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January 1997

## Banking Law

James W. Doyle

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### Recommended Citation

James W. Doyle, *Banking Law*, 50 SMU L. REV. 965 (1997)  
<https://scholar.smu.edu/smulr/vol50/iss4/4>

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# BANKING LAW

James W. Doyle\*

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## I. INTRODUCTION

THIS Survey is intended for use by the average banking law practitioner in Texas. As the Survey reflects, it is designed to update the practitioner over the wide variety of matters that the banking practitioner faces. As such, some overlap with the Secured Transaction, Real Estate and Bankruptcy Surveys is inevitable.

## II. CASE LAW

## A. BRANCH BANKING

This year, the Texas Banking Commissioner fought two interstate branch banking cases. The first, *Ghiglieri v. Ludwig*,<sup>1</sup> involved an Arkansas domiciled bank that sought to open its main office in Texas and maintain its former locations in Arkansas as branches. The second case, *Ghiglieri v. Sun World, N.A.*,<sup>2</sup> involved a Texas bank that sought to move its headquarters to New Mexico and maintain its Texas locations as branches of the New Mexico bank. In both cases, the moves were approved by the Office of the Comptroller of the Currency (OCC), each bank's primary regulator, and opposed by the Texas Banking Commission as violations of the prohibition in Texas against interstate branch banking.

The Riegle-Neal Interstate Banking and Branching Efficiencies Act of 1994 (Riegle-Neal) authorizes interstate branch banking by merger or acquisition of a bank unless a state has opted out of this statutory scheme.<sup>3</sup> In May of 1995, the Texas Legislature passed House Bill 889<sup>4</sup> "opting out" of the benefits introduced by the Riegle-Neal Act. Thus, while the action of the Arkansas bank could have been authorized under the Riegle-Neal Act, had Texas elected to permit early interstate merger,<sup>5</sup> having opted out of the Riegle-Neal Act altogether, the Comptroller had to find other justification to allow the interstate expansion.

In the *Ludwig* case, the Comptroller's Office authorized the relocation of the Arkansas bank's main office to Texas, and the retention of its prior offices as branches, pursuant to the relocation authority applicable to national banks. The relocation authority allows a national bank, upon written notice to the Comptroller, to change the location of its main office to any other location within or outside the limits of its home city, but no more than thirty miles beyond the city limits.<sup>6</sup> However, as the court pointed out, the provisions dealing with relocation contain no express au-

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1. Civ. No. 3:95-CV-2001-H, 1996 WL 315947 (N.D. Tex. May 22, 1996).

2. 942 F. Supp. 1111 (W.D. Tex. 1996).

3. Pub. L. No. 103-328, § 102a, 108 Stat. 2338, 2352-54 (1994) (codified at 12 U.S.C. §§ 30(c), 36(e)(2) (1995)).

4. Act of Apr. 19, 1995, 74th Leg., R.S., ch. 58, 1995 Tex. Sess. Law Serv. 437 (Vernon) (codified at TEX. REV. CIV. STAT. ANN. art. 489(f) (Vernon Supp. 1997)).

5. Pursuant to § 102(a)(3)(A) of the Riegle-Neal Act.

6. 12 U.S.C. § 36(e) (1995).

thority to allow a national bank to retain its prior branches, and the court concluded that to allow a relocating bank to do so, where one of the locations was in a state that did not permit interstate branch banking, would be a violation of the McFadden Act.<sup>7</sup> Since the McFadden Act only permits branches within the municipality of a bank's main branch and only in those states that permit branch banking, there was no support under federal law for the transaction and the court overruled the Comptroller's consent to it.<sup>8</sup>

In *Sun World*, the Texas Banking Commissioner again asserted that there was no provision of federal law that would allow a Texas bank to relocate its main office to another state and retain its prior locations as branches. Again, the controlling statute is the McFadden Act.<sup>9</sup> Here, since neither New Mexico law nor Texas law allows a New Mexico bank to branch back into Texas, no provision of federal law permits it either. These cases illustrate the ongoing conflict, both in Texas and elsewhere, between state bank chartering agencies, intent on fostering a healthy state banking system, and the OCC, which is intent on establishing a centralized, multi-regional concentration of banks and bank capital.

## B. USURY

### I. *Smiley v. Citibank (South Dakota), N.A.*

During this Survey period the United States Supreme Court issued its opinion in *Smiley v. Citibank (South Dakota), N.A.*<sup>10</sup> This case has wide-ranging implications on the debate whether a state or national bank charter is better. It will also have a major impact on state efforts to provide consumer protection. Ms. Smiley, a resident of California, held a credit card issued by Citibank's South Dakota affiliate. She alleged that the late payment fees charged by the bank, although legal under South Dakota law, violated California law. In an interesting application of logic, Justice Scalia notes that where the provisions of the National Banking Act are ambiguous, such as whether or not a late charge is considered interest, the Court should defer to the reasonable judgment of the Comptroller, the official charged with administering national banks.<sup>11</sup> Then the Court turns to a regulation issued by the Comptroller of the Currency which includes within the definition of interest, late payment fees.<sup>12</sup> However, this regulation was promulgated during the pendency of Smiley's appeal of a California Superior Court's dismissal of her complaint against Citibank. However, because the Court finds the Comptroller's regulation a rational extension of the definition of interest contained in the National Banking Act, it allows the Comptroller's regulation to act as a *deux ex*

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7. *Ludwig*, 1996 WL 315947, at \*6-8; McFadden Act, 12 U.S.C. § 36 (1995).

8. *Ludwig*, 1996 WL 315947, at \*11.

9. 12 U.S.C. § 36 (1995).

10. 116 S. Ct. 1730 (1996).

11. *Id.* at 1733-34.

12. 12 C.F.R. § 7.4001(a) (1996).

*machina* to extract Citibank from the possibility that its late fees would violate the Consumer Protection Laws of California.<sup>13</sup>

## 2. *Alamo Lumber Revisited*

In a vivid reminder that *Alamo Lumber*<sup>14</sup> is still controlling precedent, a Texas Court of Appeals, in *Lentino v. Cullen Center Bank & Trust*,<sup>15</sup> confirmed the fear of many practitioners that in the workout setting the *Alamo Lumber* opinion would come back to haunt the aggressive lender. *Lentino* also demonstrates how difficult it is to purge a contract of usury once usury exists. In November 1982 Eduardo and Jorge Lentino each executed separate promissory notes for \$150,000 payable to Cullen Bank to finance their purchase of certain bank stock. In 1984, each of the Lentinos, and four other parties, jointly and severally executed a new promissory note in the amount of \$2,250,000 (1984 Note), which represented a renewal and extension of notes made by six of the individuals to finance the acquisition of the bank stock. In connection with the 1984 Note, Eduardo and Jorge Lentino also each executed a guaranty agreement in favor of Cullen Bank that unconditionally and jointly and severally guaranteed payment of the note. When the 1984 Note was not paid, Cullen Bank filed individual suit collect on the note. In response, both Eduardo and Jorge Lentino entered into separate compromise and settlement agreements (the Compromise Agreements) with Cullen Bank. Under the terms of the Compromise Agreements, Eduardo and Jorge Lentino agreed to execute new promissory notes payable to Cullen Bank in the amount of \$148,842 and \$171,186, respectively (the New Notes). The Compromise Agreements further provided that Cullen Bank would pay Eduardo and Jorge each \$10 and release them of their joint and several liability under the 1984 Note and guaranty. However, if Eduardo or Jorge ever defaulted on their New Notes, then the defaulting party would be liable for the outstanding balance on the 1984 Note. In connection with the Compromise Agreements, Eduardo and Jorge also waived all affirmative defenses and causes of action relating to the loan documents previously executed. Both Eduardo and Jorge Lentino subsequently defaulted on their New Notes and Cullen Bank filed separate lawsuits to collect on the New Notes. The trial court entered final judgment against the Lentinos and in favor of the bank on each of the New Notes. During post-judgment discovery, Cullen Bank discovered certain fraudulent transfers by Jorge and Eduardo Lentino made at the time the Compromise Agreements was entered into. Cullen Bank then filed an additional suit claiming fraud and breach of contract under the Compromise Agree-

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13. Note the provisions of Chapter 15 of the Texas Credit Code, applicable to revolving credit in Texas, which similarly precludes the payment of any fee. See TEX. REV. CIV. STAT. ANN. art. 5069-15.02(f) (Vernon 1987).

14. *Alamo Lumber Co. v. Gold*, 661 S.W.2d 926 (Tex. 1983).

15. 919 S.W.2d 743 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

ments. In response to that suit, the Lentino's filed a counterclaim alleging usury under the \$2,250,000 note.

After the trial court awarded Cullen Bank a verdict on the underlying Compromise Agreements indicating that the Lentinos owed Cullen Bank \$1,817,525 in actual damages and \$2,500,000 in exemplary damages, the Lentinos appealed asserting usury. They alleged that by being forced to sign the 1984 Note, in order to get their debt *renewed*, usury resulted under the *Alamo Lumber* case. The court agreed.<sup>16</sup> Note, however, that unlike the *Alamo Lumber* case, the transaction complained of did not involve a loan, but a renewal. This distinction, the *Lentino* court acknowledged when they indicated that no additional funds were advanced.<sup>17</sup> However, by refusing a writ of error on this case, the supreme court has apparently accepted this extension of the *Alamo Lumber* doctrine.

Of equal importance the court held that the waiver by the Lentinos of any affirmative defense, which would include the defense of usury in the Compromise Agreement, was not enforceable.<sup>18</sup> Here the court held that the provisions which allowed the \$2,250,000 transaction to be revived upon the subsequent default by the Lentino under the New Notes failed to purge the contract of usury.<sup>19</sup> The court pointed out that for a claim or defense of usury to be compromised or released, the release must be done in good faith *and* the usury must be purged.<sup>20</sup> The court goes on to point out that for the underlying contract to be purged of usury, there must be "(1) cancellation of the obligation tainted by the usury; and (2) the creation of a new obligation free of usury."<sup>21</sup>

### 3. *Unilateral Charge of Interest*

One of this year's usury cases is illustrative of a problem I am constantly noting—it is the unilateral imposition of interest on past due open accounts at rates in excess of those allowed by the statute dealing with open account indebtedness where no written agreement concerning the payment of interest exists.<sup>22</sup> In *Dear v. Plastronics, Inc.*,<sup>23</sup> Dear performed services for Plastronics and issued its invoice for services rendered. The invoice disclosed that Dear charged Plastronics interest on the outstanding invoice at the rate equal to one percent per month. For each month that its bill went unpaid, it would add the unpaid interest to the invoice and then accrue interest for the next month on that com-

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16. *Id.* at 746.

17. *Id.*

18. *Id.* at 747

19. *Id.*

20. *Id.*; see *Finn v. Alexander*, 139 Tex. 461, 163 S.W.2d 714, 716 (1942).

21. *Id.*; see *Southwestern Inv. Co. v. Hockley County S&D, Inc.*, 516 S.W.2d 136, 137 (Tex. 1979); *Commerce Trust Co. v. Ramp*, 135 Tex. 84, 138 S.W.2d 531, 534 (1940), *overruled on other grounds*, 561 S.W.2d 777 (Tex. 1977) and *O'Quinn v. Beanland*, 540 S.W.2d 526, 527 (Tex. Civ. App.—San Antonio 1976, no writ).

22. TEX. REV. CIV. STAT. ANN. art. 5069-1.03 (Vernon 1987).

23. 913 S.W.2d 251 (Tex. App.—Amarillo 1996, writ denied).

pounded figure. As the court points out, since there was no agreement to pay interest, Dear was entitled only to the statutorily authorized simple interest at six percent, commencing thirty days after the debt was due.<sup>24</sup> However, by charging interest at a rate equal to one percent per month, or twelve percent per year and then compounding that rate, Dear was charging interest slightly in excess of twelve percent per year. Consequently, the open account debtor was entitled to a finding that Dear was charging usurious interest, as the court found that not only was the compounding not agreed to in writing, no written agreement authorized the charging of interest.<sup>25</sup> The practice of unilaterally charging interest on invoices is widespread throughout the state and this case serves as a reminder to practitioners that it is a violation of the usury statutes to impose such interest without a written agreement. Where the interest charges exceed twice the statutorily allowed maximum of 6% a year (for example where the invoice charges 1.5% per month or 18% per year) the penalties for usury include the forfeiture of all principal, as well as all interest charged.<sup>26</sup> But note the revisions to Article 5069-1.06, which occurred during the 1995 Legislative session, and allow a party guilty of usury, who discovers the problem and corrects it before an action is brought by the obligor, to purge the contract of usury.<sup>27</sup>

### C. SALE OF INSURANCE

The 1996 Supreme Court opinion in *Barnett Bank v. Nelson*<sup>28</sup> is just the latest salvo in a long running battle between the insurance industry and commercial banks.<sup>29</sup> This battle goes back to 1916 when the National Banking Act was amended authorizing national banks located in a place where the population does not exceed 5,000 inhabitants to act as the agent for any fire, life or other insurance company.<sup>30</sup> This provision was placed in the National Bank Act at the urging of the Comptroller of the Currency who was concerned about the difficulty that national banks in small communities were having in earning a profit. This provision was intended to provide those banks with an additional source of revenue.

In 1971, the Comptroller adopted regulations which permitted national banks to sell insurance from small town branches, even if their main office was located in a city with a population greater than 5,000.<sup>31</sup>

In 1986, the Comptroller ruled in an interpretive letter that national banks could sell insurance on a nationwide basis from a branch located in

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24. *Id.*

25. *Dear*, 913 S.W.2d at 254.

26. TEX. REV. CIV. STAT. ANN. art. 5069-1.06 (Vernon 1987).

27. *Id.* at art. 5069-1.06(4)(a).

28. 116 S. Ct. 1103 (1996).

29. This battle has been described as a "huge commercial tug-of-war." *Alabama Ass'n of Ins. Agents v. Board of Governors of the Fed. Reserve Sys.*, 533 F.2d 224 (5th Cir. 1976).

30. National Banking Act, ch. 461, 39 Stat. 753 (1916) (current version at 12 U.S.C. § 92 (1994)).

31. 12 C.F.R. 7.7100 (1993) (current version at 61 Fed. Reg. 4849 (1996)).

a small town.<sup>32</sup> This interpretation has been upheld by the courts.<sup>33</sup> It is against this backdrop that the *Barnett Bank* case must be reviewed. It had the effect of clarifying the impact of the McCarran-Ferguson Act of 1944. The McCarran-Ferguson Act<sup>34</sup> was passed in response to a 1944 U.S. Supreme Court decision<sup>35</sup> that held that the business of insurance constituted interstate commerce. That Supreme Court decision had the effect of applying the Sherman Act to the sale of insurance. McCarran-Ferguson promotes the regulation of the business of insurance by the states by providing that "no Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance."<sup>36</sup> Thus, McCarran-Ferguson acts as an anti-preemption statute, with the effect of denying normal federal preemption of a state law if it is enacted for the purpose of regulating the business of insurance unless the federal law specifically relates to the business of insurance.

What the *Barnett Bank* case did was to hold that section 92 of the National Bank Act was a federal law that specifically relates to the business of insurance thereby allowing it to preempt state law.<sup>37</sup> As a result, it is clear now that any qualifying national bank can sell insurance. A qualifying national bank is one that has a branch in a town of 5,000 inhabitants or less. By virtue of the parity provision of the Texas Constitution, a state chartered bank can likewise sell insurance.<sup>38</sup>

Notwithstanding *Barnett Bank*, the Texas Insurance Code would not permit the licensing of banks to sell insurance.<sup>39</sup> Moving to address the situation, the Texas Department of Insurance has issued interim procedures for banks selling insurance. Those interim procedures provide that a bank located and doing business in a place of less than 5,000 inhabitants may become a licensed corporate agent or it may acquire all or part of a licensed agency located and doing business in a town of less than 5,000 inhabitants.<sup>40</sup> Many operational details remain to be determined.<sup>41</sup>

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32. OCC Interpretive Letter No. 366 [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,536 (Aug. 18, 1986).

33. *Independent Ins. Agents of Am., Inc. v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993); *NBD Bank, N.A. v. Bennett*, 67 F.3d 629 (7th Cir. 1995).

34. McCarran-Ferguson Act, 15 U.S.C. § 1011-1015 (1976).

35. *United States v. Southeastern Underwriters Ass'n*, 322 U.S. 533 (1944).

36. McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1976).

37. *Barnett Bank* 116 S. Ct. at 1108.

38. TEX. CONST. art. XVI, § 16(c); *see also* TEX. REV. CIV. STAT. ANN. art. 342-3.010 (Vernon 1995).

39. TEX. INS. CODE ANN. art. 21.07-1 (Vernon 1981).

40. Tex. Commissioner's Bulletin No. B-0043-96 (June 20, 1996).

41. The Office of the Comptroller of the Currency has stated its position in a advisory letter. *Guidance to National Banks in Insurance and Annuity Sales Activities*, OCC Advisory Letter No. 96-8; [1996 Binder] Fed. Banking L. Rep. (CCH) ¶ 35,463 (Oct. 8, 1996). *See also* OCC Interpretive Letter No. 753, *Current Matters* Volume Fed. Banking L. Rep. (CCH) ¶ 81,107 (Nov. 4, 1996).



Another battle looms when *Barnett Bank* is considered in conjunction with the 1995 Supreme Court case of *NationsBank v. Variable Annuity Life Insurance Co. (VALIC)*.<sup>42</sup> In *VALIC*, the United States Supreme Court said that national banks were authorized to sell annuities, both fixed and variable. The source of this authority was the incidental powers clause of the National Bank Act<sup>43</sup> and the Comptroller's reasonable determination that annuities were an investment product and not insurance. Texas banks, both national and state-chartered, that wished to exercise their authority to sell annuities were met with the same licensing barriers in the Texas Insurance Code as had, prior to *Barnett Bank* and the Insurance Commissioner's interim procedures, prevented insurance sales. The OCC opined that Texas licensing provisions were preempted.<sup>44</sup>

Relying on McCarran-Ferguson, the Texas Department of Insurance did *not* develop procedures for bank sales of annuities. The Texas Bankers Association sued in the Federal District Court in Austin<sup>45</sup> seeking a declaratory judgment that the Texas Insurance Code was preempted to the extent that it prohibits or substantially interferes with the rights of banks to sell annuities. The case is pending and should be closely monitored.

#### D. FORECLOSURE OF DEED OF TRUST LIENS IN REAL PROPERTY

##### 1. *Counting the Days*

Notwithstanding the much needed clarification to this issue afforded by the 1993 amendments to the Property Code (indicating that no matter what time of day you post or mail you include that day as a full day in computing the twenty-one day notice period<sup>46</sup>), the issue of how to count days continues to plague the courts. While section 51.002 of the Property Code does not have an express provision concerning how you compute the twenty-one day notice period, a court has pointed out that you can rely on the Code Construction Act which provides "[i]n computing a period of days, the first day is excluded and the last day is included."<sup>47</sup> In citing this statute as controlling, the court applied the statute by indicating the sale is the *first* day of the period and it is to be excluded and then

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42. 513 U.S. 251 (1995).

43. 12 U.S.C. § 24 (1994).

44. OCC Interpretive Letter No. 749, Current Matters Volume Fed. Banking L. Rep. (CCH) ¶ 81,114 (Sept. 13, 1996).

45. Texas Bankers Ass'n & Broadway Ass'n v. Elton Bomer in His Capacity as Ins. Comm'r, NOA No. A-96-CA-694-JN (W. Dist. Tex. filed Oct. 8, 1996).

46. Act of Sept. 1 1993, 73rd Leg., R.S., ch. 48, § 5 (1993) (codified at TEX. PROP. CODE ANN. § 51.002 (Vernon 1995)) (intending to overrule the hypertechnical holdings of earlier cases such as *In re Nelson* 134 B.R. 838 (Bankr. N.D. Tex. 1991) that held if you mailed your notice at 4:00 p.m. and conducted your foreclosure at 2:00 p.m. 21 days later you gave insufficient notice).

47. TEX. GOV'T CODE ANN. § 311.014(a) (Vernon 1988).

you count backwards.<sup>48</sup> Thus, in this case where the posting occurred, counting backwards, on the twenty-first day prior to the foreclosure, excluding the day of the foreclosure from the days counted, the court held that the twenty-one day notice requirement was complied with.<sup>49</sup> This case, coupled with the 1993 amendment to the Property Code overruling the "time of day" cases should bring needed certainty to this issue.

## 2. Notice to Guarantors

This year the courts have again had an opportunity to address the question of when notice to a guarantor is required when an interest in real property is being foreclosed. This issue was addressed in *Bishop v. National Loan Investors, L.P.*,<sup>50</sup> a well reasoned opinion, which held that the Article 9 cases which require notice to a guarantor of foreclosure do not apply when the lien being foreclosed is a lien in real property.<sup>51</sup>

This is to be contrasted with the long line of cases requiring notice to a guarantor where the collateral is covered by Article 9.<sup>52</sup> The reason for the distinction in the treatment of guarantors is not so much the requirement in section 9.504, that an Article 9 foreclosure be conducted in a commercially reasonable fashion, as it is the broad definition of "debtor" contained in Article 9. In an effort to interject an element of fairness and notice, Article 9 defines a debtor to mean any person who owes payment or other performance of the obligation, including, specifically, the owner of any collateral where the borrower and the owner of the collateral are not the same person.<sup>53</sup> It is on this basis that the courts have held a guarantor is entitled to notice of an Article 9 foreclosure.<sup>54</sup>

However, if you compare the language in the Property Code to that used in Article 9, you will see that there is little difference. Just as the provisions of Article 9 impose an obligation on the lienholder to give notice of the foreclosure to anyone who is obligated on the debt, the provisions of the Property Code impose on the holder of the debt the obligation to give notice of the sale "on each Debtor who, according to the records of the holder of the debt, is obligated to pay the debt."<sup>55</sup> Accordingly, the analysis in *Bishop*, based in part on the language of the guaranty (which contains a waiver of notice), and prior case law in this state dealing with the rights of an unconditional guarantor (i.e., that a unconditional guarantor is primarily liable for repayment and not just a surety of performance) overlook the fact that the same type of language is in most

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48. *University Woods Apartments, Inc. v. McDill*, No. 01-92-00779-CV, 1996 WL 38986, at \*4 (Tex. App.—Houston [1st Dist.] Jan. 29, 1996, no writ) (not designated for publication).

49. *Id.*

50. 915 S.W.2d 241 (Tex. App.—Ft. Worth 1995, writ denied).

51. *Id.* at 245.

52. *Federal Deposit Ins. Corp. v. Lanier*, 926 F.2d 462 (5th Cir. 1991); *Adams v. Wal-drop*, 740 S.W.2d 32 (Tex. App.—El Paso 1987, no writ).

53. TEX. BUS. & COM. CODE § 9.105(4) (Tex. UCC) (Vernon 1991).

54. See, e.g., *Lanier*, 926 F.2d at 464; *Adams*, 740 S.W.2d at 33.

55. TEX. PROP. CODE ANN. § 51.002(b)(3) (Vernon 1984).

pledge agreements and in most guaranty agreements, whether used in connection with a loan secured by real estate or a loan secured by personal property while the language of the Property Code may not reach a mere pledgor, it is difficult to see how it does not encompass a guarantor. Accordingly, the practitioner would be well advised, notwithstanding the language of any guaranty agreement to give notice to all guarantors of any foreclosure of a deed of trust lien.

These cases should be contrasted with a situation where a guarantor or pledgor delivers to the bank collateral in partial satisfaction of the debt. In *Acuff v. Lamesa National Bank*,<sup>56</sup> a co-borrower "sold" his stock and certificates of deposit to the bank in partial satisfaction of a debt. Thereafter, in a deficiency action against the other co-borrower, that co-borrower argued that the bank was not entitled to a deficiency judgment because it failed to give him notice of the disposition of stock and certificates of deposit. Here the court properly held that where there was no foreclosure by the lender in the collateral, but an acceptance of it in partial satisfaction of the debt, no notice to the co-borrower was required.<sup>57</sup>

### 3. *Commercially Reasonable Standard*

Similarly an attempt by a borrower to impose upon a beneficiary under a deed of trust the obligation to conduct a real property foreclosure in a commercially reasonable manner met with failure.<sup>58</sup> The court while acknowledging that personal property must be foreclosed on a commercially reasonable manner in order for a creditor to recover a deficiency, held that foreclosure of real property under a deed of trust need not be at a commercially reasonable sale and the failure to conduct a commercially reasonable foreclosure sale of real property is not actionable.<sup>59</sup>

While this holding answers many questions concerning the deed of trust lienholder's requirement to advertise, prepare the property for sale, etc., it does not address the issue which remains under Article 9 as a result of the provisions of section 9.501, which allow a creditor to proceed, where the collateral is both real and personal property, in accordance with its rights and remedies in respect to the real property.<sup>60</sup> While this statute indicates that a foreclosure of real and personal property in accordance with a lender's rights as to the real property, leaves the provisions of Subchapter E of Article 9 inapplicable,<sup>61</sup> the author is aware of no construction of this issue in any jurisdiction, like Texas, which has no appraisal, redemption or other protections to a borrower or guarantor

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56. 919 S.W.2d 154 (Tex. App.—Eastland 1996, no writ).

57. *Id.* at 157.

58. *Sowell v. Resolution Trust Corp.*, No. 14-92-00320-CV, 1996 WL 233727 (Tex. App.—Houston [14 Dist.] May 9, 1996, no writ) (not released for publication).

59. *Id.* at \*3.

60. TEX. BUS. & COM. CODE ANN. § 9.501(d) (Tex. UCC) (Vernon 1991).

61. Subchapter E contains, among other provisions, the provisions creating the obligation to foreclose in a commercially reasonable manner. *See* TEX. BUS. & COM. CODE ANN. § 9.504(a) (Tex. UCC) (Vernon 1991).

from a deficiency claim where the lender first proceeds against collateral which is a mixture of real and personal property in a manner that is not commercially reasonable.

#### 4. *Cancellation of a Foreclosure*

Demonstrating that because of the harsh remedies available through non-judicial foreclosure, a foreclosing party should proceed only with a good understanding of the facts, the courts held in *Bonilla v. Roberson* that there was no such thing as the "cancellation" of a previously conducted foreclosure.<sup>62</sup> In this case, the beneficiary under the deed of trust conducted a foreclosure at which the beneficiary was the successful bidder, having bid \$80,000 for two tracts of land. After the sale, the beneficiary entered upon the property and discovered extensive damage thereto. After the foreclosure, the party who had acted as Substitute Trustee executed deeds purporting to rescind the first sale and a subsequent foreclosure was conducted at which the property was again purchased by the beneficiary, this time at a price of \$42,500.<sup>63</sup> Noting that a Substitute Trustee's power arises solely from the Deed of Trust, the court held that once the foreclosure is conducted, the Trustee's power is extinguished and the beneficiary must live with the outcome of the first foreclosure.<sup>64</sup>

#### 5. *Election of Remedies and the Doctrine of Merger*

A large gap in the jurisprudence of Texas was closed in *In re Gayle*.<sup>65</sup> In this case Judge Greendyke does an excellent job of describing the election of remedies and the merger doctrine and their current application in Texas. After first noting that the classic construction of the doctrine of election of remedies requires a creditor to make an election between pursuing a judicial foreclosure and non-judicial foreclosure,<sup>66</sup> the court examines the impact of this doctrine on self-help foreclosure remedies conducted *after* a judgment on a debt has been obtained. The court concludes that, because the language of Article 9 provides that a creditor may, upon default, reduce his claim to judgment, foreclosure or otherwise enforce the security interest by any available judicial procedure,<sup>67</sup> the doctrine of election of remedies does not preclude a creditor from conducting a self-help foreclosure on *personal property* after obtaining a judgment on the debt.<sup>68</sup> Judge Greendyke then notes that the issue presented by *In re Gayle*, the right of a bank to non-judicially foreclose a deed of trust lien in real property, after the creditor has first obtained a judgment on the debt, is a case of first impression in Texas.<sup>69</sup> While there

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62. *Bonilla v. Roberson*, 918 S.W.2d 17 (Tex. App.—Corpus Christi 1996, no writ).

63. *Id.* at 20.

64. *Id.* at 22.

65. 189 B.R. 914 (Bankr. S.D. Tex. 1995).

66. *Id.* at 916.

67. TEX. BUS. & COM. CODE ANN. § 9.501(a) (Tex. UCC) (Vernon 1991).

68. *In re Gayle*, 189 B.R. at 917.

69. *Id.* at 916.

is no statute dealing with real estate which compares with the provisions of section 9.501(a) of Article 9, in considering this issue, the court notes that the right to foreclose should only be barred by the actual satisfaction of the underlying debt.<sup>70</sup> Since the lien of the deed of trust should still attach to the real property, until the debt is satisfied, the court further notes that if the doctrine of election of remedies prevented a mortgagee from foreclosing on its real property lien after a successful suit on the debt, but after an unsuccessful attempt at obtaining satisfaction on the judgment through collection efforts, the mortgagee's success in a suit to enforce a debt would be meaningless.<sup>71</sup> A debtor would have no incentive to satisfy a mortgagee's judgment on a note knowing that if they could frustrate the collection efforts they would be insulated from a later foreclosure on a previously and validly granted lien.

Obviously the correlating doctrine of merger must also be examined in this setting. In fact, the debtors in this case asserted as a defense the bank's inability to maintain its deed of trust lien after its contractual debt was merged into the judgment.<sup>72</sup> The doctrine of merger provides that when a valid and final judgment is rendered in favor of the plaintiff, the plaintiff cannot thereafter maintain an action on the original claim or any part thereof, although he may be able to maintain an action upon the judgment.<sup>73</sup> Here the court notes that while the debt maybe merged into the judgment, the deed of trust lien remains unsatisfied and so long as that claim remains unsatisfied, the right to pursue a non-judicial foreclosure exists.<sup>74</sup> While the court notes that this is a case of first impression in Texas, it clarifies a situation that frequently arises in workouts and foreclosures where multiple pieces of collateral exist.

Query—whether the outcome would be the same if the property was homestead, suggesting that the debt now being foreclosed on, a judgment debt, is not the same debt (the purchase money) that was initially the debt which secured the deed of trust?

#### E. CATTLE AUCTION AS RECOGNIZED MARKET

This year's review also produces a case which suggests that it may be possible for a cattle auction to meet the requirements of a "recognized" market for purposes of section 9.504 of the UCC, thereby alleviating the secured creditor from the obligation to give the debtor notice of the time, manner or method of a foreclosure sale of collateral.<sup>75</sup> Here the court reviews the various elements which would need to be demonstrated prior to a cattle auction being held as a recognized market. While the facts of this case did not supply the court with enough information to make a

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70. *Id.* at 919.

71. *Id.*

72. *Id.*

73. *Id.* at 920.

74. *Id.* at 921.

75. *Havins v. First Nat'l Bank of Paducah*, 919 S.W.2d 177 (Tex. App.—Amarillo 1996, no writ).

determination, the court notes that there was insufficient evidence on issues such as are how are the cattle auctioned—in mass or by lot? Were the cattle in the same condition as other cattle being offered for sale at that auction? What advertising occurred with regard to the auction?<sup>76</sup> The court goes on to note however, that a true “recognized market” is rare and that for cattle to meet that test may be difficult since no two cows are the same, whereas each share of IBM stock traded on an exchange has the same value that any other share would have.<sup>77</sup> I would suggest otherwise. Because of the expense and delay associated with conducting commercially reasonable sales a community standards test should be adopted allowing a creditor to dispose of collateral in any market the creditor can demonstrate is, in that local, a known, open market dealing in similar goods. For the courts to require the New York Stock Exchange equivalent will result in an almost complete judicial emasculation of the “recognized market” exception<sup>78</sup> to the requirement that the debtor receive notice of foreclosure. The court here appears to fall into the trap of equating a recognized market with a market of a type which is the subject of widely distributed standard price quotations. The exception for notice to the debtor applies if the type of property is customarily sold on a recognized market.<sup>79</sup> However, the same section of the statute distinguishes between a recognized market and a market which is subject to widely distributed price quotations.<sup>80</sup> Thus, the drafters of the code drew a distinction between recognized market and “New York Stock Exchange” type markets where there are widely distributed price quotations on fungible goods.

#### F. ARBITRATION WAIVER

Last year's Article reviewed cases concerning the enforceability of arbitration clauses. This year's cases demonstrate again that arbitration clauses are favored by the courts. In *Moore v. Morris*,<sup>81</sup> the court demonstrates to what extent arbitration is favored when it is the agreed remedy between parties. In this case, the plaintiff instituted, in 1993, a lawsuit claiming misrepresentation and violation of the DTPA. The defendant moved to abate the suit and compel arbitration. In 1994, the court ordered the case abated pending the completion of arbitration. Subsequently, neither party took any action to initiate arbitration. In April of 1995, the plaintiff filed a motion to set aside the Order of Abatement alleging that the defendant had waived its right to arbitration by failing to

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76. *Id.* at 182.

77. *Id.* at 183.

78. TEX. BUS. & COM. CODE ANN. § 9.504(c) (Tex. UCC) (Vernon 1991).

79. *Id.*

80. Section 9.504 provides, “The secured party may buy at any public sale and if the collateral is of a type customarily sold in a *recognized market* or is of a type which is the subject of *widely distributed standard price quotations* he may buy at a private sale.” TEX. BUS. & COM. CODE ANN. § 9.504(c) (Tex. UCC) (Vernon 1991) (emphasis added).

81. 931 S.W.2d 726 (Tex. App.—Austin 1996, no writ).

initiate the arbitration proceedings. While the trial courts set aside the order of abatement and refused to compel arbitration, the appellate court held the burden is on the party seeking relief to begin the arbitration process when the other party has properly asserted its right to arbitration.<sup>82</sup> This is an interesting and compelling outcome demonstrating the court's difference to the parties' contractual intent to arbitrate, given that the plaintiff brought its action by lawsuit and the defendant requested that the suit be abated and subject to arbitration and then the defendant failed to initiate the arbitration.

#### G. FIRREA SIX YEAR STATUTE OF LIMITATIONS

This year again presents a case interpreting under what circumstances the six-year statute of limitations created by the Financial Institutions Reform Recovery and Enforcement Act (FIRREA) applies. In *Cadle Co. v. 1007 Joint Venture*, the court held that the assignee of a promissory note from the Federal Deposit Insurance Corporation (FDIC), as receiver of a failed bank, does *not* automatically have standing to assert claims under that promissory note after the then applicable time bar under Texas law runs where the instrument was *not* in default at the time it was assigned by the FDIC.<sup>83</sup> This opinion highlights the necessity to examine the application of the FIRREA's language as it relates to the extension of limitations by noting that under the language of the statute, in order for the six-year period of limitations to apply, the note in issue must be in default either before the FDIC acquired it or while the FDIC owned it.<sup>84</sup>

However, other recent Texas cases are in accord with the Texas Supreme Court ruling in *Jackson v. Thweatt*<sup>85</sup> that the six-year statute of limitations is applicable to the FDIC successor's where that successor demonstrates that the requirements of FIRREA are met.<sup>86</sup>

Presumably, the adoption during the 1995 Legislative session of the revisions of Article 3, including section 3.118, which creates a six-year statute of limitations on instruments, and the provisions in section 3.101 which causes the amendments to be applicable to any cause of action accruing after the adoption of the amendments, will make moot any FIRREA based assignee claims, to the extent that they arose after the adoption of the revisions to Article 3.<sup>87</sup> Note since the extended statute of limitations created by section 3.118 applies only to negotiable instruments, the provisions of the Texas Civil Practice and Remedies Code section 16.003(a) and section 16.004(a) will continue to have application to

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82. *Id.* at 728.

83. *Cadle Co. v. 1007 Joint Venture*, 82 F.3d 102 (5th Cir. 1996).

84. *Id.* at 105.

85. 883 S.W.2d 171, 174 (Tex. 1994).

86. See *Holstein v. Federal Debt Management, Inc.*, 902 S.W.2d 31 (Tex. App.—Houston [1st Dist.] 1995, no writ); *AmWest Sav. Ass'n v. Shatto*, 905 S.W.2d 400 (Tex. App.—Austin 1995, writ denied).

87. Uniform Commercial Code—Negotiable Instruments, 75th Leg., R.S., ch. 921, § 1 (1995).

non-negotiable instruments. Furthermore the provisions of Chapter 51 of the Texas Property Code limiting two years from the date of foreclosure, the time period in which a deficiency action can be brought, will continue to have application.<sup>88</sup>

#### H. DTPA

Each year the banking practitioner must check to see what, if any, inroads have been made to the Texas Supreme Court's opinion in *Riverside National Bank v. Lewis*<sup>89</sup> that the Texas Deceptive Practices Act (DTPA) does not apply to a transaction involving the mere lending of money, and that the DTPA applies only to the sale of a good or service.<sup>90</sup> This year is no exception.

In *Humble National Bank v. DCV, Inc.*<sup>91</sup> the plaintiff, a company that had been defrauded out of money by its dishonest bookkeeper, alleged that the bank violated the DTPA by allowing the bookkeeper to exchange checks made payable to his employer for cashiers checks payable to a fictitious company controlled by the bookkeeper. A trial court verdict that the bank was guilty of violating the DTPA by allowing the company's bookkeeper, who was not an authorized officer of the company (according to corporate resolutions the company had on file with the bank), to exchange the check, was overturned on appeal. The trial court's jury verdict was based upon a breach of an express warranty under the DTPA. Apparently the jury determined that the bank's marketing slogan "A Tradition of Excellence" and policy of "know your customer" gave rise to a warranty that the bank would only allow authorized officers of the company to transact business at the bank. The appellate court found that the bank's failure to abide by the provisions of the corporate resolution on file was simply a breach of contract and not a breach of any express or implied warranty.<sup>92</sup> Efforts by the company to draw the bank within the reaches of the DTPA through the bank's slogan "A Tradition of Excellence" and its policy of "knowing its customer" failed because those actions did not represent warranties but merely opinion or puffing and lacked the specificity required to create an actionable warranty claim under the DTPA.<sup>93</sup>

Thus, this case demonstrates that even where a service (the payment of checks) is involved, a warranty must be made by the bank to give rise to an actionable claim.

This year's cases also provide a case which supports the *Riverside* view that transactions solely relating to the granting or denial of a credit facil-

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88. TEX. PROP. CODE ANN. §§ 51.003-.005 (Vernon 1995).

89. 603 S.W.2d 169 (Tex. 1980).

90. *Id.* at 174.

91. 933 S.W.2d 224 (Tex. App.—Houston [14th Dist.] 1996, n.w.h.).

92. *Id.* at 237.

93. *Id.* at 229.



ity do not give rise to a claim under the DTPA.<sup>94</sup> In *Clardy*, the appellate court is asked to address what constitutes "loan services." The Texas Supreme Court in *Riverside*, while acknowledging that the mere lending of money is not the sale of a good or service for purposes of the DTPA, held that there could be situations where a bank provides loan services which would represent the sale of a good or service.<sup>95</sup> In *Clardy*, a prospective customer sought credit from a lender and after conducting a review of the prospective company's financial information, the lender issued, and the prospective borrower accepted, a proposal letter. The proposal letter set forth the financial accommodations that the lender *would be willing to consider*. It also contained in bold print the statement "THIS PROPOSAL LETTER IS NOT A COMMITMENT TO LEND."

The prospective borrower, acknowledging that the proposal letter contains conditions, asserts that once it met those conditions it was entitled to a loan.<sup>96</sup> When the lender ultimately failed to fund the loan, the prospective borrower brought an action claiming that it qualified under the DTPA because it sought to purchase loan services from the lender. The court properly points out though that the loan application process here was not the objective or goal of the prospective borrower, its goal was the loan.<sup>97</sup> In fact, the loan services here, the due diligence review of the prospective borrower, was solely for the benefit of the lender. Thus, the prospective borrower does not qualify under the DTPA as it was not seeking a good or service in connection with the application and due diligence process.

This year's cases also produced two additional cases which, while they both hold that the bank has no liability, illustrate inroads to the *Riverside* case and identify areas where banks have DTPA exposure. In these two cases the bank was not the seller of goods or services but they were "intertwined" with the sale of a good or service to a consumer. It is the Texas Supreme Court's view that a person need not seek or require goods or services from the parties sued in order to meet the DTPA definition of a consumer as to that party.<sup>98</sup> In *English v. Union State Bank*,<sup>99</sup> the consumer purchased cattle from a customer of the bank and inquired of the bank as to whether or not the bank held a lien on the cattle being purchased and whether or not the seller was a good customer. The bank's response was that it held no lien on the cattle being sold and that the seller had not been a problem customer. It turns out that the seller had previously sold the cattle and that the bank did hold a lien on the cattle. However, since there was no evidence that the bank sought to

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94. *Clardy Mfg. Co. v. Marine Midland Business Loans*, 88 F.3d 347, 356 (5th Cir. 1996).

95. *Riverside*, 603 S.W.2d at 175.

96. *Clardy*, 88 F.3d at 353.

97. *Id.* at 356.

98. *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 541 (Tex. 1981).

99. 911 S.W.2d 829 (Tex. App.—Corpus Christi 1995), *rev'd on other grounds*, 40 Tex. Sup. Ct. J. 234 (Jan. 10, 1997).

enjoy the benefits of the sale of the cattle, and the bank neither encouraged nor discouraged the cattle purchase, (apparently the buyers inquiry occurred after he had contracted to purchase the cattle) there was no showing that the bank had a sufficient relationship to the transaction or sought to enjoy the benefits of the transaction in order to be a seller of goods or services under the DTPA.<sup>100</sup>

Similarly, in *Brown v. Bank of Galveston National Ass'n*,<sup>101</sup> the mere assignment of the Builder's and Mechanics Liens Contract to a bank, who did enjoy the lien which had been granted in favor of the builder, did not so inextricably intertwine the bank in the transaction, so as to make the bank a proper party.<sup>102</sup> Under the inextricably intertwined cases, there must be a showing that the extension of credit forms the means of making the sale or purchase.<sup>103</sup> As a further test under this doctrine, the creditor must be shown to have some connection either with the actual sales transaction or the deceptive act relating to financing the transaction.<sup>104</sup>

Apparently, in *Brown*, the appellant did not challenge the trial court's finding that the contractor and the bank were not inextricably intertwined, nor did Brown advance this theory of recovery in the trial court. Thus, the outcome in this case bore more of a relationship to the manner in which it was pled and proven than it does to enlighten the inextricably intertwined doctrine. In fact, the facts of this case are similar to the facts of the *Flenniken* case, where the Texas Supreme Court found that the bank and the builder and the Flennikens were inextricably intertwined in a similar assignment of builders and mechanics lien case.

#### I. BANK'S FIDUCIARY OBLIGATION ON AN INDIVIDUAL RETIREMENT ACCOUNT

The legal relationship between a bank, which permits the establishment of an individual retirement account (IRA), and the party that establishes that account were recently reviewed and the result was a holding that the bank's role did not give rise to the bank acting as the holder of legal title to property maintained in an IRA.<sup>105</sup> In this case, *Colvin* maintained in an individual retirement account, a two percent overriding royalty interest in the minerals of some producing property. The operator of the well paid all of Colvin's royalties directly to the bank for further credit into the IRA maintained in Colvin's name at the bank. Colvin subsequently sold his overriding royalty interests. The purchaser sought recovery from the bank of those funds in Colvin's IRA which represented royalties paid after the date of sale. The bank asserted that any attempted assignment by Colvin was ineffective, since the bank as the holder of legal title was

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100. *Id.* at 834.

101. 930 S.W.2d 140 (Tex. App.—Houston [14th Dist.] 1996, writ granted).

102. *Id.* at 144.

103. *Flenniken v. Longview Bank & Trust Co.*, 661 S.W.2d 705, 707 (Tex. 1983).

104. *Home Sav. Ass'n v. Guerra*, 733 S.W.2d 134, 136 (Tex. 1987).

105. *Colvin v. Alta Mesa Resources, Inc.*, 920 S.W.2d 688 (Tex. App.—Houston [1st Dist.] 1996, writ denied).

the only party who could acknowledge and consent to a sale. Instead the court held that the IRA was more like a safety deposit box than a trust and held that the party that established the IRA account was free to convey the contents thereof without authorization or joinder from the bank.<sup>106</sup>

### J. GARNISHMENT

This Survey brings us two interesting garnishment cases. In *Westerman v. Comerica Bank-Texas*,<sup>107</sup> a judgment creditor garnished Westerman's account at Comerica and Comerica paid the judgment creditor the balance on deposit in Westerman's account. Westerman appealed the default judgment which gave rise to the garnishment and the default judgment was set aside by the appellate court. Westerman then brought an action against Comerica asserting that the bank improperly performed its affirmative duties to him as a customer to assert his defenses and to investigate the underlying garnishment writ before complying with it. The court held that Comerica held no duty to assert any defenses or to investigate the underlying writ before compliance and noted that Chapter 63.001 of the Texas Civil Practice and Remedies Code provides that a writ of garnishment is available if the plaintiff has a valid subsisting judgment.<sup>108</sup> Westerman also argued that the garnishment was improper because the underlying judgment was later set aside. The court held that the garnishment argument was not grounds for recovery against Comerica which, as the recipient of a garnishment, would have no way of knowing the outcome of any possible appeal on the underlying judgment.<sup>109</sup> Finally, Westerman argued that Comerica was required to give him notice of the writ before it complied with it, thereby giving Westerman an opportunity to preserve the funds he had in his account by asserting his various remedies against the judgment debtor before that money was paid over to the judgment creditor. The court noted, however, that there is no rule or statute that requires a garnishee to provide notice to the judgment debtor that garnishment proceedings have been initiated against his property.<sup>110</sup>

The other garnishment case involves the scope of the garnishee's duty to investigate and/or turn over funds that may belong to the judgment debtor. In *Overton Bank and Trust N.A. v. PaineWebber, Inc.*,<sup>111</sup> a judgment creditor filed an application for garnishment in which he stated that he:

had reason to believe, and does believe, that Garnishee is indebted to or has in hand effects belonging to Elsbree [the judgment debtor], which are being held nominally in the name of Remington Group, Inc. (Remington). This indebtedness includes, but is not limited to,

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106. *Id.* at 691.

107. 928 S.W.2d 679 (Tex. App.—San Antonio 1996, writ denied).

108. *Id.* at 681.

109. *Id.* at 682.

110. *Id.*

111. 922 S.W.2d 311 (Tex. App.—Fort Worth 1996, no writ).

all effects or monies held by Remington Group in account numbers 60009092 and 60009498.<sup>112</sup>

The actual writ of garnishment lists only Elsbree as the judgment debtor. The bank, however, in response to the writ, admitted it had deposit funds in account number 60009092, but the account was styled Remington Group, Inc. and that Elsbree was one of the authorized signors on that account. However, the bank did not freeze or place a hold on that account. The court noted that the supreme court had previously held that a bank subject to a writ of garnishment may rely on its deposit agreement when determining to whom it is indebted.<sup>113</sup> Thus, the fact that Elsbree was a signatory on a corporate account did not alter the contractual relationship between the bank and that corporate customer. The court further pointed out that if the creditor wants to challenge title in the funds held by a third party, the creditor must seek a writ of garnishment naming the nominal owner, and it would then be the court's responsibility, not the bank's responsibility, to determine true ownership.<sup>114</sup>

#### K. SECTION 26.02 NOTICES

In an effort to stem the tide of the then rising number of lender liability cases, the Legislature in 1989 passed the so-called "Super Merger Clause" statute.<sup>115</sup> This statute provides, among other things, that no terms of a loan agreement, in which the amount to be lent exceeds \$50,000, are enforceable unless they are in writing.<sup>116</sup> The statute goes on to provide that if the lender gives the appropriate written notice, the terms of any such loan agreement cannot be varied by oral agreements that occur before or contemporaneous with the execution of loan documents.<sup>117</sup>

In an interesting attempt to introduce oral testimony, the Plaintiff's in *Maginn v. Norwest Mortgage, Inc.*<sup>118</sup> alleged that the failure of the financial institution to post the notices required by section 26.02(g) of the statute prevented the financial institution from raising the statute as a defense. Section 26.02(g) of the statute provides:

All financial institutions shall conspicuously post notices that inform borrowers of the provisions of this section. The notices shall be located in such manner and in places in the institutions so as to fully inform borrowers of the provisions of this section. The Finance Commission of Texas shall prescribe the language of the notice.<sup>119</sup>

However, the court notes in reviewing the statute that while the statute provides that the failure to place in the loan documents the required written notice that there are no oral agreements between the parties results in

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112. *Id.* at 312.

113. *Id.* (citing *Bank One, Texas, N.A. v. Sunbelt Sav.*, 824 S.W.2d 557 (Tex. 1992)).

114. *Overton*, 922 S.W.2d at 313-14.

115. TEX. BUS. & COM. CODE ANN. § 26.02 (Tex. UCC) (Vernon 1989).

116. *Id.* § 26.02(b).

117. *Id.* § 26.02(d).

118. 919 S.W.2d 164 (Tex. App.—Austin 1996, no writ).

119. TEX. BUS. & COM. CODE ANN. § 26.02(g) (Tex. UCC) (Vernon Supp. 1996).

the inability of the financial institution to keep out oral testimony, the legislature imposed no penalty for failure to post the notice required by section 26.02(g). The author takes great comfort in this court's holding as, despite the author's visit to numerous banks, the author has yet to see a section 26.02 notice posted.

#### L. DISCLOSURE OF FINANCIAL INFORMATION

A bank which obtains a customer's approval, in a credit card application, to disclose its credit experience with others, has a qualified or conditional privilege subsequently to disclose its credit experience.<sup>120</sup> However, in the *Calhoun* case the court points out that this privilege can be lost where false information is disseminated and such dissemination is made with malice.<sup>121</sup> The court goes on to point out that to show malice, the burden of proof is on the plaintiff to show that the statements were made with knowledge that they were false or with reckless disregard to the truth.<sup>122</sup>

### III. STATUTORY AND REGULATORY CHANGES

#### A. FEDERAL

##### 1. Subchapter S Elections

The Small Business Job Protection Act of 1996,<sup>123</sup> together with prior amendments to Subchapter S of the Internal Revenue Code, have finally provided an effective mechanism by which certain financial institutions can achieve partnership tax treatment. Last year's Survey reflected that the efforts to create in Texas a limited banking association had failed as a result of the IRS' private letter ruling which indicated that any bank organized as a Texas limited partnership would not be classified as a partnership for tax purposes.<sup>124</sup> While the limits on the mechanism provided for in the Small Business Job Protection Act of 1996, by which a bank can make a Subchapter S election, do not provide as much flexibility as the earlier Texas effort, they do provide relief for closely held banks.

In order to obtain partnership tax treatment a bank must qualify for the Subchapter S treatment and file with the IRS a Subchapter S election. A Subchapter S election requires the consent of all the shareholders, but once made, the income of the business is directly taxed to its shareholders whether distributed or not.<sup>125</sup> To be eligible, the bank must be a domestic corporation having no more than one class of stock outstanding, no nonresident alien as a shareholder, and no shareholder that is not an indi-

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120. *Calhoun v. Chase Manhattan Bank (U.S.A.), N.A.*, 911 S.W.2d 403 (Tex. App.—Houston [1st Dist.] 1995, no writ).

121. *Id.* at 409.

122. *Id.*

123. Pub. L. No. 104-188, § 1101, 110 Stat. 1755 (Aug. 20, 1996).

124. Priv. Ltr. Rul. 95-51-032 (Sept. 27, 1995).

125. See generally 26 U.S.C. § 1361 (1994).

vidual.<sup>126</sup> A bank can make the Subchapter S election for any tax year beginning January 1, 1997. On that date, and as a result of The Small Business Job Protection Act of 1996, the limitation on the maximum number of shareholders a Subchapter S corporation can have increases from thirty-five to seventy-five.<sup>127</sup> While banks become eligible, if they meet the above criteria, to make a Subchapter S election, their use of the reserve method of accounting for bad debt will disqualify them from the advantages of Subchapter S.<sup>128</sup>

The obvious benefit of making a Subchapter S election, where dividends are distributed, is to eliminate the federal income tax on the net income of the bank and the double tax that occurs when dividends are paid to shareholders and taxed again at the shareholder level as income. This is a benefit that banks have long sought, and now that it has been achieved represents welcome tax relief that has long been available to closely held corporations that were not financial institutions.

## 2. *Golden Parachutes*

Effective April 1, 1996, the federal regulators adopted final regulations which limit, in certain circumstances, the types and amounts of "golden parachutes" that can be provided by banks without the regulators prior written approval.<sup>129</sup> Golden parachutes are defined to be any plan by which IAPs<sup>130</sup> receive certain severance payments. The regulation does not include payments which are made pursuant to a pension or retirement plan, payments that are made pursuant to a defined benefit plan,<sup>131</sup> any payment made pursuant to a bona fide deferred compensation plan,<sup>132</sup> a payment made by reason of death or termination by disability, or a payment made pursuant to a nondiscriminatory severance pay plan or arrangement which provides for payment of severance benefits to all eligible employees.<sup>133</sup>

The limits on golden parachute payments apply to "troubled financial institutions" which include a bank which has a CAMEL Rating of 4 or 5 or is subject to a proceeding to terminate its insurance.<sup>134</sup> Where a payment is made it may not exceed twelve months' salary, provided, however, that any insured deposit institution subject to a CAMEL Rating of 4 or 5 must obtain the consent of its primary federal regulator prior to mak-

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126. *Id.* § 1361(b)(1)(A).

127. *Id.*

128. *Id.* § 1361(b)(2)(A).

129. 12 C.F.R. §§ 359.1-.5 (1996).

130. IAP's (Institutionally Affiliated Parties) are defined to include any director, officer, employee or controlling stockholder. *See* 12 C.F.R. § 359.1(h) (1996).

131. *E.g.*, an employee welfare benefit plan as defined in § 3(1) of the Employee Retirement Income Security Act of 1974. 29 U.S.C. § 1002(1) (1996).

132. *E.g.*, a voluntary election to defer pledges as set forth in the regulation at 12 C.F.R. § 359.1(d) (1996).

133. *See id.* § 359.1(f)(2).

134. *Id.* § 359.1(f)(ii)(D) & (E).

ing such a payment.<sup>135</sup>

Unlike the restrictions on golden parachute payments, the restrictions on indemnification apply to all insured institutions.<sup>136</sup> However, the limitations on indemnifications deal only with administrative proceedings or civil actions initiated against an IAP by any federal banking agency.<sup>137</sup> Similar to the provisions of the Texas Banking Act of 1995, and its predecessor, this regulation requires an affirmative act by the non-interested board members before the acts of a particular IAP can be indemnified.<sup>138</sup> Indemnification of an IAP is permitted in administrative or civil enforcement actions under several situations, including where the board determines, after investigation, that the best interests of the institution would be served and the safety and soundness of the institution would not be adversely affected.<sup>139</sup> Obviously, a heavy burden is put on the non-interested directors before they can safely offer such an indemnification.<sup>140</sup>

## B. STATE

### 1. Policy Memoranda

After the passage of the Texas Banking Act of 1995 the State Banking Department continued its process of updating and reviewing the regulatory environment within which state banks operate. This resulted in the announcement by the Texas Banking Department that of the twenty seven existing policies fifteen would be rescinded and the remaining twelve were substantially rewritten.<sup>141</sup> Among the policies which were rescinded was the policy that state banks must maintain a primary capital ratio of at least six percent. The removal of this state requirement means that state banks in Texas are subject to the federal minimum capital requirements<sup>142</sup> which provide a more liberal capital requirement. This constitutes a significant liberalization of the capital requirements applicable to tax chartered banks in Texas.

After the Commissioner's action in rescinding the twenty-seven existing policies, the twelve remaining policies were published and are num-

135. *Id.* § 359.4(a)(3).

136. *Id.* § 359.5.

137. *Id.* § 359.5(a).

138. *Id.* § 359.5(a)(1) and (2).

139. *Id.* § 359.5(a)(2).

140. See Texas Banking Act of 1995, TEX. REV. CIV. STAT. ANN. art. 342-3.007 (Vernon 1995); TEX. BUS. CORP. ACT ANN. art. 2.35-1 (Vernon 1985).

141. October 14, 1996 Press Release, Texas Department of Banking (on file with the author).

142. See 12 C.F.R. § 325.103 which provides, among other matters, that a "well capitalized" bank is one which has a total risk-based capital ratio of 10.0 or greater; a Tier 1 risk-based capital ratio of 6.0 or greater and a leverage ratio of 5.0 or greater. It is the leverage ratio of 5.0 or greater which most closely equates to the prior Texas requirement of 6% capital. The regulation goes on to provide that an adequately capitalized bank has, for example, a leverage ratio of 4.0% or greater or a 3.0% leverage ratio if the bank has an overall composite Camel rating of 1.

bered 1001 through 1012, each issued July 31, 1996.<sup>143</sup>

## 2. *Loan Limits*

Additional recent changes by the Texas Department of Banking include the adoption of some new regulations. Those include the regulation which expands upon certain exceptions to the statutory legal lending limit.<sup>144</sup> These new rules adopt attribution tests, similar to those under the federal scheme, for purposes of determining when a third party guarantor shall have a loan attributed to him for purposes of determining the bank's loan amount.<sup>145</sup> Previously no distinction was made between a loan or guaranty for purposes of determining a bank customer's loan limit exposure. Now where the customer is a guarantor, the loan will not count against their legal lending limit unless they receive a direct benefit from the loan or the expected source of repayment is from that guarantor.<sup>146</sup>

## 3. *Loan Fees*

Under the previous Banking Code fees were expressly prohibited in certain situations and no statutory authority existed for their charge where they were not prohibited. The Loan Fees and Charges Regulation<sup>147</sup> adopted this summer makes clear that fees may be charged or reimbursement sought on any (i) first lien residential loan secured by real estate, (ii) any loan the purpose of which is for other than personal, family or household use and (iii) loans for personal family or household purposes that are repayable in only one installment.<sup>148</sup>

What is interesting about this regulation is that not only does it recognize a bank's right to pass on to the borrower outside expenses incurred (i.e., appraisals, survey, document preparation, title insurance, credit reports, escrows and filing fees etc.) it provides that, so long as the fee is not directly paid to a bank employee, fees may be paid directly to the bank itself for services provided by bank employee.<sup>149</sup> So, for example the bank can pass on to its borrower the "in house" cost or overhead associated with underwriting a loan, preparing documents to evidence the loan, appraise the collateral and, presumably prepare the same for foreclosure and/or foreclose upon the same. These fees must be reasonably related to the costs incurred by the bank. This allows the bank to pass on to the borrower costs that they are currently absorbing. Where a bank does not know how much of its overhead is allocated to any particular function

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143. See Interpretive Statements to Texas Banking Act with Related Provisions and Laws as amended to the 1995 Regular Session available through the Texas Department of Banking.

144. See Texas Banking Act, TEX. REV. CIV. STAT. ANN. art. 342-5.201 (Vernon Supp. 1997) for the statutory loan limits and 7 TEX. ADMIN. CODE § 12.1 (West 1996) for the regulations relating thereto.

145. *Id.* § 12.9.

146. *Id.* § 12.9(b).

147. *Id.*

148. *Id.*

149. *Id.* § 12.32.



that they desire to charge for, the regulation allows them to rely upon a cost analysis prepared by the Federal Reserve Board.<sup>150</sup>

Finally, the regulation provides that fees charged in accordance with the regulation are not interest. While it has long been the law that fees charged for identifiable services are not interest, where those services are performed by the bank and have been traditionally absorbed as a part of their overhead, a court's view of the result of this regulation will be interesting.

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150. *Id.* § 12.32(c)(1).