknit*, 337 N.Y.S.2d at 918. In *Compuknit*, the shipper sent merchandise to the consignee on a C.O.D. basis. The carrier delivered the property and accepted the consignee's postdated checks. The shipper held and then deposited these checks for collection. The bank refused payment on account of insufficient funds, and the shipper sued the carrier. *Id.* at 919-20.

[130] *Id.* at 921.

[131] *Id.*

[132] *Id.* at 922.

[133] *See supra* notes 97-132 and accompanying text for a discussion of these four cases.

[134] *See supra* note 132 and accompanying text for an example of this rationale.

[135] *See supra* note 133 and accompanying text for an example of this principle.

[136] 131 N.J.L. 114, 34 A.2d 898 (1943).

accepted a postdated check which was contrary to the provisions of the contract.[137] The carrier telephoned the shipper and explained the situation.[138] The shipper gave instructions to forward the check, but indicated that it would not accept any responsibility for its collection.[139] After the shipper received the check, the consignee went into bankruptcy making the check worthless.[140] In 1943, the New Jersey Supreme Court held the carrier liable for breach of contract.[141] The court reasoned that the shipper did not unconditionally accept the consignee's postdated check.[142] Rather, the shipper accepted the check upon the condition that it would assume no responsibility for its collection.[143] Consequently, the carrier became liable for the amount of the check when it elected to take the chance that the consignee was solvent.[144]

C. *Summary*

This section analyzed cases in which both the carrier and shipper violated the terms of the C.O.D. contract.[145] The carrier violated the terms of the C.O.D. contract by accepting a form of payment other than that authorized by the contract.[146] Correspondingly, the shipper violated

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[137] *Id.* at 899.

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.* The New Jersey Supreme Court affirmed the judgment of the lower court. In so holding the court stated that the carrier unsuccessfully argued that the shipper's instructions waived the carrier's duty to collect cash or a currently dated check. *Id.* at 899.

[142] *Id.* at 899-900.

[143] *Id.* at 900.

[144] *Id.*

[145] *See supra* notes 95-144 and accompanying text for a discussion of cases in this section.

[146] *Id.* In Rathbun v. Citizens Steamboat Co., 76 N.Y. 376, 378 (1879) the carrier accepted a check instead of cash; *see supra* notes 97-107 and accompanying text for a discussion of *Rathbun*. In Bond Rubber Corp. v. Oates Bros., Inc., 136 Conn. 248, 70 A.2d 115, 116 (1949), the carrier accepted an uncertified check instead of cash or a certified check; *see supra* notes 108-118 and accompanying text for a discussion of *Bond*. In Mountain States Waterbed Distrib. Inc. v. O.N.C. Freight Sys. Corp., 44 Colo. App. 433, 614 P.2d 906 (1980), the carrier accepted a

the terms of the C.O.D. contract by accepting this unauthorized payment.[147]

Generally, in this situation, courts will not blindly hold the carrier liable for breach of contract. Instead, they will look to determine the shipper's response to the unauthorized payment. If the shipper unconditionally accepts and deposits the unauthorized payment, courts will find waiver or ratification, which will prevent the shipper from collecting payment.[148] Conversely, if the shipper protests or refuses the unauthorized payment, courts will not find waiver or ratification, which will allow the shipper to collect.[149] In other words, the shipper bears the burden of screening every check that it receives under a C.O.D. contract. By doing this, courts are protecting the delivery and transportation industries from unwarranted liability.

III. CONTEMPORARY C.O.D. ISSUES

In contrast to Sections I and II which analyzed cases where the carrier accepted an unauthorized form of payment,[150] Section III analyzes cases where the carrier accepts an authorized form of payment, but nevertheless violates the terms of the C.O.D. contract because that payment turns out to be a worthless forgery.[151] Typically in these cases, the carrier is contractually required to accept a certified check as payment under a C.O.D. order. The carrier subsequently makes delivery, accepts a certi-

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company check instead of a cashier's check; *see supra* notes 119-126 and accompanying text for a discussion of *Mountain States*. In *S.B. Pennick*, 34 A.2d at 899, the carrier accepted a postdated check instead of a currently dated check; *see supra* notes 136-144 and accompanying text for a discussion of *S.B. Pennick*.

[147] *See supra* notes 95-144 and accompanying text for a discussion of cases in which the shipper also accepted this unauthorized payment.

[148] *See supra* notes 97-132 and accompanying text for a discussion of cases in which the shipper unconditionally accepted an unauthorized payment.

[149] *See supra* notes 136-144 and accompanying text for a discussion of a case in which the shipper conditionally accepted an unauthorized payment.

[150] *See supra* notes 21-149 and accompanying text for a discussion of Sections I and II.

[151] *See infra* notes 152-264 and accompanying text for a discussion of Section III.

fied check as payment, and returns that check to the shipper. Later, the shipper discovers that the certified check is a worthless forgery. In these situations, courts focus on two primary issues: first, the standard of care required of a carrier when undertaking to perform collection activities under a C.O.D. contract; [152] and second, should a carrier be liable for failing to verify a forged certified check that it accepted as payment under a C.O.D. contract.[153]

A. *What Is An Air Carrier's Standard of Care When Collecting Payment Under a C.O.D. Contract*

In *Video Station v. Frey's Motor Express, Inc.*,[154] the shipper contracted with the carrier to deliver goods on a C.O.D. basis. The contract required the carrier to release the goods to the consignee only upon receipt of cash or a certified check.[155] The carrier delivered the goods and accepted a certified check.[156] This check, however, did not contain the required signature of an officer of the certifying bank.[157] Further, the check was made payable to Chase Manhattan Bank, and not to the shipper.[158] As a result, the Superior Court of New Jersey, Appellate Division, held the carrier liable for negligently accepting the check.[159]

The *Video Station* court began its analysis by stating that a carrier's liability for failure to pick up cash or its

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[152] *See infra* notes 154-202 and accompanying text for a discussion of the standard of care issue.

[153] *See infra* notes 203-264 and accompanying text for a discussion of the verification issue.

[154] 188 N.J. Super. 494, 457 A.2d 1217, 1218 (1983).

[155] *Id.* at 1219.

[156] *Id.*

[157] *Id.*; *see* Menke v. Board of Educ., 211 N.W.2d 601, 605-06 (Iowa 1973) (certification of a check requires the written signature of a bank officer).

[158] *Video Station*, 457 A.2d at 1219. "Pay to the order of Chase Manhattan Bank, N.A." are words of special endorsement. These words would only be placed on a check by its holder upon negotiation. This language simply had no purpose being on the check when it was negotiated by the drawer to the holder. Clearly, this instrument was a forgery. *Id.* at 1219-20.

[159] *Id.* at 1219. The Superior Court of New Jersey, Appellate Division, affirmed the judgment of the lower court. *Id.* at 1120.

equivalent was a contractual matter between the parties.[160] The parties' collection contract was separate and unrelated to their delivery contract.[161] The effect of the parties' collection contract was to make the carrier an agent of the shipper for the purpose of collecting the price of the delivered goods.[162] The court then set forth the carrier's minimum standard of care that it must meet in performing this collection activity: "An agent to collect a debt or claim must exercise ordinary care, skill, and diligence in the performance of all the duties incident to the undertaking, and will be liable to his principal for any loss which his negligence in this respect may occasion."[163] Thus, the court held that the carrier was under a duty to exercise ordinary care, skill and diligence in collecting the payment for the shipper.[164]

The court went on to state that the carrier breached its duty of ordinary care when it accepted a certified check without the proper bank signature.[165] Furthermore, the notation "Pay to the order of the Chase Manhattan Bank," had no purpose being on the check.[166] Consequently, the court held that the check was clearly a forgery and that the carrier should have discovered this forgery.[167] In other words, the carrier had notice that the check was a possible forgery, and therefore had the duty to make further inquiry.[168]

Video Station is noteworthy for two reasons. First, it

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[160] *Id.* at 1219; *see* 13 AM. JUR. 2D *Carriers* § 454 (1964); *see also supra* note 2 for a discussion of section 454. *See* 13 C.J.S. *Carriers* § 186a (1939), *see also supra* note 4 for a discussion of section 186a.

[161] *Video Station*, 457 A.2d at 1219.

[162] *Id.*; *see supra* note 7 for a discussion of cases which have held that a C.O.D. collection contract creates an agency relationship between the shipper and the carrier.

[163] *Video Station*, 457 A.2d at 1219; *see* 3 C.J.S. *Agency* § 304a (1973); *see also supra* note 12 for a discussion of section 304a.

[164] *Video Station*, 457 A.2d at 1219.

[165] *Id.*

[166] *Id.* at 1220.

[167] *Id.*

[168] *Id.* The court repeated the observation of the trial judge, that "[a] defendant who is in the business of accepting C.O.D. shipments for delivery should rea-

firmly established the principle that a carrier has a duty of using ordinary care in collecting payment under a C.O.D. contract.[169] More importantly, however, *Video Station* held that in order to meet this duty of ordinary care, a carrier must educate its employees on how to recognize the identifying characteristics of a certified check.[170] This education requirement is significant because courts will now hold a carrier liable when it accepts a clearly forged certified check as payment under a C.O.D. contract.

Another case that analyzed the standard of care which a carrier must use in collecting payment under a C.O.D. contract was *Shockley v. United Parcel Service, Inc.*[171] In this case, the shipper entered into a C.O.D. contract with the carrier, under which the carrier was required to deliver the goods and collect cash or a company check.[172] On delivery, the consignee tendered a company check having only a hand-written notation of the company's name.[173] The carrier accepted this check and remitted it to the shipper.[174] Subsequently, the check was returned for insufficient funds and the shipper sued the carrier.[175] The

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sonably be required to educate its agents and employees as to the identifying characteristics of a certified check." *Id.*

[169] *Id.* at 1219.

[170] *Id.* at 1220.

[171] 664 S.W.2d 523 (Ky. Ct. App. 1983).

[172] *Id.*

[173] *Id.* at 524.

[174] *Id.* On February 18, 1982, the shipper required the carrier to accept cash from the consignee under the C.O.D. contract. The next morning, the shipper modified the C.O.D. contract allowing the carrier to accept cash or a company check. On March 1, 1982, before receiving payment for the initial shipment, the shipper sent a second C.O.D. order also requiring the carrier to accept cash or a company check. A few days later, the shipper received the consignee's company check that the carrier had accepted as payment for the first C.O.D. order. The check was for the correct amount but was not imprinted with the consignee's company name. Instead, the check had only a hand-written notation of the consignee's company name. The shipper became concerned with the crude appearance of this check and took it immediately to its bank to determine the check's validity. The bank informed the shipper that the account from which the check was written was closed. The shipper attempted to stop the carrier from delivering the second C.O.D. shipment, but it was too late. The shipper in this instance lost the value of both shipments. *Id.* at 523-24.

[175] *Id.* at 524.

Kentucky Court of Appeals affirmed summary judgment for the carrier.[176] The court stated that:

> placing responsibility upon UPS [carrier] to ascertain the sufficiency of the checks received to satisfy the requirements of the order, in light of the directions given to UPS, creates an undue burden upon UPS in performing its duties. UPS is not involved in the banking business and is not in a position to credit or discredit negotiable instruments beyond their duty of examining the face of the check to determine whether it comports to the instructions given UPS.[177]

According to the *Shockley* court, in order to satisfy the definition of ordinary care, a carrier must examine the face of each check to make sure that it comports with the shipper's instructions.[178] In other words, a carrier must compare the actual payment that it receives with the payment that it is authorized to collect under the C.O.D. contract. It is interesting to note, that in this set of facts, ordinary care did not include the duty of verifying the sufficiency of the checks.

The most recent case to discuss the standard of care that a carrier must use in collecting payment under a C.O.D. contract was *Littleton Stamp & Coin Co. v. Delta Airlines, Inc.*[179] In this case, the carrier entered into a contract with the shipper, agreeing to make two shipments of coins and to collect the price of the coins from the consignee.[180] The contracts authorized the carrier to accept a certified check as payment for the coins.[181] Upon delivery the carrier accepted, but did not verify, the certified checks.[182] It was later determined, however, that these

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[176] *Id.* at 524-25.
[177] *Id.*
[178] *Id.* at 525.
[179] 778 F.2d 53, 54 (1st Cir. 1985).
[180] *Id.*
[181] *Id.*
[182] *Id.* at 54-55. The consignee originally arrived at the airport with a single check covering both the price of the goods and the C.O.D. charges. The carrier refused to accept this check and required the consignee to return the next day with separate checks. *Id.* at 57.

checks were worthless forgeries.[183] The First Circuit Court of Appeals reversed the trial court's grant of summary judgment for the shipper, and held that a standard of reasonable care applied to the carrier's contractual obligation to collect.[184]

The First Circuit began its analysis of this case by enunciating the two duties a carrier assumes by delivering goods on a C.O.D. basis: the common law duty to transport the goods, and the contractual duty to collect payment.[185] The First Circuit agreed with the approach of other courts which utilize the principles of agency law in determining the standard of care that a carrier assumes in contractually agreeing to collect payment on a C.O.D. order.[186] Accordingly, an agent employed to collect money due the shipper has a duty of using reasonable care in making such collections.[187] In *Littleton*, the First Circuit never reached the conclusion of whether Delta Airlines exercised reasonable care, when it failed to verify payment.[188] Instead, the court merely held that the issue was inappropriate for summary judgment and remanded the case back to the trial court.[189]

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[183] *Id.* at 55.

[184] *Id.* at 57-58.

[185] *Id.* at 55; *see supra* note 7 for a discussion of cases which have cited this principle.

[186] *Littleton*, 778 F.2d at 55.

[187] *Id.*; *see* RESTATEMENT (SECOND) OF AGENCY § 426 (1957); *see also supra* note 12 for a discussion of section 426. The First Circuit then made a distinction between cases in which the carrier attempted to follow the shipper's instructions. *Compare Littleton*, 778 F.2d at 55 (the carrier attempted to follow the instructions) *with* Jospeh Mogul, Inc. v. C. Lewis Lavine, Inc., 247 N.Y. 20, 159 N.E. 708 (1928) (the shipper did not endorse a specific alternative to cash) and Murray v. Warner, 55 N.H. 546 (1875) (the carrier obtained no payment) and National Van Lines v. Rich Plan Corp., 385 F.2d 800 (5th Cir. 1967)(the carrier departed from the shipper's instructions by accepting a company check rather than cash). The First Circuit conceded that when a carrier fails to obtain any payment or when it accepts a form of payment not authorized by the shipper, the carrier is liable. *Littleton*, 778 F.2d at 56.

[188] *Littleton*, 778 F.2d at 57-58.

[189] *Id.* at 55. The district court granted the shipper's motion for summary judgment on the theory that the carrier is strictly liable to the shipper when it defaults under a C.O.D. contract to collect a certain sum. The First Circuit Court of Appeals remanded the case back to the district court because application of strict

In so holding, the First Circuit went on to list the factors, both pro and con, that the trial court should consider on remand in determining whether Delta Airlines exercised reasonable care.[190] In Delta's favor, suggesting that the carrier acted reasonably, the court stated that first, the shipper made a clear choice to have the checks made out in its own name, not that of Delta.[191] Second, the plane carrying the coins arrived at its destination after 6 p.m. on Friday evening.[192] These two factors indicate that Delta could not have verified the checks. Third, letters between the shipper and the consignee suggested that the shipper had already cleared the consignee's certified checks.[193]

Not all factors, however, lead to the conclusion that Delta acted reasonably.[194] For example, Delta refused to turn over the coins on Friday evening because the consignee had only one check covering both the shipping charges and the cost of the coins.[195] Delta required the consignee to return the next day with separate checks before it released the coins.[196] Therefore, it might have been reasonable for Delta to have verified the certified checks.[197] Secondly, it was Delta's standard practice to verify checks in excess of $10,000.[198] Consequently, there

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liability was inappropriate in this situation. Instead, the relevant inquiry was whether the carrier acted with reasonable care. *Id.*

[190] *Id.* at 56-57.

[191] *Id.* at 56. Airlines offer shippers a choice of having certified checks made payable to the airline or the shipper. This is significant because airlines only verify checks made payable to the airline. Airlines do not verify checks made payable to the shipper. This is because it is very difficult for an airline to verify a certified check when it is neither a drawer nor payee of the check *Id.*

[192] *Id.* Even if the carrier wanted to, it could not have verified the check on Friday evening because the coins arrived after the close of banking hours. *Id.*

[193] *Id.* at 56-57.

[194] *Id.* at 57.

[195] *Id.*

[196] *Id.* If the consignee was able to obtain a new check during the weekend, it might have been reasonable to charge the carrier with the responsibility of verifying that check. *Id.*

[197] *Id.*

[198] *Id.* Carrier's Standard Practice states: "If the instrument tendered is for more than $10,000 . . . verify with the issuing bank or agency." This Standard

were also arguments in favor of finding that Delta did not act reasonably when it failed to verify payment.[199]

As demonstrated by *Video Station*, *Shockley*, and *Littleton*, a carrier acts as an agent of the shipper when it contracts to collect payment on a C.O.D. order. As such, a carrier must exercise ordinary or reasonable care in the performance of all duties incident to this undertaking. According to *Video Station*, ordinary care requires the carrier to identify the relevant characteristics of a certified check.[200] According to *Shockley*, ordinary care further requires the carrier to compare the actual payment that it receives with the payment that it is authorized to collect under the C.O.D. contract.[201] And finally, *Littleton* sets forth a list of factors that a court should consider in determining whether a carrier exercised reasonable care.[202]

B. *Should An Air Carrier Be Liable For Failing to Verify a Forged Certified Check that it Accepted as Payment Under a C.O.D. Contract?*

The second contemporary issue facing courts is whether a carrier's duty of ordinary or reasonable care also includes the obligation to verify the solvency of a certified check.[203] This issue most frequently arises in cases where the carrier fails to verify the sufficiency of a forged certified check that it accepts as payment under a C.O.D. contract. On the one hand, the shipper claims that it should be allowed to collect payment from the carrier because the purpose of a C.O.D. shipment is to ensure that

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Practice is part of the carrier's C.O.D. contract. Therefore, if the shipper relied on this practice in choosing the method of payment, a court could find the carrier's actions unreasonable. *Id.*

[199] *Id.*

[200] *Video Station*, 457 A.2d at 1220; *see supra* notes 154-170 and accompanying text for a discussion of *Video Station*.

[201] *Shockley*, 664 S.W.2d at 525; *see supra* notes 171-178 and accompanying text for a discussion of *Shockley*.

[202] *Littleton*, 778 F.2d at 56-57; *see supra* notes 179-199 and accompanying text for a discussion of *Littleton*.

[203] *See infra* notes 204-264 and accompanying text for a discussion of this issue.

the shipper receives liquid assets.[204] On the other hand, the carrier claims that it should not be required to pay the shipper because it is not a bank, and thus, is not in a position to credit or discredit negotiable instruments.[205] So far, the limited number of courts that have addressed this issue have tended to favor the carrier's argument over that of the shipper.[206]

On February 15, 1985, the Texas Court of Appeals (San Antonio) decided *Duderstadt Surveyors Supply, Inc. v. Alamo Express, Inc.*[207] In *Duderstadt* the shipper specifically authorized the carrier to accept a certified check under a C.O.D. contract.[208] Accordingly, the carrier delivered the goods, accepted a certified check, and presented the check to the shipper.[209] The shipper, in turn, deposited the check.[210] The bank, however, refused to pay the check because it was a forgery.[211] The shipper then sued the carrier.[212] The Texas Court of Appeals held that there was more than adequate evidence to support the trial court's determination that the carrier was not liable.[213]

In *Duderstadt* the Court of Appeals began its analysis by stating that there is not any common law duty on a carrier

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[204] *See infra* notes 217-234 and accompanying text for a discussion of *Swest*.

[205] *See supra* notes 171-178 and accompanying text for a discussion of *Shockley*.

[206] *See infra* notes 256-264 and accompanying text for a discussion of *American Airlines*.

[207] 686 S.W.2d 351 (Tex. Ct. App. 1985).

[208] *Id.* at 352-53.

[209] *Id.* at 353. The uncontroverted facts in this case are that the shipper sent survey equipment under a C.O.D. contract to Petroleos Mexicanos in care of its agent, Raul Buenrostro. Upon arrival of the equipment in the carrier's terminal, a man purporting to be Raul Buenrostro picked up the goods consigned to Petroleos Mexicanos and tendered a purported cashier's check as payment. Later, upon presentment for collection, the bank determined that the check was a forgery and refused payment. Subsequently, the shipper unsuccessfully demanded payment from the carrier and initiated this suit. *Id.* at 352-53.

[210] *Id.*

[211] *Id.* The cashier's check tendered by consignee showed nothing on its face that would have led the carrier to question its authenticity. *Id.* at 355.

[212] *Id.* at 353.

[213] *Id.* at 355. The Texas Court of Appeals affirmed the judgment of the lower court. *Id.* at 356.

to act as the shipper's collecting agent.[214] Rather, a carrier must use "reasonable care and skill in making such collections in accordance with the directions of the principle."[215] The carrier in *Duberstadt* met the duty of reasonable care because the cashier's check showed nothing on its face that would have led the carrier to question its authenticity.[216]

Three months later, on May 16, 1985, the Texas Court of Appeals (Dallas) decided *Swest, Inc. v. American Airlines, Inc.*[217] *Swest* is significant because it was the first case to hold that reasonable care includes the duty to verify a certified check.[218] In *Swest* the shipper sent a number of gold and silver shipments to the consignee via American Airlines.[219] On the third and fourth shipments, the carrier accepted payment from the consignee with what appeared to be genuine certified checks, but in reality the bank certifications were forged.[220] In both instances, the carrier turned the goods over to the consignee around midnight and made no attempt to verify the forged certified

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[214] *Id.* at 355; *see* National Van Lines v. Rich Plan Corp., 385 F.2d 800, 802 (5th Cir. 1967) (a carrier bears no common law duty to act as the shipper's collecting agent. The C.O.D. obligation is a special service which is outside the scope of the carrier's public service); *see also supra* notes 75-88 and accompanying text for a discussion of *National Van Lines*.

[215] *Duderstadt*, 686 S.W.2d at 355; *see* RESTATEMENT (SECOND) OF AGENCY § 426 (1957); *see also supra* note 12 for a discussion of section 426.

[216] *Duderstadt*, 686 S.W.2d at 355; *see supra* notes 154-170 and accompanying text for a discussion that reasonable care required the carrier to identify the relevant characteristics of a certificed check; *see also supra* notes 171-178 and accompanying text for a discussion that reasonable care requires that the carrier to compare the actual payment that it receives with the payment that it is authorized to collect under the C.O.D. contract. In *Duderstadt*, the Court of Appeals held that there was sufficient evidence for the trial court to find that the carrier exercised reasonable care and diligence in forwarding the cashier's check. The cashier's check that the carrier accepted and tendered to the shipper showed nothing on its face to question its authenticity. Both the shipper and the bank handled and accepted the check as being geniune. *Duderstadt*, 686 S.W.2d at 355.

[217] 694 S.W.2d 399 (Tex. Ct. App. 1985), *rev'd*, 707 S.W.2d 545 (Tex. 1986).

[218] *Id.* at 402. Because *Swest* was reversed by the Texas Supreme Court, it is being discussed only for its historical value and to view one court's errant view of C.O.D. contract analysis.

[219] *Id.* at 401.

[220] *Id.*

checks.[221] Subsequently, the bank dishonored these checks, and the shipper sued the carrier.[222] The Texas Court of Appeals held the carrier liable for breach of contract because it failed to verify the certified checks.[223]

The *Swest* court based its decision on three principles. First, the court relied on the holding of the New York Court of Appeals in *Joseph Mogul, Inc. v. C. Lewis Lavine, Inc.*[224] In *Joseph Mogul*, the court held that a carrier which accepts a certified check as payment under a C.O.D. contract has the duty to verify that check.[225] Furthermore, a C.O.D. contract requires the carrier to accept a certified check, "and not a mere pretense of one."[226] Second, the court believed that not holding the carrier liable in this situation would undermine the policy and purpose behind a C.O.D. shipment.[227] The policy behind a C.O.D. shipment is to prevent the carrier from making delivery without collecting.[228] The purpose behind this policy is to ensure that the shipper receives liquid assets, and not a contract claim against a consignee who may be insol-

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[221] *Id.* There were not any problems with the first two shipments when payment was made by a cashier's check and a certified personal check. It was only on the third and fourth shipments that the certified checks turned out to be forged. *Id.*

[222] *Id.* At the trial court, Swest alleged breach of contract, fraud, negligence, breach of duty of good faith and fair dealing, and breach of duty to comply with reasonable commercial standards. These causes were tried before a jury which found that the carrier did not breach its C.O.D. contract with the shipper. Accordingly, the trial court entered judgment for the carrier. Subsequently, the shipper appealed. The Texas Court of Appeals reversed and held that the carrier breached its contract with the shipper as a matter of law. *Id.*

[223] *Id.* at 402. The Texas Court of Appeals reversed, and rendered judgment for the shipper. *Id.* at 404.

[224] *Id.*; *see* Joseph Mogul, Inc. v. C. Lewis Lavine, Inc., 247 N.Y. 20, 159 N.E. 708 (1928); *see also supra* notes 42-50 and accompanying text for a discussion of *Joseph Mogul.*

[225] *Joseph Mogul*, 159 N.E. at 709.

[226] *Id.*

[227] *Swest*, 694 S.W.2d at 402.

[228] *Id.* The policy is to "assure that the carrier cannot make absolute delivery without collecting, thereby leaving the shipper to his recourse against the consignee." *Id., quoting* National Van Lines v. Rich Plan Corp., 385 F.2d 800, 803 (5th Cir. 1967); *see supra* notes 75-88 and accompanying text for a discussion of *National Van Lines.*

vent.[229] Third, the court reasoned that requiring verification is just an extension of *Video Station*.[230] In *Video Station* the court held that a C.O.D. carrier must inspect a purported certified check for facial defects.[231] Now under *Swest*, a C.O.D. carrier must verify those certified checks which pass visual inspection.[232] Consequently, *Video Station* should not be read to mean that reasonable care is satisfied when a C.O.D. carrier only inspects a certified check to see if all relevant characteristics are present.[233] Instead, under *Swest*, reasonable care is satisfied only when a C.O.D. carrier inspects and verifies each certified check which it collects as payment on behalf of the shipper.[234]

On November 27, 1985, the First Circuit Court of Appeals criticized the *Swest* opinion in *Littleton Stamp & Coin Co. v. Delta Airlines, Inc.*[235] In *Littleton*, the carrier entered into a C.O.D. contract with the shipper agreeing to make two shipments of coins.[236] The contract authorized the carrier to accept certified checks as payment.[237] Upon de-

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[229] *Swest*, 694 S.W.2d at 402. The *Swest* Court stated the purpose behind the policy of a C.O.D. contract as follows:

> The seller generally utilizes a C.O.D. contract because he either does not trust the buyer or does not intend to advance credit. . . [W]hen utilizing the C.O.D. method the seller really indicates he wants liquid assets, not a contract claim against a distant buyer who may be insolvent, litigious, dishonest, or all three.

Id., *quoting* Cermetek, Inc. v. Butler Avpak, Inc., 573 F.2d 1370, 1379 (9th Cir. 1978).

[230] *Swest*, 694 S.W.2d at 402; *see* Video Station v. Frey's Motor Express, Inc., 188 N.J. Super. 494, 457 A.2d 1217, 1220 (1983); *see also supra* notes 154-170 and accompanying text for a discussion of *Video Station*.

[231] *Swest*, 694 S.W.2d at 402, *construing Video Station*, 457 A.2d at 1220.

[232] *Swest*, 694 S.W.2d at 402.

[233] *Id.*

[234] *Id.* It should be emphasized again that the holding of the Texas Court of Appeals (Dallas) was later reversed by the Texas Supreme Court, 707 S.W.2d 545 (Tex. 1986). As such, it is only being discussed for its historical value and to view one court's errant view of C.O.D. contract analysis.

[235] 778 F.2d 53 (1st Cir. 1985); *see supra* notes 179-199 and accompanying text for a discussion of *Littleton* as it relates to a carrier's standard of care in performing its collection activity under a C.O.D. contract.

[236] *Littleton*, 778 F.2d at 54.

[237] *Id.*

livery the carrier accepted, but did not verify the certified checks.[238] It was later determined that these checks were worthless forgeries.[239] The trial court awarded summary judgment to the shipper on the ground that a C.O.D. carrier that defaults on its obligation to collect a sum certain is strictly liable to the shipper.[240] The First Circuit Court of Appeals reversed the trial court on the ground that strict liability is inappropriate and remanded this case for further procedings.[241]

The First Circuit began its analysis by holding that reasonable care governs a carrier's collection duty.[242] Moreover, the First Circuit also held that even though the carrier did not verify the certified checks, this failure alone did not establish a breach of the carrier's contractual duty to collect payment, and thus subject it to a summary judgment verdict.[243] Consequently, unlike *Swest*, *Littleton* holds that reasonable care does not include the absolute duty for a carrier to verify the sufficiency of a certified check.[244] Instead, the circumstances of each case determine whether the exercise of reasonable care includes the duty to verify.[245]

In beginning its criticism of *Swest*, the First Circuit stated that the policy behind a C.O.D. contract is to assure the shipper that the carrier will not make delivery without collecting payment.[246] According to the First Circuit, this

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[238] *Id.* at 54-55.

[239] *Id.* at 55.

[240] *Id.*

[241] *Id.*

[242] *Id.*; *see supra* notes 179-199 and accompanying text for a discussion of *Littleton* as it relates to a carrier's standard of care in performing its collection activity under a C.O.D. contract.

[243] *Littleton*, 778 F.2d at 56.

[244] *Id. But see* Swest, Inc. v. American Airlines, Inc., 694 S.W.2d 399, 402 (Tex. Ct. App. 1985); *see also supra* notes 217-234 and accompanying text for a discussion that reasonable care requires a carrier to verify the sufficiency of a certified check which it collects as payment on behalf of the shipper under a C.O.D. contract.

[245] *Littleton*, 778 F.2d at 56.

[246] *Id.* at 57; *see* National Van Lines v. Rich Plan Corp., 385 F.2d 800, 803 (5th Cir. 1967); *see also supra* notes 75-88 and accompanying text for a discussion that

policy applies to situations in which the carrier is contractually obligated to collect only cash.[247] This policy does not apply, as the *Swest* court believes, to situations in which the carrier is contractually obligated to collect cash or a certified check.[248] When a shipper has decided to gamble by accepting a form of payment other than cash, it cannot later shift this increased risk of uncollectability to the carrier.[249] As support for this argument the First Circuit relied on *Shockley v. United Parcel Service, Inc.*,[250] for the proposition that placing responsibility upon a carrier to ascertain the sufficiency of a certified check creates an undue burden on the carrier performing its collection duties. Carriers are not in the banking business and thus are not in a position to credit or discredit negotiable instruments.[251]

After the decision in *Littleton*, the law in Texas on the subject of whether reasonable care included the duty to verify was in a state of great confusion. On the one hand, the Texas Court of Appeals in *Swest, Inc. v. American Airlines, Inc.*,[252] held that the exercise of reasonable care includes the absolute duty to verify a certified check.[253] On the other hand, the First Circuit in *Littleton Stamp & Coin Co. v. Delta Airlines, Inc.*,[254] held that the circumstances of each case determine whether the exercise of reasonable care includes the duty to verify.[255] This, in essence, was the issue before the Texas Supreme Court when it de-

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the policy behind a C.O.D. transaction is to assure the shipper that the carrier will not make delivery without collecting payment.

[247] *Littleton*, 778 F.2d at 57.

[248] *Id.*

[249] *Id.*

[250] 664 S.W.2d 523, 524-25 (Ky. Ct. App. 1983); *see also supra* notes 171-178 and accompanying text for a discussion of Shockley.

[251] *Littleton*, 778 F.2d at 57.

[252] 694 S.W.2d 399 (Tex. Ct. App. 1985), *rev'd*, 707 S.W.2d 545 (Tex. 1986); *see supra* notes 217-234 and accompanying text for a discussion of the Court of Appeal's holding.

[253] *Swest*, 694 S.W.2d at 402.

[254] 778 F.2d at 53; *see supra* notes 235-251 and accompanying text for a discussion of *Littleton*.

[255] *Littleton*, 778 F.2d at 56.

cided *American Airlines, Inc. v. Swest, Inc.* on appeal.[256] In determining this issue, the Texas Supreme Court reversed and remanded the Texas Court of Appeal's holding.[257] Consequently, under existing Texas law the carrier does not have an absolute duty to verify a certified check.[258]

The Texas Supreme Court was unimpressed with the Court of Appeal's argument that the confidence of the shipper would be undermined if the carrier did not verify a certified check.[259] Rather, the court stated that to require verification would significantly undermine the shipping and delivery industries.[260] For example, if the court required verification of a certified check, than an air express shipment could not be delivered after banking hours.[261] Furthermore, the shipper always has the option of protecting itself by demanding that payment be made only in cash.[262] Consequently, on the basis of these two arguments, the Texas Supreme Court held that reasonable care does not include the absolute duty to verify a certified check.[263] Instead, the circumstances of each case dictate whether the exercise of reasonable care includes the duty to verify.[264]

IV. CONCLUSION

This comment analyzed cases concerning a carrier's contractual liability for nondelivery or misdelivery under a C.O.D. contract. Section I presented a history on how courts have analyzed significant C.O.D. cases wherein the

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[256] 707 S.W.2d 545 (Tex. 1986).

[257] *Id.* at 548.

[258] *Id.* at 546.

[259] *Id.* at 547. The Court of Appeals reasoned that, "to hold that a C.O.D. carrier need not verify purported certified checks . . . would significantly undermine the confidence of shippers that they would receive cash or its equivalent in payment for their C.O.D. shipments." *Swest*, 694 S.W.2d at 402.

[260] *American Airlines*, 707 S.W.2d at 547.

[261] *Id.*

[262] *Id.*

[263] *Id.* at 546.

[264] *Id.*

shipper entered into a C.O.D. contract, and the carrier subsequently made delivery, but then failed to remit full payment back to the shipper.[265] In these cases, courts generally held the carrier liable for breach of contract. In so holding, courts reasoned that because a carrier had complete discretion in determining whether to enter into a C.O.D. contract with the shipper, the carrier was held to strict compliance with its agreement.[266] Consequently, if a carrier breached the agreement it was liable to the shipper for whatever could have been collected had the duty been fulfilled.[267]

In contrast to Section I that analyzed cases in which only the carrier violated the terms of the C.O.D. contract, Section II analyzed cases in which both the carrier and the shipper violated the terms of the C.O.D. contract.[268] In these cases, the carrier violated the terms of the C.O.D. contract by accepting a form of payment other than that authorized in the contract.[269] Correspondingly, the shipper violated the C.O.D. contract by accepting and depositing this unauthorized payment. Generally, in this situation, courts did not blindly hold the carrier liable for breach of contract. Instead, they looked to determine the shipper's response to the unauthorized payment. If the

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[265] *See supra* notes 21-94 and accompanying text for a discussion of Section I.

[266] *Id.*; *see* National Van Lines v. Rich Plan Corp., 385 F.2d 800, 802 (5th Cir. 1967); *see also supra* notes 75-88 and accompanying text for a discussion of *National Van Lines*; *see* Anthony v. American Express Co., 188 N.C. 407, 124 S.E. 753, 755 (1924); *see also supra* 36-41 and accompanying text for a discussion of *Anthony*; *see* Nuside Metal Prod., Inc. v. Eazor Express, Inc., 189 Pa. Super. 593, 152 A.2d 275, 279 (1959); *see also supra* notes 58-65 and accompanying text for a discussion of *Nuside*.

[267] *See National Van Lines*, 385 F.2d at 802; *see also supra* notes 75-88 and accompanying text for a discussion of *National Van Lines*; *see* Okin v. Railway Express Agency, 24 N.J. Misc. 8, 44 A.2d 896 (1945); *see also supra* notes 51-57 and accompanying text for a discussion of *Okin*; *see* Joseph Mogul, Inc. v. C. Lewis Lavine, Inc., 247 N.Y. 20, 159 N.E. 708 (1928); *see also supra* notes 42-50 and accompanying text for a discussion of *Joseph Mogul*; *see* Herrin Transp. Co. v. Robert E. Olson Co., 325 S.W.2d 826 (Tex. Civ. App. 1959); *see also supra* notes 66-74 and accompanying text for a discussion of *Herrin*.

[268] *See supra* notes 96-149 and accompanying text for a discussion of Section II.

[269] *See supra* note 146 for a list of cases where the carrier violated the C.O.D. contract by accepting an unauthorized payment.

shipper unconditionally accepted and deposited the unauthorized payment, courts found waiver or ratification, which prevented the shipper from collecting payment from the carrier.[270] Conversely, if the shipper protested or refused the unauthorized payment, courts did not find waiver or ratification, which allowed the shipper to collect payment from the carrier.[271] In other words, the shipper carried the burden of screening every check that it received under a C.O.D. contract. By doing this, courts protected the delivery and transportation industry from unwarranted liability.

With this background in mind, Section III analyzed two contemporary issues involving C.O.D. contracts.[272] The first issue concerned the standard of care required of a carrier when undertaking to perform collection activities under a C.O.D. contract.[273] In analyzing this issue courts determined that the principles of agency law governed a carrier's obligation to collect payment under a C.O.D. contract.[274] As such, carriers were under a duty of using ordinary or reasonable care in making such collection efforts.[275]

The second issue that Section III addressed was whether a carrier was liable for failing to verify a forged certified check that it accepted as payment under a C.O.D.

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[270] *See supra* notes 97-132 and accompanying text for a discussion of cases where the shipper unconditionally accepted an unauthorized payment.

[271] *See supra* notes 136-144 and accompanying text for a discussion of a case where the shipper did not unconditionally accept an unauthorized payment.

[272] *See supra* notes 150-264 and accompanying text for a dicussion of Section III.

[273] *See supra* notes 154-202 and accompanying text for a discussion of the standard of care analysis.

[274] *See supra* note 7 for a list of cases which have held that a carrier's collection duty is governed by agency principles.

[275] *See, e.g.*, Littleton Stamp & Coin Co. v. Delta Airlines, Inc., 778 F.2d 53 (1st Cir. 1985); *see also supra* notes 179-199 and accompanying text for a discussion of *Littleton*; *see* Shockley v. United Parcel Serv., Inc., 664 S.W.2d 523 (Ky. Ct. App. 1983); *see also supra* notes 171-178 and accompanying text for a discussion of *Shockley*; *see* Video Station v. Frey's Motor Express, Inc., 188 N.J. Super. 494, 457 A.2d 1217 (1983); *see also supra* notes 154-170 and accompanying text for a discussion of *Video Station*.

contract.[276] In other words, does ordinary or reasonable care include the duty to verify certified checks? At work in this situation were two conflicting principles: first, the protection of the carrier's confidence that it was not liable when it fulfilled its obligation to collect payment under a C.O.D. contract;[277] and second, the protection of the shipper's confidence that it will be paid for orders it initiates under a C.O.D. contract.[278] The leading case in this area held that the carrier's confidence prevailed, and that reasonable care did not include the duty to verify the sufficiency of a certified check.[279]

The holding in this leading case is correct because it is fair to both the carrier and shipper. From the carrier's perspective this rule is fair because requiring verification undermines the effectiveness of the shipping and delivery industries. For example, if the shipper sent a package air express and that package arrived after banking hours, the carrier would be required to postpone delivery until the next day in order to get verification. Verification eliminates the timesaving advantage a shipper gains in sending a package air express. Also, a verification requirement cuts down on the number of hours that deliveries could be made during a day. Consequently, the rule not requiring verification by the carrier is fair from the carrier's point of view.

In addition, this rule is fair from the shipper's perspective because the rule only states that ordinary or reasonable care does not include the duty to verify. This rule does not foreclose the opportunity for the shipper to contractually require the carrier to use a higher level of care than ordinary or reasonable care. For example, if a shipper is concerned with uncollectability, it can negotiate a

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[276] *See supra* notes 203-264 and accompanying text for a discussion of the verification issue.

[277] *See supra* notes 207-216, 235-251 and accompanying text for a discussion of the cases supporting the protection of the carrier's confidence.

[278] *See supra* notes 217-234 and accompanying text for a discussion of the case supporting the protection of the shipper's confidence.

[279] American Airlines, Inc. v. Swest, Inc., 707 S.W.2d 545 (Tex. 1986).

specific provision in the C.O.D. contract requiring the carrier to verify payment. Alternatively, the shipper can send a C.O.D. order and require the carrier to accept cash. Thus, if the shipper is concerned with untrustworthiness, it must bear the burden of including safety provisions in the C.O.D. contract. Consequently, the rule not requiring verification by the carrier is also fair from the shipper's point of view. Therefore, it follows that a carrier should not be liable for failing to verify a forged certified check that it accepts as payment under a C.O.D. contract.