

5-1-1976

Banking Law - Overdrafts-Liability for Overdrafts of a Joint Bank Account Under the UCC- Cambridge Trust Co. v. Carney

Phillip E. Broadbent

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Banking and Finance Law Commons](#)

Recommended Citation

Phillip E. Broadbent, *Banking Law - Overdrafts-Liability for Overdrafts of a Joint Bank Account Under the UCC-Cambridge Trust Co. v. Carney*, 1976 BYU L. Rev. 499 (1976).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1976/iss2/6>

This Casenote is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

CASE NOTES

Banking Law—OVERDRAFTS—LIABILITY FOR OVERDRAFTS OF A JOINT BANK ACCOUNT UNDER THE UCC—*Cambridge Trust Co. v. Carney*, 333 A.2d 442 (N.H. 1975).

Peter and Ann Carney were permanently separated in June 1971 after four years of marriage. In September of that year, Mrs. Carney's attorney negotiated a preliminary support agreement with Mr. Carney. In order to fulfill his support obligation under the agreement, Mr. Carney indicated to his wife that he would pay her a substantial amount of money from a personal checking account he had recently opened at the Cambridge Trust Co.¹ Mrs. Carney accompanied her husband to Cambridge Trust to obtain this money. Believing that by adding her name to her husband's account she would be certain to receive the promised money, Mrs. Carney became a cosignatory on Mr. Carney's account, thus transforming it into a joint account. In order to create the joint account, Mr. and Mrs. Carney jointly signed a letter and a new signature card in which they agreed to indemnify Cambridge Trust for all checks written by either of them under the account.² Mr. Carney then drew a check against the account payable to his wife for \$38,500, of which Mrs. Carney deposited \$20,000 in the form of a 2-year savings certificate at a savings and loan. Thereafter, Mrs. Carney did not draw any checks against the joint

1. While Mr. Carney maintained the account in his personal capacity, it was overdrawn on six separate occasions. *Cambridge Trust Co. v. Carney*, 333 A.2d 442, 443 (N.H. 1975).

2. The indemnification agreement was actually a letter addressed to the bank designated "special instructions," stating as follows:

Referring to the account standing in the name of P. Gerard Carney & Co. it is our wish that you add to this account the name of Ann Carney making it a Joint Account. Please honor and charge to this account all checks when signed by either of us, or by the survivor in case of the death of either, and we agree to indemnify and hold you harmless in so doing.

Brief for Appellant at 4, *Cambridge Trust Co. v. Carney*, 333 A.2d 442 (N.H. 1975) [hereinafter briefs for the appellant and appellee filed in the instant case will be referred to as Appellant's Brief and Appellee's Brief respectively]. The signature card contained the following provision:

We are this day opening an account on your books in the name of the undersigned as a joint account. Please accept any items payable to either of the undersigned and place the same to our joint credit. Please honor and charge to this account all checks when signed by either of us, or by the survivor in case of the death of either. We agree to indemnify and hold you harmless in so doing.

Id. at 5.

account, did not deposit any money in it, and did not receive any statements from the bank regarding it. In February 1972, \$10,000 of Mrs. Carney's deposit in the savings and loan was attached by Cambridge Trust to recover an overdraft of the joint account of approximately \$6,000. This overdraft was created by Mr. Carney when he deposited a worthless check for \$7,100 and drew a \$6,000 check against it.

Since Mr. Carney could not be located, a quasi in rem action was brought against Mrs. Carney. A jury verdict in her favor was affirmed by the Supreme Court of New Hampshire. The court held that Mrs. Carney was not liable since she had neither participated in negotiating the overdraft check nor received any proceeds from it. Further, since Cambridge Trust had failed to exercise ordinary care in permitting Mr. Carney to make the overdraft, the court held that Mrs. Carney was not bound by the indemnification agreement.³

I. BACKGROUND

The relationship between a bank and its customers with respect to overdrafts is governed by article 4 of the Uniform Commercial Code (UCC) and relevant case law interpreting that article.

A. *Liability for Overdrafts in General*

A bank may properly charge a check to a depositor's account even though the charge creates an overdraft.⁴ There is no obligation on a bank to pay an overdraft,⁵ however, and no such obligation arises merely because the bank has previously permitted overdrafts by the same depositor.⁶

3. 333 A.2d at 445.

4. UNIFORM COMMERCIAL CODE [hereinafter cited as UCC] § 4-401; *see, e.g.*, *City Bank v. Tenn.*, 52 Hawaii 51, 469 P.2d 816 (1970); *State v. Mullin*, 225 N.W.2d 305 (Iowa 1975); *Bond State Bank v. Vaughn*, 241 Ky. 524, 44 S.W.2d 527 (1931).

5. UCC § 4-401(1); *see, e.g.*, *Orlich v. Rubio Sav. Bank*, 240 Iowa 1074, 38 N.W.2d 622 (1949); *Modoc Meat & Cattle Co. v. First State Bank*, 532 P.2d 21 (Ore. 1975).

6. *See, e.g.*, *Orlich v. Rubio Sav. Bank*, 240 Iowa 1074, 38 N.W.2d 622 (1949); *Magness v. Equitable Trust Co.*, 176 Md. 528, 6 A.2d 241 (1939); *First Nat'l Bank v. First Nat'l Bank*, 127 Tenn. 205, 154 S.W. 965 (1913).

There is disagreement among various state courts concerning whether a bank may enter into a valid agreement with a depositor to honor his overdraft checks. Some courts have refused to enforce such agreements. *Dolan v. Danbury State Bank*, 207 Iowa 597, 223 N.W. 400 (1929); *S.R.&P. Import Co. v. American Union Bank*, 122 Misc. 798, 204 N.Y.S. 755 (Sup. Ct. N.Y. County 1924); *Brown v. Mutual Trust Co.*, 267 Pa. 523, 110 A. 155 (1920). Other courts have upheld such agreements. *Industrial Trust, Title & Sav. Co. v.*

By drawing a check in excess of the balance in his account, the depositor impliedly promises to repay the bank the amount of the overdraft.⁷ The bank's payment of the overdraft is considered a loan to the depositor that is authorized by the check;⁸ thereafter, the bank can maintain an action to recover the amount of the overdraft from the depositor.⁹ Although a bank

Weakley, 103 Ala. 458, 15 So. 854 (1894); *Saylors v. State Bank*, 99 Kan. 515, 163 P. 454 (1917).

7. UCC § 4-401(1), Comment 1; *see, e.g.*, *People's Nat'l Bank v. Rhoades*, 28 Del. 65, 90 A. 409 (1913); *Becker v. Fuller*, 99 Misc. 672, 164 N.Y.S. 495 (Sup. Ct. Monroe County 1917).

8. UCC § 4-401(1), Comment 1; *see, e.g.*, *City Bank v. Tenn.*, 52 Hawaii 51, 469 P.2d 816 (1970); *Merchants' Nat'l Bank v. Nichols & Shepard Co.*, 223 Ill. 41, 79 N.E. 38 (1906); *State v. Mullin*, 225 N.W.2d 305 (Iowa 1975); *Nebraska State Bank v. Sherlock*, 180 Neb. 772, 145 N.W.2d 573 (1966); *Bank of N.M. v. Pinion*, 57 N.M. 428, 259 P.2d 791 (1953).

9. *See note 7 supra.*

In addition to the right to sue for the amount of an overdraft, a bank may make a setoff in the amount of the overdraft against a general deposit that is not restricted in use. *Martinez v. Nat'l City Bank*, 80 F. Supp. 545 (D.P.R. 1948); *Nichols v. State*, 46 Neb. 715, 65 N.W. 774 (1896). If the depositor claims that the money deposited was a special deposit rather than a general deposit and therefore not subject to a setoff, the depositor has the burden of proving that the bank was notified of the special purpose of the deposit. *First Nat'l Bank v. City Nat'l Bank*, 102 Mo. App. 357, 76 S.W. 489 (1903); *Foulkrod v. First Nat'l Bank*, 70 Misc. 2d 616, 334 N.Y.S.2d 285 (Seneca County Ct. 1972). If a depositor has two accounts, the bank may make a setoff against one account for an overdraft in the other. *Hiller v. Bank of Columbia*, 92 S.C. 445, 79 S.E. 899 (1912). This setoff can be made whenever both accounts belong to the same individual, even if the accounts are in different names. *Cooper v. Public Nat'l Bank*, 208 App. Div. 430, 203 N.Y.S. 642 (1st Dep't 1924). It is also true where one account is savings and the other checking. *Cowen v. Valley Nat'l Bank*, 67 Ariz. 210, 193 P.2d 918 (1948); *Bromberg v. Bank of America Nat'l Trust & Savings Ass'n*, 58 Cal. App. 2d 1, 135 P.2d 689 (1943); *Pursiful v. First State Bank*, 251 Ky. 498, 65 S.W.2d 462 (1933).

Generally a payor bank cannot recover its loss on an overdraft from an outsider to the account who received payment for the check if that person had presented the check to the bank in good faith. The reason for this rule is that an overdraft is considered a loan by the bank to the drawer, and the bank should therefore look to the drawer for repayment. *See Vandagriff v. Masonic Home*, 242 Mo. 138, 145 S.W. 448 (1912). A person fraudulently obtaining money on an overdraft, however, may be liable. *Iowa State Bank v. Cereal Refund & Brokerage Co.*, 132 Iowa 248, 109 N.W. 719 (1906).

The right of a bank to recover from a principal for an overdraft made by his agent depends on whether or not the agent was authorized to overdraw. *Wheatley v. Kutz*, 19 Ind. App. 293, 49 N.E. 391 (1898). If the agent was given express authority, the principal may be liable for the overdraft. *Id.* Where the agent was not given express authority but the principal nevertheless allowed the agent habitually to overdraw the principal's account, the bank may assume that the principal will cancel any subsequent overdrafts. *Merchants' & Planters' Nat'l Bank v. Clifton Mfg. Co.*, 56 S.C. 320, 33 S.E. 750 (1899). The mere authority given to an agent to draw checks against the principal's account does not include the authority to overdraw. *Faulkner v. Bank of Italy*, 69 Cal. App. 370, 231 P. 380 (1924). If the agent does overdraw, the principal will not be liable unless special circumstances exist that constitute an estoppel or ratification. *Merchants' Nat'l Bank v. Enesco & Shepard Co.*, 223 Ill. 41, 79 N.E. 38 (1906). *See also Torrance Nat'l Bank v. Enesco Fed. Credit Union*, 134 Cal. App. 2d 316, 285 P.2d 737 (1955). An agent who

generally may recover for an overdraft, certain acts of negligence or bad faith by the bank may preclude it from recovering.¹⁰

B. Liability for Overdrafts of Joint Accounts

There is considerable confusion in banking law concerning whether one cosignatory on a joint account can be held liable for an overdraft made by another cosignatory.¹¹ This confusion is due largely to the vagueness of the UCC¹² and the scarcity and inconsistency of the relevant case law.¹³

Unfortunately, the confusion is not alleviated by the typical signature card signed by each cosignatory, which is the contract by which the joint cosignatories are bound to each other and to the bank.¹⁴ While the typical signature card by its terms permits any single cosignatory to draw the full amount on deposit in the joint account,¹⁵ it does not expressly provide that cosignatories shall be severally liable for the full amount of any overdraft.¹⁶

Although the UCC does not address this issue directly, some

overdraws his principal's account without authority may be personally liable for the overdraft. See *Commercial Nat'l Bank v. Stockyards Loan Co.*, 16 F.2d 911 (8th Cir. 1926).

10. *Citizens State Bank v. Western Union Tel. Co.*, 172 F.2d 950 (5th Cir. 1949). A bank generally may recover for an overdraft even when payment was made by the bank under the mistaken belief that there was a sufficient amount on deposit to cover the overdraft. *Morris v. First Nat'l Bank*, 162 Ala. 301, 50 So. 137 (1909); *James River Nat'l Bank v. Weber*, 19 N.D. 702, 124 N.W. 952 (1910).

11. *Cambridge Trust Co. v. Carney*, 333 A.2d 442, 444 (N.H. 1975). Compare 3 R. ANDERSON, *UNIFORM COMMERCIAL CODE* § 4-401:4, at 300 (2d ed. 1971) with W. HAWKLAND, *A TRANSACTIONAL GUIDE TO THE UCC* § 1.740301, at 385-86 (1964).

12. See notes 17-22 and accompanying text *infra*.

13. See Halls & Hauenstein, *The Uniform Commercial Code in Minnesota: Article 4—Bank Deposits and Collections*, 50 MINN. L. REV. 1027, 1041 (1966); 2 *UNIFORM LAWS ANNOTATED*, *UNIFORM COMMERCIAL CODE* § 4-401, at 376 (1963, Supp. 1975, at 208-11).

14. See *Landretto v. First Trust & Sav. Bank*, 333 Ill. 442, 448-49, 164 N.E. 836, 839 (1928).

15. *Id.*

The portions of a typical joint signature card that are relevant to the collection of overdrafts on a joint account are as follows:

The joint depositors . . . agree with each other and with the above bank that all sums now on deposit heretofore or hereafter deposited by any one or more of said joint depositors, with all accumulations thereon, are and shall be owned by them jointly . . . and be subject to the check . . . of any one or more of them . . . and payment to or on the check or receipt of any one or more of them . . . shall be valid and discharge said bank from liability. Each of the joint depositors . . . appoints each of the others attorney, with power to deposit in said joint account moneys of the grantor of this power and for that purpose to endorse any check, draft, note or other instrument payable to the order of said grantor or to him and to any others of said joint depositors.

Joint Account Signature Card, First Security Bank of Utah.

16. *Id.* See also *Faulkner v. Bank of Italy*, 69 Cal. App. 370, 231 P. 380 (1924).

commentators argue that the Code imposes liability on a cosignatory for an overdraft even though he had nothing to do with its creation.¹⁷ These commentators rely on section 4-401(1), which provides that “[a]s against its customer, a bank may charge against his account any item which is otherwise properly payable from that account even though the charge creates an overdraft.”¹⁸ “Account” is defined in section 4-104(a) as “any account with a bank and includes a checking, time, interest or savings account.”¹⁹ “Customer” is defined as “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.”²⁰ The advocates of liability conclude that since the broad definition of account clearly includes a joint account and since any cosignatory on a joint account would be a customer, the bank can collect the amount of an overdraft from *any* cosignatory on a joint account.²¹ Other commentators, however, maintain that section 4-401(1) was not meant to extend so far as to include joint depositors and joint accounts.²² The case law is similarly divided.

Only three cases have considered the liability of cosignatories on a joint account since the adoption of the Uniform Commercial Code.²³ In the first, *National Bank v. Derhammer*,²⁴ a lower Penn-

17. B. CLARK & A. SQUILLANTE, *THE LAW OF BANK DEPOSITS, COLLECTIONS AND CREDIT CARDS* 35-36 (1970); W. HAWKLAND, *A TRANSACTIONAL GUIDE TO THE UCC* § 1.70301, at 385-86 (1964).

18. UCC § 4-401(1).

19. UCC § 4-104(1)(a).

20. UCC § 4-104(1)(e).

21. See note 17 *supra*.

22. One important commentator simply states as follows:

The Code does not alter the prior rule that in the case of a joint account one cosignatory cannot be held beyond the balance in the account and that a joint deposit does not make each cosignatory the agent of the other with respect to the making of overdrafts.

3 R. ANDERSON, *UNIFORM COMMERCIAL CODE* § 4-401:4, at 300 (2d ed. 1971).

23. A number of cases treated this issue prior to the adoption of the UCC. These cases are important since they indicate the wide variety of circumstances under which this issue may arise. The first pre-Code case to specifically deal with the respective liability of joint depositors in a joint account was *Adams v. First Nat'l Bank*, 113 N.C. 332, 18 S.E. 513 (1893). In that case the Supreme Court of North Carolina held that a bank cannot charge an overdraft of a partnership joint account against the individual account of a partner. *Id.* at 335, 18 S.E. at 514. In dicta, however, the court said that the partner could be held personally liable for the overdraft even though he did not create it. *Id.* at 336, 18 S.E. at 515. In the Tennessee case of *Bank of Bellbuckle v. Mason*, 139 Tenn. 659, 202 S.W. 931 (1918), it was held that where one partner *notified* his bank that he would not be responsible for any overdrafts made by his partner in their joint account, such notice was binding on the bank and he was not liable for a subsequent overdraft made by his partner. He was liable, however, for the amount of an overdraft paid to him personally, even though

sylvania court held that a cosignatory is not liable for an overdraft of his joint account unless he either participated in the negotiation of the worthless check by which the account was "opened"²⁵ or received funds as a result of his cosignatory's fraud.²⁶ A similar result was reached in *Nielson v. Suburban Trust & Savings Bank*,²⁷ where the bank had permitted a woman to make a withdrawal from the joint savings account that she shared with her husband even though she did not have the passbook. The following day, her husband presented the passbook to make a withdrawal. Since the passbook did not indicate the previous day's

he did not know at the time he received the money that it was from an overdraft. *Id.* at 668-70, 202 S.W. at 932-33. In another pre-Code case, *Popp v. Exchange Bank*, 189 Cal. 296, 208 P. 113 (1922), the Supreme Court of California held that where a joint account was opened in the name of a husband and wife with money belonging to the wife, the wife was liable for the overdraft made by her husband even though she probably never drew any checks on the account. *Id.*, 208 P. at 115. Two years later, the California court of appeals in *Faulkner v. Bank of Italy*, 69 Cal. App. 370, 231 P. 380 (1924) distinguished the *Popp* decision and held that one who introduces a customer to a bank in good faith and becomes a cosignatory on a joint account with that customer merely for the convenience of the customer is not liable for an overdraft made by the customer. *Id.* at 371-72, 231 P. at 382. The court stressed that the person who introduced the customer neither endorsed the check by which the joint account was opened nor had anything to do with the drawing of the check which created the overdraft. *Id.* at 371, 231 P. at 381. In 1956, the Supreme Court of North Carolina in *First Citizens Bank & Trust Co. v. Raynor*, 243 N.C. 417, 90 S.E.2d 894 (1956) followed the *Faulkner* decision, holding that a husband was not liable for an overdraft made by his wife of their joint account. The wife, without the knowledge or consent of her husband, deposited an unendorsed check payable to her husband into their joint account and immediately drew a check on the account, relying on the credit of the deposited check. But since her husband had stopped payment on the deposited check, the wife's check caused an overdraft. The court based its decision on the fact that the husband did not participate in any way in creating the overdraft; he neither endorsed the check which was deposited nor had any knowledge that the deposit had been made. *Id.* at 418-19, 90 S.E.2d at 897.

24. 16 Pa. D. & C.2d 286 (1958).

25. It can be inferred from *Derhammer* that a cosignatory could be liable for an overdraft of his joint account if he participated in the negotiation of not only the worthless check by which the account was *opened*, but also any check that *overdraws* the account.

26. *Id.* at 289. In *Derhammer*, the defendant and another were cosignatories on a joint account with the plaintiff bank. The only deposit in the account was a check to the other cosignatory for \$4,950 drawn by a third party. The bank paid \$150 in cash against the original deposit to either the defendant or the other cosignatory. It also paid to the "account owners" \$2,800 on a check signed by "one of the joint makers." The original check for \$4,950, by which the account was opened, was drawn upon a fictitious bank. The plaintiff bank consequently brought suit to recover the \$2,950 it had paid. The court stated that a cosignatory to a joint account is not personally liable beyond the funds deposited in the joint account for transactions made by his cosignatory that result in an overdraft. The court held that since the bank did not specifically allege in its complaint that the defendant was responsible for the negotiation of the \$4,950 check or was enriched by the fraud of the defendant's cosignatory, the complaint was not sufficiently specific. *Id.* at 286-89.

27. 37 Ill. App. 2d 224, 185 N.E.2d 404 (1st Dist. 1962).

withdrawal made by his wife, he was able to make a withdrawal that overdrew the account. The Illinois appellate court rejected the bank's argument that an overdraft of a joint account is an indebtedness of each joint depositor, holding that the bank could not charge the wife's individual account with the overdraft made by her husband in their joint account.²⁸ In contrast to *Derhammer* and *Nielson*, the Missouri court of appeals held in *Bremen Bank & Trust Co. v. Bogdan*²⁹ that although a woman was a cosignatory on her husband's business account only for convenience and had no ownership interest in the business, she was liable as a joint tenant for an overdraft of that account.

II. INSTANT CASE

Cambridge Trust alleged that Mrs. Carney was liable primarily as a cosignatory on the joint account³⁰ and alternatively pursuant to the indemnification agreement that she had signed.³¹ In ruling on the bank's claim that Mrs. Carney was liable as a cosignatory on the joint account, the court held, without significant analysis,³² that "[s]ince Mrs. Carney neither participated in the transaction creating the overdraft nor received funds as a result of it, she cannot be held liable for payment of it."³³

In rejecting the alternative claim that Mrs. Carney was liable pursuant to the indemnification agreement, the court relied on the provisions of UCC section 4-103(1)³⁴ that limit the effectiveness of such an agreement to situations where a bank exercises ordinary care.³⁵ The court reasoned that "[w]hile allowing an

28. *Id.* at 234, 185 N.E.2d at 408.

29. 498 S.W.2d 306 (Mo. Ct. App. 1973).

30. The bank maintained that since Mrs. Carney was a cosignatory on the joint account from which the funds attached by the bank originally came, those funds were liable for payment of the overdraft of the joint account. 333 A.2d at 444.

31. *Id.* at 445.

32. The court merely noted the scarcity of decisional law and the division among commentators as to the effect of UCC § 4-401(1) and then rendered its decision without explicitly interpreting that section. *Id.* at 444-45. See also notes 17-29 and accompanying text *supra*.

33. 333 A.2d at 445. In deciding the instant case the court expressly relied upon *Faulker* and *Derhammer*. *Id.* at 444-45. The holding in the instant case differs from the holding in *Derhammer* since the cosignatory against whom the bank was trying to recover in *Derhammer* either would have had to participate in the negotiation of the worthless check that was used to open the account—rather than in the check that created the overdraft—or would have had to receive proceeds as a result of the other cosignatory's fraud rather than from the overdraft check. *Id.* at 445; note 26 and accompanying text *supra*.

34. 333 A.2d at 445.

35. *Id.*

overdraft does not generally constitute failure to exercise ordinary care,"³⁶ in this case the jury could have found a lack of ordinary care since the assistant treasurer, who had been concerned about Mr. Carney's six prior overdrafts, was not notified of the overdraft despite his request to be so informed.³⁷ Thus, the court concluded that the jury could have properly found Mrs. Carney not liable "on the basis of the indemnification agreement and card which she signed."³⁸

III. ANALYSIS

The instant case is the first state supreme court case since the adoption of the Uniform Commercial Code³⁹ to rule on the respective liabilities of cosignatories on a joint bank account for an overdraft. One of the UCC's underlying purposes and policies is "to make uniform the law among the various jurisdictions."⁴⁰ In furtherance of this purpose, there is a general policy among the courts that the decisional law of the highest tribunal of one jurisdiction should be uniformly followed by other jurisdictions.⁴¹ Consequently, the instant case assumes an eminent position in the law dealing with the liabilities of cosignatories on joint bank accounts.

The remainder of the casenote will examine (1) the appropri-

36. *Id.*

37. *Id.* The court stated that

the assistant treasurer of Cambridge Trust testified that . . . he had become so concerned about the six overdrafts made by Mr. Carney within a two-month period that he instructed the person handling the records for the account to notify him immediately in the event of any large overdrafts. The record indicates that he was not notified.

38. *Id.*

39. New Hampshire adopted the UCC on July 1, 1961. 1 R. ANDERSON, UNIFORM COMMERCIAL CODE ix (2d ed. 1971).

40. UCC § 1-102(2)(c).

41. *See, e.g.,* Evans v. Everett, 10 N.C. App. 435, 437, 179 S.E.2d 120, 122 (1971). The purpose and policy of the UCC "to make uniform the law among the various jurisdictions" cannot be accomplished unless the courts of each jurisdiction follow the decisions in other jurisdictions that interpret the UCC. *But see* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 9 (1972):

Courts in the same state will likely follow the footsteps of their predecessors, even where those footsteps have gone astray

Is a Code case in another jurisdiction entitled to special weight because of the policy of uniformity in commercial law? From time to time a court bows to this policy, but in most cases the court seems more concerned that its decision be right than that it be parallel with another state's. Certainly there are Code decisions that other courts should not follow.

(Footnotes omitted.)

ateness of the court's interpretation and application of UCC section 4-401(1), (2) the scope of the test adopted by the court, (3) the *intent* of the parties as another test that should be applied in determining liability, and (4) the effect that an indemnification agreement between the bank and the cosignatories should have.

A. *Application of the UCC*

As shown above, there are conflicting opinions concerning whether UCC section 4-401(1) can be properly interpreted to give a bank the power to recover the amount of an overdraft of a joint account from a cosignatory who was not directly responsible for the creation of the overdraft.⁴² In the instant case, although the court relied upon UCC section 4-401(1) as the controlling statutory law,⁴³ it did not articulate its construction of that section. It can be assumed from the holding, however, that the court did not read section 4-401(1) broadly enough to permit a bank to recover from *any* cosignatory on a joint account without regard to who made the overdraft or who received the proceeds from it.⁴⁴

Section 1-102(1) of the UCC states that "[t]his Act shall be liberally construed and applied to promote its underlying purposes and policies."⁴⁵ One of those underlying purposes and policies is "to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties."⁴⁶ To the extent the Code encourages banks to pay overdrafts by allowing them to recover from the maker, it tends to promote this underlying purpose of expanding commercial practices. In paying an overdraft, the bank is extending credit to the person or entity that created the overdraft. This increases the buying power within the economy, which in turn tends to expand commerce. Furthermore, encouraging banks to pay overdraft checks may have two other salutary effects: (1) the acceptability of checks as "legal tender" may be increased, and (2) there may be less handling of commercial paper through the banks, which would reduce their expenses and create a savings that could be passed on to customers.

Banks would not knowingly pay overdrafts unless they were assured of their ability to recover the amount of *any* overdraft

42. See notes 17-22 and accompanying text *supra*.

43. 333 A.2d at 444.

44. See generally notes 17-22 and accompanying text *supra*.

45. UCC § 1-102(1).

46. UCC § 1-102(2)(b).

from its creator. Section 4-401(1) of the UCC was designed not only to permit banks to pay overdrafts, but also to protect banks⁴⁷ by giving them the legal right to recover the amount of overdrafts they pay.⁴⁸ But if the courts construe section 4-401(1) such that its application denies recovery to banks for the amount of the overdrafts of joint accounts from *any* of the cosignatories (as the court did in the instant case), then the protection afforded banks that pay overdrafts of joint accounts will be substantially decreased. Consequently, the frequency with which banks pay overdrafts of joint accounts would be reduced, and the underlying purpose of the UCC to continue the expansion of commercial practices would not be served.⁴⁹ Therefore, in construing section 4-401(1), courts should carefully consider the UCC's underlying purposes and policies and the effect any decision will have on them.

B. Scope of the Test Applied in the Instant Case

In the instant case, the court applied an "either/or" test to determine when a cosignatory is liable for an overdraft of his joint account. If he either *participates* in the transaction that creates the overdraft, or *receives funds* as a result of it, he is liable.⁵⁰ Although the court had little difficulty applying this test in the instant case,⁵¹ problems may arise in future cases involving different facts.

The test used by the court lends itself to both a narrow and a broad interpretation. A narrow interpretation would not make a cosignatory on a joint account liable for an overdraft unless he actually wrote the overdraft check, helped negotiate it, or obtained actual funds from the overdraft. Such an interpretation has the advantages of resolving confusion—thereby promoting predictability in this area of the law—and achieving judicial economy.

47. The report of the New York State Law Revision Commission declares that "[a] . . . provision protecting a depository bank which pays an item in good faith is contained in Section 4-401." 2 REPORT OF THE N.Y. STATE LAW REVISION COMM'N FOR 1955, STUDY OF THE UNIFORM COMMERCIAL CODE 65 (1955).

48. UCC § 4-401(1), Comment 1. See notes 4-9 and accompanying text *supra*.

49. On the other hand, if banks could recover for an overdraft of a joint bank account from *any* cosignatory without regard to who created the overdraft or who received the funds from it, commercial practices arguably would not be expanded since unjust results would occur with such frequency that customers would be discouraged from maintaining joint accounts.

50. 333 A.2d at 445.

51. See *id.*

A broad interpretation, on the other hand, could make a joint depositor liable even if he did not actually participate in the negotiation of the check or receive the actual proceeds from it. For example, although a joint depositor may not personally have written or negotiated the check that created the overdraft, it is nevertheless conceivable that he participated sufficiently in creating the overdraft that he should be held liable for it. That is, his knowledge of, consent to, or encouragement in the creation of the overdraft may be sufficient to constitute participation in its creation. Likewise, although a joint depositor does not receive the actual funds from the overdraft, he may receive "funds as a result of it."⁵² A business or marriage partner may be considered to have received funds as a result of the second partner's overdraft to the extent that the money from the overdraft received by the second partner released other funds for the use by the first partner.

The wide range of situations in which overdrafts in joint accounts have arisen⁵³ indicates that for future cases to be decided properly the test developed in the instant case should not be construed so narrowly as to permit recovery by a bank only in limited circumstances. Rather, a broad interpretation of this test that considers all relevant circumstances should be employed.

C. *Intent as an Additional Test*

Even when the test used by the court in the instant case is not satisfied, circumstances may exist in which liability should nevertheless be imposed. An additional test that should be applied is the *intent* of the parties—cosignatories and bank—with respect to potential liability for overdrafts when the joint account was originally created. For example, if the bank and the cosignatories originally intended that liability extend to all cosignatories for any overdraft and all cosignatories actively used the account, liability should attach even if the cosignatory who did not create the overdraft neither participated in nor received funds as a result of the check that created the overdraft. Further, in situations where one cosignatory is solvent and the others are not, the bank should be able to rely on the former for any overdrafts. Thus, the *intent* of the parties is an important additional inquiry that

52. It is an uncontradicted fact that Mrs. Carney had nothing to do with the negotiation of the check that created the overdraft and did not receive funds from it. Appellant's Brief at 7-8; Appellee's Brief at 6-7.

53. See notes 23-29 and accompanying text *supra*.

should be made by courts in these cases. This inquiry requires courts to examine many factors.

The *purpose* for which the person from whom the bank is trying to recover became a cosignatory on the joint account is important in determining intent of the parties with respect to liability. If he became a cosignatory for his own benefit or the mutual benefit of himself and any of the other joint depositors, his responsibility for an overdraft that he did not create should be greater than if he became a cosignatory merely for the benefit or convenience of another cosignatory.⁵⁴ Thus, the degree to which a cosignatory is to be *benefited* by the joint account indicates his probable *intent to be burdened* or bear liability for overdrafts created by another.

Courts should also carefully examine the type and closeness of the *relationship* between the cosignatories on the joint account. Such relationships as partner-partner, principal-agent, and independent-dependent should have a bearing on the respective liabilities for overdrafts of co-depositors.⁵⁵ For example, a child who is a cosignatory on his parents' account for mere convenience should not be held responsible for an overdraft created by one of his parents. But if an agency or other business relationship exists between the cosignatories, it is more likely that the parties intended joint and several liability, and liability should more readily be imposed.

Another important fact that courts should consider is whether or not there is an *overdraft protection agreement* between the bank and the cosignatory. By such an agreement, the bank promises to pay the depositors' overdrafts up to and not beyond a certain amount.⁵⁶ In return, the cosignatory promises to

54. In *Faulkner v. Bank of Italy*, 69 Cal. App. 370, 231 P. 380 (1924), a case on which the court in the instant case placed substantial reliance, 333 A.2d at 445, the cosignatory, who did not make the overdraft but against whom the bank was trying to recover, became a joint depositor on the account merely for the convenience and benefit of the other joint depositor. The cosignatory was found not to be liable for the overdraft. *Faulkner* was distinguished from *Popp v. Exchange Bank*, 189 Cal. 296, 208 P. 113 (1922), which held that an overdraft of a joint account was an indebtedness of both cosignatories. The distinguishing feature was that the joint account in *Popp* was for the mutual benefit of both cosignatories. *Faulkner v. Bank of Italy*, *supra* at 373, 231 P. at 382.

55. See note 9 *supra*.

56. A typical overdraft protection agreement provides:

[T]he undersigned jointly and severally agree as follows:

1. "Central Bank" shall guarantee payment of any personal check drawn on it by any of the undersigned to the named payee provided all the terms and conditions on the Check Guarantee card are satisfied.
2. "Central Bank" shall honor all guaranteed checks.

repay the bank for the amount of these overdrafts. It can be argued that the cosignatory should be able to rely on the bank not to pay overdrafts above the ceiling, and therefore need not repay the bank for overdrafts that exceed the ceiling amount. Conversely, it can be argued that the cosignatory impliedly promises to pay *any* overdrafts—that the ceiling amount was merely a guarantee that the bank would make payment at *least* up to that amount—and any excess the bank chose to pay on an overdraft would remain the obligation of the cosignatory. Of course, the terms of the agreement and, especially where the terms are unclear, any representations made or circumstances surrounding the agreement should be carefully considered by the examining courts.

A fourth circumstance, the existence of an indemnification agreement between the bank and the cosignatories, is also relevant to the determination of the parties' intent to impose joint and several liability on the cosignatories for all overdrafts. In form, an indemnification agreement represents the express intent of the parties to impose such liability. But, as discussed below, such an agreement may not in substance accurately reflect the intent of the cosignatories.

D. Effect of an Indemnification Agreement

The holding in the instant case suggests that although Mrs. Carney was not liable under UCC section 4-401(1) merely as a cosignatory on the joint account, she would have been liable under the terms of the indemnification agreement she executed with the bank had there been no evidence of negligence on the

3. The undersigned hereby expressly waive any right to stop payment on any guaranteed checks.

4. The undersigned shall not exceed the established line of credit or credit limits authorized for their account when this card was issued or as the same may be revised from time to time. The undersigned fully understands that any guaranteed check negotiated which causes the line of credit or credit limit to be exceeded shall be considered a "short check" and may be a felony and punishable by fine or imprisonment or both.

5. The undersigned also agree to pay "Central Bank" its normal charge for a non-sufficient funds item for each guaranteed check negotiated which causes the established line of credit to be exceeded.

6. To pay reasonable attorney's fees incurred by "Central Bank" not in excess of 15% of the unpaid debt after default in the enforcement of the obligations hereunder and waive to the extent permitted by law the pleading of the Statute of Limitations.

Check Guarantee Agreement, Central Bank & Trust Co., Provo, Utah.

part of the bank.⁵⁷ This suggests that it is likely that such agreements will be used more extensively in the future in joint accounts in an attempt by banks to avoid the result obtained in the instant case. Form agreements such as these, however, may tend to be contracts of adhesion, not reflecting the true intent of the cosignatories.⁵⁸ Courts should squarely confront these agreements and determine whether they will enforce them even when the effect will be contrary to the intent of the cosignatories and inequity will clearly result, or whether they will refuse to enforce them on grounds of unconscionability.

V. CONCLUSION

The explicit policy of the UCC to continue the expansion of commercial practices places an affirmative duty on courts to interpret section 4-401(1) such that liability will be imposed on all cosignatories of a joint account unless the intent of the parties, negligence or bad faith of the bank, or the unconscionability of an indemnification agreement indicate that liability should not be imposed. To assure the consistent achievement of proper results in future cases, courts should employ a broad interpretation of the test used in the instant case in which all relevant circumstances are considered.

57. 333 A.2d at 445. See notes 34-38 and accompanying text *supra*.

58. See generally *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); UCC § 2-302.