

# IN THE SUPREME COURT OF TEXAS

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No. 99-0320  
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AMERICAN AIRLINES EMPLOYEES FEDERAL CREDIT UNION, PETITIONER

v.

TIM MARTIN, RESPONDENT

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ON PETITION FOR REVIEW FROM THE  
COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS  
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**Argued on January 26, 2000**

JUSTICE ABBOTT, dissenting, joined by CHIEF JUSTICE PHILLIPS.

To achieve its result, the Court must fabricate a fiction that a bank teller's signature is Martin's signature, even though Martin was a stranger to the transaction. Because I cannot go along with that fiction, I respectfully dissent, and would affirm the judgment of the court of appeals. I agree with the trial court and the court of appeals that section 4.406 does not apply in this case because Martin's unauthorized signature did not appear on an item. In addition, I agree with the court of appeals that, for the sixty-day notice provision in the Deposit Agreement to be effective, Martin must have intentionally and knowingly agreed to the provision. I would hold that the sixty-day notice provision in the Deposit Agreement was inconspicuous, and therefore Martin did not knowingly and intentionally agree to it.

## I

In order for section 4.406(a) to apply, a customer must have failed to discover “*his unauthorized signature*” on an item. *See* TEX. BUS. & COM. CODE § 4.406.<sup>1</sup> Here, Martin never signed any document related to the transactions at issue. Similarly, Blair did not sign any of the journal vouchers related to the transactions. The Court creates the fiction that the tellers’ initials on the journal vouchers constitute Martin’s unauthorized signature, and therefore section 4.406 is triggered. The Court first hypothesizes that if Martin, and not Blair, had ordered the transfers, the tellers would have been acting as his agents in initialing the vouchers, and therefore their initials could be treated as Martin’s signature. \_\_\_ S.W.3d at \_\_\_. The Court then summarily concludes that section 4.406’s requirement that Martin’s unauthorized signature appear on the item is satisfied because “the tellers signed the journal vouchers and effected the transfers without any authority from Martin, the account owner[, . . . and] thus the signatures were unauthorized.” \_\_\_ S.W.3d at \_\_\_. I disagree with both propositions.

The Court reasons that the tellers signed the vouchers as agents for Martin to authorize the transfers. As it concerns the phone transactions, the Court’s argument is plausible because an account holder could not physically sign the document. But even when Blair ordered the transfers in person, the tellers initialed the vouchers themselves and did not ask Blair to sign the vouchers. Thus, it is clear that the tellers initialed the journal vouchers only in their capacities as credit union employees to create a record of the transaction, and not as agents for the account holder to

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<sup>1</sup> Section 4.406 was amended effective January 1, 1996. *See* Act of May 28, 1995, 74<sup>th</sup> Leg., R.S., ch. 921, § 4, sec. 4.406, 1995 Tex. Gen. Laws 4582, 4639-41. Other sections of the Business and Commerce Code were also amended effective January 1, 1996. In this opinion, all citations to the Texas Business and Commerce Code are to the version in effect in 1995.

authorize the transaction.<sup>2</sup>

Next, the Court treats the tellers' initials, made at Blair's direction, as Martin's unauthorized signature. But even if the tellers were acting as agents in initialing the journal vouchers, Blair — not Martin — ordered the transfers. Thus, the tellers would be acting as Blair's agents, and their initials could at most be treated as Blair's signature — not Martin's. By treating the tellers' initials as Martin's unauthorized signature, the Court effectively rewrites the statute to require the account holder to discover *any* unauthorized transaction, rather than only "his unauthorized signature."

Perhaps because it is enamored with the policy of placing "the burden on those best able to detect unauthorized transactions so that further unauthorized transactions can be prevented," *id.* at \_\_\_, the Court ignores the express requirement of section 4.406 that an account holder fail to discover and report *his unauthorized signature*. The Court states that, "here, the Credit Union sent the journal vouchers to Martin, and those vouchers contained enough information to inform him of Blair's unauthorized transactions." *Id.* at \_\_\_. But regardless of how much information the credit union provided to Martin concerning Blair's oral transactions, Martin's unauthorized signature was not involved, and therefore section 4.406 does not apply.

The only "unauthorized signature" in this case is Blair's forgery of Martin's signature on the account change card. An account holder incurs a duty under section 4.406 only when his unauthorized signature appears on an *item*. See TEX. BUS. & COM. CODE § 4.406. An "item" is "any instrument for the payment of money even though it is not negotiable but does not include

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<sup>2</sup> For the same reasons, the journal vouchers are probably merely receipts of the transactions and therefore do not constitute "items." See *Mellon Bank, N.A. v. Securities Settlement Corp.*, 710 F. Supp. 991, 992-93 (D.N.J. 1989).

money.” TEX. BUS. & COM. CODE § 4.104(a)(7). An account change card is a document ordering the bank to change the properties of an account, not a document ordering the bank to pay money. Thus, although Martin’s unauthorized signature appears on the account change card, the card is not an “item,” and the card was never made known to Martin. Therefore, Martin did not incur a duty under section 4.406 to discover and report that forgery, and section 4.406 does not provide the credit union a defense for its negligence in transferring the funds.

In its opinion, the Court recognizes that one purpose of the Uniform Commercial Code is “to make uniform the law among the various jurisdictions.” \_\_ S.W.3d at \_\_ (quoting TEX. BUS. & COM. CODE § 1.102(b)(3)). The Court then asserts that its conclusion “is consistent with decisions from a variety of other jurisdictions which have read ‘item’ broadly, holding that deposit slips, savings account withdrawal orders, and even handwritten notes asking for cashiers’ checks are items.” \_\_ S.W.3d at \_\_ (footnotes omitted). But none of the cases cited by the Court support that proposition. In all the cases the Court cites, the drawer, not the bank teller, filled out the item and then presented the item to the bank for payment of money. *See Boutros v. Riggs Nat’l Bank, D.C.*, 655 F.2d 1257, 1259 (D.C. Cir. 1981); *Coleman v. Brotherhood State Bank*, 592 P.2d 103, 111-12 (Kan. Ct. App. 1979); *Shaw v. Union Bank & Trust Co.*, 640 P.2d 953, 954 (Okla. 1981); *Burnette v. First Citizens Bank & Trust Co.*, 269 S.E.2d 317, 318 (N.C. Ct. App. 1980). In fact, three of the four cases cited by the Court expressly note that the items were *signed by the drawer*. *See Boutros*, 655 F.2d at 1259 (“Besahi concededly made the withdrawals by presenting to the bank withdrawal slips on which he had signed Boutros’ name.”); *Coleman*, 592 P.2d at 112 (“The signature of the drawer was required on the savings account withdrawal order before money would be paid from the account by the bank.”); *Burnette*, 269 S.E.2d at 318 (“In

each instance, she forged plaintiff's signature on the withdrawal slip . . . ."). Moreover, each of these cases involves not only the signature of the drawer —as opposed to that of the bank teller —but each case also *deals with what purports to be the signature of the account holder* —“his unauthorized signature.” *See Boutros*, 655 F.2d at 1259; *Coleman*, 592 P.2d at 111-12; *Burnette*, 269 S.E.2d at 318. Thus, like checks, these items acted as written directions from the drawer to the financial institution to distribute money, and were more than mere receipts of the transactions initialed by a bank teller. Thus, the cases the Court cites are significantly different from cases involving journal vouchers.

Contrary to the Court's assertion, courts considering funds transfers have consistently held that Chapter 4 does not apply. For example, in *Walker v. Texas Commerce Bank, N.A.*, a federal district court determined that, under Texas law, Chapter 4 does not govern wire transfers made by telephone:

Although [the account holder] maintained an account with [the bank], and must be considered a customer of [the bank] within the meaning of [Article 4 of] the U.C.C., for the purposes of this case, this Court shall assume . . . that Article 4 is inapplicable, and will instead apply common law principles.<sup>3</sup> Perhaps, the language of Article 4 could be stretched to encompass wire transfers, but such application was not within the contemplation of the draftsmen. Article 4 does not

govern the transaction at issue because it does not specifically address the problems involved.

635 F. Supp. 678, 681 (S.D. Tex. 1986). Many courts have since cited *Walker* for the proposition that Article 4 does not apply to funds transfers. *See Mellon Bank, N.A. v. Securities Settlement Corp.*, 710 F. Supp. 991, 993 (D.N.J. 1989); *Security Pac. Int'l Bank v. National*

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<sup>3</sup> The Legislature adopted Article 4A to deal with funds transfers in 1993. Before Article 4A's adoption, courts often looked to the common law to decide cases involving funds transfers after determining that Article 4 did not apply.

*Bank*, 772 F. Supp. 874, 877 (W.D. Pa. 1991); *Sinclair Oil Corp. v. Sylvan State Bank*, 869 P.2d 675, 680 (Kan. 1994); *Department of Retirement Sys. v. Kralman*, 867 P.2d 643, 647 (Wash. Ct. App. 1994). Thus, subjecting funds transfers to section 4.406 does not comport with other jurisdictions and therefore thwarts one of the main purposes of the Uniform Commercial Code. Rather than making Texas jurisprudence consistent with other jurisdictions, the Court embarks on a path inconsistent with other jurisdictions.

## II

Next, the Court holds that “[b]ecause section 4.406 establishes duties and not rights, the court of appeals’ analysis of whether the Deposit Agreement adequately identified the right it purported to waive is also misplaced.” \_\_ S.W.3d at \_\_. Under the notice provision in the Deposit Agreement, the account holder “waive[s]” his right to bring a cause of action against the credit union and “agree[s] that [the credit union] will not be liable” unless the account holder provides the credit union notice of “any objection” within sixty days.<sup>4</sup> The Court reasons that because section 4.406 places a duty on the account holder to discover and report his unauthorized

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<sup>4</sup> The Deposit Agreement provides:

You are responsible for promptly examining each account statement. Any objection that you may have respecting any item shown on a statement will be waived unless made in writing to us, and received on or before the sixtieth (60<sup>th</sup>) day following the date the statement is mailed, subject to applicable law. You agree that we will not be liable for any forged or altered item drawn on or deposited to your account if you fail to notify us within that sixty day period, nor will we be liable for any forged or altered item if the forgery or alteration is not readily ascertainable upon inspection. Unless we adopt alternative procedures from time to time, checks drawn on your account will not be returned to you and copies of checks will be made available to you. That notwithstanding, you agree that your duty to examine statements promptly, and your obligation to notify us in the event of any error is not waived or diminished in any respect by our retention of checks drawn on your account. You agree that checks are deemed to be “made available” to you by your receipt of your statement and your ability to request copies of those checks.

signature on an item within one year, the notice provision in the Deposit Agreement merely modifies the account holder's duty under 4.406 by requiring the account holder to discover and report unauthorized signatures within sixty days rather than one year. Because section 4.406 does not apply — and Martin did not have a duty to discover and report Blair's unauthorized transfers — I disagree with the Court's treatment of the notice provision as merely modifying a duty.

Instead, the notice provision should be viewed as a waiver of rights. The Court acknowledges that “a bank is liable to its customer if it charges the customer's account for an item that is not properly payable from that account” and that “[a]n item with an unauthorized signature is not properly payable.” \_\_\_ S.W.3d at \_\_\_ (citing TEX. BUS. & COM. CODE § 4.401(a)). As such, Martin is vested with statutory rights of recovery against the credit union. But the Court fails to recognize that the Deposit Agreement places new and more stringent limitations on those rights to the extent it alters the standard established in section 4.401(a). Because the notice provision limits Martin's ability to hold the credit union liable for its negligence, I would treat the provision as a waiver of rights.

### III

Because the notice provision limits Martin's statutory right to bring suit under the Texas Business and Commerce Code, the provision is enforceable only if Martin knowingly, voluntarily, and intentionally agreed to that provision. *See Rolison v. Puckett*, 198 S.W.2d 74, 78 (Tex. 1946); *Estes v. Wilson*, 682 S.W.2d 711, 714 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.); *Andrews v. Powell*, 242 S.W.2d 656, 661 (Tex.Civ.App.—Texarkana 1951, no writ); *The Praetorians v. Strickland*, 66 S.W.2d 686, 689 (Tex. Comm'n App. 1933, judgment adopted). The

credit union did not mail a copy of the Deposit Agreement to Martin. At most, it notified him that a copy could be picked up at any of its branches, and that he could call the credit union to request a copy. Accordingly, because Martin was not aware of the change and the credit union never even gave the text of that change to him, I would hold as a matter of law that Martin did not knowingly, voluntarily, and intentionally agree to the notice provision, and did not waive his right to bring suit by failing to notify the credit union of the unauthorized transactions.

The Court notes that (1) in May 1994, the Credit Union adopted the Deposit Agreement containing the sixty-day notice provision, and so notified all its members; (2) the Credit Union made the new agreement available to Martin; and (3) Martin continued to maintain his account at the Credit Union. \_\_\_ S.W.3d at \_\_\_. The Court concludes that “[t]hese actions are sufficient to demonstrate that the parties agreed to be bound by the terms of the Deposit Agreement.” *Id.* at \_\_\_. The Court, however, fails to cite any cases supporting that proposition. Also, the Court fails to clarify at what point this “agreement” was formed. Were the new provisions effective immediately upon adoption by the Credit Union? Did Martin have a grace period in which he could go to the Credit Union to read the provisions? Because of these practical problems with the Court’s unsupported conclusion, I would require the Credit Union to at least give its members a copy of the new agreement before holding that an agreement had been formed.

In sum, I would hold that section 4.406 does not apply and the notice provision in the Deposit Agreement is unenforceable because Martin did not knowingly, voluntarily, and intentionally agree to it. Accordingly, I dissent and would affirm the court of appeals’ judgment.

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GREG ABBOTT  
JUSTICE

OPINION DELIVERED: September 7, 2000