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**THE BANK'S LIABILITY FOR DAMAGES  
RESULTING FROM THE EXECUTION  
OF UNAUTHORIZED PAYMENT TRANSACTIONS\*\***

*Summary*

*The way in which liability for damages is classified significantly determines the positions of both the wrongdoer and the injured party. This is because the rules governing contractual and tort liability differ substantially and can lead to different consequences. The subject of this paper concerns the attempt to classify the bank's liability for damages caused by the execution of unauthorized payment transactions. Recognizing the complexity and insufficient exploration of this topic, the author believes that an analysis of the legal nature of the bank's liability for damages could be of considerable practical importance. During the analysis of the issue, a distinction is made between cases where the bank caused harm to its client by unauthorized debiting of the client's payment account and cases where the harm was caused by unauthorized debiting of a non-payment account. It seems that these two situations should be treated differently concerning the classification of the nature of the bank's liability for damages. Accordingly, the paper analyzes both situations in isolation, presenting arguments in support of the suggested classification of the bank's liability, all with the aim of providing the most adequate answer to the question posed and with the intention of protecting the bank's client as the economically weaker contracting party.*

**Keywords:** *Bank, Payment Account, Non-payment Account, Damage, Liability, Contractual Liability, Tort Liability.*

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## 1. Introduction

Determining the nature of liability for damages is of great practical importance for several reasons. The rules on contractual and tort liability differ significantly, generally leading to different consequences for the financial state of the tortfeasor and *vice versa* for the financial state of the injured party.<sup>1</sup> In the context of unauthorized payment transactions, the issue of determining the nature of liability for damages becomes even more complicated. Situations involving unauthorized payment transactions can vary, thus making the nature of the bank's liability for damages contentious.

The subject of this paper concerns the issue of the nature of liability for damages arising from unauthorized payment transactions.<sup>2</sup> An unauthorized payment transaction occurs when a bank debits the account of its clients (the account holders) without their consent. Specifically, unauthorized transactions occur when the bank executes a payment order<sup>3</sup> directed at debiting the account of one of its clients, but the payment order was neither issued by the client nor by an authorized person. In such circumstances, the question arises as to whether the bank's liability for the damage caused to its client by the execution of an unauthorized payment transaction is tortious or contractual.

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<sup>1</sup> In addition to the opinions on the importance of distinguishing between contractual and tort liability (which are advocated by supporters of the so-called dualistic theory), in the literature there is also a theory that argues that there are no essential differences between contractual and non-contractual liability (the so-called monistic theory). For more on the monistic and dualistic theories, see N. B. Grujić, „Odnos ugovorne i vanugovorne odgovornosti za štetu“, *Glasnik Advokatske komore -Vojvodine*, 1-2/2009, 7–9; On the unnecessary distinction between contractual and tort liability, see J. Radišić, *Obligaciono pravo*, Beograd 2020, 185.

<sup>2</sup> It is also necessary to distinguish the liability for the reimbursement of costs incurred due to unauthorized transactions from liability for damages. The costs incurred as a result of executing unauthorized payment transactions primarily relate to the monetary amount for which the account of a particular client has been unauthorizedly debited. M. Radović, *Platne transakcije – Pravo bankarskih platnih usluga*, Beograd 2016, 345; The Law on Payment Services – of the Republic of Serbia, as well as the Directive EU on Payment Services, discuss liability for the reimbursement of costs of unauthorized transactions but do not contain specific rules on liability for damages that may arise in that context. See Article 50, paragraphs 2 and 3, Law on Payment Services, *Official Gazette of the Republic of Serbia*, No. 139/2014 and 44/2018.

<sup>3</sup> N. Jovanović, V. Radović, M. Radović, *Trgovinsko pravo*, Beograd 2020, 512 et seq.

Since unauthorized payment transactions are related to the unauthorized debiting of a specific account, it can be said that those transactions necessarily imply the existence of some form of contractual relationship between the bank (the tortfeasor) and the injured party (the holder of the debited account), from which the opening of the payment account arises. Thus, it could be *a priori* said that the nature of the bank's liability for damages is contractual.<sup>4</sup> However, before answering this question it seems that one should analyze the type of relationship between the bank and the injured client. Expressed differently, it appears that the *type* of account debited by the unauthorized transaction determines the answer to the question whether the bank should be liable to its client under the rules of contractual or tort liability.<sup>5</sup>

Thus, on one hand, at the time of the unauthorized payment transaction the bank could be in a contractual relationship with the injured client based on a *framework agreement for payment services*, which is accompanied by an agreement for opening and maintaining a *payment* account. In such circumstances, the execution of the unauthorized payment transaction would be manifested as the unauthorized debiting of the injured party's *payment* account.

On the other hand, it is conceivable that the bank and its client are in a relationship where an account has been opened in the client's name, but the bank has not committed to providing payment services through that account. If, under the described circumstances, a third party issues an instruction to the bank to debit the account of the its client, and the bank complies with such an instruction, this action would also be characterized as the execution of an unauthorized payment transaction.

However, it seems that this situation should be distinguished from the previous one (in which there is an agreement on payment services between

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<sup>4</sup> One of the differences between contractual and tort liability lies in the fact that contractual liability requires the existence of a valid obligation relationship between the tortfeasor and the victim. Thus, the breach of such obligation leads to the infliction of damage. N. B. Grujić, 9–10; The relationship that precedes contractual liability can arise from a contract, as well as from any other source of obligations, even from the fact of causing damage. Therefore, it could be said that the term “contractual” liability is too narrow, and in that sense, it does not reflect the actual situation, i.e., the fact that contractual liability exists also due to the breach of obligations from any other source of obligations.

<sup>5</sup> In addition to numerous differences, there are also similarities between contractual and non-contractual liability, which are primarily reflected in the conditions necessary for establishing liability. See S. Perović, „Šteta i njena naknada“, *Pravni život* 1-2/1993, 2.

the client and the bank, and the bank has opened a payment account in the client's name to provide to its client payment services through that account). The reasons that seem to require making this distinction will be discussed in more detail in the following sections.

Providing an adequate answer to the question of the nature of the bank's liability for damages appears to be of great practical importance for several reasons, particularly considering the differences in the scope of compensation that an injured party may obtain depending on whether the damage sustained is qualified as contractual or tort damage.<sup>6</sup>

Before delving into the issue of the nature of the bank's liability for unauthorized transactions, the paper will discuss the concept of unauthorized transactions and their distinction from transactions that are authorized but not properly executed. Then, the manner (and basis) of executing authorized payment transactions will be also discussed. Finally, the central part of the paper will be devoted to analyzing the nature of the bank's liability for damages resulting from unauthorized transactions. The analysis will be conducted separately depending on the type of relationship in which the bank and the injured client are at the time of executing the unauthorized payment transaction.

## **2. Concept of Unauthorized Payment Transactions and Their Differentiation from Improperly Executed Transactions**

Unauthorized payment transactions can be defined as transactions carried out against a specific user's account without their consent.<sup>7</sup> Unauthorized payment transactions, therefore, always involve the debiting of someone's account. For an account debit to be considered an unauthorized payment transaction, it must be performed without the account holder's consent.<sup>8</sup> In this situation, the account is debited based on the order of a person who is neither the account holder nor authorized to act on their behalf.

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<sup>6</sup> In addition to the extent of compensation, contractual and non-contractual liability for damages also differ in many other characteristics. N. B. Grujić, 9 ff; O. Antić, *Obligaciono pravo*, Beograd 2011, 454.

<sup>7</sup> On the concept of unauthorized transactions, see: Financial Conduct Authority, *Fair treatment for consumers who suffer unauthorised transactions*, July 2015, available at: <https://www.fca.org.uk/publication/thematic-reviews/tr15-10.pdf>, 5, last visited 15. 7. 2024.

<sup>8</sup> M. Radović, 343.

An unauthorized transaction is any unauthorized debit of an account, regardless of whether it involves a payment account or another type of monetary account. However, the type of account being debited seems to influence whether the bank's liability is to be classified as contractual or delictual, which will be discussed later.

Unauthorized transactions should be distinguished from transactions that are improperly executed. Improper payment transactions include transactions that the bank has carried out with the consent of its client but not in accordance with the issued payment order. For example, if the bank executes a transaction on the order of its client but in favor of a party not specified by the client as the payment recipient, the transaction executed is considered authorized but improperly executed. Furthermore, if the bank debits its client's account for an amount less than specified in the payment order, the transaction executed would also be considered improper. Finally, executing the transaction at a later time than agreed constitutes an improper payment transaction.<sup>9</sup>

Executing a transaction for an amount greater than agreed upon is not considered improperly executed but rather partially unauthorized. In other words, if a client instructs the bank to execute a payment transaction for a certain amount, but the bank debits the client's account for a higher amount, such a transaction would not be considered improperly executed. Instead, the described situation would imply that an authorized and proper payment transaction was executed for the amount specified in the client's payment order, while the amount exceeding the payment order would be considered an unauthorized transaction.

### **3. Basis for Execution of Payment Transactions** **– Contract on Payment Services**

The execution of a payment transaction<sup>10</sup> can be defined as a set of actions by which the bank (the provider of payment services) acts upon a specifically issued payment order from a specific user of payment services. The obligation to execute the payment transaction is in any case directly based on the previously validly issued payment order. However, two different situations may precede the moment of issuing the payment order.

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<sup>9</sup> For more on improper payment transactions, see *Ibid.*

<sup>10</sup> On the concept of a payment transaction, see N. Jovanović, V. Radović, M. Radović, 512.



On one hand, when giving the order to execute the payment transaction, the bank and its client may already be in a relationship based on which the bank has committed to providing payment services. This is a relationship stemming from a framework agreement on payment services. On the other hand, it is also possible that at the moment of giving the payment order, there is no relationship related to the provision of payment services between the bank and the user (the order giver). In that case, the execution of a specific payment transaction is based solely on the issued payment order. By accepting to execute the specific payment order, a relationship based on a contract for a one-time payment transaction is established between the bank and the client.<sup>11</sup>

A framework agreement on payment services can be defined as a contract under which the bank (service provider) commits to its client (service user) to execute the payment orders that the user subsequently provides. Thus, those orders (instructions) should meet the conditions previously defined.<sup>12</sup> Based on the provided definition, it could be concluded that the framework agreement on payment services establishes a more permanent relationship between the contractual parties.<sup>13</sup> In other words, the contractual parties define the conditions for executing payment transactions in advance, whereby the bank commits to executing every order given to it by the user during the contract's duration, under the assumption that the issued order meets the conditions defined in the framework agreement.

The issuance of an order for the execution of a payment transaction, in the context of the framework agreement on payment services, represents an act of concretizing the framework agreement. In other words, by issuing a payment order, the user defines the service that they want the bank to provide in a specific case. If the defined payment service meets the criteria set out in the framework agreement, the bank is obliged to execute the requested payment transaction. Failure to execute an order given in accordance with the framework agreement constitutes a breach of contractual obligation, thereby incurring liability for the bank.

For the payment transaction to be considered validly executed, it is necessary that the payment order is issued in accordance with the previously

<sup>11</sup> On the types of payment service contracts, see *Ibid.*, 148–149.

<sup>12</sup> The framework contract on payment services is a named contract. Its importance and the need for harmonization of legal rules related to it have been observed at the European level. In this sense, today the (framework) contract on payment services is regulated by the European Union Directive on payment services from 2016. In Serbian law, the rules of this contract are contained in the Law on Payment Services.

<sup>13</sup> N. Jovanović, V. Radović, M. Radović, 512.

agreed conditions. *A contrario*, if the specifically issued order does not comply with the conditions of the previously concluded contract, the payment transaction will be considered invalid. Thus, if a third party, unauthorized to do so, issues the payment order instead of the user of payment services, proceeding with such an issued order would be considered unauthorized and, therefore, invalid.

Although it is not necessary, the framework agreement on payment services is most often accompanied by the conclusion of a contract for account opening and management.<sup>14</sup> In other words, when concluding the contract regarding payment services, in practice, the contracting parties most often agree on opening a payment account through which the bank will provide the agreed payment services to the user. On the open account, the bank assumes the obligation to record their mutual claims covered by the contract for the provision of payment services.

In this paper, when discussing the contract regarding payment services, it will be assumed that the user of payment services has an open payment account in the business records of the service provider. This is because the central issue of this paper concerns liability for damages caused by unauthorized payment transactions, as unauthorized transactions are reflected in the unauthorized debit of someone's account.

Unlike the framework agreement on payment services, the contract for a one-time payment transaction does not establish a permanent relationship between the bank and the client.<sup>15</sup> The contract for a one-time payment transaction implies a short-term relationship between the bank and the client, which is reflected in the execution of a specific (one-time) payment transaction. Therefore, this contract is considered concluded at the moment the bank accepts the specifically issued payment order. The bank is not obliged to accept the execution of the issued payment order, as (unlike the situation with the framework agreement) it has not previously committed to do so.

At the moment before concluding the contract for a one-time payment transaction, the relationship between the bank and the client can be different. First, it is possible for the client to be in a relationship with the bank regarding the provision of payment services, but the specific payment order is not covered by the framework agreement on payment services; in that case, the bank's acceptance to execute a payment order that deviates from the

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<sup>14</sup> M. Radović, 177.

<sup>15</sup> Z. Slakoper, M. Perkušić, „Odgovornost banke za provođenje elektroničkog plaćanja“, *Zbornik radova Pravnog fakulteta Sveučilišta u Rijeci* 1/1991, 475–476.

framework agreement will be considered the conclusion of a contract for a one-time payment transaction, and the execution of such transaction will be considered valid.

Next, it is conceivable that the client and the bank do not have any relationship at the moment preceding the conclusion of the contract for a one-time payment transaction and that the client does not have an open account with that specific bank. In this situation, the range of payment services that the clients can request is significantly narrowed in the sense that they cannot request a payment service aimed at debiting their account held at that particular bank, considering that the account does not exist. Bearing in mind that the subject of this paper is unauthorized payment transactions, and that they are necessarily linked to the debit of the account of the injured client, the paper will not examine the situation where the conclusion of the “one-time contract” is not preceded by any contractual relationship between the client and the bank.

Finally, at the moment of concluding the contract for a one-time payment transaction it is possible that there is a relationship based on which the bank has opened an account for the client but it has not committed to providing payment services through that account. Besides for the purpose of providing payment services, banks may also open accounts for their clients for other purposes. In the case where the holder of such an account issues an order to the bank to execute a specific payment transaction by debiting the account for a certain amount, the execution of the instructed transaction would be considered valid. The debit of the client’s account in the described circumstances would be fully valid. However, if the bank debited the account at the request of an unauthorized person, the executed transaction would be considered unauthorized. In that sense, the bank would be liable to its client (the account holder) for damages arising from the unauthorized payment transaction.

The manner of qualifying the bank’s liability for damages caused by unauthorized debiting of its client’s account will be discussed in detail later. In this regard, the author will first analyze the situation of executing an unauthorized payment transaction by debiting the *payment* account of its client. After that, an analysis of the nature of liability for damages will be undertaken in cases where the bank executes an unauthorized payment transaction by unlawfully debiting a *non-payment* account of the client.

## 4. Bank's Liability for Unauthorized Payment Transactions – Contractual or Tortious

### 4.1. General Notes

In the case where a bank, acting without the consent, debits account of its client for a certain amount, the bank's action is qualified as an act of unauthorized payment transaction. The consequence of such an action may be reflected in the damage suffered by the bank's client (the account holder), and therefore the question of the bank's liability arises.

In the described situation, the bank is the responsible party (also the tortfeasor), while the account holder, as the injured party, is entitled to seek appropriate compensation for the damage suffered from the bank. The amount of compensation that the bank's client is entitled to claim depends on whether the liability for the unauthorized payment transaction is qualified as contractual or tortious liability.<sup>16</sup> In other words, the question arises whether the act of executing an unauthorized payment transaction constitutes a breach of a contractual obligation (or an obligation arising from some other legal relationship), or if that is not the case. If the act of executing the unauthorized payment transaction is qualified as tortious liability<sup>17</sup> of the bank, the consequence would be that the bank's clients (the injured parties) would be able to claim full compensation for all the damage caused to them (the principle of integral compensation).<sup>18</sup> On the other hand, if an unauthorized transaction made by the bank were treated as a breach of contract, clients would then be deprived of the right to demand the full amount of compensation from the bank (the wrongdoer), and their claim could be limited to the amount of foreseeable damage, unless they could prove that the bank caused them harm intentionally or with gross negligence.<sup>19</sup> Thus, the position of the

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<sup>16</sup> On contractual damage, see R. LeRoy Miller, F. B. Cross, *Business Law - Alternate Edition: Text and Summarized Cases* 1, South-Western Cengage Learning, Canada 2013, 304 ff; On the differences between tort and breach of contract, see R. Anderson, I. Fox, D. P. Twomey, *Business Law: Ucc Comprehensive Volume*, South-Western Publishing Co 1987, 162.

<sup>17</sup> Tortious or non-contractual (non-contractual) liability arises from the general principle of obligation law - the principle of the prohibition of causing damage. Slight. Art. 16, Law on Contract and Torts, *Official Gazette of the SFRY*, No. 29/78, 39/85, 45/89 - decision of the USJ and 57/89, *Official Gazette of the FRY*, No. 31/93, *Official Gazette of SCG*, No. 1/2003 - Constitutional Charter and *Official Gazette of RS*, No. 18/2020.

<sup>18</sup> N. B. Grujić, 12.

<sup>19</sup> Art. 266 Law on Contract and Torts.

injured client significantly differs depending on how the bank's liability for damages is qualified.

The answer to the question regarding the nature of the bank's liability for unauthorized payment transactions, as has been mentioned several times, seems to vary depending on the type of relationship that existed between the bank (the wrongdoer) and its client (the injured party) prior to the execution of the transaction. In other words, the qualification of the bank's liability appears to depend on whether the account that the bank unauthorizedly debited was a payment account or not.

#### ***4.2. Case 1 – Unauthorized Charge of a Payment Account***

The bank can execute an unauthorized payment transaction often to the detriment of the client with whom it is already in a contractual relationship regarding the provision of payment services. This is a case in which the bank charges the payment account of its client for a certain amount without consent.<sup>20</sup> Therefore, situations are possible where a third party, lacking the authorization, issues a payment order charged to the payment account of a bank's client. Banks commit to their payment service users that they will only carry out transactions that are authorized, meaning that there is consent from their user regarding those transactions. Additionally, upon receiving a specific payment order, banks are obligated to verify whether the holder of the payment account agrees with the order. Verifying the existence of consent from the account holder to which the specific transaction is directed is a necessary prerequisite for the valid execution of that transaction.

*A contrario*, the execution of a payment transaction based on an order that has not been authorized by the account holder constitutes a breach of contractual obligation, which also entails the bank's liability for the damage it caused to its client in that instance.<sup>21</sup> It appears that in the described case, the bank will be liable to its harmed client according to the rules of contractual liability.<sup>22</sup> The reason for this lies in the fact that, as already

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<sup>20</sup> Payment account refers to the type of money account that the bank opens in the name of its user of payment services. Mutual claims of the bank and the client arising from the contract on payment services are posted to this account. M. Radović, 180; Art. 2, para. 1, item 3 Law on Payment Services.

<sup>21</sup> Z. Slakoper, M. Perkušić, 501.

<sup>22</sup> Contractual liability is also defined in the literature as "responsibility for breach of contract", "responsibility for breach of obligation" or "responsibility for breach of contractual discipline". N.B. Grujić, 5; More on Contract Liability, R. Anderson, I.

mentioned, by concluding the payment services contract the bank assumed the obligation to execute only authorized payment transactions. The execution of a transaction that is not authorized represents an act by which the bank “breaches” its contractual obligation, and in this sense, it seems that it will be liable to its harmed client according to the rules of contractual liability.<sup>23</sup>

The bank’s contractual liability means that the bank will be obliged to compensate its client for the damage that it could have foreseen at the moment of concluding the payment services contract based on the circumstances that were known or should have been known.<sup>24</sup> Therefore, it seems that in the described case, the bank’s position is significantly eased, considering the existence of a legal limit on the compensation that the harmed contractual party can claim from its counterparty.<sup>25</sup>

The qualification of the bank’s liability for damage as contractual in the situation of unauthorized debiting of its client’s payment account seems correct and acceptable, considering the arguments previously discussed. However, an unauthorized transaction can also be executed in another way, namely by debiting an account that is not a payment account. It appears that in the mentioned situation, the application of the rules on the bank’s contractual liability would not be adequate for several reasons that will be discussed in the next section.

After all, the qualification of the bank’s liability for damage due to debiting of a non-payment account does not seem fair, considering that the rules in contractual liability limit the amount of compensation that the injured party can claim from the wrongdoer. For this reason, in the continuation of the paper, the author makes efforts to analyze the nature of liability for damage due to the debiting of a non-payment account, presents arguments for

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Fox, D. P. Twomey, 356 et seq.

<sup>23</sup> Z. Slakoper, M. Perkušić, 487-488.

<sup>24</sup> See Art. 266 Law on Contract and Torts.

<sup>25</sup> It seems that the reason for the limitation of the amount of compensation for contractual damage is reflected in the fact that the conclusion of the contract necessarily implies uncertainty regarding the possibility of realization of the undertaken work. Therefore, in order to preserve the attractiveness of concluding a contract, it seems logical to limit the amount of compensation that a contractor can claim in the event that he suffers damage by his counterparty due to non-performance or improper performance of the contract. See N. B. Grujić, 11; However, it seems that the above argument has in mind only the contract, and not the other sources of obligations, the breach of which also entails contractual liability.

and against qualifying the bank's liability as contractual or delictual, and offers the stance on the matter, keeping in mind the need to protect the position of the injured client from the bank as the economically stronger entity.

#### 4.3. Case 2 – Unauthorized Debit of a Non-payment Account

In addition to debiting the client's *payment* account, the bank may execute an unauthorized payment transaction by acting on the order of an unauthorized person directed at debiting an account that is *not* a payment account. For example, this involves a case where the bank unauthorizedly debits the account of a client with whom it has a relationship without having assumed the obligation to provide payment services under those contracts.<sup>26</sup> If a third party, acting without consent, issues an order to the bank aimed at debiting the account of the bank's client, and if the bank executes such an order, its action would be considered an act of unauthorized payment transaction. By debiting the client's account without their approval, the bank could cause damage to the holder of the debited account, in which case arises the question under which rules the aggrieved client can hold the bank accountable.

It seems that the described situation of debiting a non-payment account may create dilemmas regarding the qualification of the bank's liability for damages resulting from an unauthorized transaction.<sup>27</sup> Namely, on one hand, if we start from the assumption that the bank is contractually liable to its client (the holder of the debited account), the legal position of the bank and the injured party would not differ in relation to the position in the case of unauthorized debiting of a *payment* account. This means that the client could claim compensation from the bank up to the amount of foreseeable damages. Arguments in favor of this determination can be seen in the fact that the bank and the injured client were already in a contractual relationship at the moment of executing the unauthorized payment transaction, which is one of the prerequisites for qualifying liability as contractual. However, the question arises as to which contractual obligation the bank violated on that occasion?

Namely, in the case where the bank debits the *payment* account of its client (as discussed in the previous section), the qualification of the bank's

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<sup>26</sup> On the differences between a payment account and an ordinary money account that is not a payment account, see M. Radović, 183 et seq.

<sup>27</sup> Executing an unapproved transaction can be stressful for a client, both emotionally and financially. Financial Conduct Authority, Fair treatment for consumers who suffer unauthorised transactions, July 2015, available at: <https://www.fca.org.uk/publication/thematic-reviews/tr15-10.pdf>, 6, last visited 15. 7. 2024.

liability as contractual is not disputed, considering that the bank was already in a relationship with the damaged client regarding the provision of payment services. Thus, the bank, based on the previously concluded contract for the provision of payment services, committed to the client (service user) to execute their payment orders through the specific payment account.

The payment orders of the bank's client are those orders that they personally issue, or those issued by a third party with the prior or subsequent consent of the client.<sup>28</sup> However, if the bank debited its client's payment account in executing an order from a person acting without consent, it would violate its contractual obligation, considering that it previously committed to executing only those orders that are in accordance with the will of its counterparty (the holder of the payment account).

Unlike the previously mentioned case, in a situation where a bank, acting on the order of an unauthorized person, damages one of its clients due to the debiting of a *non-payment* account, the answer to the question of the nature of its liability for the incurred damage does not seem straightforward. In order to take the position that the bank's liability for the damage in the described situation is contractual, it would first have to be examined which obligation the bank is "violating".

Namely, while in the case of unauthorized debiting of a client's *payment* account the bank violates its obligation to provide payment services in accordance with the payment services agreement (the obligation to execute payment orders given by the payment service user), this is not the case with unauthorized debiting of a *non-payment* account. This is because the bank had no obligation regarding the provision of payment services to its client through such an account. In other words, by opening the non-payment account, the bank did not commit to providing payment services to its client through it.<sup>29</sup> Therefore, by executing the order of a third unauthorized person, and thus debiting its client's non-payment account, the bank does not violate the obligation to execute payment transactions in accordance with the client's orders, as such an obligation does not exist. Namely, in the described situation, the client and the bank were not in a relationship regarding the provision of payment services prior to the execution of the unauthorized transaction. The account that the bank opens is *not* a payment account. Based on

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<sup>28</sup> In certain situations, a transaction will be deemed to have been approved even though it has been executed without the consent of the account holder (payer). M. Radović, 343–344.

<sup>29</sup> *Ibid.*, 183, fn. 796.



this, the unauthorized debit of such an account does not violate the obligation to provide payment services in accordance with the user's order, considering that it has not assumed such an obligation *a priori*.

It seems that the aforementioned can be one of the arguments in favor of abandoning the qualification of the bank's liability as contractual liability. Additionally, it also appears justified to treat the bank's liability for damages in the described situation as tortious liability. This is because it seems acceptable to complicate the bank's position regarding liability for damages in the described situation, which could somewhat be achieved by qualifying its liability as tortious.

The aggravation of the bank's position in the case of unauthorized debiting of a *non-payment* account appears to be an acceptable solution, considering that a particularly high degree of attention must be expected from the bank when receiving a payment order in such cases.<sup>30</sup> Namely, as a business entity specialized in providing payment services, the bank is obliged to exercise a high degree of attention when receiving a payment order aimed at debiting the account of one of its clients, regardless of whether it is a payment account or not. More specifically, the bank is required to exercise the care of a good professional every time it receives an order to execute a payment transaction. In this sense, it is obliged to make efforts to investigate whether the issued order is in accordance with the previously concluded payment services agreement (if such an agreement exists), and it is particularly obliged to verify whether the payment order originates from the account holder (directly or indirectly, through an authorized person). If it does not investigate this, the bank will be considered guilty of an unauthorized transaction and, consequently, responsible for the damage.

In addition, in a situation where the bank has unauthorizedly charged a client's *non-payment* account, it is considered that it "deserves" to be more strictly "sanctioned", given that in this case it seems that the bank had to make particularly efforts to establish the identity of the order issuer. This is because, in the described situation, the bank was not obligated to provide payment services to its client (the holder of the charged account), and therefore it should not have "casually" executed payment orders originating from third unauthorized parties. If, despite this, the bank executed an unauthorized payment order and charged the client's *non-payment* account, it seems that its liability should be treated as tortious, considering the need for stricter sanctioning of its negligence. Stricter sanctioning would manifest

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<sup>30</sup> On duty of care in general, see R. LeRoy Miller, F. B. Cross, 122.

in the extent of compensation that the affected client would have the right to demand from the bank. Specifically, by invoking the rules of tort liability, the affected client would be able to claim compensation for all damages suffered and proven (the principle of integral compensation for non-contractual damages).<sup>31</sup> Additionally, by invoking tort liability, the affected party could also claim compensation for non-material damages that they may have suffered, which the rules on contractual liability deny them.<sup>32</sup>

It seems that the clients have no basis to expect that the account they hold at a certain bank, which is *not* a payment account, will be debited. It could be said that debiting a such account represents a special “shock and surprise” for its holders, and in this sense, it seems appropriate to provide the opportunity for bank’s clients to compensate the entire damage they manage to prove (instead of predictable damage).

As can be seen, causing damage through unauthorized debiting of someone’s account that is *not* a payment account seems to represent a *borderline case* that raises dilemmas regarding the qualification of liability as contractual or tortious.<sup>33</sup> On one hand, if one were to start from the argument that the tortfeasor and the injured party are already in a contractual relationship at the moment the harmful event occurs, the mentioned liability could be viewed as contractual. On the other hand, qualifying the bank’s liability as tortious seems to make more sense, considering that it is disputed which contractual obligation the bank violates by the act of unauthorized provision of payment services, given that it was not obliged to execute even authorized payment orders through the account in question. Thus, it seems that by unauthorizedly debiting the client’s account, the bank violates a general obligation (the legal prohibition of causing damage) more than it violates its contractual obligation (considering that the bank was not obligated by contract to provide payment services).

Ultimately, if (despite the aforementioned arguments) it would not be possible to make a final “decision” regarding the qualification of the bank’s liability for damages, the question arises as to which of the two types of liability takes precedence. In this sense, when there is a borderline case where it is not *prima facie* clear which type of liability for damages is involved, there are two positions regarding how to resolve the resulting dilemma. According to one position, in such a case, priority should be given to contractual liability, considering that it

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<sup>31</sup> Art. 190 Law on Contract and Torts.

<sup>32</sup> See N. B. Grujić, 12–13.

<sup>33</sup> See *Ibid.*, 20–21.

is superior in relation to the rules on liability for tortious damage (*lex specialis*). On the other hand, there is also an opinion that in the described situation, the injured party should be allowed to choose the rules under which they will hold the wrongdoer liable (the theory of competing claims).<sup>34</sup>

It seems that in a situation where a bank unlawfully charges the unpaid account of its client, the issue of qualifying its liability for damages should be resolved by applying the theory of competition of claims in favor of tort liability. The theory of competition of claims, as already mentioned, means that in the case of an inability to find an adequate qualification of the nature of liability for damages, priority in selection should be given to the injured party. Thus, in the case of the bank's liability, which could be characterized as a borderline case, the final word regarding the qualification of the claim should be given to the injured party. The injured clients will, in a common-sense manner, make a decision based on calculating which qualification would lead them to a more favorable position. In this sense, it would be logical for the injured party to opt for a claim based on non-contractual liability, considering all the advantages of applying the rules on tort damages that have already been discussed.

## 5. Conclusion

Based on everything mentioned so far, it can be concluded that the issue of the nature of the bank's liability for damages resulting from unauthorized payment transactions deserves special attention. Specifically, the rules regarding contractual and non-contractual liability differ significantly, and the position of the injured party can largely depend on whether the liability of the injurer is classified as contractual or delictual.

When it comes to the nature of the bank's liability for damages due to payment transactions, it seems that not enough attention is given to that issue. Indeed, when discussing liability for unauthorized payment transactions, legal theorists and practitioners refer to the responsibility for bearing the costs of such executed transactions. In other words, they focus exclusively on the bank's or (exceptionally) the client's liability for the costs incurred from unauthorized payment transactions. The costs of unauthorized transactions primarily include the monetary amount that corresponds to the amount by which the client's account was charged without authorization, as well as other expenses related to the specific charge of the account. Considering that the

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<sup>34</sup> J. Radišić, *Obligaciono pravo – opšti deo*, Niš 2017, 206.

issue of bearing the costs of executing unauthorized payment transactions is thoroughly regulated by the Law on Payment Services and the EU Directive on payment services, and that sufficient attention has been paid to its analysis in the literature, this paper does not address the issue of liability for bearing the costs of unauthorized transactions.

However, when it comes to the *damage* suffered by the holder of a charged account due to an unauthorized transaction, this issue seems to be unjustifiably underexplored. Namely, unlike most situations where the qualification of liability for damage is undisputed, there are cases that can provoke dilemmas regarding qualification. It appears that the question of the bank's liability for damage due to the execution of unauthorized payment transactions is precisely one of those "borderline" cases.

In fact, it seems that the case of liability for damage due to unauthorized transactions should be analyzed differently depending on the nature of the relationship between the bank and the client at the moment the unauthorized transaction was executed. In this sense, the paper first establishes that at the moment of executing an unauthorized payment transaction, a relationship between the bank and the client must necessarily exist. This is because the execution of an unauthorized transaction necessarily involves (unauthorized) debiting of the account. This further means that the person who suffered damage due to the execution of the unauthorized transaction must be the bank's client – the holder of the charged account. The difference can only exist in terms of the type of relationship in which the bank and the injured party find themselves. Therefore, based on the conducted analysis, the paper concludes that the qualification of the nature of the bank's liability for damage may depend on the type of previous relationship, or the type of account that the bank maintains for the injured client.

On one hand, it is possible that at the moment of executing an unauthorized payment transaction, the affected client has an active *payment* account. That is an account through which the bank has committed to providing payment services to its client. In the described scenario, if the bank unauthorizedly debited the relevant payment account, it seems that its liability for the damage can undoubtedly be classified as contractual liability. This is because the bank previously committed to providing payment services to its client, obligating itself to debit the relevant account according to the client's instructions. *A contrario*, if the bank debited the account without the client's consent, such a debit could be classified as a breach of a specific contractual obligation and therefore the bank's liability should be treated as contractual liability for damages.

On the other hand, it is possible that, at the moment of executing an unauthorized transaction, the client and the bank are in a relationship in which the bank has issued a *non-payment* bank account to its client (an account that is not a payment account). By unauthorized debiting of such an account the client may suffer damage and the legal nature of the bank's liability in this case seems to be questionable. Namely, the fact that the bank and the injured party are logically in a contractual relationship may lead to the conclusion that, in the described case, as well as in the previous one, it concerns the bank's contractual liability. However, it seems that the unauthorized debiting of a *regular* (non-payment) account of the client could be treated more as a violation of the general legal obligation to refrain from causing damage rather than any contractual obligation. This is because the bank was not obliged (nor authorized) to provide any payment service, even though the client and the bank are in a contractual relationship. If, in such a described case, the client issued an order to the bank and requested the debiting of regular bank account for a specific amount, the acceptance of such an order would not represent an act of executing a previously assumed contractual obligation (as such obligation does not exist), but would represent the bank's acceptance of an offer to conclude a new contract – a contract for a one-time payment transaction. However, if the order directed at debiting the client's ordinary bank account is originated from a third unauthorized party, the damage resulting from the debiting of such an account seems more likely to be classified as a tort rather than as contractual damage. The qualification of the bank's liability as tortious (in the second described scenario) appears to be correct, but also beneficial for clients, considering the advantages of the rules on non-contractual liability that have been discussed, which primarily relate to the possibility of claiming higher amounts of compensation.

Finally, in addition to the arguments presented for qualifying the bank's liability as tortious, the issue of determining the nature of the bank's liability for damages resulting from unauthorized debiting of a client's ordinary bank account can also be resolved using the theory of competition of claims. Namely, the case of debiting a client's *ordinary* (non-payment) account can be classified as a borderline case, which may raise dilemmas regarding whether the bank's liability for damages should be classified as contractual or tortious. Such borderline cases can be resolved by applying the theory of competition of claims, based on which the problem of qualification is addressed by giving the harmed parties the freedom to choose under which rules they will hold the wrongdoers accountable. Considering that the rules on tort liability

place the injured party in a more favorable position compared to the rules on contractual liability (primarily regarding the scope of compensation), it seems that a reasonable decision by the injured client would be to classify the case of liability for unauthorized debiting of a *non-payment* account as liability for tort damage.

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## **ODGOVORNOST BANKE ZA ŠTETU USLED IZVRŠENJA NEODOBRENIH PLATNIH TRANSAKCIJA**

### *Apstrakt*

Način kvalifikacije odgovornosti za štetu umnogome određuje položaj štetnika i oštećenog. Ovo iz razloga jer se pravila o ugovornoj i deliktnoj odgovornosti višestruko razlikuju, te mogu dovesti do različitih posledica. Predmet ovog rada tiče se pokušaja kvalifikacije bančine odgovornosti za štetu uzrokovanu izvršenjem neodobrenih platnih transakcija. Uočivši složenost i nedovoljnu obrađivanost ove teme, autor smatra da bi analiza pitanja pravne prirode bančine odgovornosti za štetu mogla biti od priličnog praktičnog značaja. U radu se, prilikom analize predmetnog pitanja, pravi razlika između slučaja kada je banka oštetila svog klijenta neovlašćenim zaduženjem njegovog platnog računa i slučaja kada je to učinila neovlašćenim zaduženjem njegovog neplatnog računa. Čini se da ove dve situacije treba različito tretirati po pitanju kvalifikacije prirode bančine odgovornosti za štetu. U tom smislu, u radu se obe situacije analiziraju izolovano, iznose se argumenti u prilog sugerisanog načina kvalifikacije bančine odgovornosti, a sve u cilju davanja što adekvatnijeg odgovora na postavljeno pitanje i zaštite klijenta banke kao ekonomski slabije ugovorne strane.

**Ključne reči:** banka, platni račun, neplatni račun, šteta, odgovornost, ugovorna odgovornost, deliktna odgovornost.

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