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Commercial Transactions

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I. INTRODUCTION

This year's Survey marks fifty years since the Uniform Commercial Code (UCC) first became a part of Texas statutory law.[1] One year after

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1. The Code first became effective in Texas on July 1, 1966, as a separate statute. *See* Uniform Commercial Code, 1965, 59th Leg., R.S., ch. 721, § 1-101, 1965 Tex. Gen. Laws 1951. 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, Section 2-204(1) in the Official Text became Section 2.204(a) in the Texas codification. Revisions of the Code that have taken place since 1967 still substitute

its initial effective date, the UCC was reenacted as part of the Business & Commerce Code (Code). Since then, a considerable body of law has developed to interpret and apply the Code. While many of the recent cases involve application of established principles, others address new issues or refine the interpretation of past analyses. Cases decided during this Survey period fall into all of these categories.

II. SALE OF GOODS

A. Application of Chapter 2

Chapter 2 of the Code governs the sale of goods.[2] While it is often easy to determine that Chapter 2 applies to a given transaction, that determination is sometimes more difficult.[3] In *Malin International Ship Repair & Drydock, Inc. v. Oceanografia, S.A. de C.V.*,[4] the U.S. Court of Appeals for the Fifth Circuit addressed the question of whether Chapter 2 governed a contract for fuel bunkers installed on a vessel for a vessel operator who had use of the vessel under a "bareboat charter."[5] The issue arose when a shipyard installed fuel bunkers on the chartered vessel and the vessel operator failed to pay for the bunkers and the installation when the vessel was delivered. The shipyard operator filed an attachment against the bunkers under Supplemental Admiralty Rule B to obtain jurisdiction over the vessel operator.[6] The Fifth Circuit held that sale of the fuel bunkers was not under a contract of sale governed by Chapter 2, but rather a transaction covered by "the bareboat charter agreement."[7]

"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.*, Act of May 28, 1995, 74th Leg., R.S., ch. 921, § 1, 1995 Tex. Gen. Laws 4582 (effective on Jan. 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 because of the variation in section and subsection designations over the years.

2. Tex. Bus. & Com. Code Ann. § 2.102 (West 2009) ("Unless the context otherwise requires, this chapter applies to transactions in goods . . . ."); § 2.105(a) ("'Goods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale . . . .").

3. One example of this difficulty is the split among the courts about whether electricity is a good or a service. Some hold that electricity is a good. *See, e.g.*, *In re* Grede Foundries, Inc., 435 B.R. 593, 595–96 (Bankr. W.D. Wis. 2010); *In re* Erving Indus., Inc., 432 B.R. 354, 370 (Bankr. D. Mass. 2010). Others hold that it is a service. *See, e.g.*, *In re* NE Opco, Inc., 501 B.R. 233, 256 (Bankr. D. Del. 2013); *In re* Pilgrim's Pride Corp., 421 B.R. 231, 240 (Bankr. N.D. Tex. 2009).

4. 817 F.3d 241, 247–48 (5th Cir. 2016).

5. *Id.* at 243. A "bareboat charter" is one under which a vessel operator rents use of a vessel from the vessel owner for a period of time and supplies its own crew and provisions rather than a charter under which the vessel owner supplies the crew and provisions. *See* Mark Huber, Tanker Operations: A Handbook for the Person-in-Charge (PIC) 212–13 (4th ed. 2001).

6. *Malin Int'l*, 817 F.3d at 243. Supplemental Rule B is a part of the Federal Rules of Civil Procedure dealing with admiralty and maritime claims. Fed. R. Civ. P. XIII(B).

7. *Malin Int'l*, 817 F.3d at 248.

Under these circumstances, Texas common law applied to the transaction.[8] Applying that law, the Fifth Circuit held that title to the fuel bunkers passed to the vessel operator at the time of delivery and this, in turn, created an interest in the bunkers on the part of the vessel operator that could be attached by the shipyard under Supplemental Rule B.[9] Summary judgment in favor of the shipyard for the price of the fuel bunkers, cost of installation, and attorney's fees was affirmed.[10]

B. Contract Formation

Although Chapter 2 contains some provisions modifying common law rules, it still embraces or states many common law contract principles. Section 2.204 is an example of how the Code both draws on the common law of contracts, and how it liberalizes the circumstances in which a contract may be found to exist.[11] Under that section a contract

> may be made in any manner sufficient to show agreement, including conduct by both parties . . . even though the moment of its making is undetermined . . . [and] [e]ven though one or more terms are left open . . . if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.[12]

Under Section 2.204, the standard "offer, acceptance, consideration" dance can be used to show formation of a contract for the sale of goods; however, the common law was more stringent about finding contracts formed by conduct, particularly if there were open terms.[13] *Obermeyer Hydro Accessories, Inc. v. CSI Calendering, Inc.*,[14] a decision by the U.S. District Court for the District of Colorado, applying Texas law, illustrates application of the Chapter 2 provisions to the formation of a contract for the sale of goods. In *Obermeyer*, a buyer began purchasing rubberized fabric from a seller. In the latter part of 2012 and in the early part of 2013, the parties exchanged emails and met in person to discuss a change in the seller's billing practice that had the effect of increasing the price of "calendered" fabric by some forty percent.[15] The buyer ordered, and the seller supplied, calendered fabric while the parties were still discussing the seller's new billing terms. Although there was no single moment when it could be said that a contract based on the new terms had been formed,

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8. *Id.*
9. *Id.* at 249.
10. *Id.* at 251.
11. Tex. Bus. & Com. Code Ann. § 2.204 (West 2009).
12. *Id.* § 2.204(a)–(c).
13. *See generally* E. Allan Farnsworth, Contracts 207–09 (3d ed. 1999); James J. White et al., 1 Uniform Commercial Code: Practitioner Treatise Series 65–67 (6th ed. 2012).
14. 158 F. Supp. 3d 1149 (D. Colo. 2016).
15. *Id.* at 1151–52, 1158. According to the district court, "calendered" fabric is fabric to which a rubber backing is attached to create a reinforced fabric product. The process of calendaring increases the weight to approximately double the weight of the fabric alone. *Id.* at 1153.

the buyer accepted and paid for deliveries of product.[16] The district court recognized that Texas law does not treat the mere failure to object to a change in terms as a sufficient course of conduct to indicate agreement.[17] Texas law does, however, allow a contract to be formed if a party orders and pays for goods with knowledge of the terms on which the goods have been delivered by the seller.[18] The district court held that the buyer was bound to pay at the new price.[19] As an alternative holding, the district court also ruled that even if the parties' course of dealing and course of performance did not form a contract, the new billing terms could be used as the basis for a contract modification under Section 2.209 that became effective when the buyer not only failed to object to the new terms, but continued to order and pay for the goods at the increased rate.[20]

C. Warranties of Quality

In *Becker v. Continental Motors, Inc.*,[21] the owner of an airplane purchased a new aircraft engine and had the engine installed in his plane. The contract included an express warranty covering the new engine against defects in materials or performance "[f]or a period of twenty-four months or . . . 1000 hours of operation, whichever occur[ed] first."[22] The contract also included a conspicuous clause disclaiming liability for incidental and consequential damages.[23]

After operating the airplane with the new engine for some 336 hours, the owner took the plane in for routine maintenance. Afterward, the owner discovered the engine was using an excessive amount of oil and the repair service submitted a warranty claim to the manufacturer on the

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16. *Id.* at 1159.

17. *See id.* at 1164–65.

18. *Id.* On these points, the district court cited and discussed the seminal holding in *Preston Farm & Ranch Supply, Inc. v. Bio-Zyme Enter.*, 625 S.W.2d 295, 298–300 (Tex. 1981) (buyer's conduct in making and paying for additional purchases was a course of performance indicating agreement to interest charge added to sales price in case of delayed payment). The district court also discussed subsequent Texas cases emphasizing that the rule in *Preston Farm* required more than the buyer's acknowledgement of a new term, also requiring action by the buyer indicating agreement to the term. *See* Tubelite v. Risica & Sons, Inc., 819 S.W.2d 801, 805 (Tex. 1991) ("acquiescence" to service charge may be shown by ordering, accepting, and paying for "goods with knowledge that a service charge is being imposed"); Triton Oil & Gas Corp. v. Marine Contractors & Supply, Inc., 644 S.W.2d 443, 445–46 (Tex. 1982) ("mere failure to object" does not show agreement to the "unilateral act of charging interest").

19. *Obermeyer Hydro Accessories, Inc.*, 158 F. Supp. 3d at 1171.

20. *Id.* at 1167–68. On this issue, the district court rejected an argument by the buyer that the price modification was not in good faith. *Id.* at 1169. The district court reasoned that the seller notified the buyer of the price increase well before the increase was imposed on new orders. *Id.* The district court also rejected "last ditch" arguments of negligent assent and quasi-estoppel by the seller because the extensive communications between the parties gave the buyer "reason to know" of the price increase. *Id.* at 1169–70. Even if the buyer "should have known," the seller produced no case law holding "constructive knowledge sufficient to apply the doctrine" of quasi-estoppel. *Id.* at 1170–71.

21. No. 4:13-CV-520-BJ, 2015 WL 6742104 (N.D. Tex. Nov. 2, 2015), *appeal filed*, No. 16-10166 (5th Cir. Feb. 12, 2016).

22. *Id.* at *2.

23. *Id.*

owner's behalf. During the next five months, attempts to repair failed, and the owner ultimately sued for breach of the express warranty, seeking direct damages for the cost of replacing and installing a new engine, along with the cost of hangar rental while repairs and replacement took place. The owner also sought loss of use damages for the aircraft "downtime."[24]

The U.S. District Court for the Northern District of Texas held the manufacturer was liable for breach of express warranty and allowed recovery of the direct damages incurred for attempted repair and eventual replacement of the engine, along with the hangar rental.[25] With respect to the loss of use damages, however, the district court ruled the disclaimer effectively barred recovery of incidental or consequential damages under Section 2.719 of the Code and denied recovery for loss of use.[26] As part of his claim, the owner also sought recovery under the Texas Deceptive Trade Practices Act (TDTPA), which allows breach of warranty claims to be brought under that Act as well as under Chapter 2 of the Code.[27] On this issue, the district court ruled that the TDTPA claim was "substantively the same as" the Chapter 2 claim.[28] Furthermore, there was no proof that the manufacturer had acted knowingly or intentionally.[29] Absent such proof, recovery under the TDTPA was the same as that allowed under Chapter 2.[30] The owner was, however, allowed to recover attorney's fees as provided in Section 38.001 of the Texas Civil Practice & Civil Remedies Code and by Section 17.50(d) of the TDTPA.[31]

An issue that can arise in warranty litigation when the defendant is a non-manufacturing seller is whether the claim is actually a products liability claim barred by Section 82.003 of the Texas Civil Practice and Reme-

24. *Id.* at *1–5.

25. *Id.* at *8–9.

26. *Id.* at *9–10. The district court noted that under TEX. BUS. & COM. CODE ANN. § 2.719(c) (West 2009), a limitation or exclusion of consequential damages will not be effective if the limitation or exclusion is unconscionable. *Id.* at *9 & n.13. The district court ruled that the limitation in the case at bar was not unconscionable. *Id.* at *10. This ruling in *Becker* should be compared with the determination in *E.F. Johnson Co. v. Infinity Global Tech.*, No. 05-14-01209-CV, 2016 WL 4254496 (Tex. App.—Dallas Aug. 11, 2016, no pet.) (mem. op), where the court held that a limitation of liability clause in a distributorship contract was unreasonable and unenforceable because, under the circumstances of the case, it failed to provide "minimum adequate remedies" to the aggrieved seller by allowing a buyer to renege on its "'irrevocable and non-cancellable' minimum purchase commitment." *Id.* at *4–5.

27. *See* TEX. BUS. & COM. CODE ANN. § 17.50(a)(1)–(4) (West 2011).

28. *Becker*, 2015 WL 6742104, at *11.

29. *Id.* at *12.

30. *Id.* at *11–12.

31. *Id.* at *12–13. In *Medical City Dallas, Ltd. v. Carlisle Corp.*, 251 S.W.3d 55, 63 (Tex. 2008), the Texas Supreme Court held that breach of express warranty claims are founded in contract for the purpose of recovery of attorney's fees under TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (West 1997). As to TDTPA claims, see TEX. BUS. & COM. CODE ANN. § 17.50(d) (West 2011) ("Each consumer who prevails shall be awarded court costs and reasonable and necessary attorneys' fees.").

dies Code.[32] In *Lopez v. Huron*,[33] a buyer purchased a large number of plastic bags from a non-manufacturing seller who ordered the bags from the manufacturer for shipment directly to the buyer. The buyer used the bags to package masa, a type of dried corn meal. The buyer sold 1,695 cases of the packaged masa to one of its own customers.[34] The customer returned all of the packaged masa because a defect in the plastic bags caused the bags to leak and spoil the masa. After replacing the shipment with another shipment of masa packaged in bags from another company, the buyer of the bags sued the non-manufacturing seller and the manufacturer of the plastic bags for breach of implied warranty. The jury found in favor of the buyer against both defendants.[35] The non-manufacturing seller appealed on the ground that the buyer was asserting a products liability claim because recovery was sought for damage to "other property," the damage to the masa, and not for the economic loss of the plastic bags themselves.[36] The San Antonio Court of Appeals disagreed, reasoning that the bags were a "component" of the final product, and that damage to the masa was a foreseeable consequential loss.[37] Because this was an economic loss, and not damage to other property resulting from a defect in the product itself, recovery on the breach of warranty claim was upheld.[38]

Another issue that can affect the ability of a plaintiff to recover on an implied warranty claim is the pre-suit notice requirement in Section 2.607(c)(1) of the Code.[39] In *Del Castillo v. PMI Holdings North America Inc.*,[40] an explosion at a natural gas plant in Mexico injured or killed a

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32. Tex. Civ. Prac. & Rem. Code Ann. § 82.003 (West 2011) limits the liability of a non-manufacturing seller if the plaintiff is attempting to recover for damages going beyond damages to the product itself. *See* Mid Continent Aircraft Corp. v. Curry Cty. Spraying Serv., Inc., 572 S.W.2d 308, 312–13 (Tex. 1978); Signal Oil & Gas Co. v. Universal Oil Products, 572 S.W.2d 320, 325 (Tex. 1978). For example, if a defective toaster catches on fire, damage to the toaster itself would be a warranty claim not barred by Section 82.003. But if the fire burns down the purchaser's house, the claim for damage to the house would be damage to "other property" and would constitute a products liability claim limiting recovery against the non-manufacturing seller unless the claimant satisfied one of the exceptions stated in Section 82.003. The distinction between damage to the product itself and damage to other property traces its roots in Texas to the seminal decisions in *Mid Continent* and *Signal Oil*, where the court announced what is generally known as the "economic loss rule." Under that rule, damage to the product itself is an economic loss recoverable on a claim for breach of warranty, but not recoverable on a claim of negligence or strict liability in tort. *See Mid Continent*, 572 S.W.2d at 312–13; *Signal Oil*, 572 S.W.2d at 325. Damage to the property itself is regarded as a contract claim; damage to other property is regarded as being founded in tort.

33. 490 S.W.3d 517 (Tex. App.—San Antonio 2016, no pet.).

34. *Id.* at 519.

35. *Id.*

36. *Id.* at 520, 522.

37. *Id.* at 524–25.

38. *Id.* at 525–26.

39. Tex. Bus. & Com. Code Ann. § 2.607(c)(1) (West 2009) ("Where a tender has been accepted (1) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy . . . .").

40. No. 4:14-CV-03435, 2016 WL 3745953 (S.D. Tex. July 13, 2016).

number of employees.[41] The injured parties and the family members of the deceased employees filed suit in the U.S. District Court for the Southern District of Texas on a number of theories, including breach of implied warranty for products the defendants sold to the gas plant, but without giving pre-suit notice under Section 2.607(c)(1). Citing *Vintage Homes, Inc. v. Coldiron*,[42] the plaintiffs argued this section applied only to buyers and not to bystanders injured by a defective product.[43] The district court disagreed on two grounds.[44] First, that the version of Section 2.607 discussed in *Vintage Homes* differed from that appearing in the Business & Commerce Code because it required notice to be given by the buyer to *his* seller.[45] The version enacted in Texas requires a buyer to give notice to *the* seller.[46] Second, since the time *Vintage Homes* was decided, Texas law had evolved to permit third parties to assert warranty claims against remote sellers.[47] Under these circumstances, case law had clearly established that third parties benefitting from the ability to assert claims against remote sellers should also have the responsibility of giving notice to such sellers.[48] Because of the failure to give notice, the district court held the plaintiffs were barred from recovery on a breach of implied warranty theory.[49]

D. Good Faith Purchase

Under Section 2.403, a purchaser of goods can acquire good title even if the seller has a defective title.[50] This rule is applicable, however, only if the seller had a voidable, and not a void, title to the goods.[51] This distinction was sharply drawn in *Villarreal v. Jimenez*,[52] where an automobile

41. *Id.* at *1.
42. 585 S.W.2d 886 (Tex. Civ. App.—El Paso 1979, no writ).
43. *Del Castillo*, 2016 WL 3745953, at *3.
44. *Id.*
45. *Id.* (citing McKay v. Novartis Pharm. Corp., 751 F.3d 694, 707 (5th Cir. 2014)).
46. *Id.* (citing *McKay*, 751 F.3d at 707).
47. *See id.* at *3.
48. *Id.*; *see, e.g.*, *McKay*, 751 F.3d at 706–07; U.S. Tire-Tech, Inc. v. Boeran, B.V., 110 S.W.3d 194, 199 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). It is worth noting that the post-*Vintage Home* cases are all decisions by the federal courts or by the lower Texas appellate courts predicting Texas law because the Texas Supreme Court, in *Wilcox v. Hillcrest Mem'l Park of Dallas*, 701 S.W.2d 842, 843 (Tex. 1986) (per curiam), recognized a conflict between the holding in *Wilcox* and the holding in *Vintage Homes*, but reserved judgment on the question of whether notice had to be given to anyone other than a buyer's immediate seller. The Texas Supreme Court has not expressly addressed this question again. See the discussion of this matter in *U.S. Tire-Tech*, 110 S.W.3d at 198–99. The obvious lesson to be learned from these cases is simple: In a breach of warranty case, give notice promptly and to anyone who may be a possible defendant.
49. *Del Castillo*, 2016 WL 3745953, at *3. The district court also dismissed other claims against all but one of the defendants. *See id.* at *18. As to that defendant, a pipeline operator, the court held that the plaintiffs had adequately alleged claims for negligence and gross negligence on the theory that the defendant breached a duty of care in the inspection and maintenance of a pipeline. *Id.* at *6–7.
50. Tex. Bus. & Rem. Code Ann. § 2.403(a) (West 2009).
51. *See id.*
52. No. 04-15-00544-CV, 2016 WL 3625667 (Tex. App.—San Antonio July 6, 2016, no pet.) (mem. op.).

paint shop filed and foreclosed on a mechanic's lien for a vehicle the shop had painted and for which it had not been paid.[53] The owner of the shop obtained a certificate of title in his own name and sold the vehicle to a third-party purchaser who acquired a certificate of title in his own name. The original owner of the vehicle sued the purchaser to recover the vehicle. The purchaser argued he was a good faith purchaser who acquired good title to the vehicle under Section 2.403 of the Code.[54] The trial court held that the case was governed by the Texas Certificate of Title Act rather than the Code,[55] and under that Act, the paint shop owner had failed to comply with the statutory requirements for foreclosing on a mechanic's lien.[56] Because of this failure, the certificates of title issued to the owner and to the third-party purchaser were void.[57] Judgment was rendered in favor of the original owner.[58]

On appeal, the San Antonio Court of Appeals agreed with the trial court that the paint shop owner failed to comply with the requirements of the Certificate of Title Act and never acquired a title that would allow him to sell the vehicle to someone else.[59] As to whether the dispute was governed by the Code instead of the Certificate of Title Act, the court of appeals correctly held there was no conflict between Section 2.403 and the Act because the Code clearly states that only a person with voidable title can transfer good title to a good faith purchaser.[60] Because the owner of the body shop had only a void title, and not a voidable title, the third-party purchaser also acquired a void title that was not effective against the ownership interest of the original owner.[61] Judgment in favor

53. *Id.* at *2.
54. *Id.* at *3.
55. Tex. Transp. Code Ann. §§ 501.001–.179 (West 2013). Section 501.005 of that Act provides that in case of conflict, "Chapters 1–9, Business & Commerce Code, control over a conflicting provision of this chapter." *Id.* § 501.005. The courts of appeals disagree about the circumstances in which the Code and the Act are in conflict. *Compare* Park Cities Ltd. P'ship v. Transpo Funding Corp., 131 S.W.3d 654, 658–59 (Texas App.—Dallas 2004, pet. denied) (Certificate of Title Act controls and sale of motor vehicle void if certificate of title not transferred at time of sale); Gallas v. Car Biz, Inc., 914 S.W.2d 592, 594 (Tex. App.—Dallas 1995, writ denied) (Certificate of Title Act controls and sale of motor vehicle void if certificate of title not transferred at time of sale); Pfluger v. Colquitt, 620 S.W.2d 739, 740 (Tex. App.—Dallas 1981, writ ref'd n.r.e.) (same), *with* Vibbert v. PAR, Inc., 224 S.W.3d 317, 324 (Tex. App.—El Paso 2006, no pet.) (Code controls and sale is not void even though certificate of title not transferred at time of sale); First Nat'l Bank of El Campo, Tex. v. Buss, 143 S.W.3d 915, 923–24 (Tex. App—Corpus Christi 2004, pet. denied) (Code controls and sale is not void even though certificate of title not transferred at time of sale); Hudson Buick, Pontiac, GMC Truck Co. v. Gooch, 7 S.W.3d 191 (Tex. App.—Tyler 1999, pet. denied) (same). The conflict arises because of differing interpretations of the statutory language in Tex. Transp. Code Ann. § 501.071(a) (West 2013) and Tex. Bus. & Com. Code Ann. § 2.401 (West 2009). A comprehensive analysis of the subject appears in Jonathon C. Clark, *Dude, Where's My Car? How the Proposed Uniform Certificate of Title Act Addresses Conflicts Between the Texas Certificate of Title Act and the Uniform Commercial Code*, 45 Tex. J. Bus. L. 209 (2013).
56. *Villarreal*, 2016 WL 3625667, at *3.
57. *Id.*
58. *Id.*
59. *Id.* at *4.
60. *Id.*; *see* Tex. Bus. & Rem. Code Ann. § 2.403(a) (West 2009).
61. *Villarreal*, 2016 WL 3625667, at *4.

of the original owner was affirmed.[62]

E. Remedies

In *High Rev Power, L.L.C. v. Freeport Logistics, Inc.*,[63] the Dallas Court of Appeals addressed an interesting situation involving claims by an aggrieved American buyer and counterclaims by an aggrieved Chinese seller.[64] Under their contract, the seller agreed to sell 770 go-karts to the buyer in a series of shipments at an agreed price for each go-kart. The buyer agreed to pay a twenty percent deposit on the entire order and pay the balance on each shipment when they cleared customs. Despite a problem in regard to the eighth and ninth shipments, a tenth shipment was made and accepted, but the buyer refused to pay for this shipment because of the problem with the two earlier shipments, and because the buyer had received information indicating that the seller planned to sell all remaining shipments to another buyer. Because payment had not been made for the tenth shipment, the seller refused to make any more shipments to the buyer. The buyer sued for breach of contract, seeking to recover a portion of the twenty percent down payment and lost profit damages for the undelivered balance of the original order.[65] The seller filed a counterclaim for the unpaid amount due on the tenth shipment, the remaining contract balance, and for the amount due and unpaid for parts ordered by the buyer. At trial, the buyer received a net recovery of $40,974.[66] The seller appealed on the ground that it was entitled to keep the twenty percent deposit and recover the remaining eighty percent of the unpaid purchase price.[67] The court of appeals disagreed, holding that under Section 2.708 of the Code, the seller was limited to recovering the difference between the unpaid contract price and the market price together with incidental damages caused by the buyer's breach.[68] Because the seller failed to introduce any evidence showing a difference between the market price and the contract price, and also failed to show any basis for a different calculation of damages, the measure of damage provided by Section 2.708 was upheld.[69] Retention of the deposit and recovery of the unpaid purchase price would, in the words of the court of appeals, "result in a windfall to [the seller]."[70] As to incidental damages, the court of appeals upheld an award of damages for freight and storage costs in-

62. *Id.* at *5.
63. No. 05-13-01360, 2016 WL 6462392 (Tex. App.—Dallas Oct. 31, 2016, no pet.) (mem. op.).
64. *Id.* at *1.
65. *Id.* at *2.
66. *Id.*
67. *Id.* at *4.
68. *Id.*; *see* Tex. Bus. & Com. Code Ann. § 2.708(a) (West 2015) (providing, in relevant part, "[T]he 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), but less expenses saved in consequence of the buyer's breach.").
69. *High Rev Power, L.L.C.*, 2016 WL 6462392, at *4.
70. *Id.*

curred by the seller as allowed by Section 2.710 of the Code.[71] The seller's claim for payment of some $16,000 for parts failed because there was no written contract covering the sale of the parts.[72] Under Section 2.201 of the Code, a sale of goods for a price of $500.00 or more must be in writing to be enforceable.[73] By admission of the seller, no written contract existed for this part of the transaction so recovery on this claim was barred.[74]

F. Limitations

Section 2.725(a) of the Code requires that actions for breach of a sales contract must be brought within four years of the time when the cause of action accrued.[75] Section 2.725(b) expands on this requirement by providing that "[a] cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach."[76] In cases of non-delivery, non-payment, repudiation, and the like, the time of breach should generally be fairly easy to determine. In breach of warranty cases, however, some time may pass before a breach is discovered. To address this situation, Section 2.725(b) also provides:

> A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.[77]

Except for warranties that explicitly extend the time for performance, these provisions leave little room for application of the "discovery rule."[78]

In *B. Mahler Interests, L.P. v. DMAC Construction, Inc.*,[79] an aggrieved buyer sued a construction company for breach of contract, breach of war-

71. *Id.*; *see* Tex. Bus. & Com. Code Ann. § 2.710 (West 2009) ("Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.").

72. *High Rev Power, L.L.C.*, 2016 WL 6462392, at *4.

73. Tex. Bus. & Com. Code Ann. § 2.201 (West 2009)

74. *Id.* (containing exceptions to the requirement of a written contract, but none of these were raised as a ground for satisfying the Chapter 2 Statute of Frauds); *High Rev Power, L.L.C.*, 2016 WL 6462392, at *4.

75. Tex. Bus. & Com. Code Ann. § 2.725(a) (West 2009).

76. *Id.* § 2.725(b).

77. *Id.*

78. The "discovery rule" typically means that a cause of action accrues when the injured party knows or, in the exercise of reasonable diligence, should have known of a breach. *See, e.g.*, Cosgrove v. Cade, 468 S.W.3d 32, 39 (Tex. 2015); BP Am. Prod. Co. v. Marshall, 342 S.W.3d 59, 66–67 (Tex. 2011). In the case of warranties that explicitly extend to future performance, the discovery rule does apply. *See, e.g.*, Safeway Stores, Inc. v. Certainteed Corp., 710 S.W.2d 544, 546, 548 (Tex. 1986) (express warranty extending to future performance of roofing material would be breached when defect discovered, but fact issue existed as to whether language of contract met the requirement that a warranty must "explicitly extend" to future performance).

79. 503 S.W.3d 43 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

ranty, fraudulent concealment, and equitable estoppel for alleged defects in materials used in the construction of an event center.[80] Although the work was completed in January 2008, the buyer did not file suit until October 2012. The buyer argued the defects were not discovered until an inspection report was made in May 2012, and the cause of action accrued at that time.[81] The Fourteenth Houston Court of Appeals rejected this argument on the warranty and breach of contract claims because Section 2.725 clearly states that a breach of warranty accrues upon tender of delivery,[82] and because the record showed the buyer knew or should have known of possible defects as early as January 2008.[83] Based on the evidence in the record, the court also denied recovery on the fraudulent concealment and equitable estoppel claims because the information available to the buyer in January 2008 made it unreasonable to rely on any representations by the seller about the materials used in the construction.[84] Summary judgment was affirmed in favor of the seller.[85]

III. LEASES OF GOODS

A. Lease-Purchase or Finance Lease

Chapter 2A of the Code governs leases of goods.[86] In *Jack County Appraisal District v. Jack County Hospital District*,[87] the issue before the Fort Worth Court of Appeals was whether a computerized tomography (CT) scanner in the possession of a hospital district was exempt from taxation by the county in which the hospital was located.[88] The majority, affirming summary judgment in favor of the hospital, held the scanner had been acquired under a lease-purchase contract and was owned by the hospital on the appraisal date, thereby making it exempt from taxation under the Texas Tax Code.[89] The most interesting part of this case is the dissenting opinion, which focused on the choice of law provision in the agreement between the hospital and the leasing company.[90] The agreement provided that it was subject to California law, and designated the transaction as a "Finance Lease."[91] The dissent reasoned that the definition of finance lease under California law, which is the same as the Texas definition in Section 2A.103 of the Code, meant the transaction did not

80. *Id.* at 47.
81. *Id.* at 49.
82. *Id.* at 50.
83. *See id.* at 50–53.
84. *Id.* at 56–58.
85. *Id.* at 58.
86. Tex. Bus. & Com. Code Ann. § 2A.102 (West 2009).
87. 484 S.W.3d 228 (Tex. App.—Fort Worth 2016, no pet.).
88. *Id.* at 230.
89. *Id.* at 235. Tex. Tax Code Ann. § 11.11(a) (West 2015) exempts property "owned by [the] state or by a political subdivision of [the] state" if it is "used for public purposes." Tex. Tax Code Ann. § 11.11(h) (2015) provides, in part, that "property is owned . . . if it is subject to a lease-purchase agreement" allowing the state or a political subdivision to "compel delivery of the legal title . . . at the end of the lease term."
90. *See Jack Cty. Appraisal Dist.*, 484 S.W.3d at 235–39 (Gabriel, J., dissenting).
91. *Id.* at 236.

meet the exemption provision in the Texas Tax Code.[92] The dissent concluded that summary judgment in favor of the hospital district should have been reversed and, instead, remanded to the trial court for further review to determine if the hospital district was entitled to summary judgment on a different ground.[93] Whether the majority was right or wrong about the ultimate decision exempting the hospital district from taxation is immaterial. It is disturbing to see a court ignore a choice of law clause agreed to by the parties in a written contract without at least explaining why the clause was not relevant to the decision.

IV. NEGOTIABLE INSTRUMENTS

A. Formal Requirements

Chapter 3 of the Code "applies to negotiable instruments."[94] Whether or not an instrument qualifies as a negotiable instrument depends on compliance with the formal requirements of Section 3.104(a) which states, in general, that an instrument must contain an "unconditional promise" to pay a fixed amount of money, "with or without interest or" the like, be "payable to" order or bearer, be "payable on demand or at a definite time," and include no other undertakings except for those listed in subsection (a).[95] A promise to "give, maintain, or protect collateral" is one of the allowed undertakings.[96] Although it seems clear that Section 3.104(a) allows an instrument to include references to collateral without destroying negotiability, the waters were muddied by the opinion in *Bables v. Citimortgage, Inc.*[97] In *Bables*, the plaintiffs sought to avoid foreclosure of their home.[98] In its opinion, the U.S. District Court for the Eastern District of Texas seemed to accept the defendant's argument that a note secured by real property is not a negotiable instrument under Chapter 3.[99] Unfortunately, the district court did not quote the language

92. *Id.* at 236–37. *Compare* Tex. Bus. & Com. Code Ann. § 2A.103(a)(7) (West 2009), *with* Cal. Com. Code § 10103(a)(7) (West 2002 & Supp. 2017).

93. *Jack Cty. Appraisal Dist.*, 484 S.W.3d at 238.

94. Tex. Bus. & Com. Code § 3.102(a) (West 2002) ("This chapter applies to negotiable instruments. It does not apply to money, to payment orders governed by Chapter 4A, or to securities governed by Chapter 8.").

95. Tex. Bus. & Com. Code § 3.104(a)(3)(A) (West 2002 & Supp. 2016).

96. *Id.*

97. No. 4:16cv104, 2016 WL 1450201 (E.D. Tex. Apr. 13, 2016).

98. *Id.* at *1.

99. The district court provides multiple sources to support its reasoning:

> As to Plaintiff's claims that Defendant's foreclosure efforts violate Chapter 3 of the Texas Business and Commerce Code, Defendant's authorities demonstrate that a note on real property does not fall within the UCC. [Tex. Bus. & Com. Code Ann. § 3.104 cmt. 2 (West 2002 & Supp. 2016)] ("Article 3 is not meant to apply to contracts for the sale of goods or services or the sale or lease of real property or similar writings that may contain a promise to pay money"); *see also* [Tex. Bus. & Com. Code Ann. § 9.109(d)(11) (West 2016)] ("This chapter does not apply to: the creation or transfer of an interest in or lien on real property. . . ."); [Clapp v. Wells Fargo, Nat. Ass'n, No. 4:14-CV-035-A, 2014 WL 1677805, at *3] (N.D. Tex. 2014) ("[C]ontrary to plaintiffs' assertions, a mortgage note is not 'within' the UCC because the Deed of

of the note itself, and this makes it impossible to tell if the note merely referred to the deed of trust (which would not affect negotiability) or if it made the note subject to the deed of trust (which would destroy negotiability).[100] To the extent the language of the district court can be read to mean that a note secured by an interest in real property is automatically non-negotiable, the district court was in error and it is to be hoped this reading does not become a standard interpretation of mortgage notes in Texas.

Despite its lack of clarity, the result in *Bables* was correct. The assignee of the note was allowed to foreclose on the deed of trust,[101] a result consistent with a long line of Texas cases rejecting the "show-me-the-note" or the "wet-ink" theory as a condition to the foreclosure of a deed of trust.[102]

B. Enforcement of Instruments

Martin v. Federal National Mortgage Association[103] was another mortgage foreclosure case—this time concerning a provision in the deed of trust securing the note. The issue before the U.S. Court of Appeals for the Fifth Circuit was whether a non-waiver provision in the deed of trust securing the note prevented the holder of the note and deed of trust from foreclosing by accepting payments after the maker had defaulted on the note.[104] The Fifth Circuit held that the non-waiver provision was effective and the holder was entitled to foreclose.[105]

In *LSREF2 Cobalt (TX), LLC v. 410 Centre LLC*,[106] the San Antonio Court of Appeals held that a non-waiver clause contained in a note and accompanying guaranty was effective to prevent the guarantors from asserting that the plaintiff waived the right to collect a deficiency after foreclosure without allowing the guarantors to assert their right of offset

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> Trust places a lien on real property, it is not governed by the UCC.") [(quoting Vogel v. Travelers Indem. Co., 966 S.W.2d 748, 753 (Tex. App.—San Antonio 1998, no pet.))]. Plaintiff has not shown how, despite this clear authority, Defendant's attempt at foreclosure violates the Texas Business and Commerce Code.

Id. at *2.

100. *Bables*, 2016 WL 1450201, at *2.
101. *Id.*
102. *See, e.g.*, Martins v. BAC Home Loans Servicing, L.P., 722 F.3d 249, 255 (5th Cir. 2013); Claudio D. v. Countrywide KB Home Loans, No. 3:14-CV-3969-K, 2016 WL 1003839, at *12 (N.D. Tex. Feb. 22, 2016) ("This theory has been widely rejected by courts in Texas."), *aff'd*, 2016 WL 950322 (Mar. 3, 2016) (accepting findings and recommendation of magistrate judge); Johnson-Williams v. CitiMortgage, Inc., No. 3:14-CV-3927-M (BH), 2015 WL 4997811, at *4 (N.D. Tex. Aug. 19, 2015) (accepting findings and recommendation of magistrate judge), *aff'd on other grounds sub. nom.*, Johnson-Williams v. Mortgage Elec. Registration Sys., Inc., No. 16-10276, 2017 WL 56053 (5th Cir. Jan. 4, 2017); Reardean v. CitiMortgage, Inc., No. A-11-CA-420-SS, 2011 WL 3268307, at *3 (W.D. Tex. July 25, 2011); Bierwirth v. BAC Home Loans Servicing, L.P., No. 03-11-00644-CV, 2012 WL 3793190, at *3 (Tex. App.—Austin Aug. 30, 2012, pet. denied) (mem. op.).
103. 814 F.3d 315 (5th Cir. 2016).
104. *Id.* at 316–17.
105. *Id.* at 319.
106. 501 S.W.3d 626 (Tex. App.—San Antonio 2016, pet. denied).

under the Texas Property Code.[107] The court of appeals pointed out that because the guaranty was not a negotiable instrument, and the record showed that the plaintiff had acquired the guaranty by proper assignment, the plaintiff was not required to prove it was also the holder of the note to enforce the guaranty.[108]

In contrast to *LSREF2*, the Fourteenth Houston Court of Appeals in *EverBank, N.A. v. Seedergy Ventures, Inc.*,[109] addressed the issue of whether the transferee of a note qualified as a holder entitled to foreclose on a deed of trust securing the note. In *Everbank*, a purchaser of property at a constable's auction brought an action to quiet title to the property. The purchaser alleged that defects in the assignment of the deed of trust and in the transfer of the note barred a foreclosure sale of the property by the defendant.[110] On the issue of assignment, the court of appeals held that the plaintiff failed to carry the burden of proving a break in the deed of trust chain of assignments.[111] As to transfer of the note, the court of appeals referred to Section 3.205(b) of the Code, and held that possession of a note indorsed in blank was effective to make the defendant, as the bearer of the note, a holder entitled to foreclose even if there were defects in the deed of trust assignment.[112] Summary judgment in favor of the plaintiff was reversed, and judgment rendered in favor of the defendant.[113]

Under Section 3.301 of the Code, a person may be "a person entitled to enforce" an instrument even if the person does not qualify as a holder.[114] In *Cooper v. Campbell*,[115] in addition to other defenses, the maker of a note contested the right of the person in possession to enforce the note against him.[116] After reviewing the provisions in Section 3.301, the Dallas Court of Appeals held that the terms of the note specifically provided that it could be transferred by assignment.[117] Evidence in the record showed that the plaintiff was the owner of the note and had the right to

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107. *Id.* at 629–30, 637. TEX. PROP. CODE ANN. § 51.003(c) (West 2014) allows a party obligated on a debt secured by real estate to offset a deficiency if the "fair market value" of the real estate is "greater than the [foreclosure] sale price." The amount of the offset is determined by the difference between the "fair market value" and "the sale price." *Id.*

108. *LSREF2 Cobalt (TX), LLC*, 501 S.W.3d at 636.

109. 499 S.W.3d 534 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

110. *Id.* at 536–37.

111. *Id.* at 540.

112. *Id.* at 541; *see* TEX. BUS. & COM. CODE ANN. § 3.205(b) (West 2002) ("When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially endorsed.").

113. *EverBank*, 499 S.W.3d at 544.

114. TEX. BUS. & COM. CODE ANN. § 3.301 (West 2002) ("'Person entitled to enforce' an instrument means . . . (ii) a nonholder in possession of the instrument who has the rights of a holder . . . ." This situation can occur because TEX. BUS. & COM. CODE ANN. § 3.203(b) (West 2002) states, "Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course.").

115. No. 05-15-00340-CV, 2016 WL 4487924 (Tex. App.—Dallas Aug. 24, 2016, no pet.) (mem. op.).

116. *Id.* at *1.

117. *Id.* at *5–6.

enforce it even if the plaintiff did not qualify as a holder.[118] The court of appeals rejected the maker's defense that only a holder could enforce a note.[119] The court of appeals also rejected the maker's defense that the note was a non-recourse note limiting his liability to the value of the collateral because the maker did not satisfy a condition in the note that he use his partnership distributions to repay the note.[120] The judgment of the trial court in favor of the owner of the note was affirmed.[121]

C. Rights of Accommodation Parties

In *Giles v. Carter*,[122] two friends (Friend One and Friend Two) decided to buy a house. Each of them would pay one-half of the monthly payments. To this end, Friend One co-signed a bank loan for the purchase as an accommodation party. In separate transactions, Friend One also made two personal loans of $20,000 each to Friend Two. For about one year, they split the cost of the mortgage payments; for the next five years, however, Friend One made all of the payments, totaling slightly more than $104,000. The friends thereafter had a falling out. The house was sold and Friend One, as the co-signing accommodation party, paid the note holder $16,200 to settle the deficiency remaining after the sale. At that point, Friend One sued Friend Two for $30,000 that remained unpaid on the personal loans, for $16,200 paid as an accommodation party, for one-half of the mortgage payments that Friend One had been making, and for attorney's fees.[123] The trial court granted judgment in favor of Friend One for the unpaid balance on the personal loan, and for the amount the lender paid on the co-signed loan as an accommodation party, but denied recovery for one-half of the mortgage payments and attorney's fees. Both parties appealed.[124]

The Waco Court of Appeals held that the trial court was correct in awarding damages for the unpaid personal loan, and for the amount paid by Friend One as an accommodation party.[125] The court of appeals disagreed, however, with the other rulings by the trial court.[126] On the breach of contract claim to recover one-half of the mortgage payments, the court ruled that the evidence supported the claim and reversed the trial court on this issue.[127] As to recovery of attorney's fees, the court separately addressed the rights of Friend One on the loan agreement and

118. *Id.* at *6–7.
119. *Id.* at *7.
120. *Id.* at *9.
121. *Id.* In addition to affirming the judgment of the trial court as to the maker's liability, the court also reversed the rulings by the trial court regarding a cross appeal by the owner of the note on issues of equitable forfeiture and a demand for an accounting, both of which had been denied by the court below. *Id.* at *14.
122. No. 10-15-00286-CV, 2016 WL 7177566 (Tex. App.—Waco Dec. 7, 2016, no pet.) (mem. op.).
123. *Id.* at *1–2.
124. *Id.* at *1.
125. *Id.* at *2.
126. *Id.* at *6.
127. *Id.* at *3.

on the right to recover for payment of the co-signed loan as an accommodation party.[128] The court reasoned that an agreement to repay a loan is a contract.[129] Because the lender was entitled to recover for breach of contract, the lender could also recover attorney's fees for this breach under Section 38.001 of the Texas Civil Practice & Remedies Code.[130] The most interesting part of the case was whether attorney's fees could be recovered by an accommodation party who pays all or part of the amount due on a note. On this issue, the court of appeals reasoned that under Section 3.419 of the Code, an "accommodation party . . . is entitled to reimbursement from the original obligor on the note" for payments made on a note.[131] Because a note is a contract, the rights of an accommodation party arise out of the note and are, therefore, rights based on a contract.[132] The case was remanded for entry of judgment in favor of Friend One for one-half of the mortgage payments and for recovery of attorney's fees.[133]

V. BANK DEPOSITS AND COLLECTIONS

A. Right of Charge-Back by Collecting Banks

A common check fraud involves a wrongdoer inducing the victim to deposit a check sent by the wrongdoer to the victim and wire-transferring part of the amount of the check to an account designated by the wrongdoer.[134] All too often, the check turns out to be counterfeit and the wired funds have vanished.[135] Unfortunately, the victim is unaware that the transferred funds were part of a provisional credit entered in the victim's account at the time of deposit while the check was in the process of collection, and were not "real money" received by actual final payment of

128. *Id.* at *4–5.

129. *Id.* at *4.

130. *Id.* (citing Tex. Civ. Prac. & Rem. Code Ann. § 38.001 (West 2008)).

131. *Id.* at *5 (citing Tex. Bus. & Com. Code Ann. § 3.419(f) (West 2002 & Supp. 2016) ("An accommodation party who pays the instrument is entitled to reimbursement from the accommodated party and is entitled to enforce the instrument against the accommodated party.")).

132. *Id.*

133. *Id.* at *6.

134. The seeming legitimacy of the scheme is often enhanced when the check sent to the victim appears to be a cashier's check or teller's check issued by a bank. The victim is lulled into believing, "It's a bank check—what could go wrong?" Schemes of this kind are described at Fed. Trade Comm'n, Consumer Info., *Fake Checks*, (Dec. 2012), https://www.consumer.ftc.gov/articles/0159-fake-checks [https://perma.cc/U6BV-M5VS] and Consumer Fin. Protection Bureau, *Ask CFBB—Bank Accounts and Services*, http://www.consumerfinance.gov/askcfpb/search/?selected_facets=category_exact:bank-accounts-and-services&selected_facets=category_exact:fraud-or-scam [https://perma.cc/6Z6E-97BR] (last visited Mar. 7, 2017) (Selected: Fraud or scam).

135. Advanced computers and high-quality color printing have allowed wrongdoers to produce remarkably realistic counterfeit checks. *Fake Checks*, *supra* note 134. For example, go to https://www.google.com and search in search bar for "counterfeit check images," then follow "Images" hyperlink.

the check.[136] In *American Dream Team, Inc. v. Citizens State Bank*,[137] a real estate company fell victim to this kind of fraud when it received an email from a person claiming to be an executive with a Chinese company. The sender expressed an interest in purchasing a home in the United States for his retirement.[138] Following an exchange of emails and pictures of various homes, the prospective purchaser advised the real estate company that it would be receiving a $35,000 check from the purchaser's stockbroker. Five thousand dollars was to be used as a down payment on a house selected by the purchaser, and the remaining thirty thousand dollars was to be wired to a bank account in Japan. When the check arrived, there was a discrepancy between the numerical amount and the written amount, and the bank entered a provisional credit in the lower written amount when the check was deposited.[139] At that time, the company was told that collection could take between one and two months because the check was drawn on a Canadian bank. About two weeks later, the president of the real estate company asked a bank employee about the funds and was told that the funds appeared to be there. The company proceeded to wire thirty thousand dollars to the Japanese bank. In mid-March, the bank and the real estate company learned the check was counterfeit and the bank charged thirty thousand dollars back against the company escrow account.[140] The company sued the bank on a variety of theories, including breach of contract and common law fraud. The bank counterclaimed for breach of warranty in the transfer of the instrument under Sections 3.416 and 4.207 of the Code, and on the ground that the plaintiff's claims were preempted by the Code.[141] The trial court ruled in favor of the bank and the real estate company appealed.[142]

The Tyler Court of Appeals affirmed the judgment of the trial court.[143] On the breach of contract claim, the court of appeals held that Section 4.214 of the Code gave the collecting bank a right of charge back against any provisional credit and preempted a claim for breach of contract.[144] The court ruled, however, that Section 4.214 did not preempt the common law fraud claim because Section 1.103 of the Code identifies "fraud

136. Chapter 4 of the Code distinguishes between provisional settlement, final settlement, and final payment. *See, e.g.*, TEX. BUS. & COM. CODE ANN. §§ 4.213(c), 4.214(a), 4.215(e) (West 2002).

137. 481 S.W.3d 725 (Tex. App.—Tyler 2015, pet. denied).

138. *Id.* at 728–29.

139. *Id.* at 729–30. The numerical amount of the check stated "$35,000.00USD." The written amount "stated 'Thirty Thousand and 00/100 U.S. Dollars." *Id.* at 729. Under TEX. BUS. & COM. CODE ANN. § 3.114 (West 2002), in case of conflict, "words prevail over numbers." The difference can be significant. *See* Charles R. Tips Family Trust v. PB Commercial LLC, 459 S.W.3d 147, 154 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (holding that where note stated it was in the amount of "One Million Seven Thousand and NO/100 ($1,700,000.00) Dollars," the words controlled, and recovery on the note was limited to the lower amount, a difference of $693,000.)

140. *Am. Dream Team, Inc.*, 481 S.W.3d at 729–30.

141. *Id.* at 730.

142. *Id.*

143. *Id.* at 742.

144. *Id.* at 732 (citing TEX. BUS. & COM. CODE ANN. § 4.214 (West 2002)).

as a cause of action that can be used to supplement" the provisions of the Code.[145] Since the fraud claim was not preempted, the court addressed the question of whether the plaintiff had produced sufficient evidence of fraud to raise an issue of material fact requiring trial.[146] In a careful review of the record, the court concluded the plaintiff failed to show a false representation by the bank employee when the employee made the statement about the funds "being there" because the provisional credit did appear on the employee's computer screen.[147] Furthermore, the plaintiff failed to show justifiable reliance on the bank's representation where statements in the exchange of emails, the discrepancy in the check amount, and the prospective buyer's refusal to sign a representation agreement for the home purchase all pointed to the suspicious nature of the transaction.[148] Because of the failure to introduce sufficient evidence to raise an issue of material fact in support of the fraud claim, this claim was denied as well.[149]

B. Relationship Between a Payor Bank and Its Customer

Section 4.103 of the Code permits the provisions of Chapter 4 to be varied by agreement, but a bank "cannot disclaim . . . responsibility for its lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack or failure."[150] The importance of Section 4.103 became apparent in the case of *Sting Soccer Operations Group LP v. JP Morgan Chase Bank, N.A.*,[151] where a bank closed the accounts of several customers after receiving information that the customers may have been engaged in illegal activities.[152] The plaintiffs operated a soccer association that scheduled meets, arranged meals and lodging for players, and advertised events at venues around the United States.[153] Approximately one and one-half years after the account closings, the plaintiffs sued the bank on ten different theories. Both parties filed motions for summary judgment.[154] Although summary judgment was granted in favor of the bank on some of the claims, the U.S. District Court for the Eastern District of Texas held that others raised issues of material fact requiring trial.[155] From a commercial law perspective, the most important part of

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145. *Id.* at 735–36 (citing Tex. Bus. & Com. Code Ann. § 1.103(b) (West 2009) ("Unless displaced by the particular provisions of this title, the principles of law and equity . . . and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation . . . or other validating or invalidating cause shall supplement its provisions.")).
146. *Id.* at 736.
147. *Id.* at 738–39.
148. *Id.* at 740–41.
149. *Id.* at 741.
150. Tex. Bus. & Com. Code Ann. § 4.103(a) (West 2002).
151. No. 4:15-CV-127, 2016 WL 3917640 (E.D. Tex. July 20, 2016).
152. *Id.* at *1.
153. Plaintiffs' Second Amended Complaint at ¶¶ 13–14, *Sting Soccer Operations Grp. LP*, 2016 WL 3917640 (No. 4:15-CV-127).
154. *Sting Soccer Operations Grp. LP*, 2016 WL 3917640, at *3.
155. *Id.* at *14. The bank prevailed on some of the claims on the basis of the statute of limitations having run or for failure of the plaintiff to show causation or recoverable loss.

the case was the bank's argument that the plaintiffs waived the right to recover consequential damages under a clause in the deposit agreement.[156] On that issue, the district court disagreed.[157] Referring to Section 4.103 of the Code, and the limitation on a bank's right to disclaim liability for a lack of good faith or the failure to exercise ordinary care, the district court held that the clause did not waive the plaintiffs' right to seek consequential damages.[158]

Under Section 4.401 of the Code, a payor bank is entitled to charge "properly payable" items against its customer's account.[159] If an item is not properly payable, the customer can demand a re-credit for the amount of the item, but the right to demand re-credit of an account is not unlimited.[160] Under Section 4.406 of the Code, after a bank "sends or makes available [to a customer] a statement of account," the customer has a duty to report any unauthorized signatures or alterations shown on the statement within the time limits stated in that section or in the deposit agreement.[161] If the customer fails in this duty, the customer may be barred from recovering for any loss caused by improperly paid items.[162] In *Calleja-Ahedo v. Compass Bank*,[163] a bank customer delayed reporting unauthorized charges on his account for some eighteen months after the charges occurred.[164] Under normal circumstances, the customer would be barred from recovery by the one-year provision in Section 4.406,[165] but the circumstances in this case were hardly normal because of the inter-

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Id. at *6–7, *10, *12–13. The plaintiffs survived summary judgment when the allegations stated grounds for relief raising issues of material fact. *Id.* at *9–10, *12.

156. The clause in question read, "We [the bank] will not be liable for indirect, special, or consequential damages regardless of the form of action and even if we have been advised of the possibility of such damages." *Id.* at *13.

157. *Id.* at *14.

158. *Id.* (citing Tex. Bus. & Com. Code Ann. § 4.103(a) (West 2002)).

159. Tex. Bus. & Com. Code Ann. § 4.401(a) (West 2002) ("A bank may charge against the account of a customer an item that is properly payable from that account even though the charge creates an overdraft. An item is properly payable if it is authorized by the customer and is in accordance with any agreement between the customer and the bank.").

160. *See infra* text accompanying notes 161–62.

161. Tex. Bus. & Com. Code Ann. § 4.406(c) (West 2002) ("If a bank sends or makes available a statement of account or items pursuant to Subsection (a), the customer must exercise reasonable promptness in examining the statement or the items to determine whether any payment was not authorized because of an alteration of an item or because a purported signature by or on behalf of the customer was not authorized. If, based on the statement or items provided, the customer should reasonably have discovered the unauthorized payment, the customer must promptly notify the bank of the relevant facts."). The outside time limit in Section 4.406 is one year. *See id.* § 4.406(f). If multiple forgeries or alterations are made by the same wrongdoer, the statutory time limit is shortened to thirty days. *See id.* § 4.406(d). These time limits may be changed in a deposit agreement. *See, e.g.*, Am. Airlines Emps. Fed. Credit Union v. Martin, 29 S.W.3d 86, 96 (Tex. 2000) (deposit agreements may shorten time for reporting unauthorized signatures or alterations); Canfield v. Bank One, Tex., N.A., 51 S.W.3d 828, 836 (Tex. App.—Texarkana 2001, pet. denied) (same).

162. *See* Bus. & Com. § 4.406(c), (f).

163. 508 S.W.3d 791 (Tex. App.—Houston [1st Dist.] 2016, pet. filed).

164. *Id.* at 793–94.

165. *See* Bus. & Com. § 4.406(f).

vention of an unidentified wrongdoer. The customer, a citizen of Mexico who lived in Mexico City, had opened the account in 1988. At that time, he asked that account statements be sent to his brother who lived in Texas. His brother had no responsibility to review the statements; this was done by the customer from "time to time" when he visited his brother in the United States.[166] In June of 2012, an unknown third party wrongdoer asked that the bank change the address where statements were mailed and to send blank checks and a debit card to that address. After this change was made, a series of checks and debit card transactions resulted in charges that emptied the account. The problem came to light when the customer learned that a check he had written was returned by the bank with a notation that the account had been closed. The customer promptly traveled to Texas, reviewed the bank statements for the last several months, and notified the bank about the unauthorized charges to his account.[167] The bank defended on three grounds. First, the delay of eighteen months barred recovery under Section 4.406(f). Second, the customer's brother was an employee of the customer under Section 3.405 of the Code, and he had responsibility with respect to the account. Third, the customer failed to exercise ordinary care that contributed to the forgeries and barred the customer from recovery under Section 3.406 of the Code.[168]

The first defense hinged on whether the bank had "sent or made available" the statements of account to trigger the customer's duty to report unauthorized transactions.[169] The effectiveness of this defense depended on which of two deposit agreements governed the rights of the parties.[170] One of the agreements, termed the "2008 agreement," did not clearly identify the time when the duty to report would begin. The other agreement, termed the "2012 agreement," was more specific about the time when the duty to report would begin. The bank argued that the 2012 agreement controlled because it was sent to the brother's address in February of 2012 and amended the 2008 agreement.[171] The Houston Court of Appeals rejected this argument because the bank failed to show its attempt to amend the 2008 agreement complied with the provisions of the Texas Finance Code governing amendment of deposit agreements.[172] The court of appeals then discussed the question of whether the customer had a duty to report unauthorized charges when statements of account were sent to addresses supplied by the wrongdoer.[173] On this issue, referring to the decision of the Texas Supreme Court in *Jefferson State Bank v.*

166. *Calleja-Ahedo*, 508 S.W.3d at 796.
167. *Id.* at 793–94.
168. *Id.* at 801, 805–06.
169. *Id.* at 801.
170. *See id.* at 797–98.
171. *Id.* at 798, 802.
172. *Id.* at 798. TEX. FIN. CODE ANN. § 34.302(b) (West 2013) specifies the manner in which deposit agreements can be amended.
173. *Calleja-Ahedo*, 508 S.W.3d at 799–801.

Lenk,[174] the court of appeals held the duty to report did not arise.[175]

In regard to the issue of the brother acting as an employee for purposes of the bar rule in Section 3.405, the court of appeals ruled there was "no evidence" that the brother was an "employee" or had "any 'responsibility'" beyond receiving and holding the bank statements for the customer to review when he visited in the United States.[176] On the question of whether the customer's lack of ordinary care had contributed to the forgeries, the court of appeals reasoned that because the customer had no knowledge of unauthorized activity on his account *before* the forgeries occurred, any lack of diligence *after* learning of the forgeries did not amount to a lack of ordinary care.[177] The court of appeals reversed the trial court's grant of summary judgment in favor of the bank and rendered judgment in favor of the customer on his claim to re-credit his account.[178] This case provides significant insight into the importance of careful drafting of deposit agreements, and the need for documented notification of account agreement changes.

VI. SECURED TRANSACTIONS

A. Security Interest as a Property Right

Chapter 9 of the Code governs security interests in personal property.[179] Much of Chapter 9 is concerned with the substantive rights of secured parties, debtors, and third parties asserting claims to collateral.[180] In *BCL-Equipment Leasing, LLC v. Davis*,[181] the U.S. District Court for the Eastern District of Texas addressed a procedural right of considerable importance to secured parties. In *BCL*, the plaintiff alleged that the buyer/lessor of an oil rig in a sale-leaseback arrangement refused to give the plaintiff possession of the rig that was the subject of the transaction. A third-party sought to intervene in the litigation on the ground that he held a security interest in the rig.[182] Referring to the definition of "security interest" in Section 1-201 of the Uniform Commercial Code, the district court held that a security interest was a property interest.[183] Prior case law made it clear that a party claiming a property interest was entitled to intervene in a suit between other parties if the claimant's right to the property might be affected by the result of the litigation.[184] Because

174. *Id.* at 800–01 (citing Jefferson State Bank v. Lenk, 323 S.W.3d 146 (Tex. 2010)). In *Lenk*, the Texas Supreme Court held that mailing account statements to an imposter did not trigger a duty to report under Tex. Bus. & Com. Code Ann. § 4.406 (West 2002). *See Lenk*, 323 S.W.3d at 149.
175. *Calleja-Ahedo*, 508 S.W.3d at 803.
176. *Id.* at 805.
177. *Id.* at 806–07.
178. *Id.* at 807.
179. *See* Tex. Bus. & Com. Code Ann. § 9.109(a)(1) (West 2011 & Supp. 2016).
180. *See id.* § 9.109
181. No. 2:15-CV-195-WCB, 2016 WL 115696 (E.D. Tex. Jan. 11, 2016).
182. *Id.* at *1.
183. *Id.* at *2.
184. *Id.*

the interest of the secured party in the case at bar was adverse to that of the plaintiff, and could be affected by the outcome, intervention was allowed with the secured party aligned as a defendant.[185]

B. Security Interests in Commercial Tort Claims

Under Section 9.108 of the Code, collateral can be described in a security agreement in several different ways.[186] Regardless of the method chosen, the critical test is whether the description "reasonably identifies" the collateral, but this test is subject to some important exceptions.[187] One of those exceptions deals with commercial tort claims.[188] Reading Section 9.108 together with Section 9.204, it is clear that a commercial tort claim must be in existence before a security interest can attach to the claim.[189] The Comment to Section 9.108 notes that the claim need not be described with specificity, but the description in the security agreement must at least refer to an existing claim.[190] In *Bayer CropScience, LLC v. Stearns Bank National Association*,[191] the U.S. Court of Appeals for the Eighth Circuit applied Texas law to resolve a dispute between two secured parties (SP1 and SP2), each of whom asserted a priority interest in a debtor's tort claim.[192]

SP1 obtained and perfected a security interest in various items of collateral. SP2 later took and perfected a security interest in some of the same collateral. The debtor later brought a commercial tort claim against a third party for damage caused to the collateral. While that claim was pending, SP2 entered into a forbearance agreement with the debtor in exchange for a security interest in the tort claim.[193] SP2 perfected this security interest by filing. The tort claim was ultimately settled and the tortfeasor joined SP1 and SP2 in an interpleader action to determine how

185. *Id.* at *3–4.

186. Tex. Bus. & Com. Code Ann. § 9.108(b) (West 2011) contains a list of ways in which collateral can be described, e.g., by specific listing, category, type defined in the Code, quantity, etc.

187. *Id.* § 9.108(a) ("Except as otherwise provided in Subsections (c), (d), and (e), a description of personal or real property is sufficient, whether or not it is specific, if it reasonably identifies what is described."); *id.* § 9.108(c) (providing that supergeneric descriptions, such as "all of debtor's personal property" are not sufficient); *id.* § 9.108(d) (stating a special rule for certain investment property); *id.* § 9.108(e) (excluding descriptions by "type" for commercial tort claims, consumer goods, and consumer investment property).

188. Tex. Bus. & Com. Code Ann. § 9.102(a)(13) (West 2011 & Supp. 2016) (defining a "commercial tort claim" as "a claim arising in tort with respect to which: (A) the claimant is an organization; or (B) the claimant is an individual and the claim: (i) arose in the course of the claimant's business or profession; and (ii) does not include damages arising out of personal injury to or the death of an individual").

189. Tex. Bus. & Com. Code Ann. § 9.204(b) (West 2011) ("A security interest does not attach under a term constituting an after-acquired property clause to: . . . (2) a commercial tort claim."); *see id.* § 9.108.

190. *Id.* § 9.108 cmt. 5 ("Subsection (e) does not require a description to be specific. For example, a description such as 'all tort claims arising out of the explosion of debtor's factory' would suffice . . . .").

191. 837 F.3d 911 (8th Cir. 2016).

192. *Id.* at 914.

193. *Id.* at 913–14.

the settlement funds were to be divided between them.[194]

SP1 argued that it had priority because its security interest covered general intangibles.[195] According to SP1, once the tort claim was settled, the "right to payment" under the settlement became "a payment intangible," a "subset of a general intangible," and its first perfected security interest had priority in the funds.[196] SP2 contended that this logic allowed SP1 to evade the need to identify a commercial tort as required in Sections 9.108 and 9.204, and since SP2 was the only secured party who had a security interest in the identified tort claim, it should have priority in the settlement funds.[197]

The Eighth Circuit agreed with SP2 that the claim of SP1 did not extend to the commercial tort claim itself because that claim did not exist when SP1 acquired its security interest.[198] However, some of SP1's collateral was damaged by the third-party tortfeasor, and this damage constituted proceeds of SP1's original collateral.[199] Thus, "to the extent that" SP1 could show the settlement funds constituted "payment for damages to [its] original collateral," SP1 would have a priority claim for that amount.[200]

C. Priorities in Deposit Accounts

In re Tusa-Expo Holdings, Inc.[201] is the most interesting secured transaction case decided during the Survey period. Although the case arose in the context of a preference claim by the debtor's bankruptcy trustee, a decision on this issue required the U.S. Court of Appeals for the Fifth Circuit to interpret and apply Section 9.332 of the Code.[202] Because this section rarely appeared in prior case law, the Fifth Circuit was writing on an essentially blank slate.

Section 9.332 contains only two rules.[203] Subsection (a) protects trans-

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194. *Id.* at 914.
195. *Id.*
196. *Id.* at 915; *see* Tex. Bus. & Com. Code Ann. § 9.109 cmt. 15 (West 2011 & Supp. 2016) ("[O]nce a claim arising in tort has been settled and reduced to a contractual obligation to pay, the right to payment becomes a payment intangible and ceases to be a claim arising in tort.").
197. *Bayer CropScience, LLC*, 837 F.3d at 914–16.
198. *Id.* at 915–16.
199. The Eighth Circuit noted that the definition of "proceeds" in Tex. Bus. & Com. Code Ann. § 9.102(a)(65)(D) (West 2011 & Supp. 2016) provides, "Proceeds include 'to the extent of the value of collateral, claims arising out of the loss, nonconformity, or interference with the use of, defects or infringement of rights in, *damage to* the collateral.'" *Bayer CropScience, LLC*, 837 F.3d at 916. The Eighth Circuit also noted that Bus. & Com § 9.102 cmt. 5(g) states, "A security interest in a tort claim also may exist under this Article if the claim is proceeds of other collateral." *Id.* at 917.
200. *Id.*
201. 811 F.3d 786 (5th Cir. 2016).
202. *See id.* at 794.
203. Tex. Bus. & Com. Code Ann. § 9.332(a) (West 2011) ("A transferee of money takes the money free of a security interest unless the transferee acts in collusion with the debtor in violating the rights of the secured party."); *id.* § 9.332(b) ("A transferee of funds from a deposit account takes the funds free of a security interest in the deposit account

ferees of money from a deposit account.[204] Subsection (b) protects transferees of funds from a deposit account.[205] In *In re Tusa-Expo*, a creditor had a perfected security interest in the debtor's inventory of office furniture.[206] As part of a debt restructuring agreement, the debtor obtained a loan from another creditor. This creditor took a security interest in the debtor's inventory and also required the debtor to open a deposit account for the deposit of payments made by the debtor's customers on accounts arising from their purchase of furniture. The security interest in the deposit account was perfected by control. Deposits to this account were swept daily and credited to the debtor's revolving loan to "increase the available credit" to the debtor on this loan, and new advances on the revolving loan were made to the debtor upon request (up to the available current balance).[207] A critical part of the restructuring was a subordination agreement between the first secured party and the second secured party. This agreement provided that the first secured party would retain priority in any payments made on "specified accounts receivable" deposited in the deposit account controlled by the second secured party.[208]

The trustee argued that the first secured party lost its security interest in the deposited funds when the funds were swept by the second secured party and advanced to the debtor under the revolving loan arrangement.[209] The first secured party argued that its security interest in the funds was automatically perfected by Section 9.315(b) as proceeds of its security interest in inventory when they were deposited in the deposit account, and that Section 9.332(b) did not affect this perfected interest when the funds were swept and later advanced to the debtor by the second security party.[210] In effect, the first secured party was arguing that no preference occurred because these funds were merely a substitute for its original security interest in inventory and this was not a preferential payment under the preference exception in § 547(b)(5) of the Bankruptcy Code.[211] Based on its reading of Section 9.332(b), the Fifth Circuit agreed with the first secured party.[212] In the view of the Fifth Circuit, "the *funds* in a deposit account remain unencumbered by a security interest in the deposit account itself."[213] This line of reasoning meant, in turn, that the first secured party retained its first priority security interest in the funds when they were swept by the second secured party and later advanced to

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unless the transferee acts in collusion with the debtor in violating the rights of the secured party.").

204. *See id.* § 9.332(a).
205. *See id.* § 9.332(b).
206. *In re Tusa-Expo*, 811 F.3d at 789.
207. *Id.* at 790.
208. *Id.*
209. *Id.* at 794.
210. *Id.* at 794–95.
211. 11 U.S.C. § 547(b)(5) (2012) prevents the trustee from avoiding a transfer unless the transfer allows a "creditor to receive more than . . . [it] would receive if . . . the case were a" liquidation proceeding under Chapter 7 of the Bankruptcy Code.
212. *In re Tusa-Expo*, 811 F.3d at 795–96.
213. *Id.* at 796.

the debtor.[214] In a sense, one could say this rationale was merely treating the first secured party's security interest as a kind of transmutation of collateral from inventory to funds in a deposit account and back to funds in the hands of the debtor with no net gain (i.e., preference) accruing to the first secured party. The Fifth Circuit concluded that the trustee failed to prove the first secured party received a preference.[215] The Fifth Circuit gave only a passing reference to the effect of the subordination agreement between the first and second secured parties.[216] This is a somewhat peculiar omission but it may have been because, as the Fifth Circuit pointed out in a footnote, the parties themselves did not raise the issue.[217]

In re Tusa-Expo is a fascinating case because the result seems to mean that a security interest in a deposit account attaches only to the account itself and not to the funds contained in the account. This is a little like taking a security interest in an eggshell, but the security interest does not attach to the contents of the egg. If this is true, why bother? Furthermore, how does this interpretation square with the elaborate provisions in Chapter 9 dealing with perfection by control and priorities between parties who have control?[218] The interpretation of Section 9.332(b) in *In re Tusa-Expo* raises interesting questions and at least one source has referred to the result in *In re Tusa-Expo* as "illogical."[219]

D. Disputes Between Factors and Account Debtors

It is not uncommon for a business to sell goods or services in exchange for a promise of future payment. The future payment can take several forms, including a sale in which the purchaser promises to pay for the goods or services within a certain time period, but the obligation is represented by entry in an account and not by a negotiable instrument or a contract specifically related to a particular purchase. "Accounts" are defined in Section 9.102(a)(2) of the Code as "a right to payment of a mone-

214. *See id.* at 796–97.

215. *Id.* at 801. Because the funds had been commingled during their transit into and out of the deposit account, a subsidiary issue was whether the first secured party or the trustee had the burden of tracing the funds as proceeds of collateral or as coming from another source. *Id.* at 797–99. Tex. Bus. & Com. Code Ann. § 9.315(b)(2) (2011) puts the burden on the secured party, but 11 U.S.C. § 547(g) (2012) of the Bankruptcy Code puts the burden on the trustee. *See id.* at 797–98. The Fifth Circuit held that § 547(g) prevailed and the trustee failed to carry this burden. *Id.* at 799.

216. *Id.* at 797.

217. *See id.* at 797 n.35 (quoting Tex. Bus. & Com. Code Ann. § 9.339 (West 2011) ("This chapter does not preclude subordination by agreement by a person entitled to priority.")). Because the second secured party had subordinated its security interest to that of the first secured party, reference to this section may have made the interpretation of Tex. Bus. & Com. Code Ann. § 9.332 (2011) unnecessary.

218. *See, e.g.*, Tex. Bus. & Com. Code Ann. §§ 9.104, .310(b)(8), .312(b)(1), .322(d) & (e) & .327 (West 2011).

219. *See More Line Drawing II*, 50 U.C.C. L. Letter No. 11, NL2 (Jan. 2017). An excellent article discussing security interests in deposit accounts may be found in Bruce A. Markell, *From Property to Contract and Back: An Examination of Deposit Accounts and Revised Article 9*, 74 Chi.-Kent L. Rev. 963 (1999).

tary obligation, whether or not earned by performance."[220] Section 9.109 provides that Chapter 9 applies to security interests in accounts, and to the outright sale of accounts.[221] If a seller assigns or sells an account to a third party (often termed a "factor"), the third party can notify the purchaser of the goods or services that payments on the account are to be made directly to the third party and not to the original seller. In these cases, the purchaser becomes the "account debtor."[222]

In *Tempay, Inc. v. Tanintco, Inc.*,[223] an employment service generated accounts by supplying temporary employees to its customers. The employment service then assigned the accounts to a factoring company that was then to notify the account debtors to make payments on the accounts directly to the factor. The initial notice letter sent to one of the account debtors contained a number of errors making it unclear about where payments were to be sent.[224] This lack of clarity was eventually resolved and the account debtor made payments to the factor for approximately one year when an employee of the employment service business embarked on a money laundering scheme. That employee orally notified the account debtor to make future payments directly to the employment service and the account debtor did so.[225] After the employee's dishonesty was discovered, the factor sued the employment service, the dishonest employee, and the account debtor for the missing payments. The account debtor defended by arguing that errors in the initial notice of assignment rendered it ineffective or that the notice was no longer in effect after the account debtor was orally notified by the employee that payments were to be made directly to the employment service. The factor prevailed on its claim against the employment service and the dishonest employee, but not against the account debtor. The factor appealed.[226]

On appeal, the Dallas Court of Appeals ruled that the initial notice and the surrounding circumstances raised a question of fact about whether the notice complied with the requirement of Section 9.406(b)(1) that a notice "reasonably identify" the rights assigned to the factor.[227] As to the

220. The definition in TEX. BUS. & COM. CODE ANN. § 9.102(a)(2) (West 2011 & Supp. 2016) also provides a list of transactions that result in the creation of an account and a list that excludes transactions that create another type of collateral under Chapter 9.

221. *See* TEX. BUS. & COM. CODE ANN. § 9.109(a) (West 2011 & Supp. 2016).

222. The term "account debtor" is defined in BUS. & COM. § 9.102(a)(3) as the "person obligated on an account, chattel paper, or general intangible. The term does not include persons obligated to pay a negotiable instrument, even if the instrument constitutes part of chattel paper."

223. No. 05-15-00130-CV, 2016 WL 192596 (Tex. App.—Dallas Jan. 15, 2016, no pet.) (mem. op.).

224. *Id.* at *1.

225. *Id.* at *2. The opinion does not describe exactly how the employee was able to divert the payments to her own use, but it is likely that she either intercepted the payments as they arrived or had them sent to an account that she controlled. Regardless of the specific method used, the employee obtained use of more than $500,000 in misdirected payments. *See id.*

226. *Id.* at *3.

227. *Id.* at *7; *see* TEX. BUS. & COM. CODE ANN. § 9.406(b)(1) (West 2011 & Supp. 2016). On this issue, the court of appeals noted that the account debtor had made pay-

effectiveness of the assignment after the employee orally notified the account debtor of a change in the payment instructions, the court of appeals held that the factor raised a "genuine issue of material fact" about whether a change in the payment instructions "had to be in writing."[228] Because both issues raised questions of fact, the judgment of the trial court was reversed and the case remanded for further proceedings.[229]

VII. CONCLUSION

As usual, the cases reported during this Survey period addressed questions under several Chapters of the Business & Commerce Code. While some were reaffirmations of prior holdings or direct application of the Code, others explored new territory on difficult issues.[230] The cases involving the intersection of contract provisions and the interpretation of the Code were of particular interest because they concern the drafting limits parties may face in using a contract to write their own law.[231]

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ments directly to the factor for more than a year despite the mistakes in the initial notice. *Tempay*, 2016 WL 192596, at *7.

228. *Id.* at *8–9.

229. *Id.* at *9.

230. *See, e.g.*, *In re* Tusa-Expo Holdings, Inc., 811 F.3d 786 (5th Cir. 2016) (paucity of prior case law required interpretation of Section 9.332(b)); Del Castillo v. PMI Holdings N. Am. Inc., No. 4:14-CV-03435, 2016 WL 3745953, *3 (S.D. Tex. July 13, 2016) (prior case law established that notice must be given to remote parties who may be liable for breach of warranty); Becker v. Cont'l Motors, Inc., No. 4:13-CV-520-BJ, 2015 WL 6742104, *9–10 (N.D. Tex. Nov. 2, 2015), *appeal filed*, No. 16-10166 (5th Cir. Feb. 12, 2016) (under Section 2.719 of the Code, buyer could recover direct damages for breach of express warranty but contract properly disclaimed liability for consequential damages); Jack Cty. Appraisal Dist. v. Jack Cty. Hosp. Dist., 484 S.W.3d 228, 232–36 (Tex. App.—Fort Worth 2016, no pet.) (majority and dissent disagreed about whether transaction was a lease-purchase or a finance lease under Chapter 2A).

231. *See, e.g.*, Sting Soccer Operations Grp. LP v. JP Morgan Chase Bank, N.A., No. 4:15-CV-127, 2016 WL 3917640 (E.D. Tex. July 20, 2016) (deposit agreement could not disclaim bank's lack of good faith in dealing with customer's account); Calleja-Ahedo v. Compass Bank, 508 S.W.3d 791, 801–03 (Tex. App.—Houston [1st Dist.] 2016, pet. filed) (for bank to invoke rule barring recovery under Section 4.406, deposit agreement must specify how account statements are to be sent or made available).