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Commercial Transactions

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COMMERCIAL TRANSACTIONS

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ON July 1, 2001, the law of secured transactions was substantially changed when revised Article 9 of the Uniform Commercial Code became effective in Texas and in forty-five other states.[1] While this is the most significant event affecting the subject of commercial transactions during the Survey period, it will be some time before cases are reported that interpret and apply the revision. In the meantime, however, a number of cases were decided under other provisions of the Code that are not affected by the revision and these are discussed below. As usual, the discussion follows the organization of the Texas Business and Commerce Code (the "Code").[2]

I. GENERAL PROVISIONS

A. CHOICE OF LAW

Cases arising under the Code are governed by choice of law rules contained in the Code itself and not by the choice of law rules that might be applied to non-Code disputes.[3] This principle was recognized in *In re*

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1. Revised Article 9 was adopted in Texas during the 1999 legislative session to become effective on July 1, 2001. *See* Act of June 18, 1999, 76th Leg., R.S., ch. 414, § 1.01, 1999 Tex. Gen. Laws 2639. Several technical amendments were made during the 2001 legislative session, but the effective date remained the same. *See* Act of June 13, 2001, 77th Leg., R.S., ch. 705, §§ 1-26 (codified as TEX. BUS. & COM. CODE ANN. §§ 9.101 -.709 (Vernon Supp. 2002).

Enactments in other jurisdictions are collected in the Uniform Commercial Code Reporting Service, State U.C.C. Variations Table, pp. xxv-xxvi (2001). Four other states also adopted the revision, but with changes in the effective date. In Connecticut the effective date was October 1, 2001. In Alabama, Florida, and Mississippi, the effective date was January 1, 2002.

2. In Texas, the Uniform Commercial Code comprises 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. 2000). These chapters are designated as follows:

Chapter 1:	General Provisions
Chapter 2:	Sales
Chapter 2A:	Leases
Chapter 3:	Negotiable Instruments
Chapter 4:	Bank Deposits and Collections
Chapter 4A:	Funds Transfers
Chapter 5:	Letters of Credit
Chapter 7:	Warehouse Receipts, Bills of Lading and Other Documents of Title
Chapter 8:	Investment Securities
Chapter 9:	Secured Transactions

3. *See, e.g.*, Admiral Ins. Co. v. Brinkcraft Dev., Ltd., 921 F.2d 591, 592 (5th Cir. 1991) (noting that separate standards apply to Code cases and to common law cases); Da-

Kemper,[4] where the court held that a series of promissory notes properly selected Texas law because the notes were "negotiable instruments" under the Code and the transactions bore a "reasonable relationship" to Texas.[5] The court rejected an argument that Florida and Nevada had "more significant contacts" with the transactions because section 1.105(a) of the Code only requires a reasonable relationship and not "the most significant" relationship with a given state.[6] Applying substantive Texas law, the court held an issue of material fact existed as to whether the payment of "consulting fees" required under the notes was actually a demand for the payment of illegal interest.[7] The court further held, however, that partial summary judgment should be rendered in favor of the plaintiff (who had sought application of Texas law) on the issue of whether certain letters sent by the defendants met the requirements for correcting usury violations under the Texas Finance Code.[8]

II. SALE OF GOODS

A. STATUTE OF FRAUDS

The basic premise of the Code statute of frauds contained in section 2.201 is that a contract for the sale of goods at a price of more than five hundred dollars must be in writing and signed by the party against whom enforcement is sought.[9] Even without a writing, however, a contract can satisfy the statute of frauds requirement if it meets one of three stated statutory exceptions: (1) if the goods are specially manufactured for the buyer and are not suitable for resale to others, (2) if the party against whom enforcement is sought admits in pleadings, testimony, or otherwise in court that a contract was made, or (3) if payment for the goods has been made and accepted or if the goods have been received and accepted.[10]

In *Iron Mountain Bison Ranch, Inc. v. Easley Trailer Manufacturing, Inc.*,[11] the seller took orders for livestock trailers by using quote sheets containing specifications and the price along with the name and address of the buyer and a space for the signature of the person who placed the order. The court held quote sheets signed by an agent of the buyer were

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vidson Oil Country Supply Co. v. Klockner, Inc., 908 F.2d 1238, 1248 (5th Cir. 1990) (applying Code rules because case arose under the Code).

4. 263 B.R. 773 (Bankr. E.D. Tex. 2001).

5. *Id.* at 778-79.

6. TEX. BUS. & COM. CODE ANN. § 1.105(a) (Vernon Supp. 2002) provides, *inter alia*, that "when a transaction bears a reasonable relationship to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties."

7. *See Kemper*, 263 B.R. at 782.

8. *See id.* at 785. TEX. FIN. CODE ANN. § 305.103(a) (Vernon Supp. 2002) permits a creditor to avoid a usury violation if the creditor corrects the violation within sixty days after the violation is discovered and before the obligor gives written notice of the violation or files an action alleging the violation.

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

10. TEX. BUS. & COM. CODE ANN. § 2.201(c)(1)-(3) (Vernon 1994).

11. 42 S.W.3d 149 (Tex. App.—Amarillo 2000, no pet.).

sufficient to satisfy the statute of frauds.[12] Despite having won the statute of frauds battle, judgment in favor of the seller was reversed because the jury returned a damage verdict in an amount that was not supported by the evidence.[13]

In *Continental Casing Corp. v. Siderca Corp.*,[14] the court held a distributorship agreement containing a mix of sales and services was within the Code statute of frauds if the dominant factor of the agreement was the sale of goods. Noting that no Texas case had addressed the point, the court chose to follow the majority view in favor of holding that distributorship agreements are subject to the Code.[15] Since there was no signed writing evidencing the distributorship agreement, and since none of the exceptions to the writing requirement were met, the court held the alleged agreement was unenforceable as a matter of law.[16]

Exceptions to the statute of frauds were addressed in *Morena v. Ingenieria E. Maquinaria de Guadalupe, S.A.*,[17] and *Adams v. H & H Meat Products, Inc.*.[18] In *Morena*, the court found the "payment exception" of the statute of frauds was satisfied where the buyer had paid the purchase price for a hydraulic press despite the lack of a signed writing that could be characterized as a contract.[19] The court also held, given the lack of a signed writing, parol evidence could be introduced on the issue of whether the plaintiff buyer or the defendant broker (who was acting on behalf of the seller) was responsible for supplying rail cars to be used to transport the press to the buyer's factory.[20] On this issue the court reversed a summary judgment in favor of the buyer and remanded the case for further consideration in light of the parol evidence proffered by the defendant broker.[21] In *Adams* the "accepted goods" exception to the statute of frauds was satisfied where the buyer accepted delivery of meat products but subsequently failed to pay for them.[22] Judgment in favor of the plaintiff seller was affirmed.[23]

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12. *Id.* at 157.

13. *Id.* at 161. In addition to seeking recovery on an express contract based on the quote sheets, the seller also sought recovery on theories of promissory estoppel and quantum meruit. The court of appeals ruled the broad-form damage instruction on which the damage issue was submitted to the jury was erroneous because it included both valid and invalid theories of liability and it was impossible to determine whether the jury based its verdict on an improper theory. *Id.* at 157.

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

15. On this point, the court cited cases from eighteen jurisdictions that applied the Code to distributorship agreements. *See Continental*, 38 S.W.3d at n.1.

16. *Id.* at 787-88.

17. 56 S.W.3d 652 (Tex. App.—Waco 2001, no pet.).

18. 41 S.W.3d 762 (Tex. App.—Corpus Christi 2001, no pet.).

19. *See Morena*, 56 S.W.3d at 657.

20. *Id.* at 657-58.

21. *Id.* at 658-60.

22. *See Adams*, 41 S.W.3d at 776.

23. *Id.* at 781.

B. Output And Requirement Contracts

Deregulation and price fluctuations in the natural gas market have raised issues resulting in some significant decisions by the Texas Supreme Court in recent years.[24] Other issues, however, still remain as illustrated by the decision in *Aquila Southwest Pipeline, Inc. v. Harmony Exploration, Inc.*.[25] In *Aquila*, a contract required the buyer to purchase and process all of the natural gas produced by the seller.[26] The principal issue was whether the contract required the buyer to use its "best efforts" to promote the sale of gas.[27]

In addressing this question, the court discussed some of the prior decisions and noted those decisions did not apply to the best efforts requirement in subsection (b) of section 2.306 of the Code.[28] In the case at bar, the contract covered the purchase and processing of the seller's entire output and the court concluded the buyer was required to use its best efforts to promote the sale of gas, because the price to be paid for the gas depended upon the price the buyer received from subsequent purchasers.[29] A jury verdict in favor of the seller was upheld.[30]

C. Warranties

In *PPG Industries, Inc. v. JMB/Houston Centers Partners Limited Partnership*,[31] the court faced a series of intriguing questions about the relationship between the Texas Deceptive Trade Practices Act (DTPA) and express warranties arising under section 2.313 of the Code.[32] First, because breach of warranty actions can be maintained as suits under the DTPA, if an express warranty explicitly provides that it covers goods for

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24. *See, e.g.*, El Paso Natural Gas Co. v. Minco Oil & Gas, Inc., 8 S.W.3d 309 (Tex. 1999) (holding that the Code requirement of good faith is not applicable to the termination of a contract to purchase natural gas) (discussed in John Krahmer, *Commercial Transactions*, 53 SMU L. Rev. 729, 731 (2000)); N. Natural Gas Co. v. Conoco, Inc., 986 S.W.2d 603 (Tex. 1999) (holding that contract for processing of natural gas is not an output or requirements contract where the buyer is not required to purchase any gas) (discussed in John Krahmer, *Commercial Transactions*, 52 SMU L. Rev. 813, 814-16 (1999)); Lenape Resources Corp. v. Tennessee Gas Pipeline Co., 925 S.W.2d 565 (Tex. 1996) (holding that, if a contract specifies the quantity of gas to be purchased, it is not an output or requirements contract under the Code) (discussed in John Krahmer, *Commercial Transactions*, 50 SMU L. Rev. 1025, 1030-31 (1997)).

25. 48 S.W.3d 225 (Tex. App.—San Antonio 2001, pet. denied).

26. *Id.* at 231.

27. *Id.* at 233-34.

28. *Id.* at 234-35. The court distinguished *Northern*, 986 S.W.2d 603, because that contract involved only the processing and not the purchase of gas and, therefore, it was not an output or requirements contract under either Tex. Bus. & Com. Code Ann. § 2.306(a) or (b) (Vernon 1994). *Lenape*, 925 S.W.2d 565, was distinguished because that contract specified a quantity of gas to be purchased which meant that it was not an output or requirements contract under Tex. Bus. & Com. Code Ann. § 2.306(a) (Vernon 1994).

29. *Aquila*, 48 S.W.3d at 234-35.

30. *Id.* at 247.

31. 41 S.W.3d 270 (Tex. App.—Houston [14th Dist.] 2001, Rule 53.7(f) motion filed).

32. The Texas Deceptive Trade Practices Act appears as Tex. Bus. & Com. Code Ann. § 17.43 -.63 (Vernon 1994 & Supp. 2002). The requirements for the creation of express warranties appear in Tex. Bus. & Com. Code Ann. § 2.313(a) & (b) (Vernon 1994).

twenty years, is the action governed by the DTPA as it existed when the warranty was made or is the action governed by the DTPA as it existed when suit was filed?[33] The resolution of this question was particularly important because the warranty was made while the 1973 version of DTPA was in effect and that version provided for mandatory trebling of damages.[34] By the time the breach of warranty was discovered and suit was filed, the DTPA had been amended to eliminate mandatory trebling.[35] In a careful review of the 1973 version and the subsequent amendments, the court held the DTPA should be applied as it existed when the warranty was made.[36]

Second, can a breach of warranty claim brought as a DTPA action be assigned? Noting a split of authority on the assignability of DTPA claims, and after a careful review of both prior caselaw and scholarly writings, the court was persuaded the better view is that such claims can be assigned, in part because the claim arose from a breach of warranty which, as a contract claim, was clearly assignable.[37]

Third, if an assignee cannot qualify as a consumer under the DTPA because the assignee is a business consumer with assets of 25 million dollars or more, can the assignee maintain the action based on the assignor's status as a consumer?[38] The court answered this question in the affirmative in two ways. First, under the ordinary rules of statutory construction, the amendment was prospective only. Since the exclusion for certain business consumers was added to the DTPA by amendment after the warranty had already come into existence, the exclusionary amendment did not apply.[39] Second, even if the exclusionary amendment did apply, the assignee was not asserting its own claim, but the claim of the assignor, and it was the status of the assignor that was controlling.[40]

Fourth, was the breach of warranty claim barred by limitations? On this issue, the court held that the discovery rule applied and that factual findings by the court below in the bench trial established the suit had been brought within the time permitted by the discovery rule under both the

33. Although most warranties have only a four-year lifespan under TEX. BUS. & COM. CODE ANN. § 2.725(a) (Vernon 1994) and the question of which version of the DTPA applies is usually not in issue, warranties can explicitly extend to the future performance of the goods and breach can occur at any time during the life of the warranty. *See* TEX. BUS. & COM. CODE ANN. § 2.725(b) (Vernon 1994).

34. *See* Deceptive Trade Practices—Consumer Protection Act, 1973, 63rd Leg., R.S., ch. 143, § 1, 1973 Tex. Gen. Laws. 322, 327.

35. *See* Deceptive Trade Practices—Consumer Protection Act, 1989, 71st Leg., R.S., ch. 380, § 2, 1989 Tex. Gen. Laws 1490, 1491.

36. This ruling meant that the difference in the damage recovery was $14,235,111 with mandatory trebling as compared to $4,745,037 without trebling.

37. *PPG*, 41 S.W.3d at 276-77.

38. The exclusion of business consumers with assets of 25 million dollars or more was added to TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon 1987) in 1983. *See* Deceptive Trade Practices—Consumer Protection Act, 1983, 68th Leg., R.S., ch. 883, § 2, 1983 Tex. Gen. Laws 4943, 4944.

39. *PPG*, 41 S.W.3d at 278-79.

40. *Id.* at 279.

DTPA and the Code.[41] Judgment in favor of the buyer was affirmed.[42]

In *Materials Marketing Corp. v. Spencer*,[43] the plaintiffs sued for breach of warranty and DTPA violations arising from the purchase and installation of stone tile that varied in color from the samples they had been shown when the purchase was made. The seller contended all warranties had been effectively disclaimed and, furthermore, the contract limited the seller's liability to an amount equal to the purchase price of the tile (which would avoid any liability for removal and replacement of the tile).[44] In upholding an award in favor of the homeowners that included both the purchase price of the tiles and the replacement costs, the court ruled the attempted disclaimer was ineffective in regard to implied warranties because it was contained on the back of an invoice that was sent to the contractor who had installed the tile and the contractor had provided only the front of the invoice to the homeowners.[45] As to whether the warranty was "conspicuous" as required by section 2.316 of the Code, the court noted, "The disclaimer cannot be conspicuous to the [homeowners] if they never received it."[46] As to express warranties, the court held an express warranty had been created by sample and that section 2.316(a) of the Code allows an express warranty to survive an inconsistent disclaimer.[47] The limitation of liability clause suffered from the same problem as the disclaimer—it was on the back of the invoice and was never seen by the homeowners.[48] Under these circumstances, the attempted limitation was ineffective.[49]

In *Smith v. Radam, Inc.*,[50] the court held, even if a truck dealer's statements that a used truck was in "good condition" and "would not need repairs" amounted to express warranties, an "as is" disclaimer prevented the buyer from showing the seller's conduct was a producing cause of the harm. Quoting from *Prudential Insurance Co. of America v. Jefferson As-*

41. *Id.* at 279-84.

42. *Id.* at 285.

43. 40 S.W.3d 172 (Tex. App.—Texarkana 2001, no pet.).

44. *Id.*

45. *Id.* at 175.

46. *Id.*; TEX. BUS. & COM. CODE ANN. § 2.316(b) (Vernon 1994) requires that the exclusion or modification of implied warranties must be in writing and must be conspicuous.

47. *Materials Marketing*, 40 S.W.3d at 175. TEX. BUS. & COM. CODE ANN. § 2.313(a)(3) (Vernon 1994) provides: "Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model."

TEX. BUS. & COM. CODE ANN. § 2.316(a) (Vernon 1994) states:

> Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this chapter on parol or extrinsic evidence (Section 2.202) negation or limitation is inoperative to the extent that such construction is unreasonable.

48. *Materials Marketing*, 40 S.W.3d at 176.

49. *Id.* Limitations of liability are permitted by TEX. BUS. & COM. CODE ANN. § 2.316(d) (Vernon 1994).

50. 51 S.W.3d 413 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

sociates, Ltd.,[51] the court said:

> [An as is] clause precludes a buyer from proving that the seller's conduct caused him any harm. When a buyer agrees to purchase something "as is," he agrees to make his own appraisal of the bargain and to accept the risk that he may be wrong. In making this choice, a buyer "removes the possibility that the seller's conduct will cause him damage." (Citations omitted.)[52]

The court ruled that summary judgment in favor of the dealer was proper on the buyer's warranty-based DTPA claim.[53] The court did not discuss the "express warranties survive disclaimers" rule of section 2.316(a) that was applied in the *Materials Marketing* case.[54]

An action for breach of warranty can be maintained even if the damage only involves the goods themselves as illustrated by *Rivera v. Wyeth-Ayerst Laboratories*,[55] where the plaintiffs were allowed to proceed with a suit for breach of an implied warranty of merchantability to recover the purchase price of a medication that was rendered valueless because of an FTC order withdrawing the drug from the market, even though no injury was caused by the medication. If a defective product causes injury, recovery can also be had, of course, for the resulting injury.[56]

In *Otis Spunkmeyer, Inc. v. Blakely*,[57] the plaintiff was injured by a hard object concealed in a cookie. In an action for breach of implied warranty and strict liability, the jury found the manufacturer's breach of the implied warranty of merchantability proximately resulted in the plaintiff's injury. On the strict liability claim, however, the same jury also found the defect in the cookie was not a producing cause of the injury.[58] While the court agreed that both implied warranty and strict liability claims were viable theories on the facts of the case, the conflict in the jury findings required a remand for a new trial.[59]

D. Tender And Acceptance

The Code default rule governing contracts for the sale of goods is that the obligation of the seller is to make tender of delivery and the obliga-

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51. 896 S.W.2d 156 (Tex. 1995).

52. *Smith*, 51 S.W.3d at 416 (citations omitted).

53. *Id.* at 417. In a DTPA claim based on a breach of warranty, a buyer must prove that the breach was a "producing cause" of the buyer's damages. *See* Tex. Bus. & Com. Code Ann. § 17.50(a) (Vernon 1987). This is an easier standard to meet than the "proximate cause" standard required by Tex. Bus. & Com. Code Ann. §§ 2.714, 2.715(b) (Vernon 1994).

54. *Materials Marketing*, 40 S.W.3d at 175.

55. 121 F. Supp. 2d 614 (S.D. Tex. 2000).

56. Tex. Bus. & Com. Code Ann. § 2.715(b) (Vernon 1994) expressly allows recovery for "injury to person or property proximately resulting from any breach of warranty."

57. 30 S.W.3d 678 (Tex. App.—Dallas 2000, Rule 53.7(f) motion filed).

58. *Id.* at 682.

59. *Id.* at 691-92.

tion of the buyer is to accept and pay.[60] Tender of delivery requires the seller to make the goods available to the buyer and to give the buyer any notification needed for the buyer to take delivery.[61] Unless the parties have otherwise agreed, the buyer is responsible for providing facilities that are suitable for receipt of the goods.[62] Application of these rules resulted in a summary judgment in favor of the seller in *Valero Marketing & Supply Co. v. Kalama International*,[63] where the parties had contracted for the sale and purchase of 20,000 barrels of methanol. The contract specified that the methanol was to be 99.85 percent pure and delivery was to take place no later than June 30, 1997.[64] On that date, the methanol was ready for delivery but the barge provided by the buyer was contaminated by gasoline residue left by a prior cargo of unleaded gasoline.[65] A third-party company, hired by the seller to do the actual loading, refused to load the barge because the presence of the gasoline residue would contaminate the methanol and lower the purity level.[66] Two days later, following an unsuccessful attempt to clean the barge, the seller terminated the contract.[67] The buyer "covered" by purchasing a similar quantity of methanol from another source at a higher price.[68] The buyer eventually sued for the increased cost of the cover purchase. After reviewing the relevant provisions of the Code, the court affirmed summary judgment in favor of the seller on the ground the buyer failed to fulfill its responsibility of providing facilities that were reasonably suited to receive the goods.[69]

In *Bacchus Industries, Inc. v. Frontier Mechanical Contractors*,[70] a subcontractor ordered 181 air conditioning units from a manufacturer. The subcontractor refused to accept the air conditioners because of defects.[71] After some discussion, the manufacturer agreed to repair the units and the general contractor permitted them to be left at the job sites while the manufacturer made the repairs. The manufacturer, however, never made the repairs. Faced with a project deadline, the subcontractor made the repairs itself, withholding some $35,000 from the amount due as damages

60. TEX. BUS. & COM. CODE ANN. § 2.301 (Vernon 1994) provides, "The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract."

61. TEX. BUS. & COM. CODE ANN. § 2.503(a) (Vernon 1994) provides, in part, "Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery."

62. TEX. BUS. & COM. CODE ANN. § 2.503(a)(2) (Vernon 1994) provides, "[U]nless otherwise agreed the buyer must furnish facilities reasonably suited to the receipt of the goods."

63. 51 S.W.3d 345 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

64. *Id.* at 347.

65. *Id.*

66. *Id.* at 347-48.

67. *Id.* at 348.

68. *Valero Marketing*, 51 S.W.3d at 348.

69. *Id.* at 354.

70. 36 S.W.3d 579 (Tex. App.—El Paso 2001, pet. denied).

71. *See id.* at 581.

resulting from the manufacturer's breach. In an action by the manufacturer to recover the withheld funds, the trial court, applying common law contract principles, ruled the manufacturer was not entitled to recover because it had breached the contract by delivering defective goods. On appeal, the court held application of this common law rule was error because the Code clearly provides that post-rejection conduct by a buyer, such as making repairs and using the goods, constitutes an acceptance making the buyer liable for the price of the goods.[72] The court further held, however, it was equally clear that the aggrieved buyer was entitled to deduct its damages from the price.[73] In this case, the actual damages suffered by the buyer, as the cost of making the necessary repairs, were approximately $21,000.[74] The manufacturer was entitled to recover the excess amount that had been withheld because the buyer had withheld $35,000, an amount that exceeded its actual damages by $14,000.[75] Under these circumstances, both parties were "prevailing parties" on their respective claims for the recovery of attorney's fees.[76]

E. DAMAGES

In addition to the overlap between the Code, the DTPA, and the common law of fraud in regard to theories of action founded on warranty, misrepresentation, and breach of contract, there is an overlap among these theories in regard to issues of damages. In the very interesting case of *United States v. Harrop Construction Co., Inc.*,[77] based on assurances of timely delivery and performance, a contractor ordered structural steel from a supplier for three construction projects and also engaged the services of the supplier to erect the steel framework for one of the projects. The supplier failed to make deliveries on time because of a lack of adequate facilities and labor, and completion of the projects was delayed well beyond their scheduled completion dates.[78] In fact, the delays were so significant that the contractor was forced out of the construction business. Driven, perhaps, by an understandable disgust with the supplier, the contractor refused to pay for the late deliveries of the structural steel and the supplier sued for the contract price.[79] The contractor counterclaimed, asserting claims for breach of contract, fraudulent inducement, negligent misrepresentation, breach of warranty, and violation of the DTPA.[80] The

72. *Id.* at 585. TEX. BUS. & COM. CODE ANN. § 2.606 (Vernon 1994) provides, in pertinent part, "Acceptance of goods occurs when the buyer . . . (3) does any act inconsistent with the seller's ownership . . ."

73. *Baccus Industries*, 36 S.W.3d at 586. TEX. BUS. & COM. CODE ANN. § 2.717 (Vernon 1994) authorizes this remedy for an aggrieved buyer.

74. *Baccus Industries*, 36 S.W.3d at 581.

75. *Id.* at 586.

76. *Id.* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (Vernon 1997) permits a prevailing party to recover attorney's fees in an action founded on contract.

77. 131 F. Supp. 2d 882 (S.D. Tex. 2000).

78. *Id.*

79. *Id.*

80. *Id.*

supplier won the battle on its claim for the price of the (albeit late) delivered steel but, as will be seen, it lost the war on the contractor's counterclaims.[81]

On the counterclaim for breach of contract, the court found there were untimely deliveries on every purchase order, so it was clear the supplier had breached its contractual obligations. On the fraudulent inducement claim, the court was persuaded that the evidence demonstrated that all elements of this claim had been met.[82] On the DTPA claim, the court found the contractor had proven a violation of section 17.46(b)(23) by virtue of the supplier's intentional concealment of material information.[83] No evidence of an injury separate and distinct from the injury resulting from the breach of contract, the negligent misrepresentation claim was denied and the breach of warranty claim was not pursued during trial so it also dropped out of the case.[84]

The court then turned to the question of damages. Recognizing the intertwined nature of the contractor's claims, the court made two fundamental points. First, the direct damages available to the contractor were "virtually the same under any theory of liability and causation."[85] Second, foreseeability was required for the breach of contract and fraudulent inducement claims, but not for the DTPA claim.[86] Applying these principles to the case at bar, the court found the direct damages suffered by the contractor included the additional costs and expenses resulting from the delay in completing the construction projects, a total of approximately one million dollars.[87] The court found that it was not foreseeable that the contractor would be forced out of the construction business because of the supplier's actions, consequential damages for this loss were not recoverable on the breach of contract and fraudulent inducement claims. Turning to the DTPA violation, the court found the closure of the business was a recoverable item of damage because the DTPA does not require foreseeability and, based on the evidence before it, the court valued the business at one-point-one million dollars.[88]

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81. *Id.* at 887.

82. *Harrop*, 131 F. Supp. 2d at 887. Drawing upon the decision in *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998), the court listed these elements as, "(1) a material misrepresentation (2) which was false (3) which was either known to be false when made or was asserted without knowledge of its truth (4) which was intended to be acted upon (5) which was relied upon, and (6) which caused injury." *See Harrop*, 131 F. Supp. 2d at 888.

83. *Harrop*, 131 F. Supp. 2d at 890. TEX. BUS. & COM. CODE ANN. § 17.46(b)(23) (Vernon 1987) makes "the failure to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed" a violation of the DTPA.

84. *Harrop*, 131 F. Supp. 2d at 890.

85. *Id.* at 891.

86. *Id.* at 892.

87. *Id.*

88. *Id.*

This did not, however, conclude the damage analysis. In addition to the direct and consequential damages, the court found the conduct of the supplier to be so egregious that punitive damages should be awarded on the fraudulent inducement and DTPA claims.[89] Based largely on the legislative choice contained in the DTPA, the court awarded an amount equal to three times the amount of the contractor's direct and consequential damages, resulting in a figure of six-point-six million dollars.[90] This amount, coupled with the actual damage award, resulted in a judgment for the contractor of almost nine million dollars with a setoff allowed to the supplier on its claim to recover the three-hundred-thousand dollar price of the steel it had delivered.[91]

F. Arbitration

Several cases decided during the Survey period addressed issues surrounding the use of arbitration as a means of settling disputes arising under Chapter 2. In *Helena Chemical Co. v. Wilkins*,[92] a group of farmers sued a seed company for breach of warranties and DTPA violations arising from alleged defects in seed purchased from the seller. Seventeen months after suit was filed, the farmers submitted their claims to the Texas Plant and Seed Board for arbitration.[93] The Board declined to arbitrate because it was unable to inspect the crops in "field condition" due to the delay.[94] The case proceeded to trial.[95] The trial court found that the seller had effectively disclaimed all warranties, but the farmers prevailed on their DTPA claims. The seller appealed, arguing that there was insufficient evidence to support the DTPA violations and, more importantly, that the failure to timely submit the claim to arbitration barred the farmers' claims.[96] On this issue of first impression, the Texas Supreme Court held, while the arbitration requirements of the Texas Seed Arbitration Act[97] were mandatory, they were not jurisdictional in nature and did not deprive the trial court of jurisdiction to try the case even if there was a delay in submitting the claim for arbitration.[98] The court noted, however, if a seed purchaser does not submit a claim in time for the Board or the seller to conduct a field inspection, the purchaser does so at his or her peril since the Board could make findings adverse to the purchaser on this basis.[99] The court upheld the rulings of the lower courts on the warranty and DTPA issues.[100]

89. *Harrop*, 131 F. Supp. 2d at 892-93.
90. *Id.* at 893.
91. *Id.* at 895.
92. 47 S.W.3d 486 (Tex. 2001).
93. *Id.* at 491.
94. *Id.*
95. *Id.*
96. *Id.* at 491-92.
97. Tex. Agric. Code Ann. §§ 64.001-.007 (Vernon 1995).
98. *Helena*, 47 S.W.3d at 494.
99. *Id.* at 496.
100. *Id.* at 506.

One of the few reasons an arbitration clause may not be enforced is a successful showing that agreement to the clause was induced in a procedurally unconscionable manner. *In re Rangel*[101] was a mandamus proceeding contesting the enforcement of an arbitration clause in a contract for extermination services. The court applied the standard rule that the party contesting arbitration has the burden of proving procedural unconscionability and held that the record did not show the trial judge had abused his discretion in ruling that the defense had not been adequately proven.[102] On another issue in the same case, the court further held both husband and wife were bound by the arbitration clause even though the wife had not signed the contract, because she was a third-party beneficiary who would be benefited by the extermination services.[103]

In *In re FirstMerit Bank*,[104] the buyers purchased a mobile home under an installment sales contract that was assigned to a bank as part of the financing arrangement. The contract contained an "Arbitration Addendum" requiring binding arbitration for "all disputes, claims, or other matters in question arising out of or relating to this Loan."[105] The word "Loan" was defined to include all provisions of the sales and loan documents and the addendum also warned that "the scope of arbitrability is broad and includes, without limitation, contractual, tort, statutory, and caselaw claims."[106]

Following delivery of the home, several defects surfaced and the seller failed to make repairs. The buyers stopped making payments and the home was repossessed by the bank.[107] The buyers sued on several theories, including revocation of acceptance, breach of warranty, fraud, and DTPA violations. The bank and the seller both moved to compel arbitration.[108] The motion was denied by the trial court and this ruling was upheld by the court of appeals. On further appeal, the Texas Supreme Court held the installment contract and the arbitration addendum were governed by the Federal Arbitration Act because the transaction involved interstate commerce.[109] Furthermore, according to the Court, the broad language of the addendum was sufficient to cover all complaints regarding the mobile home whether arising out of the loan and repossession or out of alleged defects in the home itself.[110] The court rejected defenses that the arbitration addendum should not be enforced because of a lack of evidence that the costs of arbitration would be excessive, that the addendum had been signed under duress, or that there had been any misrepresentation about the existence and scope of the arbitration provi-

101. 45 S.W.3d 783 (Tex. App.—Waco 2001, no pet.).
102. *Id.* at 786-87.
103. *Id.* at 787.
104. 52 S.W.3d 749 (Tex. 2001).
105. *Id.* at 752.
106. *Id.*
107. *Id.* at 753.
108. *Id.*
109. *Firstmerit*, 52 S.W.3d at 754.
110. *Id.* at 755.

sions.[111] The court also rejected defenses based on unconscionability and revocation of acceptance because those defenses went to the contract as a whole and not specifically to the arbitration addendum.[112]

In re American Homestar of Lancaster, Inc.[113] was another mandamus proceeding concerning an arbitration clause in a contract for the purchase of a manufactured home. As in *FirstMerit*, the contract contained provisions requiring all claims, disputes, and controversies arising out of the purchase to be settled by binding arbitration.[114] The trial court had ordered that the case go to arbitration, but the buyers had successfully argued in the court of appeals that the federal Magnuson-Moss Warranty Act[115] prohibited enforcement of binding arbitration clauses.[116] In concluding the arbitration clause was unenforceable, the court of appeals had relied in part on the interpretation of the Magnuson-Moss Act by the Federal Trade Commission.[117]

The Texas Supreme Court reversed the court of appeals and held the arbitration clause was enforceable against the buyers and that nothing in the federal Magnuson-Moss Warranty Act precluded the parties from agreeing to binding arbitration.[118] The court further held no Federal Trade Commission regulation specifically prohibited binding arbitration and that, while the Court was required to give deference to agency interpretations, it was not bound by an unreasonable agency interpretation.[119] Noting that "the FTC's position about binding arbitration has been less than consistent," the court ruled the trial court had been correct in compelling arbitration and conditionally granted a writ of mandamus directing the court of appeals to vacate its judgment.[120]

III. NEGOTIABLE INSTRUMENTS AND BANK TRANSACTIONS

A. Liability Of Parties

One of the most common problems agents seem to encounter in signing negotiable instruments is the failure to adequately indicate their agency status.[121] A recent example of this problem appears in *Caraway v.*

111. *Id.* at 757-58.

112. *Id.* at 757-58. The requirement that defenses must be directed specifically toward an arbitration clause and not toward the contract as a whole is derived from the interpretation of the Federal Arbitration Act announced in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 403-04 (1967).

113. 50 S.W.3d 480 (Tex. 2001).

114. *Id.* at 482.

115. 15 U.S.C.A. §§ 2301-12 (West 2000).

116. *See In re* Van Blarcum, 19 S.W.3d 484 (Tex. App.—Corpus Christi 2000, reversed, *sub nom*, *In re* American Homestar of Lancaster, Inc., 50 S.W.3d 480 (Tex. 2001).

117. *See Van Blarcum*, 19 S.W.3d at 496.

118. *American Homestar*, 50 S.W.3d at 487.

119. *Id.* at 490-91.

120. *Id.*

121. The rules governing signatures by representatives appear in Tex. Bus. & Com. Code Ann. § 3.402 (Vernon Supp. 2002).

Land Design Studio,[122] where a realty company hired a landscaping service to work on an apartment complex project.[123] The realty company agreed to sign a promissory note for the work.[124] The parties executed a note naming the company president as debtor but the note did not indicate his capacity as president of the company. The note was to be paid in full on March 31, 1999.[125] No payment was received and the creditor filed suit against the company and against the president individually. The president asserted that he had been fraudulently induced by the creditor to sign the note and that he had signed the note only as an agent of the company.[126]

The court found there was no evidence suggesting any trickery had been employed by the creditor to entice the president to sign the note.[127] Although the president asserted that the creditor represented the note would not be due until the construction loan closed, the court held such a representation did not constitute trickery so as to allow parol evidence to be offered beyond the terms stated in the note. In addition, the president argued that his intent was known to the creditor that he was to sign the note only as an agent of the realty company.[128] The court held that, to gauge intent, the note itself was the best indicator, and the note did not indicate the president's representative capacity.[129] Since the president failed to show facts supporting fraudulent inducement or that he signed only as an agent, the court affirmed the trial court ruling holding the president personally liable for the amount of the note.[130]

Another issue affecting liability that occurs with some frequency, is whether an applicable limitations period has passed that bars collection of an instrument. The determination of the applicable statute of limitations, however, is not always an easy task. For example, in *Hodge v. Northern Trust Bank of Texas, N.A.*,[131] a minor received a settlement arising out of injuries suffered in an accident. The court order approving the settlement directed that the settlement funds be deposited in an interest bearing book-entry certificate of deposit account held under the direction of the minor's mother for the minor's benefit.[132] The order also required the account be considered a special deposit. When the certificate of deposit matured, the mother withdrew the funds to pay some of her own outstanding debts.[133] The minor did not inquire about the account until twelve years after he had attained the age of majority. When he discov-

122. 47 S.W.3d 696 (Tex. App.—Austin 2001, no pet.).
123. *Id.* at 697.
124. *Id.*
125. *See id.*
126. *Id.* at 697.
127. *Caraway*, 47 S.W.3d at 699.
128. *Id.*
129. *Id.* at 700.
130. *Id.* at 701.
131. 54 S.W.3d 518 (Tex. App.—Eastland 2001, pet. denied).
132. *Id.* at 521.
133. *Id.*

ered that the funds had been withdrawn, he sued the bank to recover an amount equal to the value of the deposit account.[134] Affirming the trial court, the court of appeals held that the special deposit created a bailor-bailee relationship between the bank as bailee and the mother as bailor.[135] Since this was a special deposit, the court held that the only claim available to the plaintiff was a claim for conversion, and the two year statute of limitations began to run in 1987 when the plaintiff reached the age of majority.[136] Thus, when suit was brought twelve years later, the limitations period had already expired. The court rejected application of the "discovery rule" because that rule tolls the running of the limitations period only when the conversion is "inherently undiscoverable."[137] The court also rejected an argument that the limitations period contained in section 3.118(e)[138] should apply because the certificate of deposit in this case was in the form of a book-entry special deposit and, therefore, it was not a negotiable instrument governed by Chapter 3 of the Code.[139]

Although the Texas version of section 3.118 generally follows the uniform text, the Texas enactment includes a non-uniform addition designated as subsection (h).[140] Under this subsection, the usual six-year limitation period does not apply to actions involving real property liens,

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134. *Id.*

135. *Id.* at 522.

136. *Hodge*, 54 S.W.3d at 523.

137. *Id.* at 523.

138. TEX. BUS. & COM. CODE ANN. § 3.118(e) (Vernon Supp. 2002) provides that the limitations period to enforce the obligation of a party to a certificate of deposit is six years after demand for payment is made to the maker.

139. *Hodge*, 54 S.W.3d at 525. Although it was not effective at the time this action arose, TEX. BUS. & COM. CODE ANN. § 9.102(a)(59) (Vernon Supp. 2002) adds additional support for the conclusion that a book-entry certificate of deposit is not a negotiable instrument. That section, which became effective on July 1, 2001, provides, in part:

> "Nonnegotiable certificate of deposit" means a writing signed by a bank that:
>
> (A) states on its face that it is a certificate of deposit, as defined in Section 3.104, or receipt for book entry;
>
> (B) contains an acknowledgement that a sum of money has been received by the bank, with an express or implied agreement that the bank will repay the sum of money; and
>
> (C) is not a negotiable instrument.

TEX. BUS. & COM. CODE ANN. § 9.102(a)(59) (Vernon 2002) is a non-uniform amendment to revised Chapter 9 of the Code. State Bar Uniform Commercial Code Committee Comment 2 to this section states the following about "book-entry" certificates of deposit: "Book entry 'certificates of deposit' are described in account agreements and appropriate disclosures but modern banking practice has moved away from the use of formal certificates for what [are] otherwise known as 'time deposits' or 'time accounts.' . . . ."

140. The last subsection in the uniform text of the Commercial Code is subsection (g). During the 2001 legislative session, Texas also added a non-uniform subsection (i) that provides, "A right of action of a public institution of higher education or the Texas Higher Education Coordinating Board is not barred by this section." *See* Act of May 22, 2001, 77th Leg., R.S., ch. 279, § 1, 2001 Tex. Gen. Laws 530-31.

Under this non-uniform amendment, it appears that Texas colleges and universities, as well as the Coordinating Board are not subject to any limitations period in seeking to collect amounts due on negotiable instruments. Thus, a long delay in seeking to collect a student loan will not bar recovery on limitations grounds.

but instead, the limitations period is only four years.[141] In *Holy Cross Church of God in Christ v. Wolf*,[142] the court applied section 3.118(h) to bar an action that was commenced more than four years after the acceleration of a note. The court rejected an argument that the holder was entitled to the benefit of the six-year period available to the FDIC because the holder had purchased the note from the FDIC.[143] On this point, the court reasoned that because the acceleration did not take place until after the sale of the note by the FDIC the four-year limitations period was applicable.[144] The court stated, "When a cause of action has not accrued before the FDIC transfers a note, a transferee has the same four years under section 16.035(b) of the Texas Civil Practice and Remedies Code to sue as any other person. Accordingly, refusal to extend limitations in this situation does not significantly impact the FDIC's notes' marketability."[145]

In reaching its decision, the court also disapproved of *Swoboda v. Wilshire Credit Corp*[146] and its progeny to the extent that case could be read to require affirmative action toward foreclosure to trigger acceleration of a note secured by real property when the agreement of the parties does not require such action. Instead, the court held that a clear, positive, and unequivocal declaration of acceleration and intent to foreclose triggers the beginning of the limitations period whether or not it is followed by affirmative action to foreclose.[147]

B. Lost Instruments

Section 3.309 of the Code allows enforcement of lost, destroyed, or stolen instruments if the claimant is able to prove the terms of the instrument and the reason it cannot be produced.[148] The claimant may be required to provide a bond or other adequate protection to protect the obligor against the possibility that another person may later seek to enforce the instrument.[149] In *Caddo Parish-Villas South, Ltd. v. Beal Bank, S.S.B.*,[150] a bankruptcy case litigated in the Northern District of Texas but applying Louisiana law (which is the same as the Texas law on the matter in issue), the court held that the assignee of a note had satisfied all of the elements required to prove enforceability of the note. The assignee was able to prove that the assignor was in possession of the note when it was

141. Tex. Bus. & Com. Code Ann. § 3.118(h) (Vernon Supp. 2002) provides: "This section does not apply to an action involving a real property lien covered by Section 16.035 or 16.036, Civil Practice and Remedies Code."

142. 44 S.W.3d 562 (Tex. 2001).

143. *Id.* at 574. Under 12 U.S.C. § 1821(d)(14)(A)(i) (2000) the FDIC is entitled to a six-year limitation period for the enforcement of notes when it becomes the receiver of a failed bank.

144. *Holy Cross*, 44 S.W.3d at 574.

145. *Id.*

146. 975 S.W.2d 770 (Tex. App.—Corpus Christi 1998, pet. denied).

147. *Id.*

148. Tex. Bus. & Com. Code Ann. § 3.309 (Vernon Supp. 2002).

149. *Id.*

150. 250 F.3d 300 (5th Cir. 2001).

lost; thus, the court was not required to resolve a disagreement that had surfaced about whether section 3.309 permits recovery when a party is not in possession of an instrument at the time it is lost.[151]

C. Accord And Satisfaction

Until adoption of section 3.311 of the Code, there was uncertainty about the effect of cashing a check containing language such as, "Payment in Full."[152] Section 3.311 now provides that cashing a check containing a conspicuous statement to the effect that it is tendered in full payment of a claim will work an accord and satisfaction of an unliquidated or disputed debt, unless the person cashing the check tenders repayment of the amount of the check within ninety days after the check has been paid.[153] After ninety days, the debt is discharged.[154]

Calabrian Chemicals Corp. v. Bailey-Buchanan Masonry, Inc.,[155] is the first Texas case to consider the effect of section 3.311. The dispute arose out of a contract to construct a building.[156] After the work was completed, the building owner sent a check to the contractor in the amount of $68,000.[157] The check also bore the notation, "FINAL PAYMENT ON OUR PURCHASE ORDER 10356 which was not to exceed 68,000."[158] Despite having knowledge of this notation, the contractor deposited the check and it was paid by the owner's bank. The contractor subsequently sued the owner for payment of an additional amount that the contractor claimed was still due.[159] The trial court refused the owner's request for a jury issue on accord and satisfaction but instead submitted an issue on whether the invoice represented the complete agreement of the parties.[160] On appeal, the court held this was error on the part of the trial judge and ruled that an unconditional issue on accord and satisfaction should have been submitted to the jury.[161] The court was unable to find an accord and satisfaction as a matter of law, however, because the evidence conflicted on whether the only dispute between the parties con-

151. The disagreement centers on the requirement in Tex. Bus. & Com. Code Ann. § 3.309(a)(1) (Vernon Supp. 2002) that a person who is seeking to enforce a lost, destroyed, or stolen instrument show that "the person was in possession of the instrument and entitled to enforce it when loss of possession occurred." The various cases and the arguments surrounding this matter are ably discussed in Timothy R. Zinnecker, *Extending Enforcement Rights to Assignees of Lost, Destroyed, or Stolen Negotiable Instruments under U.C.C. Article 3: A Proposal for Reform*, 50 Kan. L. Rev. 111 (2001).

152. Tex. Bus. & Com. Code Ann. § 3.311 (Vernon Supp. 2002) was adopted during the 1995 legislative session. *See* Act of May 28, 1995, 74th Leg., R.S., ch. 921, §§ 1-2, 1995 Tex. Gen. Laws 4582.

153. § 3.311(b).

154. § 3.311(c)(2).

155. 44 S.W.3d 276 (Tex. App.—Beaumont 2001, pet. denied).

156. *Id.* at 277.

157. *Id.* at 279-80.

158. *Id.* at 280.

159. *Id.*

160. *Calabrian Chemicals*, 44 S.W.3d at 280-81.

161. *Id.* at 281.

cerned the invoice referenced on the check.[162] The case was, therefore, remanded for a new trial.[163]

D. Indorsement Of Instruments

Proper indorsement of an instrument is critical. Without proper indorsement, transfer of an instrument may be defective or payment may be made to the wrong person.[164] It is not always easy, however, to determine whether an indorsement is proper. A trap for the unwary contained in section 3.110(d) is a change in the rule as it existed under the former section 3.116 that was in effect in Texas until January 1, 1996. This rule provided that an instrument had to be indorsed by all parties *unless* the instrument listed the payees in the alternative.[165] As revised, section 3.110(d) changes the rule to provide that, if an instrument is ambiguous as to whether it is payable jointly or in the alternative, it is deemed to be payable in the alternative and can be indorsed and negotiated by any one of the payees.[166] Thus, because of this change in the rule, in *Allied Capital Partners, L.P. v. Bank One, Texas, N.A.*,[167] a check made payable to:

Complete Design
Allied Capital Partners, L.P.

was ambiguous as to whether the indorsement of one or both payees was required. Applying the "new" rule of section 3.110(d), the court held that the check was properly indorsed when only one of the payees deposited the check and received the proceeds.[168] Judgment was affirmed in favor of the bank that paid the check.[169]

Under the version of Chapter 3 that was in effect in Texas prior to January 1, 1996, it was well-established that a bank could not refuse payment of a cashier's check.[170] The author has noted elsewhere that revised Chapter 3 "reverses this result and provides a bank with the right to refuse payment on cashier's checks . . . under narrowly defined circum-

162. *Id.*

163. *Id.*

164. Several provisions of the Code defining the rights and liabilities of parties hinge on proper indorsement. *See, e.g.*, Tex. Bus. & Com. Code Ann. §§ 3.203, .204, .205, .301, .416, .417 & .420 (Vernon Supp. 2002).

165. Compare the present Tex. Bus. & Com. Code Ann. § 3.110(d) (Vernon Supp. 2002) with the former Tex. Bus. & Com. Code Ann. § 3.116 (Vernon 1994). The present version of Chapter 3 was adopted in the 1995 legislative session with an effective date of January 1, 1996. *See* Act of May 28, 1995, 74th Leg., R.S., ch. 921, §§ 1-2, 1995 Tex. Gen. Laws 4582.

166. § 3.110(d).

167. 68 S.W.3d 51 (Tex. App.—Dallas 2001, no pet. h.).

168. *Id.* at 54.

169. *Id.* at 55.

170. *See, e.g.*, Wertz v. Richardson Heights Bank & Trust, 495 S.W.2d 572, 574 (Tex. 1973). Chapter 3 of the Code was revised in the 1995 legislative session with an effective date of January 1, 1996. *See* Act of May 28, 1995, 74th Leg., R.S., ch. 921, §§ 1-2, 1995 Tex. Gen. Laws 4582.

stances."[171]

Associated Carriages, Inc. v. International Bank of Commerce,[172] seems to be the first case to address a bank's refusal to pay a cashier's check under the revised Code. In an action by the payee against the bank, the court held the bank acted properly when it refused to pay a cashier's check on the ground that the bank had a reasonable doubt about whether the payee was the person entitled to enforce the instrument.[173] The check in question was made payable to a corporation, but was presented by an individual.[174] The bank had a policy of refusing to cash checks payable to a corporation when they were presented by an individual. The court held the policy was supported by the bank's evidence showing the policy was designed to ensure money intended for the corporation did not "end up in the hands of an unauthorized individual."[175] The bank also introduced testimony that "there was no proof an individual could bring to the bank to prove that he or she was authorized to transact business on behalf of the corporation because a reasonable doubt always exist[s] about whether the person was authorized to act on behalf of the corporation."[176] Judgment in favor of the bank was affirmed, including a sanction allowing the bank to recover its attorney's fees based on the court's analysis of the plaintiff's claims as "not credible" and as lacking evidentiary support.[177] In the view of the court, the plaintiff was attempting "to use the lawsuit to recoup financial losses that occurred for reasons unrelated to the bank."[178]

E. Payment Of Forged Instruments

Section 4-406 of the Code allocates the burden of discovering and reporting forgeries between a bank and its depositor by imposing time limits for action and by stating duties of good faith and ordinary care applicable to both parties.[179] In *Canfield v. Bank One, Texas, N.A.*,[180] the court held a depositor was precluded from recovering on some 213 forgeries by his ex-wife when he failed to notify the bank of the forgeries within the time period allowed by statute, for forgeries by the same wrongdoer, or within the 90 day time period provided in the deposit agreement as an absolute bar date for the reporting of forgeries.[181] The

171. *See* John Krahmer, 12 Texas Practice: Methods Of Practice, § 26.73 (Supp. 2001). The operative provision is Tex. Bus. & Com. Code Ann. § 3.411 (Vernon Supp. 2002). There was no similar provision under the prior version of Chapter 3.

172. 37 S.W.3d 69 (Tex. App.—San Antonio 2000, pet. denied).

173. *Id.* at 73.

174. *Id.* at 71.

175. *Id.* at 73.

176. *Id.*

177. *Associated Carriages*, 37 S.W.3d at 76 (quoting from the trial court's sanction order).

178. *Id.*

179. *See* Tex. Bus. & Com. Code Ann. § 4.406 (Vernon Supp. 2002).

180. 51 S.W.3d 828 (Tex. App.—Texarkana 2001, pet. denied).

181. Chapter 4 of the Code was substantially amended in the 1995 legislative session with an effective date of January 1, 1996. *See* Act of May 28, 1995, 74th Leg., R.S., ch. 921,

forgeries began sometime in 1990, continued until December of 1992, and involved both checks and certificates of deposit.[182] The last statement on the account was delivered to the depositor in January of 1993 but no complaint was made until May of that year.[183] The court held that the 90 day time period in the deposit agreement was not unreasonably short and, absent any evidence of bad faith on the part of the bank, the depositor was barred from any recovery.[184]

The depositor attempted to avoid the effect of the limitation period by asserting a separate DTPA claim.[185] On this issue, the court held that, as to the checks, the obligation of the bank was a contractual obligation governed by contract law and not by the DTPA.[186] As to the certificates of deposit, the court held the depositor did not seek to acquire goods or services, but only an intangible; furthermore, he did not seek the bank's advice about purchasing the CDs so there were no collateral services on which a DTPA claim might be based.[187]

Although not relevant on the facts of this case, it should be noted that section 4-406 contains a comparative negligence provision that might be important if a customer delays in reporting forgeries by the same wrongdoer for more than the thirty day time period allowed by statute, but less than the time period provided in a deposit agreement.[188] Even with a comparative negligence rule, however, action by the depositor in *Canfield* was simply "too little, too late."

F. Payment Of Checks "At Par"

In *Wells Fargo Bank Texas, N.A. v. James*,[189] an action brought by several large national banks against the Texas Banking Commissioner, the federal district court for the Western District of Texas enjoined the Banking Commissioner from enforcing a non-uniform Texas amendment that added section 4.112 to Chapter 4 of the Code during the 2001 legislative session.[190] The amendment required payor banks to pay presented checks "at par" without a deduction or charge for the service of cashing the

§§ 1-2, 1995 Tex. Gen. Laws 4582. The amendment changed the statutory time period for reporting forgeries by the same wrongdoer from 14 days to 30 days. Although this case arose under the former Tex. Bus. & Com. Code Ann. § 4.406 (Vernon 1994), the change from 14 days to 30 days has no effect under the facts of this case.

182. *Canfield*, 51 S.W.3d at 833.

183. *Id.* at 833.

184. *Id.* at 836-37.

185. *Id.* at 838.

186. *Id.* at 839.

187. *Canfield*, 51 S.W.3d at 839-40.

188. Under the comparative negligence provisions in Tex. Bus. & Com. Code Ann. § 4.406(e) (Vernon Supp. 2002), if a customer can show a lack of ordinary care on the part of the bank, the loss could be allocated between the customer and the bank based on the extent to which the actions of each party contributed to the loss. Showing a lack of ordinary care by a bank is a lesser burden than showing that a bank acted in bad faith, which was the burden the plaintiff had to carry in *Canfield*.

189. 184 F. Supp. 2d 588 (W.D. Tex. 2001).

190. *See* Act of June 13, 2001, 77th Leg., R.S., ch. 699, § 20, 2001 Tex. Gen. Laws 1260.

checks.[191] The OCC had issued an opinion letter concluding that the National Bank Act and the Code of Federal Regulations permit national banks to charge fees to non-account holders for cashing checks drawn on the banks.[192] Giving deference to this opinion letter, the court ruled the plaintiff banks were likely to prevail on the merits and issued a preliminary injunction against enforcement of the statute.[193] As part of its order, the court required the banks to establish a refund or voucher system pending final resolution of the case in the event the court ultimately held the statute enforceable.[194]

G. FUNDS TRANSFERS

In *Moody National Bank v. Texas City Development Ltd., Co.*,[195] a purchaser attempted to buy a municipal property by depositing the purchase price with an escrow agent to demonstrate good faith to the city agency. The purchaser arranged to have the purchase amount wired to a title company account in a local bank.[196] When the purchaser sought to verify completion of the wire transfer, he was informed by the bank that it had never received the transfer.[197] The transfer, however, was later found to have been successful, but this was not discovered when the purchaser made inquiry because of the wire transfer clerk's failure to check either the title account history or the wire transfer log.[198] The purchaser subsequently lost his bid for the property and sued the bank for common law negligence.[199] The suit was successful and the jury awarded a substantial sum to the purchaser. The bank appealed the jury verdict, alleging the funds transfer was within Chapter 4A of the Code, thereby negating the common law negligence claim.[200]

The court of appeals decided that common law claims are precluded when such claims impose sanctions inconsistent with the provisions of Chapter 4A. The court held misinforming the purchaser and the city agency was akin to failing to send proper notice, a matter specifically described in section 4A.404(b) of the Code.[201] The court stated that the remedies for violation of this section were also set out in Chapter 4A and, therefore, the common law negligence recovery was invalid because the purchaser was limited to the remedies provided by the Code.[202]

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191. *See Wells Fargo Bank*, 184 F. Supp. 2d at 591.
192. *See* 12 U.S.C.A. § 24 (West 2002); 12 C.F.R. § 7.4002(a) (2002).
193. *Wells Fargo Bank*, 184 F. Supp. 2d at 592.
194. *Id.*
195. 46 S.W.3d 373 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).
196. *Id.* at 375-76.
197. *Id.* at 376.
198. *Id.*
199. *Id.*
200. *Moody Nat'l Bank*, 46 S.W.3d at 376.
201. *Id.* at 379. *See* TEX. BUS. & COM. CODE ANN. § 4A.404(b) (Vernon 1994).
202. *Moody Nat'l Bank*, 46 S.W.3d at 379. Under TEX. BUS. & COM. CODE ANN. § 4A.404(b) (Vernon 1994), damages are limited to the payment of interest on the amount of the payment order from the day notice should have been given until the day when the beneficiary learns of the receipt of the payment order.

IV. LETTERS OF CREDIT

A. DUTIES OF ISSUER

In *Heritage Bank v. Redcom Laboratories, Inc.*,[203] a bank issued a letter of credit for a corporate applicant to purchase goods from a seller. After the seller delivered the goods to the corporation, the seller made a presentment under the credit to the issuing bank to obtain payment.[204] Before the bank paid under the letter of credit, the corporation obtained a temporary injunction enjoining the bank from making payment on the ground the presentment was improper. The seller made two more presentments while the injunction was in effect and the bank refused to honor the draw under both of them on the basis of the injunction.[205] A third presentment was made after the injunction was dissolved and the bank again refused payment, this time on the ground that the credit had expired while the injunction was in effect. The bank sought a declaratory judgment in state court asserting it had acted properly in refusing payment.[206] The seller removed the case to federal court where the seller prevailed on its claim that the bank wrongfully dishonored the seller's presentments.[207]

On appeal to the Fifth Circuit, the court found, by its terms, the letter of credit was governed by the Uniform Customs & Practices for Documentary Credits (UCP).[208] Under the UCP, an issuer is required to notify a beneficiary such as the seller of any discrepancies within 21 days after a presentment is made under a credit. The court held the bank waived its right to assert discrepancies because the injunction only prohibited the bank from paying upon an improper presentment; it did not relieve the bank from its duty to notify the seller of any discrepancies in regard to the seller's second presentment within the required time period.[209] Because the bank waived its right to assert discrepancies, and the second presentment by the seller was timely, the bank was required to make payment when the injunction was lifted even if the letter of credit expired while the injunction was in place. As stated by the court, "[A]n injunction may provide a defense of impossibility for as long as it stands, but once it is lifted, the bank must honor or properly dishonor the drafts."[210]

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203. 250 F.3d 319 (5th Cir. 2001).
204. *Id.* at 322.
205. *Id.*
206. *Id.*
207. *Id.*
208. *Heritage*, 250 F.3d at 325-26. The letter of credit designated Uniform Customs and Practice for Documentary Credits, 1993 Revision, I.C.C. Publication No. 500 as the governing law. Under TEX. BUS. & COM. CODE ANN. § 5.103(c) (Vernon Supp. 2002), the terms of a letter of credit can be varied by agreement.
209. *Heritage*, 250 F.3d at 328.
210. *Id.*

V. SECURED TRANSACTIONS

A. TRUE LEASE OR DISGUISED SECURITY INTEREST

The determination of whether a transaction denominated as a "lease" of personal property constitutes a "true lease" or merely a "disguised security interest" can have significant effects in a bankruptcy proceeding. If the transaction is a true lease, the lessor is entitled to adequate protection of its ownership interest and, if such adequate protection is not provided, the lessor is entitled to repossess the goods.[211] If the transaction is a disguised security interest, the security interest can be avoided unless it has been properly perfected under Chapter 9.[212] Classifying a transaction as a true lease or as a disguised security interest is based on what is generally termed the "economic realities test" contained in section 1.201 of the Code.[213] That test has two parts. The first is to determine if the lessee can terminate the lease before the end of the lease term.[214] If the lessee does not have the right to terminate, the second is to establish the residual value of the goods, if any, that was anticipated by the parties at the end of the lease term.[215]

In *In re Triplex Marine Maintenance, Inc.*,[216] the court carefully reviewed the economic realities test and its application to a sale-and-lease-back transaction covering all of a bankrupt lessee's equipment. By the terms of the lease, it was clear that the lessee did not have the right to terminate the lease before the end of the lease term so the first part of the test was satisfied.[217] As to the second part of the test, the court found the critical inquiry was whether it made economic sense for the lessee to fail to exercise an option to purchase the goods at the end of the lease term.[218] Reviewing the economic choices available to the lessee at the

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211. 11 U.S.C. § 362(d) (2000).

212. 11 U.S.C. § 544 (2000) permits the trustee in bankruptcy to avoid unperfected security interests. Perfection of a security interest under Chapter 9 is usually accomplished by filing a financing statement. *See* TEX. BUS. & COM. CODE ANN. § 9.310 (Vernon Supp. 2002). The former Chapter 9 contained a similar provision. *See* TEX. BUS. & COM. CODE ANN. § 9.302 (Vernon 1994).

213. TEX. BUS. & COM. CODE ANN. § 1.201(37)(B) (Vernon Supp. 2002).

214. *Id.*

215. The economic realities test and the two part analysis are discussed at length in E. Carolyn Hochstadter Dicker & John P. Campo, *FF & E and the True Lease Question: Article 2A and Accompanying Amendments to UCC Section 1-201(37)*, 7 AM. BANKR. INST. L. REV. 517 (1999).

216. 258 B.R. 659 (Bankr. E.D. Tex. 2000).

217. *Id.* at 669-70.

218. *Id.* at 671. On this point, the court, quoting from prior decisions on the same issue, said:

> Articulated as a "sensible person" test, [the test] provides that "where the terms of the lease and option to purchase are such the only sensible course for the lessee at the end of the lease term is to exercise the option and become the owner of the goods, the lease was intended to create a security interest." . . . Articulated in a less genteel manner, "if only a fool would fail to exercise the purchase option, the option is generally considered nominal and the transaction characterized as a disguised security agreement." [Citations omitted.]

Id.

end of the lease term, the court concluded the only realistic choice would be for the lessee to exercise the option to purchase. As stated by the court, "Under these circumstances, this was not a typical finance lease. It was typical financing, disguised as a lease."[219] This "lease" was actually a security interest and the lessor had not taken the precaution of timely filing a financing statement; therefore, the trustee could avoid the security interest and the lessor could not repossess the goods.[220]

B. Perfection And Priority Of Security Interests

Although significant changes have been made by revised Chapter 9 in the rules governing the proper location for filing a financing statement, the use of a debtor's trade name instead of the debtor's actual name is still treated as being insufficient to perfect a security interest regardless of where the financing statement is filed.[221] Thus, the result in *In re Stanton*,[222] where the court held that a financing statement that listed only the debtor's trade name did not perfect a security interest in inventory where the loan had actually been made to the debtor as an individual is still good law.

In *W.H.V., Inc. v. Associates Housing Finance, LLC*,[223] a couple purchased real estate with a promissory note secured by a vendor's lien and deed of trust. The vendor's lien and deed of trust were properly recorded in the county real estate records.[224] A year later, the couple purchased a mobile home under a Manufactured Home Retail Installment Contract/ Security Agreement and a certificate of title was issued for the mobile home which acknowledged the dealer's purchase money security interest.[225] After significant improvements were made to the home, the couple divorced and defaulted on the promissory note.[226] A creditor who had acquired the security interest in the mobile home from the dealer sued the couple for the unpaid balance on the sales contract. The mort-

219. *Id.* at 673.

220. *Id.* The lessor did, in fact, file a financing statement but this was not done until two months *after* the lessee had filed for bankruptcy. *Id.* at 663. As a practical matter, unless it is absolutely clear that a transaction involves a true lease instead of a disguised security interest, there is no good reason for a lessor not to file a financing statement, particularly since Tex. Bus. & Com. Code Ann. § 9.505 (Vernon Supp. 2002) permits precautionary filings and explicitly states that such a filing "is not of itself a factor in determining whether the collateral secures an obligation."

221. Perfection by filing must now be in the state where the debtor is located. *See* Tex. Bus. & Com. Code Ann. § 9.301(a) (Vernon Supp. 2002). Under the former Chapter 9, Tex. Bus. & Com. Code Ann. § 9.103 generally required filing in the state where the collateral was located (Vernon 1994 & Supp. 2002). Revised Chapter 9 was adopted in Texas during the 1999 legislative session to become effective on July 1, 2001. *See* Act of June 18, 1999, 76th Leg., R.S., ch. 414, § 1.01, 1999 Tex. Gen. Laws 2639. Several technical amendments were made during the 2001 legislative session, but the effective date remained the same. *See* Act of June 13, 2001, 77th Leg., R.S., ch. 705, §§ 1-24 Tex. Gen. Laws 1403 (codified as Tex. Bus. & Com. Code Ann. §§ 9.101 -.709 (Vernon Supp. 2002).

222. 254 B.R. 357 (Bankr. E.D. Tex. 2000).

223. 43 S.W.3d 83 (Tex. App.—Dallas 2001, pet. denied).

224. *Id.*

225. *Id.* at 86.

226. *Id.*

gagee, fearing loss of his interest in the mobile home, sought a declaratory judgment that the mobile home was no longer considered a mobile home but, instead, had become part of the real estate.[227] The secured creditor argued that its security interest was superior to the mortgagee's lien.[228]

On appeal, the court phrased the issue as "whether a prior filed lien in the county real estate records was a prior perfected lien against a manufactured home."[229] Finding the issue was essentially the same as that previously litigated in *Gies v. NCNB Texas Forney Banking Center*,[230] the court reasoned that the analysis in *Gies* had not changed and the secured creditor had properly followed the procedures in the Texas Manufactured Housing Standards Act (MHSA) to perfect its interest.[231] The secured creditor, therefore, had the superior claim to the mobile home and the judgment of the trial court was affirmed.

In *Texas Workforce Commission v. MidFirst Bank*,[232] a bank loaned money to a debtor under a promissory note and security agreement granting the bank a security interest in all of the debtor's receivables. The bank perfected the security interest by filing a financing statement with the Texas Secretary of State and in various Texas counties where the debtor was conducting business.[233] Subsequently, the debtor defaulted on the note, and the bank obtained a judgment in an Oklahoma federal court for the balance of the note and foreclosure of the bank's security interest.[234] The debtor also owed the Texas Workforce Commission (TWC) approximately six months of unpaid unemployment taxes as well as back-wage claims.[235] The TWC issued abstracts of the assessments, which placed a hold on the debtor's funding, including receivables paid by the federal government to the Comptroller, and directed the Comptroller to turn over the federal funds to the TWC in partial satisfaction of the delinquent unemployment taxes and back-wage claims. Thereafter, the bank sued the TWC asking the court to declare the bank's security interest superior to the TWC's lien and to order the TWC to reimburse the bank for the federal funds that the TWC had received on behalf of the debtor.[236]

Affirming the trial court, the court of appeals held the TWC was not protected by sovereign immunity and it had deprived the bank of its right

227. *See id.* at 86-87.
228. *W.H.V., Inc.*, 43 S.W.3d at 87.
229. *Id.* at 91.
230. 881 S.W.2d 776 (Tex. App.—Dallas 1994, no writ).
231. *W.H.V., Inc.*, 43 S.W.3d at 90-91. Perfection of a security interest in a manufactured home is by notation of the security interest on a certificate of title issued by the Texas Department of Housing and Community Affairs under TEX. REV. CIV. STAT. ANN. art. 5221(f), § 19(a)(2)(F) (Vernon Supp. 2002).
232. 40 S.W.3d 690 (Tex. App.—Austin 2001, pet. denied).
233. *Id.* at 692.
234. *Id.*
235. *Id.* at 693.
236. *Id.* at 693-94.

to property, which constituted a "taking" in violation of the Texas Constitution.[237] The bank was entitled to reimbursement of the funds paid to the TWC because the bank perfected its security interest before the TWC liens arose, the bank was entitled to reimbursement of the funds paid to the TWC.[238] The court also approved nullification of the TWC liens until the bank's superior interest was fully satisfied.[239]

C. Enforcement Of Security Interests

If all goes well with a secured transaction, the debtor pays the debt, the security interest is released, and neither the secured party nor the debtor has any further obligation to the other party. Even if all does not go entirely well and the debtor defaults, the secured party is able to foreclose on the collateral and realize a sufficient amount from the disposition of the collateral to pay the balance of the debt without incurring any liability for a wrongful disposition. Like true love, however, the course of a disposition is not always smooth, as illustrated by *First Valley Bank of Los Fresnos v. Martin*.[240] In that case, a debtor borrowed $20,000 from a creditor using cattle as collateral for the loan. Subsequently, with the permission of the creditor, the debtor sold some of the cattle, and several years later defaulted on the loan. The creditor foreclosed and sold more of the cattle.[241] A month later, the creditor erroneously notified the sheriff's department that the cattle could not be found.[242] The debtor was indicted for hindering a secured creditor but the indictment was ultimately dismissed.[243] The debtor sued the creditor for malicious prosecution, fraud, damages to credit and personal reputation, mental anguish and loss of earning capacity. The jury awarded the debtor more than $18,000,000 in actual and exemplary damages.[244] The creditor appealed.[245]

The court found that the evidence was legally sufficient to sustain all of the debtor's claims with the exceptions of fraud and damages to credit reputation.[246] The primary focus of the opinion was on the issue of malicious prosecution and the associated damages.[247] The court held that the creditor was aware of the presence of the collateral, as evidenced by the

237. *MidFirst Bank*, 40 S.W.3d at 695-96. Tex. Const. art. I, § 17 forbids the State from taking, damaging, or destroying a person's property for public use without payment of adequate compensation.

238. *Id.* at 698.

239. *Id.*

240. 55 S.W.3d 172 (Tex. App.—Corpus Christi 2001, pet. filed).

241. *Id.* at 179.

242. *Id.* at 180.

243. *Id.* at 180. *See also* Tex. Penal Code Ann. §32.33 (Vernon 1994) which makes it a criminal offense for a debtor to intentionally hinder a secured party in the enforcement of a security interest.

244. *First Valley Bank*, 55 S.W.3d at 180.

245. *Id.* at 181.

246. *Id.* at 194.

247. *Id.* at 189-91.

authorization of the debtor's sale and by the creditor's own sale.[248] Under these circumstances, the creditor could not have reasonably believed the cattle were missing when the indictment was filed and, therefore, did not have probable cause to pursue a criminal prosecution. Furthermore, according to the court, the effects of malicious prosecution extended into both the debtor's private and public life and supported a claim for significant actual damage.[249] The court did, however, reverse the trial court judgment on the claims of fraud and loss of credit reputation due to a lack of evidence and recalculated the exemplary damages based on the "damages cap" in the Civil Practice and Remedies Code.[250] Even with the reversal on the claims of fraud and loss of credit reputation, and with the reduction in the amount of exemplary damages, the secured party was still liable for more than four million dollars.

In *Riyad Bank v. Tawfic al Gailani*,[251] the secured party fared somewhat better. In *Riyad*, a Saudi Arabian bank foreclosed on a debtor's accounts receivable that secured a two million dollar line of credit and sold them at a public foreclosure sale.[252] The bank itself was the buyer and purchased the accounts for ten dollars. No attempt was made by the bank to collect any of the accounts prior to sale.[253] Following the sale, the bank sued three co-signers who had guaranteed the debtor's promissory note for a deficiency of 1.9 million dollars.[254] The co-signers contended the bank had violated the standards of commercial reasonableness required by the Code, in part because the bank had notified the Saudi Arabian Monetary Agency (SAMA) of the default.[255] The co-signers argued that this was an effort to collect the accounts because notice to SAMA prevented them from obtaining banking services or otherwise participating in the Saudi business community and effectively destroyed the value of the collateral.[256] The trial court entered a summary judgment against the co-signers.[257] The court of appeals concluded that sending notice of default to SAMA raised fact issues as to whether this was

248. *Id.* at 184.

249. 55 S.W.3d at 190.

250. *Id.* at 194. TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (Vernon 1997) limits exemplary damages to the greater of $200,000 or two times the amount of economic damages plus non-economic damages not to exceed $750,000. Applying this limitation, the court reduced the exemplary damages to $1,470,000.

251. 61 S.W.3d 353 (Tex. 2001).

252. *Id.* at 354.

253. *Id.* at 356.

254. *Id.* at 354-55.

255. *Id.* at 355. Because the case arose under the former version of Chapter 9, the provisions of the Code considered by the court were TEX. BUS. & COM. CODE ANN. §§ 9.502, .504 & .505 (Vernon 1994). Revised Chapter 9 was adopted in Texas during the 1999 legislative session to become effective on July 1, 2001. *See* Act of June 18, 1999, 76th Leg., R.S., ch. 414, §1.01, 1999 Tex. Gen. Laws 2639. Several technical amendments were made during the 2001 legislative session, but the effective date remained the same. See Act of June 13, 2001, 77th Leg., R.S., ch. 705, §§ 1-26 Tex. Gen. Laws 1403 (codified as TEX. BUS. & COM. CODE ANN. §§ 9.101-.709 (Vernon Supp. 2002).

256. *Riyald Bank*, 61 S.W.3d at 356.

257. *Id.* at 355.

done in an attempt to collect payment and whether giving such notice was commercially reasonable under section 9.502.[258] The court of appeals did not discuss the sale of collateral issue under section 9.504.[259]

The Texas Supreme Court, on appeal, reasoned that reporting the default to SAMA did not amount to the bank's taking control or possession of the accounts for the purpose of collecting from the account debtors, but was more akin to credit reporting to an unrelated agency.[260] There was, therefore, no violation of the commercial reasonableness standard of section 9.502.[261] The court further held, however, that by selling the accounts, the bank did invoke its remedies under section 9.504 and had the burden of proving it had acted in a commercially reasonable manner.[262] Since this issue had not been addressed below, the case was remanded to the court of appeals to determine if fact issues were raised concerning the bank's compliance with section 9.504.[263]

Riyad arose before the effective date of revised Chapter 9, and, therefore, the rules applied were those of the former Chapter 9.[264] The default rules have been changed significantly by revised Chapter 9 and the issues raised in *Riyad* would now be considered under sections 9.610 and 9.615.[265] The focus would now include not only the issue of a commercially reasonable disposition, but also the valuation of the accounts in relation to the amount paid because they were sold to the secured party.[266]

258. *Id.* at 356. The court of appeals decision is reported, *sub nom*, Gailani v. Riyad Bank Houston Agency, 22 S.W.3d 560 (Tex. App.—El Paso 2000), *reversed*, 61 S.W.3d 353 (Tex. 2001).

259. 61 S.W.3d at 356.

260. *Id.* at 357.

261. *Id.* at 356-57.

262. *Id.* at 358.

263. *Id.* at 359.

264. *See supra* note 255.

265. TEX. BUS. & COM. CODE ANN. §§ 9.610, .615 (Vernon Supp. 2002).

266. *See* TEX. BUS. & COM. CODE ANN. § 9.615(f) (Vernon Supp. 2002), which provides:

> (f) The surplus or deficiency following a disposition is calculated based on the amount of proceeds that would have been realized in a disposition complying with this subchapter to a transferee other than the secured party, a person related to the secured party, or a secondary obligor if:
> (1) the transferee in the disposition is the secured party, a person related to the secured party, or a secondary obligor; and
> (2) the amount of proceeds of the disposition is significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought.