

SMU Annual Texas Survey

Volume 1

Article 5

2014

Commercial Transaction

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Recommended Citation

John Krahmer, *Commercial Transaction*, 1 SMU ANN. TEX. SURV. (2014)
<https://scholar.smu.edu/smuatxs/vol1/iss1/5>

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COMMERCIAL TRANSACTIONS

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I. INTRODUCTION

Since publication of the last *Commercial Transaction Survey* in 2012, almost two hundred cases have been decided by state and federal courts under the Texas version of the Uniform Commercial Code.¹ A majority of these cases confirmed prior interpretations of the Code, but several involved issues not previously addressed in Texas or that remain unsettled at the state or national level. Although several cases in the former category are briefly noted, this article concentrates on decisions in the latter group.

II. DEFINITIONS AND GENERAL PROVISIONS

A. CONSPICUOUSNESS & FAIR NOTICE

Several years ago, in *Dresser Industries, Inc. v. Page Petroleum, Inc.*,² the Texas Supreme Court held that the Code definition should be applied in both Code and non-Code cases to determine whether a relevant clause or notice meets the standard of “conspicuous.”³ A few years later, in *Littlefield v. Schaefer*,⁴ the court

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1. The Texas version of the Uniform Commercial Code appears as the first nine chapters in the Texas Business and Commerce Code (the “Code”). See TEX. BUS. & COM. CODE ANN. §§ 1.101–9.809 (West 2009). The Code first became effective in Texas on July 1, 1966 as a separate statute. See 1965 Tex. Gen. Laws, ch. 721, at 1–316. It was reenacted in 1967 as part of the Business & Commerce Code, the first of the codes promulgated under the Texas Codification Act. In that process, the designation of “Article” in the Official Text was changed to “Chapter,” subsections were designated by letters rather than numbers, and a period instead of a dash was used to designate sections. Thus, for example, § 2-204(1) in the Official Text became § 2.204(a) in the Texas codification. Revisions of the Code that have taken place since 1967 still substitute “Chapter” for “Article,” and still use a period instead of a dash, but now use the Official Text system for designating subsections. See, e.g., the revised version of Chapter 3 of the Code, 1995 Tex. Gen. Laws, ch. 921, § 1, which became effective on January 1, 1996. As currently enacted, Chapter 2 is the only chapter of the Code that retains the older non-uniform system to designate subsections. In the grand scheme of things, this is a minor point, but it can be confusing when doing Code research and in correlating the text of the Official Comments (which have not been adopted in Texas as part of the Code itself) to the statutory provisions. It can also affect searching on WestLaw and LEXIS if the searcher is trying to track case interpretations of particular sections of the Code due to the variation in section and subsection designations over the years.

2. *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 509 (Tex. 1993).

3. “Conspicuous” is defined in TEX. BUS. & COM. CODE ANN. § 1.201(b)(10) (West 2009), which provides:

expanded the fair notice requirements of “risk-shifting clauses,” such as waivers, releases, and indemnity provisions, by holding that such provisions must not only be conspicuous, but must also clearly state the intent of a party to be released from liability.⁵ These requirements have since been applied in numerous cases, including several decided since publication of the last Survey.⁶ While these cases were merely routine applications of the *Dresser* and *Littlefield* standards, the decision in *Van Voris v. Team Chop Shop, LLC*⁷ stands out because it addressed an unsettled issue about the effectiveness of risk-shifting provisions beyond the ordinary situation. In *Van Voris*, the court held that a release and waiver-of-liability agreement signed by a customer who enrolled in a martial arts course was both conspicuous and effective to waive a right to sue for injuries caused by the alleged negligence of the instructor during a jiu-jitsu demonstration.⁸ However, the customer also alleged that his injuries were caused not merely by negligence but by gross negligence.⁹ On this issue, the court noted that the Texas Supreme Court had not directly addressed the relationship between pre-injury releases of liability for gross negligence and public policy concerns about risk-shifting claims that may result in an award of punitive damages.¹⁰ After reviewing several cases discussing the role of public policy in other contexts, particularly in connection with insurance, the court reasoned that a “strong public policy prohibiting extraordinary risk-shifting provisions absent fair notice” required a clear statement of intent to release claims of gross negligence.¹¹ While the release in question met the requirement that it be conspicuous, it did not mention gross negligence as one of the claims

“Conspicuous,” with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is “conspicuous” or not is a decision for the court. Conspicuous terms include the following: (A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and (B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

4. *Littlefield v. Schaefer*, 955 S.W.2d 272 (Tex. 1997).

5. In *Littlefield*, the court stated, “First, a party’s intent to be released from all liability must be expressed in unambiguous terms within the four corners of the contract. . . . Second, the clause must be ‘conspicuous’ under the objective standard defined in the Uniform Commercial Code.” *Id.* at 274.

6. See, e.g., *Butler v. Taser Inter., Inc.*, 2012 WL 3867105 (N.D. Tex., Sept. 6, 2012) (waiver of the right to sue for injuries resulting from a Taser gun demonstration during training class held effective); *Thom v. Rebel’s Honky Tonk*, 2013 WL 1748798 (Tex. App.—Austin, Apr. 17, 2013, no pet.) (mem. op.) (substituted for earlier opinion) (holding a release and assumption of risk agreement precluded recovery for injuries suffered in a fall from riding a mechanical bull in an Austin bar); *Tuttle & Tuttle Trucking, Inc. v. EOG Res., Inc.*, 391 S.W.3d 240 (Tex. App.—Waco 2012, pet. dism’d) (finding an indemnity provision both conspicuous and effective to absolve trucking company from duty to defend action brought by company employee against customer of company).

7. *Van Voris v. Team Chop Shop, LLC*, 402 S.W.3d 915, 918–24 (Tex. App.—Dallas 2013, no pet.).

8. *Id.* at 920–21.

9. *Id.* at 921.

10. *Id.* at 921–22.

11. *Id.* at 924–26.

being released and, therefore, did not satisfy the requirement of fair notice.¹² Summary judgment in favor of the martial arts center on this issue was reversed and the case remanded.¹³

B. INTERPRETATION OF CONTRACT TERMS

One of the most critical issues in contract law is interpretation of the terms used by parties in their agreement. Section 1.303 of the Code allows evidence of course of performance, course of dealing, and trade usage to be used as aids to interpretation unless such evidence directly conflicts with the express terms of an agreement.¹⁴ *Citgo Petroleum Corp. v. Odfjell Seachem* is one of the relatively few cases arising in Texas involving the application of the United Nations Convention for the International Sale of Goods (CISG).¹⁵ In *Citgo*, a buyer in the United States contracted to buy several tons of a chemical from a seller in Argentina. The contract provided that the goods were to be shipped “CFR.” Because this was an international sale of goods, the court determined that it was governed by the CISG, and incorporated the International Chamber of Commerce definition of the CFR term, meaning “Cost and Freight.”¹⁶ Because both parties were engaged in the international sale and purchase of chemicals, the court held that the seller knew or should have known that the CFR term requires a seller to select a proper vessel and bear the risk of loss or damage until the goods are loaded onboard.¹⁷

Although the seller loaded the goods on a vessel in compliance with the CFR term, a problem arose when the ship broke down en-route because of a pre-

12. *Id.* at 926.

13. *Id.*

14. TEX. BUS. & COM. CODE ANN. § 1.303(d-e) (West 2009). “Course of performance” refers to how parties have acted under their current agreement. For example, if the agreement calls for deliveries on the first of each month, but deliveries are routinely made and accepted a few days late, this may prevent a buyer from suddenly rejecting a delivery for failure to deliver on the first. The behavior of the parties has indicated they have interpreted their agreement to mean deliveries “on or about” the first, that they have effectively modified their agreement to permit later delivery, or that the buyer has waived the right to reject because of a delay. “Course of dealing” refers to how the parties have dealt with each other under previous contracts of the same kind. As with course of performance, a party may be barred from acting under a current contract in a manner different from the way a party acted under similar previous contracts. “Usage of trade” refers to the way in which parties in a particular trade or industry routinely interpret contract terms used in that trade or industry (e.g., a contract for the sale of “2x4” lumber would probably not allow a buyer to reject a delivery of lumber that physically measures 1-5/8” by 3-5/8” because that is the standard dimension of 2x4 lumber). Careful drafting of express terms in a contract can, however, override use of these aids to interpretation. For example, an anti-waiver clause may allow a buyer to reject a delayed delivery even if past deliveries have been accepted despite the delay or a contract may specifically require lumber of a certain physical dimension by excluding evidence of contrary trade usage. For a recent decision rejecting evidence of course of dealing and course of performance as being insufficient to vary the ordinary meaning of a term used in a contract, see *Shell Trading (US) Co. v. Lion Oil Trading and Trans., Inc.*, No. 14-11-00289-CV, 2012 WL 3958029 (Tex. App.—Houston [14th Dist.] Sept. 11, 2012, pet. denied) (finding evidence of two prior occurrences years earlier under the circumstances caused by Hurricane Katrina did not establish a course of dealing to vary the meaning of a contract term, and single performance under a single contract did not establish a course of performance).

15. *Citgo Petroleum Corp. v. Odfjell Seachem*, No. H-07-2950, 2013 WL 2289951, at *1, *5 (S.D. Tex. May 23, 2013) (setting forth the facts of the case).

16. *Id.* at *5.

17. *Id.*

existing engine problem, causing delivery to the buyer to be delayed for almost two months.¹⁸ The buyer sued for breach of contract but the seller contended that its obligation ended when the goods were loaded on the ship. The buyer argued that article 32 of the CISG also imposes a duty on the seller to select an appropriate vessel, which this seller did not do. On this issue, the court found that article 32 obligated the seller to select an appropriate means of transportation and a fact issue existed on whether the seller had done so.¹⁹ Because of this fact issue, the seller's motion for summary judgment was denied.²⁰

C. GOOD FAITH & FAIR DEALING

In *Mailing and Shipping Systems, Inc. v. Neopost USA, Inc.*, the court addressed the question of whether a duty of good faith and fair dealing under § 1.304 of the Code required a supplier to provide a ninety-day notice of termination to a dealer where there was a conflict between the ninety-day time period stated in the Dealer's Policy Manual and a thirty-day time period contained in the dealership agreement.²¹ The court reasoned that the Policy Manual and the dealership agreement should be read together and, in light of a clause in the Policy Manual stating that it governed the relationship "[e]xcept as otherwise provided in a written agreement with the Dealer," the shorter time period was controlling.²² The court rejected an argument that the duty of good faith and fair dealing imposed any obligation greater than that stated in the dealership agreement.²³ The court noted that under Texas law, there is no independent duty of good faith and fair dealing, but, rather, the duty only requires a party to comply with the obligations created by the contract itself.²⁴

D. ACCELERATION

Acceleration of payment or performance obligations is referred to in several sections of the Code.²⁵ The right to accelerate, however, has been carefully circumscribed by judicial imposition of a series of notice requirements that must be met or effectively waived before acceleration is effective.²⁶ While the

18. *Id.*

19. *Id.* at *8.

20. *Id.*

21. *Mailing & Shipping Sys., Inc. v. Neopost USA, Inc.*, 937 F. Supp. 2d 879, 885 (W.D. Tex. 2013).

22. *Id.* at 885-86.

23. *Id.* at 889.

24. *Id.* On this point, the court cited an important decision in *Northern Nat. Gas Co. v. Conoco, Inc.*, 986 S.W.2d 603 (Tex. 1998), where the court held that there was no independent duty of good faith and fair dealing but, rather, the duty was a way of measuring a party's performance under the contract terms.

25. See TEX. BUS. & COM. CODE ANN. §§ 1.309, 2A.109, 3.106(b), .108(b), .118(a), .304(b), .304(c) (West 2009).

26. In *Ogden v. Gibraltar Sav. Ass'n*, 640 S.W.2d 232, 233-34 (Tex. 1982), the court held that proper acceleration requires a three step process: notice of intent to accelerate, notice of acceleration, and presentment. In *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 893 (Tex. 1991), the court later held that these requirements could be waived if the waiver separately stated and expressly waived each of these requirements.

requirements are clear, problems can arise if a waiver is poorly drafted or, as illustrated by the decision in *Mathis v. DCR Mortgage III Sub I, L.L.C.*,²⁷ if loan documents are not consistent in their statement of waiver. In *Mathis*, the court determined that the waiver clause in a note, standing alone, would have been effective.²⁸ Unfortunately for the creditor, however, the deed of trust securing the note did not contain a waiver that “clearly and unequivocally” waived the notice requirements.²⁹ The court held that the note and deed of trust, read together, did not waive the right to proper notice, and the attempted acceleration was therefore ineffective.³⁰ This case is of particular interest because the court pointed out that if the deed of trust had said nothing about waiver, the waiver provision in the note would have been effective.³¹ The lesson to be learned from *Mathis* is that too much drafting can sometimes be as bad as too little drafting.³²

In *APM Enterprises, LLC v. National Loan Acquisitions, Co.*, a note holder sent notices to the maker demanding payment of past due amounts and stating that if the payments were not made, the loan would be referred to an attorney for collection.³³ The court held that these notices were not sufficient to state an intent to accelerate as required by Texas law.³⁴ Summary judgment in favor of the note holder was reversed and the case remanded.³⁵

III. SALE OF GOODS

A. THE CODE STATUTE OF FRAUDS

Section 2.201 states the Statute of Frauds requirements in contracts for the sale of goods.³⁶ The basic rule requires a writing signed by the party against whom enforcement is sought for contracts in the amount of five hundred dollars or more.³⁷ A corollary to this rule is that a party who has not signed a

27. *Mathis v. DCR Mortgage III Sub I, L.L.C.*, 389 S.W.3d 494 (Tex. App.—El Paso 2012, no pet.).

28. *Id.* at 507.

29. *Id.* at 507–08.

30. *Id.*

31. *Id.* at 507.

32. The problem with excess drafting is somewhat reminiscent of what Mark Twain said about talks that last too long. See <http://www.twainquotes.com/Impulse.html> (last visited Jan. 21, 2015). It is interesting to note that the drafting problem involved in *Mathis* seems to have been rarely litigated since the only case in point cited and discussed extensively in the opinion was an unpublished decision decided some fifteen years earlier. See *Dolci v. Askew*, No. 04-95-00867-CV, 1997 WL 428560 (Tex. App.—San Antonio, July 30, 1997) (not designated for publication). In light of the numerous foreclosure cases arising in recent years, *Mathis* may provide another basis to challenge the effectiveness of a foreclosure if proper notice is not given or if inconsistent waiver language exists in the note and deed of trust. The same could also be true if waiver language in a note differs from that contained in an underlying security agreement in a personal property transaction under Chapter 9 of the Code.

33. *APM Enterprises, LLC v. Nat'l Loan Acquisitions, Co.*, 357 S.W.3d 405, 406 (Tex. App.—Texarkana 2012, no pet.).

34. *Id.* at 409.

35. *Id.*

36. TEX. BUS. & COM. CODE ANN. § 2.101 (West 2009).

37. *Id.*

written contract may still be bound if that party receives a confirmation from the other party but fails to object to the confirmation within ten days after it has been received.³⁸ The only required term that the writing or the confirmation must contain is a statement of quantity.³⁹ Once such a document is shown to exist, a party is entitled to proceed with oral testimony to prove other terms of the agreement. This basic rule and its corollary were directly involved in *Westlake Petrochemicals, L.L.C. v. United Polychem, Inc.*, where a seller entered into an agreement to sell ethylene to a buyer.⁴⁰ When the price of ethylene fell, the buyer refused to proceed, claiming that a final contract had not been formed because there was no writing to reflect the understanding of the parties about the need for the seller to approve the buyer's credit as part of the contract. The buyer argued that the credit term was essential to the contract and neither an instant message nor an email sent by the seller to the buyer reflected this term. The court held that the instant message and the email to confirm the sale were sufficient to satisfy the Statute of Frauds because the message and email stated the quantity of ethylene to be sold, the only term required by § 2.201.⁴¹ As to the credit term, the court determined that approval of credit was a condition precedent to the seller's performance and not a condition precedent to formation of a contract.⁴²

Another sale of goods issue in *Westlake* concerned the measure of damages that the seller was entitled to recover.⁴³ The trial court instructed the jury to determine an award of damages under § 2.708(a) of the Code, which is based on the standard contract formula of assessing damages based on the difference between the contract price and the market price.⁴⁴ Based on this instruction, the jury returned a verdict in the amount of \$6.3 million in favor of the seller and this amount was incorporated in the final judgment of the trial court.⁴⁵ On appeal, the court addressed the issue of whether use of the 2.708(a) formula overcompensated the seller because, after learning of the buyer's breach, the seller did not actually purchase ethylene from its own suppliers.⁴⁶ Referring to its earlier decision in *Nobs Chemical, USA v. Koppers, Co.*,⁴⁷ the court reasoned

38. This provision of the Statute of Frauds is generally referred to as the "merchant's exception" because it is only applicable to contracts between merchants. See TEX. BUS. & COM. CODE ANN. § 2.201(b) (West 2009).

39. *Id.*

40. *Westlake Petrochemicals, L.L.C. v. United Polychem, Inc.*, 688 F.3d 232, 236 (5th Cir. 2012) (setting forth facts and claims of the parties).

41. *Id.* at 241.

42. *Id.* at 242.

43. *Id.*

44. TEX. & COM. CODE ANN. § 2.708(a) (West 2009) provides:

(1) Subject to subsection (b) and to the provisions of this chapter with respect to proof of market price (Section 2.723), the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this chapter (Section 2.710), less expenses saved in consequence of the buyer's breach.

45. *Westlake*, 688 F.3d at 243.

46. *Id.*

47. *Nobs Chemical, USA v. Koppers, Co.*, 616 F.2d 212 (5th Cir. 1980). In 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE: PRACTITIONER TREATISE SERIES 715-16

that in the case of breach, both the Code and general contract law are intended to award expectation damages that put a party in the same position the party would have been in if the contract had been performed.⁴⁸ Because an award under § 2.708(a) would put the seller in a better position than performance would have done, it was more appropriate to award the seller the lost profit measure of damages under § 2.708(b).⁴⁹ The case was remanded for a new trial on the issue of damages that should be allowed under § 2.708(b).⁵⁰

B. BREACH OF WARRANTY OR BREACH OF CONTRACT?

One of the most perplexing issues in Texas law governing the sale of goods under Chapter 2 of the Code is when a claim may be asserted for breach of either contract or warranty. Part of the reason for this complexity lies in the inclusion of breach of warranty claims in the Texas Deceptive Trade Practices Act (DTPA).⁵¹ Under general Texas law, attorney's fees are recoverable in a breach of contract action under the Texas Civil Practices & Remedies Code and in breach of warranty actions brought under the DTPA.⁵² However, under the DTPA, damage recovery may be multiplied if the conduct complained of was committed "knowingly" or "intentionally," and may also result in additional recovery for mental anguish.⁵³ The lure of recovering attorney fees and enhanced damages has resulted in a vast number of cases alleging violations of the DTPA for breach of warranty.⁵⁴ In *Southwestern Bell Telephone Co. v. FDP Corp.*, the court reviewed the historical development of warranty law and pointed out that "[t]he UCC recognizes that breach of contract and breach of warranty are not the same cause of action."⁵⁵ While this helped to clarify the

(6th ed. 2010), *Nobs* is described as one of two "major cases" that properly applied TEX. BUS. & COM. CODE ANN. § 2.708(b) (West 2009) when the contract/market formula in § 2.708(a) would overcompensate a plaintiff seller.

48. *Westlake*, 688 F.3d at 243-44 (citing TEX. BUS. & COM. CODE ANN. § 1.305(a) (West 2009) and *Little Darling Corp. v. Ald, Inc.*, 566 S.W.2d 347, 349 (Tex. Civ. App.—Dallas 1978, no writ.)).

49. *Id.* at 244.

50. *Id.* at 247.

51. The Texas Deceptive Trade Practices Act appears as Chapter 17 in the Business & Commerce Code. See TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (West 2009); TEX. BUS. & COM. CODE ANN. § 17.50(a)(2) (West 2009) (which provides, *inter alia*, that "[a] consumer may maintain an action . . . [for] breach of an express or implied warranty. . .").

52. TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(8) (West 2008) ("A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for . . . an oral or written contract."); TEX. BUS. & COM. CODE ANN. § 17.50(d) (West 2009) ("Each consumer who prevails shall be awarded court costs and reasonable and necessary attorneys' fees.").

53. See TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (West 2009) (stating a formula for the recovery of economic damages and the multiplier when the trier of fact determines that conduct was committed knowingly or intentionally).

54. A rough measure of the number of cases can be determined by a Westlaw search using the phrase, "DTPA" & "breach of warranty" for cases decided after May 1, 1973, the effective date of the DTPA. As of January 22, 2015, this search found 1,154 cases in which both terms appeared. A detailed discussion of the relationship between the Code and the DTPA is beyond the scope of this Survey. Suffice it to say that other factors may lead a plaintiff to bring a claim under the DTPA, including differing statute of limitation provisions that may allow a DTPA claim to proceed even though it may be barred under the limitation provisions of the Code.

55. *Southwestern Bell Telephone Co. v. FDP Corp.*, 811 S.W.2d 572, 576 (Tex. 1991). In

point that a breach of contract would not give rise to a breach of warranty under the DTPA, it did little to explain the difference. Some subsequent decisions interpreted *Southwestern Bell* as a determination that a breach of contract could only be asserted if a seller failed to deliver goods, but that a claim for breach of warranty would lie when goods have been delivered and accepted but the buyer later finds they are defective or non-conforming.⁵⁶ A recent decision in *Beauty Manufacturing Solutions Corp. v. Ashland, Inc.* required the court to determine if delivery and acceptance of the wrong product without discovery of its non-conformity until some of the product had been used in a manufacturing process was a breach of contract or a breach of warranty.⁵⁷ As an initial matter, the court had to decide if the buyer had properly revoked acceptance of the goods. On this issue, the court held that revocation had not occurred because the condition of the goods had been changed in the manufacturing process.⁵⁸ Nonetheless, the court also held that notice of the breach was timely under § 2.607(c) of the Code and that the plaintiff was not barred from seeking recovery.⁵⁹

Having resolved these matters, the court turned to the question of whether the buyer's claim was one for breach of warranty or for breach of contract.⁶⁰ On this issue, the court noted that § 2.714 of the Code provides remedies for both breach of warranty and breach of contract.⁶¹ The court further noted that the separation between these claims was "not entirely clear."⁶² After reviewing earlier cases discussing the differences between these claims and the requirements for creation of a warranty, the court concluded that failure to deliver the product called for under the contract was "better understood as a breach of contract case" because the identifying product number was not a description of the quality or suitability of the goods.⁶³ Once the claim was determined to be a breach of contract rather than a breach of warranty, the court had no difficulty in deciding that the plaintiff could not maintain a breach of warranty claim

several other decisions, the court has stated that a "mere breach of contract" does not give rise to a DTPA violation. See, e.g., *Rocky Mountain Helicopters, Inc. v. Lubbock Cnty. Hosp. Dist.*, 987 S.W.2d 50, 53 (Tex. 1998); *Crawford v. Ace Sign, Inc.*, 917 S.W.2d 12, 14 (Tex. 1996); *La Sara Grain Co. v. First Nat'l Bank of Mercedes*, 673 S.W.2d 558, 565 (Tex. 1984); *Ashford Devel., Inc. v. USLife Real Estate Serv. Corp.*, 661 S.W.2d 933, 935 (Tex. 1983).

56. See, e.g., *United Galvanizing, Inc. v. Imperial Zinc Corp.*, No. H-08-0551, 2011 WL 11185, at *9 (S.D. Tex. Jan. 3, 2011); *Trident Steel Corp. v. Wiser Oil Co.*, 223 S.W.3d 520, 525-26 (Tex. App.—Amarillo 2006, pet. denied); *Ellis v. Precision Engine Rebuilders, Inc.*, 68 S.W.3d 894, 896-97 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *Chilton Ins. Co. v. Pate & Pate Enter.*, 930 S.W.2d 877, 890 (Tex. App.—San Antonio 1999, pet. denied).

57. *Beauty Mfg. Solutions Corp. v. Ashland, Inc.*, 848 F. Supp. 2d 663, 665-67 (N.D. Tex. 2012).

58. *Id.* at 669. See TEX. BUS. & COM. CODE ANN. § 2.608(b) (West 2009) (requiring that "[r]evocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects") (emphasis added).

59. *Beauty Mfg. Solutions Corp.*, 848 F. Supp. 2d at 671. See TEX. & COM. CODE ANN. § 2.607(c) (West 2009) (requiring that a buyer give notice of breach within a reasonable time after discovery or "be barred from any remedy").

60. *Beauty Mfg. Solutions Corp.*, 848 F. Supp. 2d at 671.

61. *Id.* at 668-69.

62. *Id.*

63. *Id.* at 671.

under the DTPA.⁶⁴

The decision in *Beauty Manufacturing* raises an interesting question. If a contract identifies a particular item as the subject of the contract, and the seller delivers an item that is not readily identifiable as being different than that called for by the contract, can this ever be a breach of warranty under the reasoning in *Beauty Manufacturing* if the buyer accepts the goods without discovery of the non-conformity? For example, suppose a contract calls for delivery of gluten-free bread and the seller delivers non-gluten-free bread that is accepted by the buyer without discovery of the non-conformity. Should this be “better understood as a breach of contract” rather than a breach of warranty? Or should the contract term calling for gluten-free bread be regarded as a description of the goods creating an express warranty under § 2.313(a)(2) of the Code, or even an implied warranty of merchantability under § 2.314(b)(1), because non-gluten-free bread would hardly “pass without objection in the trade under the contract description”?⁶⁵ The difficulty of characterization increases if we hypothesize a gluten-intolerant buyer who is harmed by eating the bread because § 2.715(b)(2) of the Code allows recovery for personal injury or property damage from a breach of warranty as consequential damage without requiring that the seller have reason to know of any general or particular requirements of the buyer.⁶⁶ Such recovery would seemingly be barred if this were a “mere” breach of contract.

Failing to treat the identification of goods in a contract as a description of the goods is an overly simplistic way of drawing a line between breach of contract and breach of warranty. On the facts of *Beauty Manufacturing*, the court may have been correct because there was some confusion about how the buyer and seller identified the product due to the use of different product numbers in their respective purchase orders and invoices, and because the buyer seemed to posit its warranty claim more on the basis of the warranty of fitness for purpose under § 2.315 of the Code rather than on a warranty of merchantability under § 2.314.⁶⁷ The difficulty with the reasoning in *Beauty Manufacturing* is that it may lead to routinely treating identification of goods in a contract as a contract claim without giving careful analysis to the possibility that the identification of the goods may also have been intended to constitute a warranty.⁶⁸

64. *Id.* at 672.

65. TEX. BUS. & COM. CODE ANN. § 2.313(a)(2) (West 2009) provides that “[a]ny description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.” TEX. BUS. & COM. CODE ANN. § 2.314(b)(1) (West 2009) provides that “[g]oods to be merchantable must be at least such as (1) pass without objection in the trade under the contract description.”

66. TEX. BUS. & COM. CODE ANN. § 2.715(b)(1) (West 2009) provides that a seller may be liable for “any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know. . . .” Section 2.715(b)(2) states no such requirement in the case of personal injury or property damage.

67. See *Beauty Mfg. Solutions Corp.*, 848 F. Supp. 2d at 671, where the court states that use of the identification number “is in some ways an ‘affirmation or promise,’” it did not “describe attributes, suitability of a particular purpose, [or] ownership of what is sold.”

68. This possibility has already been illustrated by the decision in *Berge Helene Ltd. v. GE Oil & Gas, Inc.*, where the court quoted *Beauty Manufacturing* as support for its conclusion that “[a]ny alleged promise of stainless steel piston rods [contained in a flyer and in the contract was a] ‘contract term identify[ing] what is being sold,’ and not a warranty ‘describ[ing] attributes,

In *Duran v. City of Eagle Pass, Texas*, an individual was incarcerated in a city jail.⁶⁹ During his incarceration, the person hanged himself by using a telephone cord attached to a telephone located in the cell. The individual's mother sued the city and the company that had installed the telephone. After suit was brought, the city filed a third-party complaint against the installation company. Both the plaintiff and the city asserted claims for breach of a warranty of merchantability and a warranty of fitness for particular purpose in addition to claims for negligence and strict liability. The court held that the claim for breach of the warranty of merchantability would not lie because the phone was fit for its ordinary purpose and was not unreasonably dangerous.⁷⁰ In addition, neither the plaintiff nor the city gave the installation company notice of the breach.⁷¹ As to the implied warranty of fitness for a particular purpose, however, the court rejected the installation company's argument that a lack of privity barred this claim and, citing the similar case of *JCW Electronics, Inc. v. Garza*,⁷² denied the company's motion for summary judgment for further proceedings on the issue of privity.⁷³

The requirement of giving notice to avoid being barred from any remedy under § 2.607 of the Code was critical to the decision in *McKay v. Novartis Pharmaceuticals Corp.*⁷⁴ In *McKay*, a husband and wife sued a pharmaceutical company for personal injuries the husband allegedly suffered because of a drug manufactured by the company. In addition to strict liability and negligence claims, the plaintiffs asserted claims for breach of express and implied warranties. On the warranty claims, the court pointed out that the lower Texas courts were split on the question of whether a buyer is required to give a remote manufacturer notice of breach or whether it is sufficient to give notice only to the immediate seller, and that this issue had not been resolved by the Texas Supreme Court.⁷⁵ After reviewing the conflicting decisions, the court adopted the view that a buyer must give notice to both the immediate seller and to a

suitability for a particular purpose, and ownership of what is sold.” *Berge Helene Ltd. v. GE Oil & Gas, Inc.*, 896 F. Supp. 2d 582, 605 (S.D. Tex. 2012). Conclusions like this seem contrary to the provisions in TEX. BUS. & COM. CODE ANN. § 2.313(b) (West 2009) that state that “[i]t is not necessary to the creation of an express warranty that the seller use formal words such as ‘warrant’ or ‘guarantee’ or that he have a specific intention to make a warranty” Perhaps cases like *Beauty Manufacturing* and *Berge Helene* are indications that the case law is reverting to common law approaches that the Code attempted to avoid.

69. *Duran v. City of Eagle Pass, Tex.*, No. SA-10-CV-504-XR, 2012 WL 1593185, at *1-2 (W.D. Tex. May 3, 2012) (setting forth the facts of the case and claims of the parties).

70. *Id.* at *3.

71. *Id.* As noted above in the discussion of the *Beauty Manufacturing* case, TEX. BUS. & COM. CODE ANN. § 2.607(c)(1) (West 2009) requires a buyer to give notice of breach or “be barred from any remedy.”

72. *JCW Electronics, Inc. v. Garza*, 176 S.W.3d 618 (Tex. App.—Corpus Christi 2005), *rev'd on other grounds*, 257 S.W.3d 701 (Tex. 2008).

73. *Duran*, 2012 WL 1593185, at *3.

74. *McKay v. Novartis Pharmaceuticals Corp.*, 934 F. Supp. 2d 898 (W.D. Tex. 2013).

75. *Id.* at 912. The split among the lower appellate courts was expressly recognized by the Supreme Court in its *per curiam* denial of a writ of error in *Wilcox v. Hillcrest Memorial Park of Dallas*, 701 S.W.2d 842, 843 (Tex. 1986), and reiterated in *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 674 n.14 (Tex. 2004). The conflicting cases are collected in *McKay*, 934 F. Supp. 2d at 913 n.111.

remote manufacturer to satisfy the requirements of § 2.607.⁷⁶ The court further held that the filing of an earlier class action against the manufacturer that did not identify the present plaintiff did not suffice for purposes of the notice requirement.⁷⁷ Because of the failure to give effective notice, all of the warranty claims were barred.⁷⁸

A continuing issue in Texas warranty law is whether attorney's fees can be recoverable in actions for breach of warranty. The question was partially answered by the Texas Supreme Court in *Medical City Dallas, Ltd. v. Carlisle Corp.*, where it held that attorney's fees could be recovered in actions for breach of express warranty if the plaintiff sought only to recover economic damages for failure to perform under the warranty.⁷⁹ The court did not, however, indicate whether its ruling also applied to implied warranties, because that issue was not involved on the facts before it. This left a lacuna in the law on whether attorney's fees were recoverable in implied warranty actions.⁸⁰ This issue was further complicated by a statement made by the court during the same term in *JCW Electronics, Inc. v. Garza* that "[i]mplied warranties are created by operation of law and are grounded more in tort than in contract."⁸¹

In the carefully researched and well-reasoned opinion of *Howard Industries, Inc. v. Crown Cork & Seal Co.*,⁸² the court examined earlier case law, including the decisions in *Medical City* and *JCW Electronics*, and concluded they did not stand for the proposition that attorney's fees could never be recovered in implied warranty actions because, with one exception, the claims did not seek economic damages only, but sought other damages as well.⁸³ Based on its analysis of prior cases, the court held that since the plaintiff in the case at bar was seeking only economic damages in its implied warranty action, damages were recoverable under Civil Practices & Remedies Code § 38.001(38) as a claim arising in contract.⁸⁴ *Howard Industries* is therefore a significant decision,

76. *McKay*, 934 F. Supp. 2d at 913.

77. *Id.* at 914.

78. *Id.*

79. *Medical City Dallas, Ltd. v. Carlisle Corp.*, 251 S.W.3d 55, 61–62 (Tex. 2008).

80. *JCW Electronics, Inc. v. Garza*, 257 S.W.3d 701, 703–05 (Tex. 2008). In two earlier decisions, the lower courts had denied recovery of attorney's fees on either express warranty or implied warranty claims. These rulings seemed to have been based on a phrase used in *Southwestern Bell Telephone Co. v. FDP Corp.*, 811 S.W.2d 572, 576 (Tex. 1991), that "breach of contract and breach of warranty are not the same cause of action." See *JHC Ventures, L.P. v. Fast Trucking, Inc.*, 94 S.W.3d 762, 769 (Tex. App.—San Antonio 2002, no pet.); *Harris Packaging Corp. v. Baker Concrete Const. Co.*, 982 S.W.2d 62, 69 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). The author has previously noted the difficulties created by use of this phrase. See John Kraher, *Commercial Transactions*, 62 SMU L. REV. 995, 1002 (2009); John Kraher, *Commercial Transactions*, 56 SMU L. REV. 1255, 1261 (2003).

81. *JCW Elect.*, 257 S.W.3d at 704.

82. *Howard Indus., Inc. v. Crown Cork & Seal Co.*, 403 S.W.3d 347 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

83. The cases are collected and discussed in *Howard Indus.*, 403 S.W.2d at 352–53. The one exception noted by the court is *Basic Energy Service, Inc. v. D-S-B Properties, Inc.*, 367 S.W.3d 254 (Tex. App.—Tyler 2011, no pet.), which the *Howard* court describes as reaching this conclusion "without analysis." See *Howard Indus.*, 403 S.W.3d at 353.

84. *Howard Indus.*, 403 S.W.3d at 353. TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(8) (West 2008) allows recovery of attorney's fees in actions for breach of contract. In situations where a defective product only causes damage to itself, the proper cause of action is for breach of warranty or breach of contract for economic loss, not negligence or product liability. Thus, in *Haynesville*

which may help settle the previous lack of clarity about the proper characterization of implied warranty claims.⁸⁵

*Shows v. Man Engines & Components, Inc.*⁸⁶ is another significant decision on the subject of implied warranties. The engines on a yacht were replaced in 2000, then, in 2002, the yacht was sold by the then-current owner to the plaintiff who purchased the yacht with knowledge that the yacht and engines were used goods. In 2004, one of the engines failed and was repaired. A year later, the engine failed again and could not be repaired. The plaintiff sued the engine manufacturer for breach of the implied warranty of merchantability. The jury found in favor of the plaintiff, but the trial court granted the defendant's motion for judgment notwithstanding the verdict, relying in part on the ground that under Texas law no implied warranties arise in the sale of used goods.⁸⁷ On appeal, the court pointed out that while it was true that several appellate court cases had held that no warranties arise in the sale of used goods, the Texas Supreme Court had never ruled on this issue.⁸⁸ The court distinguished these cases on the ground that the plaintiff in the case at bar was not suing the immediate seller for a breach of implied warranty arising when the plaintiff purchased the yacht, but instead, the suit was against the engine manufacturer for breach of the implied warranty that arose when the new engines were sold to a previous owner and installed in the yacht.⁸⁹ Relying on *Nobility Homes of Texas, Inc. v. Shivers*,⁹⁰ the court also held that privity was not required in the plaintiff's action against the manufacturer.⁹¹ The court reversed the judgment of the trial court and remanded the case to reinstate the jury verdict and to determine the attorney's fees to which the plaintiff might be entitled.⁹² The grant of a petition to review in *Shows* may portend further development on the issue of implied warranties in the sale of used goods.

C. DISCLAIMERS AND LIMITATION OF DAMAGES

The Code allows both the disclaimer of warranties and the limitation of

Shale Rentals, LLC v. Total Equip. & Serv., Inc., No. H-12-0860, 2012 WL 4867603, at *4-5 (S.D. Tex. Oct. 12, 2012) (mem. op.), claims for breach of warranty under the Code and under the DTPA were properly pled, but the negligence and product liability claims were dismissed.

85. *Structural Metals, Inc. v. S & C Electric Co.*, No. SA-09-CV-984-XR, 2013 WL 3790307, at *1, n.1 (W.D. Tex. July 19, 2013). The court noted that the Texas Supreme Court had not yet ruled on whether attorney's fees are recoverable in implied warranty actions, but cited *Howard Industries* as a case allowing such recovery.

86. *Shows v. Man Engines & Components, Inc.*, 364 S.W.3d 348, 350 (Tex. App.—Houston [14th Dist.] 2012, pet. granted).

87. *Id.* at 351-52.

88. *Id.* at 352 n.3. The first Texas case to hold that implied warranties do not arise in the sale of used goods was *Chaq Oil Co. v. Gardner Machinery Corp.*, 500 S.W.2d 877 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ). Subsequent cases relying on *Chaq Oil* are cited in the *Shows* opinion. See *Shows*, 364 S.W.3d at 352-53. The author has noted elsewhere that dicta in the Supreme Court decision in *Mid Continent Aircraft Corp. v. Curry Cnty. Spraying Services, Inc.*, 572 S.W.2d 308, 313 (Tex. 1978), seems to suggest that used goods might carry an implied warranty of merchantability. See John Krahrmer, *Commercial Transactions*, 37 SW. L. J. 145, 152 n.55 (1983).

89. *Shows*, 364 S.W.3d at 353.

90. *Nobility Homes of Tex., Inc. v. Shivers*, 557 S.W.2d 77 (Tex. 1977).

91. *Shows*, 364 S.W.3d at 354-55.

92. *Id.* at 359.

damages.⁹³ A disclaimer differs from a limitation of damages in that a disclaimer, if effective, prevents a warranty from arising at all. In contrast, a limitation of damages clause does not prevent creation of a warranty, but limits the damages recoverable for a breach of warranty or a breach of contract. In *Integrated Marine Services, L.L.C. v. Hoist Liftruck Mfg.*,⁹⁴ a dealer in heavy equipment argued that its dealer agreement barred a purchaser from asserting claims for breach of the warranty of merchantability and the warranty of fitness for a particular purpose. Noting that these warranties arise under the Code unless they are conspicuously excluded, the court held that the dealer agreement contained no conspicuous language excluding either warranty, and therefore denied the dealer's motion to dismiss the warranty claims.⁹⁵

An issue closely related to warranties arising under the Code involves the common law warranty of good and workmanlike performance in the repair or modification of tangible property, announced by the Texas Supreme Court in its 1987 decision in *Melody Home Manufacturing Co. v. Barnes*.⁹⁶ As part of its decision, the court added that this warranty could not be waived or disclaimed.⁹⁷ In *Centex Homes v. Buecher*,⁹⁸ the court addressed the relationship between the warranty of good and workmanlike performance arising from the decision in *Melody* and the warranty of habitability and good workmanship in the construction of new homes that was created in *Humber v. Morton*⁹⁹ in 1968. The court in *Centex* noted the parallel relationship of the warranties in *Melody* and *Humber* and that it had previously "conflated" the two warranties, leading to uncertainty about waivers or disclaimers of these warranties.¹⁰⁰ After reviewing the history and purposes of the warranty of habitability and the warranty of good workmanship, the court held that the warranty of habitability could not be disclaimed as to latent defects affecting use of a home, but that the warranty of good workmanship could be "superseded" by an express warranty that set out the standards by which the workmanship was to be measured.¹⁰¹

In a significant decision in *Gonzales v. Olshan Foundation Repair Co.*, the Texas Supreme Court provided guidance on the specificity required to permit an express warranty to supersede the implied warranty of good workmanship.¹⁰² The express warranty in question specified that the foundation repair company would employ its "Cable Lock"® system in a good and workmanlike manner

93. See TEX. BUS. & COM. CODE ANN. § 2.316 (West 2009) (stating standards for effective disclaimers); TEX. BUS. & COM. CODE ANN. § 2.718 (West 2009) (stating requirements for the liquidation or limitation of damages).

94. *Integrated Marine Services, L.L.C. v. Hoist Liftruck Mfg.*, No. H-12-1379, 2012 WL 3779308 (S.D. Tex. Aug. 30, 2012).

95. *Id.* at *2.

96. *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 353-54 (Tex. 1987).

97. *Id.* at 355.

98. *Centex Homes v. Buecher*, 95 S.W.3d 266, 269-70 (Tex. 2002).

99. *Humber v. Morton*, 426 S.W.2d 554, 555 (Tex. 1968).

100. *Centex*, 95 S.W.3d at 270-71. The court referred to its decision in *G-W-L, Inc. v. Robichaux*, 643 S.W.2d 392 (Tex. 1982), as the case in which it had failed to distinguish between the warranties of good workmanship and habitability resulting in uncertainty about the ability to waive or disclaim these warranties. See *Centex*, 95 S.W.3d at 270.

101. *Centex*, 95 S.W.3d at 274-75.

102. *Gonzales v. Olshan Found. Repair Co.*, 400 S.W.3d 52, 59 (Tex. 2013).

and level the foundation if settling of the foundation occurred in the future.¹⁰³ When problems with the repair later arose, the plaintiff sought recovery under common law and under the DTPA for breach of express warranty and for breach of the warranty of good workmanship. The jury found that the repair company had not breached the express warranty, but had breached the implied warranty. The plaintiff prevailed at trial and the repair company appealed. On appeal, the court of appeals held that the action for breach of the implied warranty could be brought only under the DTPA and that the action was barred because it had been brought more than two years and eight months after discovery of the repair problems.¹⁰⁴ On further appeal, the Supreme Court applied the rationale of *Centex* and held that the express warranty sufficiently described the “manner, performance, and quality” to supersede the implied warranty.¹⁰⁵ Because the implied warranty was superseded, the court did not find it necessary to address the issue of whether an implied warranty claim could be brought only under the DTPA.¹⁰⁶ The court also noted that it was not expressing an opinion on whether the plaintiff could assert a future claim under a separate “lifetime” warranty of repair.¹⁰⁷ *Gonzales* is a helpful case in understanding the difference between the inability to have an outright disclaimer of the implied warranty of good workmanship and the ability to supersede the implied warranty by a properly drafted express warranty describing the “manner, performance, and quality” of the work to be performed.

In a potentially significant decision in *Garden Ridge, L.P. v. Advance International, Inc.*, a retailer ordered two shipments of inflatable outdoor Christmas snowmen from a seller.¹⁰⁸ When the shipments were delivered, the buyer discovered that the design of the snowmen differed from that specified in the contract. Despite the non-conformity, the buyer accepted the snowmen and sold all of them at the originally advertised price. No customers complained about the design difference, but the buyer refused to pay for the goods. In an action for declaratory judgment brought by the buyer to enforce a liquidated damages clause that would absolve the buyer from paying for the goods, the seller counterclaimed for the full price of the goods. The buyer contended that the liquidated damage provision in the contract allowed the buyer to “charge-back” the entire price of the orders. The seller argued that the provision was

103. *Id.* at 56–57. A description of the repair company’s Cable Lock® system may be found at <http://www.olshanfoundation.com/content/about-cable-lock-st-plus>.

104. See *Southwest Olshan Found. Rep. Co, LLC v. Gonzales*, 345 S.W.3d 431, 440 (Tex. App.—San Antonio 2011) *aff’d*, 400 S.W.3d 52 (Tex. 2013). Section 17.565 of the DTPA states that actions must be brought within two years after discovery of “a false, misleading, or deceptive act or practice.” TEX. BUS. & COM. CODE ANN. § 17.565 (West 2009). The limitation period may be extended for 180 days if the plaintiff shows that the defendant knowingly induced the plaintiff to delay filing an action. *Id.* Even with an extension, the plaintiff in *Gonzales* did not file suit until two years and eight months after discovery and the court noted this was beyond even the extended limitation period. *Gonzales*, 400 S.W.3d at 59.

105. *Gonzales*, 400 S.W.3d at 59.

106. *Id.* at 55 n.9. In concluding that it was not necessary to reach this issue, the court did note a division of opinion among the courts on whether breach of the warranty of good workmanship could be brought as a common law claim or could only be brought under the DTPA.

107. *Id.* at 53 n.3.

108. *Garden Ridge, L.P. v. Adv. Int’l, Inc.*, 403 S.W.3d 432, 435–36 (Tex. App.—Houston [14th Dist.] 2013, *pet granted* (setting forth the facts of the case and the parties’ assertions)).

void as a penalty because the buyer was able to sell all of the goods at the intended price and suffered no damage. The court agreed with the seller and held that because the buyer's actual damages were zero, the liquidated damages clause was an unenforceable penalty.¹⁰⁹ In reaching this conclusion, the court noted that § 2.718 of the Code and the common law both allowed a court to determine the effectiveness of a liquidated damages clause as a matter of law.¹¹⁰

A concurring opinion argued that the majority misapplied the provisions of § 2.718 by failing to recognize that the validity of a liquidated damages clause should be based on whether the amount specified by the clause was reasonable in light of *either* the actual harm *or* in light of the anticipated harm.¹¹¹ According to the concurring opinion, by comparing only the amount stated in the liquidated damages clause with the actual harm caused, the majority's ruling conflicted with that of two other courts of appeal about application of § 2.718.¹¹² The concurring opinion also argued that by requiring only a comparison of liquidated damages to actual damages, the majority ignored a legislative intent to allow parties to contractually estimate damages in sale of goods situations based on information available to them at the time of contracting.¹¹³ Somewhat ironically, the concurrence expressed the hope that a petition for review that had been granted in one of the conflicting cases might result in a resolution of the conflict by the Texas Supreme Court.¹¹⁴ As it turned out, a petition for review has also been granted in *Garden Ridge* so there will actually be two opportunities for the Supreme Court to speak on the issue of how liquidated damage clauses should be evaluated.

D. SELLER'S RIGHT OF RESCISSION VERSUS PERFECTED SECURITY INTEREST

In *In re Steel Stadiums, Ltd.*, a steel supplier entered into a contract to sell steel to a building contractor that specialized in the construction and renovation of football stadiums.¹¹⁵ The supplier made an initial delivery of steel to the contractor, but the contractor failed to pay for the shipment. When the contractor placed an order for additional steel, the supplier met with representatives of the contractor to discuss the situation. During this meeting, the supplier was assured that the contractor was solvent, that payment for the first shipment would be made, and that the contractor would sign a credit agreement and a personal guaranty for further shipments. Satisfied with these arrangements, the supplier made the second shipment. Unbeknownst to the

109. *Id.* at 441.

110. *Id.* at 440.

111. *Id.* at 446.

112. *See id.* at 450 (citing *TXU Portfolio Management Co. v. FPL Energy, LLC*, 328 S.W.3d 580, 587-88 (Tex. App.—Dallas 2010, pet. granted) (holding liquidated damages clause valid where actual damages difficult to estimate); *McFadden v. Fuentes*, 790 S.W.2d 736, 737-38 (Tex. App.—El Paso 1990, no writ) (holding legal standard for determining validity of liquidated damages clause under § 2.718 differs from standard under Texas common law)).

113. *Garden Ridge*, 403 S.W.3d at 449-50.

114. *Id.* at 450. The conflicting decision to which the concurrence referred was *TXU Portfolio Management Co. v. FPL Energy, LLC*, 328 S.W.3d 580, 587-88 (Tex. App.—Dallas 2010, pet. granted).

115. *In re Steel Stadiums, Ltd.*, No. 11-42632-DML, 2013 WL 145628, at *1-2 (Bankr. N.D. Tex. Jan. 14, 2014) (mem. op.) (setting forth the facts and procedural history of the case).

supplier, the contractor had previously obtained financing by granting a security interest in the contractor's equipment and inventory to a bank, which had properly perfected the security interest. When the contractor failed to pay for the second shipment, the supplier sued in state court to rescind the contract, obtain return of the second shipment of steel, and recover the unpaid balance from the earlier shipment. Soon after this suit was filed, the contractor was forced into an involuntary bankruptcy and the state action was removed to the bankruptcy court.

In the bankruptcy proceeding, the issue was whether the supplier or the bank had priority in the second shipment of steel.¹¹⁶ Neither the plaintiff supplier (which had considerable self-interest in doing comprehensive research) nor the court (which seems to have been intrigued by the issue) was able to find any precedent in Texas or elsewhere addressing the relative priorities between a seller asserting a right to rescind and a secured party holding a perfected security interest.¹¹⁷ The court, however, did find numerous cases addressing reclamation claims under § 2.702 of the Code and equitable lien claims, which uniformly held that a perfected security interest had priority over a seller's claims.¹¹⁸ Reasoning that a claim for rescission was essentially the same as a claim for reclamation, and noting that both § 2.702 of the Code and § 546 of the Bankruptcy Code subordinate reclamation claims to the claim of a perfected secured party, the court held that the bank had the superior claim.¹¹⁹ The bank's motion to dismiss the supplier's claim was granted.¹²⁰

IV. LEASES OF GOODS

A. BUYERS OF LEASED GOODS

One of the risks facing a lessor of goods is that the lessee may sell the leased goods to a buyer who acquires a superior right to the goods by virtue of the rules stated in §§ 2A.305 and 2A.310 of the Code.¹²¹ These rules are similar to those governing good faith purchases by buyers in the ordinary course of business under the provisions of § 2.403 of the Code.¹²² "Buyer in the ordinary course of business" is defined in § 1.201 of the Code.¹²³ While the definition is fairly complex, the baseline rule is that a buyer in the ordinary course of business is one who, in good faith, buys goods from a merchant who is in the business of selling goods of that kind (i.e., buyers who buy out of a seller's usual

116. *Id.* at *2.

117. *Id.* at *4.

118. *Id.* (collecting and summarizing cases).

119. *Id.* at *4-5; see 11 U.S.C. § 546(c)(1) (allowing sellers to reclaim goods sold on credit within the time limits stated in that section, but also providing that the seller's rights are "subject to the prior rights of a holder of a security interest in such goods or the proceeds thereof . . .").

120. *In re Steel*, 2013 WL 145628, at *6.

121. TEX. BUS. & COM. CODE ANN. §§ 2A.305 & .310 (West 2009) state circumstances in which a buyer in the ordinary course of business can acquire an interest in goods superior to that of the lessor.

122. TEX. BUS. & COM. CODE ANN. § 2.403 (West 2009).

123. TEX. BUS. & COM. CODE ANN. § 1.201(b)(9) (West 2009).

inventory).¹²⁴

In *Wells Fargo Bank Northwest, N.A. v. RPK Capital XVI, L.L.C.*, following a convoluted history of ownership, leases, and repairs, an aircraft was sold by the then-current owner in a liquidation sale after completing a Chapter 11 bankruptcy reorganization.¹²⁵ At one point during its history, thrust reversers had been installed on the aircraft, and the purchaser was not aware that the thrust reversers were subject to a lease. The lessor of the thrust reversers sued the purchaser for conversion to recover them, for lost profits resulting from loss of their use, and for damage to the reversers. The purchaser contended that it was a buyer in the ordinary course of business with a superior right to the reversers under § 2A.310 of the Code.¹²⁶ The trial court held that a buyer at a liquidation sale could not, as a matter of law, qualify as a buyer in the ordinary course of business.¹²⁷ The court of appeals held that this ruling was overly broad and that buyers could sometimes qualify as buyers in the ordinary course of business.¹²⁸ Nonetheless, based on the facts before it, the court upheld the determination that the buyer was not a buyer in the ordinary course of business because the seller was not engaged in the business of routinely selling aircraft but, instead, was selling capital assets to raise money to pay creditors rather than selling inventory.¹²⁹ The lessor was entitled, therefore, to recover the thrust reversers in its action for conversion.¹³⁰ However, the court denied recovery of lost profits because of a failure to show the amount of lost profits with reasonable certainty.¹³¹ The claim for damage to the thrust reversers was also denied because there was no evidence that the damage occurred while the reversers were in the buyer's possession.¹³²

V. NEGOTIABLE INSTRUMENTS

A. TRANSFER AND ENFORCEMENT

Not surprisingly, several of the negotiable instrument cases reported since publication of the last *Survey* involved issues surrounding mortgage foreclosures. One common contention was that the foreclosing party failed to show that it was the holder of the note. In non-judicial foreclosures, the courts pointed out that the Texas Property Code does not require a foreclosing lien holder to produce the note as a prerequisite to enforcing a lien.¹³³ When a note was

124. *Id.*

125. *Wells Fargo Bank Northwest, N.A. v. RPK Capital XVI, L.L.C.*, 360 S.W.3d 691, 696-98 (Tex. App.—Dallas 2013, no pet.) (setting forth the facts of the case and lessor's claims).

126. *Id.* at 703.

127. *Id.* at 703-04.

128. *Id.* at 704. On this point, the court cited *In re Circuit City Stores, Inc.*, 441 B.R. 496, 509-10 (Bankr. E.D. Va. 2010) and *Amarillo Nat'l Bank v. Komatsu Zenoah Am., Inc.*, 991 F.2d 273, 277 (5th Cir. 1993), as examples of cases holding that good faith purchase could occur even if goods were being sold in liquidation.

129. *Wells Fargo*, 360 S.W.3d at 705.

130. *Id.* at 713.

131. *Id.* at 712.

132. *Id.* at 708.

133. See, e.g., *Scott v. Bank of Am., N.A.*, No. SA-12-CV-00917-DAE, 2013 WL 1821874, at *3

produced in the course of the proceedings, the courts generally referred to provisions in the Code allowing transfer by blank indorsement, enforcement by a party in possession, or by a party not in possession who proves ownership of the note.¹³⁴ When transfer, ownership, or the right to enforce is not evident from the documents provided by the party seeking to enforce a note, the issue is one of fact, and the claim of improper foreclosure should not be dismissed at the pleading stage.¹³⁵ An interesting variant on foreclosure challenges occurred in *MacFadden v. GMAC Mortgage, LLC.*, where the mortgagor asserted he had paid the amount due on the mortgage by sending the mortgagee a document he called a “check,” but which contained additional language indicating it was sent “without recourse” and designating it as an electronic funds transfer that was for discharge of debt and not for deposit.¹³⁶ Noting that such a document was an example of a “debt-elimination scheme” that was beginning to appear around the country, the court had no difficulty in holding that the document was neither a check nor an effective electronic funds transfer.¹³⁷ Judgment on the pleadings was granted in favor of the mortgagee.¹³⁸

(W.D. Tex. Apr. 29, 2013) (non-judicial foreclosure of lien on real property does not require production of note under TEX. PROP. CODE §§ 51.002 & .0025 (West 2007)); *Tyler v. Bank of Am., N.A.*, No. SA-12-CV-00909-DAE, 2013 WL 1821754, at *3 (W.D. Tex. Apr. 29, 2013) (same); *Rodriguez v. Bank of Am. N.A.*, No. SA-12-CV-00905-DAE, 2013 WL 1773670, at *6-7 (W.D. Tex. Apr. 25, 2013) (same); *Swim v. Bank of Am., N.A.*, No. 3:11-CV-1240-M, 2012 WL 170758, at *3 n.25 (N.D. Tex. Jan. 20, 2012) (same and collecting cases); *Bierwirth v. BAC Home Loans Serv., L.P.*, No. 03-11-0644-CV, 2012 WL 3793190, at *5 (Tex. App.—Austin Aug. 30, 2012, no pet.) (mem. op.) (same).

134. See, e.g., *Rodriguez v. Bank of Am. N.A.*, No. SA-12-CV-00905-DAE, 2013 WL 1773670, at *7 (W.D. Tex. Apr. 25, 2013) (holding transfer of note by blank indorsement is effective under TEX. BUS. & COM. CODE ANN. § 3.205(b) (West 2009)); *Scott v. Bank of Am., N.A.*, No. SA-12-CV-00917-DAE, 2013 WL 1821874, at *6 (W.D. Tex. Apr. 29, 2013) (holding person in possession is entitled to enforce note under TEX. BUS. & COM. CODE ANN. § 3.301 (West 2009)); *Martin v. New Century Mortg. Co.*, 377 S.W.3d 79, at 84-85 (Tex. App.—Houston [1st Dist.] 2012, no pet. h.) (holding person not in possession can enforce note upon proof of transfer under TEX. BUS. & COM. CODE ANN. § 3.301 (West 2009)).

135. *Bacon v. U.S. Bank Nat'l Assn.*, No. 4:12cv86, 2012 WL 4506532, at *4-5 (E.D. Tex. Aug. 31, 2012) (holding allegation of fraud in transfer of note sufficient to avoid motion to dismiss absent contrary documentary evidence).

136. *MacFadden v. GMAC Mortgage, LLC.*, No. 2:13-CV-91, 2013 WL 2422579, at *3 (S.D. Tex. June 3, 2013).

137. *Id.* at *4-6. In describing the “debt-elimination scheme,” the court quoted at some length from the opinion in *Koch v. Home Network Mortg., LLC*, No. 12-CV-14760, 2013 WL 392902, at *2 (E.D. Mich. 2013), where the mortgagor made a similar claim in challenging a foreclosure. Several additional cases involving marking a “check” with language stating “EFT only!” and “Not for Deposit, EFT only, For Discharge of Debt” have been reported. See, e.g., *Stout v. CarMax Auto Fin.*, No. 12-2996, 2013 WL 6231152, at *2 (W.D. Tenn. Dec. 2, 2013) (dismissing debtor’s claim that payment was effected by check bearing described markings); *Reid v. Toyota Motor Credit Corp.*, No. 12 Civ. 7436(AC)(JLC), 2013 WL 3776201, at *3 (S.D.N.Y. Jul. 18, 2013) (granting creditor’s motion to dismiss where check containing described markings was neither a negotiable instrument nor an electronic funds transfer); *Twinstar Credit Union v. Canzoni*, No. 43609-4-II, 2014 WL 129257, at *2, *6 (Wash. App. Div. 2, Jan. 14, 2014) (unpublished op.) (where a check containing such markings and drawn on non-existent account did not discharge debtor from liability); *Alaska USA Fed. Credit Union v. Holland*, No. 70313-7-1, 2014 WL 117427, at *2-3 (Wash. App. Div. 1, Jan. 13, 2014) (not discharging debtor where lender refused to accept check containing described markings); *Blocker v. U.S. Bank, N.A.*, 993 N.E.2d 1154, 1155-58 (Ind. App. 2013) (holding purported instrument containing described markings was “unorthodox” and not “legally acceptable” attempt to pay debt and discussing such instruments as part of a “redemptionist” or “vapor money” theory).

138. *MacFadden*, 2013 WL 2422579, at *8.

When an action is for enforcement of a note rather than foreclosure of a lien, § 3.308 of the Code provides that a plaintiff is entitled to recover if the plaintiff is a person entitled to enforce the note under § 3.301 of the Code and the defendant fails to prove a defense or a claim in recoupment.¹³⁹ Negotiability of the note is not an issue if the action is between immediate parties to the note, and the burden of proof shifts to the maker to establish a defense.¹⁴⁰ If a defendant maker asserts a defense, the burden is on the plaintiff to show entitlement to payment; an affidavit authenticating the note, the signatures, and the amount due is sufficient to raise issues of material fact to avoid summary judgment in favor of the maker.¹⁴¹

B. LIABILITY OF PARTIES ON INSTRUMENTS AND GUARANTIES

The decisions in *84 Lumber Co. v. Powers*¹⁴² and in *Playboy Enterprises v. Sanchez-Campuzano*¹⁴³ illustrate an issue that can arise when instruments or guaranties are signed by agents. In *84 Lumber*, an agent identified himself as the president of the borrower and added that he “unconditionally and irrevocably personally” guaranteed a credit account.¹⁴⁴ Because the signatory language did not merely indicate that the signer was signing in his capacity as an agent of the corporation, but also stated that he was personally guaranteeing the debt, the court had no difficulty in holding him personally liable for unpaid amounts under the credit agreement.¹⁴⁵ In *Playboy Enterprises*, an individual signed a guaranty agreement as the purported agent for a non-existent entity.¹⁴⁶ In an action to enforce the guaranty, the guarantor argued that under § 3.402 of the Code, he was not liable on the guaranty because the parties understood that he was signing only as an agent.¹⁴⁷ There were two problems with this argument. First, the guaranty agreement was not a negotiable instrument so § 3.402 did not apply. However, regardless of the application of that section, the Texas law of guaranties parallels that of the Code, and a “subjective belief” on the part of a guarantor was not sufficient to establish a contrary understanding between the parties.¹⁴⁸ Furthermore, by signing as the purported representative of a non-existent entity, the guarantor became personally liable for the debt.¹⁴⁹

139. See TEX. BUS. & COM. CODE ANN. §§ 3.301 & .308 (West 2009).

140. See *Ropa Exploration Corp. v. Barash Energy, Ltd.*, No. 02-11-00258-CV, 2013 WL 2631164, at *5, *11 (Tex. App.—Fort Worth June 13, 2013, no pet.) (mem. op.).

141. See *Dorsett v. Hispanic Housing and Educ. Corp.*, 389 S.W.3d 609, 613–14 (Tex. App.—Houston [14th Dist.] 2012, no. pet.).

142. *84 Lumber Co. v. Powers*, 393 S.W.3d 299 (Tex. App.—Houston [1st Dist.] 2012, no. pet.).

143. *Playboy Enterprises v. Sanchez-Campuzano*, 519 F. App'x 219 (5th Cir. Mar. 5, 2013) (unpublished decision).

144. *84 Lumber Co.*, 393 S.W.3d at 305.

145. *Id.* at 307.

146. *Playboy Enterprises*, 519 F. App'x at 224.

147. *Id.* at 226; see TEX. BUS. & COM. CODE ANN. § 3.402(b)(2) (West 2009) (“[T]he representative is liable on the instrument unless the representative proves that the original parties did not intend the representative to be liable on the instrument.”).

148. *Playboy Enterprises*, 519 F. App'x at 227.

149. *Id.* This is the same result that obtains under TEX. BUS. & COM. CODE ANN. § 3.403(a) (West 2009) imposing liability on the unauthorized signer of a note. A classic statement of this rule appears in *New Georgia Nat'l Bank v. J. & G. Lippmann*, 164 N.E. 108, 109 (N.Y. 1928), where Justice Cardozo said, “We think the proviso [in the Negotiable Instruments Law] that the agent or

In *Chance v. Citimortgage, Inc.*, the maker of a note argued that he had been discharged from liability by virtue of a stamped notation marking a blank indorsement on the back of the note as “Void.”¹⁵⁰ Referring to § 3.604 of the Code, the court held that stamping the indorsement void did not evidence an intentional cancellation of the note or release of the maker from liability.¹⁵¹ Summary judgment against the maker was affirmed.¹⁵²

C. ACCORD AND SATISFACTION BY USE OF AN INSTRUMENT

Under § 3.311 of the Code, disputed claims can be settled by an accord and satisfaction between the parties.¹⁵³ In *Barnes v. University Federal Credit Union*, a borrower and a lender were at odds about the borrower’s failure to provide proof of insurance on two vehicles she had used to collateralize two loans.¹⁵⁴ After engaging in some initial litigation, the lender proposed a settlement that would release all of the lender’s claims and cancel the vehicle liens in exchange for payment of \$8,000 by the borrower. The borrower did not sign the settlement agreement, but did send a cashier’s check in the proper amount to the lender. When the check was received, the lender sent a letter to the borrower stating that it would not accept or cash the check until the settlement agreement was signed and returned, but the lender did not return the check. During the following six months, the lender sent additional letters asking the borrower to sign and return the settlement agreement. She did not do so and ultimately obtained a refund for a lost cashier’s check from the issuing bank. The borrower then sued the lender on the theory that the lender’s retention of the check for at least six months amounted to an accord and satisfaction despite the borrower’s failure to sign the settlement agreement. Both parties moved for summary judgment, and the trial court rendered judgment in favor of the lender. On appeal by the borrower, while recognizing that retention of a cashier’s check for an unreasonable period of time can result in an accord and satisfaction, the court pointed out that application of this rule depends on the circumstances of each case.¹⁵⁵ Because the lender had immediately notified the

representative shall not be liable on the instrument ‘if he was duly authorized’ to sign, carries with it a fair implication that he should be so liable if not authorized.” Issues of this kind are not limited to negotiable instruments, but can take place in the closely related area of guaranty agreements.

150. *Chance v. Citimortgage, Inc.*, 395 S.W.3d 311, 313 (Tex. App.—Dallas 2013, no pet.).

151. *Id.* at 313–14. TEX. BUS. & COM. CODE ANN. § 3.604(a) (West 2009) provides:

A person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument: (1) by an intentional voluntary act, such as surrender of the instrument to the party, destruction, mutilation, or cancellation of the instrument, cancellation or striking out of the party’s signature, or the addition of words to the instrument indicating discharge; or (2) by agreeing not to sue or otherwise renouncing rights against the party by a signed writing.

152. *Chance*, 395 S.W.3d at 316.

153. TEX. BUS. & COM. CODE ANN. § 3.311 (West 2009).

154. *Barnes v. University Federal Credit Union*, No. 03-10-00147-CV, 2013 WL 1748788, at *1–2 (Tex. App.—Austin Apr. 18, 2013, no pet.) (mem. op.) (setting forth case facts and procedural history).

155. *Id.* at *6 (citing *Tarrant Wholesale Drug Co. v. Kendall*, 223 S.W.2d 964, 966–67 (Tex. Civ. App.—San Antonio 1949, no writ), *Willis v. City Nat’l Bank of Galveston*, 280 S.W. 270, 273 (Tex. Civ. App.—Galveston 1926, writ ref’d); *Curran v. Bray Wood Heel Co.*, 68 A.2d 712, 718 (Vt.

borrower that it would not accept the check absent signing of the settlement agreement and the borrower's failure to demand return of the check, the court held that the trial court could properly determine that no accord and satisfaction had taken place.¹⁵⁶ Furthermore, under § 3.311, the borrower had not conspicuously indicated on the check or in a letter accompanying the check that it was being tendered in full satisfaction of the lender's claims as required by that section.¹⁵⁷ The court, therefore, affirmed the judgment of the trial court but did order a remittitur for part of the lender's attorney fees that had been granted by the trial court.¹⁵⁸

VI. BANK DEPOSITS AND COLLECTIONS

A. CUSTOMER'S DUTY TO NOTIFY BANK ABOUT IMPROPERLY PAID ITEMS

Section 4.406 of the Code requires a customer to notify the bank within one year after the customer discovers that the bank has paid items that were altered or that were not authorized by the customer.¹⁵⁹ Under various circumstances, this time period may be shortened by other provisions in § 4.406 or by the terms of a deposit agreement. In *Coffey v. Bank of America*, an estate administrator discovered that a bank had paid several unauthorized checks from the decedent's account.¹⁶⁰ Under the deposit agreement, notice of unauthorized checks was to be given within sixty days after a statement of account was sent to the customer. The administrator received the decedent's bank records after her appointment as administrator, but instead of giving notice of the unauthorized payments, the administrator filed suit instead. The bank contended that filing suit did not satisfy the notice requirement in the deposit agreement. The trial court agreed and granted summary judgment in favor of the bank. On appeal by the administrator, the court affirmed, holding that the administrator's petition did not identify the checks or the amount of any improper payments.¹⁶¹ While the suit notified the bank that the administrator "suspected problems" about payments from the account, the deposit agreement clearly required more specific

1949)).

156. *Id.*

157. *Id.* at *7. TEX. BUS. & COM. CODE ANN. § 3.311(b) (West 2009) states, in part, that a "claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim."

158. *Barnes*, 2013 WL 1748288, at *17.

159. TEX. BUS. & COM. CODE ANN. § 4.406(f) (West 2009) provides:

Without regard to care or lack of care of either the customer or the bank, a customer who does not within one year after the statement or items are made available to the customer (Subsection (a)) discover and report the customer's unauthorized signature on or any alteration on the item is precluded from asserting against the bank the unauthorized signature or alteration. If there is a preclusion under this subsection, the payor bank may not recover for breach of warranty under Section 4.208 with respect to the unauthorized signature or alteration to which the preclusion applies.

160. *Coffey v. Bank of Am.*, No. 09-12-00113-CV, 2013 WL 257363, at *1-2 (Tex. App.—Beaumont Jan. 24, 2013) (mem. op.) (setting forth the facts of the case and its procedural history).

161. *Id.* at *6-7.

information about the items or payments on which the administrator was basing her complaint.¹⁶²

An estate administrator's complaints about payments made from a decedent's account in *Federal Deposit Insurance Corp. v. Lenk*¹⁶³ became the second case to reach the Texas Supreme Court as a result of the fraudulent machinations of Melvyn Spillman, a county clerk who named himself as executor of unclaimed estates and then raided bank accounts held by the estates.¹⁶⁴ In the first *Lenk* case, the court held that the one-year bar in § 4.406 began to run from the date the administrator was appointed and that the one year period had elapsed before notice of improper payments was given to the bank.¹⁶⁵ In the second *Lenk* case, the administrator sued for breach of contract to recover all of the funds on deposit at the time of the decedent's death.¹⁶⁶ The court distinguished its earlier decision because, in that case, the bank asserted the § 4.406 statute of repose as a defense to the administrator's action; in this case, the bank did not raise § 4.406 as an affirmative defense but, instead, defended on the ground that it had not breached the deposit agreement and did not cause injury to the estate.¹⁶⁷ The court reasoned that as a breach of contract case, the administrator's claim was subject to a four-year limitation period under the Texas Finance Code and the Texas Civil Practice and Remedies Code; hence, the claim was timely.¹⁶⁸ The judgment of the court of appeals in favor of the administrator was affirmed.¹⁶⁹ A strong dissenting opinion argued that the majority had misconstrued the provisions of the Finance Code by ignoring part of the provision stating that a bank is deemed to have denied liability when it provides a statement or passbook to its customer.¹⁷⁰ According to the dissent, this misreading of the Finance Code allowed the administrator to create a cause of action with a four-year limitation period and avoid the one-year statute of repose stated in § 4.406.¹⁷¹

VII. FUNDS TRANSFERS

A. SELECTION OF COMMERCIALY REASONABLE SECURITY PROCEDURE

In *All American Siding & Windows, Inc. v. Bank of America, N.A.*, a bank customer discovered that two unauthorized wire transfers and one unauthorized automated clearinghouse transfer had been made from the customer's account

162. *Id.* at *7.

163. *Fed. Deposit Ins. Corp. v. Lenk*, 361 S.W.3d 602 (Tex. 2012).

164. Spillman's activities and how he perpetrated the fraud for several years are described in John Krahmer, *Commercial Transactions*, 63 SMU L. REV. 425, 444-45 (2010).

165. *See* *Jefferson State Bank v. Lenk*, 323 S.W.3d 146, 147 (Tex. 2010).

166. *Fed. Deposit Ins. Corp.*, 361 S.W.3d at 605.

167. *Id.* at 605-06.

168. *Id.* at 610 (discussing TEX. FIN. CODE ANN. § 34.301(b) (West 2013) and TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (West 2008)).

169. *Fed. Deposit Ins. Corp.*, 361 S.W.3d at 612.

170. *Id.* at 613.

171. *Id.* at 613-14 (stating that by allowing the administrator to create a breach of contract claim by making a delayed demand for payment, the misconstruction of TEX. FIN. CODE ANN. § 34.301(b) (West 2013) would "be significant to the entire financial industry in Texas.").

between September 10th and September 12th, 2008.¹⁷² The customer notified the bank, and the bank was able to recover part of the funds. However, the bank refused to reimburse the customer for the amount that could not be recovered. The case hinged on two provisions in the account agreement. First, the agreement placed “sole responsibility” on the customer to select a security procedure from the group of procedures offered by the bank.¹⁷³ Second, the agreement provided that it could not be modified except in writing.¹⁷⁴ The court held that the security procedure offered by the bank was commercially reasonable and that the bank had acted in good faith in its use of the procedure.¹⁷⁵ The customer, therefore, was bound by § 4A.202 of the Code due to the customer’s selection of the procedure.¹⁷⁶ The court also held that the account agreement barred the customer from recovering on its claim that the bank had orally agreed to reimburse the total amount of the unauthorized transfers.¹⁷⁷ Summary judgment was affirmed in favor of the bank.¹⁷⁸

VIII. SECURED TRANSACTIONS

A. PERFECTION OF SECURITY INTERESTS

Under Chapter 9 of the Code, a security interest must be perfected to obtain maximum protection against claims asserted by competing creditors, lienholders, trustees in bankruptcy, and the like. Filing a financing statement in the correct public record is probably the most common method used to perfect a security interest. *In re Diabetes America, Inc.*¹⁷⁹ and *Westlake Styrene, LLC v. United States*¹⁸⁰ are good illustrations of the right way and the wrong way to select a public record in which a filing should be made. Under § 9.301 of the Code, filings should generally be made in the jurisdiction where the debtor is located.¹⁸¹ “Registered organizations,” such as corporations, are deemed to be located in the state of organization.¹⁸² In *Diabetes America*, the debtor was organized in Delaware.¹⁸³ The secured party mistakenly believed, however, that a choice-of-law clause in the security agreement providing that Texas law would apply to its

172. *All American Siding & Windows, Inc. v. Bank of Am., N.A.*, 367 S.W.3d 490, 494-95 (Tex. App.—Texarkana 2012, pet. denied) (setting forth the facts of the case).

173. *Id.* at 499.

174. *Id.* at 500.

175. *Id.* at 500-01.

176. *Id.* TEX. BUS. & COM. CODE ANN. § 4A.202(b) (West 2009) provides that a customer is bound by selection of a commercially reasonable security procedure and the bank proves that it accepted a payment order in good faith.

177. *All American*, 367 S.W.3d at 501.

178. *Id.* at 502-03.

179. *In re Diabetes Am., Inc.*, No. 10-41521, 2012 WL 6694074 (Bankr. S.D. Tex. Dec. 21, 2012) (mem. op.).

180. *Westlake Styrene, LLC v. United States*, No. H-10-2631, 2012 WL 2133550 (S.D. Tex. June 11, 2012).

181. TEX. BUS. & COM. CODE ANN. § 9.301(1) (West 2009).

182. TEX. BUS. & COM. CODE ANN. § 9.307 (West 2009) (stating rules for determining the location of a debtor).

183. *In re Diabetes Am.*, 2012 WL 6694074, at *4.

loan transaction mandated filing in Texas.¹⁸⁴ In what is almost a how-to-do-it text on filing, the court described how the Chapter 9 filing rules work and where the secured party erred in its reading of § 9.301.¹⁸⁵ Because of the failure to file in the right jurisdiction, the security interest was unperfected and the secured party was a mere unsecured creditor with no greater rights than other unsecured creditors in the debtor's bankruptcy proceeding.¹⁸⁶ In contrast, in *Westlake Styrene*, the secured party correctly identified Texas as the location of a corporate debtor and perfected its security interest by making a Texas filing even though the debtor's business activities were conducted in Louisiana.¹⁸⁷ As in *Diabetes America*, the court pointed out that under § 9.301, a corporation is located in its state of incorporation for purposes of filing.¹⁸⁸

In addition to filing in the wrong location, another thing that can go wrong with a filing is the failure to use the correct name of the debtor on a financing statement. This may sound like a self-evident statement. Obviously, a secured party making a loan to Jane Doe shouldn't identify the debtor as "Richard Roe" on the financing statement. On another level, however, §§ 9.503 and 9.506 of the Code are quite specific about what constitutes the correct name of a debtor.¹⁸⁹ The secured party in *CNH Capital America, LLC v. Progreso Materials Ltd.* learned this the hard way when it left the letter "s" off of the word "Materials" in the debtor's name.¹⁹⁰ The court held that this omission made the financing statement seriously misleading and rendered the security interest unperfected.¹⁹¹

While the requirements for determining the correct name of a debtor on a financing statement are quite specific, the rules are less stringent if perfection depends on the name of a secured party used in noting a lien on a certificate of title. Thus, in *In re Hoffman*, a secured party properly perfected its security interest in a motor vehicle by identifying itself with an assumed name on the

184. *Id.*

185. *Id.* at *4-5.

186. *Id.* at *6.

187. *Westlake Styrene, LLC v. United States*, No. H-10-2631, 2012 WL 2133550, at *4 (S.D. Tex. June 11, 2012).

188. *Id.*

189. TEX. BUS. & COM. CODE ANN. §§ 9.503, .506 (West 2009) (containing rules for determining the correct name of organizational debtors, trusts, estates, and individuals).

190. *CNH Capital Am., LLC v. Progreso Materials Ltd.*, No. M-10-478, 2012 WL 5305697, at *4-5 (S.D. Tex. Oct. 25, 2012).

191. *Id.* Slight misspelling of a debtor's name has been found fatal to perfection in numerous cases. See, e.g., *In re Jim Ross Tires, Inc.*, 379 B.R. 670 (Bankr. S.D. Tex. 2007) (holding that filing in the name "Jim Ross Tires, Inc. d/b/a HTC Tires & Automotive Centers" was not effective to perfect security interest where organization's name did not include the dba name; further holding a separate filing in the name "Jim Ross Tire Inc." was ineffective because of omission of letter "s" in the word "Tires"); *Host Am. Corp. v. Coastline Fin., Inc.*, No. 2:06CV5, 2006 WL 1579614 (D. Utah May 30, 2006) (holding that identifying a debtor as "KWM Electronics Corporation" instead of "K.W.M. Electronics Corporation" was seriously misleading because of omitted periods in debtor's name); *Receivables Purchasing Co. v. R & R Directional Drilling, L.L.C.*, 263 Ga. App. 649, 588 S.E.2d 831 (Ga. Ct. App. 2003) (holding that identification of debtor as "Net work Solutions, Inc." instead of "Network Solutions, Inc." was seriously misleading because of space inserted in the word "Network"). Although the secured party lost on the perfection issue, there were issues of material fact about whether a buyer of the collateral had actual knowledge of the security interest such that the secured party would have priority over the buyer under TEX. BUS. & COM. CODE ANN. § 9.317 (West 2011). See *CNH Capital Am.*, 2012 WL 5305697, at *6.

certificate of title.¹⁹² The court held that the financing statement cases were inapposite because they dealt with the requirements for naming a debtor and not with naming a secured party.¹⁹³

B. PRIORITIES

Marathon Machine Tools, Inc. v. Davis-Lynch, Inc. involved an interesting priority dispute arising in an odd factual setting.¹⁹⁴ In *Marathon*, several dishonest employees used funds stolen from their employer to set up and operate their own company. The company used some of the stolen funds to make a down payment for the purchase of equipment and granted the seller a purchase money security interest (PMSI) in the equipment to secure the balance of the purchase price. When the employer discovered the theft, it sued the company and the employees in federal court, which temporarily enjoined the company and the employees from disposing of any money or property that could be traced to the stolen funds. When the secured seller learned about the suit, it filed a financing statement to perfect its PMSI but did not intervene in the federal litigation. A few months later, the federal court entered a judgment ordering that all assets of the company, including the equipment, be transferred to the employer. At this point, the seller sued the company in state court on the ground that the PMSI gave the seller a superior interest in the purchased equipment. The court saw the issue as one of priority between an employer who had a constructive trust on equipment purchased with stolen funds and a seller holding a perfected PMSI. The court held that the constructive trust gave the employer lien creditor rights that arose before the seller's PMSI was perfected.¹⁹⁵ Under § 9.317 of the Code, a creditor who acquires a lien before a security interest is perfected has priority even if the security interest is later perfected.¹⁹⁶ Summary judgment was affirmed in favor of the employer.¹⁹⁷ The lesson of *Marathon* is simple: there is no good reason to delay filing to perfect a security interest.

C. REPOSSESSION OF COLLATERAL

The intersection between Chapter 9 of the Code and the provisions of the Bankruptcy Code can be dangerous for a secured creditor, as illustrated by the decision in *In re Burrell*, where a secured party repossessed a car following a debtor's default.¹⁹⁸ The debtor filed for bankruptcy a few weeks later. Two days

192. *In re Hoffman*, No. 11-43848, 2013 WL 3070437, at *4 (Bankr. E.D. Tex. July 30, 2012) (mem. op.).

193. *Id.*

194. *Marathon Machine Tools, Inc. v. Davis-Lynch, Inc.*, 400 S.W.3d 133, 134–35 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (setting forth the facts and procedural history of the case).

195. *Id.* at 136–38.

196. TEX. BUS. & COM. CODE ANN. § 9.317(a) (West 2011) (providing, in relevant part, “A security interest or agricultural lien is subordinate to the rights of . . . a person that becomes a lien creditor before the earlier of the time; (A) the security interest or agricultural lien is perfected . . .”).

197. *Marathon*, 400 S.W.3d at 139.

198. *In re Burrell*, No. 10-36989-H4-13, 2012 WL 3727130, at *1 (Bankr. S.D. Tex., Aug. 27, 2012) (mem. op.).

after the bankruptcy filing, the debtor's attorney sent a letter demanding return of the car. The secured party refused, contending that it had sold the car at a foreclosure sale the day before the debtor filed her bankruptcy petition.¹⁹⁹ The bankruptcy court found that the creditor did sell the car, but had backdated the bill of sale instead of returning the vehicle.²⁰⁰ Because no sale had actually taken place before the filing, the debtor still had a right to redeem the vehicle on the date of bankruptcy, and the car was therefore part of the bankruptcy estate.²⁰¹ The court held that the secured party had violated the automatic stay by failing to return the vehicle and that the violation was "egregious."²⁰² Judgment against the secured party for both actual and punitive damages as well as attorney's fees was affirmed.²⁰³

D. DISPOSITION OF COLLATERAL FOLLOWING DEFAULT

If collateral has been successfully repossessed, a secured party may have the option of retaining the collateral in full or partial satisfaction of the debt, or selling it at public or private sale.²⁰⁴ If the secured party decides to sell the collateral, Chapter 9 of the Code contains several sections dealing with the giving of notice and accounting for the proceeds of sale.²⁰⁵ Under § 9.610, a sale must be conducted in a commercially reasonable manner.²⁰⁶ In *Foley v. Capital One Bank*, the debtor challenged the commercial reasonableness of a sale.²⁰⁷ The court correctly held that once this issue is raised, the secured party has the burden of proving commercial reasonableness.²⁰⁸ On this issue, the court determined that the secured party failed to carry the burden and denied recovery of a deficiency.²⁰⁹ The decision in *Foley* is significant because of the court's

199. *Id.* at *2.

200. *Id.* at *3.

201. *Id.* at *13.

202. *Id.* at *14.

203. *Id.* at *16. Other bankruptcy decisions have reached similar results. *See, e.g.*, *Stephens v. Guaranteed Auto, Inc.*, 495 B.R. 608 (Bankr. N.D. Ga. 2013) (awarding actual and punitive damages following failure to return repossessed car upon demand); *Weber v. SEFCU*, 719 F.3d 72 (2d Cir. 2013) (holding creditor violated automatic stay by failing to return repossessed vehicle after filing of bankruptcy, and remanding to bankruptcy court to determine if creditor should be sanctioned); *Thompson v. Gen. Motors Acceptance Corp. (In re Thompson)*, 566 F.3d 699 (7th Cir. 2009) (same); *but see, In re Hall*, 502 B.R. 650 (Bankr. D.C. 2014) (disagreeing with majority approach to application of automatic stay where creditor obtains possession before filing of bankruptcy petition).

204. In commercial cases, the secured party always has the option of keeping collateral in full or partial satisfaction of a debt (strict foreclosure). In consumer cases, the option of keeping collateral in partial satisfaction is not available and, if more than sixty percent of the price has been paid, neither is keeping the collateral in full satisfaction and the collateral must be sold. *See* TEX. BUS. & COM. CODE ANN. § 9.620 (West 2011).

205. *See, e.g.*, TEX. BUS. & COM. CODE ANN. §§ 9.610–616 (West 2011).

206. TEX. BUS. & COM. CODE ANN. § 9.610(b) (West 2011) (providing, in part, that "[e]very aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable").

207. *Foley v. Capital One Bank*, 383 S.W.3d 644, 646 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

208. *Id.* at 647. The court based its holding on both the common law rule as announced in *Greathouse v. Charter Nat'l Bank-SW*, 851 S.W.2d 173, 177 (Tex. 1992) and on TEX. BUS. & COM. CODE ANN. § 9.626 (West 2011) which provides a similar procedural rule.

209. *Foley*, 383 S.W.3d at 649.

ruling that allocating the burden of proof to the secured party following a specific denial by the debtor applies to both commercial and to consumer cases.²¹⁰ This resolves an issue that § 9.626(b) expressly left open for court determination.²¹¹ The result in *Foley* should be contrasted with an incorrect ruling in *People's United Equipment Finance Corp. v. Seminole-Civil, Inc.*, where the court held that a debtor has the burden of showing that a disposition of collateral was not commercially reasonable.²¹²

In *Bergene v. Community Bank of Texas, N.A.*, a secured party conducted a foreclosure sale of two towing vessels.²¹³ The debtor contested the commercial reasonableness of the sale. After reviewing the evidence, the court concluded that the secured party had carried its burden of proving that the sale was conducted in a commercially reasonable manner and that the purchase price of the two vessels was reasonable in light of their fair market value.²¹⁴ The trial court judgment allowing recovery of a deficiency was affirmed.²¹⁵

In *In re Adobe Trucking, Inc.*, the secured party conducted a foreclosure sale of oil field equipment in Texas.²¹⁶ However, the security agreement provided that the transaction would be governed by New York law. Referring to the provisions of the New York enactment of the Code (which are the same as the Texas enactment), the court held that the sale was commercially reasonable and affirmed judgment in favor of the secured party.²¹⁷

Chapter 9 of the Code includes certain transactions that are not situations in which personal property is used as collateral for a loan. Notable among these situations is the outright sale of chattel paper.²¹⁸ In such cases, it is not uncommon for the purchaser to purchase the chattel paper with a right of recourse against the seller if an account debtor fails to make payments. If the

210. *Id.* at 647.

211. See *id.* Note that TEX. BUS. & COM. CODE ANN. § 9.626(b) (West 2011) provides: The limitation of the rules in Subsection (a) to transactions other than consumer transactions is intended to leave to the court the determination of the proper rules in consumer transactions. The court may not infer from that limitation the nature of the proper rule in consumer transactions and may continue to apply established approaches.

212. *People's United Equip. Fin. Corp. v. Seminole-Civil, Inc.*, No. H-11-0374, 2012 WL 1556187, at *3 (S.D. Tex. May 1, 2012), where the court stated, "The debtor on a secured note bears the burden of proving that a foreclosure sale was unreasonable," citing *Texas Refrigeration Supply, Inc. v. FDIC*, 953 F.2d 975, 982 (5th Cir. 1992), which was decided on February 20, 1992, some six months before the decision in *Greathouse* on July 1, 1992. It is unfortunate that the court in *People's United Equipment* failed to recognize that allocation of the burden of proof was changed by the *Greathouse* decision and the enactment of TEX. BUS. & COM. CODE ANN. § 9.626(a) (West 2011) by Acts 1999, 76th Leg., ch. 414, § 1.01, eff. July 1, 2001.

213. *Bergene v. Cmty. Bank of Tex., N.A.*, No. 09-12-00315-CV, 2013 WL 2732681, at *1 (Tex. App.—Beaumont June 13, 2013, no pet.) (mem. op.).

214. *Id.* at *4-8.

215. *Id.* at *8.

216. *In re Adobe Trucking, Inc.*, No. 13-50335, 2014 WL 54736, at *1-2 (5th Cir. Jan. 8, 2014) (unpublished opinion).

217. *Id.* at *6.

218. See TEX. BUS. & COM. CODE ANN. § 9.109(a)(3) (West 2011). "Chattel paper" is a specialized form of collateral that evidences both a monetary obligation and a security interest in goods. For example, if a car buyer purchases a car from a dealer by signing both a promissory note and a security agreement granting a security interest in the car, the resulting documents, taken together, constitute chattel paper. The term is defined in TEX. BUS. & COM. CODE ANN. § 9.102(a)(11) (West 2011).

seller fails to repurchase the chattel paper, the purchaser is entitled to foreclose and sell the underlying collateral. However, unlike the ordinary secured transaction, § 9.601 of the Code relieves the purchaser from the need to give notice of sale to the seller of the chattel paper.²¹⁹ Thus, in *Tex Star Motors, Inc. v. Regal Finance Co.*, the court held that while the secured party was required to conduct sales of collateral in a commercially reasonable manner, it was not required to give the seller of the chattel paper any prior notice of the sales.²²⁰ The secured party was, therefore, entitled to recover a deficiency, but the case was remanded for the trial court to determine prejudgment interest and whether funds held in a reserve account should be used to offset the amount of the deficiency.²²¹

219. TEX. BUS. & COM. CODE ANN. § 9.601(g) (West 2011) (“Except as otherwise provided in Section 9.607(c), this subchapter imposes no duties upon a secured party that is a consignor or is a buyer of accounts, chattel paper, payment intangibles, or promissory notes.”).

220. *Tex Star Motors, Inc. v. Regal Fin. Co.*, 401 S.W.3d 190, 200 (Tex. App.—Houston [14th Dist.] 2012).

221. *Id.* at 204.