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Artículo 1 sobre los principios generales

A. LA APLICACIÓN SUPLETORIA DEL COMMON LAW Y DE LA EQUITY

THE FRENCH LUMBER CO., INC. & others, v. COMMERCIAL REALTY & FINANCE CO., INC. & another SUPREME JUDICIAL COURT OF MASSACHUSETTS 346 Mass. 716; 2 U. C. C. Rep. Serv. 3 December 3, 1963, Argued January 15, 1964, Decided

OPINION BY: SPALDING [*716] [**508] This bill in equity seeks to determine the ownership of certain funds derived from the sale of an automobile at a public auction.

The judge made findings of the material facts. The findings and evidence establish these facts: On February 9, 1959, The French Lumber Co., Inc. (French), purchased a 1959 Cadillac automobile and financed this purchase through the Ware Trust Company (Ware). French received $4,600 [*717] which together with a finance charge of $460 resulted in a total indebtedness by it to Ware in the amount of $5,060 which was to be repaid in twenty-three successive monthly instalments of $207 each."French entered into a Uniform Commercial Code security agreement as security for its note," and this agreement was duly recorded.

On July 10, 1959, French pledged its existing equity in the Cadillac to the defendant Commercial Realty and Finance Co., Inc. (Commercial), as collateral security for funds advanced by Commercial. Commercial's security interest was duly recorded. The note to Commercial was in the sum of $8,040 and was payable in sixty monthly instalments of $134. In addition to the equity in the Cadillac this note was secured by a real estate mortgage, a chattel mortgage and assignments of life insurance. The

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note was signed by French, Arthur T. Winters and Charles W. Proctor.

French failed to make payments under its agreement with Ware and in the latter part of July, 1959, Ware turned over the French chattel mortgage and note to its attorney, Mr. Schlosstein, for the purpose of foreclosure. Arrangements to refinance the mortgage having come to naught, Mr. Schlosstein ordered repossession of the Cadillac on August 15, 1959. In September, 1959, Winters and Proctor on behalf of French conferred with Associates Discount Corporation (Associates) about refinancing the Cadillac then in Ware's possession. As a result of these negotiations Winters and Proctor entered into a security agreement with Associates, which was duly recorded, covering the refinancing [**509] of the Cadillac for the total amount of $5,022. Upon receiving a note in this amount signed by Winters and Proctor, Associates issued its check in the sum of $4,256 payable to Ware, Winters, and Proctor. This check was turned over by Winters to Mr. Schlosstein on September 4, 1959, and he made a notation on the French note that it was paid in full. Subsequently the Ware security agreement and discharge were sent to Associates. On the check given by Associates was a notation over the indorsements of Winters, Proctor, and Ware that it was in payment in full for the Cadillac.

[*718] On August 30, 1960, Associates repossessed the Cadillac because of defaults in payments. A public auction followed and the present controversy has to do with the ownership of the proceeds ($3,200) of the foreclosure sale. Commercial asserts that it is entitled to the proceeds. Associates asserts that it is subrogated to the rights of Ware and is therefore entitled to the proceeds. After finding the foregoing facts the judge concluded: "There was nothing to indicate that French, Winters or Proctor ever informed Associates that Commercial held any security interest in the

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Cadillac over and above the interest held by [Ware] I infer from the evidence that Associates had no knowledge of this situation. It is incredible that Associates would not have taken appropriate protective steps by way of an assignment from the bank. If the assumption is made that Associates was negligent in failing to check the records, this negligent act will not necessarily bar Associates from obtaining the relief it seeks through subrogation. Such negligence was as to its own interests and did not affect prejudically the interests of Commercial. There has been no change of position by Commercial. It is left exactly in the position it originally was in. It had a claim known by it to be subordinated to [Ware] . [Ware] was paid by Associates. If Associates had taken an assignment from [Ware], Commercial would have had no cause for complaint."

The judge ordered the entry of a decree declaring that Associates is entitled to the $3,200 arising from the proceeds of the auction sale. From a decree accordingly Commercial appealed.

Commercial seeks to establish rights in the proceeds prior to the rights of Associates. That part of the Uniform Commercial Code (*G. L. c. 106, § 9-312 [5] [a]*), here pertinent, provides that the order of filing determines the order of priorities among conflicting interests in the same collateral. Under this provision the order of priorities would be: Ware, Commercial, and Associates. This establishes Commercial's priority over Associates unless Associates can establish a right to succeed to Ware's priority.

[*719] A security interest can be "assigned" to another creditor without loss of its priority even if no filing is made. G. *L. c. 106, § 9-302 (2)*. Thus Ware could have made an assignment of its security interest to Associates, and Associates would then have acquired Ware's priority over Commercial. But no such assignment was made.

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Associates could also acquire Ware's priority through the doctrine of subrogation. For cases analogous to the present where this doctrine has been applied, see *Hill v. Wiley, 295 Mass. 396*; *Worcester No. Sav. Inst. v. Farwell, 292 Mass. 568*; *Home Owners' Loan Corp. v. Baker, 299 Mass. 158*.

In *Home Owners' Loan Corp. v. Baker, supra,* where the doctrine of subrogation was discussed, it was said at pages 161-162, "The plaintiff, having paid the debts of the defendant out of its funds and taken its mortgage in the mistaken belief that it would have a first lien on the premises, was not officious. In such circumstances equity has given relief by way of subrogation when the interest of intervening [**510] lienors were not prejudicially affected."

The trial judge, having found that the conduct of Associates did not prejudice Commercial or cause it to change its position, was of opinion that the principle of the cases cited above was applicable and accorded Associates priority over Commercial. Commercial argues that Associates has elected to stand on its own later security interest and should have no rights to Ware's interest. We are of opinion that this argument lacks merit. Associates was seeking to collect its own claim. This was not inconsistent with its present claim for subrogation to Ware's rights.

The decisions on subrogation discussed above are not superseded by the Uniform Commercial Code. Section 1-103 of the Code provides in part, "Unless displaced by the particular provisions of this chapter, the principles of law and equity shall supplement its provisions." No provision of the Code purports to affect the fundamental equitable doctrine of subrogation.

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Commercial argues that even if Associates is entitled to subrogation its rights can rise no higher than Ware's. [*720] This, of course, is true. H*ome Owners' Loan Corp. v. Baker, 299 Mass. 158, 162*. The facts establish that Ware received $4,256 from Associates in payment of the balance due on French's debt to Ware. They also show that Associates received $1,297.50 in payments by French on its debt to Associates. Commercial argues that the $1,297.50 in payments made to Associates by French should be allocated as payment on the $4,256 balance owed to Ware at the time Associates paid off the debt to Ware. This could limit Associates' subrogation rights to $2,958.50. We do not agree. Associates had a right to enforce its own claim without displacing its right to subrogation to Ware's security. Associates is entitled to be subrogated to the full $3,200 of the proceeds.

Contrary to the contention of Commercial, the failure of French to disclose to Associates the existence of Commercial's security interest would have no effect on Associates' rights to subrogation.

The decrees are affirmed with costs of appeal.

So ordered.

¿Este caso supone un ejemplo en el derecho privado de Estados Unidos de la aplicación del principio *lex generalis derogat lex specialis*?

B. LA BUENA FE

LA SARA GRAIN COMPANY, et al., Petitioners v. FIRST NATIONAL BANK OF MERCEDES, TEXAS, Respondent SUPREME COURT OF TEXAS 673 S. W.2d 558; 38 U. C. C. Rep. Serv. 963 May 23, 1984, Decided

OPINION BY: SPEARS [*561] This action concerns a bank's liability for honoring checks with fewer than the

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required number of signatures, failing to follow a restrictive endorsement, and other alleged wrongful acts and deceptive trade practices which allowed an employee to embezzle funds from his employer. After a non-jury trial, the district court rendered judgment against the bank for $911,329.66; that figure included actual damages, additional damages under the Deceptive Trade Practices Act (DTPA), interest, and attorney's fees. The court of appeals reversed the judgment of the trial court and rendered judgment that plaintiff La Sara take nothing.*646 S. W.2d 246*. We affirm that portion of the judgment of the court of appeals that removed the award of DTPA additional damages. We reverse the judgment of the court of appeals in all other regards, and affirm the trial court judgment for actual damages. We remand the cause for the consideration of a factual insufficiency point and for the recalculation of prejudgment interest.

La [**2] Sara Grain Company, a corporation, hired Harold Jones as general manager and opened a checking account with First National Bank of Mercedes in 1975. La Sara filed with the bank a corporate resolution naming the four officers of the corporation as authorized signatories and providing that any two of them could sign checks for the corporation. Jones was one of the officers named in this resolution. The bank also provided La Sara with a signature card; however, during its circulation among the four officers, the card was altered to require only one signature rather than two. From the spring of 1975 to the fall of 1978, the bank honored checks drawn on La Sara's account bearing the signature of only one officer, ordinarily Jones, the officer in charge of La Sara's day-to-day affairs. During this period, La Sara received monthly statements of its account with the bank.

In the fall of 1978, La Sara fired Jones. An audit subsequently revealed that Jones had embezzled over

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$300,000. In July of 1979, La Sara filed suit against Jones to recover the amounts embezzled. La Sara thereafter amended its petition to join as defendants Fidelity & Deposit Company of Maryland and the First National [**3] Bank of Mercedes. Prior to trial, La Sara settled its claims against Jones and Fidelity. Jones agreed to make restitution; Fidelity paid $90,000 to settle La Sara's claim on a fidelity bond and then intervened in La Sara's suit against the bank, claiming a right to subrogation.[1]

1 Although La Sara and Fidelity have filed separate applications for writ of error their arguments are the same and will hereafter be attributed only to La Sara.

I. Application of TEX. UCC § 4.406(d)

La Sara's primary complaint at trial was that the bank had breached the depository contract by paying checks signed only by Jones without the second signature required by the corporate resolution. The bank denied liability. The basis of the bank's defense was that it had sent La Sara monthly statements accompanied by all checks paid, but that La Sara had failed to examine the statements and report the unauthorized signature within the one-year period prescribed by *section 4.406(d)*. T*ex. Bus. & Com. Code Ann. § 4.406(d)* (Tex. [**4] UCC) (Vernon 1968).

Section 4.406 places a duty upon the depositor to promptly examine his bank statement and report to the bank the discovery of any "unauthorized signature or any alteration." [2] *Id. § 4.406(a)*. If the depositor [*562] fails to comply with this duty, the bank is protected from loss so long as it has exercised ordinary care and paid the item in good faith. I*d. § 4.406(b)*, *(c)*. If a depositor does not report an unauthorized signature within one year from the time the statement and items are made available to him, the bank's care or lack thereof becomes irrelevant, *id. § 4.406(d)*; at

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that point, the customer's only claim is that the item was not paid in good faith. I*d. § 4.406(d)*.

2*Tex. Bus. & Com. Code Ann. section 4.406* provides:

§ 4.406. Customer's Duty to Discover and Report Unauthorized Signature or Alteration

(a) When a bank sends to its customer a statement of account accompanied by items paid in good faith in support of the debit entries or holds the statement and items pursuant to a request or instruction of its customer or otherwise in a reasonable manner makes the statement and items available to the customer, the customer must exercise reasonable care and promptness to examine the statement and items to discover his unauthorized signature or any alteration on an item and must notify the bank promptly after discovery thereof.

(b) If the bank establishes that the customer failed with respect to an item to comply with the duties imposed on the customer by Subsection (a) the customer is precluded from asserting against the bank

(1) his unauthorized signature or any alteration on the item if the bank also establishes that it suffered a loss by reason of such failure; and

(2) an unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank after the first item and statement was available to the customer for a reasonable period not exceeding fourteen calendar days and before the bank receives notification from the customer of any such unauthorized signature or alteration.

(c) The preclusion under Subsection (b) does not apply if the customer establishes lack of ordinary care on the part of the bank in paying the item(s).

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(d) Without regard to care or lack of care of either the customer or the bank a customer who does not within one year from the time the statement and items are made available to the customer (Subsection (a)) discover and report his unauthorized signature or any alteration on the face or back of the item or does not within three years from that time discover and report any unauthorized indorsement is precluded from asserting against the bank such unauthorized signature or indorsement or such alteration.

[**5] *A. La Sara's Checks*

The courts below interpreted the term "unauthorized signature" differently and therefore disagreed on the application of *section 4.406*. The trial court rejected the bank's defense under *section 4.406*. It found that, because Jones's signature was one of four authorized in La Sara's corporate resolution, the checks were not paid on an "unauthorized" signature. The court of appeals, on the other hand, concluded that the bank was entitled to rely on *section 4.406*, saying "when a bank honors a check or withdrawal on less that the required number of signatures, the signature is an unauthorized signature within the meaning of 4.406(d)." *646 S. W.2d at 252*.

The initial issue is whether the checks drawn on La Sara's account were paid on unauthorized signatures. La Sara contends that, because no signatures were forged and the signature of Jones was authorized, *section 4.406(d)* does not protect the bank. We do not agree.

An unauthorized signature includes more than just a forgery. P*ine Bluff National Bank v. Kesterson, 257 Ark. 813, 520 S. W.2d 253, 258 (1975)*. An unauthorized signature is defined as "one made without actual, implied or apparent authority [**6] and includes a forgery", *Tex. Bus. & Com. Code Ann. § 1.201(43)* (Tex. UCC) (Vernon 1968), and includes a signature made by an agent in excess

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of his authority. I*d.* *§ 3.404*, comment 1. La Sara's argument that *section 4.406* does not apply focuses on Jones's signature rather than that of La Sara, the bank's customer. La Sara's signature required the joint signatures of two officers. Although Jones was one of four authorized to sign, his signature alone was not La Sara's. When the bank paid the checks bearing only one of two required signatures, it paid on an unauthorized signature within the meaning of *section 4.406(d)*.

La Sara also argues that the checks were not paid in good faith. If so, the bank cannot claim the protection of *section 4.406*. The time limits of that section apply only to items paid in good faith. I*d.*, [*563] *§ 4.406(a)*. Moreover, an obligation of good faith is imposed on the performance of every contract or duty within the Code. I*d.* *§ 1.203*. Good faith is defined as "honesty in fact in the conduct or transaction concerned." *Id.* *§ 1.201(19)*. The test for good faith is the actual belief of the party in question, not the reasonableness [**7] of that belief. R*iley v. First State Bank, 469 S. W.2d 812* (Tex. Civ. App. -- Amarillo 1971, writ ref'd n. R. E.).

La Sara contends that the bank actually knew Jones's signature alone was insufficient, yet paid the checks anyway, and therefore did not exercise good faith. The trial court agreed, finding that the bank had actual knowledge of the unauthorized change of the signature card from a dual to a single-signature requirement. The court of appeals, however, held that there was no evidence to support this finding. At trial, the evidence showed that La Sara's corporate resolution, which the bank required, was in the bank's files; the corporate resolution specified that two signatures were necessary. The bank president testified that the bank would know of anything that was in the files. The bank,a corporation, is bound by the knowledge of one of its agents if that knowledge came to him in the course of the

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agent's employment. *City of Fort Worth v. Pippen, 439 S. W.2d 660 (Tex. 1969)*; *Wellington Oil Co. of Delaware v. Maffi, 136 Tex. 201, 150 S. W.2d 60 (1941)*. The bank does not contend that the corporate resolution was filed outside the normal course of business. [**8] Moreover, the checks were paid pursuant to an obviously altered signature card, and many were deposited into Jones's personal account. The trial court found that, under these facts, the bank knew that Jones's signature alone was not the authorized signature of La Sara. There is evidence supporting that finding. La Sara is entitled to recover for the checks paid on Jones's signature alone, less a credit for the funds from which La Sara benefited.[3]

3 The trial court made this calculation in its judgment for actual damages. The bank has not contended that the trial court's figures were inaccurate.

B. La Sara's other claims

In addition to the unauthorized payment of its checks, La Sara complains that the bank failed to follow a restrictive endorsement, allowed Jones to orally transfer money from its account, and paid Jones the proceeds of loans made in La Sara's name. These complaints concern four separate transactions:

1. On July 15, 1977, the Holland Farms check made payable to La Sara and [**9] endorsed "For Deposit Only" was split with $40,000 deposited to Jones's personal account and $22,600 deposited to La Sara's account.

2. On May 12, 1977, the bank transferred $14,000 from La Sara's account to Jones's personal account at Jones's oral request.

3. On June 8, 1976, a $19,506 loan was made to La Sara at Jones's request. Proceeds of the loan were used by

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Jones to purchase a cashier's check payable to the McCrabb Brothers.

4. On July 22, 1977, a $35,000 loan was made to La Sara at Jones's request. The proceeds were split with $12,000 deposited to Jones's personal account and $23,000 deposited to La Sara's account.

The court of appeals did not expressly address these claims but implicitly held that *section 4.406(d)* barred La Sara's right to recovery. La Sara argues that *section 4.406(d)* does not shield the bank from liability. We agree.

In *Fultz v. First National Bank, 388 S. W.2d 405 (Tex. 1965)*, we held that a bank breached its depository contract when it failed to follow its depositor's restrictive endorsement, "For Deposit Only." Although *Fultz* predates the adoption of the Uniform Commercial Code, the rule remains unchanged. Under the Code, a depositary [**10] bank is liable for paying an instrument other than in accordance with the terms of a restrictive endorsement. *Tex. Bus. & Com. Code Ann. §§ 3.206(c)*, *(d)*, *3.419(c)*, *(d)* (Tex. UCC) (Vernon 1968).

[*564] The bank also breached its contract by transferring $14,000 from La Sara's account at Jones's oral request. When a customer deposits funds with a bank, the bank impliedly agrees to disburse those funds only in accordance with the depositor's instructions. M*esquite State Bank v. Professional Investment Co., 488 S. W.2d 73, 75 (Tex. 1973)*; *Tex. Bus. & Com. Code Ann. §§ 3.404(a)*, *4.401(a)* (Tex. UCC) (Vernon 1968). La Sara did not authorize the bank to disburse funds from La Sara's account at the oral request of Jones. S*ection 4.406(d)* provides no defense to the bank because no unauthorized signature was used to obtain the $14,000 withdrawal.

Finally, the bank does not assert *section 4.406(d)* as a defense to the loans in dispute. Instead, the bank argues that

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Jones had the authority to borrow money in La Sara's name and that La Sara is estopped to the extent it has gained the use and benefit of these loans. The record shows, however, that La Sara did not have the use and [**11] benefit of all funds borrowed in its name. La Sara established that the first loan was used by Jones to purchase a cashier's check payable to a third party, and that a portion of the second loan was deposited directly into Jones's personal account.

We hold that La Sara is entitled to judgment against the bank for the $40,000 loss caused by the bank's failure to follow La Sara's restrictive endorsement, for the $14,000 withdrawal from La Sara's account made without proper authorization and for $31,506 representing the sum the bank delivered to Jones but charged to La Sara as proceeds from two loans.

II. La Sara's DTPA Claim

La Sara also contends that the bank has violated the Deceptive Trade Practices -- Consumer Protection Act. T*ex. Bus. & Com. Code Ann. §§ 17.41 -.63*.(Vernon Supp. 1984). La Sara claims that as part of the depository contract the bank impliedly warranted the dual-signature requirement adopted in La Sara's corporate resolution. La Sara alleges that the bank breached this warranty when it paid checks signed only by Jones and is therefore liable for treble damages under *section 17.50(a)(2)*. In addition to the checks, La Sara contends that the bank's practice [**12] of splitting items payable to La Sara between the accounts of Jones and La Sara, of making loans in La Sara's name without proper authorization, and of allowing Jones to orally withdraw money from La Sara's account violated the general prohibition against "(f)alse, misleading or deceptive acts or practices in the conduct of any trade or commerce" contained in the 1977 act. I*d. §§ 17.46(a)*, *17.50(a)(1)*. The trial court agreed.

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The court of appeals reversed the judgment of the trial court and rendered judgment that La Sara take nothing on its DTPA claim. The court of appeals found no evidence of a false, misleading, or deceptive act or practice in violation of *sections 17.46(a)* and *17.50(a)(1)*. The court did agree that the bank had breached an implied warranty in paying La Sara's checks on only one signature, but held that La Sara's cause of action for breach of warranty accrued in 1975 when the checking account was first opened. The court of appeals reasoned that La Sara was not a consumer then because the 1975 version of the DTPA defined services as "work, labor, or services purchased or leased for use for other than commercial or business use." *See Farmers & Merchants* [**13] *State Bank v. Ferguson, 617 S. W.2d 918, 920 (Tex. 1981)*.

A. DTPA § 17.50(a)(2) -- Breach of Warranty

Section 17.50(a)(2) provides that a consumer may maintain an action if he has been adversely affected by the breach of an express or implied warranty. A consumer is defined as an "individual, partnership or corporation, or governmental entity who seeks or acquires by purchase or lease any goods or services." *Tex. Bus. & Com. Code Ann. § 17.45(4)* (Vernon Supp. 1984). The services provided by a bank in connection with a checking account are within the scope of the DTPA. F*armers & Merchants State Bank v. Ferguson, 605 S. W.2d 320, 324* (Tex. Civ. App. -- Fort Worth [*565] 1980), *aff'd on other grounds*, *617 S. W.2d 918 (Tex. 1981)*.

The court of appeals erred in applying the 1975 act to all of La Sara's checks. The applicable version of the DTPA is determined by the date the deceptive act or practice occurs. W*oods v. Littleton, 554 S. W.2d 662, 666 (Tex. 1977)*. If the bank breached a warranty by honoring La Sara's checks on an unauthorized signature, La Sara's cause

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of action accrued under the version of the DTPA in force at the time the checks were [**14] paid. The 1977 Act would therefore apply to those checks paid after May 23, 1977, the effective date of the amendment which deleted the phrase "for other than commercial or business use" from the definition of services. Because La Sara qualifies as a consumer under the 1977 act, we must determine whether the bank breached an implied warranty by paying checks contrary to La Sara's instructions.

The DTPA does not define the term "warranty." [4] Furthermore, the act does not create any warranties; therefore any warranty must be established independently of the act. C*heney v. Parks, 605 S. W.2d 640, 642* (Tex. Civ. App. -- Houston [1st Dist.] 1980, writ ref'd n. R. E.); D. Bragg, P. Maxwell, & J. Longley, *Texas Consumer Litigation* § 5.01 (2d ed. 1983). While express warranties are imposed by agreement of the parties to the contract, *Rinehart v. Sonitrol of Dallas, Inc., 620 S. W.2d 660, 662-3* (Tex. Civ. App. -- Dallas 1981, writ ref'd n. R. E.); *Tex. Bus. & Com. Code Ann. § 2.313* (Tex. UCC) (Vernon 1968), implied warranties are created by operation of law and are grounded more in tort than in contract. H*umber v. Morton, 426 S. W.2d 554 (Tex. 1968)*. Implied warranties [**15] are derived primarily from statute, although some have their origin at common law. S*ee Kamarath v. Bennett, 568 S. W.2d 658 (Tex. 1978)*; *Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S. W.2d 828 (1942)*.

4 This is unfortunate because the word's meaning at common law is ambiguous. S*ee* 5 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 673 (3d ed. 1961). Karl Llewellyn, the father of the Uniform Commercial Code, complained that, "To say warranty is to say nothing definite as to legal effect." K. LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES 211 (1930).

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One statutory source of implied warranties is the Uniform Commercial Code. S*ee, e. G.*, *Tex. Bus. & Com. Code Ann. §§ 2.314*, *2.315* (Tex. UCC) (Vernon 1968). Although the UCC imposes a number of warranties on customers and collecting banks in the payment process, *see id.* § 4.207, there is no mention of a warranty by a payor bank in favor of its customer. All of the warranties created in section 4.207 concern either the item [**16] itself (for instance, that it has not been materially altered) or the holder's relationship to it (that he has good title, for example). Each of these warranties goes to a present fact. On the other hand, when section 4.207 speaks of a promise to accept the return of a dishonored item, it speaks of an "engagement."Generally, courts are to construe statutes so as to harmonize with other relevant laws, if possible. S*tate v. Standard Oil Co., 130 Tex. 313, 107 S. W.2d 550 (1937)*. We hold that the bank's implied promise that it will not pay checks on an unauthorized signature is not a warranty, but only an implied term of the contract. A mere breach of contract is not a violation of the DTPA. A*shford Development, Inc. v. USLife Real Estate Services Corp., 661 S. W.2d 933, 935 (Tex. 1983)*.

B. DTPA §§ 17.46(a) & 17.50(a)(1) -- Deceptive Trade Practice

La Sara next contends that the bank's practice of paying its checks on an unauthorized signature violated the 1977 act's general prohibition against "(f)alse, misleading or deceptive acts or practices in the conduct of any trade or commerce." *Tex. Bus. & Com. Code Ann. §§ 17.46(a)*, *17.50(a)(1)* (Vernon Supp. 1984). We, [**17] however, like the court of appeals find no evidence that the bank's payment of La Sara's checks on only one signature was a deceptive [*566] trade practice. La Sara was fully informed of the bank's practice; each month the bank returned La Sara's cancelled checks with a statement of its account.

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Before 1979, it was an open question whether the failure to disclose material facts was a violation of 17.46(a). S*ee Robinson v. Preston Chrysler-Plymouth, 633 S. W.2d 500 (Tex. 1982)* (failure to disclose an unknown material fact not a deceptive trade practice). This case, however, does not even involve a failure to disclose; the bank sent La Sara notice of all transactions. Although the bank's conduct may have been in bad faith under the UCC, it was not false, misleading, or deceptive.

In addition to the checks, the trial court found the $14,000 oral withdrawal and the two unauthorized loans to be deceptive trade practices. La Sara argues the court of appeals has erred in failing to address and affirm these findings. The first loan and the oral withdrawal, however, provide no basis for a DTPA claim because both occurred during the period governed by the 1975 act when La Sara [**18] did not qualify as a consumer of services. Only the second loan originated after the 1977 amendment to the DTPA which expanded the definition of services to include business and commercial uses. [5] La Sara maintains that this loan was a deceptive trade practice under *sections 17.46(a)* and *17.50(a)(1)* because it was made without proper authorization and the proceeds were split between the accounts of La Sara and Jones.

5 Although the split deposit of the Holland Farms check occurred after the 1977 amendment, it was not found to be a deceptive trade practice by the trial court.

We first considered whether a loan might provide the basis for a DTPA claim in *Riverside National Bank v. Lewis, 603 S. W.2d 169 (Tex. 1980)*. In *Riverside* the plaintiff Lewis sought to refinance the loan on his automobile through Riverside Bank. Riverside advised Lewis that the loan had been approved, but subsequently refused to lend the money. After his car was repossessed

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and sold, Lewis sued Riverside Bank alleging that the [**19] Bank's conduct violated the DTPA. We held that Lewis was not a consumer and therefore had no claim under the DTPA. We said that a person who seeks only to borrow money is not a consumer because the lending of money involves neither a good nor a service.

Since the holding in *Riverside*, we have twice limited the case to its facts, emphasizing that Lewis sought only the extension of credit from Riverside, and nothing more. In *Knight v. International Harvester Credit Corp., 627 S. W.2d 382, 389 (Tex. 1982)*, we held a lender subject to a DTPA claim because the lender and seller "were so inextricably intertwined in the transaction as to be equally responsible for the conduct of the sale." In determining that the borrower was a consumer, we considered the borrower's purpose for the loan. We distinguished *Riverside* because the borrower there sought only the extension of credit, whereas "Knight's objective in the transaction was the purchase of a dump truck." *627 S. W.2d at 389*. In *Flenniken v. Longview Bank & Trust Co., 661 S. W.2d 705 (Tex. 1983)*, we held the purchaser of a home could sue the bank under the DTPA for an unconscionable course of conduct in foreclosing on [**20] his partially constructed home. The bank had agreed to provide the interim financing to the builder in return for an assignment of the purchaser's note and mechanic's lien contract. Again we viewed the transaction from the purchasers' perspective and concluded "the Flennikens did not seek to borrow money; they sought to acquire a house." *661 S. W.2d at 708*.

The rule of law that *Knight* and *Flenniken* announced is not restricted to cases involving financial institutions. In *Cameron v. Terrell and Garrett Co., 618 S. W.2d 535 (Tex. 1981)* we held that a buyer of a house could bring a DTPA action against a realtor from whom he had purchased nothing. In *Cameron*, the realtor, who was the seller's

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agent, represented to the buyer that the house in question was larger than it actually was. We held that the buyer was a DTPA consumer because of the purchase [*567] of the house; therefore, he could bring a DTPA action against anyone in the transaction who violated the act.

Under *Knight* and *Flenniken*,a lender may be subject to a DTPA claim if the borrower's "objective" is the purchase or lease of a good or service thereby qualifying the borrower as a consumer. [**21] Obviously, we cannot determine La Sara's objective concerning this loan, because La Sara's complaint is that it did not authorize the transaction. There is no evidence, however, that Jones represented to the bank that the loan was to purchase or lease goods or services, that the bank thought the loan was for that purpose, or that the loan was one of a series with which La Sara obtained goods or services. In fact, there is no evidence that La Sara ever borrowed money from the bank for goods or services. Because the loan involves only the extension of credit, La Sara has not shown itself to be a consumer and therefore has no DTPA claim.

III. Interest/Attorney's Fees

At trial, La Sara also obtained a judgment for interest and attorney's fees. In the court of appeals, the bank had points of error complaining of both. The court of appeals did not reach those points in light of its holding that La Sara could not recover any damages. Insofar as those points raised questions within our jurisdiction, we now address them to determine what judgment the court of appeals should have rendered. K*nutson v. Morton Foods, Inc., 603 S. W.2d 805 (Tex. 1980)*.

The bank asserted that [**22] La Sara's claim was not one arising from a "written contract ascertaining the sum payable," within the meaning of the prejudgment interest statute, Tex. Rev. Civ. Stat. Ann. art. 5069-1.03 (Vernon

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Supp. 1984). Therefore, according to the bank, La Sara is not entitled to prejudgment interest. *578 S. W.2d 109, 116-117 (Tex. 1979)*. The requirement that the contract set out a sum payable has always been liberally construed by this court. As was said in *Federal Life Insurance Co. v. Kriton, 112 Tex. 532, 249 S. W. 193 (1923)*, it is sufficient if the contract provides the conditions upon which liability depends and fixes a measure by which the sum payable can be ascertained with reasonable certainty, in the light of the attending circumstances." *Id. at 195*. In this case, the depository contract provides the conditions upon which liability depends -- payment of the depositor's funds except according to his instructions, and fixes a measure by which the sum payable can be ascertained -- the amount paid. Hence, this case falls within the prejudgment interest statute.

Article 5069-1.03 was amended in 1979, after La Sara's cause of action arose but before La Sara filed suit. [**23] The change was to provide that interest would begin running thirty days after the sum became due. In this case, however, the trial court awarded interest on each check from the date that it was cashed. It has long been the rule in Texas thatwhen the legislature repeals a statute creating a remedy, that repeal is effective immediately. K*night v. International Harvester Credit Corp., 627 S. W.2d at 384*. It follows that if the legislature amends a remedy such as this one, the change will be effective retroactively. Hence, the trial court erred in calculating interest from the date that each check was cashed or loan made, rather than thirty days thereafter. Therefore, we remand the cause to the trial court to recalculate interest accordingly.

The bank also argued to the court of appeals that La Sara was not entitled to attorney's fees. The basis of the bank's complaint was evidentiary. At trial, La Sara had a local attorney testify to what would be a reasonable fee for

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handling the case. We hold that this testimony was some evidence supporting the trial court's award of attorney's fees. The bank also argued to the court of appeals that there was factually insufficient evidence [**24] to support the trial court's award. That point of error is not within our jurisdiction. Therefore, we must remand the cause to [*568] the court of appeals to consider it. B*iggs v. United States Fire Insurance Co., 611 S. W.2d 624 (Tex. 1981)*.

We affirm the court of appeals in reversing the award of additional damages under the DTPA. We reverse the judgment of the court of appeals and affirm the trial court's judgment for actual damages. We remand the cause to the court of appeals to consider the factual sufficiency of La Sara's evidence on attorney's fees. The court of appeals, after considering that point, is to remand the cause to the trial court to recalculate prejudgment interest in accordance with art. 5069-1.03 as amended.[6]

6 According to the judgment of the trial court, Fidelity is entitled to 20% of La Sara's judgment against the bank.

¿ El banco acá actuó con una actitud de rigor y honestidad en todos los actos y los hechos?

I. ARTÍCULO 2 SOBRE LA COMPRAVENTA

A. SU APLICACIÓN EN NEGOCIOS JURÍDICOS MIXTOS

EL ELEMENTO PREDOMINANTE DEL NEGOCIO

BAUM TEXTILE MILL CO., INC., et al., Appellants, v. MILAU ASSOCIATES, INCORPORATED, et al., Respondents. COURT OF APPEALS OF NEW YORK 42 N. Y.2d 482; 368 N. E.2d 1247 September 8, 1977, ArguedOctober 11, 1977, Decided

OPINION BY: WACHTLER [*484] [**1248] A massive burst in an underground section of pipe,

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