

Priority of Mistakenly Transferred Funds Between Restitution Claims and Security Interest on Deposit Accounts: A Comparative Analysis on the Good Faith Purchase Defense under the Law of Restitution, The U.C.C. and the Japanese Civil Code

KOYAMA Yasushi^{*}

I. Introduction

The Law of Restitution has been recognized recently as the third category of the common law—in private law—besides the contract and the torts.¹⁾ There are still no specific statutes that hold general provisions to cover this area of law. Additionally, it is not possible to recognize a common understanding on a definition of the law of restitution or law of unjust enrichment.²⁾ On the other hand, Japanese Civil Code has kept blanket provisions which cover all types of restitution cases,³⁾ and it seems to be that Supreme

* Professor of Law, Ritsumeikan University Faculty of Law (Kyoto, Japan). This research is supported by grants from the Zengin Foundation for Studies on Economics and Finance and the Research Fund of Ritsumeikan University. I am deeply grateful to Professor John D. McCamus for helpful comments and assistance in researching this paper. All errors and omissions remain the author's responsibility.

1) See, Peter Birks, *UNJUST ENRICHMENT*, 2nd eds., (Oxford University Press 2005), 3 to 5; John D. McCamus, *THE LAW OF RESTITUTION*, 2nd eds (loose leaf) (Canada Law Book, 2004), Section 1:400 at 1-9-to 1-14, and Chapter 2.

2) See, McCamus *supra* note 1, Chapter 3 "General Principles" at 3-1 to 3-9; American Law Institute, *RESTATEMENT OF THE LAW RESTITUTION AND UNJUST ENRICHMENT, DISCUSSION DRAFT* (2000), 1 to 4.

3) Japanese Civil Code, section 703 and 704. § 703 is prescribed as follows:

A person who without legal ground derives a benefit from the property or services of another and thereby causes loss to said other shall be obliged to return such benefit to the extent that it subsists.

§ 704 also provides:

Where a person receiving a benefit was aware that there was no legal ground, the said person shall be obliged to return any benefit subsisting at the time he became aware of the said fact together with interest thereon.

See, Hiroshi Oda, *JAPANESE LAW* (2d ed. Oxford University Press 2001) at p. 193-194. Originally, the Japanese Civil Code (*Minpo*) was adopted in 1898. *Minpo* [Civil Code], Law No. 89 of 1896

Court of Japan has been decided a variety of cases since that adoption in 1898. On the surface, Japanese Civil Code has much more clarity and merits than Anglo-American law of restitution.

However, if we imagine the following situation, we can see the above first impression cannot withstand. If misdirected funds are transferred by mistake into a deposit account in which a secured creditor has a security interest, will the person who transferred the money, as plaintiff, seek to claim against the original recipient of the money? Although there has been no discussion on this problem under Japanese law, some civil law scholars are discussing the availability of deposit accounts as collateral for security interest.⁴⁾ In particular, under the Uniform Commercial Code Article 9, a secured party had to trace the original collateral, e.g., accounts receivables, into the deposit account as identifiable proceeds or proceeds of proceeds under U.C.C. Section 9-306(2) before revision in 1998 until 1999. Presently, a secured creditor avails oneself of a deposit account as original collateral under revised U.C.C. 9-104.⁵⁾ It is not easy to predict, however, how the law of restitution under Japanese civil code and Anglo-American law deals with the above difficult question. The purpose of this paper is to analyze the interrelation between the law of restitution and the law of secured transactions under the both jurisprudence and to clarify the rules of priority between the secured party on deposit accounts and the creditor who claims the misdirected transferred funds.

To carry out this purpose, I will pick up some restitutionary defenses. In particular, the concept of 'good faith purchase defense' will be highlighted. The idea of 'good faith purchase' plays an important role under U.C.C. Articles 2 and 9. Concentrating our interest on this term ensures that we can attain certain evaluation of interrelation between both areas of laws. Moreover, this vague concept lies not only in the Japanese Civil Code section 703 but also in the Anglo-American law of restitution. It is of use to compare some restitutionary defenses under both legal systems in order to clarify the vague concepts. To be sure, referring to the law of secured transactions under the Japanese Civil Code is inevitable in clarifying the function of restitutionary defenses for the comparative legal analysis.

To limit and clarify our study object, it should be necessary to explain the background of this topic in more detail. If misdirected funds are transferred by mistake into a deposit account in which a secured creditor holds a security interest, the person who transferred the money, as plaintiff, will seek to claim against the original recipient of the money

and Law No. 9 of 1898]. But very recently it has been totally revised to update its old-style Japanese language into modern words and phrases. Law No. 147, 2004. This new Civil Code has been enforced since April 1st, 2005.

4) See e.g., Hiroki Morita, "Collateralization of saving account", in Hiroto Dogauchi other edited, SHINTAKU-TORIKI and MINO-HORI(Yuhikaku 2003, Japan) 299.

5) The term "deposit accounts" is defined in Revised U.C.C. § 9-102(a)(29) as "a demand, time, savings, passbook, or similar account remained with a bank".

because the recipient of a mistaken payment is liable to refund it “to the extent allowed by the law of mistake and restitution” under U.C.C. Article 4A —Funds Transfers.⁶⁾ However, when the original recipient has become insolvency, it is natural that the secured creditor attempts to enforce its security interest in the debtor-recipient’s deposit account. The plaintiff attempts to reclaim the misdirected funds against the secured creditor on the basis of the law of restitution, because the creditor has gained the benefit at the expense of the plaintiff. While it would be a difficult problem to determine who should assume the risk of insolvency of the recipient, one possible resolution for the secured creditor might be to argue a defense based on the law of restitution which, if applied, would discharge him or her from the burden of returning the benefit he or she has received.

Here, we will be confronted with some crucial questions: whether and to what extent the requirement of “good faith purchaser for value” under the U.C.C. is in conformity with the good faith purchase defense in the law of restitution. We will find some important clue to the original “good faith purchase” idea in the U.C.C. immediately. Under U.C.C. Articles 2 and 9, the concept of “good faith purchase” has been built in the U.C.C. Section 2-403, “Good faith purchaser for value”. The traditional good faith purchase defense of law of restitution requires “without notice” of the mistaken payment by the recipient. However, a secured party as a “good faith” purchaser under U.C.C. § 2-403 is subject to no requirement of ‘without notice’ against the reclaiming seller. I will examine this point in the following section.

On the other hand, Japanese Civil Code § 703 provides a unified rule of law of restitution in the case of unjust enrichment: “A person who without legal ground derives a benefit from the property or services of another and thereby causes loss to said other shall be obliged to return such benefit to the extent that it subsists.”⁷⁾ The last phrase “to the extent that it subsists”, has the same function as the change of position defense under the law of restitution at common law and in equity.

First, I will attempt to narrow our study object down, to introduce some restitutionary defenses under Anglo-American law and Japanese Civil Code, to examine their role on each law of secured transactions, and to submit resemblance of defenses between the common law and the civil law.

Second, I will attempt to examine affirmative defenses available for the recipient to escape his or her liability under the law of restitution. It is important to distinguish the common basis and differences between the good faith purchase defense and the change of position defense. In this part I will also refer to the English and the Canadian authority in order to ask for more helpful materials.

Third, I will attempt to summarize the existing case law concerning the status of a secured creditor as a good faith purchaser under the U.C.C. in relation to the conflict with

6) U.C.C. § 4A-303(a)(1989).

7) Minpo [Civil Code], Law No. 147, 2004.

the seller's reclamation rights. If we seek to examine the standard of good faith in the case of a misdirected funds transfer, in which the secured party holds a security interest, we should take note of the necessity of knowing whether the act was done in good faith or bad faith.

Fourth, I will attempt to discuss the existing case law of unjust enrichment under the Japanese Civil Code and points out the notable differences in its evaluation of the same type of problems.

2. The Concept of "Good Faith" and the Defenses of the Law of Restitution

A plaintiff who can show that the defendant has been enriched by the payment of misdirected funds at the expense of the plaintiff can recover the enrichment subject to the defenses of bona fide purchase ("good faith"), change of position and estoppels.⁸⁾ If the defendant is a secured creditor holding the security interest in a deposit account into which misdirected funds are transferred under a mistake by the sender, the defendant can still argue the good faith purchase defense or the change of position defense.⁹⁾ For the recipient of a mistaken payment is liable to refund it "to the extent allowed by the law of mistake and restitution" under U.C.C. Article 4A — Funds Transfers.¹⁰⁾ The U.C.C. provisions on mistaken payments are only a partial codification, without material alteration, of the common law of restitution.¹¹⁾ Among the restitutionary cases which discuss the applicability of the good faith purchase defense, most of the cases require the defendant to be without notice of the plaintiff's claim for the defendant to have eligibility as a good faith purchaser for value.¹²⁾ These cases materially require the recipient of money to be ignorant of the restitution claims under Restatement § 14, the "Discharge for Value" rule. Restatement § 14 subsection (1) provides:

8) Steven Fennell, *Misdirected Funds: Problems of Uncertainty and Inconsistency*, 57 M.L.R. 38, 39 (1994); III George Palmer LAW OF RESTITUTION, § 16.3 (1978).

9) RESTATEMENT OF THE LAW, RESTITUTION, QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS, § 14 (Discharge For Value,) § 142 (Change of Circumstances), § 172 (Bona Fide Purchase)(1937).

10) U.C.C. § 4A-303(a)(1989).

11) ALI Restatement of the Law Third: RESTATEMENT OF THE LAW, RESTITUTION AND UNJUST ENRICHMENT Tentative Draft No. 1, § 6, at 20 and 39 (2001).

12) *See e.g.*, *Banque Worms v. BankAmerica International*, 570 N.E.2d 189, 198 (N.Y. 1991); *Chicago Title & Trust Co. v. Walsh*, 34 Ill. App. 3d 458, 340 N.E. 2d 106, 110-11 (Ill. App. Ct. 1975); *NBase Communs. v. American Nat'l Bank & Trust Co.*, 8 F. Supp. 2d 1071, 1075 (N. D. Ill. 1998); *Credit Lyonnais New York Branch v. Koval*, 745 So. 2d 837, 39 UCC Rep.Serv.2d 205 (S.C. Miss. 1999); *Credit Lyonnais v. SGC International Inc.*, 1996 W.L. 626332 (E.D.Mo. 1996); *Equilease Corp. v. Hentz*, 634 F. 2d 850, 853 (5th Cir. 1981); *St. Mary's Medical Center, Inc. v. United Farm Bureau Family Life*, 624 N.E. 2d 939, 942 (Ind. App. 1993).

A creditor of another or one having a lien on another's property who has received from a third person any benefit in discharge of the debt or lien, is under no duty to make restitution therefore, although the discharge was given by mistake of the transferor as to his interests or duties, if the transferee made no misrepresentation and did not have notice of the transferor's mistake.

The comment of this section explains that the "Discharge for Value" rule is "a specific application of the underlying principle of bona fide purchase" defense.¹³⁾ This implies basic relation between discharge for value defense and good faith purchase defense.

As for the cases involving negotiable instruments, Restatement § 33 also provides that "the holder of a check or other bill of exchange who, having paid value in good faith, therefore, receives payment from the drawee without reason to know that the drawee is mistaken, is under no duty of restitution to him although the drawee pays because of a mistaken belief that he has sufficient funds of the drawer or that he is otherwise under a duty to pay."¹⁴⁾ In this context, the term of "good faith" straightforwardly implies that the defendant received payment without knowing the mistake by the plaintiff.

On the other hand, 'good faith' under the U.C.C. has no element corresponding to "without notice". Before revision in 1999, U.C.C. § 2-103(1) (b) provided that "good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing. In addition, U.C.C. § 1-201(20) provided that good faith means honesty in fact in the conduct or transaction concerned. Present § 1-201(20) has totally revised and changed to the same way to the former § 2-103(1) (b): "Good faith, except as otherwise provided in Article 5, means honesty in fact and the observance of reasonable commercial standards of fair dealing." Now this general definition of "good faith" covers all of the U.C.C. including Articles 2 and 9. This definition, however, does not require the element of "without notice" which is the essential component in the good faith purchase defense in the law of restitution.

Then, the next necessary step is to ascertain that which standard of "good faith" should be applied to the case in which the secured party receives the misdirected funds on deposit accounts as collateral. However, except for the United States, England and other commonwealth countries present some unique idea on change of position defense and good faith purchase defense, so it should be better for us to examine how the former should be distinguished from the latter.

In present English law, Lord Goff clearly sorts out both defenses:

We cannot simply say that bona fide purchase is a species of change of position. This is because change of position will only be available for the defendant to the extent that his position has been materially changed as a result of the receipt of the

13) RESTATEMENT *supra* note 9, § 14, Comment a.

14) *Id.* § 33.

money; whereas where bona fide purchase is invoked, no inquiry is made into adequacy of the consideration.¹⁵⁾

Nevertheless, the recipient's act of "in good faith" consists of the common characteristics of the good faith purchase defense and the change of position defense regarding the charity exception.¹⁶⁾ Lord Goff also continues:

If the plaintiff pays money to the defendant under a mistake of fact, and the defendant then, acting in good faith, pays the money or part of it to charity, it is unjust to require the defendant to make restitution to the extent that he has so changed his position.¹⁷⁾

In the recent Canadian case law of restitution, it is indicated that the expenditures prerequisite for a change of position defense must occur "in good faith" in the sense that the defendant did not have sufficient knowledge of the plaintiff's claim.¹⁸⁾ Even though "good faith" here has common foundation between the good faith purchase defense and the change of position defense, it is inevitable to inquire whether the "without notice" factor constitutes the essential ingredient of "good faith" for the restitution defenses.¹⁹⁾

Professor Burrows has legitimately pointed out that there are two versions of the change of position defense. First, the narrower version is that the defendant must have detrimentally relied on the benefit as being his to keep. For instance, the language of §

15) *Lipkin Gorman v. Karpnale Ltd.*, [1991] 2 A.C. 548, 580-581 (H.L.)(Eng.). In the 1930s in the United States, it was indicated that "the doctrine of purchaser for value rests upon and is merely a branch of a more general doctrine of change of position." Stephen I. Langmaid, "Quasi-Contract-Change of Position by Receipt of Money In Satisfaction of Pre-existing Obligation" (1932), 21 Cal L Rev 310, 319. Henry Cohen, "Change of Position in Quasi-Contracts" (1931-32), 45 Harv L Rev 1333, 1342 (The defense of purchaser for value "may be nothing more than an instance of change of position grown doctrinaire."); Peter Millet, "Tracing Proceeds of Fraud" (1991), 107 L.Q.R. 71, 82; Peter Birks, "English Recognition of Unjust Enrichment", [1991] L.M.C.L.Q. 473 ; Peter Birks, *RESTITUTION—THE FUTURE* (Federation Press 1992), 132-135.

16) *See*, Elise Bant & Peter Creighton, "The Statutory Change of position Defenses in Western Australia" (2003), 31 U. W.A. L. Rev. 47, 53-54; Elise Bant & Peter Creighton, "The Australian Change of position Defense" (2002), 30 U. W.A. L. Rev. 208, 221. *Lipkin Gorman v. Karpnale Ltd. Case*, [1991] 2 A.C. 548, 559, 580, 582-583; Lord Goff of Cleeve & Gareth Jones, *THE LAW OF RESTITUTION* (6th ed. Sweet & Maxwell 2002), § 40-003 at 826. *See also*, *Dextra Bank and Trust Co., Ltd. v. Bank of Jamaica*, [2002] 1 All.E.R. (Comm.) 193, § 38(Privy Council).

17) *Lipkin Gorman v. Karpnale Ltd.*, [1991] 2 A.C. 548, 579-580.

18) *Garland v. Consumers' Gas Co. Ltd.*, 273 D.L.R. (4th) 385, 408-409, [63] to [66] (S.C.C. 2004); *Pacific National Investments Ltd. v. Corporation of the City of Victoria*, 245 D.L.R. (4th) 211(S.C.C. 2004); Mitchell McInnes, "Unjust Enrichment and Parm Tree Justice: *Garland v. Consumers' Gas Co.*", 41 Can. Bus. L. J. 103, 130 (2004).

19) "It is, of course, plain that the defense [of change of position] is not open to one who has changed his position in bad faith, as where the defendant has paid away the money with knowledge of the facts entitling the plaintiff to restitution; and it is commonly accepted that the defense should not be open to a wrongdoer." Lord Goff's statement in *Lipkin Gorman v. Karpnale Ltd.*, [1991] 2 A.C. 548, 579-580; *Garland v. Consumers' Gas Co. Ltd.*, 273 D.L.R. (4th) 385, 408-409, [63] to [66] (S.C.C. 2004).

94B of the New Zealand Judicature Act 1908²⁰⁾ provides the narrow version of the change of position defense, by which the recovery of mistaken payments is prevented if a person has “received the payment in good faith and has so altered his position in reliance on the validity of the payment.” Secondly, the wider version holds that detrimental reliance is not a necessary component and that the defendant should have a defense where his position, consequent on the benefit, has so changed that it would be inequitable to allow restitution.²¹⁾

On the other hand, American Restatement of Restitution § 142 is provided as follows:

Change of Circumstances

- (1) The right of a person to restitution from another because of a benefit received is terminated or diminished if, after the receipt of the benefit, circumstances have so changed that it would be inequitable to require the other to make full restitution.
- (2) Change of circumstances may be a defense or a partial defense if the conduct of the recipient was not tortuous and he was no more at fault for his receipt, retention or dealing with the subject matter than was the claimant.
- (3) Change of circumstances is not a defense if
 - (a) the conduct of the recipient in obtaining, retaining or dealing with the subject matter was tortuous, or
 - (b) the change occurred after the recipient had knowledge of the facts entitling the other to restitution and had an opportunity to make restitution.

The prevailing approach to change of position is that the defendant’s innocent expenditure of the money received means that one of the elements of the principle of unjust enrichment is no longer present.²²⁾ In this context, “detrimental reliance” implies that the payer’s action expressly or implicitly invited the recipient to rely on for the purpose of making this kind of expenditure.²³⁾ The above statements of Restatement § 142 do not directly refer to “detrimental reliance” in which the recipient should expense or burden something on the faith

20) Judicature Act, 1908, § 94B (N.A.).

21) Andrew Burrows, “Change of Position: The View from England” (2003), 36 *Loyola Los. L. Rev.* 803, 805.

22) Peter Birks, “Overview: Tracing, Claiming and Defences”, in *Laundering and Tracing* 289, 331 (Peter Birks ed., 1995).

23) Ernest J. Weinrib, “Book Review: Restoring Restitution” (2005), 91 *Vir. L.Rev.* 361, 371. Weinrib cited the Canadian case of *Clark v. Eckroyd*, 12 O.A.R. 425 (1886) as a example of detrimental reliance. “The plaintiffs paid an invoice for goods that the defendant had shipped to them by rail. Unfortunately the goods had been misaddressed and had in fact never been received. They had been stored in the railroad’s freight sheds awaiting pickup and, when unclaimed after a certain period, had been sold, as was allowed by statute, to pay the freight charges. The plaintiffs successfully sued for the recovery of the payment. The defendant argued that the plaintiffs were estopped because they had made a representation on which he had relied to his detriment: by making the payment, the plaintiffs had misled him into thinking that the goods had been received, thus preventing him from making inquiries about the goods before the railroad sold them.” *Id.* at 872 n. 43.

of received performance or benefit without notice of its invalidity.

Some American mistaken payment cases, however, overlook that detrimental reliance by the recipient is unnecessary under Restatement of Restitution § 142. Rather, they add that extra requirement to the words and phrases of that section.²⁴⁾ Moreover, just as I mentioned before, the comment of Restatement § 14 shows that the "Discharge for Value" rule is "a specific application of the underlying principle of bona fide purchase" defense.²⁵⁾ Nevertheless, some cases²⁶⁾ also impose detrimental reliance on the requirement of the Restatement § 14 "discharge for value" which does not directly refer to the "reliance" requirement.

3. "Good Faith" Purchase under U.C.C. Article 2-403 and Other U.C.C. Articles

(a) Good Faith Purchase for Value under U.C.C. § 2-403

In such cases involving the wire transfer of a mistaken payment and the existence of a security interest on the deposit account, the standard of "good faith" might be referred to the U.C.C. definition of it: "honesty in fact and the observance of reasonable commercial standards of fair dealing" (U.C.C. § 1-201(19)). The definition is different from the good faith purchase defense in the law of restitution in that the former does not include the lack of knowledge requirement. The following case shows the notable contrast between them.

The leading case, *In re Samuels & Co., Inc.*,²⁷⁾ held that a secured creditor who holds a security interest based on an after-acquired property clause can have priority over a seller's reclamation rights under U.C.C. § 2-403. Since the seller's reclamation rights under the U.C.C. § 2-507(2),²⁸⁾ § 2-511(3) and § 2-702²⁹⁾ are based on the buyer-debtor's

24) *Bank Saderat Iran v. Amin Beydoun Inc.*, 555 F.Supp. 770, 774 (D.C.N.Y. 1983).

25) *RESTATEMENT supra* note 9, § 14, Comment a.

26) *Banque Worms v. BankAmerica International*, 570 N.E. 2d 189, 192 (N.Y. 1991). *See*, Restatement § 14 Comment a.

27) 526 F.2d 1238 (5th Cir. 1976) (en banc).

28) § 2-507. Effect of Seller's Tender; Delivery on Condition.

(1) Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to his duty to pay for them. Tender entitles the seller to acceptance of the goods and to payment according to the contract.

(2) Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due.

29) § 2-702. Seller's Remedies on Discovery of Buyer's insolvency.

(1) Where the seller discovers the buyer to be insolvent he may refuse delivery except for cash including payment for all goods theretofore delivered under the contract, and stop delivery under this Article (Section 2-705).

(2) Where the seller discovers that the buyer has received goods on credit while insolvent, the seller may reclaim the goods upon demand made within a reasonable time after the buyer's

fraud, they should be regarded as codified statutory restitutionary rights.³⁰⁾ Premised that seller's reclamation rights are so statutory restitutionary rights that it should be said that the "good faith purchase" under U.C.C. § 2-403 is a codified statutory defense of restitution. If so, we have to ascertain that the requirement of this defense also includes the same element of "without notice" as the normal restitutionary good faith purchase defense.

In the case of *In re Samuels & Co., Inc.*, the seller of cattle for cash filed a suit to reclaim the meat in the possession of the insolvent buyer based on U.C.C. § 2-511.³¹⁾ In fact, the financier already had a security interest — a so-called floating lien under U.C.C. Article 9 — on all the debtor-buyer's after-acquired property, including inventory and livestock which the buyer had purchased for slaughter and processing. The financier terminated the financing and dishonored the checks.³²⁾ After the bankruptcy petition was filed, the cattle was sold and slaughtered, and the meat was sold because of its perishability. Proceeds of the sale of meat produced from the cattle seller's livestock were held subject to court order so that the claimants could dispute their disposition.³³⁾ The 5th Circuit Court discussed whether the secured party holding the after-acquired property security interest (the so-called floating lien) would be a good faith purchaser for value under U.C.C. § 2-403. Judge Godbold affirmed the question and concluded that the act of the "floating lienor" fulfilled the standard of good faith of "the observance of reasonable commercial standards of fair dealing" under the former U.C.C. § 2-103(1)(b) and could cut

receipt of the goods. Except as provided in this subsection, the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

(3) The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course of business or other good faith purchaser for value under Section 2-403. Successful reclamation of goods excludes all other remedies with respect to them.

30) Andrew Kull, "Restitution in Bankruptcy: Reclamation and Constructive Trust" (1998), 72 *Amer. Bankr. L. J.* 265, 267-268 n. 8.

31) § 2-511. Tender of Payment by Buyer; Payment by Check.

(1) Unless otherwise agreed tender of payment is a condition to the seller's duty to tender and complete any delivery.

(2) Tender of payment is sufficient when made by any means or in any manner current in the ordinary course of business unless the seller demands payment in legal tender and gives any extension of time reasonably necessary to procure it.

(3) Subject to the provisions of this Act on the effect of an instrument on an obligation (Section 3-802), payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment.

32) The facts of the case are summed up on the basis of the following: *In re Samuels & Co., Inc.*, 510 F.2d 139, 143-144 (5th Cir. 1975), *rev'd on rehearing*, 526 F.2d 1238, 1251 (5th Cir. 1976)(en banc); Julian B. McDonnell, "The Floating Lienor as Good Faith Purchaser" (1977), 50 *S. Cal. L. Rev.* 429, 431-432; Zipporah B. Wiseman, "Cash Sellers, Secured Financers and the Meat Industry: An Analysis of Article Two and Nine of the Uniform Commercial Code" (1977), 19 *B. C. L. Rev.* 101, 107-108.

33) *In re Samuels & Co., Inc.*, 526 F.2d at 1251.

off the seller's reclamation rights.³⁴⁾ He stated:

Lack of knowledge of outstanding claims is necessary to the common law BFP (bona fide purchaser), and is similarly expressly required in many Code BFP and priority provisions. *See e.g.*, U.C.C. § 3-302; 6-110; 8-301, 8-302; 9-301(a)(2). But the Code's definition of an Article Two good faith purchaser does not expressly or impliedly include lack of knowledge of third-party claims as an element. The detailed definition of the Article's counterpart of the common law BFP requires only honesty in fact, reasonable commercial behavior, fair dealing.

The decision to terminate further funding was clearly reasonable. It was also fair and honest.³⁵⁾

The standard of good faith, "honesty in fact and the observance of reasonable commercial standards of fair dealing", is applied under the former U.C.C. § 2-103(1)(b). In contrast to the general good purchase defense under the law of restitution, this U.C.C. definition does not include the secured party's ignorance of the competing seller's claims.³⁶⁾

The dissenting opinion in *In re Samuels & Co., Inc.*, pointed out that "[i]mplicit in the term "good faith" is the requirement that C.I.T. [the secured party] take its interest in the cattle without notice of the outstanding claims of others."³⁷⁾ Some authors concurring with this dissenting opinion argue that the fulfillment of the requirements for the floating lienor to be a "good faith purchaser for value" should be restricted to the case where he extends new value in reliance on the delivery of the goods from the seller to the buyer.³⁸⁾ These

34) The opinion by Judge Godbold was originally the dissenting opinion of the 5th Circuit Court. *See, In re Samuels & Co.*, 510 F.2d 139 (5th Cir. 1975). Owing to the appeal for rehearing en banc by the secured party, the 5th Circuit Court set aside the majority opinion and adopted the former dissenting opinion by judge Godbold as the court opinion. *See, In re Samuels & Co., Inc.*, 526 F.2d 1238, 1249; Zipporah B. Wiseman, *supra* note 32, at 133.

35) *In re Samuels & Co., Inc.*, 526 F.2d 1238, 1243-44 (5th Cir. 1976).

36) *Id.*

37) *Id.* at 1256.

38) McDonnell, *supra* note 32 at 454; Thomas H. Jackson & Ellen A. Peters, "Quest for Uncertainty: A Proposal for Flexible Resolution of Inherent Conflicts Between Article 2 and Article 9 of the Uniform Commercial Code" (1978), 87 Yale L.J. 907, 967-68; Wiseman, *supra* note 32 at 144-146; Note (Arnold), "The Cash Seller's Right of Reclamation Versus the Secured Party's Floating Lien: Who is Entitled to Priority?" (1978), 35 Wash. & Lee L. Rev. 277, 298; Note, "Who Gets the Goods? Conflicting Priorities of the Reclaiming Seller and the Article 9 Secured Inventory Financer—*In re Samuels & Co.*" (1977), 48 U.Colo. L. Rev. 267, 282; Note, "The Rights of Reclaiming Cash Sellers When Contested By Secured Creditors of the Buyers" (1977), 77 Colum.L.Rev. 934, 956; Eugene M. Anderson, Jr., "The Reclaiming Seller Under UCC § 2-702 vs. His Four Horseman of the Apocalypse" (1976), 8 St. Mary's L.J. 271, 282; Vern Countryman, "Buyers and Sellers of Goods in Bankruptcy" (1971), 1 N.M.L.Rev. 435, 458-459 n. 119; William Louis Tabac, "Battle for the Bulge: The Reclaiming Seller vs. the Floating Lien Creditor" (2001), 2001 Colum.Bus. L.Rev. 509, 526-527, 532. *See also*, Donald J. Rapson, A "Home Run" Application of Established Principles of Statutory Consideration: U.C.C. Analogies"(1985). 5 Cardozo L.Rev. 441, 446-447.

opinions submit that lack of knowledge of outstanding claims is necessary to the common law “bona fide purchaser” and to the Uniform Sales Act § 24.³⁹⁾ To fulfill such requirements, it is necessary for the party to prove that he relied on the buyer’s possession ostensibly without any charges. Consequently, he must generally prove that he gave new value to the buyer. And this principle of bona fide purchaser under common law and the Uniform Sales Act has not changed even under the U.C.C.⁴⁰⁾

An additional argument directly emphasizes how the floating lienor’s acts should fulfill the meaning of the term “in good faith”: The standard of “the observance of reasonable commercial standards of fair dealing” under U.C.C. 2-103(1)(b) at that time by a general financier such as a floating lienor “should not include the expectation that its after-acquired property interest will attach to goods for which the check bounced” under the facts of *In re Samuels & Co., Inc.*, or like ones.⁴¹⁾ If the secured party holding an after-acquired property security interest had known that the advance might be refused and that the buyer’s check would be dishonored, termination of the advance would be contrary to the “reasonable standards of fair dealing”, and such act should not suffice to meet the objective definition of “good faith”.⁴²⁾ In other words, the arguments demand that the floating lienor rely on the buyer’s apparent possession of the goods in the ordinary course of business under U.C.C. § 9-307 and give “new value” if he expects to have priority over the seller’s reclamation rights.⁴³⁾

The *In re Samuels* opinion by Judge Godbold entirely rejects those arguments: First, “purchase” means “taking by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift, or any other voluntary transaction creating an interest in property” under U.C.C. § 1-201(29) at that time.⁴⁴⁾ Acquiring all assets security

39) *In re Samuels & Co., Inc.*, 526 F.2d 1238, 1243(5th Cir.1976); Grant Gilmore, “The Commercial Doctrine of Good Faith Purchase” (1954), 63 Yale L.J. 1057, 1059 n. 6. Uniform Sales Act § 24 provides: “Where the seller of goods has a voidable title thereto, but his title has not avoided at the time of the sale, a buyer acquires the good title to the goods, provided he buys them in good faith, for value, and without notice of the seller’s defect of title.”

40) See, C. N. Bruckel, BENDER’S UNIFORM COMMERCIAL CODE SERVICE (SECURED TRANSACTIONS), § 18A, “The Unpaid Seller’s Right of Reclamation in Cash and Credit Sales: Applying Principles of Article 2 and 9 Toward an Equitable System of Priorities”, § 18A.04[4][b], at 18A-55 to 57. (This article is currently unavailable in the present Bender’s U.C.C. binder on account of deletion of files prior to the present date: a copy is in the author’s possession.) Such interpretation presupposes that the priority conflict between the security interest of the floating lien and the seller’s reclamation rights is relevant to the words “unless the context indicates otherwise requires” of U.C.C. § 1-201(19) and 2-103(1). *Id.* at 18A-58. See also, *In re Emery Corp.*, 38 Bankr. 489, 493 (Bankr. E.D. Pa. 1984).

41) Richard L. Barnes, “Toward a Normative Framework for the Uniform Commercial Code” (1989), 62 Temp. L. Rev. 117, 174-175 n. 289.

42) Barnes, *Id.* at 174-176 and n. 291 (p. 176); Bruckel, *supra* note 40 at § 18A.04[4][b], at 18A-56 to 58; Jackson & Peters, *supra* note 38 at 967-68.

43) Barnes, *supra* note 41 at 175; Bruckel, *supra* note 40 at § 18A.04[4][b], at 18A-59 to 60; Jackson & Peters, *supra* note 38 at 967-968, 950-951; Tabac, *supra* note 38 at 526-527.

44) U.C.C. § 1-201(29) revised in 2001. This definition of “purchase” was provided in § 1-201(32)

interest in after-acquired property fulfills this definition because the debtor owns or obtains the rights in the collateral. The pre-revised § 1-201(44) and Revised § 1-204 define "value" as what may be pledged (a) "in return for a binding commitment to extend credit or for the extension of immediately available credit" or (b) as security for or in total or partial satisfaction of a pre-existing claim". In the case of *In re Samuels & Co., Inc.*, this requirement was totally fulfilled by the fact that the debtor was indebted to the secured party in an amount in excess of \$1,800,000.⁴⁵⁾

Accordingly, "good faith" is the most important issue that determines the priority between the reclamation sellers and the holder of a security interest under an after-acquired clause. When *In re Samuels & Co., Inc.*, was released, "good faith" was originally defined as "honesty in fact in the conduct or transaction concerned" under § 1-201(29). However, in dealings involving a merchant, the more strict definition of "honesty in fact and the observance of reasonable commercial standards of fair dealing" is applied under § 2-103(1)(b). The new revised definition of § 1-201(20) has adopted approximately the same definition and enlarged the application of the merchant's standard of good faith to other Articles regardless of both merchants and non-merchants.⁴⁶⁾

(b) "Policing" of the Debtor by the Secured Party and Knowledge in Good Faith

It must be argued that allowing secured party makes use of good faith purchase defense for the security interest on a deposit account confers a windfall upon the secured party at the expense of mistaken sender.⁴⁷⁾ The critiques of the court opinion by Judge Godbold in the *In re Samuels* case assert that the secured creditor should not have relied on the debtor's dealing with the seller after a security agreement which included an after-acquired property clause had been exchanged: if that creditor has priority over the seller, he obtains a windfall "at the expense of" the seller because the secured creditor could automatically capture the seller's goods as collateral of the floating lien, owing to the after-acquired property clause.⁴⁸⁾ These critiques straightforwardly apply to the secured creditor who captures the misdirected funds as collateral of his security interest on a deposit account at the expense of the mistaken sender.

Under the scheme of "good faith purchaser for value" as put forth by Judge Godbold,

in 1976 when *In re Samuels & Co., Inc.*, was released. No change was made in the language.

45) Mahon v. Stowers, 416 U.S. 100, 103 (1974). U.C.C. recognizes as effective value even antecedent debt. Andrew Kull, "Defenses to Restitution: The Bona Fide Creditor" (2001), 81 B.U.L.R. 919 at 935.

46) First, Article 2A explicitly incorporated the Article 2 standard. See, § 2A-103(7). Then, other Articles broadened the applicability of that standard by adopting it for all parties rather than just for merchants See, e.g., § 3-1-3(a)(4), 4A-105(a)(6), 8-102(a)(10), and 9-102(a)(43). § 1-201 Official Comment 20 second paragraph. However, the revised § 2-103(b) omits the words "in the trade".

47) See, Kull, *supra* note 45 at 953 n. 98.

48) Alvin C. Harrell, "Sales-Related Conflicts Between Article 2 and 9" (1989), 22 U.C.C.L.J. 134, 165-166 (1989). See, Rapson, *supra* note 38 at 447.

“value” is not always necessarily “new”: it is sufficient that the secured party has already loaned to the debtor-recipient by making a loan agreement. “Purchase” is sufficient to take a security interest on a deposit account in itself. In consequence, the remaining requirement is that the act of the secured party is done in good faith. In the *In re Samuels* case, where the sum of the debts was too great for comfort, the “decision to terminate further funding was clearly reasonable” and was also “fair, and honest.”⁴⁹⁾ Lack of knowledge of the other creditor’s unpaid claims is not required in order for an act to be in good faith.

On the other hand, the traditional good faith purchase defense in the law of restitution seems to accords with the dissenting opinion in the *In re Samuels* case; the contrasting version of “good faith purchaser for value” in the dissenting opinion requires lack of knowledge of outstanding claims. Refusing to make the additional loan with knowledge of the other creditor’s unpaid claims is contrary to an act in good faith. Granted, the secured party’s decision to cut off the loan without notice of outstanding claims is not always regarded as an act in “bad faith”. However, the standard used by the dissenting opinion and the concurring arguments is based on the “value” requirement in relation to the reliance that could be placed on the buyer’s acquisition of new assets.⁵⁰⁾

The phrase “reliance to the debtor’s dealing” is relevant to the “policing” of the debtor by the secured creditor. Before enactment of U.C.C. Article 9, it was fraudulent or invalid to admit the debtor’s liberty to dispose of the collateral without the debtor’s being required to account to the secured party for the proceeds or to substitute new collateral.^{50-a)} U.C.C. Article 9 has abolished this restriction, so that policing or monitoring by the secured party never disturbs the validity of the floating lien.⁵¹⁾ One of the cases⁵²⁾ which support the dissenting opinion in the *In re Samuels* case points out that the term “purchaser” in § 2-702(3) includes a secured creditor only to the extent that such creditor gives new value to the debtor and receives a security interest thereon after the delivery of the goods and prior to the demand for reclamation. In another case⁵³⁾, the secured party was indifferent to the financial condition of the debtor-buyer because it had sufficient security. In this case, the Georgia District Court concluded that the secured party would have had no eligibility as a “good faith purchaser” under U.C.C. § 2-403 if he

49) *In re Samuels & Co., Inc.*, 526 F.2d 1238, 1243-44 (5th Cir.1976).

50) *Id.* at 1256. Revised § 9-203 in 1999 expands the “rights in the collateral” concept to include cases where the debtor has “the power to transfer the rights in the collateral to a secured party”. The second phrase of U.C.C. 9-203 Official Comment 6; JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE, 756 (West Pub. 5th eds. 2000).

50-a) *Benedict v. Ratner*, 268 U. S. 353 (1925).

51) U.C.C. § 9-205 Official Comment 2.

52) *In re Emery Corp.*, 38 Bankr. 489, 493 and 496 (Bankr. E.D. Pa. 1984), reversed *Lavonia Manufacturing Co. v. Emery Corp.*, 52 Bankr. 944 (E.D. Pa. 1985).

53) *In re American Food Purveyors, Inc.*, 17 U.C.C. Rep. Serv. 436, 441-442 (N. D. Ga. 1974), 1974 U.S. Dist. LEXIS 13012.

had known about the debtor's insolvency. These cases are totally inconsistent with the present U.C.C. because the policing requirement had already been eliminated with the adoption of U.C.C. Article 9. They can no longer be sustainable in that they require the secured creditor's "reliance" on the debtor's possession of goods without knowing of the seller's reclamation rights.

Among the cases dealing with a seller's reclamation rights, *E.A. Miller, Inc. v. South Shore Bank*⁵⁴⁾ states that the "essence of bad faith in context of Uniform Commercial Code is not state of mind but rather attendant 'bad actions'" and that the secured party is not obliged to notify the other potential creditors of the debtor's financial condition even though he knows there are other unpaid creditors.⁵⁵⁾ In similar fashion, *Genesee Merchants Bank & Trust Co. v. Trucker Motors Sales*⁵⁶⁾ suggests that taking possession of collateral while knowing of the debtor's financial crisis does not constitute bad faith.⁵⁷⁾

These cases rejected the arguments which support the dissenting opinion of *In re Samuels & Co., Inc.* and lay down that it is unnecessary to add ignorance of the unpaid seller's rights of reclamation as the requirement for being a good faith purchaser for value. Moreover, the necessity of reliance on the debtor's acquisition of new assets for new value also contradicts the validity of the after-acquired property clause and the abandonment of policing.⁵⁸⁾ Thus, the good faith purchase defense for a security interest in a deposit account takes it as natural that one should dispense with "detrimental reliance" on the debtor's acquisition of funds in exchange for new value.

To obtain enforceability against a third party, any kind of security needs "perfection."⁵⁹⁾ If a deposit account consists of second-generated proceeds by sale of inventory or in exchange for accounts receivables, perfection is done by filing a financing statement, as with the original collateral under Revised U.C.C. § 9-310(a). On the other hand, when a deposit account is the original collateral, the security interest is only perfected by "control" under § 9-314.⁶⁰⁾

According to Revised U.C.C. § 9-104(a), the secured party has "control" of a deposit account if (1) the secured party is the bank with which the deposit account is maintained; (2) the debtor, secured party, and bank have agreed in an authenticated record that the bank will comply with instructions originated by the secured party directing disposition of

54) 539 N.E. 519 (Mass. 1989).

55) *Id.* at 523.

56) 327 N.W.2d 546 (Mich. App. 1985).

57) *Id.* at 549; 2 Barklay Clark & Barbara Clark, 2 THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE, ¶10.06[5][b] at 10-135 to 10-136.

58) U.C.C. 9-205 Official Comment 1-3; 2 Barklay Clark & Barbara Clark, *supra* note 57, ¶10.06[5][a] at 10-130 n. 269.5 to 10-136. *See also*, Hanoch Dagan, THE LAW AND ETHICS OF LAW OF RESTITUTION (Cambridge University Press 2004), at 73.

59) "Perfection" means that the security interest has attached and the secured party has taken all the steps required in Sections 9-310 through 9-316. U.C.C. Section 9-308 Official Comment 2.

60) Revised U.C.C. § 9-312(b)(1).

the funds in the deposit account without further consent by the debtor; or (3) the secured party becomes the depository institution's customer with respect to the deposit account by having it carried in its name.⁶¹⁾

Under this type of perfection by "control", the monitoring of the debtor's management by the secured party can be much closer than that of regular inventory or accounts receivable financing. In order to assert a good faith purchase defense, the secured creditor must not have notice of the restitution claim. Specifying the deposit bank account in which the secured creditor holds security interest as the account for payment from the debtor's customers enables him to collect sufficient information on the cash flow of the debtor. If misdirected funds are commingled in the bank account, the secured party should have known that unusual things had occurred and should have checked the account balance.

As a result, imposing a requirement of "ignorance" or lack of knowledge on the good faith purchase defense, if anything, provides an escape path for the careless secured creditor. Hence, the requirement that the secured creditor be "without notice" cannot be added to the good faith purchase defense in the case that security interest on a deposit account is involved.

When "reliance without notice" has been omitted from the good faith purchase defense, the last resort in weighing the restitutionary claim to recover misdirected funds against the claim of the secured creditor depends on what should be considered to regard an act as being in "good faith" under the standard of "honesty in fact in the conduct or transaction concerned" in the U.C.C. pre-revised § 1-201(19) and § 2-103(b).

In *Iola State Bank v. Bolan*,⁶²⁾ the Kansas Supreme Court held that "where a bank knows sums deposited in the account of one of its depositors belong to a third party, it does not act in good faith when it applies such funds of the third party by set-off against the depositor's debts to the bank."⁶³⁾ In similar fashion, in *Monsanto Co. v. Walter E. Heller & Co.*,⁶⁴⁾ the floating lienor was "policing" the debtor's operations by auditing its books, its periodical fiscal reports and its daily conversations with the debtor's manager. Consequently it became intimately acquainted with the debtor's operations, whereas it nevertheless guaranteed to the seller to furnish a line of credit to cover the payment of the debtor's check. When the check was bounced, the seller sought to reclaim the goods from the buyer and the floating lienor who had repossessed the goods that the seller had sold to the buyer. The trial court admitted that the floating lienor "would be unjustly enriched by

61) See, 2 Barklay Clark & Barbara Clark, *supra* note 57, ¶16.10 at 16-43.

62) 679 P.2d 720 (Kan. 1984).

63) *Id.* at 725, 728-731, especially at page 731 of the part that cited the Commercial Disc. Corp. v. Milw. Western Bank, 61 Wis.2d 671, 680-81, 214 N.W.2d 33(1974); 2 Barklay Clark & Barbara Clark, *supra* note 57, ¶10.06[5][b] at 10-133 to 10-134.

64) 114 Ill. App. 3d 1078, 449 N.E.2d 993 (Ill. App. 1983).

the value of the delivered goods."⁶⁵⁾ The Illinois Court of Appeal emphasized the close involvement in dealings between the seller and the debtor-buyer and stated clearly that by cutting off funds to the debtor without previous notice, the secured creditor violated a tacit understanding that the seller would not be exposed to more than the fixed and guaranteed amount of risk which was induced by the longstanding line of credit to the debtor. These findings of facts amounted to the conclusion that the secured creditor was acting in lack of "good faith".⁶⁶⁾

In sum, financiers that have taken a security interest in a debtor's assets usually monitor the debtor's daily activities. The more closely a secured creditor monitors and checks its debtor's activities, the more details the secured creditor will know about the reality of the debtor's operations of business. Regardless of the exclusion of "policing" from the effective requirements of a security interest, the degree of monitoring and involvement with a debtor's financial condition often operates as an important factor to determine whether the secured creditor acted in good faith.⁶⁷⁾

Under the revised § 1-201(20), the meaning of "good faith" has been changed the standard of "honesty in fact and the observance of reasonable commercial standard of fair dealing". This new definition is more objective than the pre-revised one and applies not only to U.C.C. Article 2 but also to Article 9.⁶⁸⁾ Nevertheless, the interpretation of "good faith" in the above cases would be sustainable even after U.C.C.'s revision of good faith definition. Rather, the interpretation in the above cases seems to put emphasis on the "fair dealing" side of "good faith purchase". In particular, the way of involvement towards line of credit to the debtor is one of the key factors to evaluate the degree of "fair dealing".

4. A Summary of Misdirected Funds Cases Under the Japanese Civil Code

(a) The General Principle of the Law of Unjust Enrichment from § 703

To examine whether the secured creditor acted in good faith, we also have to consider a variety of vague factors (e.g. "fair dealing"). As I mentioned before in this article,⁶⁹⁾ the § 703 and § 704 of the Japanese Civil Code has codified and generalized the right to

65) *Id.* at 114 Ill. App. 3d at 1085, 449 N.E.2d at 997.

66) 49 N.E.2d at 996, 999-1000. *See also*, Dick Hatfield Chevrolet, Inc. v. Bob Watson Motors, Inc., 699 P.2d 566, 571, 10 Kan.App.2d 350, 355, 40 UCC Rep.Serv. 1876, 1876 (Kan. App. 1985), rev'd 238 Kan. 41, 708 P.2d 494 (Kan. 1985).

67) *See*, Julian B. McDonnell, 1A Bender's Uniform Commercial Code Service: Secured Transactions under the Uniform Commercial Code, Chapter 7D, "Unpaid Sellers vs. Secured Lenders" (2002), § 7D.07[3] at 7D-39.

68) U.C.C. 1-201 official comment § 20.

69) *See*, Chapter 1 of this article.

restitution on the basis of unjust enrichment;⁷⁰⁾ in contrast to the common law and the principle of equity. However, even this unified rule poses necessity to clarify the meaning of each words and phrases under each provisions. I will attempt to show the similarity and difference of how different jurisdictions deal with the defenses of the law of restitution in order to clarify the characteristics of each law of restitutions.

In comparison with a *mal fides* beneficiary who has the obligation to return the full benefit under § 704 of the Japanese Civil Code, § 703 impliedly imposes on the beneficiary, who is ignorant of the lack of legal basis for the benefit, the obligation to return this benefit “to the extent that it subsists.” For example, if the beneficiary misuses another’s property based on his or her mistaken belief, he or she is considered to be without notice of lack of legal ground. However, he is treated as *mal fides* if his mistaken belief is attributed to his own fault.⁷¹⁾ The burden of proof of extinction of a benefit is imposed on the beneficiary.⁷²⁾ Additionally, the extinction of the benefit after the beneficiary knew of the lack of legal cause for the benefit cannot discharge his liability to return the full benefit.⁷³⁾ While this defense of benefit extinction is in conformity with the change of position defense under the common law of restitution, detrimental reliance is not required under § 703 of the Japanese Civil Code.⁷⁴⁾

(b) Development of Rulings for Third Party Cases

In fact, the general rule of unjust enrichment of § 703 presupposes that the restitution claim occurs in a case involving two parties, regardless of the pre-existence of a contractual relationship. However, separate consideration must be paid to third party cases where the plaintiff seeks the return of misdirected funds against the third party recipient.

The first case is the judgment of the Supreme Court on March 31, 1967, which was directed to the paying off of one’s own debt by fraudulent payment.⁷⁵⁾ Y, the defendant,

70) Concerning the civil law countries in general, *see*, Brice Dickson, “Unjust Enrichment Claims: A Comparative Analysis”, in edited by William Swadling, *THE LIMITS OF RESTITUTIONARY CLAIMS: A COMPARATIVE ANALYSIS* (United Kingdom National Committee of Comparative Law 1997), 16-31. There is strict controversy with respect to the terminologies between “law of restitution” and “law of unjust enrichment” in common law and equity. *See e.g.*, Birks, *supra* note 1 at 11-16; Andrew Burrows, *THE LAW OF RESTITUTION* (2d ed. LexisNexis Butterworths 2002) at 1-15; Dagan, *supra* note 58 at 11-35.

71) Koji Omi, *Minpo Kogi VI: Jimkanri, Ftouritoku, Fuhoukouki* (Textbook on Civil Code: Management of Affairs without Mandate, Unjust Enrichment, and Torts), 2nd eds., at 53 (Seibundo 2007).

72) Judgment of the Supreme Court case, November 19, 1991 (Minshu (Supreme Court Reports, Civil Cases) 45-8-1209 (vol. 45 No. 8 p. 1209).

73) *Id.*

74) The defense of benefit extinction is equivalent to the “wide version” of the change of position defense under the common law of restitution *See*, Burrows, *supra* note 21 at 805-806; *RESTATEMENT*, *supra* note 91, § 142 (Change of Circumstances).

75) Judgment of the Supreme Court case, March 31, 1967 (*Minshu* (Supreme Court Reports, Civil Cases) 21-2-475 (vol. 21, No. 2. p. 475), Hanrei-Jiho No. 480 p. 25).

the seller who sold oranges to M, demanded from M payment for the purchase. M fraudulently obtained cash from X, the plaintiff and repaid his debt to Y. The Supreme Court ruled that Y's benefit does not lack legal basis because Y received it, without notice of the fraud, as the repayment of the purchase cost. Even the original capital coming from M's fraudulent receipt of cash paid by X cannot create the legal relationship of unjust enrichment, so the claim by X against Y cannot be permitted.⁷⁶⁾

The second case is the Supreme Court case on September 26, 1974,⁷⁷⁾ which held that in the case of a third party, where the third party beneficiary has notice of the fraudulent intent of the direct beneficiary or is in fault in receiving the payment of cash without notice of such intent, the benefit is considered to lack legal basis. In that case, A owed to Y, the defendant, which was the Kuni (Japanese government), the debt of damages. B, a manager of the accounting department of company X, the plaintiff, in collusion with A let X make a loan agreement with a bank. A received the cash by way of B and finally repaid his debt to Y. The critical point of this case is whether there is a causal connection between the X's loss and Y's benefit, because the direct beneficiary A had already lost its benefit. The Supreme Court held that the absence of ignorance of the fraudulence of a benefit on the part of the beneficiary or the fault of the beneficiary equivalent to such recognition creates a "social connection" between X's loss and Y's benefit in the transfer of the benefit.⁷⁸⁾

These cases have two clear characteristics. First, the availability of the restitution claim depends on the knowledge of the third party (as defendant) that the benefit derives from the unjust intent of the direct recipient or on an equivalent fault of the defendant. To receive the benefit during knowing the intent of the direct recipient makes holding the benefit by the third party defendant unjust. Secondly, the same benefit extinction defense under § 703 of the Civil Code (the "to the extent" rule) is also applied to a third party restitution case; the defendant beneficiary who does not know of the plaintiff's restitution claim can hold the benefit without fault "to the extent" under § 703 that he has disposed of the money. In reality, however, the rule for the third party case enables the beneficiary who is ignorant of the plaintiff's loss to discharge the plaintiff's restitution claim by cutting off the nexus of causation, and consequently, he can hold the entire benefit regardless of what has already been consumed. This result corresponds with the application of the good faith purchase defense under common law and equity.

Although the above third party rule on fraud cases under Japanese law is apparently very similar to the good faith purchase defense and change of position defense under common law and equity, the Japanese Supreme Court considers the peculiarity when the

76) *Id.* Misshu Vol. 21 No. 2 at p. 476.

77) Judgment of the Supreme Court case, September 26, 1974(*Minshu* 28-6-1243).

78) *Minshu* 28-6 at 1249-1250. "Social connection" is also required to identify and trace the benefit between the plaintiff and the third party if the direct recipient expends the money for his own benefit or commingles his own money. *Id.*

above rule is applied to wire transfer cases. The Supreme Court case of April 26, 1996⁷⁹⁾ implies that the sender who seeks the return of funds should take action against the beneficiary's bank; the mistaken payment order on the funds is made at his own risk. However, the contractual relationship between the sender and the sender's bank cannot have any effect on the good relationship between the beneficiary and the beneficiary's bank. The beneficiary's bank should simply obey the pre-existing sending order by the beneficiary that the funds sent by wire transfer should be deposited to the bank account.⁸⁰⁾ Basing its premise on such implication, the Supreme Court held that the plaintiff who sent the funds by mistake takes the claim based on unjust enrichment against the beneficiary, while the recipient makes a good claim of withdrawal against even misdirected funds transferred into his deposit account.⁸¹⁾

(c) Imposing Criminal Responsibility for Fraud on the Recipient

Recently, some Japanese scholars have studied the availability of savings accounts as direct cash collateral, as in Revised U.C.C. Article 9, to reply to the demand in practice for facilitating project finance, structured finance or securitization.⁸²⁾ Even now, the secured party can take a security interest on a deposit account by using a pledge on debts under Japanese Civil Code § 364(1)⁸³⁾ or assignments of receivables for security under § 467(2).⁸⁴⁾ On the basis of the judgment of the Supreme Court of August 4, 1996, a secured

79) Judgment of Supreme Court case, April 26, 1996 (*Minshu* 50-5-1267), Kinyu-Shoji Hanrei (Case Reports for Financial and Commercial Cases) No. 995 p. 3.

80) Hiroto Dogauchi, Case Comment, Tegata-Kogitte Hanrei-Hyakusen, 5th ed. (the collection of case comments for students, concerning promissory note, checks, and other payment systems), at p. 221 (Yuhikaku 1997).

81) Judgement, *supra* note 79 at *Minshu* 50-5-1270 to 1271. Supreme Court rejected the plaintiff's claim of unjust enrichment and affirmed the seizure proceeding of the deposit account by the third party. Validity of the seizure presupposes that the beneficiary can make a good claim against the misdirected funds in his deposit account.

82) Hiroto Dogauchi, *Collateralization of Saving Account*, in Hiroyasu Nakata & Hiroto Dogauchi edited, *Kinyu-Torihiki to Minpo-Houri* (Financial Transactions and Rules of Civil Code) 43 et seq. (Yuhikaku 2000); Hiroki Morita, *Collateralization of Saving Account: Review*, in Hiroto Dogauchi, Atsushi Omura & Masahiko Takizawa, *Shintaku-Torihiki to Minpohouru* (Trust Transactions and Rules of Civil Code), 299 et seq. (Yuhikaku 2003). *See also*, Judgment of the Supreme Court case, November 2, 2001, *Minshu*. 55-6-1056.

83) Japanese Civil Code, "§ 364 (Requirements for assertion of pledge over claim in name of specific creditor):

Where a claim belonging to a specific creditor is made the object of a pledge, the pledge cannot be asserted against the original debtor of such claim or any other third party, unless such original debtor has been notified of the creation of the pledge or unless he has given consent thereto, according to the § 467.

84) Japanese Civil Code, "§ 467 (Perfection for assignments of receivables in name of specific creditor) (1) The assignment of a claim belonging to a specified person cannot be asserted as against the obligor or any third party unless the assignor has given notice thereof to the obligor or the obligor has consented thereto to the assignor or the assignee.

creditor seems to be able to capture misdirected funds as collateral if they have passed into the deposit account which is the subject of the security interest. However, the Japanese Supreme Court held that the beneficiary is to be charged with fraud under Japanese Penal Code § 246(1), if he withdrew the misdirected funds in order to pay his own debt while knowing that the funds were unexpected and accidentally sent. In other words, although the beneficiary can acquire a good claim to withdraw the misdirected funds from the bank account under the civil law, the act of withdrawal consists of fraud under criminal law.⁸⁵⁾ Additionally, this Supreme Court case states that the direct recipient of misdirected funds should notify his own bank that mistaken payments were transferred into his deposit account after he becomes aware of the flow of the misdirected funds, to protect the sender. Most of the wire transfer agreements among Japanese banks provide for the procedure of systematically returning the misdirected funds to the original sender.⁸⁶⁾ Even the original recipient of misdirected funds cannot freely dispose of the funds because he has no substantial rights in them. According to the principle stated in the Civil Code § 1(2),⁸⁷⁾ he should assume the obligation of notice to enable the

(2) The notice or consent described in Section 467(1) cannot be asserted against a third party other than the obligor unless they are given in a date certified writing."

The notice or consent described in § 467(1) cannot be asserted against a third party other than the obligor unless it is given in a date-certified writing. Subsection 1 provides the perfection for the assignee to enforce the debt against the obligor (account debtor); subsection 2 provides the requirement to assert the assignment against the third party. If several creditors are assigned at the same time, priority is determined by the time when each debtor receives the date-certified writing; first reached, first priority. The date order of the multiple certified writing is immaterial. Judgment of the Supreme Court, March 7, 1974, *Minshu* 28-2-174. If the non date-certified mail and the date-certified mail are reached to the debtor, the latter has priority. *Id.* A new act was adopted in 1998 which modifies the priority rule under Civil Code § 467(2) for a legal entity: The Act on the Exceptions to the Civil Code on Perfection of Assignment of Claims Law No. 104, 1998. This new act's § 2 dispenses with the multiple notice to each debtor to perfect each assignment only if the assignee once registers the assignment with the assignor. Moreover, this act has revised again for the realization of future receivables financing; the newest revision enables the secured creditor to take future receivables which do not specify account debtors as collateral and to perfect its security interest before receivables come into existence. Additionally, this revised act offers a registration system for chattels. *See*, The Act on the Exceptions to the Civil Code on Perfection of Assignment of Chattels and Claims." Law No. 21, 2005 (it has been enforced since August 2005).

85) Judgment of the Supreme Court case, March 12, 2003 (Keishu (Supreme Court Reports, Criminal Cases) 57-3-322, at p. 323-324. The English translation of this case is available at <http://courtdomino2.courts.go.jp/promjudg.nsf/766e4f1d46701bec49256b8700435d2e/6640b53d33d2004049256df3002652b6?OpenDocument>

86) The Supreme Court suggests that all banks should endeavour to make their payment systems by wire transfer more accurate and speedy. *Id.*

87) Japanese Civil Code § 1(2) provides: "Exercise of rights and performance of obligations must be done in good faith."

In Japan, this "good faith" in the Civil Code § 1(2) is the most basic and common legal principle which covers all of private law, including law of contracts, property, unjust enrichment, torts, family law and any other private law. A general duty of good faith for law of contracts is not necessarily admitted in all common law countries. *See*, A. F. Mason, "Contract, Good Faith and Equitable

beneficiary bank to begin the procedure required for the return of the funds.⁸⁸⁾

The line of reasoning by a series of Supreme Court decisions clearly commands one very recent lower court case. In the case decided by Nagoya District Court, April 21, 2004,⁸⁹⁾ the sender of misdirected funds sought the return of the money against the beneficiary bank. On the same day when the mistaken payment order was accomplished, the sender became aware of his own mistake and immediately asked the sender's bank to return the misdirected funds. However, the beneficiary bank rejected this request, since the checking account of the beneficiary had already been closed compulsorily owing to the beneficiary's financial trouble, and the funds had been transferred to another account of the beneficiary bank. After the sender took the action against the beneficiary bank to return the funds on the basis of unjust enrichment under § 703 of Civil Code, the beneficiary bank attempted to set off the debt of repayment of the misdirected funds to the beneficiary and the loan against the beneficiary.

The Nagoya District Court denied the set-off by the beneficiary bank because making the set-off while rejecting the return of the funds is contrary to "justice and fairness" and the set-off is ineffective against the plaintiff's claim.⁹⁰⁾ The High Court of Nagoya affirmed the decision of the lower court but it added a new reasoning.⁹¹⁾ First, it looked at the subject matter of the set-off, which was accomplished by the unreasonable transfer from the original bank account to another bank account. That above fact of that case makes the set-off lack the requirement of the bidirectional character between each debt that is required § 505 of the Japanese Civil Code. Secondly, the court affirmed the return of the money based on the reasoning that it denied substantial legal effect of the bank account, provided that the sender requested the beneficiary bank through the sender's bank immediately and that the beneficiary consented to return the money.

In other words, under Japanese law, although the beneficiary can make a claim to withdraw the misdirected funds, he cannot withdraw them. For criminal responsibility would be imposed on him from the perspective of "justice and fairness". The interested party, like the creditors of the beneficiary, should not expect to use the misdirected funds as a resource for the repayment of debt.⁹²⁾

Standards in Fair Dealing" (2000), 116 L.Q.R. 66 (2000).

88) Judgment of the Supreme Court, March 12, 2003, (*Keishu* 57-3 at p. 323-324).

89) Judgment of Nagoya District Court, April 21, 2004 (Kinyu-Shoji-Hanrei No. 1192 p. 11), affirmed but another reasoning by Judgment of Nagoya High Court, March 17, 2005 (Kinyu-Shoji-Hanrei No. 1214 p. 19).

90) Judgment of Nagoya District Court, April 21, 2004 (Kinyu-Shoji-Hanrei No. 1192 at p. 13 to 14.).

91) Judgment of Nagoya High Court, March 17, 2005 (Kinyu-Shoji-Hanrei No. 1214 at p. 23 to 24).

92) Judgment of Nagoya District Court, April 21, 2004 (Kinyu-Shoji-Hanrei No. 1192 at p. 14) and Judgment of Nagoya High Court, March 17, 2005 (Kinyu-Shoji-Hanrei No. 1214 at p. 24).

5. Conclusion

Generally speaking, in conformity with the new definition of "good faith" under Revised U.C.C. § 1-201(20), which covers any Articles under the U.C.C., the secured creditor who holds an after-acquired security interest on a deposit account seems required to act not in reasonableness but in fairness under the U.C.C.⁹³⁾ Nevertheless, it is uncertain that the meaning of "fairness" in this context is equivalent to the phrase "justice and fairness" in Japanese law, for the latter denies not only to the recipient but also to the secured party any reliance on the misdirected funds as a resource for the repayment of debt, whereas the former good faith purchase defense justifies such expectation in U.S. law. However, if the meaning of "good faith", which means "honesty in fact and the observance of reasonable commercial standards of fair dealing" under revised U.C.C. § 1-201(20), does not include the expectation that the secured party can depend on misdirected funds for repayment, the meaning of "fairness" in this context seems to correspond to the term's meaning in Japanese law.

On the other hand, in the restitution cases of Anglo-American law, the courts require the defendant to be without notice of the plaintiff's claim for the defendant to have eligibility as a good faith purchaser for value. However, the secured creditor who holds a security interest on a deposit account should be eligible to argue that he is a good faith purchaser for value even if he could have known the restitution claim for misdirected funds according to his monitoring of the debtor-recipient's daily activities and the flow of money. Imposing on the secured party the requirement to be "without notice" of the restitution claim, if anything, might be contrary to the U.C.C. standard of "good faith", which means "honesty in fact and the observance of reasonable commercial standards of fair dealing." Pointing to the resolution in this direction operates to improve the finality of payment, and the protection of the restitution claim is naturally reduced.

Contrary to such lines of ruling in the U.S., the Supreme Court of Japan has taken a different approach to these cases: imposing criminal liability on the recipient of money materially disturbs the effectiveness of the security interest on a deposit account. As a result, Japanese courts tend to regard the protection of the restitution claim as more important than the protection of the finality of payment. Neither the recipient nor the secured party is permitted to rely on the misdirected funds as a resource for payment of debt. While the Japanese law of unjust enrichment does not permit a proprietary remedy like constructive trust in a debtor's insolvency, by attaching more importance to the protection of the mistaken person who sent the funds than to the finality of payment, the Japanese law of unjust enrichment chooses the way which weakens the operation of wire

93) See, 2 Barklay Clark & Barbara Clark, *supra* note 57, ¶ 16.10 at 16-43.

transfer, a simple and speedy payment system. In contrast, U.S. law takes the opposite position: to protect the finality of payment facilitates speedy fund settlement by wire transfer.

Even if the good faith standard under the U.C.C. dispenses with ignorance of a restitution claim as the requirement for the good faith purchase defense, no scrutiny has been done yet concerning the secured party's ability to rely on the misdirected funds for the subject matter of collateral. Although, as between Japanese law and the U.C.C., it is difficult to determine which is to be preferred,⁹⁴⁾ it can be said that adoption by the United States of the direction taken by Japanese courts would conflict with the tendency to reinforce the U.C.C. Article 9 security interest.

94) See, Kull, *supra* note 45 at 949.