IN THE SUPREME COURT OF TEXAS

NO. 08-0908

FEDERAL DEPOSIT INSURANCE CORP.
AS RECEIVER FOR GUARANTY BANK, PETITIONER,

v.

CHRISTA C. LENK, ADMINISTRATOR OF THE ESTATE OF
JOHN ALBERT THOMPSON, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

JUSTICE HECHT, joined by JUSTICE GREEN, dissenting.

John Albert Thompson died in January 2000 with about $3,000 on deposit in a Guaranty Bank checking account. A few weeks later, Mel Spillman falsely represented to the Bank that he was Thompson's nephew and estate administrator, and directed that he be named on Thompson's account. The Bank complied. Spillman then deposited around $167,000 to the account, and over the next several months proceeded to withdraw all but a small amount that was eaten up in service charges. The Bank closed the account on September 13, 2001.

Spillman was a fraud. He forged letters of administration in dozens of estates like Thompson's. In June 2002, he was sentenced to ten years in prison.

In September 2003, Christa Lenk was appointed administrator of Thompson's estate and several others Spillman had defrauded. In June 2005, Lenk demanded that the Bank repay the funds

Spillman had withdrawn from Thompson's account years earlier. The Bank refused, and Lenk sued. The trial court granted summary judgment for the Bank; the court of appeals reversed, holding that summary judgment should have been granted for Lenk.[1]

The first sentence of Section 34.301(b) of the Texas Finance Code states: "A cause of action for denial of deposit liability on a deposit contract without a maturity date does not accrue until the bank has denied liability and given notice of the denial to the account holder."[2] Lenk contends that her action against the Bank for allowing unauthorized withdrawals from Thompson's checking account until January 2001 accrued in June 2005, when she demanded that the Bank return the money, and the Bank refused. The Court agrees that this is Lenk's contention — "[Lenk] claimed the bank breached the deposit agreement by refusing her payment demand"[3] — and that it is correct — "the bank refused to pay general deposit funds to the rightful account holder (Lenk), and so . . . breached the deposit agreement."[4]

But Lenk's claim ignores the second sentence of Section 34.301(b): "A bank that provides an account statement or passbook to the account holder is considered to have denied liability and given the notice as to any amount not shown on the statement or passbook."[5] In *Jefferson State*

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[1] ___ S.W.3d ___ (Tex. App.–San Antonio 2008).

[2] TEX. FIN. CODE § 34.301(b).

[3] *Ante* at ___.

[4] *Ante* at ___.

[5] TEX. FIN. CODE § 34.301(b). Lenk relies heavily on a sentence in *Hodge v. Northern Trust Bank of Texas*, 54 S.W.3d 518, 526 (Tex. App.–Eastland 2001, pet. denied): "It is when the bank refuses a demand for payment of the general deposit that the bank breaches its relationship with the depositor." But the court was only speaking generally and not construing Section 34.301(b), which it noted did not apply because the case involved a certificate of deposit with a maturity date. *Id*. at 524.

Bank v. Lenk, we held that a bank that makes account statements available at its offices is considered to have denied liability for, and given notice of, unauthorized withdrawals from a deceased customer's checking account when a representative is appointed for the decedent's estate.[6] Lenk was appointed the representative of Thompson's estate in September 2003. Under Section 34.301(b), her action against the Bank accrued then, not in June 2005.

The Court observes that suit based on a claim that accrued in September 2003 would be time-barred[7] and faults the Bank for not making that argument. But the Bank argues, and the Court specifically acknowledges, that Lenk's claim is for the Bank's refusal of her June 2005 demand. Lenk pleaded in her petition:

> On June 4, 2005, [Lenk] made demand upon [the Bank] for the payment of [unauthorized withdrawals] from the account, and [the Bank] has failed and refused to pay over to [Lenk] the sums due and owing from the account.
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> * * *
>
> Under the terms of the depositor's agreement with [Thompson] and applicable law, [the Bank] was required to pay sums on deposit to [Lenk] on demand or to her order to such persons as she may direct. [The Bank] failed and refused to pay to [Lenk] the sums deposited upon her demand. Accordingly, [Lenk] is entitled to judgment in the amount of all sums which were deposited in the name of [Thompson] or his representative since the date of his death.

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[6] 323 S.W.3d 146, 149-150 (Tex. 2010) ("Accordingly, we conclude that in the event of a customer's death, banks can satisfy their [statutory] burden [to make account statements available to a customer] by retaining statements at the bank, but the customer's burden to report unauthorized signatures does not arise until an estate representative is appointed.").

[7] UCC Section 4.406(f) provides that "[w]ithout regard to care or lack of care of either the customer or the bank, a customer who does not within one year after the statement or items are made available to the customer . . . discover and report the customer's unauthorized signature on or any alteration on the item is precluded from asserting against the bank the unauthorized signature or alteration." TEX. BUS. & COM. CODE § 4.406(f). In *American Airlines Employees Federal Credit Union v. Martin*, 29 S.W.3d 86, 89 (Tex. 2000), we held that this one-year repose period could be shortened by agreement to sixty days.

She asserted in her motion for summary judgment:

> On June 4, 2005, [Lenk] made written demand upon [the Bank] for the sums deposited into [Thompson's] account, and [the Bank] has failed and refused to pay the sums deposited into the account to [Lenk].
>
> [The Bank's] failure and refusal to pay to [Lenk] the sums deposited into the account of [Thompson] breached the terms of the depositor's agreement. Accordingly, [Lenk] is entitled to judgment . . . .

She argued to the court of appeals:

> In Plaintiff's Original Petition, [Lenk] stated that [her] cause of action is based upon the requirements of the depositors agreement and [the Bank's] refusal to pay [Lenk] the sums deposited into Mr. Thompson's account after her demand.

Lenk could not have been clearer. She alleged that her June 2005 demand triggered her claim. She sued the Bank days later. An assertion by the Bank that her claim for its refusal of her demand was time-barred would have been frivolous.

The problem with the claim Lenk asserts is not that it is time-barred; the problem is that, under Section 34.301(b), the claim does not exist, and for good reason. Allowing a bank customer to create a cause of action merely by writing a demand letter, as Lenk contends, would circumvent all time limitations on claims for unauthorized withdrawals. That is what the Court has done in this case.

It bears comment that the Court hands Lenk a windfall. Not only does she recover the $3,000 Spillman stole from Thompson's account, Lenk recovers about $145,000 of the money that Spillman laundered through the account, using letters of administration the Bank had no reason to know were forged, on a claim filed nearly four years after the account was closed and nearly two years after she was on notice of all the transactions. But the consequences of the Court's

misapplication of Section 34.301(b), in this case decided without argument, will be significant to the entire financial industry in Texas.

I respectfully dissent.

Nathan L. Hecht
Justice

Opinion delivered: March 9, 2012