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John Krahmer

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COMMERCIAL TRANSACTIONS

John Krahmer*

LEGISLATIVE action took center stage in the area of commercial transactions during this Survey period. In its 1999 legislative session, the Texas Legislature not only resuscitated the revised article 5 on letters of credit that failed to pass in the 1997 session, but also became one of the first jurisdictions to enact the revised article 9 on secured transactions.¹ This Article not only includes the traditional discussion of selected cases decided during the Survey period, but also includes a summary (albeit brief) of important changes made by the 1999 legislative revisions.²

I. DEFINITIONS & GENERAL PROVISIONS

A. "CONSPICUOUS"

As illustrated by *Douglas Cablevision IV, L.P. v. Southwestern Electric Power Co.*,³ the Texas Business and Commerce Code ("Code") definition of "conspicuous" has become firmly entrenched in the general Texas law of contracts. In *Douglas*, an employee of a house-moving company suf-

* Professor of Law and Foundation Professor of Commercial Law, Texas Tech University. B.A., J.D., University of Iowa; LL.M., Harvard University.

1. The National Conference of Commissioners on Uniform State Laws (NCCUSL) approved a revision of the Official Text of article 5 in 1995. See U.C.C. §§ 5-101 to 9-117 (1995). The revision won a majority vote in both the House and Senate during the 1997 legislative session, but unexpectedly failed to win passage because of a point of order raised by Representative Wohlgemuth on May 30, 1997. See H.J. OF TEX., 75th Leg., R.S. 3809-10 (1997). This point of order prevented final passage of some fifty-two bills, including article 5, and occurred too late in the session to be remedied. The revised article 5 was reintroduced in the 1999 legislative session and won final approval with an effective date of September 1, 1999. See Act of April 7, 1999, 76th Leg., R.S., ch. 4, § 1, 1999 Tex. Gen. Laws 7.

NCCUSL approved a complete revision of article 9 in 1998. See U.C.C. §§ 9-101 to 9-708 (1995). The revised article 9 was passed in Texas during the 1999 legislative session with an effective date of July 1, 2001. See Act of June 18, 1999, 76th Leg., R.S., ch. 414, § 1.01, 1999 Tex. Gen. Laws 2639. The other states approving the revised article 9 during their 1999 legislative sessions were Arizona, California, Maryland, Montana, Nebraska, and Nevada. All of these jurisdictions used the date of July 1, 2001 to conform to the uniform effective date proposed by NCCUSL. See U.C.C. § 9-701 (1995); Act of June 18, 1999, 76th Leg., R.S., ch. 414, § 3.01, 1999 Tex. Gen. Laws 2747.

2. As enacted in Texas, 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 1994 & Supp. 1999). The Uniform Commercial Code Official Text uses the term "article" to refer to the various subject matters it covers; the Texas enactment uses the term "chapter" instead. Thus, "article 5: Letters of Credit" in the Official Text becomes "chapter 5: Letters of Credit" in the Texas Code.

3. 992 S.W.2d 503, 507 (Tex. App.—Texarkana 1999, pet. denied).

fered serious injuries from electric shock when a television cablewire attached to a power company utility pole came into contact with an electric power line attached to the same pole. The power company and the cable company both settled with the injured employee, but the power company sought indemnity from the cable company under the terms of a contract that required the cable company to indemnify the power company for any damage caused by its negligent acts or omissions.⁴ The court noted that the indemnity clause, while sufficient to meet the "express negligence doctrine,"⁵ failed to meet the requirement that it also be "conspicuous."⁶ In applying the Code standard, the court noted that the operative language in the indemnity clause was "contained in two sentences spanning roughly one half page of a thirteen-page document."⁷ The court further noted that the clause was not titled with a descriptive heading and was not designed to "draw the attention of a reasonable person" to it.⁸ The court held that, as a matter of law the indemnity provision was not conspicuous and was, therefore, unenforceable.⁹ The court also rejected an argument by the power company that the Code definition applies only to *form* contracts and opined that the definition should apply to "any document which contains a risk-shifting clause, regardless of whether the document is original, preprinted, computer-generated, or used without substantial changes for numerous parties."¹⁰ Even assuming, however, that the Code definition did apply only to form contracts, the contract in question contained blanks for the insertion of dates, names, and pole locations and, in the view of the court, was a form contract.¹¹ Although the discussion by the court regarding application of the Code definition of "conspicuous" to contracts of all types is merely an alternative analysis of the contract in question, this may be the most important part of the opinion for the contract drafter. Coupled with its remarks about the lack of

4. The contract between the power company and the cable company was a lease agreement permitting the cable company to attach television cables to designated power company utility poles as part of the cable company's television distribution system.

5. *Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705, 707-08 (Tex. 1987). The express negligence doctrine requires that a party seeking indemnity from the consequences of its own negligence express this intent in specific terms contained within the contract between the parties.

6. In *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 511 (Tex. 1993), the court held that the definition of "conspicuous" contained in § 1.201(10) of the Code would be used as the standard against which contract terms of all types would be measured, regardless of whether the contract was otherwise one specifically covered by the Code. In *Dresser*, the court also held that whether a clause is conspicuous is a question of law for the court.

7. *Douglas Cablevision*, 992 S.W.2d at 509.

8. *Id.*

9. *See id.* at 510.

10. *Id.* at 507. Form contracts, such as insurance contracts or preprinted sales contracts, are also known as "contracts of adhesion." *See, e.g.*, Frederick Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION—DECIDING APPEALS*, 362-71 (1960); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1176-77 (1983).

11. *See Douglas Cablevision*, 992 S.W.2d at 508.

descriptive titles and the non-distinctive nature of the type font used for the indemnity clause, *Douglas* indicates that a cautious drafter should make a serious effort to include paragraph or section titles and bold-faced type whether or not the contract is one that would be considered a classic form contract. In this day of word-processing software and an almost infinite variety of type styles, *Douglas* may forewarn a more stringent attitude toward reviewing contracts for "conspicuous" terms.

B. "GOOD FAITH"

Litigation surrounding the issue of good faith continued unabated during the Survey period. In *El Paso Natural Gas Co. v. Minco Oil & Gas, Inc.*,¹² the court held that contract formation or termination is distinct from contract modification and, therefore, is not within the Code's requirement that modifications be made in good faith.¹³ The court reasoned that an agreement between the parties to terminate contracts for the purchase of natural gas, together with a release of all mutual liabilities between the parties, was not a modification of the prior contracts but was instead the formation of a new contract that did not involve the performance or enforcement of an existing contract to which the Code obligation of good faith applied.¹⁴ Based on this distinction between termination and modification, the court reversed the lower court decision applying a good faith standard to the termination agreements and entered judgment that the terminations released the buyer from any further liability to the sellers under the gas purchase contracts.¹⁵ The court added, however, that even though the standard of good faith did not apply to contract formation, the conduct of a party in the formation of a contract was still subject to the Code doctrine of unconscionability.¹⁶

Acceleration and foreclosure actions have been a fertile source for claims by debtors asserting a lack of good faith on the part of creditors.¹⁷

12. 8 S.W.3d 309 (Tex. Nov. 18, 1999, pet. filed).

13. See *id.* at 313-14.

14. See *id.* Good faith is defined in section 1.201(19) as "honesty in fact in the conduct or transaction concerned." TEX. BUS. & COM. CODE ANN. § 1.201(19) (Vernon 1994). Section 1.203 provides, "Every contract or duty within this title imposes an obligation of good faith in its performance or enforcement." *Id.* § 1.203. The comments to § 2.209 state, in pertinent part, that "modifications . . . must meet the test of good faith imposed by this Act. The effective use of bad faith to escape performance on the original contract terms is barred, and the extortion of a 'modification' without legitimate commercial reason is ineffective as a violation of the duty of good faith." *Id.* § 2.209 cmt. 2.

15. See *El Paso Natural Gas*, 8 S.W.3d at 312. The lower court decision was reported at 964 S.W.2d 54 (Tex. App.—Amarillo 1998, pet. granted) and was described in last year's Survey. See John Krahmer, *Commercial Transactions*, 52 SMU L. REV. 813, 816 (1999).

16. See 8 S.W.3d at 312. As to one of the releases an issue of unconscionability was raised but the court found that it was unnecessary to decide that issue. See *id.* at 313.

17. See, e.g., *F.D.I.C. v. Coleman*, 795 S.W.2d 706, 708-09 (Tex. 1990) (stating that good faith is required only if there is a "special relationship" between the parties; ordinary debtor-creditor transactions do not create a special relationship); *Nance v. R.T.C.*, 803 S.W.2d 323 (Tex. App.—San Antonio 1990), writ denied *per curiam*, 813 S.W.2d 154 (Tex. 1991) (where no special relationship between debtor and creditor existed); *Pack v. First Federal Savings & Loan Ass'n of Tyler*, 828 S.W.2d 60 (Tex. App.—Tyler 1991, no writ).

In *Commercial National Bank v. Batchelor*,¹⁸ a bank accelerated the balance due on a series of loans after the debtor defaulted. The bank refused to renegotiate or renew the loans and told the debtor that he could sell the property securing the loans to a buyer who had expressed an interest in buying the property or face foreclosure proceedings. The bank did not disclose that it had already obtained an appraisal of the property. The debtor chose to sell the property himself and the sale proceeds were credited to the amount of the outstanding debt. The bank subsequently sued for the deficiency. The debtor contended that the bank had not acted in good faith by refusing to renegotiate or renew the loans and by failing to disclose its knowledge of the appraised value of the property. The jury found in the debtor's favor on the issue of good faith and based on this finding, the trial court entered a take-nothing judgment against the bank.

On appeal, the court reversed the trial court's decision because the actions of the bank did not support a conclusion that it had failed to act in good faith. The appellate court ruled that the contract between the parties did not establish any duty on the part of the bank to disclose its private appraisals, nor did it create a fiduciary relationship with the debtor. Furthermore, there was no contractual obligation requiring the bank to renegotiate or renew the loans. The court rendered judgment in favor of the bank because there was no evidence to support the jury finding of a lack of good faith.¹⁹

In *Meadowbrook Gardens, Ltd. v. WMFMT Real Estate Limited Partnership*,²⁰ the court held that the creditor had given proper notice of an intent to accelerate and that subsequent notice of foreclosure by trustee's sale was effective as a notice of the acceleration itself. The court further held that the creditor had not violated the express terms of the note and deed of trust permitting the debtor to pay any past due installment prior to the due date of the next installment by scheduling a foreclosure sale before the next due date where the debtor had been in default for more than three years. The express terms of the note and deed of trust dealt only with payment of past due installments; it did not address when the debtor would be required to pay the entire balance due following acceleration. The court affirmed the judgment in favor of the creditor.²¹

II. SALE OF GOODS

A. STATUTE OF FRAUDS

Under the Code statute of frauds provision, a contract for the sale of goods is enforceable if there is a minimal writing stating a quantity and

(holding that the duty of good faith was fulfilled by creditor who disclosed knowledge about contract to sell property to another purchaser).

18. 980 S.W.2d 750 (Tex. App.—Corpus Christi 1998, no pet.).

19. *See id.* at 754.

20. 980 S.W.2d 916 (Tex. App.—Fort Worth 1998, pet. denied).

21. *See id.* at 919.

signed by the party against whom enforcement is sought.²² Even if no writing exists, the statute may be satisfied if the alleged contract falls within one of the statutory exceptions.²³ In *Flameout Design & Fabrication, Inc.*,²⁴ the court held that a letter of intent, even when read together with a parts list and a cover letter, did not satisfy the statute because the writings failed to indicate the existence of an agreement between the parties.²⁵ The seller also failed to establish an equitable estoppel because there was no showing beyond a conclusory statement that the buyer had made any false representation of a material fact.²⁶ The seller was more fortunate in *Posey v. Broughton Farm Co.*²⁷ where, although the agreement was admittedly only an oral understanding, the buyer, acting through an agent, had taken delivery of warehouse receipts. By virtue of this delivery, the court held that the seller met the part performance exception to the statute of frauds for the quantity of goods represented by the warehouse receipts.²⁸ An interesting twist to this case, however, is that the seller's action was against the agent and not against the actual buyer because the agent did not disclose that she was acting for an undisclosed principal when she accepted the warehouse receipts. The agent attempted to avoid liability on the ground that disclosure of her agency capacity occurred when she paid for the warehouse receipts with drafts drawn against the account of her principal. The court properly recognized that this disclosure came too late since the contract became enforceable under the part performance exception to the statute of frauds as soon as the warehouse receipts were delivered; at that point, the agent had not yet disclosed her agency capacity.²⁹

The seller in *Artemis Seafood, Inc. v. Butcher's Choice, Inc.*³⁰ was also able to satisfy the statute of frauds without having a signed writing where the buyer accepted delivery of large quantities of frozen seafood which were later invoiced to the buyer and for which the buyer failed to pay. The court held that the seller met both the "merchant's exception" and

22. See TEX. BUS. & COM. CODE ANN. § 2.201(a) (Vernon 1994).

23. The exceptions include a confirming writing to which no objection is given, see TEX. BUS. & COM. CODE ANN. § 2.201(b) (Vernon 1994); specially manufactured goods, § 2.201(c)(1); admission in pleadings, testimony, or otherwise in court that a contract was made, § 2.201(c)(2); and goods for which payment has been made or accepted or goods which have been received or accepted, § 2.201(c)(3). Texas caselaw has added an additional exception to the statutory requirements if a party is equitably estopped from asserting the statute of frauds as a defense. See, e.g., *Brookside Farms v. Mama Rizzo's, Inc.*, 873 F. Supp. 1029, 1033 (S.D. Tex. 1995) (stating that Texas recognizes promissory estoppel as an exception to statute of frauds); "Moore" *Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 937 (Tex. 1972) (stating that promissory estoppel is available where party has promised to put oral agreement in writing). The estoppel exception also appears as a statutory provision in section 2A.201(d)(4), governing leases of personal property. See TEX. BUS. & COM. CODE ANN. § 2A.201(d)(4) (Vernon 1994).

24. 994 S.W.2d 830 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

25. See *id.* at 835.

26. See *id.* at 836.

27. 997 S.W.2d 829 (Tex. App.—Eastland 1999, pet. denied).

28. See *id.* at 831.

29. See *id.*

30. 1999 WL 608853 (N.D. Tex. 1999).

the part performance exception in the statute of frauds and allowed recovery for the invoiced amounts.³¹

B. WARRANTIES

The overlap between the theories of negligence, strict liability, and warranty under Texas law has been noted in several prior Survey articles.³² The extent of this overlap is nicely illustrated by a decision reached during this Survey period in *Hyundai Motor Co. v. Rodriguez*,³³ where an injured plaintiff alleged that a motor vehicle was not crashworthy because of design defects in the roof structure and passenger restraint system. The supreme court held that when a case is tried on theories of negligence, strict liability, and breach of implied warranty, the trial court is not required to submit separate instructions on each theory when the issue to be determined by the jury is identical.³⁴ In *Rodriguez*, the controlling issues regarding the alleged design defects were identical and a single instruction on this issue was proper to avoid confusing the jury. The Court noted that, to the extent some elements of a case may differ from one theory to another, separate instructions may be required. For example, causation on a breach of warranty theory requires a finding of proximate cause but a strict liability theory requires only a finding of producing cause. When such differences exist, separate instructions on those matters is required.³⁵

Another area of overlapping claims concerns the relationship between common law or Code warranties and the Texas Deceptive Trade Practices Act (DTPA).³⁶ Perhaps the most intriguing warranty case decided during the Survey period was *Arthur's Garage, Inc. v. Racal-Chubb Security Systems, Inc.*,³⁷ where a commercial customer (a lessee of business premises) sued the fire and burglar alarm system installer for improper installation. The system failed to detect a fire on the premises in a timely manner due to improper wiring of smoke detectors, which were a part of the system. The fire caused damages of some \$58,000. Although suit was brought on a variety of legal theories, the issues on appeal centered on the enforceability of a limitation of liability clause, which limited damage recovery to a maximum amount of \$350 if the system failed to perform, and on an indemnity clause, which protected the defendant from third-party

31. See *id.* at *2-3. The "merchant's exception" is applicable when a writing in confirmation of a contract is sent between merchants and no objection is made to its contents within ten days after it is received. See TEX. BUS. & COM. CODE ANN. § 2.201(b) (Vernon 1994).

32. See, e.g., John Krahmer, *Commercial Transactions*, 51 SMU L. REV. 783, 787-91 (1998); John Krahmer, *Commercial Transactions*, 49 SMU L. REV. 775, 781-85 (1996); John Krahmer, *Commercial Transactions*, 48 SMU L. REV. 973, 979-82 (1995).

33. 995 S.W.2d 661 (Tex. 1999).

34. See *id.* at 665.

35. See *id.* at 667-68.

36. The Texas Deceptive Trade Practices Act appears as TEX. BUS. & COM. CODE ANN. § 17.43 -.63 (Vernon 1994).

37. 997 S.W.2d 803 (Tex. App.—Dallas 1999, no pet.).

claims.³⁸ The court held that the limitation of liability clause was effective with respect to an express warranty claim asserted by the plaintiff because the clause was part of the basis of the bargain between the parties arising from the same contract that created the express warranty.³⁹ The plaintiff also alleged, however, that the limitation of liability was ineffective with regard to the common law implied warranty of good and workmanlike performance in the repair or modification of existing tangible goods or property announced by the Texas Supreme Court in *Melody Home Manufacturing Co. v. Barnes*.⁴⁰ In *Melody*, the Supreme Court also held that this implied warranty could not be waived or disclaimed.⁴¹ The court in *Arthur's Garage* was willing to recognize the existence of this implied warranty in the abstract and its application to the repair and servicing of the alarm system. However, because the defendant had never repaired, modified, or serviced the system, the court held that no implied warranty had arisen.⁴² Since this warranty never came into existence, the defendant could not be held liable for its breach. Applying the limitation of liability clause to the implied warranty theory was, therefore, moot.

This did not end the case, however, because the plaintiff had also alleged misrepresentation and unconscionability claims under the DTPA that were not dependent on the existence of a warranty whether express or implied. As to these claims, the court held that the limitation of liability clause was unenforceable because it attempted to waive rights created by the DTPA in violation of the "no-waiver" provision contained in the act itself.⁴³ The plaintiff also contended that an indemnity clause contained in the contract did not meet the fair notice requirements of conspicuousness and unambiguous terms. On this point, the court held that the language of the indemnity clause was not ambiguous in its coverage of any negligence, breach of warranty, or strict liability claims asserted by third parties against the defendant, and that the clause was prominently titled in capital letters and was conspicuous.⁴⁴ Under this clause, the de-

38. See *id.* at 808. The limitation of liability clause operated to cap damages for the lessee's claim against the defendant. The indemnity clause operated to protect the defendant from third party claims against the defendant because of the loss or destruction of any property of such third parties located on the leased premises. In this case, the landlord, as lessor of the premises, asserted a third-party claim and the defendant sought attorney's fees from the lessee under the indemnity clause.

39. See *id.* at 812. On this point the court relied on the ruling announced in *Southwestern Bell Telephone Co. v. FDP Corp.*, 811 S.W.2d 572 (Tex. 1991). The court there held that if a warranty can be disclaimed under the law creating it, a limitation of liability clause is effective despite the "no-waiver" provision as it then appeared in the DTPA. See *id.* at 577. Although the "no-waiver" provision has since been modified to permit a waiver that complies with specific statutory requirements, the reasoning in *Southwestern Bell* still stands as to waivers that fail to comply with the DTPA. See TEX. BUS. & COM. CODE ANN. § 17.42 (Vernon Supp. 2000).

40. 741 S.W.2d 349, 354 (Tex. 1987).

41. See *id.* at 355.

42. See *Arthur's Garage*, 997 S.W.2d at 814.

43. See *id.* at 811. As to the "no-waiver" provision in the DTPA, see *supra*, note 40.

44. See *Arthur's Garage*, 997 S.W.2d at 815. The fair notice requirements are discussed in more detail in the text at *supra*, note 3.

fendant was entitled to recover attorney's fees incurred in defending a claim asserted by the owner of the building who had leased the property to the plaintiff.⁴⁵

Negligence, breach of warranty, strict liability, and DTPA claims are not the only instances where overlapping claims can go to a jury under a broad form submission. This point is illustrated by *Paul Mueller Co. v. Alcon Laboratories, Inc.*,⁴⁶ where a buyer properly revoked acceptance of stainless steel tanks because of rust and corrosion problems and sued for both breach of contract and for breach of warranty. The seller argued that the trial court erred because it did not submit damage issues separately for the breach of contract and breach of warranty claims. The court of appeals held that, because the incidental and consequential damages flowing from the breach were the same regardless of the theory on which such damages were based, a broad form submission was proper.⁴⁷

C. GOOD FAITH PURCHASE

Several provisions in the Code deal with the problem of determining rights between multiple parties who assert claims to the same property.⁴⁸ One context in which a dispute may arise involves a transaction in which innocent party A delivers property to B for a limited purpose but B, in turn, sells the property to innocent party C. When A learns that C now has (and intends to keep) the property and that it is useless to assert a claim against B, the legal issue becomes one of allocating the loss between two innocent parties. Under Texas law, if the actions of B involve criminal activity the question may arise in a property hearing held as part of the criminal proceedings against B.⁴⁹ In such hearings the property is to be returned "to the person appearing by the proof to be the owner."⁵⁰ In a civil suit, the determination will probably be made under section 2.403 of the Code, which provides that a person with voidable title has power to transfer a good title to a good faith purchaser for value.⁵¹

Although the basis on which the property rights are to be determined is not the same under these two statutes, the outcome may be identical as shown by *A. Benjamini, Inc. v. Dickson*.⁵² In *Benjamini*, the owner of two diamonds delivered them on consignment to Houston Gems & Appraising for resale, but gave specific instructions that they were not to be sold unless the owner approved the sale price. An employee stole the

45. See *Arthur's Garage*, 997 S.W.2d at 817.

46. 993 S.W.2d 851 (Tex. App.—Fort Worth 1999, no pet. h.).

47. See *id.* at 856-57.

48. See, e.g., TEX. BUS. & COM. CODE ANN. § 2.403 (Vernon 1994) (rights of good faith purchaser or buyer in ordinary course of business as against owner); § 3.305 (rights of holder in due course against prior parties); § 9.301 (rights of purchasers against unperfected security interests); § 9.312 (rights of secured creditors *inter se*).

49. Property hearings are conducted under TEX. CRIM. PROC. CODE ANN. art. 47.02 (Vernon 1979).

50. *Id.*

51. See TEX. BUS. & COM. CODE ANN. § 2.403(a) (Vernon 1994).

52. 2 S.W.3d 611 (Tex. App.—Houston [14th Dist.] 1999, no pet. h.).

diamonds from the company safe and, together with an accomplice, sold them to another jewelry company under a representation that the accomplice had inherited the diamonds and wanted to sell them. The jewelry company bought the diamonds and later resold them to Benjamini. In a property hearing conducted as part of the criminal proceeding against the dishonest employee, the trial court determined that the original owner appeared "by the proof" to have the right to the property. On appeal Benjamini argued that it had a superior right as a good faith purchaser under the terms of section 2.403. The court of appeals held that section 2.403 was not applicable to the case because it arose in the criminal proceedings and not in a civil suit between the original owner and the purchaser.⁵³ Even if the action were brought under the Code, however, the court noted that the dishonest employee had not acquired the diamonds "under a transaction of purchase" as required by section 2.403, but had stolen the diamonds from the company safe.⁵⁴ Under these circumstances, even if section 2.403 had been applied, the result would be the same.⁵⁵

Although not directly involving the issue of good faith purchase, the decision in *Wagal v. SI Diamond Technology, Inc.*⁵⁶ did concern the relative rights of competing claimants to goods. In this case, the buyer of equipment sued the seller for conversion. The claim arose when the seller refused to deliver the remaining equipment after the buyer defaulted in making the payments due under the contract. The seller resold the equipment, applied the proceeds to the remaining balance due from the buyer, and returned the surplus to the buyer. The court held that the buyer had no right to recover in conversion because any title acquired by the buyer under the contract of sale was subject to the seller's right to reclaim goods still in its possession.⁵⁷ The court noted that the right of reclamation was a statutory right granted to unpaid sellers and could be enforced by a seller in a manner similar to that of a secured party under chapter 9.⁵⁸

III. NEGOTIABLE INSTRUMENTS, GUARANTIES, & BANK TRANSACTIONS

A. TRANSFER OF INSTRUMENTS

Under the prior version of chapter 3 of the Code, as interpreted by the Texas courts, an indorsement contained on an allonge was effective only if there was inadequate space left to make the indorsement on the instru-

53. See *id.* at 613. A similar conclusion had been reached previously in *Four B's Inc. v. State*, 902 S.W.2d 683 (Tex. App.—Austin 1995, writ denied). *Four B's* is discussed in John Krahmer, *Commercial Transactions*, 49 SMU L. REV. 775, 778 (1996).

54. See *Benjamini*, 2 S.W.3d at 613.

55. See *id.*

56. 998 S.W.2d 299 (Tex. App.—Houston [1st Dist.] 1999, no pet. h.)

57. See *id.* at 301. The court noted that, "It would be absurd to allow a seller to reclaim goods in transit but not allow a seller to reclaim goods in its possession . . ." *Id.*

58. See *id.*

ment itself.⁵⁹ Under the revised chapter 3, an allonge may be used "even though there is sufficient space on the instrument for an indorsement."⁶⁰ Although the Texas Supreme Court has indicated a willingness to consider the revised chapter 3 as a guide interpretation of the prior law,⁶¹ no such willingness was exhibited by the court in *Federal Financial Co. v. Delgado*,⁶² where the court held that an allonge could not be used for an effective indorsement when the original note still had five inches of blank space remaining on it.⁶³ The purchaser of the note was, therefore, a mere transferee instead of a holder.⁶⁴ As such, the purchaser was subject to any valid defenses of the makers. All of this was a tempest in a teapot, however, because the court further held that the makers failed to establish their claimed defenses of laches and payment.⁶⁵

In *Hudspeth v. Investor Collections Services Ltd. Partnership*,⁶⁶ however, the purchaser of a note did qualify as a holder in due course, albeit under the federal holder in due course doctrine rather than under the Code, even though the note was past due at the time of purchase.⁶⁷ As a holder in due course, the purchaser took the note free of the maker's alleged personal defenses.⁶⁸

Even the federal holder in due course doctrine is not always a safe harbor against certain defenses. Thus, in *Cadle Co. v. Henderson*,⁶⁹ the purchaser of a note from the FDIC as receiver of a failed bank did not protect the purchaser from a statute of limitations defense. The four-year state limitations period had already run when the parties to the transfer

59. See *Crossland Sav. Bank FSB v. Constant*, 737 S.W.2d 19, 21 (Tex. App.—Corpus Christi 1987, no writ). The use of an allonge (which means an additional page or pages affixed to the original instrument to accommodate more indorsements) was authorized by section 3.202(b) of the Code. See TEX. BUS. & COM. CODE ANN. § 3.202(B) (Vernon 1994). Chapter 3 of the Code was completely revised by the Act of May 28, 1995, 74th Leg., R.S., ch. 921, § 1, 1995 Tex. Gen. Laws 4582 (codified as TEX. BUS. & COM. CODE ANN. §§ 3.101-.605 (Tex. UCC) (Vernon Supp. 2000)). The new chapter 3 became effective on January 1, 1996. See Act of May 28, 1995, 74th Leg., R.S., ch. 921, § 1, 1995 Tex. Gen. Laws 4582, 4643.

60. TEX. BUS. & COM. CODE ANN. § 3.204 cmt. 1 (Vernon Supp. 2000).

61. See, e.g., *Southwestern Resolution Corp. v. Watson*, 964 S.W.2d 262 (Tex. 1997) (holding that relaxed requirements of revised chapter 3 applied to validate allonge attached by staples instead of glue); *Amberboy v. Societe de Banque Privee*, 831 S.W.2d 793 (Tex. 1992) (holding that allowance of variable interest rates in revised UCC article 3 was persuasive on issue of whether instrument met the "sum certain" requirement of then-existing Code).

62. 1 S.W.3d 181 (Tex. App.—Corpus Christi 1999, no pet. h.).

63. See *id.* at 186.

64. See *id.*

65. See *id.*

66. 985 S.W.2d 477 (Tex. App.—San Antonio 1998, no pet.).

67. As noted by the court, the federal holder in due course doctrine is a special rule intended to protect federal agencies that insure depository institutions and permits the agencies and their assigns to assert holder in due course status to cut off defenses whether or not they satisfy the technical requirements of state law, principally the Code. See *id.* at 479-80.

68. Under both the federal holder in due course doctrine and under the Code, a holder in due course takes an instrument free of personal defenses. See TEX. BUS. & COM. CODE ANN. § 3.305(b) (Vernon Supp. 2000).

69. 982 S.W.2d 543 (Tex. App.—San Antonio 1998, no pet.).

amended the assignment agreement under which the note was transferred to permit the purchaser to use the six-year limitations period available to the FDIC. The amendment was deemed necessary because the original assignment provided that the transfer did not include "any rights, causes of action or defenses peculiar to the [FDIC or Receiver] under any statute or rule of law."⁷⁰

B. PAYMENT AS A DEFENSE

Both tender of payment and actual payment can operate to discharge a party from further liability on an instrument.⁷¹ If the obligor alleges tender of payment as a defense, he or she must prove that tender was made to the holder of the instrument. Thus, in *Coker v. Cramer Financial Group, Inc.*,⁷² proof that the obligor tendered payment to a stranger who was not acting as an agent of the owner or holder did not amount to proof that tender of payment was made.⁷³ The obligor, therefore, remained liable for the principal amount of the notes, plus interest at the highest lawful rate (18%), and attorney's fees incurred in the suit to collect the notes.⁷⁴

In *Southeast Investments, Inc. v. Clade*,⁷⁵ however, there was no dispute that the obligor made actual payment of all installments due on a note; the only question was whether any further amount was due under a provision in the note requiring additional payments for each year in which the obligor's net profits exceeded one-hundred thousand dollars. Treating interpretation of the note as a matter of law, the court held that the obli-

70. *Id.* at 544. In concluding that the amendment of the assignment after the state limitations period had already expired came too late to permit the transferee to use the six-year federal limitations period, the court noted, "This is an issue of first impression in Texas. However, to accept Cadle's argument could result in the employment of unfair trial tactics: assignees who failed to secure all the rights entitled to the FDIC in their original agreements would essentially be given another bite at the apple, even after the time for their first bite had expired. This is not what the record or the law permits." *Id.* at 548.

71. See TEX. BUS. & COM. CODE ANN. § 3.603 (Vernon Supp. 2000).

72. 992 S.W.2d 586 (Tex. App.—Texarkana 1999, no pet.).

73. See *id.* at 596.

74. See *id.* at 597. *Southeast Investments, Inc. v. Clade* also discusses the right of an assignee to maintain an action for recovery on a lost instrument. See *Southeast Investments, Inc. v. Clade*, 1999 WL 476865 (N.D. Tex. 1999). The evidence showed that the note in question was lost while in the FDIC's possession. The court held, however, that the assignee stood in the shoes of the FDIC and had any enforcement rights held by the FDIC. The plaintiff, therefore, satisfied the requirements of section 3.309 of the Code to enforce a lost instrument, including an offer of indemnity if the note should later surface in the hands of another holder. See TEX. BUS. & COM. CODE ANN. § 3.309 (Vernon Supp. 2000). Whether an assignee has the right to recover on a note lost by a prior holder, but assigned to the assignee, has yielded conflicting decisions under the revised UCC article 3. Compare *Dennis Joslin Co. v. Robinson Broad. Corp.*, 977 F. Supp. 491, 494-95 (D.D.C. 1997) (holding assignee had no right to recover on note lost prior to assignment under revised UCC § 3-309) with *Beal Bank, S.S.B. v. Caddo Parish-Villas S., Ltd.*, 218 B.R. 851, 855 (N.D. Tex. 1998) (holding assignee had right to recover on note lost prior to assignment where assignment expressly included all rights of assignor, including right to enforce lost note). See also John Krahmer, *Commercial Transactions*, 52 SMU L. REV. 813, 823 (1999) (discussing lost instruments).

75. 1999 WL 476865 (N.D. Tex. 1999).

gor fully satisfied its obligations under the note and, in an unusual move, the court itself moved for summary judgment on the issue of payment *sua sponte* on behalf of the defendant obligor. The court directed the plaintiff holder to respond to this motion.

C. GUARANTIES

In *Taylor-Made Hose, Inc. v. Wilkerson*,⁷⁶ a creditor sought to impose personal liability on the vice-president of a corporation who allegedly guaranteed a debt incurred by the corporation. The credit application, provided by the creditor, required only general information about the corporation and did not require any personal information regarding the vice-president who signed the application. At the bottom of the credit application the form stated, "I personally agree to pay all invoices and costs of collection . . . on any amount remaining unpaid after 90 days."⁷⁷ The corporation subsequently filed a Chapter 11 bankruptcy petition and the creditor sought recovery from the vice-president as guarantor. The creditor argued that the agreement was a personal guaranty, that the vice-president signed the credit application in her individual capacity as guarantor, and that the creditor would not have extended credit to the corporation without the vice-president's personal guaranty. The vice-president argued that she did not sign in her individual capacity as a guarantor and that this debt had been discharged in the corporation's bankruptcy.

On appeal, the court held that the credit application was ambiguous and that no single provision in the agreement would be controlling; instead, all provisions in the agreement would be considered in reference to the instrument as a whole.⁷⁸ Applying this standard, the court noted that the credit application was tailored for use by business entities and that the application required no personal information regarding the person who signed the application. The court pointed out that key words were missing from the language of the agreement, words such as "guarantor" and "individual capacity." The court reversed the summary judgment in favor of the creditor and remanded the case for a factual determination as to the intent of the parties.⁷⁹

D. DELAYED RETURNS

OK, time for a test question.

76. 1999 WL 90021 (Tex. App.—San Antonio Feb. 24, 1999) (Opinion Not Yet Released for Publication). Although not yet released for publication, this case has already been extensively cited for its discussion of the standard of review to be applied in no-evidence motions for summary judgment, such as that made by the plaintiff creditor in this case. See, e.g., *Steinkamp v. Caremark*, 3 S.W.3d 191 (Tex. App.—El Paso 1999, pet. denied), *Ruiz v. Government Employees Ins. Co.*, 4 S.W.3d 838 (Tex. App.—El Paso 1999, no pet. h.); *Marsaglia v. University of Texas*, El Paso, 1999 WL 649241 (Tex. App.—El Paso, Aug. 26, 1999, pet. denied).

77. 1999 WL 90021 at *1.

78. See *id.* at *3.

79. See *id.*

Suppose Payee receives a check from Drawer to pay a bill owed by Drawer to Payee. Payee deposits the check in Payee's account at Depository Bank and the check is ultimately presented through the Federal Reserve System to Payor Bank (whom you represent). Two banking days later, Payor Bank returns the item to Depository Bank marked "not sufficient funds." Upon learning of the returned check, Payee takes immediate and successful steps to collect the amount of the check from Drawer.

Time passes.

Payee continues to do business with Drawer.

Drawer runs up another bill with Payee and is unable to pay. Payee sues Payor Bank for failing to return the NSF check by its midnight deadline.

Please choose the best answer from the selections given below. You may assume that the UCC is the only applicable law and there is no federal regulation or clearinghouse rule that affects the case.

- (A) Payor Bank is liable for the tort of having money.
- (B) General equitable principles apply under UCC section 1.103 and should relieve Payor Bank of liability for the return of the NSF check after the midnight deadline.
- (C) Payor Bank is accountable (*i.e.*, strictly liable) under UCC section 4.302 for the amount of the NSF check that was returned after the midnight deadline.
- (D) Payor Bank is accountable (*i.e.*, strictly liable) for the amount of the NSF check but the Payee's recovery should be reduced because of the payment it received from Drawer earlier on the same check.

According to the court in *Channel Equipment Co. v. Community State Bank*,⁸⁰ choice "D" is correct. The court rejected choice "B" on the ground that use of general equitable principles to determine if a bank was accountable for failing to return any particular check would "undermin[e] the order and certainty that section 4.302 was designed to provide."⁸¹ Choice "C" is almost correct because the court did uphold the strict accountability rule of section 4.302, but not without qualification as to the scope of the payor bank's liability.⁸² This leaves choices "A" and "D." As stated by the court,

[T]he Bank is strictly accountable for the value of the checks. Equity cannot modify that responsibility. Nonetheless, the Bank properly raised equitable principles in determining the extent of that liability [W]e believe the Bank conclusively established that further payments to Plaintiffs on the checks would violate equitable principles of unjust enrichment and double recovery.⁸³

80. 996 S.W.2d 374 (Tex. App.—Austin 1999, no pet. h.).

81. *Id.* at 379.

82. *See id.* at 380.

83. *Id.* at 380-81. There were actually two checks and two payees involved in the case but both checks were issued at the same time to pay the payees for the respective services that each one had rendered to the drawers through the lease of construction equipment.

Choice "A" was not before the court.

While it is clear that a bank customer has a responsibility under the Code to notify his or her bank about forgeries on the customer's account, determining whether the customer has met that responsibility in a particular factual setting is more difficult. In *Hatcher Cleaning Co. v. Comerica Bank-Texas*,⁸⁴ a bookkeeper had a rubber stamp of his employer's signature made surreptitiously. Over a two-year period, the bookkeeper used this stamp to forge checks on his employer's bank accounts. When this activity was discovered in July 1995, the employer sent a facsimile to the bank on July 14th to "immediately . . . place a blanket stop pay order on the above-captioned payroll account. . . ."⁸⁵ The bank complied and, during the next several months, worked with the customer to provide copies of checks and bank statements that had been paid from the account so the customer could reconstruct records that had been destroyed by the bookkeeper. The customer ultimately identified thirty-one unauthorized checks for which demand letters were sent to the bank.

Under both the former and the revised section 4.406 of the Code, a customer must "report" an unauthorized signature within one year after a statement is made available to the customer.⁸⁶ The issue before the court had two parts: first, was the July 14th facsimile a sufficient "report" and, second, did any of the subsequent communications with the bank, some oral and some written, constitute reports? As to the first issue, the court, noting a dearth of authority on the meaning of the term "report," held that the facsimile communication on July 14th was not a sufficient "report" to satisfy section 4.406 because it identified only the account number and did not identify specific items already paid that may have been forged.⁸⁷ As to the second issue, the court ruled that a report could be either written or oral and that the employer's subsequent communications with the bank raised a genuine issue of material fact as to whether these communications were sufficient "reports" under section 4.406.⁸⁸

*American Airlines Employees Federal Credit Union v. Martin*⁸⁹ also concerned the interpretation and application of former section 4.406 but

This point had no bearing on the decision. This is an interesting and carefully reasoned decision that collects a number of primary and secondary authorities on the scope of a payor bank's liability for late return. It is worth keeping in mind in case the reader should run into a late return problem.

84. 995 S.W.2d 933 (Tex. App.—Fort Worth 1999, no pet. h.).

85. *Id.* at 935.

86. Because the facts arose before January 1, 1996, the effective date of the revised chapter 4, the court applied section 4.406(d). See TEX. BUS. & COM. CODE ANN. § 4.406(d) (Vernon 1994). As revised, the relevant section now appears as TEX. BUS. & COM. CODE ANN. § 4.406(f) (Vernon Supp. 2000).

87. See *Hatcher*, 995 S.W.2d at 938.

88. See *id.* at 939. The court noted that it was construing the former version of TEX. BUS. & COM. CODE ANN. § 4.406(d) (Vernon 1994) and not the present version contained in TEX. BUS. & COM. CODE ANN. § 4.406(f) (Vernon Supp. 2000). See *Hatcher*, 995 S.W.2d at 938-39. It does not appear, however, that the operative language in § 4.406 that was considered by the court was changed by the revision in a way that would affect the court's reasoning.

89. 991 S.W.2d 887 (Tex. App.—Fort Worth 1999, pet. granted).

several additional issues were involved.⁹⁰ In *Martin*, a customer's girlfriend added herself as a joint owner of the customer's credit union account. Between June 12th and November 16th of 1995, she transferred almost fifty thousand dollars from the customer's account to an account she had at the same credit union. During this time period the credit union mailed two quarterly statements showing the addition of the joint owner on the account as well as showing ten of the fourteen transfers, but the customer claimed he never saw the statements. Finally, on December 20, 1995, while making a deposit, the customer discovered the change in his account balance, immediately told the credit union that the balance was wrong, and later filed suit.

The credit union defended on three grounds. First, the customer failed to report the unauthorized withdrawals within the sixty day time period required by the deposit agreement.⁹¹ Second, the customer failed to exercise reasonable care and promptness in examining his statements to discover the unauthorized activity. Third, the customer failed to meet the fourteen day time period stated in the former section 4.406 for unauthorized signatures or alterations by the same wrongdoer.⁹²

A critical factor in the case was that all of the account transfers had been made by means of oral instructions from the customer's girlfriend and documented by a "journal voucher" completed and initialed by an employee of the credit union and never signed by the girlfriend herself.⁹³ The only document she signed in connection with the entire matter was the "Membership Account Change Card" used to add herself as a joint owner of the customer's account.

As viewed by the court, much of the case hinged on the definition of the terms "item" and "unauthorized signature." The court concluded that neither the vouchers nor the account change card were "items" bearing "unauthorized signatures" that triggered the customer's duty to report within sixty days under the deposit agreement.⁹⁴ As to the customer's claims for breach of contract and negligence on the part of the credit union, the court addressed the question of whether the credit union had

90. As in *Hatcher*, although the court was construing the former version of § 4.406, it does not seem that the language of the revision would affect the court's reasoning. The reader should note that a petition has been granted in this case, and an opinion by the Texas Supreme Court may provide significant guidance on the duties of a customer and a bank under TEX. BUS. & COM. CODE ANN. § 4.406 (Vernon Supp. 2000).

91. The deposit agreement specified that a customer was required to report unauthorized signatures or alterations on items within sixty days and that all objections were "waived unless made in writing to us, and received on or before the sixtieth (60th) day following the date the statement is mailed, subject to applicable law." *Martin*, 991 S.W.2d at 892.

92. The time period in revised section 4.406(d)(2) is now thirty days. See TEX. BUS. & COM. CODE ANN. § 4.406(d)(2) (Vernon Supp. 2000).

93. Twelve of the fourteen transfers were done by telephone and for each of them a teller generated and initialed a journal voucher. On the other two transfers, the customer's girlfriend went to the credit union and orally instructed the teller to transfer funds, both of which were also handled by means of journal vouchers. See *Martin*, 991 S.W.2d at 890-91.

94. See *id.* at 894-96.

acted according to reasonable commercial standards when it failed (by its own admission) to examine the signatures on the account change card. Expert testimony on behalf of the credit union showed that "large national credit unions do not verify signatures at all when the ownership status of an account is changed."⁹⁵ Expert testimony on standards in the banking industry indicated that banks "verify signatures on account change cards, and that experienced, trained personnel are used in signature verification."⁹⁶ The credit union used only untrained temporary personnel.

The court upheld the trial court's determination that the credit union was negligent in allowing the addition of a co-owner to the customer's account.⁹⁷

IV. LETTERS OF CREDIT

A. RECENT CASES

In *Vest v. Pilot Point National Bank*,⁹⁸ a road construction company obtained an irrevocable standby letter of credit from a bank to assure performance of a road building contract with Denton County. The letter of credit required that if the construction company defaulted on the project, a statement of the default was to be certified by the judge of Denton County as a condition of the county making a draw under the credit. After a default occurred, the acting county judge for Denton County, who had been delegated by the elected county judge to preside over the county commissioners court on a temporary basis, executed a statement of default on official county commissioners court letterhead that identified the signer as the acting county Judge. The bank paid on the letter of credit. The construction company sued the bank for wrongfully honoring the letter of credit, contending that payment should have been made only upon a statement of default signed by the elected county judge and not by another person serving only temporarily as acting county judge.

The court ruled that determination of an inconsistency with the required documentation on a letter of credit must be made from the issuing

95. *Id.* at 899.

96. *Id.*

97. *See id.* at 899-900. Although it is difficult to predict exactly which issues may be addressed by the Supreme Court if the grant of a petition in this case ultimately results in an opinion, the issue of compliance with reasonable commercial standards that is now a part of the statutory definition of ordinary care in the revised Code may play a part if the Court regards this definition as declaratory of the prior Code. *See* TEX. BUS. & COM. CODE ANN. §§ 3.103(a)(7), 4.104(c), 4.406(e) (Vernon 2000). As to the possibility that the revised definition may be used, *see McDowell v. Dallas Teachers Credit Union*, 772 S.W.2d 183 (Tex. App.—Dallas 1989, no writ), where, under the former chapters 3 and 4, the court held that the failure of a credit union to examine signatures on items was not commercially reasonable.

Another issue that may be addressed is the ability of a drawee to change the one-year time period for barring customer claims for forgeries or alterations to a shorter time period as the drawee attempted to do under the deposit agreement in *Martin*.

98. 996 S.W.2d 9 (Tex. App.—Ft. Worth 1999, pet. denied).

bank's perspective. Because the bank could not be expected to be knowledgeable about the county government or whether a statement of default by an acting county judge instead of the elected county judge would be significant to the company, the court ruled that the tendered document reasonably complied with the terms of the credit.⁹⁹ The court added that, had the company wanted to require the signature of a specific person as an express condition, it could have done so, and the bank would then have known precisely and unequivocally its duty under the letter of credit.¹⁰⁰

A fundamental premise underlying letter of credit law is that an issuer must pay against documents when those documents comply with the terms of the credit regardless of disputes that may exist between the parties in regard to the transaction that gave rise to the letter of credit.¹⁰¹ This premise, commonly termed the "independence principle," is subject to a small exception if the documents presented to the issuer are forged or if there has been such fraud in the transaction that the issuer should be enjoined from honoring the presentation made under the letter of credit.¹⁰²

In *SRS Products Co. v. LG Engineering Co.*,¹⁰³ the court addressed both the independence principle and the scope of the fraud exception and concluded that the narrow exception for fraud did not encompass a breach of warranty claim asserted against a seller who refused to perform warranty service on goods purchased by the buyer. In a clear opinion reviewing both the independence principle and the fraud exception, the court stated that,

A dispute over the existence or scope of warranty obligations does not amount to fraud in the transaction, and therefore, does not provide grounds to enjoin payment of a letter of credit issued to secure performance of those obligations. . . . [I]t would fly in the face of Article Five to enjoin payment on the letter of credit based solely on a dispute between the bank's customer and the beneficiary over underlying contractual obligations.¹⁰⁴

99. See *id.* at 11-14. In reaching this conclusion, the court discussed *New Braunfels National Bank v. Odiorne*, 780 S.W.2d 313 (Tex. App.—Austin 1989, writ denied), where the court distinguished between discrepancies relating to the issuer's business of banking and discrepancies relating to the underlying transaction. *Odiorne* is cited with approval in the revised TEX. BUS. & COM. CODE ANN. § 5.108 cmt. 1 (Vernon 2000).

100. See *Vest*, 996 S.W.2d at 16.

101. See, e.g., *Philipp Bros., Inc. v. Oil Country Specialists, Ltd.*, 787 S.W.2d 38 (Tex. 1990) (finding no fraud in the transaction even though goods delivered were substantially below quality called for by the underlying contract); *GATX Leasing Corp. v. DBM Drilling Corp.*, 657 S.W.2d 178 (Tex. App.—San Antonio 1983, n.w.h.) (holding that fraud must be so egregious as to vitiate the transaction).

102. See *Philipp Bros.*, 787 S.W.2d at 38.

103. 994 S.W.2d 380 (Tex. App.—Houston [14th Dist.] 1999, no pet. h.).

104. *Id.* at 385-86. See discussion "Fraud in the transaction" under revised section 5.109 *infra* note 140; see also TEX. BUS. & COM. CODE ANN. § 5.109 (Vernon 2000).

B. LEGISLATIVE REVISION OF CHAPTER 5

The legislative revision of chapter 5 of the Code during the 1999 legislative session was so extensive that the revised chapter substantially replaces the original version.¹⁰⁵ The revised chapter 5 became effective on September 1, 1999.¹⁰⁶ Because of space limitations, the following summary can list only some of the changes. A more detailed discussion of the revision can be found in the sources listed in the accompanying footnote.¹⁰⁷

1. *Definitional Changes and Choice of Law*

Two party letters of credit are now expressly allowed; thus, one branch of a bank may issue a letter of credit for the benefit of another branch, or a bank may issue a letter of credit to secure its own obligation.¹⁰⁸ "Issuer" is defined to include nonbank issuers.¹⁰⁹ A new definition, the "nominated person," covers persons whom the issuer authorizes to pay, negotiate, or give value for draws under a letter of credit with the expectation or agreement of obtaining reimbursement from the issuer.¹¹⁰ The term "applicant" is now used instead of the term "customer."¹¹¹ Chapter 5 expressly recognizes the right of the parties to incorporate and have a letter of credit governed by the Uniform Customs and Practices for Documentary Credits as promulgated by the International Chamber of Commerce.¹¹²

Issuers, advisers and payors under a letter of credit have complete freedom to choose the governing law and forum for disputes even if the law or forum chosen bears no relation to the transaction.¹¹³ Absent a choice of law provision, the law of the place of the issuer, advisor, or nominated person governs.¹¹⁴

105. As revised, chapter 5 now appears as TEX. BUS. & COM. CODE ANN. §§ 5.101 -.117 (Vernon Supp. 2000).

106. Act of April 7, 1999, 76th Leg., R.S., ch. 4, § 9 (Vernon) (to be codified as an amendment to TEX. BUS. COM. CODE ANN. § 5).

107. See JOHN F. DOLAN, *THE LAW OF LETTERS OF CREDIT: COMMERCIAL AND STANDBY CREDITS* (3d ed. 1999); WILLIAM D. HAWKLAND & FREDERICK H. MILLER, 66 *UNIFORM COMMERCIAL CODE SERIES: REVISED ARTICLE 5 LETTERS OF CREDIT* §§ 5-101 to 5-117 (1996); 3 JAMES WHITE & ROBERT SUMMERS, *UNIFORM COMMERCIAL CODE: PRACTITIONER TREATISE SERIES* §§ 26-1 to 26-16 (4th ed. 1995 & Supp. 1999); James G. Barnes & James E. Byrne, *Revision of UCC Article 5*, 50 *BUS. LAW.* 1449 (1995).

108. See TEX. BUS. & COM. CODE ANN. § 5.102(a)(10) (Vernon 2000).

109. See § 5.102(a)(9).

110. See § 5.102(a)(11).

111. See § 5.102(a)(2).

112. See §§ 5.103(c), 5.116(c). The current version of the Uniform Customs and Practices for Documentary Credits is designated as I.C.C. Pub. No. 500 (1993) (hereinafter UCP).

113. See TEX. BUS. & COM. CODE ANN. § 5.116(a) (Vernon 2000).

114. See § 5.116(b).

2. *Rules on Nondocumentary Conditions Clarified and Non-Waivable Conditions Expressly Stated*

Nondocumentary conditions, unless they are so fundamental that they cause the document not to be a letter of credit, are to be ignored by the issuer.¹¹⁵ The provisions of chapter 5 that cannot be varied by agreement are now explicitly stated.¹¹⁶

3. *Rights of Beneficiaries Accorded to Successors*

Successors to the beneficiary by operation of law, such as bankruptcy trustees, receivers, executors, and successors by merger are accorded the rights of the beneficiary under the letter of credit, a result that was reached with some uncertainty under the prior chapter 5.¹¹⁷ Successors to beneficiaries by operation of law and beneficiaries that change a corporate name when merging with another entity may consent to amendments, sign and present documents, and receive payment either in the name of the beneficiary or in its own name as successor, provided the successor beneficiary follows the requirements of the issuer for recognition of a successor that are standard practice for issuers or that are otherwise reasonable.¹¹⁸ An issuer is protected if the purported successor's proof of successorship is facially sufficient.¹¹⁹

4. *Independence and Strict Compliance Principles Expressly Stated*

Although not a change from existing Texas case law interpreting the prior chapter 5, the revised chapter 5 now expressly recognizes the independence principle that the obligation of the issuer is independent of any performance or breach of the underlying contract.¹²⁰ The strict compliance standard previously applied by Texas cases has also been statutorily adopted.¹²¹ Although documents presented for honor must strictly comply with the terms and conditions of the letter of credit, the Official Comment to section 5.108 notes that "strict compliance" does not mean

115. See § 5.108(g).

116. The non-waivable conditions include the following: TEX. BUS. & COM. CODE ANN. § 5.102(a)(9), (10) (Vernon 2000) (what constitutes a letter of credit and who may issue one); § 5.103(a) (applicability of chapter 5 to letters of credit); § 5.103(c) (provisions of article 5 that cannot be varied by agreement); § 5.106(d) (five-year expiration date for perpetual letter of credits); § 5.114(d) (issuer's right to withhold consent to assignment of proceeds); § 5.117(d) (no subrogation rights until honor).

117. See TEX. BUS. & COM. CODE ANN. §§ 5.102(a)(15), .113 (Vernon 2000); FDIC v. Bank of Boulder, 911 F.2d 1466 (10th Cir. 1990).

118. See TEX. BUS. & COM. CODE ANN. §§ 5.102(a)(15), 5.113(b) (Vernon 2000).

119. See § 5.113(c), (d).

120. See §§ 5.103(d), 5.108(f); cf. Philipp Bros., Inc. v. Oil Country Specialists, Ltd., 787 S.W.2d 38 (Tex. 1990) (finding that issuer's obligation is independent of the underlying transaction); see also, SRS Products Co., Inc. v. LG Engineering Co., Ltd., 994 S.W.2d 380 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (discussed *supra*, note 100).

121. See TEX. BUS. & COM. CODE ANN. § 5.108(f) (Vernon 2000); see also Westwind Exploration, Inc. v. Homestate Sav. Ass'n, 696 S.W.2d 378 (Tex. 1985) (finding that presentation of demand for payment must strictly comply with terms of letter of credit); Temple-Eastex, Inc. v. Addison Bank, 672 S.W.2d 793 (Tex. 1984) (finding the same).

"slavish compliance" and it indorses the approach taken in *New Braunfels National Bank v. Odiorne*.¹²² In determining whether documents strictly comply with the terms of the credit, the issuer must observe the standard practice of financial institutions that regularly issue letters of credit.¹²³ Determination of compliance with that standard is a matter for the court and not for the jury.¹²⁴

5. *Electronic Letters of Credit Allowed*

In recognition of the growing use of electronic technology, letters of credit may now be issued in electronic form.¹²⁵ The terms "document" and "record" are defined to include documents or records presented or kept in a tangible medium or in electronic form if authorized by the letter of credit.¹²⁶ The methods by which a record may be authenticated are described in the Official Comment to section 5.104.¹²⁷

6. *Enforceability, Irrevocability, Amendment, and Expiration*

Consistent with UCP 500, a letter of credit is now irrevocable unless by its terms it is stated to be revocable.¹²⁸ A letter of credit is issued and becomes enforceable when it is sent or transmitted, not when it is received.¹²⁹ After a letter of credit has been issued, the rights of the issuer, beneficiary, applicant, or confirmer are not affected by an amendment to it without their consent unless the letter of credit is revocable.¹³⁰ A letter of credit without an expiration date expires one year from date of issuance and a "perpetual" letter of credit expires five years from date of issuance.¹³¹

7. *Issuer's Duties Clarified*

An issuer has a reasonable time, but not beyond seven business days after receipt, to determine if a presentment is conforming and, if so, to give notice of discrepancies.¹³² Deferred payment letters of credit are

122. See 780 S.W.2d 313 (Tex. App.—Austin 1989, writ denied); TEX. BUS. & COM. CODE ANN. § 5.108(a), 5.108 cmt. 1 (Vernon 2000) stating, "[T]his article indorses the conclusion of the court in *New Braunfels Nat. Bank . . .* (beneficiary could collect when draft requested payment on 'Letter of Credit No. 86-122-5' and letter of credit specified 'Letter of Credit No. 86-122-S' holding strict compliance does not demand oppressive perfectionism)." TEX. BUS. & COM. CODE ANN. § 5.108(a), 5108 cmt. 1 (Vernon 2000).

123. See TEX. BUS. & COM. CODE ANN. § 5.108(a), (e) (Vernon 2000).

124. See *id.*

125. See §§ 5.102(a)(14), 5.104.

126. See §§ 5.102(a)(6), (a)(14).

127. See § 5.104 cmts. 2, 3 (Vernon 2000), providing, *inter alia*, that, "An authentication agreement may be by system rule, by standard practice, or by direct agreement between the parties." *Id.*

128. Compare UCP 500, art. 6(c) with TEX. BUS. & COM. CODE ANN. § 5.106(a) (Vernon 2000).

129. See TEX. BUS. & COM. CODE ANN. § 5.106(a) (Vernon 2000).

130. See § 5.106(b).

131. See § 5.106(c), (d).

132. See § 5.108(b).

now expressly authorized.¹³³ “Honor” is defined to include actual payment on a deferred obligation or acceptance.¹³⁴ Except for fraud or forgery, an issuer cannot defend dishonor of a presentment based on a discrepancy for which notice was either not given or not timely given.¹³⁵ An issuer that honors a presentment is precluded from recourse against the beneficiary as the drawer or indorser of a draft under sections 3.414 and 3.415 or for discrepancies in the document or presentment that are apparent.¹³⁶ Issuers may state requirements for transfer of the right to draw or to demand performance in the letter of credit or, even if no particular procedures for transfer are stated, may impose requirements that are standard practice for issuers of letters of credit or that are otherwise reasonable in the circumstances.¹³⁷ An issuer need not recognize an assignment of proceeds of a letter of credit unless the assignee possesses and exhibits the letter of credit and its presentation is a condition to honor.¹³⁸ After payment or honor, the issuer or other payor and any applicant that reimburses an issuer are accorded broad subrogation rights against other parties if subrogation is otherwise appropriate under other law.¹³⁹ Remedies for wrongful dishonor now include the amount wrongfully dishonored, incidental but not consequential damages, interest, attorneys’ fees, and specific performance.¹⁴⁰ A beneficiary need not mitigate damages.¹⁴¹ Claims for breach of a right or obligation under chapter 5 must be brought within the later of one year after expiration of the letter of credit or after the cause of action accrues.¹⁴²

8. *Rules on Forgery and Fraud Restated*

Although dishonor of, or an injunction against, a forged document or fraudulent presentment is still permitted, the exceptions and substantive and procedural conditions to such a dishonor or injunction are elaborated. These include observing the rights of innocent parties who give value, requirements for posting security, and requirements for meeting established preconditions for granting injunctive relief.¹⁴³

9. *New Warranties by Beneficiaries*

A beneficiary that obtains payment now warrants to the issuer and to the applicant that there is no fraud or forgery involved and that the drawing does not violate any agreement to which the letter of credit

133. See § 5.108(b)(2).

134. See § 5.102(a)(8).

135. See TEX. BUS. & COM. CODE ANN. § 5.108(c), (d) (Vernon 2000).

136. See §§ 5.108(i)(3), (4). The obligations of drawers and indorsers appear in TEX. BUS. & COM. CODE ANN. §§ 3.414, 3.415 (Vernon 2000), respectively.

137. See TEX. BUS. & COM. CODE ANN. § 5.112(b)(2) (Vernon 2000).

138. See § 5.114(d).

139. See § 5.117.

140. See § 5.111.

141. See *id.*

142. See § 5.115.

143. See TEX. BUS. & COM. CODE ANN. § 5.109 (Vernon Supp. 2000).

pertains.¹⁴⁴

10. Rules Stated for Security Interests in Proceeds

A procedure under chapter 9 has been added for granting a security interest in the proceeds of a letter of credit.¹⁴⁵ The rights of a transferee beneficiary have priority over those of an assignee of proceeds of the prior beneficiary.¹⁴⁶

V. SECURED TRANSACTIONS

A. RECENT CASES

The last Survey discussed the decision *In re Rees*,¹⁴⁷ in which a bankruptcy court decided that Department of Agriculture regulations under the Federal Crop Insurance Act, requiring assignment of the right to receive payment under a crop insurance policy, did not prevent attachment and perfection of a security interest to the proceeds of a crop insurance policy, but only prevented attachment to an insured's right to receive the proceeds before they were actually paid.¹⁴⁸ During this Survey period the Fifth Circuit held that, "The bankruptcy's court's reasoning in *Rees* is sound; its conclusion correct."¹⁴⁹ On this basis, the court held that a security interest attached to, and was perfected in, the proceeds of a crop insurance policy purchased by the debtors under the Federal Crop Insurance Act.¹⁵⁰

Priority conflicts between secured parties are generally governed by Code sections 9.301 through 9.319.¹⁵¹ As with other claims, however, an assertion that a security interest has priority must be made within the relevant limitations period. In some contexts, this may be in the form of an action for conversion of collateral from the secured party who asserts priority. Such claims must be brought within two years from the time the conversion occurs unless, for some reason, the limitations period is tolled.¹⁵² One reason for tolling the limitations period is the "discovery rule," which provides that accrual of a cause of action is deferred until the claimant knew, or by exercising reasonable diligence should have known,

144. See § 5.110.

145. To establish this procedure, the revision of chapter 5 includes provisions in chapter 5 and conforming amendments in the current chapter 9. See §§ 5.102(a)(10), 5.114(f), 9.103(a), 9.104(13), 9.106, 9.304(a), 9.305. The revision of chapter 9 (effective on July 1, 2001) carries forward the provisions dealing with security interests in the proceeds of a letter of credit.

146. See TEX. BUS. & COM. CODE ANN. § 5.114(f) (Vernon Supp. 2000).

147. 216 B.R. 551 (Bankr. N.D. Tex. 1998). *Rees* is discussed in John Krahmer, *Commercial Transactions*, 52 SMU L. REV. 813, 828-29 (1999).

148. See *Rees*, 216 B.R. at 554. The regulations in question appeared in 7 C.F.R. § 457.8 (1995).

149. *In re Cook*, 169 F.3d 271, 277 (5th Cir. 1999).

150. See *id.*

151. See TEX. BUS. & COM. CODE ANN. §§ 9.301 -319 (Vernon 1997).

152. The two-year limitations period for conversion actions is stated in TEX. CIV. PRAC. & REM. CODE § 16.003(a).

of the facts giving rise to the cause of action. In *Conoco, Inc. v. Amarillo National Bank*,¹⁵³ the court remanded a conversion action to the court of appeals for reconsideration of the discovery rule in light of the decision by the Supreme Court in *HECI Exploration Company v. Neel*.¹⁵⁴ The court of appeals held that the discovery rule tolled the limitations period in an action by a secured party claiming priority in accounts receivable.¹⁵⁵ Without ruling on the merits, the Supreme Court remanded the case to the court of appeals to determine whether the discovery rule was even applicable under the *HECI* principles that the discovery rule should be applied only when (1) the nature of the injury is inherently undiscoverable, and (2) the injury itself is objectively verifiable.¹⁵⁶

Foreclosure of a security interest is always fraught with danger under existing Texas law. Failure of a secured party to give proper notice of disposition or to dispose of collateral in a commercially reasonable manner will prevent the secured party from recovering a deficiency.¹⁵⁷ The burden of proving that proper notice and disposition took place is on the secured party.¹⁵⁸ In *SMS Financial, L.L.C. v. ABCO Homes, Inc.*,¹⁵⁹ summary judgment in favor of the secured party was reversed because there was a genuine issue of material fact on whether bowling alley equipment used as collateral for a loan was disposed of in a commercially reasonable manner.¹⁶⁰

One of the continuing problems associated with UCC financing statement filings is the possibility of a mistake in the debtor's name. But the Code provides for some margin of error if the financing statement is not seriously misleading. In *ITT Commercial Finance Corp. v. Bank of the West*,¹⁶¹ the court considered whether a financing statement that listed the name of the debtor as "Compucentro, USA, Inc." instead of "Compu-Centro, USA, Inc." was within the allowed margin of error. The court first held that a non-uniform amendment to the Texas version of the Code did not apply to the case of a misspelling of a corporate name.¹⁶² The court then considered whether the omission of the hyphen in the corporate name made the filing seriously misleading. On this issue, the court discussed the computerized search system used in the office of the Texas Secretary of State and its treatment of hyphenated words. Because the filing omitted the hyphen in the name "Compu-Centro," the search

153. 996 S.W.2d 853 (Tex. 1999).

154. 982 S.W.2d 881 (Tex. 1998).

155. See *Conoco, Inc. v. Amarillo Nat'l Bank*, 950 S.W.2d 790, 798 (Tex. App.—Amarillo 1997, writ granted).

156. See *Conoco*, 996 S.W.2d at 854. The principles governing the discovery rule are stated in *HECI*, 982 S.W.2d at 886.

157. See *Tanenbaum v. Economics Lab., Inc.*, 628 S.W.2d 769 (Tex. 1982).

158. See *Greathouse v. Charter Nat'l Bank—Southwest*, 851 S.W.2d 173, 176-77 (Tex. 1992).

159. 166 F.3d 295 (5th Cir. 1999).

160. See *id.* at 244.

161. 166 F.3d 295 (5th Cir. 1999).

162. See *id.* at 300 (citing Jerald M. Pomerantz, *Trade Name Filings Under UCC Article 9: Anatomy of a Nonuniform Amendment*, 47 Consumer Fin. L.Q. Rep. 34, 36 (1993)).

system would not locate a filing under the name "Compucentro." Reasoning that the policy of the Code was to place the burden of accurate filing on the filing creditor, the court held that the financing statement was seriously misleading because a subsequent search based on the debtor's legal name would not (indeed, did not) reveal the misspelled name.¹⁶³

B. LEGISLATIVE REVISION OF CHAPTER 9

The revision of chapter 9 approved during the 1999 legislative session completely replaces the existing chapter 9. As noted earlier in this Article, the effective date of the revision is July 1, 1999, which provides some "lead time" for attorneys and financial institutions to become familiar with the new rules governing secured transactions.¹⁶⁴ The following summary briefly describes several important subjects covered by the revised chapter 9.

1. *New Types of Collateral Allowed*

Revised chapter 9 permits the use of several new types of collateral. An expanded definition of "account" now includes health care insurance receivables and certain insurance payments, the service of providing energy (gas, electricity, etc.), credit or charge cards and information contained on or for use with the card (e.g., information contained in a magnetic stripe or an embedded chip), and lottery or gambling winnings.¹⁶⁵ New types of collateral that are separately defined include: commercial tort claims,¹⁶⁶ deposit accounts,¹⁶⁷ electronic chattel pa-

163. See *ITT Commercial Finance*, 166 F.3d at 304-05. The court noted, but did not discuss, the recent revision of chapter 9, which provides, *inter alia*, that, "If a search of the records of the filing office under the debtor's correct name, utilizing the filing office's standard search logic, if any, would disclose a financing statement that fails sufficiently to provide the name of the debtor in accordance with Section 9-503(a), the name provided does not make the financing statement seriously misleading." U.C.C. § 9-506(c).

Although not discussed by the court, the test provided by the revision would seem to lead to the same result as that reached by the court since a search made under the debtor's correct name did not reveal the filing made in the incorrect name that omitted a critical hyphen. Further discussion of financing statement filings under the revised chapter 9 appears in the text, *infra*, at note 189.

164. Because the changes made by the revision are both extensive and complex, *The Texas Bank Lawyer* and the Texas Tech Law School Foundation have prepared a resource disk on CD-ROM in hypertext format. It contains the full text of the revision as adopted in Texas, plus disposition tables, collateral tables, search software, and text discussions of changes made by the revision. The resource disk will be updated with additional material from time to time. For information about this CD-ROM contact John Krahmer, Texas Tech University School of Law, Lubbock, Texas 79409-0004. Telephone inquiries may be directed to (806) 742-3920 (Voice) or (806) 742-1629 (FAX). Professor Krahmer may also be contacted by email sent to: jkrahmer@krahmer.net.

165. See TEX. BUS. & COM. CODE ANN. Rev. § 9.102(a)(2) (Vernon Supp. 2000). Note that this Supplement contains the text of both the current chapter 9 that will be effective until July 1, 2001 and the revised chapter 9 that will become effective on that date. To distinguish between these two versions of chapter 9, references to the revised chapter 9 insert the designation "Rev." before the section number in the citations that follow.

166. See Rev. § 9.102(a)(13).

167. See Rev. § 9.102(a)(29).

per,¹⁶⁸ letter of credit rights,¹⁶⁹ payment intangibles as a form of general intangible,¹⁷⁰ software of two types, that embedded in goods, such as a chip contained in a hand-held calculator,¹⁷¹ and “stand alone” software,¹⁷² and supporting obligations such as guaranties or other secondary obligations that support the payment or performance of accounts, chattel paper or the like.¹⁷³

2. *Sales of Accounts, Chattel Paper, Payment Intangibles, and Promissory Notes*

Revised chapter 9 applies to the sale of accounts, chattel paper, payment intangibles, and promissory notes, as well as to security interests in these types of collateral.¹⁷⁴ Clauses waiving defenses by account debtors and preventing affirmative recovery against assignees are clarified by the revision.¹⁷⁵

3. *Definition of “Secured Party” Expanded*

The definition of “secured party” has been expanded to include a variety of persons with interests in certain property to better correlate the interests of such persons with those traditionally associated with security interests. The term now includes consignors, persons holding an agricultural lien (e.g., cropshare leases), persons who have purchased accounts, chattel paper, payment intangibles, or promissory notes, and persons who hold security interests arising from other provisions of the Code.¹⁷⁶

4. *Simplified Collateral Descriptions Allowed in Security Agreements and Financing Statements*

The manner in which collateral is described in a security agreement has been broadened, including a “safe harbor” for description by “a type of collateral” defined in chapter 9 (e.g., accounts, inventory, etc.).¹⁷⁷ Description by “type” is not sufficient, however, for commercial tort claims, consumer goods, a security entitlement, a securities account, or a commodity account.¹⁷⁸ Descriptions such as “all of the debtor’s assets” or “all of the debtor’s personal property” are not sufficient descriptions in a security agreement, but they are sufficient descriptions for purposes of a financing statement.¹⁷⁹

168. See Rev. § 9.102(a)(31).

169. See Rev. § 9.102(a)(51).

170. See Rev. § 9.102(a)(42), (a)(62).

171. See TEX. BUS. & COM. CODE ANN. Rev. § 9.102(a)(44) (Vernon Supp. 2000).

172. See Rev. § 9.102(a)(76).

173. See Rev. § 9.102(a)(78).

174. See Rev. § 9.109(a)(3).

175. See Rev. §§ 9.403, 9.406.

176. See TEX. BUS. & COM. CODE ANN. Rev. § 9.102(a)(73) (Vernon Supp. 2000).

177. See Rev. § 9.108(b).

178. See Rev. § 9.108(d), (e).

179. Compare TEX. BUS. & COM. CODE ANN. Rev. § 9.108(c) (Vernon Supp. 2000) with § 9.504(2). The description of collateral in a financing statement can be extremely

5. *Methods for Creating and Perfecting Security Agreements Expanded and Standardized*

While a security agreement under revised chapter 9 can still take the form of a written document signed by the debtor, the revision also contemplates the use of security agreements that take the form of "records" stored in an electronic or other medium that are retrievable in a perceivable form, for example, printed copy generated from a computer disk.¹⁸⁰ To be an effective security agreement, such a record must be "authenticated," and this can be done by such means as an encryption that identifies the authenticating party.¹⁸¹ Under the revised chapter 9, there is no longer any requirement that the debtor sign a financing statement if the debtor has signed a security agreement or authenticated a record creating a security interest; the secured party is, instead, authorized to file a financing statement that conforms to the terms of the security agreement.¹⁸² Uniform forms for financing statements, continuation statements, termination statements, and the like, are now contained in chapter 9 itself.¹⁸³ Filings can be made electronically or in paper form.¹⁸⁴ In the 1999 legislative session, the Texas Legislature also adopted provisions regarding electronic filing to make it clear that such filings are presently available under the existing version of chapter 9.¹⁸⁵ The revised chapter 9 will, therefore, not change existing Texas law in this regard.

6. *Definition of Proceeds Expanded and Tracing Approved*

The definition of proceeds has been expanded under the revised chapter 9 to make it clear that the term includes whatever the debtor receives upon sale, lease, license, exchange, collection, distribution, loss or other disposition of collateral.¹⁸⁶ Tracing is specifically approved as a means of identifying proceeds.¹⁸⁷

7. *Definition of Purchase Money Security Interest Expanded and Clarified; Dual-Status Rule Adopted*

The definition of "purchase money security interest" has been expanded and clarified by the revised chapter 9 and, in addition, the revi-

broad. For example, a description of "all assets" or "all personal property" is acceptable. *See* Rev. § 9.504(2). Note, however, that this allowance of super-generic descriptions does not extend to descriptions contained in the security agreement. *See* Rev. § 9.108(c). Fixture filings and timber or mineral filings continue to require real estate descriptions. *See* Rev. § 9.502(b).

180. *See* Rev. § 9.102(a)(70).

181. *See* Rev. §§ 9.102(a)(7), (a)(70), 9.203.

182. *See* Rev. §§ 9.502, 9.509.

183. *See* Rev. § 9.521.

184. *See* TEX. BUS. & COM. CODE ANN. REV. § 9.516 (Vernon Supp. 2000).

185. *See* Act of March 11, 1999, 76th Leg., R.S., ch. 149, §§ 1, 2, 1999 Tex. Gen. Laws 494, (effective May 21, 1999); Act of May 19, 1999, 76th Leg., R.S., ch. 569, § 1, 1999 Tex. Gen. Laws 707, (effective June 18, 1999).

186. *See* TEX. BUS. & COM. CODE ANN. REV. §§ 9.102(a)(65), 9.203(e)(1) (Vernon Supp. 2000).

187. *See* Rev. § 9.315(b)(2).

sion statutorily adopts the “dual-status” rule in non-consumer transactions to protect renewal or refinancing of purchase money transactions.¹⁸⁸ This should avoid the “transformation rule” that has been a problem in the refinancing of purchase money interests under the present chapter 9.¹⁸⁹

8. *Rules for Determining Jurisdiction for Filing Substantially Changed; Other Methods of Perfection Permitted*

The rules for determining the jurisdiction where a financing statement must be filed to perfect a security interest have been substantially changed. Perhaps the most important change is a requirement that financing statements be filed in the state where the debtor is located instead of in the state where the collateral is located.¹⁹⁰ For purposes of this rule, the location of a corporate or other “entity” debtor is in the state of incorporation.¹⁹¹ Despite this change in determining where a financing statement must be filed to perfect a security interest, however, the law of the jurisdiction where the collateral is located will continue to govern issues concerning the effect of perfection, for example, in disputes concerning priorities.¹⁹² Security interests in certain collateral can be perfected only by taking “control” of the collateral, a concept that was introduced in the revised chapter 8,¹⁹³ and that has been extended in the revised chapter 9 to include, in addition to investment property, security interests in deposit accounts,¹⁹⁴ electronic chattel paper,¹⁹⁵ and letter of credit rights.¹⁹⁶ As a general proposition, “control” requires the assent of the person who maintains the records showing ownership of the property to be “controlled.” For example, the bank where the debtor has a deposit account must assent to the secured party having control of the account. Perfection can be automatic if the secured party is the same person as the person that maintains the records, for example, if the secured party is also the bank where the deposit account is maintained.

Under revised chapter 9, possession remains as a proper method of perfection and, in some instances, is the best method of perfection. For example, possession of instruments is safer than filing because it prevents transfer of an instrument to a holder in due course. Perfection by possession can be used whenever the collateral is in a form that is capable of

188. See Rev. § 9.103.

189. See Rev. § 9.103(e). See also John Krahmer, *Annual Survey of Texas Law: Commercial Transactions*, 51 SMU L. REV. 783, 799-800 (1998) (for a discussion of the “dual-status” rule and the “transformation” rule).

190. Compare TEX. BUS. & COM. CODE ANN. § 9.103(a) (Vernon Supp. 2000) with Rev. §§ 9.301, 9.307.

191. See Rev. § 9.307(e).

192. See Rev. § 9.301(3).

193. See § 8.106.

194. See Rev. §§ 9.102(a)(29), 9.104, 9.312(b) & 9.314. Cf. § 9.304(a) (the present non-uniform Texas amendment) covering “book-entry” certificates of deposit.

195. See TEX. BUS. & COM. CODE ANN. Rev. §§ 9.102(a)(31), 9.105, 9.312(a), 9.314(a) (Vernon Supp. 2000).

196. See Rev. §§ 9.102(a)(51), 9.107, 9.308(d), 9.312(b)(2), 9.314(c), 9.409.

being possessed, that is, when the property has a tangible form. For example, possession can be used to perfect a security interest in negotiable documents, goods, instruments, money, certificated securities, or tangible chattel paper.¹⁹⁷ Security interests in intangible collateral, such as electronic chattel paper, must be perfected by filing or control.¹⁹⁸ If the collateral is in the possession of a third party, such as a bailee who has not issued a document of title covering the goods, the secured party has possession from the time the third party acknowledges that it holds possession for the benefit of the secured party.¹⁹⁹

Except for fixture filings and filings covering timber or minerals (which are termed "as-extracted collateral"),²⁰⁰ financing statement filings are centralized in the Office of the Secretary of State by the revised chapter 9.²⁰¹ This represents only a modest change from the non-uniform version of section 9.401 that is presently in effect in Texas.²⁰² The non-uniform Texas amendment dealing with the rights of persons as interest owners in oil and gas production that currently appears in section 9.318 of the Code has been retained as section 9.343 in the revision.²⁰³

9. *Rules for Identifying the Debtor Clarified and Test of Identification Standardized*

The standards for specifying the name of the debtor used in a financing statement are clarified and a statutory test based on the search logic used by the filing office is stated for judging if the name is seriously misleading.²⁰⁴

10. *Concept of Perfection by Control Extended to Several Forms of Collateral; Setoff Rights Given Super-Priority*

Security interests in deposit accounts, promissory notes, letter of credit rights, and investment property perfected by possession or control take priority over security interests perfected by filing.²⁰⁵ The "super-priority" of purchase money interests is continued and, in some instances, ex-

197. See Rev. § 9.313.

198. See Rev. § 9.314.

199. See Rev. § 9.313(e). If a negotiable document of title covers the goods, possession of the document of title itself is required to perfect a security interest in the goods. See Rev. § 9.313(a). If a non-negotiable document covers the goods, the bailee's receipt of notification of the secured party's interest is sufficient. See Rev. § 9.312(d).

200. See TEX. BUS. & COM. CODE ANN. Rev. § 9.102(a)(6) (Vernon Supp. 2000).

201. See Rev. § 9.501(a).

202. See § 9.401(a).

203. See TEX. BUS. & COM. CODE ANN. § 9.318 (Vernon 1991); TEX. BUS. & COM. CODE ANN. Rev. § 9.343 (Vernon Supp. 2000).

204. See TEX. BUS. & COM. CODE ANN. Rev. §§ 9.502(a)(1), 9.503, 9.506(b) (Vernon Supp. 2000); see also *ITT Commercial Fin. Corp. v. Bank of the West*, 166 F.3d 295 (5th Cir. 1999) (where the court used this test as part of the basis for its decision under the existing chapter 9).

205. See TEX. BUS. & COM. CODE ANN. Rev. §§ 9.107, 9.325, 9.328(1), 9.329, 9.330(d), 9.331(a) (Vernon Supp. 2000).

tended.²⁰⁶ Rights of setoff or recoupment by a depository institution have priority over a perfected security interest in a deposit account held by a third party secured creditor unless the creditor has put the account in its own name.²⁰⁷

11. *Rules on Transferees of Collateral Generally Unchanged*

As against transferees of collateral, revised chapter 9 continues most of the current rules. A buyer in the ordinary course of business, however, will not take free of a security interest perfected by a secured party in possession of the purchased goods.²⁰⁸ Transferees of money or of funds from a deposit account take free of a security interest unless they act in collusion with the debtor.²⁰⁹

12. *Default Rules Made Applicable to Guarantors*

Rules governing default are explicitly made applicable to secondary obligors such as guarantors.²¹⁰ This is consistent with the result reached in Texas case law for some aspects of default under the old version of chapter 9, but it may also extend this principle to some degree as regards pre-default waivers.²¹¹ The prohibition against pre-default waivers is expanded to cover more subjects than are covered in the existing chapter 9.²¹² Except for letters of credit, a secured party has the explicit right to enforce claims against secondary parties or account debtors who are obligated on collateral.²¹³ A separate rule concerning enforcement of security interests in rights under a letter of credit is stated in section 5.114 as revised in 1999.²¹⁴

206. See Rev. §§ 9.103(b)(2), 9.324.

207. See Rev. § 9.340. This will reverse the equitable setoff rule adopted in *National Indemnity Co. v. Spring Branch State Bank*, 348 S.W.2d 528 (Tex. 1961).

208. See TEX. BUS. & COM. CODE ANN. Rev. § 9.320(e) (Vernon Supp. 2000); see also Rev. § 1.201(9). This is intended to reverse the result reached in *Tanbro Fabrics Corp. v. Deering Milliken, Inc.*, 350 N.E. 2d 590 (N.Y. 1976). See C. COOPER, *THE NEW ARTICLE 9* 35-36 (1999).

209. See TEX. BUS. & COM. CODE ANN. Rev. § 9.332 (Vernon Supp. 2000).

210. See Rev. §§ 9.102(a)(60), 9.102(a)(72), 9.602.

211. As to post-default notice, see, e.g., *MBank Dallas v. Sunbelt Manuf., Inc.*, 710 S.W.2d 633 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) (holding that guarantor entitled to notice before sale of collateral). As to pre-default waivers, see *Rabinowitz v. Cadle Co. II, Inc.*, 993 S.W.2d 796 (Tex. App.—Dallas 1999, no pet. h.), where the court found there were no Texas state court cases addressing the precise issue, but holding that a guarantor, before default, could not waive the right to have collateral sold in a commercially reasonable manner. The court noted that the federal court reached a different result in *Steinberg v. Cinema N' Drafthouse Sys., Inc.*, 28 F.3d 23 (5th Cir. 1994), but rejected the reasoning of the federal court as "wholly unpersuasive." See *Rabinowitz*, 993 S.W.2d at 799 n.1.

212. Compare TEX. BUS. & COM. CODE ANN. § 9.501(c) (Vernon Supp. 2000) with Rev. § 9.602.

213. See Rev. § 9.607.

214. See § 5.114. The revision of § 5.114 became effective on September 1, 1999 as part of the revision of chapter 5 of the Code discussed, *supra*, note 144. Application of this rule to security interests in letter of credit rights does not await the effective date of July 1, 2001 for the chapter 9 revision.

13. *Notice Rules on Disposition of Collateral Parallel Prior Texas Non-Uniform Amendments*

The revised chapter 9 adopts the non-uniform Texas amendment in the current section 9.504 requiring that notice of sale be given to other secured parties who have filed financing statements on the same collateral.²¹⁵ The revised chapter 9 also provides a "safe harbor" form for giving notice of public sale to the debtor, to obligors, and to other secured parties.²¹⁶

14. *Rebuttable Presumption Rule Adopted in Non-Consumer Cases; Revision Takes No Position on Consumer Cases*

Revised chapter 9 adopts the "rebuttable presumption rule" instead of the "absolute bar rule" for non-consumer transactions.²¹⁷ This changes the absolute bar rule adopted in *Tanenbaum v. Economic Laboratories*,²¹⁸ and subsequently applied in several Texas cases.²¹⁹ The revision takes no position on the rule that should be applied in consumer transactions, thus leaving open the possibility that the absolute bar rule will continue to apply in those cases.

15. *Rules for Accepting Return and Retention of Collateral Liberalized With Exception of Consumer Cases*

Except in consumer transactions, a secured party may accept the return of collateral in either full or partial satisfaction of a secured claim.²²⁰ A secured party will not be deemed to have impliedly accepted collateral in satisfaction of the debt; there must be an affirmative act of acceptance before the secured party will be treated as having accepted the collateral in satisfaction.²²¹ Applied to the facts of *Tanenbaum v. Economic Laboratories*,²²² this rule would prevent treating the creditor as having accepted the collateral in full satisfaction of the debt; revised chapter 9

215. Compare § 9.504(c) (Vernon 1991) with Rev. § 9.611(c) (Vernon Supp. 2000).

216. See Rev. § 9.613.

217. See TEX. BUS. & COM. CODE ANN. Rev. § 9.626(a)(3) (Vernon Supp. 2000). Under the absolute bar rule, if a creditor fails to dispose of collateral in a commercially reasonable manner, the creditor is barred from recovering a deficiency. See, e.g., *Milliorn v. Finance Plus, Inc.*, 973 S.W.2d 690 (Tex. App.—Eastland 1998, no pet.) (holding that failure to give notice of public sale of collateral note barred recovery of deficiency but creditor entitled to recover on a separate note not involved in commercially unreasonable foreclosure sale); *Havins v. First Nat'l Bank*, 919 S.W.2d 177 (Tex. App.—Amarillo 1996, no writ) (holding that sale of collateral in a recognized market does not require prior notice but record did not show that livestock auction was a recognized market; absent proof of notice and commercially reasonable disposition or that sale was in a recognized market, creditor not entitled to recover deficiency); *ITT Commercial Fin. Corp. v. Riehn*, 796 S.W.2d 248 (Tex. App.—Dallas 1990, no writ) (holding that creditor who elects to sell collateral must both give notice and sell in commercially reasonable manner to recover deficiency; failure to meet either requirement makes sale an act of conversion).

218. 628 S.W.2d 769 (Tex. 1982).

219. See cases cited *supra* note 216.

220. See TEX. BUS. & COM. CODE ANN. Rev. § 9.618 & 9.620 (Vernon Supp. 2000).

221. See Rev. § 9.620(c).

222. 628 S.W.2d 769 (Tex. 1982).

would instead treat any delay like that involved in *Tanenbaum* as going to the question of the commercial reasonableness of the disposition.²²³

16. *Burden of Proving Commercial Reasonableness Placed on Secured Party*

The burden of proving the commercial reasonableness of a disposition is placed on the secured party if the debtor puts the secured party's compliance with the rules governing disposition of collateral in issue.²²⁴ This is consistent with the ruling by the Texas Supreme Court in *Greathouse v. Charter National Bank-Southwest*,²²⁵ and will not effect a significant change in Texas law as it currently exists.

17. *Consumer Secured Transactions Defined; More Information After Default Required in Consumer Cases*

Consumer secured transactions are defined as transactions in which both the collateral and the secured obligation are primarily for personal, family, or household purposes.²²⁶ Unlike the provisions in chapter 2A governing leases of personal property, there is no dollar cap on consumer secured transactions.²²⁷ The Federal Trade Commission holder in due course rule is explicitly made applicable to consumer secured transactions.²²⁸ Consumer debtors are entitled to more information in the event of default and sale of collateral.²²⁹

18. *Extensive Transition Provisions Stated*

To allow time for secured parties to learn the rules of the revised chapter 9, and to protect existing security interests from invalidation because of changes made by the revision, the new chapter 9 contains extensive transition provisions.²³⁰ The transition provisions govern such matters as

223. See TEX. BUS. & COM. CODE ANN. REV. § 9.627 (Vernon Supp. 2000); see also *Piney Point Inv. Corp. v. Photo Design, Inc.*, 691 S.W.2d 768 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.). The court held that a creditor had not elected to retain collateral in satisfaction of a debt even though the creditor still had most of the collateral in its possession some two years after repossession.

Piney Point was probably an incorrect application of *Tanenbaum*, 628 S.W.2d 769, when it was decided, but the result there reached is now condoned by the revised chapter 9.

224. See TEX. BUS. & COM. CODE ANN. REV. § 9.626(a) (Vernon Supp. 2000).

225. 851 S.W.2d 173 (Tex. 1992).

226. See TEX. BUS. & COM. CODE ANN. REV. §§ 9.102(a)(22), (a)(23), (a)(24) (Vernon Supp. 2000).

227. See Rev. § 2A.103(a)(5) (Vernon Supp. 2000) (defining a consumer lease as one in which the total payments, excluding payments for options to renew or buy at the end of the lease term, are less than \$25,000).

228. See Rev. § 9.403(d) (Vernon Supp. 2000). The FTC holder in due course rule requires that any consumer credit contract contain a notice that the holder remains subject to any claims and defenses that the debtor could assert against the seller of the goods or services provided under the contract. See 16 C.F.R. §§ 433.1 -.3 (1999).

229. See TEX. BUS. & COM. CODE ANN. REV. §§ 9.614, 9.616 (Vernon Supp. 2000).

230. In the Official Text of the revised Code, these provisions are contained in U.C.C. §§ 9-701 to 9-708. As enacted in Texas, the transition provisions were not included as part of chapter 9 itself, but were adopted as §§ 3.01 -.08 of the bill enacting the revised chapter

the continued effectiveness of currently filed financing statements, the attachment of security interests to new types of collateral as of the effective date of the revised chapter 9, and priorities between filings made under the “old” Code and filings made under the “new” Code.²³¹

9. See Act of June 18, 1999, 76th Leg., R.S., ch. 414, § 3.01 -.08, 1999 Tex. Gen. Laws 1058. The transition provisions appear in the “Historical and Statutory Notes” in the 2000 Supplement for TEX. BUS. & COM. CODE ANN. REV. § 9.101 (Vernon Supp. 2000).

231. A detailed analysis of the transition provisions is included on the CD-ROM resource disk described *supra* note 163.