

Bank Deposits: The Need for an Adverse Claim Statute in North Carolina

INTRODUCTION

Mrs. Stevenson made a deposit to her checking account in the amount of \$1000.¹ First National Bank of Washington (First National) erroneously recorded the \$1000 deposit as a \$10,000 deposit.² Mrs. Stevenson became aware of the recording error when it appeared on her statement, and she notified First National of its error.³ First National responded that it did not make an error.⁴ Several weeks later, Mrs. Stevenson withdrew the majority of the \$9000 error from her account at First National and deposited it in an account she and her husband held jointly at Perpetual Federal Savings and Loan Association (Perpetual).⁵ On December 16, 1975, more than one month after Mrs. Stevenson initially notified First National of the error, First National discovered the error, traced the fund to Mrs. Stevenson's account at Perpetual, and demanded return of the fund.⁶ First National, making an adverse claim to the fund, asked Perpetual to freeze Mr. and Mrs. Stevenson's account.⁷ On December 18, 1975, Perpetual refused Mr. Stevenson's request to withdraw money from the joint account.⁸ The following day, First National sued Mr. and Mrs. Stevenson to recover the mistakenly paid fund and sued Perpetual "for an injunction restraining [it] from releasing the Stevensons' account pending resolution of the suit."⁹ Mr. and Mrs. Stevenson then agreed to repay the mistakenly paid fund to First National.¹⁰

The situation experienced in the *Stevenson* case is an example of an adverse claim to a bank deposit; however, there are other circumstances in which an adverse claim situation can arise.¹¹ An adverse claim situation can arise when money is deposited in a bank without

1. *Stevenson v. First Nat'l Bank of Wash.*, 395 A.2d 21, 22 (D.C. 1978).

2. *Id.*

3. *Id.*

4. *Id.* at 22-23.

5. *Id.* at 23.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. See generally Comment, *Conflicting Rights, Duties and Liabilities of Interested Parties Upon Assertion of Adverse Claims to Bank Deposits*, 51 YALE L.J. 986 (1942).

the consent—either stolen or wrongfully deposited by someone properly in possession—of the true owner of the fund and then the true owner so notifies the bank.¹² An adverse claim can also arise where the depositor is an agent for the true owner of the fund and the true owner notifies the bank that the agent's power has been terminated thereby making a claim for the fund.¹³ However, in all situations,¹⁴ there will be at least three parties: the bank, the depositor and the adverse claimant.¹⁵ Each of these parties has different interests and the law must adequately protect the interests of each while not exposing any one of the parties to more potential loss than absolutely necessary.

The law governing an adverse claim to a bank deposit, and the protection afforded to each party in an adverse claim situation, reflects a policy decision of each individual state. The majority of states have a statute governing an adverse claim situation.¹⁶ While the statutes are not completely uniform, the statutes mostly shift the burden in an adverse claim situation to the adverse claimant and away from the bank. North Carolina cannot be placed in the majority of United

12. *Id.* at 987.

13. *Id.* at 987-88.

14. This Comment does not consider any right of set-off a bank may have, and the proposed statute is not intended to govern that situation. The statute proposed in this Comment is also not intended to interfere with “the creation, perfection or enforcement of a security interest in a deposit or account . . .” ME. REV. STAT. ANN. tit. 9-B, § 427(10) (2007).

15. Comment, *supra* note 11, at 986.

16. See ALA. CODE § 5-5A-42 (LexisNexis 1996); ALASKA STAT. § 06.05.145 (2006); ARIZ. REV. STAT. ANN. § 6-233 (1999); ARK. CODE ANN. § 23-47-205 (2000); CAL. FIN. CODE § 952 (West 1999); COLO. REV. STAT. § 11-105-107 (2007); CONN. GEN. STAT. ANN. § 36a-293 (West 2004); D.C. CODE ANN. § 26-803 (LexisNexis 2005); FLA. STAT. ANN. § 655.83 (West 2004); GA. CODE ANN. § 7-1-353 (2004); IDAHO CODE ANN. § 26-713 (2008); 205 ILL. COMP. STAT. ANN. 700/1 to 700/25 (West 2007); IND. CODE ANN. §§ 28-9-1-1 to -5-3 (LexisNexis 2000); IOWA CODE § 524.808 (2001); KAN. STAT. ANN. § 9-1207 (2001); KY. REV. STAT. ANN. § 286.3-800 (West 2007); LA. REV. STAT. ANN. § 6:315 (2005); ME. REV. STAT. ANN. tit. 9-B, § 427(10); MD. CODE ANN., FIN. INST. § 5-306 (West 2003); MASS. GEN. LAWS ANN. ch. 167D, § 31 (LexisNexis 1997); MICH. COMP. LAWS SERV. § 487.691 (LexisNexis 2001); MISS. CODE ANN. §§ 81-5-67, -12-127 (1999); MO. REV. STAT. § 362.375 (2007); N.J. STAT. ANN. § 17:9A-223 (West 2000); N.M. STAT. § 58-1-7 (2004); N.Y. BANKING LAW § 134(4), (5) (McKinney 2008); OHIO REV. CODE ANN. § 1161.25 (West 1996); OKLA. STAT. tit. 6, § 905 (2001); OR. REV. STAT. ANN. § 708A.435 (West 2007); 7 PA. CONS. STAT. ANN. § 606 (West 1995); S.C. CODE ANN. §§ 34-11-110, -28-650 (1987 & Supp. 2007); S.D. CODIFIED LAWS § 51A-1-3 (2004); TENN. CODE ANN. § 45-2-706 (2007); UTAH CODE ANN. § 7-1-601 (2006); WASH. REV. CODE ANN. §§ 30.20.090, 30.22.220, 32.12.120 (West 2005); W. VA. CODE ANN. § 31A-4-32 (West 2003); WIS. STAT. ANN. § 710.05 (West 2001).

States jurisdictions because there is no North Carolina statute governing an adverse claim to funds on deposit with a bank. The minority of jurisdictions in the United States—most of those states without adverse claim statutes—follow the American common law rule that places the burden on the bank rather than the adverse claimant.¹⁷ North Carolina cannot be placed in the minority of United States jurisdictions either because the law governing adverse claims to bank deposits in North Carolina is unclear.

The law governing adverse claims in North Carolina appears to reflect a policy choice favoring neither the depositor nor the adverse claimant and a policy adverse to the bank.¹⁸ North Carolina's policy is adverse to the interests of the bank because it is unclear whether a bank presented with notice of an adverse claim should honor the adverse claim or honor the demands of its depositor.¹⁹ This uncertainty practically forces a North Carolina bank presented with notice of an adverse claim to file an interpleader action and turn its depositor's money over to a court—an option that causes the bank to incur both tangible and intangible costs.²⁰

Though the treatment of this adverse claim situation is not uniform throughout the United States,²¹ there is a possibility of uniformity. A Study Committee of The National Conference of Commissioners on Uniform State Laws (Study Committee) has undertaken to determine whether a Bank Deposits Act is needed.²² While the decision to promulgate such an Act has not yet been made, nor has the scope of any such Act been decided,²³ such an Act—if enacted in each state—would provide uniform treatment throughout the United States.

In the absence of a decision from the Study Committee, the statute proposed in this Comment should be enacted in North Carolina both to clarify the law and to afford appropriate protection to banks and depositors while not sacrificing the needs of an adverse claimant.

17. 1 BARKLEY CLARK & BARBARA CLARK, *THE LAW OF BANK DEPOSITS, COLLECTIONS AND CREDIT CARDS* ¶ 3.09[1] (rev. ed. 2007).

18. *See Miller v. Bank of Wash.*, 96 S.E. 977 (N.C. 1918).

19. *See id.*

20. *See discussion infra* Part V.B.

21. 1 CLARK & CLARK, *supra* note 17, ¶ 3.09[1].

22. Interview with Richard A. Lord, Reporter, Bank Deposit Act Study Comm., in Buies Creek, N.C. (Feb. 13, 2008); Uniform Law Commission, <http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=261> (last visited Feb. 27, 2008).

23. Interview with Richard A. Lord, *supra* note 22.

I. OVERVIEW

This Comment will examine the treatment of the adverse claim problem in the various jurisdictions and propose a statutory solution for North Carolina. Section II of this Comment will examine the perilous position in which banks are placed under the rule of the American common law. Section III of this Comment will then discuss the unfortunate position in which adverse claimants are placed as a result of the statutory solution to the adverse claim problem taken by many states. Section IV will examine a comprehensive adverse claim statute that strikes an innovative balance between the needs of all parties in an adverse claim situation. Section V of this Comment will examine the common law of North Carolina. Finally, Section VI will propose a statutory solution to the adverse claim problem in North Carolina.

This proposed solution will bring clarity to the law governing adverse claims to bank deposits in North Carolina while offering adequate protection to banks, depositors, and adverse claimants. The solution requires a statute that: (1) preempts the common law rule; (2) sets the length of time for which a bank should freeze a customer's deposit account after it receives notice of an adverse claim; (3) details the type of notice that must be given; (4) contains a court order provision; and (5) retains the bank's option of filing an interpleader action. This solution incorporates the protection afforded the adverse claimant under the American common law rule while adequately protecting the depositor and eliminating a needless, though very real, risk faced by banks holding customer deposits in North Carolina.

II. AMERICAN COMMON LAW TREATMENT OF ADVERSE CLAIMS

The American courts have developed rules for a bank to follow when it receives notice of an adverse claim to a depositor's account. The American common law rule imposes a duty upon a bank receiving notice of an adverse claim to the fund in a depositor's account to freeze the account for a reasonable length of time—a length of time sufficient to allow the adverse claimant to institute legal proceedings to enforce his right to the fund.²⁴ The duty of a bank to freeze an account for a reasonable length of time is limited to just that—a reasonable length of time—and no longer.²⁵ As an alternative to waiting for the adverse claimant to initiate a legal proceeding, a bank may, after freezing the

24. 1 CLARK & CLARK, *supra* note 17, ¶ 3.09[1].

25. See *Huff v. Okla. State Bank*, 207 P. 963, 964 (Okla. 1922) (“[T]he bank cannot be required to hold the money beyond a reasonable time in order for the claimant to assert his rights, and, if he fails to assert them within such time, he is estopped.”).

account, file an interpleader action and let a court determine which party has a superior claim to the fund.²⁶

A. *Bank's Duty to Freeze the Account for a Reasonable Time*

The duty imposed upon a bank receiving notice of an adverse claim was read by the court in *Gendler v. Sibley State Bank*²⁷ as “the duty to withhold payment [to the depositor] until the third party claimant can institute the necessary court proceedings to stop payment to the depositor by court order or process.”²⁸ The court then restated its version of the rule as the duty “not to release the deposit unreasonably early after such third party makes known his adverse claim.”²⁹ While the court in *Gendler* reads the rule as to impose upon a bank the duty to freeze the account until legal proceedings are instituted, the court also states that “it is the duty of the third party claimant to diligently and promptly institute the necessary legal proceedings to stop payment to the depositor by court order or process and if such claimant does not so do the bank is released from liability.”³⁰ The duty so imposed on the adverse claimant allows the bank's duty to be read as to freeze the deposit account for only the period of time necessary to allow a diligent adverse claimant to institute legal proceedings—a reasonable time.

Defining a bank's duty to an adverse claimant in terms of “a reasonable time” situates a bank in between a proverbial rock and a hard place. The dilemma, adequately stated, is that if a bank “holds the account too long before the adverse claimant brings an action . . . it could be liable to the depositor; c]onversely, if the bank fails to hold the account long enough, it could be liable to the adverse claimant if subsequent checks deplete the account.”³¹ This uncertainty causes a bank to guess—with severe consequences for doing so incorrectly—as to what length of time is reasonable.

An example of a bank being forced to make a decision as to what length of time is reasonable can be found in *Huff v. Oklahoma State Bank*.³² Laura Huff served written notice on the bank stating that she owned the fund held by the bank in the account of John Huff, Laura's husband, and asking that the bank not release the fund in the account

26. 1 CLARK & CLARK, *supra* note 17, ¶ 3.09[1].

27. 62 F. Supp. 805 (N.D. Iowa 1945).

28. *Id.* at 813.

29. *Id.*

30. *Id.*

31. 1 CLARK & CLARK, *supra* note 17, ¶ 3.09[1].

32. 207 P. 963 (Okla. 1922).

to John Huff.³³ The bank, upon receiving notice of the adverse claim, placed a freeze on the account.³⁴ Nine days after freezing the account, yet prior to receiving any restraining order issued at the request of Laura Huff, the bank received a demand from John Huff to release the fund in his account; the bank, complying with his demand, released the fund to him.³⁵ Laura Huff then sued the bank, and the question of whether the bank had frozen the account for a reasonable time was given to the jury.³⁶ The jury found that the bank had frozen the account for a reasonable time,³⁷ and the judgment of the lower court against Laura Huff was affirmed.³⁸

When a bank is forced to guess as to what length of time is reasonable, even if it guesses correctly, a cost is incurred. The Oklahoma State Bank was found to have correctly determined that it had complied with its duty to freeze John Huff's account for a reasonable time.³⁹ However, the ultimate question of whether the bank had complied with its duty was left in the hands of the jury, requiring Oklahoma State Bank to defend itself in litigation.⁴⁰ A more clearly defined duty imposed upon a bank in this situation would allow a bank not to expend its resources attempting to avoid liability for simply attempting to comply with an ambiguous duty.

A bank holding funds in customer deposit accounts does have the ability to partially protect itself from liability under the duty imposed in an adverse claim situation. It has been suggested that one potential remedy a bank may take to protect itself in this situation is to define "reasonable," or state what length of time will be considered "reasonable," in its deposit account contract.⁴¹ This remedy, however, would only—as noted by its proponent—provide protection against liability to the depositor, still leaving the bank exposed to liability to the adverse claimant.⁴² Since a bank only has the ability to limit its potential liability to its customer—the named deposit account owner—and not against liability to the adverse claimant, a statute defining what length of time is reasonable would be required to completely protect a bank in this situation.

33. *Id.* at 963.

34. *Id.* at 963-64.

35. *Id.* at 964.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. 1 CLARK & CLARK, *supra* note 17, ¶ 3.09[1].

42. *Id.*

B. Bank May File Its Own Interpleader Action

Under the American common law rule, a bank also has an option of filing an interpleader action.⁴³ When a bank receives notice of an adverse claim to a fund held in a depositor's account, the bank's only duty—as discussed above—is to freeze the account for a reasonable length of time.⁴⁴ The bank can avoid having to play the perilous guessing game of determining the appropriate length of a “reasonable time” by filing its own interpleader action.⁴⁵

Interpleader is designed to shield the stakeholder from liability to multiple parties which are each claiming an interest in the same fund held by the stakeholder.⁴⁶ The stakeholder, the bank, is protected by a judicial decision as to which party is entitled to the fund.⁴⁷ Therefore, a bank's decision to file its own interpleader action would eliminate the bank's liability exposure to both the named deposit account owner and the adverse claimant created by the bank's duty to freeze the deposit account for a reasonable length of time.⁴⁸ Interpleader also allows the bank to avoid having the potentially costly decision of determining on its own which party has a superior claim to the fund held in the account,⁴⁹ and instead allows the court to determine which party has the superior claim to the fund.⁵⁰ The theory supporting the interpleader procedure—that a stakeholder should not be forced to undertake the liability risk accompanying making one's own decision as to which party has a superior claim to the fund⁵¹—seems particularly appropriate to serve as a solution to the liability risks facing a bank under the American common law rule.

In contrast to a bank's duty under the American common law to freeze a depositor's account for a reasonable length of time upon notice of an adverse claim, a bank is under no duty to file an interpleader action and should not be held liable for simply not filing such an action.⁵² Despite the fact that a bank has no duty to file an inter-

43. *Id.*

44. *Gendler v. Sibley State Bank*, 62 F. Supp. 805, 815 (N.D. Iowa 1945).

45. 1 CLARK & CLARK, *supra* note 17, ¶ 3.09[1].

46. 44B AM. JUR. 2D *Interpleader* § 1 (2007).

47. *Id.*

48. *See* 1 CLARK & CLARK, *supra* note 17, ¶ 3.09[1].

49. Comment, *supra* note 11, at 994 (“The bank, in fact, is said to act at its own peril if it takes any affirmative action in determining for itself the rightful owner following the assertion of an adverse claim . . .”).

50. 1 CLARK & CLARK, *supra* note 17, ¶ 3.09[1].

51. 44B AM. JUR. 2D *Interpleader* § 1 (2007).

52. *See Gendler v. Sibley State Bank*, 62 F. Supp. 805, 815 (N.D. Iowa 1945) (“[T]he fact that the Sibley Bank had the right to interplead the two claimants did not

pleader action, it seems that this is the option with the least liability exposure available to a bank when an adverse claim is presented. Additionally, in certain circumstances, filing its own interpleader action may be the prudent course for a bank.⁵³

However, it seems grossly inefficient to force, by default, a bank—an institution in the business of holding customer deposits—to expend its resources to resolve a conflict it did not create. A bank is not only forced to expend resources on legal fees and filing fees for the interpleader action itself, but also loses capital in the form of consumer goodwill when it files an interpleader action and hales its own deposit account holder into court to litigate his right to a fund he lent to the bank. Even though a bank may be able to recover its legal and filing fees through a contractual agreement with its depositor, that partial remedy does not provide for a bank's loss of consumer goodwill. As such, a solution to the adverse claim problem is needed that does not require a bank to face liability exposure to both the adverse claimant and the deposit account owner or risk losing capital through legal fees and loss of consumer goodwill.

III. INITIAL STATUTORY RESPONSE TO THE ADVERSE CLAIM PROBLEM

A. *Promulgation of a Model Adverse Claim Statute*

Understandably unhappy with the options available to a bank when presented with notice of an adverse claim to a fund held in a depositor's account, the American Bankers Association recommended a solution it found acceptable.⁵⁴ The proposed solution took the form of the following recommended model statute:

Notice to any bank or trust company doing business in this state of an adverse claim to a deposit standing on its books to the credit of any person shall not be effectual to cause said bank to recognize said adverse claimant unless said adverse claimant shall also either procure a restraining order, injunction or other appropriate process against said bank from a court of competent jurisdiction in a cause therein instituted by him wherein the person to whose credit the deposit stands is made a party and served with summons, or shall execute to

make it the duty of that bank to do so. Under the majority rule the only duty owed by the bank to the plaintiff was, after notice, to hold up the Sanders deposit for such time as would enable the plaintiff by proceeding diligently and promptly to tie up the deposit by legal action.”).

53. See 1 CLARK & CLARK, *supra* note 17, ¶ 3.09[2], at 3-279 (“If a particularly large deposit is involved, the bank may be well-advised to bring an immediate interpleader action.”).

54. *Gendler*, 62 F. Supp. at 811.

said bank, in form and with sureties acceptable to it a bond, indemnifying said bank from any and all liability, loss, damage, costs and expenses for and on account of the payment of such adverse claim or the dishonor of the check or other order of the person to whose credit the deposit stands on the books of said bank: provided, that this law shall not apply in any instance where the person to whose credit the deposit stands is a fiduciary for such adverse claimant, and the facts constituting such relationship, as also the facts showing reasonable cause of belief on the part of the said claimant that the said fiduciary is about to misappropriate said deposit, are made to appear by the affidavit of such claimant.⁵⁵

Since the promulgation of this model statute in the early 1920s,⁵⁶ a majority of the states in the United States and the District of Columbia have adopted a statute basically identical or serving the same purpose as the original recommended model statute of the American Bankers Association.⁵⁷

B. Adoption of Statutes Based on the American Bankers Association Model

A statute based on the American Bankers Association's model statute was adopted by several states soon after promulgation of the model.⁵⁸ Today, there is an adverse claim statute in effect in at least thirty-six states and the District of Columbia.⁵⁹ While not all of the statutes are substantially similar to the model statute promulgated by

55. 1 THOMAS B. PATON, PATON'S DIGEST § 1972, at 325 (Thomas B. Paton, Jr. ed., 1926).

56. *Id.*

57. See statutes cited *supra* note 16. It is important to note at the outset of this section that courts have viewed these statutes—statutes based on the model statute adopted by the various states—as an additional option available to a bank in the event of an adverse claim to a fund in a customer's deposit account, rather than viewing the statutes as displacing the common law option. As such, even in a state which has adopted a statute based on the preceding model, a bank may still elect to freeze a depositor's account for a reasonable time, allowing the adverse claimant an opportunity to institute legal proceedings, or file its own interpleader action, when notice of an adverse claim is given that does not comply with the state's statute; however, notice of an adverse claim that complies with the commands of the state's statute requires a bank to follow the statute's instructions. 1 CLARK & CLARK, *supra* note 17, ¶ 3.09[2].

58. 1 PATON, *supra* note 55, § 1972, at 325 (noting that by 1926 the following states had adopted a statute substantially similar to the recommended model statute: Arkansas, Kansas, Maine, Mississippi, and West Virginia).

59. See statutes cited *supra* note 16.

the American Bankers Association,⁶⁰ many appear in a substantially similar form.⁶¹

The American Bankers Association's model statute can be characterized as being composed of two main operative components: notice to a bank of an adverse claim is ineffective unless accompanied by (1) a court order⁶² or (2) an indemnity bond.⁶³ The model statute contains a third provision that disallows the application of the preceding two provisions when the deposit account owner is a fiduciary for the party asserting the adverse claim.⁶⁴ These three provisions and the enactment thereof in the various jurisdictions will be discussed subsequently in turn.

1. Court Order Provision

The first provision of the American Bankers Association's model adverse claim statute is what can be called the "court order" provision.⁶⁵ Every adverse claim statute enacted by a jurisdiction in the United States contains a court order provision.⁶⁶ This court order pro-

60. See, e.g., IND. CODE ANN. §§ 28-9-1-1 to -5-3 (LexisNexis 2000).

61. See, e.g., ARK. CODE ANN. § 23-47-205 (2006).

62. 1 PATON, *supra* note 55, § 1972, at 325 ("Notice to any bank or trust company doing business in this state of an adverse claim to a deposit standing on its books to the credit of any person shall not be effectual to cause said bank to recognize said adverse claimant unless said adverse claimant shall also either procure a restraining order, injunction or other appropriate process against said bank from a court of competent jurisdiction in a cause therein instituted by him wherein the person to whose credit the deposit stands is made a party and served with summons . . .").

63. *Id.* ("[O]r shall execute to said bank, in form and with sureties acceptable to it a bond, indemnifying said bank from any and all liability, loss, damage, costs and expenses for and on account of the payment of such adverse claim or the dishonor of the check or other order of the person to whose credit the deposit stands on the books of said bank . . .").

64. *Id.* ("[P]rovided, that this law shall not apply in any instance where the person to whose credit the deposit stands is a fiduciary for such adverse claimant, and the facts constituting such relationship, as also the facts showing reasonable cause of belief on the part of the said claimant that the said fiduciary is about to misappropriate said deposit, are made to appear by the affidavit of such claimant.").

65. See *supra* note 62 and accompanying parenthetical.

66. ALA. CODE § 5-5A-42 (LexisNexis 1996) (substantially similar to model); ALASKA STAT. § 06.05.145 (2006) (similar to model; not requiring the adverse claimant to initiate the action and not requiring service upon the depositor); ARIZ. REV. STAT. ANN. § 6-233(A) (1999) (similar to model; specifying court be in the United States, not requiring the adverse claimant to initiate the action, not requiring the depositor be a party to the action or service upon him); ARK. CODE ANN. § 23-47-205(1) (2006) (substantially similar to model; adding that court order must be "final and not further appealable"); CAL. FIN. CODE § 952(b) (West 2007) (similar to model; specifying that order must issue from an action—while not requiring it be initiated by adverse

claimant—in which the adverse claimant and all depositors are parties and requiring the order to be served upon the bank “at the office at which the deposit is carried”); COLO. REV. STAT. § 11-105-107(1) (2007) (substantially similar to model; also requiring the order to be served upon the bank); CONN. GEN. STAT. ANN. § 36a-293(1) (West 2004) (substantially similar to model); D.C. CODE ANN. § 26-803(1) (LexisNexis 2005) (substantially similar to model); FLA. STAT. ANN. § 655.83(1) (West 2004) (substantially similar to model); GA. CODE ANN. § 7-1-353(b)(1) (2004) (entitling bank “to act and rely upon . . . [a] court order, distraint, levy, or other effective legal process”); IDAHO CODE ANN. § 26-713(1) (2008) (substantially similar to model; not requiring adverse claimant to institute the action from which the order issues); 205 ILL. COMP. STAT. ANN. 700/20(a) (West 2007) (requiring service upon “the financial institution a certified copy of an appropriate order, by a court having jurisdiction, restraining any action with respect to the deposit account or instructing the financial institution to pay the balance of the deposit account or to deliver the property in the deposit account, in whole or in part, as provided in the order, until further order of the court”); IND. CODE ANN. § 28-9-3-3(b)(2) (LexisNexis 2000) (requiring service upon “the depository financial institution notice of an adverse claim with a restraining order, an injunction, or another legal process that: (A) directs the depository financial institution to place a hold on or otherwise restrict withdrawals from a deposit account; (B) is issued or appears to be issued by a court having jurisdiction as a result of an action in which the depositor, the depository financial institution, and all persons who are known to the depository financial institution as having an interest in the deposit account are parties; and (C) is accompanied by a court order providing for the recovery and collection by the depository financial institution of all costs and expenses, including attorney’s fees, that have been or may be incurred by the depository financial institution as a result of the action”); IOWA CODE § 524.808(2)(a) (2001) (requiring service of “an appropriate court order or judicial process directed to the state bank, restraining any action with respect to the account until further order of such court or instructing the state bank to pay the balance of the account, in whole or in part, as provided in the order or process”); KAN. STAT. ANN. § 9-1207 (2001) (similar to model; requiring service upon bank of order or process issuing from action—without requiring adverse claimant to initiate action—to which “adverse claimant and the person or persons nominally entitled to the deposit are parties”); KY. REV. STAT. ANN. § 286.3-800(1) (LexisNexis 2007) (similar to model; omitting requirement that adverse claimant initiate court action); LA. REV. STAT. ANN. § 6:315(A) (2005) (substantially similar to model); ME. REV. STAT. ANN. tit. 9-B, § 427(10) (2007) (similar to model; omitting requirement that adverse claimant initiate action and omitting requirement of service upon party-depositor); MD. CODE ANN., FIN. INST. § 5-306(b) (LexisNexis 2007) (stating that “[i]f, in an action to which the adverse claimant is a party, a court order or decree involving a claim to the deposit, money, or property is served on the banking institution, the banking institution may or, if required by the court, shall impound the deposit, money, or property, subject to further order of the court, without any liability on its part to anyone for doing so”); MASS. GEN. LAWS ANN. ch. 167D, § 31 (West 1997) (similar to model; requiring service of order upon bank, omitting requirement that adverse claimant initiate action and omitting requirement of service upon depositor); MICH. COMP. LAWS SERV. § 487.691 (LexisNexis 2001) (substantially similar to model); MISS. CODE ANN. §§ 81-5-67, -12-127 (West 1999) (substantially similar to model); MO. ANN. STAT. § 362.375(1) (West 2007) (substantially similar to model); N.J. STAT. ANN. § 17:9A-223 (West 2000) (similar to

vision provides that—except as found in the indemnity and fiduciary provisions—notice to a bank of an adverse claim to the fund in a depositor's account will not be effective to require the bank to recognize the adverse claimant unless the notice is accompanied by a court order.⁶⁷ This is in contrast to the American common law rule that notice by an adverse claimant to a bank is effective to require the bank to freeze the account for a reasonable time to enable the party making the adverse

model; specifying that depositor must be a “complainant” or “defendant” in the action from which the order issues, and omitting requirement that adverse claimant initiate action); N.M. STAT. § 58-1-7 (2004) (similar to model; specifying that order must issue from an action to which “the adverse claimant and the person or persons nominally entitled to the deposit are parties” and requiring service of the order or process upon the bank); N.Y. BANKING LAW § 134(4) (McKinney 2008) (similar to model; specifying court be in the United States, omitting requirement that person asserting conflicting claim of authority initiate action, omitting requirements that depositor be a party to the action and be served with process); N.Y. BANKING LAW § 134(5) (McKinney 2007) (substantially similar to model; specifying court be in the United States); OHIO REV. CODE ANN. § 1161.25(B)(1) (LexisNexis 1996) (requiring service upon “the savings bank a certified copy of an appropriate order by a court having jurisdiction restraining any action with respect to the deposit account, stock deposit account, safe deposit box, or other property until further order of such court, or instructing the savings bank to pay the balance of the deposit account or stock deposit account, or deliver the property, in whole or in part, as provided in the order”); OKLA. STAT. tit. 6, § 905 (2001) (substantially similar to model); OR. REV. STAT. § 708A.435(1)(a) (2007) (similar; omitting requirement that adverse claimant initiate action); 7 PA. STAT. ANN. § 606(b)(i) (West 1995) (requiring service upon “the institution an appropriate order directed to the institution by a court restraining any action with respect to the account or property until further order of such court or instructing the institution to pay the balance of the account or deliver the property, in whole or part, as provided in the order”); S.C. CODE ANN. § 34-11-110(1) (1987) (similar to model; omitting requirement that adverse claimant initiate the action and omitting requirement of service upon depositor); S.C. CODE ANN. § 34-28-650(1) (1987) (substantially similar to model); S.D. CODIFIED LAWS § 51A-1-3(1) (2004) (requiring recognition of adverse claim when “adverse claim is made through acts or proceedings pursuant to law”); TENN. CODE ANN. § 45-2-706 (2007) (similar to model; omitting requirement that adverse claimant institute action and omitting requirements that depositor be a party to the action and served with process); UTAH CODE ANN. § 7-1-601 (2006) (similar to model; omitting requirement that party-depositor be served); WASH. REV. CODE ANN. §§ 30.20.090, 32.12.120 (West 2005) (substantially similar to model); W. VA. CODE ANN. § 31A-4-32(b)(1) (LexisNexis 2003) (requiring the adverse claimant to serve upon “the institution an appropriate order directed to the institution by a court restraining any action with respect to the account or property until further order of such court or instructing the institution to pay the balance of the account or deliver the property, in whole or in part, as provided in the order”); WIS. STAT. ANN. § 710.05(2) (West 2001) (requiring recognition of adverse claim when “ordered by a court or administrative agency of appropriate jurisdiction”).

67. See *supra* note 62 and accompanying parenthetical.

claim to initiate legal proceedings, thereby presumably obtaining a court order.⁶⁸

The model adverse claim statute's court order provision is a statutory pronouncement of the English common law rule.⁶⁹ The English common law rule requires a bank to "recognize the nominal depositor as the sole party with the right to the disputed deposit, until and unless restrained by legal process."⁷⁰ This position, unlike the American common law rule, protects the bank from risk of liability to multiple parties brought about by having to determine a reasonable length of time to freeze the account.⁷¹ While this provision does not alter any rights the adverse claimant may have to the fund held by a bank in its depositor's account, it also does not allow the adverse claimant any protection against depletion of the account while a court order is being obtained.

2. *Indemnity Bond Provision*

The second provision of the American Bankers Association's model statute is what can be referred to as an "indemnity bond" provision. It provides that—except as found in the court order and fiduciary provisions—notice of an adverse claim to a fund held by the bank in a depositor's account is not effective to cause the bank to take any action unless the bank is, to its satisfaction, indemnified by the adverse claimant for any liability it may incur as a result of freezing the account or otherwise disobeying its depositor's orders.⁷² This provision protects the bank against any financial loss it may incur as a result of the adverse claim situation. While a bank still may be susceptible to incurring intangible costs, such as a loss in consumer goodwill because it will not honor the depositor's orders without a court of law telling it not to do so, the statute's requirement that the bank be satisfied with the indemnity before the adverse claim must be recognized allows a bank to account for this intangible cost in determining what indemnity will satisfy it. Almost every jurisdictional enactment of an adverse claim statute contains an indemnity provision.⁷³

68. 1 CLARK & CLARK, *supra* note 17, ¶ 3.09[1].

69. See Comment, *supra* note 11, at 1007.

70. *Id.*

71. *Id.*

72. See *supra* note 63 and accompanying parenthetical.

73. ALA. CODE § 5-5A-42 (LexisNexis 1996) (substantially similar to model); ALASKA STAT. § 06.05.145 (2006) (substantially similar to model); ARK. CODE ANN. § 23-47-205(2) (2000) (substantially similar to model); COLO. REV. STAT. § 11-105-107(2) (2007) (substantially similar to model); CONN. GEN. STAT. ANN. § 36a-293(2) (West 2004) (substantially similar to model); D.C. CODE ANN. § 26-803(2) (LexisNexis

2005) (substantially similar to model); FLA. STAT. § 655.83(2) (2004) (substantially similar to model; applicable also to fiduciary accounts and adding that “[u]pon receipt of such bond, the institution shall hold the account pending agreement between the claimant and the person to whose credit the deposit or fiduciary account stands on the books of the institution or pending receipt of a restraining order, injunction, or other process pursuant to [the court order exception]”); GA. CODE ANN. § 7-1-353(b)(3) (2004) (providing that “[a] bank shall be entitled to act and rely upon: [an adverse claim] accompanied by a bond or other indemnity adequate to protect the bank or trust company from loss as a consequence of recognizing an adverse claim”); IDAHO CODE ANN. § 26-713(2) (2008) (substantially similar to model); 205 ILL. COMP. STAT. ANN. 700/20(b) (West 2007) (providing that “[a] financial institution may, in its sole discretion, recognize an adverse claim to, or adverse claim of authority to control, a deposit account if the person making the claim delivers to the financial institution a bond, in a form and amount and with sureties satisfactory to the financial institution, indemnifying the financial institution against any liability, loss, or expense that the financial institution might incur because of its recognition of the adverse claim or because of its refusal by reason of the claim to honor any check or order of, or to deliver any property to, the depositor”); IND. CODE ANN. § 28-9-3-3(b)(3) (LexisNexis 2000) (similar to model; also specifically requiring indemnity for attorney’s fees and also requiring indemnity for any damage incurred as a result of the “dishonor by the depository financial institution of other duties imposed upon the depository financial institution by contract or law”); IOWA CODE § 524.808(2)(b) (2001) (substantially similar to model); KAN. STAT. ANN. § 9-1207 (2007) (requiring the adverse claimant to provide “indemnity deemed adequate by the bank”); KY. REV. STAT. ANN. § 286.3-800(2) (LexisNexis 2007) (substantially similar to model); LA. REV. STAT. ANN. § 6:315(A) (2005) (substantially similar to model); ME. REV. STAT. ANN. tit. 9-B, § 427(10) (2007) (substantially similar to model); MASS. GEN. LAWS ANN. ch. 167D, § 31 (West 1997) (requiring “bond satisfactory to the depository and the adverse claimant to hold harmless and indemnify it from any liability, loss, damage, costs and expenses whatsoever on account of such adverse claim”); MICH. COMP. LAWS SERV. § 487.691 (LexisNexis 2001) (substantially similar to model); MISS. CODE ANN. §§ 81-5-67, 81-12-127 (West 1999) (substantially similar to model); MO. REV. STAT. § 362.375(1) (2007) (substantially similar to model); N.J. STAT. ANN. § 17:9A-223 (West 2000) (substantially similar to model); N.M. STAT. § 58-1-7 (2004) (requiring adverse claimant to supply “indemnity deemed adequate by the bank”); N.Y. BANKING LAW § 134(4) (McKinney 2008) (requiring consent of the bank; applicable to conflicting claims of authority); N.Y. BANKING LAW § 134(5) (McKinney 2008) (substantially similar to model); OHIO REV. CODE ANN. § 1161.25(B)(2) (LexisNexis 1996) (substantially similar to model); OKLA. STAT. tit. 6, § 905 (2001) (substantially similar to model); OR. REV. STAT. § 708A.435(1)(b) (2007) (substantially similar to model; also allowing, as an alternative to a bond, an “irrevocable letter of credit issued by an insured institution, as defined in [Or. Rev. Stat. §] 706.008”); 7 PA. STAT. ANN. § 606(b)(ii) (West 1995) (substantially similar to model); S.C. CODE ANN. § 34-11-110(2) (1987) (substantially similar to model); S.C. CODE ANN. § 34-28-650(2) (1987) (substantially similar to model); S.D. CODIFIED LAWS § 51A-1-3(1) (2004) (substantially similar to model); UTAH CODE ANN. § 7-1-601 (2006) (providing that bond must be “a good and sufficient bond in double the amount claimed” and specifically requiring indemnity for “attorneys’ fees”); WASH. REV. CODE ANN. §§ 30.20.090, 32.12.120 (West 2005) (similar to model; setting amount of bond at

This provision, however, inadequately protects both the adverse claimant and the depositor. The only way for an adverse claimant to ensure that the fund held by the bank will not be withdrawn while a court order is being obtained is to purchase an indemnity bond. This is a cost not every adverse claimant may be able to bear. A bank can be afforded protection equal to that which it is given under this provision if the governing statute simply defines the length of time for which a deposit account should be frozen and shields the bank from liability to the depositor for freezing the account for this statutorily prescribed duration. The adverse claimant would then be able to ensure that the fund subject to the adverse claim remained securely in the bank while a court order is sought. Also, this provision does not offer any protection to the deposit account owner. It enables any person to freeze a depositor's account—without any indication of the nature of the adverse claim—simply by purchasing an indemnity bond. As such, albeit for different reasons, this provision inadequately protects both the adverse claimant and the depositor.

3. *Fiduciary Provision*

The third provision, though actually an exemption, is what can be called the “fiduciary” provision. It provides that the statute does not apply when the depositor is a fiduciary for the adverse claimant.⁷⁴ Under circumstances where the deposit account owner is a fiduciary for the adverse claimant, the adverse claimant must, in an affidavit, state the facts indicating the fiduciary relationship and “the facts showing reasonable cause of belief on the part of the said claimant that the said fiduciary is about to misappropriate said deposit”⁷⁵ This

“double either the amount of said deposit or said adverse claim, whichever is the lesser”); WASH. REV. CODE ANN. § 30.22.220 (West 2005) (providing that “[n]otwithstanding [Wash. Rev. Code §] 30.22.210, a financial institution may, without liability, pay or permit withdrawal of any funds on deposit in an account to a depositor and/or agent of a depositor and/or trust or P.O.D. account beneficiary, and/or other person claiming an interest therein, even when the financial institution has actual knowledge of the existence of the dispute, if the adverse claimant shall execute to the financial institution, in form and with security acceptable to it, a bond in an amount which is double either the amount of the deposit or the adverse claim, whichever is the lesser, indemnifying the financial institution from any and all liability, loss, damage, costs, and expenses, for and on account of the payment of the adverse claim or the dishonor of the check or other order of the person in whose name the deposit stands on the books of the financial institution”); W. VA. CODE ANN. § 31A-4-32(b)(2) (West 2003) (substantially similar to model; also specifically requiring indemnity for “reasonable attorney fees”).

74. See *supra* note 64 and accompanying parenthetical.

75. 1 PATON, *supra* note 55, § 1972, at 325.

provision accommodates adverse claimants in situations where urgency is of the utmost importance. The American Bankers Association appears to feel that a sworn statement indicating the adverse claimant's equitable ownership of the fund in the account and the adverse claimant's belief that his or her fiduciary is on the precipice of absconding with the fund is sufficient notice to allow a bank to feel secure in freezing the depositor's account.⁷⁶ The bank, upon receiving an affidavit as outlined in the model statute, should then treat the situation as being governed by the American common law; the bank should freeze the account for a reasonable time to enable the adverse claimant to institute legal proceedings or file its own interpleader action.⁷⁷ The fiduciary provision—the provision offering the least security to the bank of the three provisions contained within the model statute—is the least popular provision among enacting jurisdictions, as roughly only half of the enacting jurisdictions have enacted a statute with a fiduciary provision.⁷⁸

76. *See id.*

77. 1 CLARK & CLARK, *supra* note 17, ¶ 3.09[2].

78. *See* ALA. CODE § 5-5A-42 (LexisNexis 1996) (substantially similar to model); ALASKA STAT. § 06.05.145 (2006) (substantially similar to model); CAL. FIN. CODE § 952(a) (West 1999) (requiring the adverse claimant to deliver to the bank "at the office at which the deposit is carried or at which the property is held an affidavit of the adverse claimant stating that of the adverse claimant's own knowledge the person to whose credit the deposit stands or for whose account the property is held is a fiduciary for the adverse claimant and that the adverse claimant has reason to believe the fiduciary is about to misappropriate the deposit or the property, and stating the facts on which the claim of fiduciary relationship and the belief are founded, the bank shall refuse payment of the deposit and shall refuse to deliver the property for a period of not more than three court days (including the day of delivery) from the date that the bank received the adverse claimant's affidavit, without liability on its part and without liability for the sufficiency or truth of the facts alleged in the affidavit"); COLO. REV. STAT. § 11-105-107(3) (2007) (substantially similar to model); CONN. GEN. STAT. ANN. § 36a-293 (West 2004) (substantially similar to model); D.C. CODE ANN. § 26-803 (LexisNexis 2005) (substantially similar to model); IDAHO CODE ANN. § 26-713 (2008) (substantially similar to model); LA. REV. STAT. ANN. § 6:315(A) (2005) (substantially similar to model); MASS. GEN. LAWS ANN. ch. 167D, § 31 (LexisNexis 1997) (providing, under the adverse claim statute, that notice is effective when the adverse claimant "files with the depository an affidavit setting forth facts showing a reasonable cause for belief that a fiduciary relationship exists between such person and said adverse claimant and that such person is about to misappropriate the deposit or securities in question"); MICH. COMP. LAWS SERV. § 487.691 (LexisNexis 2001) (substantially similar to model); MO. ANN. STAT. § 362.375(1) (West 2007) (substantially similar to model); N.J. STAT. ANN. § 17:9A-223 (West 2000) (substantially similar to model); OKLA. STAT. tit. 6, § 905 (2001) (similar to model; omitting requirement of showing reasonable cause of belief on the part of the said claimant that the said fiduciary is about to misappropriate said deposit); OR. REV. STAT. § 708A.435(2) (2007)

Perhaps the explanation for this can be found in the judicial treatment of the fiduciary provision. A primary purpose of the American Bankers Association in drafting a model statute was to eliminate the perilous position in which banks are placed when an adverse claim is made to a deposit account—potential liability to both the deposit account owner and the adverse claimant.⁷⁹ While the model statute's first provision removes this risk and the second provision indemnifies the bank for having to face the risk, the fiduciary provision restores the risk for a certain kind of adverse claim because adverse claims falling under the purview of the fiduciary provision are exempted from the statute's coverage⁸⁰ and the American common law rule applies.⁸¹ An adverse claim situation presented by these circumstances not only restores a bank to the position of uncertainty found at common law, but further complicates a bank's determination of the appropriate course of action.⁸² The determination is complicated because in order for this fiduciary provision to apply, "[t]he account needs neither to have been opened as a fiduciary account, nor to appear on its face as such."⁸³ In other words, a bank must determine whether the account is a fiduciary account, then it must determine what length of time is appropriate to freeze the depositor's account under the American common law rule. This result does not offer more clarity to a bank in determining the appropriate course of action; rather, it adds to the confusion. The additional confusion added by the fiduciary provision of the model statute perhaps explains why roughly half the jurisdic-

(substantially similar to model); S.C. CODE ANN. § 34-11-110 (1987) (substantially similar to model; applicable to banks and trust companies); WASH. REV. CODE ANN. § 30.20.090 (West 2005) (providing, under the adverse claim statute, "[t]hat where the person to whose credit the deposit stands is a fiduciary for such adverse claimant, and the facts constituting such relationship, and also the facts showing reasonable cause of belief on the part of said claimant that the said fiduciary is about to misappropriate said deposit, are made to appear by the affidavit of such claimant, the bank or trust company shall without liability refuse to deliver such property for a period of not more than five business days from the date that the bank received the adverse claimant's affidavit, without liability for the sufficiency or truth of the facts alleged in the affidavit, after which time the claim shall be treated as any other claim under this section"); WASH. REV. CODE ANN. § 30.22.220 (West 2005) (substantially similar to WASH. REV. CODE ANN. § 30.20.090, as stated above in this footnote); WASH. REV. CODE ANN. § 32.12.120 (West 1986) (substantially similar to model).

79. See 1 PATON, *supra* note 55, § 1972, at 325.

80. *Id.*

81. 1 CLARK & CLARK, *supra* note 17, ¶ 3.09[2].

82. See 1 PATON, *supra* note 55, § 1972, at 325.

83. 1 CLARK & CLARK, *supra* note 17, ¶ 3.09[2] (citing authority).

tions seeking to bring clarity to adverse claims law chose not to adopt this portion of the model statute.

A statute that does not contain a different rule for fiduciary accounts would eliminate the confusion added by this provision. Eliminating this distinction would not only remove all reasonableness considerations ushered in with the American common law rule, but would also remove the added question of whether an account not appearing so on its face is, in fact, a fiduciary account. Treating all accounts equally and requiring a brief freeze, for a defined length of time, would eliminate the risk of liability for the bank and ensure that the fund against which an adverse claim is being made remains in the bank while legal action is commenced.

IV. THE COMPREHENSIVE ADVERSE CLAIM STATUTE

A. *Augmentation of the American Bankers Association Model Statute*

Several jurisdictions have adopted their own adverse claims statutes that are more comprehensive than the model statute promulgated by the American Bankers Association.⁸⁴ For most of these jurisdictions, this means adding on to what is otherwise a statute based on the American Bankers Association's model statute. For some of these jurisdictions this means simply defining terms applicable in the adverse claim situation.⁸⁵ For others, this means adding other means by which an adverse claimant can require a bank to recognize an adverse claim.⁸⁶ For Indiana, however, this means adopting a statute that comprehensively lays out the procedures that are to be followed in various adverse claim situations.⁸⁷

84. See, e.g., N.Y. BANKING LAW § 134 (McKinney 2008).

85. See, e.g., ARIZ. REV. STAT. ANN. § 6-233(B) (1999) (stating that an “[a]dverse claim” means a claim by any person who asserts the right to all or part of a deposit account to the exclusion of anyone to whose credit the account stands on the records of the bank [and that] “[a]dverse claim” also includes conflicting claims of any persons to the right to operate an account [and that] “[a]dverse claimant” means any person asserting an adverse claim”); CONN. GEN. STAT. ANN. § 36a-293 (West 2004) (stating that “[a]n adverse claimant means one who is not a named owner, joint owner or co-owner of the deposit account or share account according to the bank’s or credit union’s records”).

86. See, e.g., GA. CODE ANN. § 7-1-353(b)(2) (2004) (providing that “[a] bank shall be entitled to act and rely upon . . . [a]n agreement of the parties concerning an adverse claim”); LA. REV. STAT. ANN. § 6:315(B)(1)(b) (2005) (substantially similar).

87. See IND. CODE ANN. §§ 28-9-1-1 to -5-3 (LexisNexis 2000).

B. Indiana's Depository Financial Institutions Adverse Claims Act

Indiana's Depository Financial Institutions Adverse Claims Act⁸⁸ (the Indiana Act) is what can be considered a comprehensive adverse claim statute. The Indiana Act helpfully provides a definition for "[a]dverse claim,"⁸⁹ "[a]dverse claimant,"⁹⁰ "[d]epositor,"⁹¹ "[d]eposit account,"⁹² "[d]epository financial institution,"⁹³ "[p]erson,"⁹⁴ and "[w]orking day,"⁹⁵ and makes these definitions applicable throughout the Indiana Act.⁹⁶ The Indiana Act also divides adverse claims into three distinct groups: (1) orders of income withholding for the purpose of child support,⁹⁷ (2) "[a]dverse claim[s] [by one] who is not [a] money judgment creditor of [a] depositor[.]"⁹⁸ and (3) "[a]dverse claim[s] [by] [a] money judgment creditor attempting to garnish [a] deposit account[.]"⁹⁹ The first of the preceding groups—child support orders—is specifically excluded from treatment under the Indiana Act.¹⁰⁰ The second and third groups, however, are given detailed treatment under the Indiana Act.¹⁰¹ Each of these two groups will be examined in turn.

In its treatment of adverse claims made by persons other than judgment creditors, the Indiana Act provides three options for an adverse claimant, one of which must be satisfied in order for a bank to be held liable for its failure to act upon the adverse claim.¹⁰² The first option requires the adverse claimant to "serve[] on the depository financial institution written verified notice of the adverse claim" detailing the nature and facts giving rise to the adverse claim, and stating that a legal proceeding—having as parties "all persons known by the adverse claimant" to have an interest in the account—has been or will

88. *Id.*

89. *Id.* § 28-9-2-2.

90. *Id.* § 28-9-2-3.

91. *Id.* § 28-9-2-4.

92. *Id.* § 28-9-2-5.

93. *Id.* § 28-9-2-6.

94. *Id.* § 28-9-2-7.

95. *Id.* § 28-9-2-8.

96. *Id.* § 28-9-2-1.

97. *Id.* § 28-9-1-1 (cross-referencing IND. CODE ANN. § 31-16-15 (LexisNexis 2000) ("Child Support Income Withholding Orders")).

98. *Id.* § 28-9-3-3.

99. *Id.* § 28-9-3-4.

100. *Id.* § 28-9-1-1.

101. *See id.* §§ 28-9-3-1 to -5-3.

102. *Id.* § 28-9-3-3.

be instituted within three days.¹⁰³ The second option available to the adverse claimant requires the adverse claimant to serve notice accompanied by a court order—originating from a court presiding over a legal proceeding with the bank, the depositor, and any other party with an interest in the account as parties—instructing the bank to freeze “or otherwise restrict withdrawals from” the account and providing for recovery by the bank of all fees incurred as a result of the legal proceeding.¹⁰⁴ The third option available to the adverse claimant is to provide the bank with a bond that the bank finds acceptable indemnifying it against any expense it may incur as a result of paying the adverse claim or dishonoring any duty to or instruction of the depositor.¹⁰⁵

The second and third options available to an adverse claimant discussed above are similar to the court order and indemnity bond provisions, respectively, of the American Bankers Association’s original model statute; the first option is an innovative provision that manages to strike a balance between the conflicting desires to protect the bank, the depositor, and the adverse claimant. The Indiana Act provides specific instructions to a bank as to how it should proceed upon receipt of notice under this provision,¹⁰⁶ and also provides protection against liability for a bank for taking action when an adverse claimant fulfills the requirements of this first option.¹⁰⁷ The adverse claimant retains the security afforded it under the American common law rule—restricting the deposit account while a legal proceeding is being initiated to protect the adverse claimant’s right to the fund—because the bank is required to freeze the deposit account when an adverse claimant complies with the first option.¹⁰⁸ Essentially, this first option¹⁰⁹ is a codification of the American common law rule with the uncertainty removed by defining a reasonable time—three working days¹¹⁰—and the risk removed by providing the bank with immunity from liability.¹¹¹

The Indiana Act also provides specialized and particular rules for the treatment of adverse claims made by judgment creditors.¹¹² The Indiana Act provides that a bank cannot be held liable to an adverse

103. *Id.* § 28-9-3-3(b)(1).

104. *Id.* § 28-9-3-3(b)(2).

105. *Id.* § 28-9-3-3(b)(3).

106. *Id.* § 28-9-4-1.

107. *Id.* § 28-9-5-1(a).

108. *Id.* § 28-9-4-1(a).

109. *Id.* § 28-9-3-3(b)(1).

110. *See id.* §§ 28-9-3-3(b)(1), 28-9-4-1(b).

111. *Id.* § 28-9-5-1(a).

112. *Id.* § 28-9-3-4.

claimant¹¹³ and that a bank has no duty to answer interrogatories regarding its deposit accounts¹¹⁴ unless the adverse claimant complies with the provisions of the Act.¹¹⁵ The Indiana Act explains in detail the steps that must be taken by the adverse claimant¹¹⁶ and the duty of a bank upon receipt of an adverse claim of this type.¹¹⁷ A bank is also afforded limited immunity under the Indiana Act for its failure to properly follow the procedures set forth for it in an adverse claim situation of this type.¹¹⁸

The Indiana Act makes clear how it affects the duty of a bank under the American common law rule.¹¹⁹ The Indiana Act states that unless an adverse claimant follows the procedures outlined in the Indiana Act, a bank is under no duty to acknowledge the adverse claim¹²⁰ or to freeze the account.¹²¹ The Indiana Act also specifically states that unless the adverse claimant follows the procedures in the Indiana Act for properly asserting an adverse claim, a bank can continue to honor the instructions or demands of its depositor without becoming liable to any other party.¹²² As such, these provisions statutorily preempt a bank's duty imposed upon notice of an adverse claim by the American common law rule.

A bank's option of filing an interpleader action is also addressed in the Indiana Act.¹²³ This provision specifically allows a bank to elect to file an interpleader action and pay the claimed fund into a court.¹²⁴ The Indiana Act allows the bank to recover the expenses it incurs in the action.¹²⁵

The Indiana Act also includes an indemnity provision.¹²⁶ This provision provides that, so long as a bank responds to an adverse claimant "in good faith,"¹²⁷ a bank will be indemnified by the adverse

113. *Id.* § 28-9-3-4(b).

114. *Id.* § 28-9-3-4(c).

115. *Id.* § 28-9-3-4(d).

116. *Id.* §§ 28-9-3-4(d), 28-9-3-5.

117. *Id.* § 28-9-4-2.

118. *Id.* § 28-9-5-1(b).

119. *See id.* §§ 28-9-3-1, 28-9-3-2.

120. *Id.* § 28-9-3-1(1).

121. *Id.* § 28-9-3-1(2).

122. *Id.* § 28-9-3-2.

123. *Id.* § 28-9-5-3.

124. *Id.*

125. *Id.*

126. *Id.* § 28-9-5-2.

127. *Id.* § 28-9-5-2(1).

claimant for all expenses it incurs if it is held liable to any party as a result of not honoring its deposit agreement with its depositor.¹²⁸

The Indiana Act¹²⁹ has provided an innovative solution to the adverse claim problem. While some provisions are clearly designed to protect the bank at the expense of the adverse claimant,¹³⁰ the clarity provided by the proper procedure a bank is to follow upon assertion of an adverse claim and the protection still offered to an adverse claimant to preserve the fund represented by the first option¹³¹ available to an adverse claimant—not a judgment creditor—strikes a terrific balance that manages to protect competing interests.

V. LAW GOVERNING ADVERSE CLAIMS TO BANK DEPOSITS IN NORTH CAROLINA

The North Carolina law governing the assertion of an adverse claim to a fund held by a bank in one of its depositor's accounts is, at best, unclear.¹³² North Carolina, unlike the majority of jurisdictions in the United States, has not adopted an adverse claim statute.¹³³ In the absence of statutory authority, and without any state court decisions that set forth rules to be followed,¹³⁴ the law regulating adverse claims in North Carolina remains unsettled.

A. *Application of the American Common Law Rule?*

The Supreme Court of North Carolina heard an adverse claim case in *Miller v. Bank of Washington*.¹³⁵ According to evidence presented to the trial court below, Minnie Miller gave \$800 to her husband, G. H. Miller, to deposit in a bank in Belhaven.¹³⁶ G. H. Miller, against Minnie's instructions, went to the Bank of Washington instead and deposited the fund in his own name.¹³⁷ Thereafter, G. H. Miller threatened to leave North Carolina.¹³⁸ Minnie Miller spoke with an attorney in

128. *Id.* § 28-9-5-2.

129. *Id.* §§ 28-9-1-1 to -5-3.

130. *See, e.g., id.* § 28-9-5-2.

131. *Id.* § 28-9-3-3(b)(1).

132. *See Miller v. Bank of Wash.*, 96 S.E. 977 (N.C. 1918).

133. *See* statutes cited *supra* note 16.

134. *Miller*, 96 S.E. at 980 (Clark, C.J.) (noting that the court was evenly divided and, as a result, that each opinion expresses only the opinion of its writer).

135. *Miller*, 96 S.E. 977 (appearing to be the only North Carolina appellate case directly confronting an adverse claim to a bank deposit).

136. *Id.* at 977.

137. *Id.*

138. *Id.*

Washington about the matter and then traveled to Washington.¹³⁹ After Minnie arrived in Washington, she and her attorney visited the bank, informed the cashier that the fund in G. H. Miller's account was actually owned by Minnie Miller, and instructed the Bank's cashier not to pay out the fund in the account.¹⁴⁰ Several hours later,¹⁴¹ the Bank's cashier released the fund in the account to G. H. Miller.¹⁴²

The jury found that "Minnie Miller[] was the equitable owner of said deposit[,] that the bank knew that she claimed to own said fund, and knew, or had reason to believe, that she was getting out proceedings to have the same attached."¹⁴³ A judgment was entered against the Bank of Washington, and it appealed to the Supreme Court of North Carolina.¹⁴⁴ Sitting with only four members,¹⁴⁵ the court split evenly; two opinions affirmed the judgment below, while the other two opinions disagreed with the judgment below. As a result, the judgment below was affirmed.¹⁴⁶ While the opinions written in this case represent only the opinion of each writer,¹⁴⁷ these opinions reveal the uncertainty in the law of adverse claims in North Carolina.

The first opinion states what its writer feels is the law governing the adverse claim situation.¹⁴⁸ The opinion dictates that upon receiving notice of a "bona fide" adverse claim to the fund held in a depositor's account, a bank should freeze the account for a reasonable time to allow the adverse claimant to bring legal proceedings to determine the proper owner of the fund.¹⁴⁹ The opinion also explains that the reasoning supporting this rule is particularly strong when it is claimed that the fund was "deposited without the authority of the owner, with the fraudulent intent on the part of a trustee, or agent, to convert to his own use [a] fund[] placed with him in trust."¹⁵⁰ The opinion's state-

139. *Id.*

140. *Id.*

141. *Id.* at 981 (Hoke, J., concurring).

142. *Id.* at 977.

143. *Id.*

144. *Id.*

145. *Id.* at 980 (Clark, C.J.) ("In this case four opinions have been filed, but Judge B[rown], being a stockholder in defendant bank, does not sit . . .").

146. *Id.* ("[T]he court being evenly divided, the judgment is affirmed." (internal quotation marks omitted)).

147. *Id.* ("The opinions in favor of affirmation (like those of a contrary view) express the views of each writer only; the conclusion alone that, there being an even division, the judgment is affirmed, is the act of the court, by operation of law." (internal quotation marks omitted)).

148. *Id.* at 977.

149. *Id.*

150. *Id.*

ment of the rule—describing the bank’s duty as attaching when the bank receives a “bona fide claim”¹⁵¹ to the fund held in a deposit account—may impose a duty upon the bank to determine for itself the veracity of the asserted claim.¹⁵² Whether this duty—a bank’s duty to determine for itself the validity of the adverse claim—is imposed by the opinion is unclear, however, because the opinion later quotes several treatises¹⁵³ that do not indicate that the adverse claim must be determined to be a “bona fide claim” before a bank’s duty to freeze the account attaches.¹⁵⁴ The opinion also states that the adverse claimant is not required to ask the bank to hold the fund, but the duty to freeze the account attaches “when it is found that [the adverse claimant] was the real owner; that the bank knew [the adverse claimant] claimed to own the fund, and knew or had reason to believe that [the adverse claimant] was proceeding to have it attached.”¹⁵⁵ Thus, it appears from this opinion that, with the possible addition of a bank being required to determine the validity—though, most likely, with a low standard of proof¹⁵⁶—of the adverse claim itself, North Carolina follows the American common law rule.

The second opinion filed in the case¹⁵⁷ appears to agree that North Carolina follows the American common law rule.¹⁵⁸ The opinion agrees that a bank’s duty is imposed upon “reasonable notice of a bona fide claim.”¹⁵⁹ The opinion goes on to state, citing decisions from other jurisdictions and treatises, that a bank should notify the owner of the deposit account of the adverse claim and freeze the

151. *Id.*

152. Comment, *supra* note 11, at 993.

153. “In *Tiffany on Banks* . . . it is said: ‘After receiving notice of an adverse claim, the bank will pay its depositor at its peril. . . . Payment to the equitable owner will, of course, always be a defense.’” *Miller*, 96 S.E. at 978 (Clark, C.J.) (quoting FRANCIS B. TIFFANY, *LAW OF BANKS AND BANKING* §§ 12-16, at 50 (1912)). The Chief Justice further noted, “In *Morse on Banks* . . . it is said: ‘A bank is justified in paying to the depositor or his order until the fund is claimed by some other person; but, if notified that the funds belong to another, it will pay the depositor at its peril. If notice that a third person claims under a superior title and intends to enforce a claim adverse to the depository, the bank should hold the funds until the title is settled or take a bond of indemnity; otherwise, it may be a loser’” *Id.* (quoting I JOHN T. MORSE, JR. & FRANK PARSONS, *A TREATISE ON THE LAW OF BANKS AND BANKING* § 342, at 573 (3d ed. 1888)).

154. *See id.*

155. *Id.*

156. *See* Comment, *supra* note 11, at 994.

157. *Miller*, 96 S.E. at 981 (Hoke, J., concurring).

158. *Id.*

159. *Id.*

account for a reasonable length of time.¹⁶⁰ The second opinion adds, however, that under certain circumstances a bank has been required to initiate legal proceedings itself before being able to pay either its depositor or the adverse claimant.¹⁶¹ As applied in the case before the court, the Bank of Washington “knew that [the adverse claimant] claimed [the fund] and . . . also knew at the time of payment [to its depositor] that [the adverse claimant] was then engaged in taking out legal process to assert and protect her rights[;]”¹⁶² as such, the bank violated the rights of the adverse claimant by releasing the fund in the account several hours after receiving notice of the adverse claim.¹⁶³ Because the stated rule requires the bank to freeze the account for a reasonable time, it appears that freezing the account for a period of several hours is, according to this opinion, not reasonable.¹⁶⁴

The third opinion filed in the case¹⁶⁵ indicates that its author is troubled by several aspects of the case and the preceding two opinions.¹⁶⁶ This opinion questions, *inter alia*, the finding by the preceding opinions that the bank’s paying out of the account several hours after notice of the claim did not allow the adverse claimant a reasonable time in which to assert her rights.¹⁶⁷ Referencing testimony given at the trial,¹⁶⁸ the opinion states that the adverse claimant had sufficient time to have the fund attached;¹⁶⁹ the adverse claimant’s failure to act in a timely fashion resulted in the bank being justified in honoring the order of its depositor.¹⁷⁰

Additionally, the opinion questions the sufficiency of the notice given to the bank by the adverse claimant.¹⁷¹ The opinion states that “[i]t surely cannot be successfully contended that a bank should hold a fund left with it, upon a promise to pay checks of the depositor, and

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *See id.*

165. *Id.* at 982 (Walker, J., dissenting).

166. *Id.*

167. *Id.*

168. *Id.* (“It also appeared by the testimony of her former attorney that she had ample time to have attached the fund after she came to the bank, and before [G. H.] Miller presented his check against the same, about three hours. The same attorney testified that: ‘The papers had been prepared and were waiting for her to come and sign them, and all that was needed to perfect them was her signature, and the advance payment of costs. They could have been served within half an hour.’”).

169. *Id.* at 983.

170. *Id.*

171. *Id.*

refuse to pay a check drawn against the deposit, merely because some one enters the bank and claims the fund, without any proof of, or suggestion as to, the nature of the claim”¹⁷² As such, this opinion seems to imply that merely claiming an interest in a fund held by the bank in a depositor’s account is insufficient, but rather either proof or a full explanation of the facts giving rise to the adverse claim is required before a bank’s duty under the American common law to freeze the account is attached.

Perhaps the most interesting statement contained in the third opinion relates to the applicability of the American common law rule in North Carolina. The law governing the adverse claim situation is stated, citing authority from other jurisdictions and banking treatises, by the first opinion¹⁷³ and the second opinion¹⁷⁴ filed in the case as being the American common law rule. The third opinion disagrees with the preceding two opinions that the American common law rule is the law of North Carolina.¹⁷⁵ The third opinion states that the English rule—requiring the bank to recognize the deposit account owner’s right to the fund unless ordered otherwise by a court¹⁷⁶—dictates that the adverse claimant is not entitled to recovery in the instant case and that the Supreme Court of North Carolina “has never adopted or followed any other rule.”¹⁷⁷ As such, the opinions also do not agree as to which rule is followed in North Carolina. This is troubling because the American common law rule requires a bank to freeze its depositor’s account upon assertion of an adverse claim.¹⁷⁸ The English common law rule requires a bank to ignore an adverse claim unless it is served along with a court order.¹⁷⁹ A bank could, therefore, proceed properly under the American common law rule and still be held liable to its depositor if the jurisdiction follows the English rule. Conversely, a bank could proceed properly under the English

172. *Id.*

173. *See id.* at 977 (Clark, C.J.).

174. *See id.* at 981 (Hoke, J., concurring).

175. *See id.* at 984 (Walker, J., dissenting).

176. Comment, *supra* note 11, at 1007.

177. *Miller*, 96 S.E. at 984 (Walker, J., dissenting).

178. *Id.* at 977 (Clark, C.J.) (“When a bank has reasonable notice of a bona fide claim that money deposited with it is the property of another than the depositor, it should withhold payment until there is reasonable opportunity to institute legal proceedings to contest the ownership.”).

179. Comment, *supra* note 11, at 1007 (“Under the English rule, the bank is protected from the threat of double liability upon the assertion of an adverse claim by the requirement that the bank recognize the nominal depositor as the sole party with the right to the disputed deposit, until and unless restrained by legal process.”).

rule and still be held liable to the adverse claimant if the jurisdiction follows the American rule. Given the differing requirements of each rule, a clear indication of how a bank should proceed after receiving notice of an adverse claim is necessary.

The fourth and final opinion filed in this case does not discuss the law of adverse claims to bank deposits. The opinion does not address whether North Carolina follows the American common law rule or the English rule.¹⁸⁰ It is also silent on whether the notice given by the adverse claimant in the case was sufficient to trigger a bank's duty under the American common law rule.¹⁸¹ The opinion instead focuses on the confusion of the jury and its apparently, according to the opinion, contradictory responses to questions posed.¹⁸² The opinion concludes by suggesting a new trial be granted to remedy the apparent confusion.¹⁸³

The opinions filed in this case perfectly illustrate the uncertainty found in North Carolina's adverse claims law. It is altogether unclear what notice should be given by an adverse claimant and what length of time is reasonable when a bank must freeze a customer's deposit account. Most interestingly, there is also uncertainty as to whether North Carolina follows the American common law rule or the English rule. As such, a statutory remedy is needed to provide clarity and certainty to this area of the law.

B. *Interpleader*

The duty of a bank upon assertion of an adverse claim is unclear in North Carolina, but a bank may still resort to filing its own interpleader action under North Carolina's interpleader statute.¹⁸⁴ North Carolina's interpleader statute¹⁸⁵ allows a plaintiff to hale into court those parties which "may expose the plaintiff to double or multiple liability."¹⁸⁶ In the adverse claim setting, this would allow the bank to interplead the depositor and the adverse claimant—as these parties may expose the bank to double liability¹⁸⁷—and allow a court to determine which party has the superior claim to the fund. The statute also

180. See *Miller*, 96 S.E. at 984 (Allen, J., dissenting).

181. See *id.*

182. *Id.* at 984-85.

183. *Id.* at 985.

184. N.C. R. Civ. P. 22.

185. *Id.*

186. *Id.* at R. 22(a).

187. See *Miller*, 96 S.E. 977 (affirming, by operation of law, a judgment requiring a bank to pay plaintiff \$800 plus interest when it had already paid the \$800 balance of the deposit account to the plaintiff's former husband).

provides that the court may order the fund deposited with the clerk or deposited in an interest-bearing bank account.¹⁸⁸ Additionally, the judgment entered in the interpleader action will direct how the deposited fund is to be distributed.¹⁸⁹ Interpleader allows the court to enter a judgment directing to which party the fund is to be paid, thereby eliminating the risk of double liability facing the bank if it pays either party incorrectly; however, a bank electing this option must still incur—unless recoverable under the deposit agreement—the costs of the interpleader action¹⁹⁰ and potential loss in consumer goodwill. As such, the interpleader option is less than ideal to fully secure the bank.

VI. PROPOSAL FOR A STATUTORY SOLUTION IN NORTH CAROLINA

The law governing adverse claims to bank deposits is unclear in North Carolina.¹⁹¹ Additionally, both rules purportedly followed in North Carolina offer insufficient protection to at least one of the three parties to an adverse claim. This being the case, a statutory remedy is needed both to clarify the law governing adverse claims to bank deposits in North Carolina and to adequately protect the bank, the adverse claimant, and the depositor.

The appropriate statutory solution can be partially found in the Indiana Act.¹⁹² This comprehensive adverse claim statute contains an innovative section that allows all parties to an adverse claim situation to be adequately protected.¹⁹³ This section allows an adverse claimant to have a depositor's account frozen by serving "written verified notice" on a bank which contains the nature of and the facts giving rise to the adverse claim, and states that an action—naming as parties all those known to have an interest in the account—either has been or will be, within three days, filed to determine the ownership of the fund in the depositor's account.¹⁹⁴ Another provision of the Act specifically states that upon receipt of such notice, the bank is to freeze the account;¹⁹⁵ if the bank has not received an order from the court having jurisdiction in the action claimed to be instituted, or so instituted

188. N.C. R. CIV. P. 22(b).

189. *Id.*

190. *See Metro. Life Ins. Co. v. Jordan*, 221 F. Supp. 842, 843 (W.D.N.C. 1963) ("In North Carolina, attorneys' fees are not part of the 'costs' of litigation, nor is it the practice in this state, even in an interpleader case, to tax against the unsuccessful defendant an attorney's fee for the plaintiff to be paid out of the fund.").

191. *See Miller*, 96 S.E. 977.

192. IND. CODE ANN. §§ 28-9-1-1 to -5-3 (LexisNexis 2000).

193. *See id.* § 28-9-3-3(b)(1).

194. *Id.*

195. *Id.* § 28-9-4-1(a).

within three days, the bank is to release the freeze and act as if no adverse claim had been made.¹⁹⁶

Together, these provisions protect the bank and the adverse claimant. The adverse claimant is extended the same protection as is available under the American common law rule: the adverse claimant can have a deposit account frozen simply by serving notice of the adverse claim upon the bank. The bank is adequately protected because the statute clearly states that a bank is to freeze the account for only three days; if no court order is received within three days of the notice being served, the freeze is to evaporate.¹⁹⁷ This relieves the bank from having to guess as to the appropriate length of time for which an account must be frozen, as it is forced to do under the American common law rule. As such, these provisions manage to provide adequate security to both the adverse claimant and the bank when an adverse claim situation arises involving a need to secure the funds in the account immediately, prior to the adverse claimant obtaining a court order.

The depositor will be adequately protected by the requirement that the adverse claimant's notice must be "written verified notice" that details the nature of and circumstances giving rise to the adverse claim. The North Carolina statute should also mandate that the adverse claimant set forth these facts under oath so as to have the foundation for a perjury charge in place.¹⁹⁸ This requirement provides a disincentive to frivolous adverse claims, adequately protecting the depositor from unnecessary freezes of his or her deposit account. Additionally, this requirement would seem to substantiate the adverse claim to a degree sufficient to satisfy the concerns of the Supreme Court of North Carolina in *Miller v. Bank of Washington*.¹⁹⁹

The only other option available to an adverse claimant to freeze a depositor's account, in addition to the procedure for the three-day freeze discussed above, should be a court order provision similar to that found in the American Bankers Association's model statute.²⁰⁰ This provision should be included both to reemphasize that a bank must obey a court order and, most importantly, to make clear that it is the only available option to an adverse claimant aside from the three-day freeze provision. An indemnity bond provision should not be included because such a provision does not offer the depositor any

196. *Id.* § 28-9-41(b).

197. *Id.* § 28-9-41(a)-(b).

198. *See* *State v. Basden*, 429 S.E.2d 740, 742 (N.C. Ct. App. 1993).

199. *Miller v. Bank of Wash.*, 96 S.E. 977, 977 (N.C. 1918) (Clark, C.J.), 981 (Hoke, J., concurring), 982 (Walker, J., dissenting).

200. 1 PATON, *supra* note 55, § 1972, at 325.

protection against unfounded adverse claims. While an unfounded claim would not ultimately deprive the depositor of the fund, it would prevent use of the fund for an indefinite period. As such, a court order should be the only option other than a three-day freeze available to an adverse claimant.

Any statutory remedy should make clear that it preempts any common law duty that may be imposed on a bank by asserting an adverse claim to a fund held in a customer's deposit account. Additionally, this provision should make clear²⁰¹ how the adverse claimant is to cause the notice of the adverse claim to be given to the bank, whether the notice is to be served in the manner detailed in the North Carolina Rules of Civil Procedure,²⁰² or otherwise.

The statute should also address how it affects a bank's option of filing its own interpleader action.²⁰³ The only party not fully protected by the filing of an interpleader action is the bank; as previously discussed, the bank is not fully protected because it could potentially incur costs, both real and in consumer goodwill, by filing such an action. If the bank elects to file an interpleader action when it can simply ignore the adverse claim unless and until the adverse claimant complies with a provision of the statute, then there is no injustice in forcing it to bear the costs of its decision.

The final decision to be made for enacting a statute in North Carolina is where to place it in the General Statutes of North Carolina. North Carolina has separate chapters in its General Statutes governing banks,²⁰⁴ savings and loan associations,²⁰⁵ and savings banks.²⁰⁶ Other jurisdictions with similarly designed statutes have enacted multiple adverse claim statutes, one in each chapter.²⁰⁷ Alternatively, the adverse claim statute could be placed as a separate chapter and define "bank" by referring to the definitions contained within the chapters of the General Statutes governing each type of institution.²⁰⁸ If the sec-

201. See 1 CLARK & CLARK, *supra* note 17, ¶ 3.09[2] (citing *Hendricks County Bank & Trust Co. v. Guthrie Bldg. Materials, Inc.*, 663 N.E.2d 1180 (Ind. Ct. App. 1996) and stating that faxing notice of an adverse claim did not satisfy the Indiana adverse claim statute, which required "service," because proper service of process is required before the statute is satisfied).

202. N.C. R. Civ. P. 4.

203. See, e.g., IND. CODE ANN. § 28-9-5-3 (LexisNexis 2000).

204. N.C. GEN. STAT. §§ 53-1 to -426 (2007).

205. *Id.* §§ 54B-1 to -278.

206. *Id.* §§ 54C-1 to -212.

207. See, e.g., MISS. CODE ANN. §§ 81-5-67, -12-127 (2006); S.C. CODE ANN. §§ 34-11-110, -28-650 (2008).

208. See, e.g., IND. CODE ANN. § 28-9-2-6 (LexisNexis 2000).

ond option is selected, it is possible to expand the scope of the statute to encompass other institutions holding funds for customers in accounts similar to deposit accounts.²⁰⁹

A statute containing the provisions recommended in the preceding discussion would serve two important purposes. A statute addressing adverse claims to bank deposits would certainly bring clarity to the law in North Carolina. Also, the proposed statute would adequately protect the bank, the depositor, and the adverse claimant while providing each party with options sufficient to satisfy the needs of any particular adverse claim situation.

CONCLUSION

An adverse claim to a fund held in a customer's deposit account presents significant risks to a bank. While these situations are not frequently litigated,²¹⁰ the risk remains constant. The law governing these situations in North Carolina is unclear,²¹¹ which increases the risk exposure of banks holding deposits in this state. For a state containing—measured by total amount of domestic deposits held—three of the largest eleven commercial banks and savings institutions in the United States,²¹² this constitutes a significant problem. While a bank is forced to bear the burden of being exposed to double liability under the American common law rule, the adverse claimant is forced to bear the burden of not being able to secure its funds while enforcing its rights through legal process under the English common law rule. Also, a rule allowing a bank to freeze its depositor's account without a sworn statement setting forth the facts and circumstances surrounding the adverse claim offers insufficient protection to the depositor. No party should be forced to bear its respective burden. This dilemma can be solved by the North Carolina General Assembly enacting an adverse claim statute. A statute modeled after the proposal in this Comment will ensure that a bank, a depositor and an adverse claimant are presented with options while simultaneously being adequately pro-

209. See, e.g., *id.* § 28-9-2-6(8).

210. See Comment, *supra* note 11, at 986.

211. See *Miller v. Bank of Wash.*, 96 S.E. 977 (N.C. 1918).

212. FED. DEPOSIT INS. CORP., TOP 50 BANK HOLDING COMPANIES BY TOTAL DOMESTIC DEPOSITS (2008), available at <http://www2.fdic.gov/sod/sodSumReport.asp?sInfoAsOf=2008&sAreas=&barItem=3>. These banks are Bank of America, Wachovia Bank, and Branch Banking and Trust Company. *Id.* Considering the current economic forecast, these statistics will more than likely change in the future.

tected in the event of an adverse claim being made to a fund held by a bank in its depositor's account.

J. Adam Sholar