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COMMERCIAL TRANSACTIONS

John Kraemer*

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INTRODUCTION

ALTHOUGH 2009 was a legislative year, no significant legislative changes were made to the Uniform Commercial Code (the Code). However, several cases of interest were reported during the Survey period. These are discussed in the same order as the chapters in the Code.¹

I. GENERAL PROVISIONS

A. CONSPICUOUSNESS

In *Dresser Industries, Inc. v. Page Petroleum, Inc.*, the Texas Supreme Court held that the Code definition of “conspicuous” should be applied

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1. The Texas version of the Uniform Commercial Code is contained in the first eleven chapters of the Texas Business and Commerce Code (the Code). See TEX. BUS. & COM. CODE ANN. §§ 1.101-11.108 (Vernon 2009).

to any case in which the conspicuousness of a contract term was at issue—whether or not the case arose under one of the chapters in the Code.² In an interesting pair of cases, the courts cited *Dresser* in applying the definition of “conspicuous” to determine whether the contracts in question complied with the fair notice requirements of Texas law governing indemnity provisions. In *Enron Corp. Savings Plan v. Hewitt Associates, L.L.C.*,³ the administrator of an employer’s employee benefit plans sought indemnification from the employer arising from the administrator’s miscalculation of benefits under the plans. The federal district court for the Southern District of Texas noted that Texas law requires that a clause indemnifying a party against its own negligence must provide fair notice and be conspicuous.⁴ The court further noted that determination of conspicuousness is a matter of law for the court.⁵ Reviewing the clause in question, the court found it was not conspicuous because the uniformity of typeface, font size, and bold headings in the lengthy agreement were not such that the indemnity provisions would be called to the attention of a reasonable person.⁶ A motion by the employer to dismiss the administrator’s indemnity claims was granted.⁷

II. SALE OF GOODS

A. STATUTE OF FRAUDS

Although the Code was first adopted in Texas in 1965 and codified as part of the Business and Commerce Code one year later, it was not until 2001 that a Texas court addressed the issue of whether distributorship contracts were contracts for services or contracts for the sale of goods.⁸ In *Continental Casing Corp. v. Siderca Corp.*,⁹ the Houston Fourteenth Court of Appeals noted that no Texas case had previously addressed this issue, but, following the view of a majority of cases decided in other jurisdictions, the court ruled that the predominant factor, or “essence,” of a distributorship contract is a sale of goods, subject to the Code statute of

2. 853 S.W.2d 505, 509-11 (Tex. 1993). In *Dresser*, the supreme court interpreted the definition of “conspicuous” as it then appeared in Texas Business & Commerce Code. See *id.* § 1.201(10) (Vernon 2009); see also *id.* § 1.201(b)(10) (Vernon 2009) (explained and revised definition).

3. 611 F. Supp. 2d 654 (S.D. Tex. 2009).

4. *Id.* at 663.

5. *Id.*

6. *Id.* at 673.

7. *Id.* at 675. In contrast to *Enron*, the federal district court for the District of North Dakota, applying Texas law, held in *EOG Resources, Inc. v. Badlands Power Fuels, LLC*, that an indemnity clause provided fair notice and was conspicuous where the clause followed two paragraphs set out in capitals which were themselves part of a section that dealt solely with indemnity. 621 F. Supp. 2d 731, 739 (D.N.D. 2009). The court reached this conclusion even though the paragraph in question was not set out in capitals or in a font of a different size or color. *Id.*

8. The Uniform Commercial Code first became effective in Texas on June 30, 1966, having been adopted in the Act of May 31, 1965, 59th Leg., R.S., ch. 721, 1957 Tex. Gen. Laws 1, 1-316. In 1967 it became part of the Texas Business & Commerce Code. See Act of May 29, 1967, 60th Leg., R.S., ch. 785, §§ 1-6 1967 Tex. Gen. Laws 2343-2782.

9. 38 S.W.3d 782 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

frauds.¹⁰ The *Siderca* court further held that because the distributorship contract was not in writing and none of the exceptions to the writing requirement were met, the alleged agreement was unenforceable as a matter of law.¹¹ In *East Hill Marine, Inc. v. Rinker Boat Co.*,¹² the Fort Worth Court of Appeals, citing *Siderca*, reached a similar result.¹³ It is now well-established that distributorship contracts are subject to the Code statute of frauds, as illustrated by *D & M Edwards, Inc. v. Bio-Cide International, Inc.*,¹⁴ in which the parties conceded that the Code governs enforcement of distributorship contracts. Despite this agreement on the application of the Code, however, the plaintiff still faced the difficulty of producing a writing that met the requirements of the Code. The plaintiff argued that during an exchange of emails, the parties had agreed on the terms of an agreement for the distribution of a product used in meat processing. The defendant moved to dismiss the claim on the ground that the alleged agreement had never been reduced to writing. While the federal district court for the Northern District of Texas was willing to consider the emails as a writing that might satisfy the statute of frauds, the plaintiff hit a procedural stumbling block because it had not attached the emails to its pleading. The court, therefore, denied the motion to dismiss without prejudice but required the plaintiff to amend its petition to include the emails and allege facts to support its additional claim that the defendant had breached a fiduciary duty by failing to put the agreement into a formal writing.¹⁵

B. DISCLAIMER OF WARRANTIES

Chapter 2 of the Code includes provisions dealing with three different warranties of quality: (1) express warranties created by affirmations of fact, descriptions, or the display of samples or models; (2) implied warranties of merchantability; and (3) implied warranties of fitness for a particular purpose created by operation of law.¹⁶ The disclaimer of an express warranty is ineffective to the extent the disclaimer is inconsistent with words or conduct creating the warranty.¹⁷ Disclaimers of implied warranties must be conspicuous, and, in the case of the implied warranty of merchantability, the disclaimer must mention merchantability specifically.¹⁸ Implied warranties can also be disclaimed by using terms such as

10. *Id.* at 787-88. See TEX. BUS. & COM. CODE ANN. § 2.201 (Vernon 2009) (statute of frauds governing the sale of goods).

11. 38 S.W.3d at 787-88.

12. 229 S.W.3d 813 (Tex. App.—Fort Worth 2007, pet. denied).

13. *Id.* at 818.

14. No. 3:08-CV-0670-L, 2009 WL 102732, at *3 (N.D. Tex. Jan. 14, 2009).

15. *Id.* at *5.

16. See TEX. BUS. & COM. CODE ANN. § 2.313 (Vernon 2009) (express warranties); *id.* § 2.314 (warranty of merchantability); *id.* § 2.315 (warranty of fitness for a particular purpose). An implied warranty of good title is also created by operation of law under the Texas Business and Commerce Code, but this is not a warranty dealing with the quality of the goods. See *id.* § 2.312 (Vernon 2009).

17. *Id.* § 2.316(a).

18. *Id.* § 2.316(b).

“as is” or “with all faults.”¹⁹ An effective disclaimer can be used not only to exclude warranty claims brought under the Code, but to bar claims for negligent misrepresentation, fraud, and claims brought under the Deceptive Trade Practice Act (DTPA) as well.²⁰ This point is nicely illustrated by the decision in *Thermacor Process, L.P. v. BASF Corp.*,²¹ where the purchaser of spray foam sued the seller for negligent misrepresentation, fraudulent inducement, and violations of the DTPA. The federal Fifth Circuit Court of Appeals held that a disclaimer printed in capital letters and contained in the seller’s “terms and conditions” accompanying each sales order of the product in question, as well as in sales orders for other products sold to the buyer over a period of years, was effective to bar all of the buyer’s claims.²² Based on a long-standing relationship between sophisticated parties who were aware of the terms and conditions, the court found no reason why the “terms and conditions” should not be given effect.²³

C. DEMANDS FOR ASSURANCE AND SUSPENSION OF PERFORMANCE

Under the general law of contracts, if one party to a contract has reasonable doubts about whether the other party has been or will be performing, the party with doubts runs the risk of itself breaching the contract if it acts too soon in declaring the other party to be in breach.²⁴ This risk led the drafters of the Code to include the innovative concept of allowing a party to demand a reasonable assurance of performance if there are “reasonable grounds for insecurity” about the other party’s willingness to perform.²⁵ Pending a response, the party requesting assurance is entitled to suspend its own performance under the contract, thereby ameliorating the difficulty of making what might be viewed in hindsight as a precipitous decision that did not justify a suspension of perform-

19. *Id.* § 2.316(c). This section also provides that the implied warranties may be disclaimed when the buyer has examined the goods and should have discovered any defects or when the course of dealing, course of performance, or usage of trade would exclude these warranties. *See id.*

20. Claims for negligent misrepresentation and fraud are, of course, common law claims. Deceptive Trade Practice Act claims arise under the Texas Business and Commerce Code. TEX. BUS. & COM. CODE ANN. § 17.41-.63 (Vernon 2002).

21. 567 F.3d 736 (5th Cir. 2009).

22. *Id.* at 743 (citing *Prudential Ins. Co. of Am. v. Jefferson Assocs.*, 896 S.W.2d 156, 161 (Tex. 1995) (disclaimer effective to bar fraud and DTPA claims); *Coastal Bank SSB v. Chase Bank of Tex., N.A.*, 135 S.W.3d 840, 843-44 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (disclaimer effective to bar negligent misrepresentation claim)). As to the conspicuousness of the disclaimer, the court held that the use of bold, capital letters met the requirements for conspicuousness stated in the Texas Business and Commerce Code. *See* TEX. BUS. & COM. CODE ANN. § 1.201(b)(10) (Vernon 2009).

23. 567 F.3d at 743.

24. The difficulty lies in determining if the other party has committed a “total breach” justifying the non-breaching party in refusing to perform its own obligations under the contract or whether the other party has committed only a “partial breach,” which does not allow the non-breaching party to refuse performance. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 242-43 (1981).

25. *See* TEX. BUS. & COM. CODE ANN. § 2.609(a) (Vernon 2009).

ance.²⁶ The concept proved useful enough to be included in the Restatement (Second) of Contracts as a device applicable to contracts of all types and not limited to the sale of goods.²⁷ An interesting variation on the idea of demanding assurance of performance arose in *Flint Hills Resources LP v. JAG Energy Inc.*,²⁸ in which a contract allowed a buyer of natural gas condensate to request evidence of clear title for the condensate from the seller. The contract also provided that a failure of the seller to respond to such a request allowed the buyer to withhold payments and, ultimately, to cancel the contract. When the buyer learned that some Mexican oil companies were selling stolen condensate in the United States, the buyer became concerned about potential criminal liability if it purchased stolen condensate even though its seller was not identified as one that might be engaged in such activity. To clarify its position, the buyer asked the seller to provide evidence of title. Although the seller initially promised to provide documents showing its right to sell the condensate, such documents were never provided, and the buyer cancelled the contract. Based on the contract terms, the federal Fifth Circuit Court of Appeals held that it did not need to reach the issue of whether the buyer's request and cancellation were commercially reasonable under the Code, because the contract itself had the effect of granting the buyer these rights if the seller failed to respond to a request for information.²⁹ The district court had found the buyer's request for information and suspension of performance to be commercially unreasonable under the Code and had granted summary judgment for the seller. The Fifth Circuit, however, ruled that the contract terms relieved the buyer from the need to prove the commercial reasonableness of its actions. It reversed the judgment in favor of the seller and rendered summary judgment for the buyer.³⁰ In effect, this ruling gives a contracting party a way to avoid factual disputes about whether a demand for assurance and possible suspension of performance or cancellation is reasonably justified by contractually expanding the party's rights beyond those provided by the Code.

D. ACTIONS FOR BREACH OF CONTRACT

The title of section 2.709, "Action for the Price," sounds like it gives the seller a universal remedy—if the buyer breaches, sue for the price. Unfortunately, the title is misleading in its simplicity. Actions for the price are, in fact, quite limited and available to the seller in only two circumstances: (1) if the goods have been accepted or if conforming

26. *See id.*

27. RESTATEMENT (SECOND) OF CONTRACTS § 251 (1981). *See generally* R.J. Robertson, Jr., *The Right to Demand Adequate Assurance of Due Performance: Uniform Commercial Code Section 2-609 and Restatement (Second) of Contracts Section 251*, 38 DRAKE L. REV. 305 (1988-89) (discussing the history and application of UCC § 2.609 and Restatement § 251).

28. 559 F.3d 373 (5th Cir. 2009).

29. *Id.* at 376.

30. *Id.*

goods have been lost or damaged after the risk of loss has passed to the buyer, and (2) if the goods in the seller's possession have been identified in the contract and cannot be resold, or the circumstances indicate an effort to resell them would be fruitless.³¹ In *Nazareth International, Inc. v. J.C. Penney Co.*,³² a clothing supplier sold goods to a department store chain under the chain's standard wholesale contract. The contract allowed the chain to charge back costs incurred for inspection and distribution if the supplier failed to comply with the terms of the contract and to deduct the charge-backs from the amounts owed to the supplier. As events unfolded, the charge-backs reached a point where the supplier owed more money to the chain for charge-backs than the chain owed to the supplier for the goods. Following a demand by the supplier for payment and the refusal of the chain to do so, the supplier sued on various theories, including an action for the price. The Dallas Court of Appeals recognized that this was a proper case for such a claim, since goods had been delivered to the buyer and payment had not been made, but the court also found that section 2.717 of the Code allows a buyer to deduct damages from the price for any breach resulting from a seller's breach.³³ Based on the contract terms and the evidence produced at trial, the court held that a jury could find an action for the price would not stand where the right to charge-backs exceeded the amount demanded by the supplier.³⁴ The supplier's other claims for usury, fraud, and negligent misrepresentation were also without merit, because a jury could reasonably decide that dealings between the parties showed that the supplier understood the terms of the wholesale contract and was not misled by conversations and correspondence about how charge-backs were determined.³⁵

In *Global Integrated Building Systems v. Target Logistics, LLC*,³⁶ a manufacturer of prefabricated buildings contracted with a buyer to manufacture forty-four housing units to be resold by the buyer to a university for temporary student housing. After ten units had been delivered to the university, they were found to be substantially defective, so the buyer notified the manufacturer to cease production. Following discussions between the manufacturer, the buyer, and the university, production resumed and twenty-eight additional units were delivered in installments. The buyer declined to pay for the last four of these units because of costs incurred by the buyer in correcting defects. The manufacturer delivered the remaining six units to its secured creditor who resold them to a third

31. TEX. BUS. & COM. CODE ANN. § 2.709 (Vernon 2009). Both situations are posited on the theory that the seller has completed performance and the goods are out of the seller's control or have such limited utility to any other buyer that the seller is effectively "stuck" with them. If neither of these situations exist, and the buyer has breached the contract before delivery, the more common remedies for a seller are to sue for damages under section 2.708 or resell the goods under section 2.706. See *id.* §§ 2.706, 2.708.

32. 287 S.W.3d 452 (Tex. App.—Dallas 2009, pet. denied).

33. *Id.* at 458.

34. *Id.* at 458-59.

35. *Id.* at 459-61.

36. No. H-06-2637, 2009 WL 259360 (S.D. Tex. Feb. 3, 2009).

party. The manufacturer sued the buyer, the university, and others for fraud and breach of contract.³⁷ As part of its claim against the buyer, the manufacturer sought recovery of consequential damages resulting from future lost profits anticipated from contracts with third parties, start-up costs incurred to manufacture the units, and damages suffered by the manufacturer in lawsuits brought against it by its own suppliers.³⁸ The federal district court for the Southern District of Texas correctly pointed out that the Code “does not provide for the recovery of consequential damages by a seller” and limits this remedy to buyers.³⁹ As a result, the buyer was entitled to summary judgment.⁴⁰ The court also determined that the manufacturer failed to show the necessary elements to support its fraud claims, and summary judgment was granted to the buyer on these claims as well.⁴¹ Other issues associated with the breach of contract claims and counterclaims between the manufacturer, the buyer, and the university were reserved for trial.⁴²

Under section 2.305 of the Code, the parties can agree to an open-price term allowing either party to set the price instead of providing for a contractually fixed price.⁴³ Such an arrangement is useful when a contract is to extend over a period of time during which market prices are expected to fluctuate. One obvious difficulty with such an arrangement, however, is that the party with the right to set the price may abuse that right by setting a price that is too high or too low. To avoid such abuse, the Code specifies that the price be one that is set “in good faith.”⁴⁴ “Good faith” is defined to mean “honesty in fact and the observance of reasonable commercial standards.”⁴⁵ In *Exxon Mobil Corp. v. Gill*,⁴⁶ the Texas Supreme Court considered whether an oil company had breached its duty of good faith to its service station dealers. In *Gill*, the oil company had failed to disclose that the prices it set for gasoline sold to the dealers from time to time allowed for the company’s recoupment of rebates to dealers for keeping stations open for specified hours and for selling specified amounts of gasoline. Determination of this issue was critical because the suit was brought by a state-wide group of dealers seeking certification of claims as a class action. The dealers specifically limited their claims to breach of contract instead of alleging fraud because it was clear that fraud would require individual proof of reliance on the oil company’s representation, and the need for individual proof would preclude a class action.⁴⁷

37. *Id.* at *3.

38. *Id.* at *10.

39. *Id.* (quoting *Nobs Chem., U.S.A., Inc. v. Koppers Co.*, 616 F.2d 212, 216 (5th Cir. 1980)).

40. *Id.*

41. *Id.* at *9.

42. *Id.* at *11.

43. TEX. BUS. & COM. CODE ANN. § 2.305(b) (Vernon 2009).

44. *Id.*

45. *Id.* § 1201(b)(20).

46. 299 S.W.3d 124 (Tex. 2009).

47. *Id.* at 127. This point had been established previously in *Henry Schein, Inc. v. Stromboe*. 102 S.W.3d 675, 686 (Tex. 2002).

Referring to its earlier decision in *Shell Oil Co. v. HRN, Inc.*,⁴⁸ the supreme court held that failure to disclose the recoupment of rebates as a factor in setting prices did not violate the good-faith standard where the dealers made no claim that anything in the contracts prohibited the seller from considering rebate costs when setting a price and made no claim that the prices were commercially unreasonable.⁴⁹ The case was remanded for reconsideration of whether the dealers' claims met the requirements for class certification.⁵⁰

In *Dynegy Midstream Services, L.P. v. Apache Corp.*,⁵¹ a producer of natural gas sued the buyer for an alleged failure to pay for gas delivered to the buyer at the buyer's processing plant. The issue centered on the interpretation of a contract term requiring the buyer to pay the seller based on a percentage of gas sold by the buyer to third parties. Under the system used for delivery, the amount of gas was measured at the seller's wellhead and at the "tailgate" located at the buyer's plant. The delivered quantity was always less than the quantity produced at the wellhead because of leakage during pipeline transmission, use of some gas as fuel to operate pumping through the pipeline, gas lost during repairs, and the like. Both parties agreed that the buyer was not required to pay for the amount of gas produced at the wellhead and that decreases in the amount of gas delivered at the tailgate were at the seller's risk. They disagreed, however, about whether the buyer was liable for "unaccounted-for" gas as measured by the difference between the amount of gas delivered at the tailgate and the amount of gas sold by the buyer to third parties. The Texas Supreme Court held that the contract terms requiring payment based on a percentage of the sales made by the buyer unambiguously placed the risk of loss for unaccounted-for gas on the

48. 144 S.W.3d 429 (Tex. 2004). In *HRN*, the Texas Supreme Court held that the duty of good faith was not violated when an oil company allegedly set prices with the intent to force independent dealers out of business so they could be replaced with more profitable company-owned stations. *Id.* at 430-31. In reaching this conclusion, the court reasoned that a good faith violation of section 2.305 would occur if a seller set discriminatory prices allowing some dealers to purchase gasoline at a lower price while demanding that other dealers pay a higher price, but not where the same price was charged to all dealers. *Id.* at 437-38.

49. *Gill*, 299 S.W.3d at 128. Citing *HRN*, the supreme court noted that comment 3 of section 2.305 of the Business and Commerce Code describes the good faith standard as one that creates a safe harbor for the party setting the price by allowing that party to use a "posted price" as the price charged. Quoting from *HRN*, the court described the purpose of comment 3 as a means

to minimize judicial intrusion into the setting of prices under open-price-term contracts The drafters reasonably foresaw that almost any price could be attacked unless it benefitted from a strong presumption. Thus, they adopted a safe harbor, Comment 3's posted price presumption, to preserve the practice of using sellers' standard prices while seeking to avoid discriminatory prices.

Id. at 127-28. The court also noted that the good faith requirement had to be measured objectively rather than subjectively to avoid having a jury decide if a seller in every § 2.305(b) case had acted with an improper motive even if the price ultimately set fell within the range of commercially reasonable prices. *Id.* at 128.

50. *Id.* at 129.

51. 294 S.W.3d 164 (Tex. 2009).

seller rather than the buyer, even if the decrease in quantity occurred after delivery at the buyer's tailgate.⁵²

E. REMEDIES AND EXCUSED PERFORMANCE

*Virginia Power Energy Marketing, Inc. v. Apache Corp.*⁵³ addressed application of the *force majeure* doctrine where the seller failed to deliver gas because of interruptions caused by Hurricanes Katrina and Rita. When the buyer discovered that gas it purchased in the spot market to cover a shortfall in deliveries *came from its seller*, the buyer deducted its alleged damages from the amount it paid to the seller for deliveries that had been made under their contract, and the seller sued to recover the amount deducted.⁵⁴ The trial court accepted the seller's *force majeure* excuse and granted summary judgment in favor of the seller. The buyer appealed on two grounds: first, that the seller was required to use reasonable efforts to avoid the disruption of deliveries by making delivery at an alternate delivery point; and second, that there was a genuine issue of material fact about whether the seller had an adequate supply of gas to meet the buyer's needs.

The Houston Fourteenth Court of Appeals agreed with the seller on the first issue.⁵⁵ The purchase contract provided for delivery at two locations. Location 1 was damaged by the hurricanes. Location 2 was undamaged. Although the seller could have delivered at either location, the court held that because the contract terms expressly required a *specific* amount of gas to be delivered at a *specific* location, the *force majeure* clause would be rendered meaningless if the seller had to deliver more gas to the undamaged Location 2 than called for under the contract.⁵⁶ Summary judgment in favor of the seller was affirmed on this issue.⁵⁷

On the second issue, the court had a different view. At Location 2, the seller was required to deliver a total of 1,550,000 dekatherms of gas to be divided equally between five different buyers, including the defendant,

52. *Id.* at 169. The court noted there was no claim that the buyer had converted any gas and sold it to third parties without accounting for it. There was simply no evidence about why the amount of gas sold by the buyer was less than the amount delivered at the tailgate. *Id.*

53. 297 S.W.3d 397 (Tex. App.—Houston [14th Dist.] 2009, pet. denied).

54. One can understand that the buyer may have been more than a little irritated when its seller, in effect, said, "I can't deliver gas to you under our contract because of hurricanes, but I can sell the same gas in the spot market at a higher price—buy it there if you want it." The right of a buyer to deduct damages from amounts owed to a seller is provided in section 2.717. See TEX. BUS. & COM. CODE ANN. § 2.717 (Vernon 2009).

55. *Apache Corp.*, 297 S.W.3d at 401.

56. *Id.* at 403-05. The court held that while the Code provides for substituted performance by use of an alternate delivery method or location in section 2.614, this provision is a "gap-filler" that can be varied by agreement of the parties, and the parties had done just that under the purchase contract. See TEX. BUS. & COM. CODE ANN. § 2.614 (Vernon 2009). There are numerous gap-filler provisions in Chapter 2 of the Code. See JAMES J. WHITE & ROBERT S. SUMMERS, 1 UNIFORM COMMERCIAL CODE: PRACTITIONER TREATISE SERIES 125-35 (4th ed. 1995). Section 2.614 is listed among them. See *id.* at 135 n.62.

57. *Apache Corp.*, 297 S.W.3d at 409.

equating to 310,000 dekatherms to each buyer.⁵⁸ After the hurricanes, the seller actually delivered more gas to Location 2 than called for by the five contracts and did not divide the output equally among the buyers. In fact, one buyer received more than three times the amount required under its contract, leaving only 559,111 dekatherms to be divided among the other four buyers. Because the seller was able to supply more than enough gas to satisfy its contract requirements at Location 2, an issue of material fact existed about why the additional gas was not used to reduce the shortfall in deliveries to the defendant buyer caused by the damage at Location 1 and why the gas was not divided equally among the buyers.⁵⁹ Summary judgment in favor of the seller was reversed on this issue, and the case was remanded for reconsideration of whether the asserted *force majeure* excused the seller from performing at Location 2.⁶⁰

In *Stewart & Stevenson, LLC v. Galveston Party Boats, Inc.*,⁶¹ a buyer purchased six marine engines from a seller. The sale was financed in part by a state grant from the Texas Commission on Environmental Quality (TCEQ) through a program designed to encourage businesses to use low-emission diesel engines. The contract between the buyer, the seller, and the TCEQ made no mention of arbitration. The engines were delivered in two lots: the first consisting of two engines and the second of four engines. In each instance, invoices were sent after the engines had been shipped.⁶² All of the invoices contained an arbitration provision.

The buyer began experiencing problems with the engines within a few weeks after installation. The seller attempted to resolve the problems under its warranty, but the attempts were unsuccessful. The buyer ultimately sued on several grounds, including breach of warranty, fraud, and violations of the DTPA. The seller's motion to compel arbitration was denied by the trial court, and the seller appealed.⁶³ As a threshold matter, the Houston First Court of Appeals found that the arbitration provision on the invoices, if effective, would require arbitration under the Federal Arbitration Act.⁶⁴ As to the effectiveness of the provision, however, the court reasoned that the provision never became part of the contract between the parties, because (1) there was no reference to

58. Under the contract, a "dekatherm" was defined as one million British thermal units. *Id.* at 400 n.2.

59. *Id.* at 408.

60. *Id.* at 409.

61. Nos. 01-09-00030-CV, 01-09-00111-CV, 2009 WL 3673823 (Tex. App.—Houston [1st Dist.] Nov. 5, 2009, no pet.).

62. The opinion indicates that invoices were sent a few days after each lot was shipped, followed by additional invoices dated approximately ten months after shipment and installation. *See id.* at *2-3.

63. The court noted that after September 1, 2009, the procedure to appeal an order denying a motion to compel arbitration was by interlocutory appeal and not by the former procedure of requesting a writ of mandamus. Because this appeal was filed before the effective date of the change, the court held that it lacked jurisdiction over an interlocutory appeal and reviewed the case on the seller's petition for a writ of mandamus. *Id.* at *6 nn.5-6.

64. *Id.* at *5; see 9 U.S.C. §§ 1-16 (2000).

arbitration in the original purchase contract, (2) there was no “meeting of the minds” on the use of arbitration, (3) the contract had not been effectively modified, (4) the buyer’s acceptance and use of the goods was not sufficient to show an agreement to arbitrate, and (5) the buyer had not ratified the use of arbitration by any of its actions.⁶⁵ The seller’s petition for a writ of mandamus was denied.⁶⁶

The effectiveness of an arbitration provision was also addressed in *Harris v. Blockbuster, Inc.*,⁶⁷ which was set against a novel factual background that may become more common as technology progresses. In *Harris*, a video provider operated a video rental service in association with Facebook that allowed a customer to rent a movie online. The customer’s movie choices would then be disseminated by the seller to the customer’s friends through the customer’s Facebook account. The plaintiff sued for an alleged violation of the federal Video Privacy Protection Act, a statute that prohibits a video provider from disclosing information about a customer without having the customer’s informed, written consent at the time of the disclosure.⁶⁸ The provider’s website contained the “Terms and Conditions” governing rentals, including an arbitration provision and a provision purporting to allow the provider sole discretion to change the “Terms and Conditions” at any time. Any change was to be effective immediately and the customer was charged with the responsibility to periodically review the “Terms and Conditions” and to quit using the website if the customer did not agree to any changes. The customer’s agreement was signified by clicking a box to complete a so-called “click-wrap” agreement. The customer argued that the ability of the provider to make unilateral changes to the contract terms, including the arbitration provision, made the agreement to arbitrate illusory and unconscionable. In its discussion, the federal district court for the Northern District of Texas reviewed the Fifth Circuit decision in *Morrison v. Amway Corp.*⁶⁹ and found that it involved a very similar arbitration clause, which was held illusory because the right to change the terms did not limit the effect of such a change to subsequent dispute, but instead permitted change in terms to apply to disputes that arose before the change was made.⁷⁰ Be-

65. *Galveston Party Boats, Inc.*, 2009 WL 3678323, at *7-12. An important element in the court’s reasoning was that the original contract was silent on the subject of arbitration, and the court was unwilling to hold that a “post-contract course of dealing . . . served to put [the buyer] on notice that its acceptance of and payment for goods . . . would subject it to mandatory arbitration in the event of a dispute.” *Id.* at *11.

66. *Id.* at *13.

67. 622 F. Supp. 2d 396 (N.D. Tex. 2009).

68. See Video Privacy Protection Act, 18 U.S.C. § 2710 (2000). The Act allows recovery of \$2,500 in liquidated damages for each violation. *Id.*

69. 517 F.3d 248 (5th Cir. 2008).

70. *Harris*, 622 F. Supp. 2d at 398. Permitting one party to a contract to unilaterally change the terms applying to disputes arising both before and after a change is not only “changing the rules in the middle of the game,” but also allowing a change in the rules to reverse the result of rules used to make decisions earlier in the game. This is reminiscent of the “Razoo Rule” noted by the court in *Mauriceville Nat’l Bank v. Zerniel*. 880 S.W.2d 282 (Tex. App.—Beaumont 1995), *rev’d per curiam*, 892 S.W.2d 858 (Tex. 1995). As described by the court, the Razoo Rule was one used in playing marbles “for keeps” and

cause the video provider had unfettered discretion to change the arbitration terms, the court found the relevant clause, like the clause in *Morrison*, to be illusory and unenforceable.⁷¹ Having found the arbitration provision illusory, the court held that it did not need to address the issue of unconscionability.⁷²

Arbitration in *In re Olshan Foundation Repair Co.*⁷³ focused on the issue of whether proceedings were to be conducted under the Federal Arbitration Act (FAA) or under the Texas General Arbitration Act (TGAA) when the owners of a home sued the seller for breach of contract, breach of warranty, and violations of the DTPA for failing to make foundation repairs.⁷⁴ The seller filed a plea in abatement, arguing that the case was subject to arbitration under the FAA. The homeowners contended that the TGAA governed their claims and, under that act, the arbitration clause was void because their attorney did not sign the agreement. After a hearing, the trial court denied the plea in abatement. The seller sought a writ of mandamus to require arbitration under the FAA. The Dallas Court of Appeals held that the contract made an effective choice of Texas law and did not require language excluding application of the federal law, noting that existing case law does not require “‘magic’ language” to exclude the FAA.⁷⁵ The judgment of the trial court was

“triggered an unwritten legal concept known as ‘absolute and unquestioned ownership’ of all the marbles which could be grabbed by any of the players. The fairness of the ‘Razoo Rule’ was derived from the fact that all players ‘agreed’ to the rule.” *Id.* at 292.

71. *Harris*, 622 F. Supp. 2d at 398-99. The court also noted that the Fifth Circuit in *Morrison* had distinguished *In re Halliburton Co.*, in which the Texas Supreme Court had approved a contract allowing a party to change an arbitration clause because any changes would not be effective until ten days after notice was given to the other party and would not apply to disputes arising before a change was made. *Morrison*, 517 F.3d at 254-47; see *In re Halliburton Co.*, 80 S.W.3d 566, 569-70 (Tex. 2002). This limitation on the ability to unilaterally change the terms was viewed as a significant difference between the arbitration provisions in *Harris* and *Halliburton*. See *Harris*, 622 F. Supp. 2d at 398-99.

72. *Id.* at 397.

73. 277 S.W.3d 124 (Tex. App.—Dallas, pet. denied).

74. *Id.* at 127. See Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1999); Texas General Arbitration Act, TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.001-.098 (Vernon 2005 & Supp. 2009); Texas Home Solicitation Act, TEX. BUS. & COM. CODE ANN. §§ 39.001-.009 (Vernon 2009). A violation of the Texas Home Solicitation Act is also a violation of the DTPA. See *id.* § 39.008(e).

75. *In re Olshan*, 277 S.W.3d at 131. In reaching this conclusion, the court noted an apparent disparity between two Fifth Circuit cases on the wording that must be used to effectively choose the TGAA as the governing law. In *Ford v. NYLCare Health Plans of the Gulf Coast, Inc.*, the court upheld a clause that chose the TGAA as the governing law, but contained no language excluding application of the FAA. 141 F.3d 243 (5th Cir. 1998). In *Pedcor Mgmt. Co., Inc. Welfare Benefit Plan v. Nations Pers. of Tex., Inc.*, the court held that application of the FAA must be expressly excluded, basing its decision on *In re L & L Kempwood Assoc. Pedcor Mgmt. Co., Inc. Welfare Benefit Plan v. Nations Pers. of Tex., Inc.*, 343 F.3d 355, 361 (5th Cir. 2003); see *In re L & L Kempwood Assocs.*, 9 S.W.3d 125, 127-28, 127 n.15 (Tex. 1999). The Dallas Court of Appeals in *Olshan* reasoned that the language used in the arbitration clause was adequate to meet the *Kempwood* test without having to use any particular phrase such as, “Arbitration under this contract is governed by the Texas General Arbitration Act and application of the Federal Arbitration Act is excluded.” See 277 S.W.3d at 132. Nonetheless, careful drafting would indicate that language excluding application of the FAA might avoid disputes of the kind illustrated by *Olshan*.

upheld and the mandamus petition was denied.⁷⁶

In a pair of cases reported during this Survey period, the Texas Supreme Court addressed the right of parties to recover attorney's fees in breach of contract cases. In *MBM Financial Corp. v. Woodlands Operating Co., L.P.*,⁷⁷ an equipment lessee had rented nineteen copiers under a four-year lease. When the lessee decided not to renew the lease, the lessor engaged in a series of maneuvers to prevent the lessee from terminating the lease so the lessor could collect rent for an additional year. The lessor's stalling tactics included withholding information, changing renewal dates in the leases, and refusing to designate a location for return of the copiers. Because of the delay, the lessee sought recovery for time wasted in seeking the lessor's cooperation and for legal costs incurred in the process. At trial, however, the lessee introduced no evidence placing a value on the lost time, but the trial court entered judgment in favor of the lessee for nominal damages of \$1,000 plus attorney's fees of \$145,091.59.⁷⁸ The Beaumont Court of Appeals affirmed the award of nominal damages but remanded the case for recalculation of the attorney's fees.⁷⁹ On further appeal, in a copiously footnoted opinion detailing the history of nominal damages in Texas and elsewhere, the Texas Supreme Court ruled that an award of \$1,000 was not nominal, and given the failure of the lessee to produce any evidence about the value of the time lost in dealing with the lessor, the award had to be reversed.⁸⁰ The supreme court then turned to the issue of whether attorney's fees were recoverable absent proof of damage. On this issue, the supreme court held that proof of some damage was required and that attorney's fees could not be recovered on the basis of the lessor's bad-faith pre-litigation conduct or by recasting the lessee's claim as one for declaratory relief for the sole purpose of recovering attorney's fees.⁸¹

76. *Id.* As of September 1, 2009, the proper procedure to challenge denial of a motion to compel arbitration is by interlocutory appeal. *See supra* note 63. As to the grounds for an appeal from an adverse arbitration decision, *see infra* note 124.

77. 292 S.W.3d 660 (Tex. 2009).

78. *Id.* at 663.

79. *MBM Fin. Corp. v. Woodlands Operating Co.*, 251 S.W.3d 174, 184 (Tex. App.—Beaumont 2008), *rev'd*, 292 S.W.3d 660 (Tex. 2009).

80. *MBM Fin. Corp.*, 292 S.W.3d at 666. The court noted it had previously held that a case would not be reversed and remanded simply to allow a party to recover nominal damages. *Id.* (citing *Travelers Ins. Co. v. Employers Cas. Co.*, 380 S.W.2d 610, 614-15 (Tex. 1964)). Because the lessee's damage recovery was \$0.00, the court held that it was not necessary to reach the question of whether nominal damages alone would support the award of attorney's fees. *Id.*

81. *Id.* at 670. The court reasoned that recovery of attorney's fees based on pre-litigation bad faith was not allowed by rule 13 of the Texas Rules of Civil Procedure because such recovery is posited on post-litigation conduct. *Id.* at 667. As to an award of attorney's fees under section 37.004(b) of the Texas Declaratory Judgments Act, allowing recovery of attorney's fees in the context of this case would frustrate the limits on fee recovery provided in section 38.001 of the Texas Civil Practice and Remedies Code by permitting a declaratory judgment claim to be "merely tacked onto a standard suit based on a matured breach of contract." *Id.* at 670; *see* TEX. CIV. PRAC. & REM. CODE ANN. §§ 37.001-.011, 38.001 (Vernon 2008).

In the second case, *Intercontinental Group Partnership v. KB Home Lone Star L.P.*, decided on the same day as *MBM Financial*, the Texas Supreme Court held in a five-to-four decision that a contract clause allowing recovery by the "prevailing party" in litigation was also ineffective to permit recovery of attorney's fees.⁸² The supreme court reached this result by reasoning that, absent a definition of the term in the contract, a "prevailing party" must recover something in the lawsuit. In this case, the jury found the defendant had breached the contract but found \$0.00 damages.⁸³ Because the contract did not address whether there would be a "prevailing party" in the event of a breach without damages, the lower court's award of attorney fees was reversed and judgment rendered in favor of the defendant.⁸⁴ Four justices joined in a vigorous dissent written by Justice Brister, who had written the majority opinion in *MBM Financial*. The dissent reasoned that the contract terms made it clear that the "prevailing party" could be either the plaintiff or the defendant. In the view of the dissent, the critical language in the contract was that it allowed the recovery of fees by either party who prevailed "in an action 'to declare rights hereunder.'"⁸⁵ Because the plaintiff obtained a jury determination that the defendant had breached the contract, this made the plaintiff the "prevailing party."⁸⁶

These two cases present an interesting study of legal reasoning applied to the interpretation of statutes and contracts. They are well worth reading, not only for their substantive discussions, but for the light they cast on the importance of contract drafting and on the judicial process.

III. NEGOTIABLE INSTRUMENTS

A. LIABILITY OF PARTIES

Chapter 3 of the Code contains an elaborate series of provisions detailing the liability of parties on negotiable instruments.⁸⁷ While most of

82. 295 S.W.3d 650, 652 (Tex. 2009).

83. *Id.*

84. *Id.* at 653, 662.

85. *Id.* at 662.

86. *Id.*

87. See, e.g., TEX. BUS. & COM. CODE ANN. § 3.412 (Vernon 2002) (Obligation of Issuer of Note or Cashier's Check); *id.* § 3.413 (Obligation of Acceptor); *id.* § 3.414 (Obligation of Drawer); *id.* § 3.415 (Obligation of Indorser). The official text of UCC Article 3 was substantially revised in 1990, and this revision was adopted in Texas in 1995. See Act of May 29, 1995, 74th Leg., R.S., ch. 921, §§ 1-2, 1995 Tex. Gen. Laws 4582 (codified at TEX. BUS. & COM. CODE ch. 3). Prior to the revision, the parallel sections in the earlier Article 3 were titled in the form, "Contract of Maker, Drawer, and Acceptor," "Contract of Indorser," etc. See Peter A. Alces, *An Essay on Independence, Interdependence, and the Suretyship Principle*, 1993 U. ILL. L. REV. 447, 479 n.120 (1993) (emphasis added). The titles were changed by the revision, but there is no discussion of the reason for this change in the transcript of the meetings of the National Conference of Commissioners on Uniform State Laws (NCCUSL) or in the transcript of the proceedings of the American Law Institute (ALI) that preceded final approval of the revision. See HANDBOOK OF THE NCCUSL AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS NINETY-SEVENTH YEAR 313-19 (1988) [hereinafter NCCUSL]; PROCEEDINGS OF THE 67TH ANNUAL MEETING OF THE A.L.I. 382, 405 (1990) (transcribing Robert L. Jordan). The only references

these provisions apply to issuers and transferors, a few deal with the liability of transferees.⁸⁸ In *Woods Code 3, Inc. v. JPMorgan Chase Bank, N.A.*,⁸⁹ a dishonest bookkeeper with authority to write checks on her employer's account embezzled funds by writing several hundred checks on the account, making them payable to herself or fictitious entities, and depositing them in her personal account. The employer sued the bank under section 3.307 of the Code, alleging the bank had notice that the employee was breaching her fiduciary duties to her employer.⁹⁰ The trial court entered a take-nothing summary judgment in favor of the bank. On appeal, the Beaumont Court of Appeals held that indorsements on some of the checks did not give the bank notice of a breach of fiduciary duty because the payee names shown on the checks did not indicate they were payable to the employer or to the employee as a fiduciary.⁹¹ Furthermore, for checks deposited without indorsement by the employee, the court pointed out that section 4.205 of the Code allows a bank to take unindorsed checks for collection.⁹² The court affirmed summary judg-

about changes in terminology appear in the introductory remarks in the NCCUSL Conference Proceedings referring to the revision as a "change in structure," "a more modern structure," and the statement at the ALI proceedings: "The language might be somewhat different, but the substance is the same." NCCUSL, *supra*; PROCEEDINGS OF THE 67TH ANNUAL MEETING OF THE A.L.I., *supra* (transcribing Robert L. Jordan). The failure of the court to recognize that the change in wording from "Contract" to "Obligation" had no substantive significance seems to have led to an erroneous decision in *Time Out Grocery v. Vanguard Group, Inc.*, in which the court denied recovery of attorney's fees in an action against the drawer of a check on the ground that the drawer's liability was based on a statutory obligation rather than a contractual obligation. 187 S.W.3d 41 (Tex. App.—Dallas 2005, no pet.); *see also* John Kraemer, *Commercial Transactions*, 59 SMU L. REV. 1013, 1030-31 (2006) (discussing *Time Out Grocery*). Unfortunately, this error now seems to have been perpetuated by the decision in *Zamora v. The Money Box*, in which the court, relying on *Time Out Grocery*, denied recovery of attorney's fees in an action brought against the drawer of a check without recognizing the change in section titles was apparently regarded as a mere change in terminology and not a change in substance. No. 04-08-00549-CV, 2009 WL 2050207, at *4 (Tex. App.—San Antonio July 15, 2009, pet. denied). A petition for rehearing on the denial of the appeal in *Zamora* has been filed and one hopes that, if the case ultimately results in a decision by the Texas Supreme Court, it will recognize that claims against drawers, makers, acceptors, and indorsers are based on contract and not on a statutorily created obligation. It is worth noting that the only two law review articles directly addressing the liability of drawers under the revision both refer to such liability as contractual. *See* Henry J. Bailey, *New 1990 Uniform Commercial Code: Article 3, Negotiable Instruments, Article 4, Bank Deposits and Collections* 29 WILIAMETTE L. REV. 409, 419 (1993); Donald W. Garland, *A New Law of Negotiable Instruments: Revised Article 3 of the UCC* 109 BANKING L.J. 557 (1992).

88. *See, e.g.*, TEX. BUS. & COM. CODE ANN. § 3.404 (Imposters; Fictitious Payees) (Vernon 2002); *id.* § 3.405 (Employer's Responsibility for Fraudulent Indorsement by Employee); *id.* § 3.406 (Negligence Contributing to Forged Signature or Alteration of Instrument). In each of these sections, the loss may be allocated between the transferor and the transferee if the transferee fails to exercise ordinary care in taking or paying an instrument. *See id.* §§ 3.404-406.

89. 292 S.W.3d 795 (Tex. App.—Beaumont 2009, no pet.).

90. *Id.* at 796 (citing TEX. BUS. & COM. CODE ANN. § 3.307 (Vernon 2002)). If a transferee has notice that an instrument is being transferred in breach of a fiduciary duty, the transferee is subject to claims by the rightful owner of the instrument under section 3.306. TEX. BUS. & COM. CODE ANN. § 3.306.

91. *Woods Code 3, Inc.*, 292 S.W.3d at 798.

92. *Id.* at 797.

ment in favor of the bank.⁹³

A negotiable instrument under Chapter 3 is subject to acceleration at the option of the holder if the note so provides.⁹⁴ An important addendum to the right of acceleration under Texas case law is the requirement that the holder first give notice of intent to accelerate before giving notice of acceleration.⁹⁵ In *Burns v. Stanton*,⁹⁶ one co-owner of a business bought out the other co-owner in exchange for shares of stock in the company and a promissory note. The note included a clause allowing acceleration upon any of several events of default, one of which was the transfer of stock by the maker of the note. When the maker converted the company from a corporation to a partnership, his stock was transferred to the partnership. The holder declared a default and gave notice that he intended to use the enforcement actions permitted by the note. The Texarkana Court of Appeals held that an event of default had occurred within the meaning of the note and that notice that the holder would use his available enforcement actions was sufficient notice of intent to accelerate.⁹⁷ There was no requirement that the holder use the specific phrase "intent to accelerate."⁹⁸

One of the difficulties that a holder can encounter in exercising a right of acceleration is the risk of miscalculating the interest due.⁹⁹ A usury violation resulting from miscalculation of interest can sometimes be avoided by using a savings clause to disavow any intent to charge usurious interest and to allow the holder to correct any error in the amount demanded.¹⁰⁰ A savings clause will not be effective, however, if it is "directly contrary to the explicit terms of the contract" or if the creditor makes no effort to use the savings clause to correct an erroneous calculation.¹⁰¹ In *Kennon v. McGraw*, a note contained a savings clause that stated, "It is further expressly agreed that interest on this note will not be charged in excess of the highest legal rate specified by the Laws of the State of Texas and that future adjustments will be made to avoid the pay-

93. *Id.* at 798.

94. TEX. BUS. & COM. CODE ANN. § 3.108 (Vernon 2002).

95. See *Ogden v. Gibraltar Sav. Ass'n*, 640 S.W.2d 232, 233-34 (Tex. 1982). The Texas Supreme Court has held that rights to notice of intent to accelerate, notice of acceleration, presentment, and notice of dishonor may be waived if the waiver specifically identifies the rights being waived. See *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 893 (Tex. 1991).

96. 286 S.W.3d 657 (Tex. App.—Texarkana 2009, pet. denied).

97. *Id.* at 661.

98. *Id.* at 661-62.

99. See generally *Jim Walter Homes, Inc. v. Schuenemann*, 668 S.W.2d 324 (Tex. 1984); *Pentico v. Mad-Wayler, Inc.*, 964 S.W.2d 708 (Tex. App.—Corpus Christi 1998, pet. denied); *Oyster Creek Fin. Corp. v. Richwood Invs., II, Inc.*, 957 S.W.2d 640 (Tex. App.—Amarillo 1997, pet. denied).

100. This is the method the Texas Supreme Court very strongly suggested in *Jim Walter Homes*. See *Jim Walter Homes*, 668 S.W.2d at 333 n.6.

101. See generally *Armstrong v. Steppes Apartments, Ltd.*, 57 S.W.3d 37, 47 (Tex. App.—Fort Worth 2001, pet. denied); *First State Bank v. Dorst*, 843 S.W.2d 790, 793 (Tex. App.—Austin 1992, pet. denied).

ment of interest in excess of such limits.”¹⁰² When the maker of the note defaulted, the holder accelerated the note and demanded payment of interest on the entire unpaid balance. The holder was twice advised that this method of calculation was incorrect and constituted a demand for usurious interest. Despite such notice, the holder persisted in her demand. The Eastland Court of Appeals held that under these circumstances, the savings clause did not immunize against a usury claim.¹⁰³ The case was remanded for the trial court to determine the amount of the usurious charge by calculating the amount of interest that could be legally charged under the clause and comparing that amount to the amount demanded by the holder.¹⁰⁴

The Code introduced some new rules in section 3.311 regarding accord and satisfaction by use of “payment-in-full” checks.¹⁰⁵ Under the general law of contracts, if a creditor cashed a payment-in-full check tendered by the debtor on an unliquidated or disputed claim, the creditor was deemed to have agreed to a contract discharging the debtor from any further claim.¹⁰⁶ Under section 3.311, a creditor who inadvertently cashes a check tendered in full satisfaction of an unliquidated or disputed claim can avoid a discharge of the debtor by tendering a refund of the amount of the check within ninety days after payment of the check.¹⁰⁷ Alternatively, an organizational creditor can notify persons with whom it deals that payment-in-full checks should be sent to a designated office or person to give the creditor an opportunity to avoid the unintentional cashing of such checks.¹⁰⁸ In *Milton M. Cooke Co. v. First Bank & Trust*,¹⁰⁹ a company borrowed money from a bank. In an unrelated series of events, the company’s bookkeeper embezzled funds from the company to support her gambling habit. The bank refused to reimburse the company for the amounts paid on unauthorized checks issued by the bookkeeper to herself. In an attempt to recoup its losses, the company issued two checks to the bank in the amount of its usual monthly payments, but added a notation that the checks were “payment in full” for the loans.¹¹⁰ In an action by the bank to collect on the notes, the company argued that it was discharged from any further liability by an effective accord and satisfaction under section 3.311. The Houston First Court of Appeals disagreed, pointing out that the terms of the notes expressly required that any check tendered as payment in full be sent to a specified office of the bank.¹¹¹

102. 281 S.W.3d 648, 651 (Tex. App.—Eastland 2009, no pet.).

103. *Id.* at 652.

104. *Id.* at 653-54.

105. See TEX. BUS. & COM. CODE ANN. § 3.311 (Vernon 2002).

106. See E. ALLAN FARNSWORTH, CONTRACTS 282 (1982); 6 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS §§ 1277-78 (1962).

107. TEX. BUS. & COM. CODE ANN. § 3.311(c).

108. *Id.*

109. 290 S.W.3d 297 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

110. *Id.* at 301. The checks were written in the amounts of \$3,471.38 and \$2,888.91 against loans that then totaled \$122,218.53 and \$193,156.51, respectively. *Id.*

111. *Id.* at 305.

Because an officer of the company had given the checks to a teller instead of sending them to the designated office, the court held that no accord and satisfaction had taken place.¹¹² Summary judgment was affirmed in favor of the bank.¹¹³

IV. BANK DEPOSITS AND COLLECTIONS

A. RELATIONSHIP BETWEEN PAYOR BANKS AND THEIR CUSTOMERS

Although Chapter 4 of the Code contains numerous provisions outlining the rights and responsibilities of banks and their customers, many of those provisions can be varied by agreement.¹¹⁴ Such agreements have been subject to litigation in Texas during the Survey period.¹¹⁵

In *In re Morgan Stanley & Co.*, the Texas Supreme Court addressed the validity of arbitration clauses contained in brokerage account agreements where the account holder allegedly lacked mental capacity to contract.¹¹⁶ The supreme court held that determination of mental capacity was to be determined by the court, not by the arbitrator.¹¹⁷ The supreme court reasoned that issues of contract formation go to the very existence of a contract and are not subject to the usual requirement that a challenge be made separately and specifically to the arbitration clause itself.¹¹⁸ The supreme court upheld the decision of the trial court denying a motion to compel arbitration.¹¹⁹

An important issue regarding arbitration in the context of bank accounts was addressed by the federal Fifth Circuit Court of Appeals in *Citigroup Global Markets, Inc. v. Bacon*.¹²⁰ In *Bacon*, a customer submitted a claim in arbitration against a bank for reimbursement of \$238,000 in

112. *Id.* at 306.

113. *Id.* at 312.

114. See TEX. BUS. & COM. CODE ANN. § 4.103(a) (Vernon 2002).

115. See Gerry W. Beyer, *Wills and Trusts*, 63 SMU L. REV. 865, 885-87 (2010) (discussing *Holmes v. Beatty*, 290 S.W.3d 852, 854-59 (Tex. 2009); *Nipp v. Broumley*, 285 S.W.3d 552, 558-69 (Tex. App.—Waco 2009, no pet.)).

116. 293 S.W.3d 182, 183 (Tex. 2009).

117. *Id.*

118. *Id.* at 187-88. In its opinion, the court described *Buckeye Check Cashing, Inc. v. Cardegna*, as a case that created three categories of challenges to arbitration clauses: (1) challenges to the validity of the contract generally, (2) challenges to the arbitration clause specifically, and (3) challenges based on whether a contract ever came into existence. *Id.* at 187; see *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1 (2006). In the view of the supreme court, challenges falling into the first two categories were to be determined by the arbitrator; challenges in the third category were to be determined by the court. *Id.* at 188-89. In reaching its conclusion that an issue of contract formation arising from an assertion of mental incapacity was a question for the court, the supreme court asserted that it was not bound by a contrary result reached by the Fifth Circuit in *Primerica Life Insurance Co. v. Brown*, because Texas state courts are bound only by decisions of higher Texas state courts and by the United States Supreme Court. *Id.* at 189-90; see *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 472 (5th Cir. 2002). The opinion in *In re Morgan Stanley* includes citations to other cases and secondary sources that are critical of the *Primerica* decision and are “must reads” for attorneys considering challenges to arbitration clauses. *In re Morgan Stanley*, 293 S.W.3d at 188.

119. *Id.* at 190.

120. 562 F.3d 349 (5th Cir. 2009).

withdrawals made by her husband's forgery of checks drawn on her individual retirement accounts. The customer notified the bank as soon as she discovered the unauthorized withdrawals. The arbitration panel awarded the customer \$218,000 in damages and \$38,000 in attorney's fees. The bank requested vacatur of the award, and the district court granted the motion to vacate, holding that the award was made in manifest disregard of the law.¹²¹ The holding was based on three grounds: (1) the customer was not harmed by the withdrawals because her husband used the money for her benefit and promised to pay her back; (2) the customer's claims were barred by Texas law, which required the customer to report an unauthorized transaction within thirty days of the withdrawal; and (3) Texas law required apportionment among the liable parties (in this case the customer's husband).¹²² On appeal, relying on the United States Supreme Court decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*,¹²³ the Fifth Circuit held that a manifest disregard of the law was not an independent, non-statutory ground for vacating awards under the FAA.¹²⁴ The court concluded that section 10 of the FAA limits the grounds for vacatur and modification of arbitration awards.¹²⁵ The court held that under the FAA, statutory provisions are the exclusive grounds for vacatur and any non-statutory claims must be rejected.¹²⁶ The court vacated the district court's judgment and remanded the case.¹²⁷ Similar decisions on use of manifest disregard of the law as a basis for appealing an arbitration award were reached by the Dallas Court of Appeals in *Ancor Holdings, LLC v. Peterson, Goldman & Villani, Inc.*,¹²⁸ and by the Houston First Court of Appeals in *Allstyle Coil Co. v. Carreon*¹²⁹ and *Royce Homes, L.P. v. Bates*.¹³⁰

Another issue that can arise between a customer and a payor financial institution about the payment of unauthorized withdrawals is whether the customer has complied with the time limits in UCC section 4-406 or any modification of those time limits contained in a deposit agreement.¹³¹ In *In re Estate of Berry*,¹³² several forged checks were charged by a bank

121. *Bacon*, 562 F.3d at 350.

122. *Id.* at 358.

123. 552 U.S. 576 (2008).

124. *Bacon*, 562 F.3d at 358.

125. *Id.*

126. *Id.*

127. *Id.*

128. 294 S.W.3d 818, 828 (Tex. App.—Dallas 2009, pet. denied).

129. 295 S.W.3d 42, 44 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

130. No. 01-08-00191-CV, 2010 WL 184216, at *11 (Tex. App.—Houston [1st Dist.] Jan. 21, 2010, no pet.).

131. Section 4.406 of the Texas Business and Commerce Code requires notice of forgeries of a customer's signature and notice of alterations to be given within a reasonable time after bank statements are sent or made available to the customer. TEX. BUS. & COM. CODE ANN. § 4.406 (Vernon 2002). If repeated forgeries are made by the same wrongdoer, the time period is specified as thirty days. *Id.* Whether or not repeated forgeries occur, section 4.406 also provides an outside limit of one year for giving notice of forgeries or alterations. *Id.*

132. 280 S.W.3d 478 (Tex. App.—Dallas 2009, no pet.).

against a customer's account between February 14, 2003, and March 4, 2004. Statements of account were sent to the customer's address throughout this period. In September 2005, the customer sued the bank to recover the amounts paid on the forged checks. The Eastland Court of Appeals held that, even if filing suit constituted notice to the bank, the customer's action was barred by the one-year time limit for giving notice of forgeries that is found in section 4.406(f).¹³³

On occasion, a death occurs and the decedent's body is unclaimed. In such a situation, an effort is made to find relatives of the decedent. In larger counties, this job is often assigned to a county employee. Such was the case in Bexar County, where a county clerk named Melvyn Spillman had this responsibility for several years. Spillman discovered that with his home computer and a county seal, it was a simple matter to create fake letters of administration, name himself as administrator of decedents' estates and present the documents to banks to give himself authority to write checks and withdraw funds from their bank accounts.¹³⁴ When his scheme was discovered, the inevitable legal tangle ensued surrounding the liability of banks that paid checks on these accounts based on the false letters of administration. In *Lenk v. Guaranty Bank*,¹³⁵ a lawfully appointed administrator sued a bank for breach of its deposit agreement on behalf of one of the looted estates. Summary judgment was entered in favor of the administrator on the ground that section 186 of the Texas Probate Code did not allow a bank to rely on fraudulent letters of administration to avoid a breach of contract claim.¹³⁶ *Lenk v. Jefferson State Bank*¹³⁷ involves the same issue but, from a commercial law standpoint, is a more interesting decision because it also addresses the application of the notice requirement in section 4.406 of the Business and Commerce Code. After reaching the same conclusion that the bank could not rely on section 186 of the Probate Code as a defense to a breach of contract claim, the San Antonio Court of Appeals also held that the notice requirement in section 4.406 was not triggered because the bank had sent account statements to an address provided by Spillman and not to the customer.¹³⁸ Because the statements were sent to Spillman instead of the customer, the one-year bar in section 4.406(f) did not preclude the lawfully appointed administrator from asserting a claim based on checks

133. *Id.* at 481; see TEX. BUS. & COM. CODE ANN. § 4.406(f).

134. Over the years, Spillman stole something in excess of four million dollars, and the story made the national news. See David Kohn, *Scammed: County Clerk Cashes In*, CBS, Nov. 8, 2002, available at <http://www.cbsnews.com/stories/2002/11/07/48hours/main528514.shtml>. A more detailed account appears in ERIC COLE & SANDRA RING, *INSIDER THREAT: PROTECTING THE ENTERPRISE FROM SABOTAGE, SPYING, AND THEFT* 128-34 (Syngress Publishing 2006).

135. No. 04-07-00503-CV, 2008 WL 2602121 (Tex. App.—San Antonio July 2, 2008, no pet.) (mem. op.) (rule 53.7(f) motion granted).

136. *Id.* at *1.

137. No. 04-07-00828-CV, 2009 WL 618693 (Tex. App.—San Antonio Mar. 11, 2009, pet. granted) (mem. op.).

138. *Id.* at *3.

drawn by Spillman and paid from the decedent's account.¹³⁹

V. SECURED TRANSACTIONS

A. CREATING AND PERFECTING A SECURITY INTEREST

The basic rules for the creation of a security interest under Chapter 9 can be stated rather easily: (1) the debtor must agree to grant a security interest in described collateral to the secured party, (2) the debtor must have rights in the collateral, (3) value must be given by the secured party, and (4) the agreement must satisfy the Chapter 9 "statute of frauds."¹⁴⁰ Once these requirements have been met, the security interest is said to "attach" to the collateral.¹⁴¹ Perfection of a security interest requires compliance with any one of five methods described in Chapter 9, the most common of which is the filing of a financing statement to give notice to third parties that a party has a security interest in the described collateral.¹⁴² One of the more common problems in the application of these requirements is the failure of the parties to properly describe the collateral in the security agreement or in the financing statement.¹⁴³ This situation occurred in *Sanders v. Comerica Bank, Inc.*,¹⁴⁴ in which both the security agreement and the financing statement described the collateral as stock in a corporation, but the secured party claimed a security interest in construction equipment. The secured party argued that a subsequent financing statement identified the collateral as construction equipment, but the Fort Worth Court of Appeals held there was no security agreement granting a security interest in equipment, and the financing statement, standing alone, did not operate to create a security interest.¹⁴⁵ The secured party also argued that a competing secured lender knew of his

139. *Id.* The bank also argued that the claim was barred because the account agreement shortened the time period from one year to sixty days. The court pointed out that the contractual modification was irrelevant because it would only apply if section 4.406(a) were satisfied by sending account statements to the customer. *Id.* at *4.

140. See TEX. BUS. & COM. CODE ANN. § 9.203(b) (Vernon 2002). These requirements are often conflated as "Agreement, Value, Rights." See e.g., 4 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 31-2 (6th ed. 2010). In fact, section 9.203(b)(3) indirectly creates a statute of frauds requirement by specifying that any one of three conditions be met to make a security agreement enforceable. Under this subsection, there must be an authenticated security agreement (usually written and signed by the debtor), or the secured party must have possession of the collateral, or the secured party must have "control" of the collateral. *Id.*

141. See TEX. BUS. & COM. CODE ANN. § 9.203(a).

142. See *id.* § 9.310(a)-(b). The five perfection methods are: (1) filing a financing statement, (2) taking possession of the collateral, (3) obtaining control of the collateral, (4) automatic temporary perfection, and (5) automatic permanent perfection. See *id.*

143. Errors in description can occur in either the security agreement or in a financing statement filed to perfect the security interest. See, e.g., *Orix Credit Alliance, Inc. v. Omnibank, N.A.*, 858 S.W.2d 586, 591 (Tex. App.—Houston [14th Dist.] 1993, writ dismissed) (overly broad description in security agreement ineffective to permit attachment); *Chase Manhattan Bank, N.A. v. J & L Gen. Contractors, Inc.*, 832 S.W.2d 204, 208 (Tex. App.—Beaumont 1992, no pet.) (financing statement referred to collateral on attached list, but no list was attached).

144. 274 S.W.3d 861 (Tex. App.—Fort Worth 2008, no pet.).

145. *Id.* at 864.

claim to the equipment, but the court correctly pointed out that knowledge of a claim does not obviate a valid agreement creating a security interest in the claimed collateral.¹⁴⁶

One of the most important differences between the pre-2002 Chapter 9 and the present Chapter 9 was a change in the location where financing statements must be filed to perfect a security interest in collateral. Under the former Chapter 9, filings were to be made in the state where the collateral was located.¹⁴⁷ Under the current Chapter 9, filings must be made in the state where the debtor is located.¹⁴⁸ Section 9.307 contains a series of rules to determine the location of a debtor.¹⁴⁹ For a corporate debtor (a “registered organization” in the terminology of Chapter 9), the location of the debtor is the state where the debtor’s certificate of incorporation was issued.¹⁵⁰ This change in the location for filing resulted in one of the most significant cases decided during the Survey period.

In *In re SemCrude, L.P.*,¹⁵¹ a parent corporation and several affiliated companies were engaged in the business of buying oil and gas from Texas producers and then reselling it to refiners and other resellers. In 2008, volatility in the oil and gas markets caused a loss to the companies in excess of two billion dollars. This loss resulted in the filing of Chapter 11 bankruptcies by the parent company and its affiliates.

Under a non-uniform Texas provision added to the Business and Commerce Code as section 9.343, oil and gas producers have automatically perfected security interests in oil and gas sold to a purchaser, in this case, the companies engaged in buying and reselling the product. When the Chapter 11 proceedings were filed, the Texas producers claimed perfected security interests in the product still in the debtors’ hands and in the proceeds the debtors had received but not yet paid to the Texas producers. In a careful review of the non-uniform Texas provision and its relationship to the requirement that perfection requires filing in the state where the debtor is located, the bankruptcy court for the District of Delaware concluded that the non-uniform provision applied only to product and proceeds located in Texas; product and proceeds in the hands of the debtors outside Texas required perfection by filing in the state of the debtors’ location, in this case, either Delaware, where the parent company was organized, or Oklahoma, where an affiliate was organized.¹⁵² Because the Texas producers had not filed in either Delaware or

146. *Id.*

147. *See* TEX. BUS. & COM. CODE ANN. §§ 9.103, 9.401 (Vernon 2002).

148. *See* TEX. BUS. & COM. CODE ANN. § 9.301 (Vernon 2002).

149. *See id.* § 9.307(a)-(k).

150. *See id.* § 9.307(e). The term “registered organization” is defined in section 9.201(b)(71) of the Texas Business and Commerce Code. *See id.* § 9.201(b)(71).

151. 407 B.R. 112 (Bankr. D. Del. 2009). This case involved oil and gas producers in Texas. *Id.* at 117. Companion cases involving oil and gas producers in Kansas and Oklahoma raised similar issues. *See In re SemCrude, L.P.*, 407 B.R. 82 (Bankr. D. Del. 2009) (Kansas producers); *In re SemCrude, L.P.*, 407 B.R. 140 (Bankr. D. Del. 2009) (Oklahoma producers).

152. *In re SemCrude*, 407 B.R. at 138.

Oklahoma, their security interests were unperfected and subordinate to security interests claimed by banks that had made loans to the parent and its affiliates and had perfected those interests by filing in the correct locations.¹⁵³

In re SemCrude nicely illustrates the hazard of making non-uniform amendments to the Code that may not have extra-territorial effect under the choice of law rules in section 9.301 of revised Article 9.¹⁵⁴

B. SCOPE OF A SECURITY INTEREST

One problematic issue about the scope of security interests noted in the last two Surveys has been the effect of the “hanging paragraph” in section 1325(a) of the Bankruptcy Code.¹⁵⁵ The dispute has centered on whether a buyer’s negative equity in a trade-in vehicle that is paid off in the course of financing the purchase of a new vehicle should be included within the scope of a purchase money security interest (PMSI) granted to the secured party as part of the transaction. Although early cases decided in the lower courts were deeply split on this issue, recent cases reaching the U.S. court of appeals are unanimous in holding that amounts loaned to pay off negative equity should be included in a PMSI.¹⁵⁶ This issue now seems to be settled in favor of including negative equity loans as part of the value secured by a PMSI.

153. *Id.* Similar results were reached in the companion cases. *See In re SemCrude*, 407 B.R. at 111 (Kansas producers); *In re SemCrude*, 407 B.R. at 158 (Oklahoma producers). Because of the importance of these decisions, the court certified all three cases for direct appeal to the Third Circuit, but as of this writing, there is no record of an appeal.

154. The official text of section 9.301(1) in revised Article 9 provides, “Except as otherwise provided in this section, while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral.” TEX. BUS. & COM. CODE ANN. § 9.301(1) (Vernon 2002). This was a significant change from the prior law, which required filing in the state where the *collateral* was located rather than filing in the state where the *debtor* was located. *See* U.C.C. § 9-103(1)(b) (1972). Another non-uniform amendment adopted in Texas that may create a trap for the unwary is section 9.503(a)(4). TEX. BUS. & COM. CODE ANN. § 9.503(a)(4) (Vernon Supp. 2009). This amendment attempts to clarify the use of the correct name of an individual debtor on financing statements by providing that the use of the name shown on a driver’s license or state identification certificate issued by the state of the debtor’s residence will sufficiently provide the name of the debtor. *See id.* This provision would be effective in Texas for Texas residents, but it is possible that another state may have a different standard and that the name shown on a driver’s license or identification certificate may not be adequate under the filing-office search logic used in the other state.

155. *See* John Krahrmer, *Commercial Transactions*, 62 SMU L. REV. 995, 1015-16, 1015 n.159 (2009) [hereinafter Krahrmer 2009]; John Krahrmer, *Commercial Transactions*, 61 SMU L. REV. 657, 673-74 (2008). By one account, the hanging paragraph “has 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.” *See* Dianne C. Kerns, *Cram-a-lot: The Quest Continues*, 24 AM. BANKR. INST. J. 10, 10 (2005).

156. *See In re Dale*, 582 F.3d 568, 574 (5th Cir. 2009) (including negative equity, gap insurance, and extended warranties within scope of a purchase money obligation); *In re Mierkowski*, 580 F.3d 740, 743 (8th Cir. 2009) (same); *In re Ford*, 574 F.3d 1279, 1285 (10th Cir. 2009) (same); *In re Price*, 562 F.3d 618, 625-28 (4th Cir. 2009) (same); *In re Graupner*, 537 F.3d 1295, 1302 (11th Cir. 2008) (same); *but see In re Penrod*, 392 B.R. 835, 859 (B.A.P. 9th Cir. 2008) (stating that negative equity should not be treated as part of a PMSI).

Another difficulty arising under the hanging paragraph is whether a debtor can voluntarily surrender a vehicle in full satisfaction of a secured debt in a Chapter 13 plan or whether surrender satisfies the debt only in an amount equal to the value of the vehicle, allowing the secured party to assert an unsecured deficiency claim for any remaining balance of the debt. As in the “negative equity as part of PMSI” cases, the courts of appeals have been unanimous in interpreting the hanging paragraph to allow secured parties to seek deficiency claims despite contrary interpretations by the lower courts.¹⁵⁷

The worst of the hanging paragraph problems may now be behind us, but similar issues can arise under state law. In *Bledsoe Dodge, L.L.C. v. Kuberski*,¹⁵⁸ a car buyer contended that the inclusion of negative equity as part of the cash price for a new vehicle violated the Texas Finance Code.¹⁵⁹ The Dallas Court of Appeals held that the buyer failed to show the seller would have offered the same vehicle to a cash buyer at a price lower than the price charged to the buyer with the exclusion of the amount required to pay off the negative equity.¹⁶⁰ The buyer also argued that the negative equity should have been treated as a finance charge. The court disagreed, reasoning that the amount owed on the buyer’s trade-in was not an amount imposed by the creditor as a condition of the seller’s extension of credit but should be treated, instead, as part of the purchase price.¹⁶¹

A problem with continuing the perfection of a security interest following its assignment from one secured party to another was noted in the

157. See *In re Miller*, 570 F.3d 633, 640 (5th Cir. 2009) (treating the balance of debt in excess of value of vehicle as an unsecured deficiency claim in Chapter 13 plan); *In re Barrett*, 543 F.3d 1239, 1247 (11th Cir. 2008) (same); *Tidewater Fin. Co. v. Kenney*, 531 F.3d 312, 319 (4th Cir. 2008) (same); *In re Ballard*, 526 F.3d 634, 641 (10th Cir. 2008) (same); *In re Long*, 519 F.3d 288, 291 (6th Cir. 2008) (same, but in divided opinion); *Capital One Auto Finance v. Osborn*, 515 F.3d 817, 822-23 (8th Cir. 2008) (same); *In re Wright*, 492 F.3d 829, 832 (7th Cir. 2007). A similar issue is whether a Chapter 13 plan can be modified by surrender of a vehicle after a plan has been confirmed. See *In re Davis*, 404 B.R. 183, 189 (Bankr. S.D. Tex. 2009). In *In re Davis*, the bankruptcy court for the Southern District of Texas recognized that a plan may be modified to permit surrender of a vehicle in full satisfaction of the secured portion of a debt scheduled in the plan. Nonetheless, the court declined to do so in this case because the vehicle had been seriously damaged in a wreck and sat in a repair shop for two years before it was repossessed by the secured party. The court determined that the voluntary repossession permitted reclassification of the unpaid portion of the secured debt as unsecured, but that it would be inequitable to treat the surrender as full satisfaction of the claim because of the damage to the vehicle. Thus, the court allowed reclassification of the secured debt but included the amount of the unsecured debt as part of the unsecured deficiency. *Id.* at 196.

158. 279 S.W.3d 839 (Tex. App.—Dallas 2009, no pet.).

159. *Id.* at 841-42; see also TEX. FIN. CODE ANN. § 348.004(a) (Vernon 2006) (defining a cash price as the “price at which the retail seller offers in the ordinary course of business to sell for cash the goods or services that are subject to the transaction”).

160. *Kuberski*, 279 S.W.3d at 843. The net listed cash price for the vehicle was \$27,350.92, and the evidence before the court did not reflect any offer by the seller to sell the vehicle to a cash buyer for less than that amount. *Id.*

161. *Id.* at 843-44.

2009 Survey.¹⁶² In *In re Clark Contracting Services, Inc.*,¹⁶³ the bankruptcy court for the Western District of Texas held that continued perfection of a security interest requiring perfection by notation of a certificate of title required an assignee to record its name on the assigned titles.¹⁶⁴ The court reached this decision based on its reading of the Texas Certificate of Title Act.¹⁶⁵ Because this result conflicted with section 9.514 of the Code, which permits, but does not require, an assignee to continue perfection by making a filing of record, the Certificate of Title Act was amended during the 2009 legislative session to parallel the permissive continuation approach allowed by the Code.¹⁶⁶ The continuation rule applied in *Clark* is, therefore, no longer effective for security interests perfected by notation on certificates of title.

C. EFFECT OF TERMINATING A SECURITY INTEREST

Once a debt has been repaid in full, Chapter 9 imposes several duties on a secured party, including filing a termination statement or releasing

162. See Krahmer 2009, *supra* note 155, at 1016-18.

163. 399 B.R. 789 (Bankr. W.D. Tex. 2008); see Krahmer 2009, *supra* note 155, at 1016-17.

164. *In re Clark*, 399 B.R. at 804.

165. *Id.* at 805; see also TEX. BUS. & COM. CODE ANN. § 9.311(b) (Vernon 2002) (providing that perfection of a security interest in titled collateral must be made in compliance with the Certificate of Title Act). At the time *In re Clark* was decided, section 501.111 of the Texas Transportation Code required notation on a certificate of title to perfect a security interest in titled collateral. *In re Clark*, 399 B.R. at 794; see TEX. TRANSP. CODE ANN. § 501.111 (Vernon 2007)).

166. See Act of June 19, 2009, 81st Leg., R.S., ch. 814, §§ 4-5, 2009 Tex. Sess. Law Serv. 2049 (Vernon 2009) (codified as amendments to TEX. TRANSP. CODE ANN. §§ 501.113-.114). The same Act made similar changes in the certificate of title provisions governing utility security interests, boats, and boat motors. See Act of June 19, 2009, 81st Leg., R.S., ch. 814, §§ 1-2, 2009 Tex. Sess. Law Serv. 2047 (Vernon 2009) (codified as amendments to TEX. BUS. & COM. CODE ANN. §§ 261.004, 261.012) (utility security interests); Act of June 19, 2009, 81st Leg., R.S., ch. 814, § 3, 2009 Tex. Sess. Law Serv. 2047 (Vernon 2009) (codified as an amendment to TEX. PARKS & WILD. CODE ANN. § 31.052) (boats & boat motors).

control over collateral.¹⁶⁷ In *In re Spillman Development Group, Ltd.*,¹⁶⁸ the bankruptcy court for the Western District of Texas addressed the question of whether a credit-bid purchase of a bankruptcy debtor's assets that fully satisfied a debt required the secured party to return collateral to the debtor. The court had no difficulty in concluding that full payment required the return of a certificate of deposit pledged as security for the loan, and that full repayment also extinguished any liability on the part of the debtor's guarantors.¹⁶⁹

167. See, e.g., TEX. BUS. & COM. CODE ANN. § 9.208 (Vernon 2002) (imposing duty to release control of deposit accounts, electronic chattel paper, investment property, letter-of-credit rights, and electronic documents within ten days after demand by the debtor); *id.* § 9.513(a) (imposing duty to file termination statement in consumer goods transactions within thirty days whether or not there is a demand by the debtor); *id.* § 9.513(b) (imposing duty to terminate filing in commercial transactions within twenty days following demand by the debtor). See also *id.* § 9.208 cmt. 4 (noting that no statutory duty was deemed necessary to require the return of collateral in the possession of a secured party upon repayment because common law conversion remedies were adequate).

Although not involving Texas law, the decision in *Regions Bank v. Britt* deserves note in the context of termination of a security interest. 642 F. Supp. 2d 584 (S.D. Miss. 2009). In *Britt*, two bank customers sued a bank for failing to release a lien after a loan had been paid. According to the bank, one of the customers had signed a promissory note and deed of trust to secure the loan. The note and deed of trust contained arbitration provisions stating that the parties agreed to arbitrate any disputes that arose between them. The bank contended that the customers' claim fell within the arbitration provision and filed a motion to compel arbitration. The customers objected to the bank's motion arguing that (1) the court lacked personal jurisdiction over one of the customers because he was never served with process; (2) the FAA did not apply because the transactions did not involve interstate commerce; (3) the deed of trust was invalid because it encumbered marital property and only one of the parties had signed it; and (4) the promissory note was unenforceable and moot because it had been satisfied. *Id.* at 586-887, 591-92.

The federal district court for the Southern District of Mississippi held that the FAA applied because the transaction did involve interstate commerce. Furthermore, the arbitration agreement remained enforceable even though the note had been paid. The court reasoned that the arbitration agreement did not stipulate that it would expire upon payoff of the loan; therefore, the obligation to arbitrate survived by operation of law. *Id.* at 592.

Britt raises questions about the arbitrability of claims that might arise under sections of the Code requiring release of control or the filing of termination statements. It also raises questions about the effect an arbitration clause might have on the remedies stated in section 9.625(a), which provides that, "a court may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions." See TEX. BUS. & COM. CODE ANN. § 9.625 (Vernon 2002). If a security agreement contains an arbitration clause, would the clause divest the court of jurisdiction to enter such orders? Is determination of the validity of such a clause (arguably a violation of state law) to be determined by the court or by the arbitrator under the rule of *Buckeye Check Cashing, Inc. v. Cardegna*? 546 U.S. 440, 446 (2006) (holding that that legality of a loan contract challenged as usurious under state law was a matter for the arbitrator to decide). These questions and others would be raised if arbitration clauses indeed survive full payment of a secured debt.

168. 401 B.R. 240 (Bankr. W.D. Tex. 2009).

169. *Id.* at 256. To emphasize its holding, the court used some rather unusual phrasing in the last paragraph of the opinion, where it stated, "Fire Eagle's Senior Loan was paid in full. As such Fire Eagle has no claim either against the SIG CD or the Guarantors under their respective Guarantees. Fire Eagle's feigned ability to not understand the Court's reasoning falls on deaf ears. This is not rocket science. The Senior Loan has been PAID!!!!!" *Id.*

D. REPOSSESSION AND DISPOSITION OF COLLATERAL

Prior to the adoption of the current version of Chapter 9, the Texas Supreme Court had established a procedure for actions in which a secured party sought recovery of a deficiency following the disposition of collateral. In *Greathouse v. Charter National Bank–Southwest*, the supreme court announced that the creditor was required to plead that the disposition was done in a commercially reasonable manner.¹⁷⁰ The pleading could be done either specifically or generally. If done specifically, the creditor assumed the burden of proving the specific allegations; if done generally, the creditor did not have that burden, unless the debtor denied the commercial reasonableness of the disposition.¹⁷¹ Section 9.626(a) in the present Chapter 9 states essentially the same requirements.¹⁷²

In *Jantzen v. American National Bank of Texas, N.A.*,¹⁷³ a secured party repossessed and sold an aircraft. In the creditor's action to recover a deficiency, the debtor asserted that the repossession and sale were not conducted in a commercially reasonable manner. The creditor responded by producing a letter to the debtor showing that notice of a private sale was given. The creditor also produced a bill of sale, along with the affidavit of the creditor's agent stating that the aircraft had been sold for the price shown in the affidavit. No other evidence was provided by the creditor. The Dallas Court of Appeals held that this evidence failed to address many of the factors used in determining whether a disposition was conducted in a commercially reasonable manner.¹⁷⁴ Summary judgment in favor of the bank was reversed, and the case was remanded.¹⁷⁵

In *Sky Technologies LLC v. SAP AG*,¹⁷⁶ the collateral consisted of several patents. When the debtor defaulted, the secured party foreclosed on the patents, sold them at public auction, and later transferred them to

170. 851 S.W.2d 173, 173 (Tex. 1992).

171. *Id.* at 176-77.

172. TEX. BUS. & COM. CODE ANN. § 9.626(a)(1)-(2) (Vernon 2002). The Code provides that once the amount of a deficiency or surplus is put in issue:

(1) A secured party need not prove compliance with the provisions of this subchapter relating to collection, enforcement, disposition, or acceptance unless the debtor or a secondary obligor places the secured party's compliance in issue. (2) If the secured party's compliance is placed in issue, the secured party has the burden of establishing that the collection, enforcement, disposition, or acceptance was conducted in accordance with this subchapter.

Id.

173. 300 S.W.3d 412 (Tex. App.—Dallas 2009, no pet.).

174. *Id.* at 415-16. The court listed the following as typical factors to be considered in making a determination of commercial reasonableness: (1) whether the secured party attempted to achieve the best possible price, (2) whether the sale was a public or private sale, (3) the condition of the collateral, (4) whether efforts were made to enhance the value of the collateral, (5) how they collateral was advertised, (6) how many bids were received, and (7) the process by which bids were solicited. *See id.*

175. *Id.* at 417. The court also reversed summary judgment in favor of the bank on a conversion claim asserted by the debtor for the alleged loss of personal property that was in the plane at the time of repossession, because the bank did not address issues of material fact raised by the counterclaim. *See id.*

176. 576 F.3d 1374, 1376 (Fed. Cir. 2009).

another company. At no time after foreclosure, however, did the debtor sign a written agreement assigning its rights in the patents to the secured party. The transferee of the patents later sued another company for patent infringement, and that company defended by arguing the transferee had not acquired rights in the patents because the lack of a written assignment by the debtor rendered the purported transfer ineffective under the Federal Patent Act.¹⁷⁷ The Court of Appeals for the Federal Circuit disagreed with this contention and held that signing a security agreement granting a security interest in the patents along with the right to dispose of the collateral under sections 9-610 and 9-617 of the Massachusetts Code (which is the same as the Texas Code) allowed transfer by operation of law.¹⁷⁸ The court reasoned that transfer by operation of law is not an "assignment" that requires a writing under the Patent Act.¹⁷⁹ The court also rejected an argument that the Patent Act preempted the foreclosure provisions of the Code, ruling instead that the transferee had properly acquired ownership of the patents and had standing to make a claim for their infringement.¹⁸⁰

VI. CONCLUSION

Although the Code was little changed by legislation during the 2009 Survey period, case law interpretations had some significant impact. Two cases from the federal courts stand out. The decision with the most direct effect on the Code itself was *In re SemCrude*, holding that section 9.343 of the Code does not provide automatic perfection for oil and gas producers for products in the hands of non-Texas debtors.¹⁸¹ The other decision, with implications extending beyond the Code, was *Citigroup Global Markets, Inc. v. Bacon*, establishing that an appeal from an arbitration award can no longer be based on an arbitrator's manifest disregard of the law.¹⁸² In the state courts, the Texas Supreme Court revisited the doctrine of good faith and its interaction with open price terms in sales to retail gasoline dealers under section 2.305 of the Code.¹⁸³ At the producer level, the supreme court addressed risk-of-loss issues under contract terms dealing with quantity differences between natural gas produced at the well-head and gas delivered to the buyer.¹⁸⁴ Cases pending before the supreme court that may affect the application of the Code include *In re Olshan Foundation Repair Co., LLC*, holding that an arbitration clause specifying application of the Texas General Arbitration Act can exclude

177. *Id.* at 1379; see 35 U.S.C. § 261 (2006) (requiring assignments of interests in patents to be in writing).

178. *Sky Technologies*, 576 F.3d at 1380.

179. *Id.* at 1379, 1381.

180. *Id.* at 1381-82.

181. 407 B.R. 112, 130 (Bankr. D. Del. 2009).

182. 562 F.3d 349, 358 (5th Cir. 2009).

183. *Exxon Mobil Corp. v. Gill*, 299 S.W.3d 124, 127-28 (Tex. 2009).

184. *Dynegy Midstream Servs., L.P. v. Apache Corp.*, 294 S.W.3d 164, 168-69 (Tex. 2009).

use of the Federal Arbitration Act,¹⁸⁵ and *Lenk v. Guaranty Bank*, dealing with the liability of a bank that relied on false letters of administration to pay funds out of a decedents' account.¹⁸⁶ Finally, a case still pending from last year will have an impact on the application of section 9.406 and the assignability of rights to payment when that section conflicts with other Texas law.¹⁸⁷

185. 277 S.W.3d 124, 132 (Tex. App.—Dallas 2009, pet. denied).

186. No. 04-07-00503-CV, 2008 WL 2602121, at *3-4 (Tex. App.—San Antonio July 2, 2008, pet. denied) (mem. op.) (rule 53.7(f) motion granted).

187. See *Texas Lottery Comm'n v. First State Bank of DeQueen*, 254 S.W.3d 677, 681-85 (Tex. App.—Austin 2008, pet. granted); *Krahmer* 2009, *supra* note 155, at 1018.

