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## Commercial Transactions

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# COMMERCIAL TRANSACTIONS

*John Krahmer\**

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## I. INTRODUCTION

Although 2017 was a legislative year in Texas, no changes were made to the Texas version of the Uniform Commercial Code (the Code).<sup>1</sup> This Survey, therefore, is devoted to a discussion of recent cases analyzing and

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1. The Code first became effective in Texas on July 1, 1966, as a separate statute. *See* Unif. Commercial Code, 59th Leg., R.S., ch. 721, § 1-101, 1965 Tex. Gen. Laws 1. It was reenacted in 1967 as part of the Texas 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.*, 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

applying various provisions of the Code. The cases are discussed in an order paralleling the chapters in the Code.

## II. GENERAL PROVISIONS

In *Dresser Industries, Inc. v. Page Petroleum, Inc.*,<sup>2</sup> the Texas Supreme Court held that the Code definition of “conspicuous” should be applied to both Code and non-Code cases. Numerous cases have since followed that mandate.<sup>3</sup> During the Survey period, in *McKinney/Pearl Restaurant Partners, L.P. v. Metropolitan Life Insurance Co.*, the U.S. District Court for the Northern District of Texas determined that a landlord’s waiver of liability for “consequential, punitive or special damages” was not conspicuous.<sup>4</sup> Although the tenant won this battle, it lost the war on another ground because the tenant had actual knowledge of the waiver based on information provided by the tenant’s counsel and signed two lease amendments acknowledging existence of the waiver.<sup>5</sup> *McKinney/Pearl* is a good recent example on the treatment of waivers and disclaimers under Texas law.

## III. SALE OF GOODS

### A. STATUTE OF FRAUDS

Section 2.201 of the Code requires contracts for the sale of goods for a price of \$500 or more to be evidenced by a signed writing unless the contract falls within one of the exceptions to the writing requirement.<sup>6</sup> In *Duradril, L.L.C. v. Dynamax Drilling Tools, Inc.*,<sup>7</sup> a manufacturer and a

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particular Code sections because of the variation in section and subsection designations over the years.

2. 853 S.W.2d 505, 511 (Tex. 1993).

3. *See, e.g.*, *Coppock v. Nat’l Seating & Mobility, Inc.*, 121 F. Supp. 3d 661, 668 (W.D. Tex. 2015) (disclaimer of warranty in bold face type appearing above signature block was conspicuous); *Dewayne Rogers Logging, Inc. v. Propac Indus., Ltd.*, 299 S.W.3d 374, 390 (Tex. App.—Tyler 2009, pet. denied) (disclaimer of warranties was effective when set out in boldface capital letters); *Mickens v. Longhorn DFW Moving, Inc.*, 264 S.W.3d 875, 879 (Tex. App.—Dallas 2008, pet. denied) (limitation of liability clause in moving company’s contract was conspicuous); *Am. Home Shield Corp. v. Lahorgue*, 201 S.W.3d 181, 185 (Tex. App.—Dallas 2006, pet. denied) (indemnity agreement was not conspicuous in home repair agreement).

4. *McKinney/Pearl Rest. Partners, L.P. v. Metro Life Ins. Co.*, 241 F. Supp. 3d 737, 755 (N.D. Tex. 2017).

5. *Id.* Even if a clause is not conspicuous, actual knowledge of a waiver, disclaimer, or the like will make a clause effective. *Id.* The Texas Supreme Court recognized this exception in *Dresser* by reference to its earlier decision in *Cate v. Dover Corp.*, 790 S.W.2d 559, 562 (Tex. 1990), where the court stated, in the context of a warranty disclaimer in a sale of goods contract, “[w]hen the buyer is not surprised by the disclaimer, insisting on compliance with the conspicuousness requirement serves no purpose. The extent of a buyer’s knowledge of a disclaimer of the implied warranty of merchantability is thus clearly relevant to a determination of its enforceability.” *Id.* at 562 (internal citations omitted).

6. TEX. BUS. & COM. CODE ANN. § 2.201(a) (West 2009). The exceptions listed in § 2.201 include (1) a confirmation sent between merchants to which no objection is made; (2) specially manufactured goods; (3) admissions by a party that a contract was made; and (3) full or partial performance of the contract. *Id.* § 2.201(b)–(c).

7. 516 S.W.3d 147, 154–55 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

distributor entered into an agreement naming the distributor as the exclusive distributor of the manufacturer's products in the United States. The agreement included a minimum distribution requirement. Between 2009 and 2013, the distributor failed to meet the requirements and, in 2013, the parties sought to remedy the default by entering into an "Asset Purchase Agreement," (APA) under which the manufacturer would acquire various assets of the distributor to satisfy the outstanding debt. A few months later, the manufacturer learned the distributor had violated the APA by transferring certain assets that were encumbered by liens and filed suit on several grounds, including breach of contract. The distributor defended the breach of contract claim on the theory that the APA did not satisfy the statute of frauds. Tracking the language of Sections 2.201 and 2.204 of the Code, the trial court instructed the jury that part performance would satisfy the statute of frauds. Based on this instruction, the jury found that the statute of frauds had been satisfied, and the trial court ruled in favor of the manufacturer. On appeal by the distributor, the Fourteenth Houston Court of Appeals approved the jury instruction form.<sup>8</sup> The court of appeals then reviewed the evidence supporting the jury's finding and concluded the evidence supported the verdict.<sup>9</sup> Judgment was affirmed in favor of the manufacturer.<sup>10</sup>

In *Al-Sabban v. Ritell*,<sup>11</sup> a purchaser wire transferred funds to a bank as a down payment on the purchase of an aircraft. There was some confusion about the account to which the funds were to be sent, and they ended up in a third party's account who was not involved in the aircraft purchase.<sup>12</sup> Part of the funds were withdrawn by the third party and were allegedly used to purchase an automobile.<sup>13</sup> When the aircraft purchaser learned about the withdrawal, he contacted his bank, and it made a demand on the receiving bank for return of the funds.<sup>14</sup> The receiving bank interpleaded the funds.<sup>15</sup> Both the aircraft purchaser and the third party asserted claims to the funds. During the course of the litigation, the third party admitted that he had no documents or other evidence showing the existence of a contract with the aircraft purchaser.<sup>16</sup> The U.S. District Court for the Southern District of Texas granted summary judgment in favor of the aircraft purchaser on his claim to the interpleaded funds, and also entered judgment against the third-party defendant for the amount that had been withdrawn from the account to which the funds had been wire transferred.<sup>17</sup>

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8. *Id.* at 159–60.

9. *Id.* at 163.

10. *Id.* at 170.

11. No. H-15-1570-CV, 2017 WL 771076 (S.D. Tex. Feb. 28, 2017).

12. *Id.* at \*3.

13. *Id.* at \*1.

14. *Id.*

15. *Id.*

16. *Id.* at \*3.

17. *Id.* at \*4.

## B. BATTLE OF THE FORMS

Under the common law “mirror image rule,” if the terms in an acceptance did not match the terms in an offer, the acceptance was treated as a counteroffer. Unless the counteroffer was itself accepted, no contract was formed.<sup>18</sup> Section 2.207 of the Code radically changes this approach to permit an “expression of acceptance” to operate “as an acceptance” even if the terms in the acceptance do not match the terms of the offer.<sup>19</sup> Section 2.207 goes on to provide a series of rules by which non-matching terms should be tested to determine if they become part of the contract.<sup>20</sup>

In *Stelluti Kerr, L.L.C. v. Mapei Corp.*,<sup>21</sup> the U.S. Court of Appeals for the Fifth Circuit discussed applying § 2.207 in a situation where an “expression of acceptance” differed materially from the terms contained in a price quotation. In *Stelluti*, a seller sent a price quotation to a prospective buyer proposing an arrangement to give the buyer the right to distribute improved plastic bagging machines the seller would purchase from a third-party manufacturer for delivery to the buyer. During the following year, the parties discussed various issues about the design and production of the product. These discussions resulted in a revised and very detailed price quotation for the sale of fourteen of the new machines. The buyer returned a purchase order for only one machine. After this machine was delivered and installed, disputes arose between the manufacturer of the machines, the seller, and the buyer about the purchase of the thirteen additional machines. The seller sued both the manufacturer and the buyer in state court for breach of contract. Following removal to federal court, the seller’s claim against the manufacturer was resolved by arbitration in the seller’s favor. The seller then reopened proceedings against the buyer in the federal district court. The jury found in favor of the seller, but the district court granted the buyer’s motion for judgment as a matter of law based on the court’s view that the verdict was “against the weight and preponderance of the evidence.”<sup>22</sup> On appeal by the seller, the Fifth Circuit pointed out that § 2.207 abrogates the common law mirror image rule and allows a varying acceptance to operate as a binding acceptance, unless it provides “unambiguous notice that it is a rejection or counter-offer.”<sup>23</sup> Applying this standard, the Fifth Circuit held there was sufficient

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18. See generally E. ALLAN FARNSWORTH, *CONTRACTS* 166–69 (3d ed. 1999); JAMES J. WHITE ET AL., *1 UNIFORM COMMERCIAL CODE: PRACTITIONER TREATISE SERIES* 79 (6th ed. 2012).

19. The Texas Business and Commerce Code provides:

A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

TEX. BUS. & COM. CODE ANN. § 2.207(a) (West 2009).

20. See *id.* § 2.207(b)–(c).

21. 703 F. App’x 214 (5th Cir. 2017) (per curiam).

22. *Id.* at 232. The district court opinion is not reported on Westlaw or Lexis. The quotation is from the Court of Appeals opinion.

23. *Id.* at 225.

evidence to support the jury's verdict.<sup>24</sup> The Fifth Circuit further held there was sufficient evidence to support an implied jury finding that the purchase order sent by the buyer had been sent by employees of the buyer who had authority to enter into a contract for the purchase of fourteen machines, and not merely one machine.<sup>25</sup> The district court's judgment was reversed and the case remanded for entry of judgment in favor of the seller on the breach of contract claim.<sup>26</sup>

Section 2.207 was also addressed in a somewhat unusual situation where the parties exchanged forms for the sale and purchase of scrap metal. In *Jutalia Recycling, Inc. v. CNA Metals Ltd.*,<sup>27</sup> a buyer's purchase orders provided that the seller was to submit to jurisdiction in Texas. The seller's forms specified that the buyer was to submit to jurisdiction in New York. The seller's form also provided that it was expressly conditioned on the buyer's agreement to the seller's terms, and that no differing terms in the buyer's purchase order would become part of the contract.<sup>28</sup> When the first order of scrap arrived at its destination in China, the buyer determined the material was worthless, and sued the seller in Texas. The seller entered a special appearance contesting jurisdiction. The trial court denied the special appearance, and the seller appealed. The Fourteenth Houston Court of Appeals held that under § 2.207, the seller's forms controlled, and the seller had not assented to jurisdiction in Texas.<sup>29</sup> Despite this conclusion, the court also had to address the question of whether the seller had sufficient minimum contacts with Texas to give the trial court jurisdiction over the seller. On this issue, the court considered three points which the buyer urged as being sufficient for Texas jurisdiction. First, the seller had made telephone calls to the buyer in Texas soliciting business. Second, the seller had entered into three contracts with the buyer. Third, the seller asked the buyer to make payment by wire transfers to the seller's New York bank. The court of appeals held that these contacts, whether taken individually or as a group, did not constitute sufficient minimum contacts to give the trial court jurisdiction over the seller, particularly where no meetings were held in Texas, and the goods were shipped to China and not to Texas.<sup>30</sup>

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24. *Id.* at 226.

25. *Id.* at 228–29.

26. *Id.* at 232–33. The Fifth Circuit did, however, uphold the district court's grant of judgment notwithstanding the verdict on the seller's alternative claim of tortious interference with contract, because the Fifth Circuit determined there was insufficient evidence to support damages beyond those suffered on the breach of contract claim. *Id.* at 232.

27. 542 S.W.3d 90 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

28. *Id.* at 93. By use of this language, the seller was invoking the last clause in § 2.207(a) that provides, “[a] definite and seasonable expression of acceptance . . . operates as an acceptance . . . unless acceptance is expressly made conditional on assent to the additional or different terms.” TEX. BUS. & COM. CODE ANN. § 2.207(a) (West 2009) (emphasis added).

29. *Jutalia Recycling*, 542 S.W.3d at 96.

30. *Id.* at 96–100.

## C. WARRANTIES

Chapter 2 of the Code contains provisions dealing with four warranties that can arise in a contract for the sale of goods. These include an implied warranty of good title, express warranties arising from representations by the seller, an implied warranty of merchantability, and a warranty of fitness for a particular purpose.<sup>31</sup> Because actions for breach of warranty are also enumerated as one of the causes of action that can be brought for violation of the Texas Deceptive Trade Practices Act (the TDTPA), it is not uncommon for suits to be brought under both the Code and the TDTPA.<sup>32</sup> In *GB Tubulars, Inc. v. Union Gas Operating Co.*,<sup>33</sup> a buyer purchased couplings from a manufacturer for use in a gas well. The couplings failed to withstand the pressure in the well, and the buyer sued the manufacturer on several grounds, including breach of express and implied warranties, breach of the implied warranty of fitness for a particular purpose, breach of warranty under the TDTPA, and negligence. The jury found in favor of the buyer on all of these theories, but also found that the buyer's own negligence was responsible for 45% of the damage to the well. The buyer ultimately decided to recover damages for breach of express warranties, and to forego recovery on the other theories. On appeal by the manufacturer, the Fourteenth Houston Court of Appeals held that representations made by the manufacturer about the performance characteristics of the couplings constituted express warranties and, based on expert testimony, those warranties had been breached.<sup>34</sup> In reaching this conclusion, the court of appeals made a curious shift on the issue of causation. Under the Code, a breach of warranty must proximately cause the damage for which recovery is sought.<sup>35</sup> Under the TDTPA, the breach need only be a producing cause.<sup>36</sup> At one point in the opinion, the court of appeals held that the evidence supported a finding that the damage to the well was proximately caused by the manufacturer's misrepresentation about the characteristics of the couplings.<sup>37</sup> In the next three paragraphs of the opinion, the court of appeals held that the evidence supported a finding that the breach of warranty was a producing cause of the damage.<sup>38</sup> The opinion does not clearly explain the discussion of producing cause in light of the buyer's election to recover for breach of express warranties rather than recovery under the TDTPA.

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31. See TEX. BUS. & COM. §§ 2.312–.315 (West 2011).

32. TEX. BUS. & COM. CODE ANN. § 17.50(a)(2) (West 2011) provides that actions may be brought under the TDTPA for “breach of an express or implied warranty.”

33. 527 S.W.3d 563, 566–67 (Tex. App.—Houston [14th Dist.] 2017, pet. filed).

34. *Id.* at 571.

35. See TEX. BUS. & COM. CODE ANN. § 2.715(b)(2) (West 2009) (providing that damages are recoverable for “injury to persons or property proximately resulting from any breach of warranty”).

36. See TEX. BUS. & COM. CODE ANN. § 17.50(a) (West 2011). This section provides, *inter alia*, that an action for breach of warranty can be maintained when the breach is “a producing cause of economic damages. . . .”

37. *GB Tubulars*, 527 S.W.3d at 570.

38. *Id.*

The manufacturer also argued that the jury finding that the buyer's negligence was responsible for 45% of the damage should result in a proportionate reduction in the buyer's damage award. On this issue, the court of appeals pointed out that Texas law had evolved to treat actions for breach of express warranties as contract-based actions not subject to the proportionate responsibility rules in the Texas Civil Practices and Remedies Code, in contrast to actions for breach of implied warranties to which the proportionate responsibility rules apply.<sup>39</sup> The trial court judgment in favor of the buyer was affirmed.<sup>40</sup>

In *Wildman v. Medtronic, Inc.*,<sup>41</sup> the district court dismissed the plaintiff's express warranty claim on the ground that it was preempted by the Medical Device Act Amendments of 1976.<sup>42</sup> On appeal by the plaintiff, the U.S. Court of Appeals for the Fifth Circuit reversed the district court and held that a representation on a medical device manufacturer's website constituted an express warranty that was not preempted by the Medical Device Act Amendments.<sup>43</sup> The Fifth Circuit reasoned that preemption applied only to statements that paralleled claims approved by the Food & Drug Administration (FDA), but did not apply to statements making promises going beyond those approved by the FDA.<sup>44</sup>

*Tsao v. Ferring Pharmaceuticals, Inc.*<sup>45</sup> also involved medically-related warranty claims, this time in the context of a fertility drug. The plaintiff, who sought to improve her fertility, used a drug manufactured by the defendant. In its "Patient Information" and "Prescribing Information" material, the manufacturer represented that the drug would provide seventy-five International Units of a follicle-stimulating hormone that would increase the development and release of ovarian eggs. The manufacturer later learned that some lots of the drug lost potency over time and recalled those lots, including lots used by the plaintiff in the course of her treatment. The plaintiff sued for breach of express warranty, breach of the implied warranty of merchantability, breach of the implied warranty

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39. See *id.* at 577. The proportionate responsibility rules are set out in TEX. CIV. PRAC. & REM. CODE ANN. § 33.002(a)(1) (West 2015). The seminal case establishing that actions for breach of express warranty are contract actions is *Med. City Dallas, Ltd. v. Carlisle Corp.*, 251 S.W.3d 55, 60–61 (Tex. 2008) (actions for breach of express warranty are founded in contract). In *Cressman Tubular Prods. Corp. v. Kurt Wiseman Oil & Gas, Ltd.*, 322 S.W.3d 453, 459–61 (Tex. App.—Houston [14th Dist.] 2010, pet. denied), the Fourteenth Houston Court of Appeals reasoned that implied warranty claims are subject to the proportionate responsibility rules where the plaintiff was seeking recovery for damage to property other than economic damage to the product itself. Compare *id.* with *Howard Indus., Inc. v. Crown Cork & Seal Co., LLC*, 403 S.W.3d 347, 352 (Tex. App.—Houston [1st Dist.] 2013, no pet.), where the First Houston Court of Appeals held that recovery in an action for breach of implied warranty was an action founded on contract where the plaintiff sought recovery only for economic loss of the product and not for damage to other property.

40. *GB Tubulars*, 527 S.W.3d at 579.

41. 874 F.3d 862 (5th Cir. 2017).

42. The Medical Device Act Amendments appear in 21 U.S.C. § 360k(a) (2012).

43. *Wildman*, 874 F.3d at 870.

44. *Id.* at 869–70.

45. No. 4:16-CV-01724, 2017 WL 746451 (S.D. Tex. Jan. 4, 2017), adopted by No. 4:16-CV-1724, 2017 WL 749009, at \*1 (S.D. Tex. Feb. 24, 2017).

of fitness for a particular purpose, and for violations of the TDTPA. The plaintiff sought recovery for economic damages based on the cost she incurred for the purchase and use of the drug and damages for mental anguish. The defendant moved to dismiss all claims. The U.S. District Court for the Southern District of Texas held that based on the statements made in the Prescribing Information, the plaintiff had stated claims for breach of express warranty and breach of the implied warranty of merchantability, but not for breach of the implied warranty of fitness for a particular purpose.<sup>46</sup> As to the TDTPA claims, the district court held that the plaintiff failed to adequately allege reliance on the Prescribing Information to meet the requirements of a laundry list violation under the TDTPA, but she could still seek TDTPA recovery for treble damages and mental anguish, because her warranty claims were cognizable under both the Code and the TDTPA.<sup>47</sup> On this issue, the district court noted that the voluntary recall by the manufacturer supported the plaintiff's claim that the manufacturer had acted knowingly or intentionally in its sale of a drug with lower potency than it represented.<sup>48</sup> The defendant's motion to dismiss the breach of warranty of fitness for a particular purpose was granted.<sup>49</sup> The motion to dismiss the laundry list claims was also granted, but with leave to amend without prejudice.<sup>50</sup> The remaining motions to dismiss were denied.<sup>51</sup>

#### D. REVOCATION OF ACCEPTANCE

When goods have been tendered or delivered by a seller, Section 2.602 of the Code allows a buyer to reject the goods for any non-conformity if the buyer acts within a reasonable time after the tender or delivery has been made.<sup>52</sup> If the goods have been accepted, the buyer can no longer reject the goods for "any non-conformity," but may be able to revoke acceptance by meeting the more stringent standards provided in Section

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46. *Id.* at \*5–8.

47. *Id.* at \*11. TEX. BUS. & COM. CODE ANN. § 17.46(b)(1)–(33) (West 2009) contains a list of acts and practices that constitute violations of the Act. This list is commonly referred to as the "laundry list." The plaintiff must have relied on the act or practice complained of to maintain a laundry list claim. *Id.* § 17.50(a)(1)(B).

48. *Tsao*, 2017 WL 746451, at \*11.

49. *Id.* at \*12.

50. *Id.*

51. *Id.*

52. TEX. BUS. & COM. CODE § 2.602(a) provides, "[r]ejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller."

2.608.<sup>53</sup> In *Hess Corp. v. Schlumberger Tech. Corp.*,<sup>54</sup> a buyer purchased “Subsurface Safety Valves” for a seller for use in oil wells located in the Gulf of Mexico. The purchase contract warranted the valves for a period of one year. All other warranties were disclaimed. The valves failed more than one year after installation. The buyer revoked acceptance and asserted claims for breach of warranty and for breach of contract. The seller moved to dismiss all claims. The U.S. District Court for the Southern District of Texas had to determine if the buyer’s claims sounded in warranty or in contract. If the claims were based on a breach of warranty, they were time-barred, and the buyer could not revoke acceptance on that ground. On the other hand, if the claims were based on a breach of contract, they were not time-barred and the buyer could revoke acceptance.<sup>55</sup> In a carefully written opinion, the district court noted that the warranty/contract distinction was a “murky area of law.”<sup>56</sup> The district court reasoned that the contract terms required the seller to deliver valves that conformed to the specifications of various organizations that established standards for oil well equipment.<sup>57</sup> The district also reasoned, however, that the seller did not warrant that the valves would function for an indefinite time, but had clearly limited the warranty to a period of one year.<sup>58</sup> The district court concluded that the buyer’s allegation were sufficient to state a claim for revocation based on the failure of the valves to conform to the contract, but could not pursue a breach of warranty claim because of the one-year limitation stated in the seller’s warranty.<sup>59</sup> The seller’s motion to dismiss the breach of contract claim was denied, but

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53. TEX. BUS. & COM. CODE § 2.608 provides:

- (a) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it
  - (1) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or
  - (2) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller’s assurances.
- (b) Revocation 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. It is not effective until the buyer notifies the seller of it.
- (c) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

54. No. CV-H-16-3415, 2017 WL 2829697 (S.D. Tex. June 29, 2017).

55. TEX. BUS. & COM. CODE § 2.725(a) provides a four-year statute of limitations for breach of a contract for the sale of goods.

56. *Hess*, 2017 WL 2829697, at \*5. The difficulty surrounding the warranty/contract distinction has arisen in other contexts as well. See cases cited *supra* note 39.

57. *Hess*, 2017 WL 2829697, at \*6. The contract provided, in part, that “[c]ontractor [the seller’s] equipment shall comply with the latest editions of applicable standards and specification, e.g.,—API, ASME, ANSI, ASTM, ASNT, ISO, etc., as required by local/federal regulations, specified by the Company [the buyer] or identified within the Contract.” *Id.* at \*1.

58. *Id.* at \*7.

59. *Id.*

was granted on the breach of warranty claim.<sup>60</sup> As to the breach of contract claim, the district court noted that determining if the valves did not conform to the contract specifications was a fact issue that could not be resolved on a motion to dismiss.<sup>61</sup>

#### IV. NEGOTIABLE INSTRUMENTS

##### A. ENFORCEMENT OF INSTRUMENTS

Under Texas law, it is clear that when a note is secured by a lien on real property, the lienholder has the right to enforce the lien against the property by nonjudicial foreclosure without producing the note.<sup>62</sup> But, if the lienholder seeks to recover on the note, the right to enforce the note must be established by showing the claimant falls within one of the three categories listed in Section 3.301 of the Code.<sup>63</sup> Two cases decided during the Survey period illustrate both of these rules.

In *Brock v. RJT Property and Management, LLC*,<sup>64</sup> on a wrongful foreclosure claim brought by the plaintiff, the U.S. District Court for the Northern District of Texas rejected the plaintiff's argument that the lienholder was required to produce the note to affect a valid nonjudicial foreclosure.<sup>65</sup> In contrast to *Brock*, the plaintiff in *Waterfall Victoria Master Fund Ltd. v. Avery*<sup>66</sup> sued for judicial foreclosure and enforcement of the note. Based on its possession of the note and an allonge containing a blank indorsement, the plaintiff moved for summary judgment, contending that it was the holder of the note and had the right to enforce it.<sup>67</sup> The U.S. District Court for the Northern District of Texas disagreed, pointing out there were unexplained discrepancies in how the note had been transferred by the payee through a series of transfers, some of which included the backdating of assignments.<sup>68</sup> Noting that the plaintiff failed

60. *Id.*

61. *Id.*

62. After the economic downturn in 2008, numerous cases applied this rule in Texas foreclosure cases. *See, e.g., Reinagel v. Deutsche Bank Nat'l Tr. Co.*, 735 F.3d 220, 226 n.12 (5th Cir. 2013); *Martins v. BAC Home Loans Serv., L.P.*, 722 F.3d 249, 255 (5th Cir. 2013); *Johnson-Williams v. CitiMortgage, Inc.*, No. 3:14-CV-3927-M (BH), 2015 WL 4997811, at \*4 (N.D. Tex. Aug. 19, 2015); *Aguero v. Ramirez*, 70 S.W.3d 372, 374 (Tex. App.—Corpus Christi 2002, pet. denied); *Morlock, L.L.C. v. Bank of N.Y.*, 448 S.W.3d 514, 519 (Tex. App.—Houston [1st Dist.] 2014, pet. denied).

63. TEX. BUS. & COM. CODE § 3.301 (West 2002) provides that a “‘Person entitled to enforce’ an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to § 3.309 or § 3.418(d).”

64. No. 3:16-CV-1545-G-BH, 2016 WL 7665881 (N.D. Tex. Dec. 8, 2016), *adopted by* 2017 WL 76909, at \*1 (N.D. Tex. Jan. 9, 2017).

65. *Id.* at \*4. A similar result was reached in *Aguilar v. Wells Fargo Bank, N.A.*, No. 3:16-cv-211-K-BN, 2017 WL 1450622, at \*4 (N.D. Tex. Mar. 31, 2017), *adopted by* 2017 WL 1436962, at \*1 (N.D. Tex. Apr. 24, 2017).

66. No. 3:16-CV-0173-B, 2017 WL 477313 (N.D. Tex. Feb. 6, 2017).

67. An indorsement in blank makes an instrument bearer paper under TEX. BUS. & COM. CODE § 3.205(b) that can be transferred by possession alone without the need for further indorsement.

68. *Avery*, 2017 WL 477313, at \*4.

to produce any evidence showing the chain of title by which it acquired the note, the district court denied the plaintiff's motion for summary judgment because the gaps in the chain of title raised an issue of material fact.<sup>69</sup>

In *Khoury v. Tomlinson*,<sup>70</sup> an investor loaned money to an oil trading company. The loan was evidenced by a note. When the company failed to make any payments on the note, the investor met with the company's president to discuss repayment. The parties agreed that the president would personally repay the debt. After the meeting, the investor sent an email to the president to confirm their agreement. The president responded with an email that said, "We are in agreement." No payments were made by the president, and the investor sued for breach of contract, Texas Securities Act violations, and common law fraud.<sup>71</sup> The president defended the breach of contract claim on the ground that his contract of guaranty was not signed by him as required by Section 26.01 of the Texas Business and Commerce Code.<sup>72</sup> He defended the Securities Act claim on the theory that the note was not a security, but a commercial loan, and defended the fraud claim on the ground that the investor had acknowledged receipt of all information about the investment. The jury found in favor of the investor for the entire amount of his loan. The trial court entered judgment notwithstanding the verdict in favor of the president on all counts.

On appeal, the First Houston Court of Appeals reasoned that because the president's name and email address appeared in the "From" field in his email, the signature requirement of Section 26.01 was satisfied under the Texas Uniform Electronic Transaction Act (UETA).<sup>73</sup> The president argued that even if his name and address satisfied the signature requirement, it did not show his intent to be bound. On this point, the court of appeals held that his affirmative response that the parties were "in agree-

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69. *Id.*

70. 518 S.W.3d 568 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

71. *Id.* at 572. The Texas Securities Act appears in TEX. REV. CIV. STAT. ANN. art. 581-33 (West 2010).

72. TEX. BUS. & COM. CODE ANN. § 26.01(a)(1)–(2), (b)(2) (West 2015) requires promises to repay the debt of another to be in a writing signed by the party against whom enforcement is sought. Guarantors may be liable as accommodation parties under TEX. BUS. & COM. CODE ANN. § 3.419(a) (West 2002) by signing the instrument itself or outside of the Code by signing a separate contract of guaranty. If the liability is based on a signature on the instrument, TEX. BUS. & COM. CODE §§ 3.104(a) and 3.103(a)(7) contain what is, in effect, its own statute of frauds. If the liability is based on a separate contract of guaranty, the writing and signature requirements are stated in TEX. BUS. & COM. CODE ANN. § 26.01(a)(1)–(2), (b)(2) (West 2015). Discharge of accommodation parties is governed by TEX. BUS. & COM. CODE ANN. § 3.605 (West 2002). Discharge of guarantors on separate contracts of guaranty are governed by the principles stated in RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY (AM. LAW INST. 1996). TEX. BUS. & COM. CODE § 3.605, cmt.1 points out that the rules in that section "essentially parallel modern interpretations of the law of suretyship and guaranty that apply when a secondary obligor is not a party to an instrument."

73. *Khoury*, 518 S.W.3d at 579. The Texas Uniform Electronic Transaction Act, commonly referred to as UETA, appears as TEX. BUS. & COM. CODE ANN. §§ 322.001–.021 (West 2015).

ment” showed his intent to be bound.<sup>74</sup> In regard to the Securities Act claim, the court of appeals held that because the note included an obligation to pay 10% of the net profits from the venture, as well as the payment of the debt and interest, it was a security rather than a commercial loan.<sup>75</sup> The court of appeals also held that the evidence supported the jury’s verdict in favor of the investor on the fraud claim.<sup>76</sup> The judgment of the trial court was reversed on the substantive issues and the case remanded for a new trial on the investor’s claim for recovery of attorney fees.<sup>77</sup>

When an instrument is made payable to more than one person, questions can arise about whether the instrument can be transferred by the indorsement of a single payee, or whether all of the payees must indorse to make a transfer effective.<sup>78</sup> If the instrument is payable to the payees in the alternative, any one of them can indorse and transfer the instrument.<sup>79</sup> If it is payable jointly, all of the payees must indorse.<sup>80</sup> In *Gusma Properties, L.P. v. Travelers Lloyds Insurance Co.*,<sup>81</sup> the Fourteenth Houston Court of Appeals addressed a variation on the issue of jointly payable checks. In *Gusma*, several buildings were damaged in a hurricane. An insurer issued a check made payable to the building owners and to their attorney. While it was clear that this was a jointly payable check, it was indorsed only by the attorney, and the building owners received none of the funds. The building owners sued the insurer for failing to promptly pay their claims as required by the Texas Insurance Code.<sup>82</sup> The court of appeals held that the usual rule requiring the indorsement of all payees on a jointly payable check did not apply when one of the payees was acting as an agent for the other payees.<sup>83</sup> Because the attorney was acting as an agent for the other payees, his receipt and indorsement of the check constituted an effective delivery of the insurance proceeds and sat-

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74. *Khoury*, 518 S.W.3d at 579.

75. *Id.* at 582.

76. *Id.* at 583.

77. *Id.* at 585.

78. See *Allied Capital Partners, L.P. v. Bank One, Tex., N.A.*, 68 S.W.3d 51, 53 (Tex. App.—Dallas 2001, no pet.) (discussing application of TEX. BUS. & COM. CODE ANN. § 3.110(d) (West 2002) to determine if ambiguous instruments are payable jointly or in the alternative); see also *Mazon Assocs., Inc. v. Comerica Bank*, 195 S.W.3d 800, 804 (Tex. App.—Dallas 2006, no pet.) (same).

79. See TEX. BUS. & COM. CODE ANN. § 3.110(d) (West 2002); see also *McAllen Hospitals, L.P. v. State Farm Cty. Mut. Ins. Co. of Tex.*, 433 S.W.3d 535, 540 (Tex. 2014) (drawer of check remains liable to non-indorsing co-payee when check is made jointly payable and only one of the payees indorses the check). The non-indorsing co-payee may also have a conversion claim against subsequent transferees under TEX. BUS. & COM. CODE § 3.420(a), or a common law claim against the payee who indorsed the instrument and kept the proceeds.

80. See TEX. BUS. & COM. CODE § 3.110(d).

81. 514 S.W.3d 319 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

82. See TEX. INS. CODE ANN. § 542.051–.061 (West 2009), which requires insurers to pay claims within a specified series of times. *Id.* § 542.054. Failure to meet these requirements can result in additional damages. *Id.* § 542.058.

83. *Gusma*, 514 S.W.3d at 327–28.

ified the prompt payment requirements of the Texas Insurance Code.<sup>84</sup> Summary judgment in favor of the insurer was affirmed.<sup>85</sup>

#### B. RELATIONSHIPS BETWEEN BANKS AND THEIR CUSTOMERS

In *Villarreal v. First Presidio Bank*,<sup>86</sup> the plaintiff sought to redeem five certificates of deposit he had in a safe deposit box. The certificates had been issued by a predecessor of the bank in 1983 and 1984. The bank refused payment, contending that the certificates had already been redeemed. In an action by the plaintiff to obtain the funds, the bank defended on the ground that Texas law presumes payment to have been made on a debt if no demand for payment is made for at least twenty years between the time when a claimant first has the right to enforce an obligation and the time when enforcement is sought. In an interesting opinion exploring the history and origins of the presumption, the district court could find no cases applying the presumption of payment to a bank's refusal to redeem a certificate of deposit.<sup>87</sup> In its review of the record, the district court reasoned that a customer could reasonably believe that an automatically-renewing certificate of deposit would remain valid regardless of the passage of time.<sup>88</sup> Furthermore, even if the presumption of payment applied, the certificates themselves were adequate to rebut the presumption.<sup>89</sup> The district court also rejected the bank's arguments that the plaintiff's claims were barred by any statutes of limitations or by laches because the plaintiff had filed suit well within the statutory time limits and had not acted with "unreasonable delay" in asserting his claims.<sup>90</sup> The bank's final arguments in support of its motion focused on its recordkeeping requirements, its internal policies, and the possibility that the certificates had been redeemed by the plaintiff's first wife who had died in 1986. The district court held that none of the evidence adduced by the bank was sufficient to support summary judgment, and that questions of material fact remained.<sup>91</sup> The bank's motion for summary judgment was denied.<sup>92</sup>

Identity theft has become an unfortunate fact of life in the modern world. Stolen credit card data, theft of personal information, tax fraud, and bank fraud are only a few of the ways in which fraudsters make off with billions of dollars each year.<sup>93</sup> In 2017, the takeover of bank ac-

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84. *Id.* at 330.

85. *Id.* at 331.

86. No. EP-15-CV-88-KC, 2017 WL 1063563 (W.D. Tex. Jan. 17, 2017).

87. *Id.* at \*5.

88. *Id.* at \*6.

89. *Id.* at \*7.

90. *Id.* at \*9–10.

91. *Id.* at \*11–12.

92. *Id.* at \*12.

93. See *Identity Fraud High with 15.4 Million U.S. Victims in 2016, Up 16 Percent According to New Javelin Strategy + Research Study*, JAVELIN (Feb. 1, 2017), <https://www.javelinstrategy.com/press-release/identity-fraud-hits-record-high-154-million-us-victims-2016-16-percent-according-new> [<https://perma.cc/LD8H-T9D5>] (compiling statistics on reported identity fraud).

counts, or the opening of new accounts by fraudsters, ranked fourth among the various types of reported fraud.<sup>94</sup> *Giovinale v. JP Morgan Chase Bank, N.A.*<sup>95</sup> is a recent example of a bank account takeover that left the U.S. District Court for the Southern District of Texas with the task of allocating the loss between a customer and her bank. In *Giovinale*, the customer, a resident of Venezuela, had an account at a Texas branch of a national bank. Before moving to Venezuela in 2011, she received monthly account statements at her address in the United States. After moving to Venezuela, the statements arrived only “sporadically,” but she did not contact the bank about her failure to receive statements. Between January and March 2013, seven wire transfers were made from her account. In January 2013, at the telephone request of an unknown person, the bank changed the address for the account to Miami, Florida. According to the bank employee who received the request, the caller answered all of the security questions to identify the caller as the owner of the account. New checks and account statements were sent to the Miami address in March 2013. Between March and August 2013, eighteen fraudulent checks were allegedly paid from the customer’s account. In August 2013, the customer notified the bank about the twenty-five allegedly fraudulent withdrawals. The bank refused to reimburse the funds because of the customer’s failure to comply with the terms of the account agreement. In an action by the customer on a variety of theories, the bank moved for summary judgment on all claims.<sup>96</sup>

Much of the district court’s analysis focused on the account agreement. As to the seven wire transfers, the district court held that the customer failed to notify the bank within thirty days after the bank sent account statements to her or made them available by online banking.<sup>97</sup> As to the eighteen allegedly unauthorized checks, the situation was more complex because the customer argued that she had six months to notify the bank about the checks, since the deposit agreement provided a separate time period to report unauthorized “endorsements.”<sup>98</sup> The district court re-

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94. See Cory Warren, *How Common Is Identity Theft?*, LIFELOCK (Oct. 13, 2017), <https://www.lifelock.com/education/how-common-is-identity-theft/> [<https://perma.cc/G2A9-4P8N>].

95. No. CV-H-16-986, 2017 WL 3535440 (S.D. Tex. Aug. 17, 2017).

96. *Id.* at \*2. In her original complaint, the plaintiff asserted claims for breach of common law and statutory warranties, breach of fiduciary duty, breach of contract, violation of the TDTPA, and conversion under TEX. BUS. & COM. CODE ANN. § 3.420 (West 2002). *Id.* In an earlier proceeding, the bank moved to dismiss all but the § 3.420 claim, and the district court granted the motion to dismiss with leave for the plaintiff to amend without prejudice. See *Giovinale v. JP Morgan Chase Bank, N.A.*, No. CV-H-16-986, 2017 WL 1092312, at \*7 (S.D. Tex. Mar. 23, 2017). In the later proceeding discussed here, the district court dealt with the bank’s motion for summary judgment. *Giovinale*, 2017 WL 3535440, at \*1.

97. *Giovinale*, 2017 WL 3535440, at \*6. The account agreement read, in part, “[y]ou must notify us in writing within 30 days after we mail a statement or otherwise make a statement available (for example paperless statements) if: An item that you did not authorize or is altered is listed on the statement . . . .” *Id.* at \*5.

98. *Id.* at \*6. On this issue, the account agreement stated, “[y]ou must notify us in writing of any unauthorized, improper, or missing endorsements within 6 months after the

jected this argument because the deposit agreement itself contained examples of how checks are “endorsed,” and the Code excludes signatures of the drawer from the definition of “indorsement.”<sup>99</sup> This did not end the matter, however, because the customer did report the last five of the eighteen checks within thirty days after a statement of account was sent to her. The bank defended its refusal to reimburse the account for these checks under the “repeat wrongdoer” rule in Section 4.406(d) of the Code.<sup>100</sup> As to these checks, the district court ruled that the customer had raised an issue of material fact on her breach of contract claim regarding her compliance with the thirty day time period required to report unauthorized drawer signatures, on her conversion claim for forged indorsements on two of the checks, and on application of the repeat wrongdoer rule to the same two checks because they were made payable to different payees.<sup>101</sup> The district court granted summary judgment for the bank on most of the plaintiff’s claims, but denied summary judgment for the bank on claims based on the last five checks paid from the account.<sup>102</sup>

Attorneys who represent financial institutions should carefully review the decisions in *Giovinale* and in *Calleja-Ahedo v. Compass Bank*,<sup>103</sup> which also involved the takeover of a bank account and use of a deposit agreement to allocate loss between a customer and a bank. Both cases illustrate the importance of a well-drafted deposit agreement.

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account statement is mailed or made available.” *Id.* at \*5. The difference in the Code spelling of the word “indorsement” in Chapters 3 & 4 of the Code and the spelling of “endorsement” used in the deposit agreement was noted in *Perini Corp. v. First Nat’l Bank of Habersham County, Georgia*, in the following terms:

The P.E.G. stamp employed by banks stands for “Prior endorsements guaranteed.” While the Uniform Commercial Code, as will be seen, frequently fails to provide clear answers to questions in the area of negotiable instruments, it is unequivocal in its insistence that indorsement is to be spelled with the letter “i”. Bankers, who claim to know much of such weighty matters, may insist on beginning with “e”, but this practice could be attributed to the bankers’ understandable reluctance to stamp “Pay any Bank PIG” on the backs of the checks they handle.

*Perini Corp. v. First Nat’l Bank of Habersham Cty., GA*, 553 F.2d 398, 401 n.1 (5th Cir. 1977).

99. *Giovinale*, 2017 WL 3535440, at \*6. TEX. BUS. & COM. CODE ANN. § 3.204(a) (West 2002) provides, in part, that, “‘Indorsement’ means a signature, other than that of a signer as maker, drawer, or acceptor, that . . . is made . . . for the purpose of (i) negotiating the instrument . . . .”

100. *Giovinale*, 2017 WL 3535440 at \*9. TEX. BUS. & COM. CODE § 4.406(c), (d)(2) provides, in effect, that if the same wrongdoer forges the drawer’s name on a series of checks, the drawer is precluded from asserting a claim for all but the first check in the series if the drawer delays in reporting the forgeries for more than thirty days on items paid after the customer has a reasonable opportunity to know about the first forgery in the series.

101. *Giovinale*, 2017 WL 3535440 at \*7, \*9. If the repeat wrongdoer rule did not apply to these two checks, the plaintiff would be able to assert a conversion claim under TEX. BUS. & COM. CODE § 3.420 for payment of the checks on forged indorsements and the longer six-month time period allowed under the deposit agreement to assert forged indorsement claims.

102. *Id.* at \*11.

103. 508 S.W.3d 791 (Tex. App.—Houston [1st Dist.] 2016, pet. granted). *Callja-Ahedo* was discussed in the 2017 Survey. See John Krahmer, *Commercial Transactions*, 3 SMU ANN. TEX. SURVEY 101, 119–21 (2017).

## V. SECURED TRANSACTIONS

## A. CREATION OF SECURITY INTERESTS

To create an enforceable security interest under the Code, there must be an agreement between the debtor and the secured party granting a security interest in described collateral, the secured party must give value, and the debtor must have rights in the collateral.<sup>104</sup> If the value given by the secured party is used by the debtor to acquire rights in the collateral, the security interest is called a “purchase-money security interest” that may give the secured party priority over non-purchase money security interests in the same collateral.<sup>105</sup> In 2005, Congress amended the Bankruptcy Code to include a special provision dealing with purchase-money security interests in Chapter 13 proceedings.<sup>106</sup> This provision, generally called the “hanging paragraph,” requires bankruptcy courts to determine if value given by the secured party in connection with a motor vehicle financing transaction within 910 days of a bankruptcy filing qualifies as a purchase-money security interest, or if the claim should be treated as an unsecured claim that can be “crammed down” by the debtor in a Chapter 13 plan.<sup>107</sup>

In *In re Villarreal*<sup>108</sup> and *In re McPhilamy*,<sup>109</sup> the debtors purchased motor vehicles for personal use within 910 days before filing a Chapter 13 bankruptcy. In both cases, the loans were cross-collateralized, and part of the money was used for purposes other than payment of the price of the vehicles. The debtors argued that the loans were not subject to the hanging paragraph and that they were entitled to bifurcate and cram down the loans under their Chapter 13 plans. In both cases, applying Fifth Circuit precedent *In re Dale*,<sup>110</sup> the bankruptcy courts agreed with the debtors, and concluded that cross-collateralization, and use of funds for non-purchase money purposes, meant that the loans were not covered by the hanging paragraph and were, therefore, unsecured loans that could be crammed down.<sup>111</sup> In both cases, the bankruptcy courts confirmed the debtors’ Chapter 13 plans.<sup>112</sup>

In *Carmel Financial Corp., Inc. v. Castro*,<sup>113</sup> the secured party financed

104. These requirements are stated in TEX. BUS. & COM. CODE ANN. § 9.203(b) (West 2011).

105. Purchase-money security interests are defined in TEX. BUS. & COM. CODE § 9.103(a)–(b). The priority rules applicable to purchase-money security interests are contained in TEX. BUS. & COM. CODE § 9.324.

106. See 11 U.S.C. § 1325(a) (2010) amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 306, 119 Stat. 23, 80.

107. *Id.* The “hanging paragraph” has been described as having “no alphanumeric designation and merely dangles at the end of [11 U.S.C.] § 1325(a). There is no way to cite to this provision other than its proximity to other citable provisions.” Dianne C. Kerns, *Cram-a-lot: The Quest Continues*, AM. BANKR. INST. J. 10, 10 (2005).

108. 566 B.R. 859 (Bankr. S.D. Tex. 2017).

109. 566 B.R. 382 (Bankr. S.D. Tex. 2017).

110. 582 F.3d 568 (5th Cir. 2009).

111. *In re Villarreal*, 566 B.R. at 869; *In re McPhilamy*, 566 B.R. at 395.

112. *In re Villarreal*, 566 B.R. at 869; *In re McPhilamy*, 566 B.R. at 396.

113. 514 S.W.3d 291 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).

a home water treatment system. Because the water treatment system was installed on real property, the secured party perfected its interest by making a fixture filing in the real estate records in the county where the real property was located.<sup>114</sup> After the debtor defaulted on his home loan and on the water treatment system loan, the home loan was foreclosed and rights in the home were transferred to the Department of Housing and Urban Development (HUD). The secured party sought compensation for the balance due on the water treatment system loan, but HUD offered to pay only \$1,000 of the amount due. This offer was rejected, and the secured party filed suit to recover the balance remaining on its loan. The secured party argued that making a fixture filing to perfect its purchase-money security interest gave it priority as provided in Section 9.334 of the Code, and that its interest could be enforced as a lien on the realty as provided in Section 9.604 of the Code.<sup>115</sup> In a carefully written opinion, the Fourteenth Houston Court of Appeals reasoned that, while a secured party could obtain a priority claim to fixtures, and could enforce that claim as a lien on the real estate, neither section dealt with the issue of whether the security agreement itself granted a lien on the realty.<sup>116</sup> As to this issue, the court of appeals held that the description of collateral in the security agreement only granted a security interest in the water treatment system, and did not grant a security interest or lien on the real property.<sup>117</sup> The court of appeals further reasoned that including a description of the realty in the financing statement merely complied with the requirements needed to make a fixture filing and did not extend the fixture claim to any property beyond that described in the security agreement.<sup>118</sup>

## B. PRIORITIES

In *City of Galveston v. Consolidated Concepts, Inc.*,<sup>119</sup> the City of Galveston (the City) found itself in possession of more than \$700,000 when several checks it had issued to a contractor to pay for repairs to buildings damaged by Hurricane Ike were never cashed, and the funds remained in the City's account. Because numerous entities asserted claims to the funds, the City filed an interpleader in state trial court to have the court determine priorities in the funds.

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114. See TEX. BUS. & COM. CODE ANN. § 9.502(b) (West 2011), which states the requirements for a fixture filing. Unlike an ordinary UCC-1 financing statement, a fixture filing requires a description of the collateral along with a description of the real estate. *Id.*

115. By complying with the requirements of TEX. BUS. & COM. CODE § 9.334(d), a purchase-money security interest in fixtures can obtain priority in the fixtures over the competing claims of a prior encumbrancer or owner. TEX. BUS. & COM. CODE § 9.604(b) permits enforcement of a fixture security interest as an interest in personal property under Chapter 9, or by complying with the real property rules for enforcing a lien on real property.

116. *Castro*, 514 S.W.3d at 296.

117. *Id.* at 296–97.

118. *Id.* at 297.

119. 274 F. Supp. 3d 687 (S.D. Tex. Mar. 3, 2017).

The competing claimants included the United States, a surety, a lender, and multiple subcontractors. The United States removed the action to federal court and moved for summary judgment, asserting it was entitled to the entire fund because a federal tax lien had attached to all of the property and to all rights in property belonging to the general contractor. The surety had executed a UCC-1 financing statement to perfect its agreement with the contractor, and it asserted that it was entitled to the funds because it had suffered significant losses on the bonds it issued to the contractor. The lender argued that it was entitled to the funds because the contractor signed both a security agreement and a promissory note which granted the lender a security interest in the contractor's "accounts receivable, contract rights, and compensation."<sup>120</sup> The subcontractors alleged that they were entitled to the funds under Section 162 of the Texas Construction Trust Fund Act.<sup>121</sup> The United States moved for summary judgment.

The U.S. District Court for the Southern District of Texas held that the United States was entitled to the interpled funds because, under § 6321 of the Internal Revenue Code, the United States is afforded a lien for delinquent taxes "upon all property and rights to property."<sup>122</sup> The other claimants argued that the funds were not the general contractor's "property" and, therefore, § 6321 did not apply. The district court determined that it should first look to state law to determine the general contractor's rights and then look to federal law to determine if those rights qualified as property rights.<sup>123</sup> The district court rejected the lender's argument that the interpled funds met the definition of "accounts" because the lender did not provide sufficient evidence to prove an "account" existed for summary judgment purposes.<sup>124</sup> The surety also lacked sufficient summary judgment evidence because it focused on losses the general contractor incurred on projects performed in Arizona rather than Texas.<sup>125</sup> Finally, the subcontractors' argument that the Texas Construction Trust Fund Act applied was rejected because mere delivery of checks that were never cashed did not constitute payment under the Act.<sup>126</sup> Moreover, the City was not a contractor or subcontractor, so it was not covered by the Texas Construction Trust Fund Act.<sup>127</sup> The district court held that the United States tax lien had priority for the entire amount of the interpled funds.<sup>128</sup>

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120. *Id.* at 690.

121. Under the Texas Construction Trust Fund Act, payments made to a contractor are held in trust for the benefit of subcontractors and materialmen. TEX. PROP. CODE ANN. § 162.001-.003 (West 2014).

122. *City of Galveston*, 274 F. Supp. 3d at 691; *see also* 26 U.S.C. § 6321 (2017).

123. *City of Galveston*, 274 F. Supp. 3d at 693.

124. *Id.* at 694.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 695.

The decision in *In re SemCrude, L.P.*<sup>129</sup> probably represents the last chapter in the effort by unpaid oil producers in Kansas, Oklahoma, and Texas to recoup losses resulting from the 2008 bankruptcy of the SemCrude Group. In three earlier decisions, the U.S. Bankruptcy Court for the District of Delaware held that a group of lending banks had priority over the producers' claims to oil and gas production and to the proceeds of production.<sup>130</sup> The bankruptcy court reasoned that the producers failed to perfect their interests by making UCC filings or obtaining control of bank accounts in the jurisdiction of the debtor as required by U.C.C. Section 9-301(1).<sup>131</sup> In the three earlier decisions, the producers reserved the right to proceed against downstream producers, pending the outcome of certified appeals to the U.S. Court of Appeals for the Third Circuit. Ultimately, the appeals were settled and no decision was rendered by the Third Circuit.<sup>132</sup>

In this latest round of litigation by the producers against downstream purchasers, the cases did reach the Third Circuit, and the Third Circuit upheld the decisions of the bankruptcy court finding in favor of the downstream purchasers.<sup>133</sup> The Third Circuit reasoned that the producers failed to perfect security interests in the oil and gas production as required by U.C.C. Section 9-301(1), and this gave the downstream purchasers priority as buyers for value under U.C.C. Section 9-317(b).<sup>134</sup> The Third Circuit rejected arguments by the producers that their security interests were created and automatically perfected under non-uniform producer lien statutes enacted in Kansas, Oklahoma, and Texas.<sup>135</sup>

### C. FILING FALSE FINANCING STATEMENTS

As part of its adoption of the Code provisions governing secured transactions, Texas added a non-uniform Section 9.5185 to provide a remedy

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129. 864 F.3d 280 (3d Cir. 2017).

130. The opinions affecting producers in Kansas, Oklahoma, and Texas are reported respectively in *In re SemCrude, L.P.*, 407 B.R. 82, 110 (Bankr. D. Del. 2009); *In re SemCrude, L.P.*, 407 B.R. 140, 157 (Bankr. D. Del. 2009); and *In re SemCrude, L.P.*, 407 B.R. 112, 130–31 (Bankr. D. Del. 2009).

131. U.C.C. § 9.301(1) (AM. LAW INST. & NAT'L CONF. OF COMM'RS OF UNIF. ST. LAWS 2017) provides, with some exceptions, that when a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection and priority of security interests. See *In re SemCrude, L.P.*, 407 B.R. at 110; *In re SemCrude, L.P.*, 407 B.R. at 158; *In re SemCrude, L.P.*, 407 B.R. at 139. The Official Text of U.C.C. § 9-301(1) was enacted in identical form in Kansas, Oklahoma, and Texas. See KAN. STAT. ANN. § 84-9-301(1); 12A OKLA. STAT. ANN. § 1-9-301(1) (West 2015); TEX. BUS. & COM. CODE ANN. § 9.301(1) (West 2011).

132. *In re SemCrude, L.P.*, 728 F.3d 314, 319 (3d Cir. 2013).

133. *In re SemCrude*, 864 F.3d at 301.

134. *Id.* at 300. U.C.C. § 9-317(b) provides, in part, that a buyer for value who takes possession of goods takes free of a security interest if the buyer gives value and receives delivery without knowledge of the security interest before it is perfected. As with UCC Section 9-301(1), this section was adopted without change in Kansas, Oklahoma, and Texas. See KAN. STAT. ANN. § 84-9-317(b); 12A OKLA. STAT. ANN. § 1-9-317(b); TEX. BUS. & COM. CODE ANN. § 9.317(b) (West 2011).

135. *In re SemCrude, L.P.*, 864 F.3d at 300–01. The non-uniform producer lien statutes appear in KAN. STAT. ANN. § 84-9-339a, OKLA. STAT. ANN. Tit. 52, §§ 570.1–.15; and TEX. BUS. & COM. CODE ANN. § 9.343 (West 2011).

against anyone who files a false financing statement purporting to show that the filer has a security interest in the aggrieved party's assets.<sup>136</sup> In *Quintanilla v. West*,<sup>137</sup> the San Antonio Court of Appeals addressed an interesting question involving the intersection of Section 9.5185 and the Texas Citizens Participation Act (TCPA).<sup>138</sup> This Act is the Texas version of "Anti-Slapp" legislation intended to allow expedited dismissal of claims affecting a defendant's right to communicate on matters of public concern.<sup>139</sup> In general, if the defendant moves to dismiss an action on the basis of the Act, the plaintiff must make a *prima facie* showing on each element of the complaint.<sup>140</sup> Failing to support each element with such evidence will result in dismissal.<sup>141</sup> Absent exceptional circumstances, discovery is suspended until a hearing on the motion to dismiss has been held.<sup>142</sup>

In *Quintanilla*, the plaintiff alleged that the defendant filed false financing statements with the Texas Secretary of State and in the real estate records of a county clerk claiming a security interest in the plaintiff's personal property, and a lien on the plaintiff's oil and gas leases and mineral interests in the county where the lien was filed.<sup>143</sup> According to the plaintiff, the filings violated the provisions of Section 9.5185 and also constituted a slander of the plaintiff's title to the assets covered by the financing statements. After filing an answer to the plaintiff's complaint, the defendant moved to dismiss on the ground that the complaint violated the TCPA. The trial court ruled that the filing of a financing statement was a protected act under the TCPA, but ultimately denied the motion to dismiss. On appeal, the court of appeals agreed that the TCPA applied because filing financing statements was an exercise of free speech and an exercise of the right to petition.<sup>144</sup> The court of appeals, however, disagreed with the trial court on whether the plaintiff had established a *prima facie* case.<sup>145</sup> On this issue, the court of appeals held that the plain-

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136. See TEX. BUS. & COM. CODE § 9.5185. This section provides, in part:

- (a) A person may not intentionally or knowingly present for filing or cause to be presented for filing a financing statement that the person knows:
- (1) is forged;
  - (2) contains a material false statement; or
  - (3) is groundless.

Subsections (b)–(d) provide penalties and a right to specific relief, including release of the financing statement if the plaintiff prevails.

137. 534 S.W.3d 34 (Tex. App.—San Antonio 2017, pet. filed).

138. See TEX. CIV. PRAC. & REM. CODE ANN. § 27.001–.011 (West 2015).

139. See *id.* § 27.001; see generally Laura Lee Prather, *A Primer on the Texas Anti-SLAPP Statute*, SLAPPEDINTEXAS.COM, <https://slappedintexas.com/primer/> [https://perma.cc/E7PN-EXQK] (last visited Feb. 9, 2018); Laura Prather, *The Texas Citizens Participation Act – Five Years After Passage*, HAYNESBOONE.COM, [http://www.haynesboone.com/~media/files/attorney%20publications/2016/antislapp\\_5yr.ashx](http://www.haynesboone.com/~media/files/attorney%20publications/2016/antislapp_5yr.ashx) [https://perma.cc/WTY3-AKMW] (last visited Feb. 9, 2018).

140. See TEX. CIV. PRAC. & REM. CODE § 27.005(c) (West 2015).

141. See *id.* § 27.004–.006.

142. See *id.* § 27.003(c).

143. *Quintanilla*, 534 S.W.3d at 38–42.

144. *Id.* at 45–46.

145. *Id.* at 50.

tiff's use of extrinsic evidence contradicting the terms of the underlying security agreement and note could not be used to support his allegation that the financing statements were wrongful under Section 5185 of the Code, or that the filings constituted a slander of title.<sup>146</sup> The trial court's judgment was reversed with instructions to grant the defendant's motion to dismiss and to allow recovery of attorney's fees, costs, and expenses to the defendant.<sup>147</sup>

## VI. CONCLUSION

Cases reported during the Survey period once again covered a spectrum of issues arising under the Code. While many of the cases involved application of established precedent, others addressed new issues or sharpened the analysis provided in earlier case law. In this latter category, a few cases deserve special note. In regard to the sale of goods, *Hess v. Schlumberger Tech. Corp.*<sup>148</sup> is of interest on whether an action should be treated as a claim for breach of contract or a claim for breach of warranty. In regard to the relationship between customers and banks, *Giovinale v. JP Morgan Chase Bank, N.A.*<sup>149</sup> and *Calleja-Ahedo v. Compass Bank*,<sup>150</sup> are must-reads for guidance in drafting effective deposit agreements. In the area of secured transactions, *Quintanilla v. West*<sup>151</sup> is a significant decision dealing with the intersection of the Code and the Texas Citizens Participation Act in the context of commercial litigation.

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146. *Id.* at 49–50.

147. *Id.* at 50–51.

148. No. CV-H-16-3415, 2017 WL 2829697 (S.D. Tex. June 29, 2017).

149. No. CV-H-16-986, 2017 WL 3535440 (S.D. Tex. Aug. 17, 2017).

150. 508 S.W.3d 791 (Tex. App.—Houston [1st Dist.] 2016, pet. granted).

151. 534 S.W.3d 34 (Tex. App.—San Antonio 2017, pet. filed).

