

1968

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Recommended Citation

Kevin P. Colleran, *The Depositary Bank as a Holder in Due Course*, 47 Neb. L. Rev. 116 (1968)

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THE DEPOSITARY BANK AS A HOLDER IN DUE COURSE

INTRODUCTION

The difference in the status of a holder in due course and one not a holder in due course is clearly pointed out by the Uniform Commercial Code.¹ Section 3-302(1) of the Code states the requirements for holding in due course and apparently one need only make a determination as to whether a particular holder² has taken an instrument³ for value,⁴ in good faith⁵ and without notice⁶ of certain factual situations. The determination is not simple, however, and this article will attempt to deal with only one facet of holding in due course; that is, when a depository bank is deemed to be a holder in due course. As will be shown, one of the most difficult questions to be answered in order to reach an ultimate determination of whether or not a depository bank is a holder in due course is—when has such a bank given value.

PART I. THE PROBLEM IN THE CODE

Section 4-209, When Bank Gives Value for Purposes of Holder in Due Course, provides:

For purposes of determining its status as a holder in due course, the bank has given value to the extent that it has a *security interest* in an item provided that the bank otherwise complies with the

¹ UNIFORM COMMERCIAL CODE § 3-305, (1962 version) Rights of a Holder in Due Course, and 3-306, Rights of One Not a Holder in Due Course, point out the critical difference and importance to holding in due course. Section 3-305. "To the extent that a holder is a holder in due course he takes the instrument free from (1) *all claims* to it on the part of any person; and (2) *all defenses* of any party to the instrument with whom the holder has not dealt except..." (emphasis added). Five specific exceptions are given and these are generally called "real defenses." Section 3-306. "Unless he has the rights of a holder in due course any person takes the instrument subject to (a) *all valid claims* to it on the part of any person; and (b) *all defenses* of any party which would be available in an action on a simple contract;..." (emphasis added). A cursory reading indicates the importance of the status of a holder in due course. UNIFORM COMMERCIAL CODE citations herein are to the 1962 Official Text.

² UNIFORM COMMERCIAL CODE § 1-201 (20) (1962 version) [hereinafter cited as UCC].

³ UCC § 3-102(1)(e).

⁴ UCC § 3-303.

⁵ UCC § 1-201(19).

⁶ UCC §§ 1-201(25), 3-508.

requirements of Section 3-302 on what constitutes a holder in due course.⁷

Section 4-208, Security Interest of Collecting Bank in Items, Accompanying Documents and Proceeds, thus becomes the next stop in an effort to make an eventual determination of the issue presented. 4-208(1) states:

(1) A bank has a security interest in an item and any accompanying documents or the proceeds of either (a) in case of an item deposited in an account to the extent to which credit given for the item has been withdrawn or applied; (b) in case of an item for which it has given credit available for withdrawal as of right, to the extent of the credit given whether or not the credit is drawn upon and whether or not there is a right of charge-back; or (c) if it makes an advance on or against the item.

This article will focus its attention on two of the above provisions, 4-208(1)(a) and 4-208(1)(b).⁸ Hopefully, it will be demonstrated that 4-208(1)(a) is reasonably clear, and even more hopefully, some ascertainable meaning will be derived from 4-208(1)(b). To restate the problem then, the question presented is when does a depository bank⁹ have a "security interest" under section 4-208 so that it may be a holder in due course under section 4-209 and 3-302.

PART II. SECTION 4-208(1)(a)

As was stated earlier, the distinction between a holder in due course and one not a holder in due course can be critical, so the next step must be an attempt to determine what type of factual situation 4-208(1)(a) is trying to cover.

Let us suppose that on Monday the depositor has a final credit of 100 dollars. On Tuesday he deposits a check for 100 dollars for which he received a provisional credit. On Wednesday the customer deposits an additional 100 dollars in cash and then on Thursday, he

⁷ Section 3-303 (emphasis added). Taking for Value, and § 1-201(37), which defines "security interest" are not particularly enlightening for the situation which involves a depository bank.

⁸ Section 4-208(1)(c) "...if it makes an advance on or against the item" is sufficiently clear that comment on it will not be included in this article.

⁹ Primary concern for the depository bank in the resolution of this problem is based on § 3-201, Transfer, Right of Indorsement, which provides in applicable part "(1) Transfer of an instrument vests in the transferee such rights as the transferor has therein..." This is the so called "shelter provision." Thus, any collecting or presenting bank will be protected if the depository bank is a holder in due course, for section 3-201 vests in the transferee such rights as the transferor had, and no reason exists to exclude from the shelter of section 3-201 the rights of a holder in due course.

withdraws 200 dollars.¹⁰ Let us also suppose that the depository bank has sent the check deposited on Tuesday on for collection in a proper fashion and that at the time of the withdrawal on Thursday, the check has not been finally paid. Under sections 4-208(2)¹¹ and 4-208(1)(a) the depository bank would have a security interest in the check deposited on Tuesday.

Let us now suppose that on the following Monday the payor bank¹² has paid on the check of the drawer when the check should have been dishonored for insufficient funds. Let us further suppose that the drawer has "skipped" the country. The payor bank is now out 100 dollars and would like to get its money back.

It may sue the depository bank, but to no avail¹³ for the depository bank is a holder in due course under section 4-208(1)(a) and section 3-418. Finality of Payment or Acceptance, provides:

Except for recovery of bank payments as provided in the article on Bank Deposits and Collections (Article 4) and except for liability for breach of warranty on presentment under the preceding section, payment or acceptance of any instrument is final in favor of a holder in due course, or a person who has in good faith changed his position in reliance on the payment.

The payor bank also might be desirous of suing the collecting¹⁴ or presenting bank,¹⁵ but under the "shelter provisions" of section 3-201¹⁶ the payor bank should not succeed.

Another situation in which the question of the depository bank being a holder in due course is vital is that of the forged instrument. Suppose B forges an instrument of G and the check is deposited and

¹⁰ 1 W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE, § 1.7904, at 443-44 (International Printing Co. 1964).

¹¹ UCC § 4-208(2) "When credit which has been given for several items received at one time or pursuant to a single agreement is withdrawn or applied in part the security interest remains upon all the items, any accompanying documents or the proceeds of either. For the purpose of this section, credits first given are first withdrawn."

The last sentence of 4-208(2) provides for the "first in first out" or "FIFO" method of tracing. Thus, for the purposes of the bank of obtaining a "security interest" the provisional credit for the check was the first in, thus it is also the first out. See 1 W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE § 1.7904, at 443-44 (International Printing Co. 1964).

¹² UCC § 4-105(b) "Payor bank" means a bank by which an item is payable as drawn or accepted.

¹³ 1 W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE § 1.7904, at 443-44 (International Printing Co. 1964). C. FUNK, BANKS AND THE UNIFORM COMMERCIAL CODE, 138-39 (rev. ed. 1962).

¹⁴ UCC § 4-105(d).

¹⁵ UCC § 4-105(e).

¹⁶ See footnote 9, *supra*.

sent on for collection. Sometime later G discovers the forgery and invokes his right under the Uniform Commercial Code.¹⁷ G has not breached any duty¹⁸ imposed by the Code; consequently, the payor bank has to re-credit his account.¹⁹ Once again the payor bank is going to look for someone from whom it can recover. Obviously, the forger is a vulnerable party for under the Code²⁰ the unauthorized signature operates as that of the forger; however, let us suppose that the forger cannot be located and that all of the other parties involved are blameless.

Thus, the background is set for the following factual situation: B forges an instrument of G drawn on the P bank for 500 dollars and made payable to X. X negotiates it to M, a merchant, and M places the item in his bank, D, for collection. D through proper methods forwards the check on to a collecting bank, C, and eventually the check is presented to P bank; P bank then makes payment on the check. Before P had paid on the instrument, D bank had given M a provisional credit, C bank had given D bank a provisional credit and so on through the chain of collection until the instrument reached P bank and P had made final payment.²¹

To this set of facts one makes the same line of inquiry as was used in the prior example. One must first determine when and whether payment of the instrument is final;²² the next answer to be sought is whether the D bank has applied the provisional credit or allowed M to withdraw on the provisional credit. After making these determinations one should then ascertain the applicability of the "shelter" provided by 3-201. If the following additional facts are assumed, that D bank had allowed withdrawals by M and that

¹⁷ UCC § 3-401. Signature. (1) No person is liable on an instrument unless his signature appears thereon. UCC § 3-404. Unauthorized Signatures. (1) Any unauthorized signature is wholly inoperative as that of the person whose name is signed unless he ratifies it or is precluded from denying it; but it operates as the signature of the unauthorized signer in favor of any person who in good faith pays the instrument or takes it for value.

¹⁸ UCC § 3-406. Negligence Contributing to Alteration or Unauthorized Signature. Any person who by his negligence substantially contributes ... to the making of an unauthorized signature is precluded from asserting the ... lack of authority against a holder in due course or against a drawee or other payor who pays the instrument. ...

¹⁹ UCC §§ 3-401(1), 3-404(1).

²⁰ UCC § 3-404(1).

²¹ Final payment will be discussed later in this article in relation to both § 4-208(1)(a) and § 4-208(1)(b).

²² UCC § 3-418. Comments (1) and (2) to § 3-418 states specifically that this section follows the famous case of *Price v. Neal*, 3 Burn. 1354 (1762), and speaks of the traditional rationale of the case as well as a "less fictional" rationale.

the withdrawals exceeded the amount that M had in his account before he had deposited the check, then D bank would be a holder in due course to the extent that the credit given had been withdrawn.²³ In addition, it would appear that since section 3-418 also provides that payment is final as against one who has changed his position in reliance on the payment of instrument the need to be a holder in due course, or to have a prior holder in due course in the chain of ownership or collection that the instrument takes is reduced.²⁴

Additional situations²⁵ also arise that invoke the provision of section 4-208(1)(a), but the inquiry is basically the same, so only one such situation will be discussed further. This situation presents the depository bank as a plaintiff. X and Y contract for the sale of goods. X draws a check on P bank, payable to Y, in payment for the goods. Y deposits the check in D bank for collection and D gives Y a provisional credit thereon. Y utilizes the provisional credit before D is able to learn that X has stopped payment on the check payable to Y because the goods were defective. D first seeks to recover the amount of the credit used from Y,²⁶ but D is unable to find him. D then seeks to recover his loss from X, and X sets up the defense that the goods were defective. Once again D's status as a holder in due course is relevant and D should be able to recover.²⁷ X's possible defense of Y's breach of contract should have no impact on the status of D.

PART III. SECTION 4-208(1)(b)

The troublesome aspect of section 4-208(1)(b) stems from the words "credit available for withdrawal as of right," and despite the fact that a section²⁸ does exist in the Code that seemingly defines when credit becomes available for withdrawal as of right the question remains as to whether section 4-208(1)(b) and section 4-213(4) are related one to the other. In order to determine whether or not

²³ It might be wise to insert a word of caution here. It must be remembered that this article is dealing only with the requirement of value for holding in due course for a bank. It does not deal with the other requirements of holding in due course, nor does it deal with other possibilities of recovery for a payor bank such as those contained in section 4-407.

²⁴ C. FUNK, *BANKS AND THE UNIFORM COMMERCIAL CODE* 163 (rev. ed. 1962).

²⁵ *Id.* at 165.

²⁶ UCC § 3-414. Contract of indorser; order of liability. UCC § 3-417. Warranties on presentment and transfer.

²⁷ UCC § 3-305(2).

²⁸ UCC § 4-213(4). As stated earlier, this section will be discussed later in the article.

any relationship does exist one must first determine exactly with what section 4-208(1) (b) deals. To do this it is enlightening to look at and inquire into earlier tentative and "final" drafts of the Uniform Commercial Code. But before delving into the legislative development of 4-208(1) (b) it might be helpful to indicate in which direction 4-208(1) (b) will ultimately lead one.

First it is important to note that a collecting bank, "unless a contrary intent clearly appears," prior to final settlement is presumed to be the agent or the subagent of the owner, and this is true "even though credit given for the item is subject to immediate withdrawal as of right."²⁹ In addition, the same section provides that the relevant provisions of article 4 apply even though a "bank has purchased the item and is the owner of it."³⁰ Thus, apparently, the Code is attempting to give answers to banking problems not on the basis of whether the bank is the owner³¹ of a particular item, but by distinguishing between the situations where a customer deposits an item in an account and the situation where the bank discounts the item. As it has been stated:

The rule is different where an item is not deposited in an account, for example, where it is discounted or otherwise purchased by a bank. In these situations, the transferee bank has a security interest in the item or its proceeds, whenever it has given its transferor credit available for withdrawal as of right, to the extent of the credit given, even though the credit is not actually drawn upon, and even though there is a right of charge-back (4-208(1)(b)).³²

Falling in the same category would be the situation where the bank took the instrument as collateral for a loan, regardless of whether the customer had drawn on the proceeds of the loan;³³ or where the bank took the instrument in payment of or as security for an antecedent claim whether or not the claim was due.³⁴ Thus, the Code is attempting to focus on what facts have transpired and not whether a bank has or has not purchased a particular item. At first this distinction appears to be more apparent than real; however, as comment (1) of section 4-201 states:

Historically, much time has been spent and effort expended in determining or attempting to determine whether a bank was a purchaser of an item or merely an agent for collection.

²⁹ UCC § 4-201.

³⁰ UCC § 4-201.

³¹ See Comment 1 of 4-201 for a more detailed explanation of the lack of distinction between a bank as "agent" and as "owner".

³² C. FUNK, BANKS AND THE UNIFORM COMMERCIAL CODE 138 (rev. ed. 1962)

³³ *Id.* at 14.

³⁴ *Id.*

For the most part the relevant question is not whether the bank is the agent or the purchaser but whether it has given the customer money by allowing it to withdraw on provisional credit, by discounting a draft, or by taking the item as collateral for a loan.

In support of the position that section 4-208(1)(b) applies to the above mentioned situations is the legislative development of the Code. Originally, the Code distinguished between "cash items" and "non-cash items" and what was then section 703,³⁵ used the following definitions:

(a) "Item" means any negotiable or non-negotiable instrument for the payment of money; (b) "Cash item" means a check, . . . or a demand draft payable through a bank, and includes any other demand item which by usage is handled in bulk by banks in the relevant clearing area; and (c) "Non-cash item" means an item not a cash item, and a *cash item* previously dishonored or *with documents attached* or taken by a bank for collection under special instructions becomes a non-cash item.

Section 720 of the same draft gave a depository bank, extending credit available for withdrawal as of right against a depositor's non-cash items, a lien on the item and the documents regardless of whether the credit was used and regardless of the right of charge-back.

In the May 1949 Draft³⁶ section 3-603 changed what was formerly section 703 by dropping the definition of a "non-cash item"; however, what was then section 3-612, Lien of Bank Extending Credit, and what was eventually to become 4-208, provided for that distinction with a provision³⁷ specifically designated for "cash items" and a provision³⁸ for "any other items."

³⁵ ALI—NAT'L CONFERENCE OF COMM'RS OF UNIFORM STATE LAWS, THE CODE OF COMMERCIAL LAW, Art. 3 § 703 (July 30, 1948 Proposed Final Draft No. 2). (emphasis added). It may be noted that Proposed Final Draft No. 1, of Article 3, of April 15, 1948, although making a distinction between "cash" and "non-cash items" had not written the provisions for "non-cash items."

³⁶ ALI—NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE (May 1949 Draft).

³⁷ *Id.* § 3-612(1).

³⁸ *Id.* § 3-612(2). "A depository bank extending credit available for withdrawal as of right against any other items has a lien upon the items and any accompanying documents whether or not the credit is used or there is any right of charge-back."

The comment to § 3-612 provided, among other things, that the purpose of this section is "[t]o state the 'value' position of a bank extending credit during the collection process;" that the section adopts a lien theory for cash items for insurance reasons; and, ". . . that credit immediately available for withdrawal when extended has the effect of an advance of cash and its immediate deposit by the customer. This is not inconsistent with Subsection (1) as the extension of credit

The 1950 spring draft³⁹ provided in section 4-206(2):

Credit is available for withdrawal as of right... to a customer who is not a bank in an account which is not a checking account or for a time item which has not yet matured or a *documentary draft*.... (emphasis added).

Section 4-208 of the same draft provided that a bank which had extended credit available for withdrawal as of right "as against a documentary draft or which discounts or otherwise purchases it thereby acquires a security interest in the draft and accompanying documents to the extent of the purchase made or credit given" and this was so regardless of whether the credit was drawn upon or a right of charge-back given. Section 4-104(e) defining "item", dropped completely the distinction between "cash" and "non-cash items", and defined "item as any instrument for the payment of money even though it is not negotiable but does not include money."

The September 1950 revision⁴⁰ of article 4 shifted what was before and after section 4-208 to section 4-211, When Bank Extending Credit for Item or Purchasing Draft on Time Instrument Has a Security Interest. Section 4-211(1)(a) provided that a bank had a security interest in "an item deposited in a checking account, to the extent to which credit given has been withdrawn or applied;" and part (1)(b) of the same section stated that the bank had a security interest in the item and any accompanying documents "in all other cases for which it has given credit available for withdrawal as of right, to the extent of the interest purchased or credit given..." The same revision under section 4-215(2) substantially adopted what had been 4-206 in the 1950 spring draft; 4-215(2) dropped the words "or to a customer who is not a bank in an account which is not a checking account."

The spring of 1951 Text Edition⁴¹ changed 4-211 back to section

against the documentary draft, for example, is authorized by a lending officer, while, in the case of cash items, the posting is automatic...."

The purpose of § 3-603, "Item"; "Cash item"; "Special Instructions", as stated in the Comment is; "[t]o make a division between the cash item, primarily the check, and other non-cash items which include the draft with documents attached, the time note and the like. Different operating problems are posed by the two types, and different rules of law, therefore, should apply" and § 3-603(b) "cash item" specifically excludes the documentary draft.

³⁹ ALI-NAT'L CONFERENCE COMM'RS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE (Spring 1950 Proposed Final Draft).

⁴⁰ ALI-NAT'L CONFERENCE OF COMM'RS OF UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE (Sept. 1950 Rev. of Arts. 2, 4, 9).

⁴¹ ALI-NAT' CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE (text ed. Spring 1951 Proposed Final Draft No. 2).

4-208 without any change in substance and re-numbered section 4-215, making it instead 4-214, When Credit is Available for Withdrawal, and under 4-214(2) (c) defined credit as being available for withdrawal as of right as may be agreed between the parties:

- (a) when it is given between banks; or
- (b) in an account which is not a checking account; or
- (c) for a time item which has not yet matured or for a documentary draft or for an item accepted for collection with special instruction.

In the Final Text Edition of November 1951, section 4-208(1)(b) took the form that it has at the present; therefore, the words "of the interest purchased" as contained in the spring of 1951 Text Edition were deleted. In addition section 4-214(2), stating the situations when credit was available for withdrawal as of right was taken completely out of the November 1951 Draft, the drafters evidently thinking that section 4-208(1)(b)'s provision for "credit available for withdrawal as of right"⁴² would be self-defining from the context in which it was used.

This draft, however, did not end the defining of "credit available for withdrawal as of right," for under the present Code, section 4-213(4) we again have such a definition. It is submitted, however, that the credit available for withdrawal as of right in 4-208(1)(b) and the credit available for withdrawal as of right under section 4-213(4)⁴³ are not the same.

First, it must be recalled, as was mentioned in part two of this article, that, as with a check, when an item is deposited in an account for collection the depository bank gives the depositor a provisional credit and when the depository bank forwards the instrument to a collecting bank, the collecting bank gives the depository bank a provisional credit, and so on until the check ultimately reaches the payor bank. Thus, a chain of provisional credits is created and such credits remain provisional until they become final as provided in section 4-213(1) and (2). It must also be noted that section 4-213(4)(a) speaks in terms of credit given to a "customer";⁴⁴ the term customer is broad enough to include every party

⁴² A definition for "credit available for withdrawal as of right" may have been buried somewhere in § 4-213, Final Payment of Item by Payor Bank; When Provisional Debits and Credits Become Final; but if it was so buried, it was interred deeply.

⁴³ For the purposes of this article, § 4-213(4)(b) is of no moment; the concern of this article is with § 4-213(4)(a).

⁴⁴ UCC § 4-104(1)(e). "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...."

involved in the chain of provisional credit.⁴⁵ In addition, 4-213(4) says that the credit given by the bank for the item is in an "account"⁴⁶ which is not the situation 4-208(1)(b) is covering for 4-208(1)(a) specifically provides for an "item deposited in an account," while 4-208(1)(b) makes no mention of an "account" situation. To say that 4-208(1)(b) covers an "account" problem would make that section completely incongruous with 4-208(1)(a). One section would nullify the other, for in section 4-208(1)(a) the bank has a security interest in an item deposited in an account "to the extent credit given for the item has been withdrawn or applied," while in 4-208(1)(b) the bank has a security interest in an item "for which it has given credit available for withdrawal as of right, to the extent of the credit given whether or not the credit is drawn upon and whether or not there is a right of charge back..." (emphasis added).

If section 4-208(1)(b) is said to cover an "account" situation, then three obvious incongruities appear between 4-208(1)(a) and 4-208(1)(b). First, 4-208(1)(a) requires that in order for the bank to have a security interest, the credit given must have been "withdrawn or applied," while 4-208(1)(b) gives the bank a security interest "whether or not the credit is drawn upon." Second, 4-208(1)(a) gives the bank a security interest only to the "extent" that the credit given has been withdrawn or applied, while 4-208(1)(b) gives the bank a security interest "to the extent of the credit given." Third, 4-208(1)(a), being an account situation, makes no provision for the "right of charge back," while 4-208(1)(b) states that the bank has a security interest "whether or not there is a right of charge back." Section 4-212 is the charge back provision and it states that:

(1) If a collecting bank has made provisional settlement with its customer for an item...and itself fails...to receive a settlement for the item which is or becomes final, the bank may revoke the settlement given by it, charge back the amount of any credit given for the item to its customer's account or obtain a refund from its customer....These rights to revoke, charge-back and obtain refund terminate if and when a settlement for the item received by the bank is or becomes final....

Perhaps comment 10 of 4-213, which deals with subsection (4) (a) is more enlightening:

⁴⁵ Bunn, *Bank Collections Under the Uniform Commercial Code*, 1964 Wis. L. REV. 278.

⁴⁶ UCC § 4-104(1)(a). "Account means any account with a bank and includes a checking, time, interest or savings account..."

⁴⁷ UCC §§ 4-213(1), 4-213(2).

Subsection (4)(a) deals with the situation where a bank has given credit (usually provisional) for an item to its customer and in turn has received a provisional settlement for the item from an intermediary or payor bank to which it has forwarded the item. In this situation before the provisional credit entered by the collecting bank in the account of its customer becomes available for withdrawal as of right, it is not only necessary that the provisional settlement received by the bank for the item becomes final but also that the collecting bank has a reasonable time to learn that this is so....

It is submitted that 4-213(4)(a) does not apply to the "credit available for withdrawal as of right" spoken of in section 4-208(1)(b), but rather it does apply to such situations as were mentioned in part two of this article dealing with section 4-208(1)(a). For example, on Monday the depositor has a final credit of 100 dollars. On Tuesday he deposits a check for 200 dollars and the depository bank sends it along for collection. The bank has given the depositor a provisional credit and the collecting process has created additional provisional credits. When the provisional credit given in the chain as created by the collecting procedures and given by the depository bank becomes final,⁴⁷ and the particular bank involved has reasonable time to learn of the finality of the settlement,⁴⁸ then each customer in the chain has credit available for withdrawal as of right.

If this be so, that is, that section 4-213(4)(a) does not apply to and define the "credit available for withdrawal as of right" contained in section 4-208(1)(b), then one must, attempt to determine what type of factual situation 4-208(1)(b) is trying to cover. It is submitted that according to the historical development of 4-208(1)(b) as well as the fact that no other section in the Code covers the problem, that 4-208(1)(b) applies to the following type of situation.

S, Seller, comes to D, bank, with a draft drawn on B, Buyer, with documents⁴⁹ attached, payable to S. S is in need of money and D agrees to discount the draft and such is done.⁵⁰ At this time the bank has a security interest in the item, the documents, and the proceeds of both,⁵¹ for surely in this situation the bank has given credit available for withdrawal as of right. Suppose then that D sends the documentary draft to B's bank, P, for acceptance by B and it too "discounts" or gives to D credit available for withdrawal

⁴⁸ UCC § 4-104(g).

⁴⁹ UCC §§ 7-102(e), 1-201(15).

⁵⁰ C. FUNK, BANKS AND THE UNIFORM COMMERCIAL CODE 138 (rev. ed. 1962).

⁵¹ C. FUNK, BANKS AND THE UNIFORM COMMERCIAL CODE 138 (rev. ed. 1962).

as of right; now P would have a security interest in the item, the document and the proceeds of both.

In either of these situations, the banks would be holders in due course regardless of whether the credit was withdrawn or regardless of whether there was a right of charge-back; consequently the bank would have the rights⁵² of a holder in due course on the instrument and also would be protected from other security interests in the item and documents.⁵³

CONCLUSION

Section 4-208(1)(a) is reasonably clear and the situations to which it applies are somewhat apparent; however, the use of the phrase "credit available for withdrawal as of right" contained in both sections 4-213(4)(a) and 4-208(1)(b) is more confusing than helpful. It seems somewhat evident that the two sections are not related and little has been done to improve the situation that existed in 1956 when the following was written:

Section 4-208 as revised in Supplement No. 1 also provides for a security interest arising when the bank gives credit "available for withdrawal as of right", as well as when advances are made, or credit for a deposited item is drawn upon. Failure of Article 4 to state when an item becomes so available is a defect in the present text; the Editorial Board's subcommittee on Articles 3 and 4 have drafted a proposal to fill this gap, supplying a needed distinction between "finality" of credit given and its availability for withdrawal.⁵⁴

It is suggested that although the gap mentioned above may have been filled by section 4-213(4)(a) a definitional gap still exists between sections 4-208(1)(b) and 4-213(4)(a) and such gap could stand some bridging.

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⁵² UCC § 3-305.

⁵³ UCC § 4-208(3)(c). "Receipt by a collecting bank of a final settlement for an item is a realization on its security interest in the item, accompanying documents and proceeds. To the extent and so long as the bank does not receive final settlement for the item or give up possession of the item or accompanying documents for purposes other than collection, the security interest continues and is subject to the provisions of Article 9 except that (c) the security interest has priority over conflicting perfected security interests in the item, accompanying documents or proceeds."

⁵⁴ 1956 N. Y. LAW REVISION COMM'N, REPORT RELATING TO THE UNIFORM COMMERCIAL CODE 43.