

Spotlight 07/22



# DISPUTE OVER JOINT ACCOUNT – FIRST COME, FIRST SERVED?

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Joint accounts are widespread. While a joint account has many advantages in everyday life, there are also risks associated with it. This is especially true if the account holders have fallen out with each other. In a new leading decision, the Swiss Federal Supreme Court has clarified the question of whose order the bank must comply with if the account holders issue payment orders that contradict each other.

### The joint account

The joint account (or joint custody account) is a banking relationship giving several holders a joint right of disposal. Under Swiss law, the joint account is based on the concept of so-called active solidarity. This means that the account holders, as joint creditors, are each individually entitled to dispose of the assets without restriction, in particular, to manage, withdraw or transfer them. The joint account is often also referred to as an "or account" or "compte-joint".

The advantage of a joint account is that each account holder has access to the account. It simplifies processes for each account holder to initiate transactions at the bank on their own. However, this sole power of disposal of each account holder also entails risks. A recent decision of the Federal Supreme Court illustrates this clearly.

### New leading decision of the Federal Supreme Court

The decision of the Federal Supreme Court to be published as a leading decision (BGer 4A\_630/2020 of 24 March 2022) was based on the following facts: A father and his son had a joint current account as well as a joint trust account at a bank in which substantial assets were held. The father instructed the bank to transfer the amount of EUR 18 million from the joint accounts to an account at another bank. Before the bank carried out this order, it informed the son about the father's order. Thereupon, on the same day, the son instructed the bank to transfer the entire available balance in the current account to another account at the same bank of which he was the sole holder. The bank then informed the account holders that it would only follow a joint order signed by both account holders. The son then immediately filed a lawsuit against the bank demanding the execution of his order. The father in turn initiated a debt collection action against the bank about a month later.

In the lawsuit between father, son and the bank, the court of first instance ruled in favour of the father and obliged the bank to first execute the father's order, as it had been given first, and then to transfer the remaining balance to the son's individual account. The first instance justified its decision, *inter alia*, by stating that it would be shocking if the bank, which had triggered the son's own order in the first place by notifying him of his father's order, were then to execute the son's order first, which had been issued later. The appellate court overturned



this decision and upheld the son's claim, since he was the first to sue and the bank was therefore obliged to comply with the son's order in accordance with Art. 150 para. 3 CO, irrespective of the father's first order.

The Federal Supreme Court agreed with the ruling of the appellate court and dismissed an appeal against that ruling. In its decision, the Federal Supreme Court had the opportunity to confirm the following principles regarding the joint account: The holders of a joint account are to be qualified as so-called joint and several creditors. This means that each account holder alone can dispose of the entire account balance. The bank is obliged to execute orders of each individual account holder and can achieve full discharge of its debt by making payment to one of the account holders (Art. 150 para. 2 CO). However, as soon as there are contradictory orders from several account holders, this legal situation changes and the bank's obligation to execute orders ceases to apply. However, the bank remains entitled to perform in this situation and is free to choose which order it executes. This applies until one of the account holders initiates legal action (debt collection or lawsuit) against the bank in relation to the joint account (Art. 150 para. 3 CO). In this case, the bank must pay to the account holder who was the first to initiate debt collection proceedings or file a lawsuit. A mere oral or written reminder from an account holder, however, is not sufficient to bring about this legal situation.

Art. 150 para. 3 CO is not mandatory law and can therefore be contractually modified or excluded. Since no such exclusion had been agreed in the case at hand, the bank had to execute the son's order. Although the son's order had been received later than the father's order, he had been the first to take legal action against the bank through his lawsuit.

### Legal steps are crucial

The Federal Supreme Court has, thus, ruled that in the relationship with the bank, the account holder who initiates legal action against the bank more quickly and prevails in that proceedings against the bank can enforce his or her order. In this case, the initiation of a debt collection proceedings is entirely sufficient. An actual lawsuit is not necessary, therefore.

The Federal Supreme Court further confirmed its long-standing case law according to which the legal relationship between the account holders (relations inter se) is irrelevant for the bank and is also not the subject of the proceedings between the bank and the claimant account holder. It is irrelevant therefore, whether or not the claimant account holder is authorised according to the relations inter se, for example, to dispose of the entire account balance. Likewise, it is also irrelevant for the bank which account holder the assets on the joint account actually originate from and which account holder would be entitled to such assets in the relations inter se. In the lawsuit against the bank seeking the execution of the order, only the relationship between the account holders and the bank (relations with third parties) is clarified, i.e. the question of which order the bank must follow.

### Conclusions for practice and open questions

In its ruling in this case, the Federal Supreme Court has clarified that in the event of incompatible orders of different account holders, the decisive factor is who is the first to take legal action against the bank, whereby it does not matter whether debt enforcement proceedings or a lawsuit is filed.

It is true that according to Art. 150 para. 3 CO, in the case of conflicting orders, the bank has the choice of which account holder it wants to pay. In fact, however, the bank is likely to wait in such a case until it knows whether and which account holder has taken legal action against it first. Fact is that in reality it can take several days or weeks until the bank is informed of the filing of a lawsuit or debt collection against it. From the account holder's point of view, it is in any case advisable to inform the bank immediately about the filing of a lawsuit or debt collection proceedings. However, even if the bank is informed by an account holder of the initiation of legal action, it is a tricky situation for the bank to execute the account holder's order, as it cannot be ruled out that the other account holder has not already initiated legal action beforehand. It also remains open how to proceed if the account holders initiate legal action at the same time. The question therefore arises as to whether it should not rather depend on the bank's actual knowledge or its constructive notice.

It was not clarified in this case whether the bank was liable to the father by informing the son of the father's first order and thus giving the son the opportunity to place a contradictory order before the first order was executed. At the time the father's order was received, as far as is known, there were no contradictory orders, so that the bank would have been obliged to execute the order at that time, in accordance with the principles also confirmed by the Federal Supreme Court. If the bank does not execute the order of one account holder and gives the other account holder the opportunity to place a contradictory order, the account holder who first placed an order may suffer a loss due to the intervention of the other account holder, e.g. if financial instruments are not sold at a certain time.



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