

No. 08-0908

**In the Supreme Court of Texas
Austin, Texas**

GUARANTY BANK

Petitioner,

v.

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

Respondent.

FROM THE FOURTH COURT OF APPEALS, SAN ANTONIO TEXAS

No. 04-07-00503-CV

**AMICUS BRIEF OF INDEPENDENT BANKERS ASSOCIATION
OF TEXAS IN SUPPORT OF PETITIONER**

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IDENTITY OF AMICUS CURIAE AND PAYMENT

Pursuant to Rule 11 of the Texas Rules of Appellate Procedure, the following brief is presented on behalf of the Independent Bankers Association of Texas (“IBAT”). IBAT is a trade association representing over 500 independent community banks domiciled in Texas. Every member offers deposit accounts for estates, each of which will potentially be affected by the court of appeals’ opinion.

The source of any fee paid for the preparation of this brief is IBAT. Copies of this brief have been served on all attorneys of record as reflected in the Certificate of Service.

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TO THE HONORABLE SUPREME COURT OF TEXAS:

NOW COMES Independent Bankers Association of Texas and respectfully submits this brief in support of the Petition for Review filed by Guaranty Bank.

STATEMENT OF FACTS

Based on the Petition for Review, it appears that John Albert Thompson died intestate on January 30, 2000. At the time of his death, he had a checking account at Guaranty Bank. Two months later, Melvyn Morris Spillman (“Spillman”) represented to

the bank that Thompson had died and that he was Thompson's nephew. Spillman presented Letters of Administration and a death certificate to Guaranty Bank and requested to be named on Thompson's account. Guaranty Bank, relying on the documents that Spillman had provided to it, named Spillman on the account as administrator. Spillman made several deposits to the account, apparently from other estate assets. He then withdrew funds over a period of time. Guaranty Bank closed the account on or about September 13, 2001 because the account had a negative balance.

Several years later, Christa Lenk qualified as the administratrix of the Thompson estate. Almost two years after that, she notified Guaranty Bank of the appointment and demanded that the bank tender \$163,064.99 plus other sums belonging to Mr. Thompson on deposit. Presumably because there was nothing in the account, Guaranty Bank did not comply with the demand. In fact, as of the date of the demand, the account had been closed for several years because of a negative balance.

Guaranty Bank has now learned that, although the Certificate of Death presented to it was correct, the letters of administration had been falsified by Spillman. Spillman was a prior Bexar County Probate Clerk and had apparently falsified letters of administration in hundreds of estates, continuing a pattern of theft and fraud for years until he was caught, prosecuted and incarcerated for a ten-year term.

ARGUMENT AND AUTHORITIES

I. Introduction.

Guaranty Bank followed industry standard procedures in handling the account of Thompson upon his death. The Bank accepted documentation that is commonly required

for such estates and named the administrator as the appropriate signatory. Furthermore, the Bank closed the account when it had a negative balance, a practice that is not only common in the industry for banks but is essentially mandated by regulatory overdraft “best practices.”

The decision by the court of appeals basically allowed Lenk to reopen a closed and nonexistent deposit account in order to make a claim. Furthermore, the court of appeals completely ignored the actions of the putative administrator of the estate in adding to and withdrawing funds to the account. It was the latter’s actions that caused damages, if any, to the Thompson estate. Allowing a nonparty to a deposit account to reopen it years after it was closed creates the potential for significant chaos in deposit account relationships for Texas institutions. Furthermore, this decision casts doubt on long-standing account-opening procedures for estates, and appears to place a burden on institutions to perform investigations independent of documentation or to proceed at their peril.

II. Account Documentation Procedures.

New account officers in banks receive training in account-documentation procedures and account-opening requirements. In addition to training, many officers rely on *Account Documentation*, an online manual by Don Totusek published by The Book Store Inc. This manual describes the appropriate documentation for an estate account. Banks typically require either letters testamentary or letters of administration. *Account Documentation* notes that these can either be an original copy with seal or a photocopy taken of an original. According to section 186 of the Texas Probate Code, the letters are sufficient evidence of the appointment and qualification of the personal representative of

an estate. TEX. PROB. CODE ANN. § 186 (Vernon 2003). Thus, banks do not go behind the letters of administration in order to verify that the letters have been properly issued by the court. The letters themselves, with the court's seal, are proof of that.

In Texas, there are currently 704 banks with 6,887 offices, according to the FDIC. <http://www2.fdic.gov/sod/sodSumReport.asp?barItem=3&sInfoAsOf=2008>. As of June 30, 2008, these institutions held \$4.8 billion in deposits. *Id.* It would be unduly burdensome to require these entities to personally investigate every single estate before opening an account. Rather, it is reasonable to apply industry best practices and standards and accept letters testamentary or letters of administration as evidence of authority for an estate account.

It is also illustrative to look at the Customer Identification Program Rule that implements the USA PATRIOT Act. 31 C.F.R. § 103.121. For entities such as estates, the rule provides that it is appropriate to obtain documentary evidence to verify the customer's identity. In the case of an estate, the documentary evidence for verification is the letters testamentary or the letters of administration. Furthermore, after comments from thousands of respondents, the regulators concluded that it is not necessary for an institution to verify the identity of signatories of entities. *See* Customer Identification Programs, 68 Fed. Reg. 25,090-01, 25,094 (May 9, 2003). Banks may verify identities, but are not required to do so. In any event, if the bank verified the identity of Spillman by inspecting his driver's license, that would not have revealed the fact that the letters of administration were in fact counterfeit.

III. Account Closing Procedures.

The Thompson estate account was appropriately closed by the Bank when the account had a negative balance. In 2005, all of the federal banking regulators issued guidance on overdraft protection programs. The Office of Thrift Supervision, which regulates Guaranty Bank, issued a separate guidance that was virtually identical to the joint guidance. *See* Guidance on Overdraft Protection, 70 Fed. Reg. 8428-01 (February 18, 2005). As part of the safety and soundness considerations for overdraft situations, overdraft balances should generally be written off when considered uncollectible but, in any event, no later than 60 days from the date first overdrawn. In addition, institutions should have established procedures for identifying consumers who do not manage their accounts in a satisfactory manner. Where appropriate, overdrawn accounts should be not only charged off but also closed.

In addition, banks often unilaterally close accounts in other situations. For example, when a pattern of fraud is detected, an institution is required to file a Suspicious Activity Report (“SAR”). 12 C.F.R. § 563.180. At that time, the bank should make its own determination as to whether the account should be closed to prevent a continuing fraud. Even if law enforcement requests that a bank maintain an account with suspicious activity, the bank still has the ultimate responsibility for deciding whether to do so. *See* Financial Crimes Enforcement Network Guidance FIN-2007-G002 (June 13, 2007) at http://www.fincen.gov/statutes_regs/guidance/pdf/Maintaining_Accounts_Guidance.pdf.

Furthermore, banks routinely close accounts that become uneconomical to maintain. When balances drop to a very low level, the cost of data processing, reporting,

maintaining federal reserves, and other factors may make the account cost more than it is capable of earning for the institution. Thus, banks will typically reserve in their account agreements the right to close the account and send the balances, if any, to the depositor.

The opinion of the court of appeals appears to destroy the ability of banks to close accounts for these and other legitimate reasons. If a non-party to the account can simply make a demand many years later and thereby re-open the account, then the critical certainty that is necessary for management of deposit account relationships is eviscerated.

CONCLUSION AND PRAYER

The lessons learned from the court of appeals' opinion would seem to be that banks may not rely on documents in opening estate accounts, and they may not close accounts effectively. The lack of certainty created by the court of appeals could lead to higher costs for such customers or a refusal to establish estate accounts. Thus, the impact on account management for financial institutions in Texas is extremely significant. The cost of investigating all potential entity customers would be astronomical both for financial institutions and for estates, which would experience delay in administration. The potential liability for closed accounts years after closure is unimaginable.

For these reasons, IBAT would respectfully request that the Court grant the petition, reverse the judgment of the court of appeals, and render judgment in favor of Guaranty Bank in accordance with the summary judgment granted by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amicus Brief of Independent Bankers Association of Texas in Support of Petitioners' Motion for Rehearing has been forwarded to all counsel and parties of record, listed below, on the ____ day of January, 2009 by Certified Mail, Return Receipt Requested.

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