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Malcolm S. Murchison

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clear.⁵⁹ If existing principles covering subpoenas are extended to cover this area,⁶⁰ the courts will require the IRS to show a reasonable expectation that the depositors' names will shed light on an investigation into possible tax liability, rather than provide information for a mere research project, and will weigh that expectation against the burden of compliance on the bank.⁶¹

Henry J. Miltenberger, Jr.

OVERDRAFT LIABILITY OF JOINT ACCOUNT COSIGNATORIES

In 1974 the Louisiana legislature enacted a portion of the Uniform Commercial Code¹ as Title 10 of the Louisiana Revised Statutes and entitled it the Commercial Laws.² One of the purposes of the adoption was to promote uniformity with other jurisdictions with respect to commercial paper and certain commercial transactions.³ The manner in which the jurisprudence of different states has approached the liability, under Article 4 of the U.C.C., of joint checking account depositors for overdrafts drawn by their cosignatories should prove a useful guide to Louisiana practitioners and courts in

59. In *Humble* the IRS admitted the crucial facts on the stand, an occurrence not usually available. 488 F.2d at 955.

60. See *United States v. Harrington*, 388 F.2d 520 (2d Cir. 1968).

61. See, e.g., discussion in text *supra* at notes 18-21; *United States v. Armour*, 376 F. Supp. 318 (D. Conn. 1974). Precedent exists for evaluating administrative summonses by use of a balancing process. E.g., *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946) (weighing the public and private interests involved); *United States v. Williams*, 337 F. Supp. 1114 (S.D.N.Y. 1971) (specifically weighed the burden of compliance against the likelihood of uncovering tax liability and denied enforcement).

1. UNIFORM COMMERCIAL CODE, 1972 Official Text, The American Law Institute—National Conference of Commissioners on Uniform State Laws [hereinafter cited as U.C.C.].

2. La. Acts 1974, No. 92 § 1.

3. *Id.*: "AN ACT—To amend the Revised Statutes of 1950 by adding thereto a new Title 10 entitled Commercial Laws, relating to commercial paper and certain commercial transactions, contracts and other documents concerning them, . . . to promote uniformity of the law with respect thereto . . ." (emphasis added). To achieve the desired uniformity Louisiana courts should look to other states' application of the U.C.C. This will not be possible when a change was made in the U.C.C. text to conform with existing Louisiana jurisprudence. E.g., LA. R.S. 10:4-402 (Supp. 1974).

considering similar problems under Chapter 4 of Title 10 and hopefully will aid in the attainment of uniformity sought in the Code's adoption.⁴

The law is well settled that an overdraft is in effect a loan by a bank to its customer who, by the act of drawing the check against nonexistent funds, promises to repay the loan.⁵ Subsection 4-401(1)⁶ of the U.C.C. permits a bank to charge overdrafts to a customer's account,⁷ but does not require the bank to do so.⁸ However, whether an overdraft may be charged by a bank against all signers of a joint checking account that has been overdrawn is not clear from the language of § 4-401(1). Commentators have suggested that a bank is empowered by the broad language of Article 4 to charge all signers on the account for the full amount of an overdraft;⁹ they base their argument upon § 4-401(1), which does not speak in terms of charging the drawer but rather charging the account itself, as well as upon the expansive definitions of "customer" and "account" found in Article 4.¹⁰

The first court to confront the problem of a cosignatory's liability under the U.C.C. for an overdraft in a joint checking account rejected the commentators' broad construction. In *National Bank of Slatington v. Derhammer, I*,¹¹ the plaintiff

4. Chapter 4 of Title 10 of the Louisiana Revised Statutes is a near in toto enactment of U.C.C. Article 4. Hereafter all references to the U.C.C. will apply to the Louisiana counterpart in Title 10; any differences that may exist will be noted.

5. *E.g.*, *Bracket v. Fulton Nat'l Bank*, 56 S.E.2d 486 (Ga. Ct. App. 1949); *Caddo Trust & Sav. Bank v. Bush*, 182 So. 397 (La. App. 2d Cir. 1938); *Title Guar. & Trust Co. v. Emadee Realty Corp.*, 136 Misc. Rep. 328, 240 N.Y.S. 36 (Sup. Ct. 1930); *FDIC v. Ciaffoni*, 176 Pa. Super. 91, 107 A.2d 211 (1954).

6. U.C.C. 4-401(1): "As against its customer, a bank *may* charge against his account any item which is otherwise properly payable from that account even though the charge creates an overdraft" (emphasis added).

7. *City Bank v. Tenn*, 469 P.2d 816 (Hawaii 1970); *Citizens Nat'l Bank v. Fort Lee Sav. & L. Ass'n*, 89 N.J. Super. 43, 213 A.2d 315 (1965).

8. 1 W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE U.C.C. 385 (1964) [hereinafter cited as HAWKLAND].

9. See HAWKLAND, 385-86; Halls & Hauenstein, *The Uniform Commercial Code in Minnesota: Article 4—Bank Deposits and Collections*, 50 MINN. L. REV. 1027, 1041 (1965).

10. Section 4-104 defines the terms "account" and "customer." "Account" means "any account with a bank and includes a checking, time, interest, or savings account." "Customer" means "any person having an account with a bank or for whom a bank has agreed to collect items and includes a bank carrying an account with another bank."

11. 16 Pa. D. & C. 2d 286 (1958).

bank sought to recover a deficit of \$2,950 from a cosignatory of a joint account. Since the complaint did not specify which cosignatory had drawn the overdraft nor which one had received the funds,¹² the trial court sustained the defendant's motion for a more specific pleading. The plaintiff there contended that the petition was sufficiently specific because the broad language of §§ 4-104 and 4-212¹³ dictates that each cosignatory to an account is personally liable for transactions by his cosignatory that result in an overdraft. However, in accord with decisions rendered both before¹⁴ and after¹⁵ adoption of the U.C.C., the court held that a cosignatory can be held liable beyond the balance in the account only in two instances: when he was responsible for the negotiation of the check, or when he was enriched through the creation of the overdraft.¹⁶ The court reasoned that the language of Article 4 does not burden a cosignatory with a partnership type of liability whereby all the assets of the cosignatory could be held for the actions of the other cosignatory.

The plaintiff filed an amended complaint,¹⁷ alleging that negligent and fraudulent representations by the defendant caused the bank to overdraw the account.¹⁸ The trial court

12. The complaint alleged that the account had been opened with a check in the amount of \$4,950 drawn upon a fictitious bank, that the bank had paid the "defendant or her cosignatory" \$150 in cash against the check and had also paid to "account owners" on a check signed by "one of the joint makers" in the amount of \$2,800, and that the check drawn upon the fictitious bank was returned. The suit was instituted to recover the resultant \$2,950 overdraft. Under § 4-212 when a bank makes a provisional settlement with a customer on an item which subsequently is not paid, the bank may revoke the settlement, charge the item back against the account for the amount of any credit given for it, or obtain a refund from the customer. Such a charge-back under § 4-212 would be an "item which is properly payable from the account" under § 4-401(1) and thus may be effected even when it results in an overdraft.

13. The court noted that § 4-212 subjects a customer to refund upon dishonor of a collection item while § 4-104 defines customer as "any person having an account." 16 Pa. D. & C. 2d 286, 289 (1958).

14. See *Faulkner v. Bank of Italy*, 69 Cal. App. 370, 231 P. 380 (1924); *First Citizens Bank & Trust Co. v. Raynor*, 90 S.E.2d 894 (N.C. Sup. Ct. 1956).

15. *Cambridge Trust Co. v. Carney*, 333 A.2d 442 (N.H. 1975).

16. 16 Pa. D. & C. 2d 286, 289 (1958).

17. *National Bank of Slatington v. Derhammer, II*, 16 Pa. D. & C. 2d 290 (1958).

18. This new complaint alleged that the defendant had introduced the fraudulent cosignatory to bank officials and "falsely and fraudulently represented with intent to deceive the plaintiff that the defendant had known

overruled the defendant's demurrer¹⁹ to this complaint and ordered her to answer on the merits.²⁰ Thus, the trial court expanded the situations in which a cosignatory could be held personally liable for another's overdraft on their joint account to include a third class of instances when the cosignatory's own negligence or fraud induces the bank to create the overdraft. A subsequent case did not recognize clearly the exception, recognized in *Derhammer*, II, for instances in which the cosignatory's fraud or negligence induced the bank to handle the overdraft item.²¹ Arguably, such a situation establishes the cosignatory as having participated in the negotiation of the check. Use of three exceptions, however, results in a more accurate expression of the reasons for placing personal liability upon a non-drawer cosignatory and should be applied so that a court's basis for establishing liability will be clear.

The limitation of the liability of a cosignatory to the balance of the joint account unless he falls within one of these three limited exceptions seems to be a correct interpretation of the U.C.C. To construe the Code to impose liability on each cosignatory of a joint account for all overdrafts would in effect establish an implied partnership without limit as to the liability of one signatory for loans obtained by another. From the language of § 4-401(1) it is not clear whether the drafters of the Code contemplated the liability of a cosignatory for an overdraft in a joint account.²² Since doubt exists as to

said [cosignatory] all of her life and was engaged to be married to the said [cosignatory] and that she impliedly represented that [he] was a man of good moral character, whereas, in fact his character was bad which fact was known or should have been to defendant." Also, it was alleged that not only was the \$4,950 check drawn upon a fictitious bank, but that the defendant knew or should have known that fact. 16 Pa. D. & C. 2d at 291.

19. A demurrer is a method of disputing the sufficiency in law of the pleading of the opponent; the legal consequences of those facts alleged by the opponent, if true, are not of a nature to require an answer or further proceedings. *E.g.*, *Mountain Park Institute v. Lovill*, 198 N.C. 642, 153 S.E. 114, 116 (1930); *Green v. Carter*, 28 Ohio App. 492, 162 N.E. 814, 815 (1927); *State v. Broad River Power Co.*, 177 S.C. 240, 181 S.E. 41 (1935).

20. 16 Pa. D. & C. 2d 290, 291 (1958). For additional discussion of both *National Bank of Slatington v. Derhammer*, I and II, see Del Duca, *Commercial Code Litigation*, 66 DICK. L. REV. 39, 50-51 (1961).

21. See *Cambridge Trust Co. v. Carney*, 333 A.2d 442 (N.H. 1975).

22. Cf. *HAWKLAND* 385.

whether the problem was examined fully in the development of the U.C.C., one should not conclude from definitional language that the drafters of the Code intended to imply such a partnership in a joint account. Clearly, however, when a joint account arises under a principal and agent relationship, the normal principal and agent rules should apply to determine the liability of the cosignatories.²³ Thus, the rationale limiting a non-drawer cosignatory's liability to the balance in the account should not apply when one cosignatory's actions legally bind the other due to a particular relationship such as that which exists in a marriage under a community property regime.²⁴

The analysis of a non-drawer cosignatory's personal liability does not end here, however, since § 4-103 permits the effects of Article 4 to be varied by agreement.²⁵ This ability to vary the effects of Article 4 perhaps explains the relatively few cases involving it.²⁶ Thus, the liability of a cosignatory, in most instances, is probably fixed by contracts such as indemnification agreements in which a cosignatory to a joint ac-

23. See *Torrance Nat'l Bank v. Enesco Fed. Credit Union*, 285 P.2d 737 (Cal. Ct. App. 1955). Here a principal was held not liable for an overdraft created by a check drawn by his agent in the absence of express, implied, or apparent authority of the agent to borrow money or create an overdraft in the principal's checking account. The bank received the items drawn by the agent which created the overdraft due to the agent's representation that he could not otherwise adequately carry on his principal's business. It was never shown whether the principal actually benefited or was enriched by the creation of the overdraft. When the principal is enriched, he should be liable to the bank just as any other cosignatory despite the agent's lack of authority to bind the principal. Arguably, the other two exceptions, when they exist in the principal and agent situation, would serve as a basis for apparent authority in the agent to bind the principal. Thus, the usual analysis applies, but only within the framework of agency rules.

24. Cf. *Bremen Bank & Trust Co. v. Bogdan*, 498 S.W.2d 306 (Mo. Ct. App. 1973). In this case a wife was held liable for an overdraft in a joint checking account (her husband's business account) with the determination that the facts were sufficient to support the finding that she was a joint tenant under Missouri law; no reference was made to Article 4 of the U.C.C. which was in force in Missouri at the time of the court's decision.

25. U.C.C. § 4-103(1).

26. See Clontz, *How Article 4 Has Fared in the Courts*, 4 U.C.C. LAW JOURNAL 16, 20-21 (1971). This author suggests that the general public's and possibly the general practitioners' lack of familiarity with Article 4 and the recent adoption of the article by nearly half the jurisdictions in the nation explains the few number of cases arising under it.

count agrees to indemnify a bank for any and all losses suffered by the bank on the account.²⁷ The U.C.C. provides a definition for "agreement" as used in § 4-103,²⁸ while Title 10 of the Revised Statutes does not.²⁹ Louisiana R.S. 10:1-103³⁰ provides that "[u]nless displaced by the particular provisions of this Title, the other laws of Louisiana shall apply." Since Title 10 does not define "agreement" or "contract,"³¹ the general obligations law will determine if an agreement establishing the overdraft liability of a cosignatory on a joint account is effective in Louisiana. A valid Louisiana checking account agreement between the cosignatories of a joint account and a bank,³² wherein each party agrees to indemnify the bank for

27. *Cambridge Trust Co. v. Carney*, 333 A.2d 442 (N.H. 1975). When the signatory who is responsible for the overdraft refuses to repay the "loan," the bank suffers a loss. The cosignatory's agreement to "indemnify" the bank must be intended to enable the bank to seek collection from him for the loss resulting from non-payment of the overdraft, not simply to authorize the bank to honor the checks of either cosignatory beyond one-half of the balance of the account. See also discussion in notes 32, 33, *infra*.

28. The official U.C.C. comment to § 4-103 notes that "agreement" as used in § 4-103 has the meaning given to it by § 1-201(3). U.C.C. § 1-201(3) provides: "Agreement means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act (Sections 1-205 and 2-208). Whether an agreement has legal consequences is determined by the provisions of this Act, if applicable; otherwise by the law of contracts (Section 1-103). . . ."

29. The Louisiana comment to § 1-201 notes that the definitions of both "agreement" and "contract" were deleted as being "incomplete, inaccurate, and unnecessary."

30. Louisiana R.S. 10:1-103 differs in language from U.C.C. § 1-103. The Official Louisiana Comment to R.S. 10:1-103 notes that the thrust of the U.C.C. article is that the remainder of a state's law supplements the commercial law in those situations not covered by the U.C.C. and that the Louisiana version says this without limitation.

31. See discussion in note 29, *supra*.

32. Normally the agreement between the bank and depositor is found on the signature card. Although the average person may not read the signature card when he signs, Louisiana law has recognized that, *in the absence of fraud*, a person signing a written document is presumed to know its contents and may not avoid the obligations contained therein by claiming that he did not read the instrument; *Jayco Sales & Service, Inc. v. Smith*, 303 So. 2d 554 (La. App. 1st Cir. 1974); *South Central Bell Telephone Co. v. McKay*, 285 So. 2d 563 (La. App. 1st Cir. 1973); *Commercial Credit Corp. v. Shipp*, 220 So. 2d 735 (La. App. 2d Cir.), *cert. denied*, 254 La. 132, 222 So. 2d 883 (1969); or that he is unable to read or write, *Plan Investments of Shreveport, Inc. v. Heflin*, 286 So. 2d 511 (La. App. 2d Cir. 1973). To avoid allegations of fraud due to unequal bargaining positions between the bank and the customer, the bank should, in

any loss suffered by it for paying checks properly drawn on their account, will bind each signatory for overdrafts drawn by the other, even though the party held liable for the amount does not fall within one of the three exceptions enumerated above.³³

Although a legally enforceable agreement may be effected, a bank is unable to avoid responsibility through such a contract for its failure to exercise "ordinary care."³⁴ Therefore, an indemnification agreement by a cosignatory obligating him to pay for all overdrafts will be ineffective when the circumstances indicate that the bank's payment of the item creating the overdraft is not within the bank's exercise of ordinary care.³⁵ The determination that a bank has failed to exercise ordinary care is a question of fact³⁶ and "[e]ach case must rest upon its own facts."³⁷ Normally, however, the bank's overdrawing an account by charging against it a properly payable item is not a failure to exercise ordinary care,³⁸ it is action approved by Article 4.³⁹

opening the account, require each party to the account to read or have read to them the entire agreement with particular care being taken to inform the customer that under the agreement each cosignatory will be responsible for any overdraft that occurs in the account. *Cf.* *Griffing v. Atkins*, 1 So. 2d 445 (La. App. 1st Cir. 1941); LA. CIV. CODE art. 1847. See note 27, *supra*, and note 33, *infra*.

33. See text at notes 25-27, *supra*. A properly drafted agreement should contain not only an indemnification agreement but also clearly state that each cosignatory agrees to be bound *in solido* for all overdrafts which arise as a result of any item(s) which are charged against the account correctly. This will insure that each cosignatory will be bound for the full amount of any overdrafts in the account. See LA. CIV. CODE arts. 2082, 2091, and 2093.

34. U.C.C. § 4-103(1). Subsection 4-103(3) defines the term "ordinary care" as "[a]ction or non-action approved by this Article or pursuant to Federal Reserve regulations or operating letters . . . and, in the absence of special instructions, action or non-action consistent with clearing house rules and the like or with a general banking usage not disapproved by this Article. . . ." Additionally, § 4-103(4) provides that ". . . approval of certain procedures by this Article does not constitute disapproval of other procedures which may be reasonable under the circumstances."

35. *Cambridge Trust Co. v. Carney*, 333 A.2d 442 (N.H. 1975).

36. In *Cambridge*, the court found the record sufficient to support a jury's finding that in creating an overdraft the bank had failed to exercise ordinary care under the circumstances. See *Cooper v. Union Bank*, 103 Cal. Rptr. 610 (Cal. Ct. App. 1972); *First Nat'l Bank v. Stephens*, 184 S.E.2d 484 (Ga. Ct. App. 1971).

37. *Cooper v. Union Bank*, *supra* note 36, at 615.

38. U.C.C. § 4-401(1).

39. U.C.C. § 4-103(3). See text of § 4-103(3) in note 34, *supra*.

The Louisiana courts have never been presented with the issue of the liability of one joint checking account signatory for an overdraft drawn by another. The reasons for this may be that cosignatories pay overdrafts created by another without questioning their liability, law practitioners are unaware that a cosignatory's liability may well be limited, and banks, especially those in smaller communities, are aware that adverse public relations may result from pursuing a cosignatory beyond the account balance for an overdraft for which he was not responsible or from which he did not benefit. Many problems can be avoided if checking account agreements are properly drafted and the banks call to the attention of their depositors the agreements' provisions.⁴⁰ To achieve the desired uniformity, Louisiana courts should construe Title 10 to limit the liability of each cosignatory to the balance of the account in the absence of a valid indemnification agreement between the bank and its joint account depositors,⁴¹ or a showing of the cosignatory's participation in the negotiation of the check, enrichment through the creation of the overdraft, or negligence or fraud inducing the bank to create the overdraft.⁴²

Malcolm S. Murchison

A PRIVATE CAUSE OF ACTION FOR VIOLATIONS OF
AIR POLLUTION LEGISLATION?—REMEDIES UNDER LOUISIANA
CIVIL CODE ARTICLES 667-669

During recent years, federal and state lawmakers have enacted legislation aimed at protecting the purity of the atmosphere. The major federal legislation dealing with the control of air pollution is the Clean Air Act,¹ which was restructured and significantly strengthened in 1970.² Louisiana took action in this area in 1964, when the Louisiana Air Control Law was enacted.³ Both laws establish administrative agen-

40. See discussion in note 32, *supra*.

41. See text at notes 25-33, *supra*.

42. See text at notes 14-21, *supra*.

1. 42 U.S.C. §§ 1857-1857(l) (1970).

2. Pub. L. No. 91-604, 84 Stat. 1676 (1970). Most of what is now the Clean Air Act came from these 1970 amendments.

3. LA. R.S. 40:2201-16 (Supp. 1964).