ORAL ARGUMENT — 1/26/00
99-0320
AMERICAN AIRLINES CREDIT UNION V. MARTIN

BASKIND: Petitioner contends that the CA's opinion in this case should be reversed for two reasons: 1) a notice shortening agreement in a depository contract does not require proof of waiver even if the notice period is less than 1 year provided under the UCC; and 2) the CA erred in determining that art. 4.406 of the Uniform Commercial Code was inapplicable to this case.

This case presents some significance to the credit union industry as is evidenced by the filing of the amicus briefs. The opinion will have an impact on probably every deposit agreement that's currently in place in the State of Texas for credit union depositors.

Petitioner contends that the opinion should not stand as a published opinion in this jurisdiction because it places Texas out of step with the jurisprudence of other states in this country. Also the opinion is confusing and simply provides poor legal reason. It's confusing and it's not proper legal reasoning, because the CA first concludes that art. 4.406 of the UCC is inapplicable to the facts of this case. Then it turns to deal with the deposit agreement between the parties, which provided that the customer Martin had 60 days to give notice of irregularities in his account. In trying to determine whether Martin was bound by that depository agreement, the CA concluded that the deposit agreement was an attempt to waive Martin's statutory 1-year right provided under art. 4.406. It was circular reasoning. If art. 4.406 does not apply to this case, which petitioner contends that it does, then the parties are simply left with their deposit agreement, and the deposit agreement is enforceable.

ENOCH: The deposit agreement still refers to an item?

BASKIND: It does.

ENOCH: And if this oral request for transfer of these funds is considered an item or whatever it produces is an item, then 4.406 would apply, and then we just go to the question of whether or not the agreement can reduce that period from 1 year down to 6 months?

BASKIND: That would be correct.

ENOCH: But the question is - you talked about being out of step with other cases - do you have a case that has this kind of situation where there's been an altered signature card and an oral instruction to transfer funds that holds that 4.406 applies in those cases?

BASKIND: No, we have not cited any case - we haven't found any case that is exactly the same on the facts.

ENOCH: But our court has *La Sara Grain,* that takes an oral instruction to transfer some funds over a doctored signature card. And this court holds that that is not an unauthorized signature with respect to an item. So how do we get around *La Sara*?

BASKIND: I think *La Sara* is easy to get around. In *La Sara* the underlying fraud as you pointed out was the manipulation of the signature card. What the customer wanted - it was a corporate account - any two of four signatories to sign. The wrongdoer manipulated the signature card, crossed out the two and wrote in one, so the bank was deceived by the fraud in believing that any one authorized signatory could sign. So the underlying fraud in *La Sara* is the manipulation of the signature card.

ENOCH: Except in *La Sara Grain* they said, the checks recovered because they were unauthorized signatures for that very reason.

BASKIND: The court in *La Sara* found that a corporate signature that is signed by a person, one of two authorized signatories, was still an unauthorized signature for purposes of 4.406. To contrast the underlying fraud in *La Sara* and our case is the old fashionable traditional forgery. We do have a forgery in this case. Molly Blair according to Martin forged his name on what is called the "change card", which is really just a replacement for the original membership application, so that every time a transaction occurred in this case, the credit union was deceived by an old fashion traditional forgery. They believed that Molly Blair was authorized to act in the account because she had deceived them by forging Martin's name on the underlying document.

ENOCH: Isn't that what happened in *La Sara Grain*, the bank was deceived in to thinking only one signature was necessary?

BASKIND: It was deceived but it was a different kind of deception. It wasn't a forgery. But I think then the next reason we would distinguish *La Sara* in addition to the fact that the underlying fraud is different, is that in this case each time Blair calls the credit union and gives what is essentially an oral order, it is reduced to writing. There is no evidence in the record in the *La Sara* case that there was ever any writing created. There's only one telephone transfer I believe in *La Sara*. In our case each time a transfer was performed the credit union reduced it to writing and created what we contend is an item. And so on that basis *La Sara* is also distinguishable.

One of the amicus lawyers reviewed the record in *La Sara* and represented to this court that the underlying record reflects that there was no writing in *La Sara*. It was simply a phone call.

ENOCH: If *La Sara* cannot be distinguished, is *La Sara* - or do you have any commentators that talk about whether or not it's good law on that point with respect to the UCC?

BASKIND: I would argue that *La Sara* is not much precedential value here. First of all,

it doesn't deal with the fundamental issue in this case, which is, is a notice provision less than 1 year enforceable? It simply doesn't reach that point. And I don't think you ever - if this court wants to conclude that *La Sara* compels you to decide that 4.406 is inapplicable, you still then have to decide what the contract of the parties in this case was and whether it imposed a 60-day notice requirement is enforceable.

ENOCH: Except that that agreement also refers to the matter being an item. It seems to me the whole issue is, is there an item that had an unauthorized signature on it that the bank is entitled to require the depositor to notify them about?

BASKIND: I would respectfully disagree.

ENOCH: If an oral order doesn't reach the level of being an item, then it would seem that also affects the outcome under the depository agreement.

BASKIND: The credit union would disagree that the deposit agreement is limited to the term "item" as defined in the UCC. If you're going to apply art. 4 of the UCC and apply the definition of "item", then you're going to apply 4.406. If you're simply going to review the depository contract as a contract, what it says is that the customer has to report in regard to any item reflected on. And it's how are you going to interpret the word "item?" The common definition of "item" would not be the code definition of item. The common definition of "item" is any piece of information. So again, I think we find ourselves in circular reasoning. If you're going to apply the definitions of art. 4, then article 4 applies. If you're going to go outside of article 4, then you can construe the contract as any other contract. And it is clear from this record that these parties contemplated telephone transfers. One of the amicus briefs recites to the court that there are over 780 million telephone transfers in credit unions per year. The record of this case talks about the telephone center of the credit union where telephone transfers were conducted. Those transfers would only be reflected by the records generated by the credit union in the account statements and in these journal vouchers and sent to the customer. And it's in that context that you should then construe the meaning of the depository agreement.

Again, if you're going to apply the definition of "item" that is applicable under the code under art. 4, then art. 4.406 applies. Again, I think we find ourselves going in a circle here, which is exactly what the CA did in 1) going through the analysis that you're going through which is no item of unauthorized signature; and then getting to the deposit agreement and trying to determine whether it was enforceable and concluding that it involved a waiver of a statutory right provided by art. 4.406. I don't think you can have that both ways.

GONZALES: Your argument is that you can agree under the statute to shorten the notice period. Here, did the customer ever, as far as you know, see the deposit agreement? He was notified of the change under the terms of the deposit agreement?

BASKIND: The record is that the depositor testified that he never saw it and that he was unaware of it.

GONZALES: And your argument is, he continued to - he had agreed initially that he would be subject to any amendments of the deposit agreement?

BASKIND: When he signed his membership application, he signed an agreement that said he would be bound by the then current by-laws, rules and regulations and any amended thereafter.

GONZALES: Would he have any choice no matter what kind of amendment?

BASKIND: He would not have a choice. If he wanted to be a member of the credit union, he must agree to that.

GONZALES: So you could charge some extraordinary fee and he would not have a choice?

BASKIND: Absolutely not. All of these rules and regulations are governed by reasonableness, including the one we're talking about. The shortening period of time cannot be manifestly unreasonable. There's always going to be an overlay of reasonableness and compliance with federal regulations for example on this credit union. And that's another point I haven't made yet, is that this is a federal credit union regulated by federal regulations and examined and governed by the national credit union administration. So overlaying all of the things the credit union does or cannot do are those regulations.

ABBOTT: But there's no regulation that would have prevented you from providing better information to him, such that he perhaps would have had a greater probability of learning about the amendment?

BASKIND: Nothing restricted us from doing that. It is our contention that when we amended the depository agreement, we advised the members through a notice in the newsletter, which was sent to all members, and a statement on the account statement itself which was sent to everyone who had an account, that there was a new deposit agreement, that it was available in the 30 branches that are around the country and the world. This is a credit union that has a membership population that is always moving.

ABBOTT: And it was sent on a single statement, correct?

BASKIND: It was sent on a single statement and the newsletter. It was then available at the branches. Anytime the credit union member visited they could pick it up at the branch. In fact, the evidence in this case indicates that when Martin stumbled on to the problem in his account, he went and got the deposit agreement at the branch where he works. He works at the DFW airport. And also the newsletter said if you would like a copy of it call us. So it was available. And our

position in that regard is that that form of notification is consistent with that which is provided in the federal regulations relating to truth in savings. These are regulations promulgated by the NCUA and they specifically deal with when there are amendments to truth in savings disclosures, that once there's an existing account that the new actual text of the disclosure information does not have to be mailed to the member. They can merely be notified on a statement or in the newsletter. But the method in which we made available the notice of the deposit agreement was in the context of the federal regulations.

HANKINSON: The CA seems to have given a very literal reading to "item" as it's defined under the code. Would you agree with that?

BASKIND: I would not.

HANKINSON: You don't think that it requires at all a little bit of flexibility in the definition in order to reach?

BASKIND: Absolutely. There is a great deal of flexibility. The definition of item and in the comment it talks about that the choice of the term "item" was picked up by the persons who codified the UCC because it was banking language. When it talks about it it talks about paper. There clearly is a suggestion that item requires something in writing. I think we quote in our brief Professor Hofland(?) who says the same thing. He of course says that there should be a great deal of flexibility of what can be an item and he even suggests that when you look at the definition of writing in 2.01 of the code, it says that a writing is any intentional reduction to tangible form. And he says, that merely making an entry on the account statement itself reducing electronic communication or verbal communication to an entry on the statement itself ought to serve as an item for purposes of 4.406.

HANKINSON: Do you know how old 4.406 provision is and also the definitions that we have to look to underneath it?

BASKIND: The definitions I guess they were codified in the early 60's with the Uniform Commercial Code. I think adopted by Texas in 1967. But the underlying rule of 4.406, which is a customer has a duty to pay attention to his account can be traced back to *Leatherman v. Morgan*, 1886 case.

HANKINSON: I guess my point is, is that given the date of these provisions obviously the changes in the banking industry have been huge over the last 30-40 years, and so that's why I am asking. It seems to me the CA gave a very literal reading to the words that are used in the statute perhaps not looking at the comments as you are mentioning, but in fact looking at the words as used in the statute. And I'm curious - it seems strange to me that we haven't seen any case law in any other jurisdiction even where this question has been raised; whereas banking procedures have changed and technology has advanced so that transactions occur in different ways than perhaps they

did back in the early 60's. That's why my question to you is, is this a definition that is flexible in terms of expanding to cover the changes in the banking industry, or are we in some way bound to a more restrictive definition that is more literal as the CA said?

BASKIND: I think it's very flexible. And that's what the commentators say. And there are cases. There is the *Sabatino*(?) case that we cite where the underlying fraud relates to withdrawals from an account, then cashiers checks issued. So what comes back with the account statement is simply the account statement itself showing the withdrawals. That was a South Carolina case and the court holds that even though the items don't come back with the statement that the duty under 4.406 was invoked because there was enough information on the statement itself to cause the customer to inquire. And then they could have asked and they could have seen the items. So there is a court that recognizes that there's all different kinds of fraud and there's all different kinds of ways fraud can occur.

HANKINSON: In this instance then if he had looked at his statements he would have asked to see the journal entries since they were oral transfers. Is that how this same analysis would work?

BASKIND: This case is probably a case which is the other extreme. This credit union sent Mr. Martin 14 different mailings; 12 journal vouchers, each mailed individually; and two account statements in a 6-month period of time. And it's clear that he wasn't going to read his mail. He simply didn't look at anything we sent him. And so this is not a case that turns on the absence of paper or an attempt to communicate with the customer.

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RESPONDENT

LEWIS: I would like to jump directly to one of the arguments that Justice Hankinson raised about the definition of "item." Whether or not 4.406, that one specific provision of the UCC applies, because this is a financial commercial transaction, it's still governed by the UCC. The definition of "item" is governed by the UCC. And this is their agreement. It's to be construed strictly against them. So if they are going to have an agreement in a commercial transaction to which the UCC governs, the definition of "item" in the UCC that's elsewhere besides 4.406, regardless of whether 4.406 applies, applies. And "item" is defined as an instrument or order for the payment of money.

So here's a simple test. We can tell that these journal vouchers are not items and that that argument is ridiculous. Let's take one of these journal vouchers, let's take it to the credit union, present it to a teller and say, Okay, give me $5000. This is an order for the payment of $5,000. They are going to tell you very quickly, No that's not an order for the payment of $5,000. That's a receipt of $5,000 that's already been paid. So it doesn't meet the definition.

HANKINSON: Do you agree that these oral transfers are very routine with credit unions and

that the agreement between depositors and the credit union to allow oral transfers is a very regular provision?

LEWIS: Oral transfers are becoming more regular.

HANKINSON: And if that's the case, where are they governed and under what provisions of the UCC would we look to to determine what obligations or duties the depositor has vis-a-vis the transactions that are occurring at the credit union?

LEWIS: I believe, although the TC judge disagreed with me, that (4)(a) of the UCC, which governs electronic transfers and that would be an oral transfer, applies in that case. And in this case, I specifically during the trial asked their expert witness and that's cited in my brief. I took the comment from (4)(a) which are electronic funds transfers. There is an example given in No. 1 of the comments. I went over that example with their expert witness and they admitted that this transaction was exactly like the example given. It didn't involve a wire transfer between two banks. It involved a customer transferring funds in his own bank between two separate accounts. And if this is controlled by (4)(a), the only penalty for failing to give notice as required by (4)(a) is you don't get interest.

HANKINSON: The funds transfer provision seems to apply to transactions as between various financial institutions.

LEWIS: Again, the comment to (4)(a), comment no. 1 gives an example. And that example is exactly like this. It's a transaction within a single financial institution from one account to another by a depositor. So I believe the comment applies.

HANKINSON: So if the provisions of (4)(a) apply, then there is no duty on the part of the depositor to give notice within a certain period of time if there is some sort of a problem with the transaction?

LEWIS: No, there is still a duty.

HANKINSON: What are the parameters of that duty and where do we find it?

LEWIS: It's in (4)(a) something. But if you fail to give notice, the only penalty is you cannot recover interest.

HANKINSON: But can you give us what the summary of - is there a time period in which the person has to do?

LEWIS: I believe it's a one-year time period also.

HANKINSON: And if you don't give notice within that time period, you just can't recover interest but you get all your money back?

LEWIS: Yes. And that brings up the question, the underlying issue that I think the court has to address here regardless of whether this is covered by 4.406 or (4)(a), the bottom line is, can a financial institution modify the limitations period in which you have to bring a claim by a provision in their own deposit agreement? Now in what I consider almost an act of divine guidance and intervention in this case, there is a law review article that came out this month in the Texas Tech Law Review. Professor Sosanski(?) from the UH Law School has written an article entitled Deposit Agreements, A Wall of Protection or a Wall of False Foundation. That article tracks our position in this case almost exactly and in fact argues it much more persuasively than I'm able to do so with much better analysis. And what's very important in that case, all of the cases relied on that they say are the other jurisdictional authority that Texas is going to be out of step with, all of those cases trace back to a single case from New York called *Parent Teacher Association*. *Parent Teacher Association* was the case that said, Yes, you can modify these deposit agreements, this time period under 4.406 to 14 days.

HANKINSON: This certainly seems to undercut your position that (4)(a) applies, because the provisions that are talked about in connection with this kind of transaction are the ones that petitioner has cited for us.

LEWIS: No, it doesn't undercut (4)(a) because most of the cases involve checks, traditional forgery. *La Sara* is the only case that involves an oral transfer. Now in the *Walker* case that's cited in my brief, the federal court in Houston reviewed an oral transfer and said (4)(a) does apply. But again the TC and the CA disagreed with me.

Going back to the law review article, The *Parent Teacher Association* case. What they don't tell you in their brief when they cite it and quote from it extensively is that *Parent Teacher Association* was a trial court level opinion. In New York the trial judge can issue opinion. Three separate appellate decisions from New York after *Parent Teacher Association* by three-judge panels and decided after *Parent Teacher* refused to follow it and effectively overruled it. Now that's important because the *Bassy(?)* which they also rely on so heavily relies on *Parent Teacher Association* almost exclusively as its authority. And what's also important is that New York does not have a provision, a public policy like Texas does that's found in 16.071 of the Civ. Prac. & Rem. Code. That provision expressly states that no contract can impose a condition precedent. They call this is a condition precedent four times in their brief. 16.070 says, no condition precedent of less than 90 days. Anything less than 90 days is void on its face.

Now they may say, well it's not really a condition precedent. It's an effective statute of limitations. And in fact, the PTA case called it a short and statute of limitations. The *Bassy*(?) case called it a short and statute of limitations. Professors White and Sommers in their commentary calls it a short and statute of limitations. That raises another problem. The preceding

section of the Civ. Prac. & Rem. Code, 16.070 says, parties cannot contractually agree to any period of limitations less than 2 years. So although the legislature can set a 1-year statute of limitations under 4.406, the parties by agreement may not do so though the legislature has spoken specifically to that attempt. And that's what Professor Soshanski discusses.

So in other words, the position that the credit union is asking this court to take is an extremely activist position. They are asking you to side-step 16.070 and .071. They are asking you to avoid the public policy arguments that are expressed by the _____. They are asking you to avoid the public policy arguments that are contained in the UCC itself. They are asking you to overrule *La Sara Grain*. And I would respectfully assert that the court should not do that.

BAKER: Does the fact that he asserts that because this is a federal credit union it's governed by federal regulations and therefore your argument wouldn't apply?

LEWIS: No. The federal regulations do not supersede state law in this case. There was no pleading or proof in any of the TC or the CA that these laws were superseded by federal law. And all of the cases involving national banks for which there is a national banking act, as well as federal credit unions that are on the books, none of them, there is not a single case that says state law is supplanted by any federal provision.

ENOCH: Now it's your position that the three appellate decisions in New York all say that the depository agreement cannot shorten the period of time for notifying the bank?

LEWIS: Yes. Specifically the *Hirdsong(?)* case which is mentioned in one of the amicus briefs in a footnote, and which is also discussed in the law review article. The *Hurtsong(?)* case from New York says that these kind of provisions under New York law are void against public policy because they are effectively a disclaimer of the bank's own negligence. And 4.103 which says, you can modify the provisions of the UCC by agreement say except you cannot disclaim your own negligence. If they are shortening the time period in which you can report one of these things or have a right to recover, they are disclaiming their negligence beyond that time period. And that's the effect. And in fact, Professors White and Sommers state in their commentaries that a short limitations period serves as effectively to enable the bank to escape liability as an outright disclaimer. So, this is also void because it's an attempt to disclaimer on negligence.

In that regard, I would like to address their position whether this is a duty or a right that's being waived. I think the easy way to look at it is this. Under 4.406 or the common law whether or not it applies, prior to the deposit agreement (if we just look at the statutes without the deposit agreement) Tim Martin has the right to object to unauthorized transactions on his account from day one to day either 365 or four years under a common law thing. He has that right. After the deposit agreement that's gone. At day 60 it's cutoff. So his rights on day 61, 62 all the way through are gone. This is a waiver of right. And the attempted distinction between a duty and a right is...

ENOCH: But this right - if the parties have no relationship until he goes to them and says, I want to have a relationship with the credit union, and the credit unions says okay, and that means I'm going to hold your money and I'm going to pay you interest and we will do all this sort of stuff, so I agree with them, Okay, you can hold this money and here's our contractual right. Where does the right come in for this member in the credit union other than what's ever in the contract? What other rights outside the contract exist as between the credit union and one of their depositors?

LEWIS: The right to bring an action for damages when that contract is breached. This court has held in *La Sara Grain* that when they pay an unauthorized transaction, they are breaching the contract.

ENOCH: And so there's some public policy that if you enter into a depository contract with the bank as a part of the agreement, the parties cannot agree to a term limitation period less than...

LEWIS: I would say 90 days under 16.071, or you could say that the legislature considered this and debated this when they enacted the UCC and they said, one year and anything less than one year - it depends on how far the court wants to go.

ENOCH: But the UCC is subject to what the other people contract isn't it?

LEWIS: Except they cannot disclaim the bank's responsibility for its negligence. And when they are shortening that time period that's what they are doing. They are cutting off their responsibility.

ABBOTT: Where in here do you find that parties cannot contract contrary to what may be prescribed in 4.406 or whatever?

LEWIS: It's in 16.071 of the Civ. Prac. & Rem. Code, and 16.070. The legislature says it's void. They don't say voidable or subject to negotiations. They say it is void as a matter of law.

GONZALES: But they could shorten it to 90 days couldn't they?

LEWIS: Under 16.071 it's arguable that they could short it to 90 days if they want to call it a condition precedent. But if it's a short and statute of limitations, they can't shorten it to less than the one-year period the legislature enacted. Either way for the facts of this case, the 60 day attempt is void.

Also I believe that this case is exactly like *La Sara Grain*. As you noted it involved an altered signature card. Now they attempt to distinguish from *La Sara Grain* by saying, Wait, in La Sara there is no indication in the record that the bank had any written record of these oral

transfers. Right. I'm sure that this National Bank of Mercedes had no written evidence anywhere of the transactions that had occurred at their bank. And the national bank examiners would be very happy to hear that. That's a ridiculous extrapolation of the facts in *La Sara*. Of course, the bank had a written record. But they didn't go through these mental gymnastics of trying to say that the teller's initials on a transaction made by Blair operate as Martin' signature. That's ridiculous.

ENOCH: If an item can simply be a notation on a statement, if an item includes the notation on that statement that's backed up by a written record of a transfer or an order of withdrawal of certain funds to go, that would cover this transaction?

LEWIS: No.

ENOCH: Why would that not cover this transaction?

LEWIS: The item is not the writing on the statement. The item is the underlying written record that's reflected on the statement. The check, the actual check, is the item.

ENOCH: Why couldn't it be the authority to make an oral withdrawal of funds?

LEWIS: Because the UCC's definition of item requires it to be an instrument or order to pay money. And the UCC duty here and the contract duty is to examine for your forged signature. There's no forged signature of Martin on any of those things. So you've got to have not only an item, but you've got to have an alteration or a forgery on that item.

ENOCH: So the order to pay has to be in writing? The order itself to pay has to be in writing?

LEWIS: Yes.

ENOCH: So there's millions of transactions out there that are not recovered by the UCC?

LEWIS: No.

ENOCH: What about an on-line paying the bill?

LEWIS: There's an order to pay. It's electronic but it's in writing electronically. But it's an order to pay. It's not a receipt of a transaction that's already occurred. It's an order. If I go on Quicken on my home computer and pay my bills by filling out that payment request, I am placing an order to pay that. I am authenticating that order with some kind of pen code. There's no evidence that that happened in any of these cases.

ENOCH: But an oral order - I call on the phone and I'm talking to a human being on the other side, and they go check the pen code, basically the signature card to see if this is the person authorized to make this order. That somehow is not covered by the UCC because it's not in writing, that order is not in writing?

LEWIS: No. I believe (4)(a) covers it.

HANKINSON: But if we disagree with you about (4)(a) applying to this kind of transaction, then there's no place else to look in the code for an oral transaction to be covered, is that right?

LEWIS: I'm not aware of another place.

HANKINSON: So if we disagree with you, then these oral transactions that are occurring daily are not covered by the UCC?

LEWIS: No, they are covered by the UCC. They are not covered by 4.406. That's what the court held in *La Sara*.

HANKINSON: But in terms of notice provisions, duties to report, and so on and so forth, we have no other place to look in the UCC if we disagree with you about (4)(a) applicability?

LEWIS: If 4.406, that is the only provision that provides; therefore, if that doesn't cover it then there is no notice provision in the UCC. However, whether or not 4.406 applies - you know now these things are all governed by comparative negligence standard, and that's a modification that's been made.

HANKINSON: If there's no provision under the UCC that govern's why doesn't the deposit agreement then govern?

LEWIS: The deposit agreement would still have to comply with 16.070 and .071, which the legislature says it's void by the notice period being shortened to less than 90 days at a minimum. If it was more than 90 days, then it might cover. But also remember the TC made a finding. They did not request any additional findings. The TC made a finding of fact and a conclusion of law that this deposit agreement was vague and ambiguous. And waiver requires a voluntary relinquishment of a known right. If it's vague and ambiguous how does Martin know what he's waiving.

HANKINSON: But we have to decide that there really is a waiver though first before that analysis ever even applies. And the UCC speaks in terms of duty as opposed to right and waiver.

LEWIS: But a duty and a right are the same thing. You have a right to a jury trial, but you have a duty to pay the jury fee.

HANKINSON: Those are two very different things. Duty is an obligation that you have to do something. You may get a benefit as a result of it or earn a right, but duty and right are not synonymous under the law are they?

LEWIS: My point is that in reality duties and rights always correspond with each other. Their attempted distinction is that...

HANKINSON: But they are different legal concepts?

LEWIS: Yes. But it's still his right that has been waived, because his right is the right to complain. He's not waiving his duty to examine the statement. That's not what's being waived. What's being waived is his right to recover. And that is a right provided by law, both common law and statute.

HANKINSON: Or else he has a duty under the law to do something in order to be able to get his money back. That's another way of looking at it.

LEWIS: Yes, but that's not what's being waived.

HANKINSON: That presumes that there's a right being waived. If you look at it from a duty analysis and you read the statute that way, then if he has a duty and he properly exercises his duty, then certain benefits come his way.

LEWIS: Right. But they are conditioning his right to recover, which I don't believe they can do.

GONZALES: Is it or isn't it your position that any attempt to shorten a notice period constitutes an attempt to limit the measure of damages?

LEWIS: Yes, that is my position. The legislature debated this and said one year. Any attempt to modify that is an attempt to disclaim their own duty of good faith. And that's what the *Herzotz(?)* case in New York concluded when they reviewed this, as well as cases in Ohio, Alabama and West Virginia have concluded that.

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REBUTTAL

BASKIND: I think the discussion - maybe we ought to bring it back to the concept of this 90-day statute under 16.071. It is simply inapplicable. And the way to decide that is fairly easy. 4.406 in the UCC has two defenses. One is the one we've been dealing with primarily. It's called

the absolute notice provision - 1 year. The other defense in that is called the repeater rule. And under the pre-1996 code, there was a notice requirement of 14 days and a defense would be created. That is the customer had 14 days in order to give notice of problems in his account and if he failed to do that, if the same wrongdoer continued to act, then the customer was cut-off. That was lengthened to 30 days in January 1996 with the amendments.

So I guess what Mr. Lewis is arguing is that the legislature in 4.406 and the repeater rule created notice provision that is inconsistent with 16.071. Well that's not right, because 16.071 if you trace it back it's been on the books a long time. The code comes into effect in early 1960's with the 14-day rule. It then is modified in 1996. And proper statutory construction is is that the later is going to control over the earlier. So the later UCC rule is going to control over the earlier. And more importantly, the specific statute is going to control over the general.

Our legislature enacted the UCC and it creates the basic law concerning relationship between customers and financial institutions. And they would not draft in a notice provision that it's violative of some other statute. And if it is, then the specific statute in the UCC is going to control over general.

ENOCH: Let's talk about the definition of an "item." Mr. Lewis argues that a demand for an oral order to pay is not in writing. And he says item is defined throughout the UCC as being something in writing that's an order to pay.

BASKIND: If this court believes that an oral transfer has got to be reduced to writing in order for art. 4 to apply, then we have that very thing happening. The journal vouchers are the attempt of the teller to write down what they are being told. They have on the bottom of them a blank and it has the word printed on there "signature" and they are signed. They are not mere receipts. Particularly if you look at them from the perspective of Martin. Money is being taken away from Martin's account and put into Blair's account. Martin didn't receive anything. They are a reduction to tangible form, which is the definition of writing. Any reduction to tangible form is a writing by a person acting on behalf of someone they think is authorized to act in the account.

The old fashion forger would rip a check out of a check book and forge and send into the collection process. There you have a piece of paper. This one, the modern forger, calls on the phone because she's already deceived the financial institution by what? An old fashion forgery. She sends in a change card and sets up the credit union believing that she's now authorized to act on the account and so she perpetrates her fraud by phone and the tellers write it down. And she knows the tellers are writing it down because on the third transaction she does it in person. And even in person when she communicates person to person, the tellers write it down for her. So again, the case should not turn on who writes the item, who prepares the item. And we've given an example. For example, pre-authorized drafts. You give your insurance company information about what your checking account number is. They send communications to various banks that get back to your bank and the $200 premium goes back to the insurance company. And on your statement

under “other transactions” there will be all your preauthorized drafts.

And that goes back to Justice Hankinson’s question: What law controls those? Well there are other laws: electronic funds transfers are computer to computer transaction ATM transaction. Federal regulation controls that. (4)(a) does control wire transfers and some others, but it doesn’t control when the flow of instructions comes from the person getting the money. Even if you think this is otherwise a funds transfer, this is what’s called a debit transfer. And a debit transfer is one where the instructions comes from the person who receives the money as opposed to the person who sends the money. A classic example would be a wire transfer. You call up the bank and say, wire $1 million to the Bahamas. That’s a funds transfer and it’s called a credit transaction - instruction coming from the person sending the money.