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Bankruptcy and Creditors' Rights

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BANKRUPTCY AND CREDITORS' RIGHTS

Roger S. Cox*

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I. INTRODUCTION—SCOPE OF ARTICLE

ALTHOUGH this article includes developments in the bankruptcy courts, the author has attempted to limit the reported cases to those involving state law, other developments that directly impact enforcement of the debtor-creditor relationship,¹ or cases that might not otherwise be analyzed in a conventional bankruptcy survey. In other words, this is not intended to be an exhaustive survey of bankruptcy developments, but rather an update regarding cases of interest to the Texas based debtor-creditor practitioner.²

II. LEGISLATIVE DEVELOPMENTS

A. BANKRUPTCY REFORM

So-called bankruptcy reform legislation remained an issue during the 2002 session. The bill ultimately died late in the session due primarily to the inclusion of some abortion related language when no compromise could be reached. As of this writing, similar legislation had been filed in the 2003 session, but its prospects for passage, and in what form, remain uncertain.

B. CHAPTER 12 EXTENSION

In December 2002, President Bush signed legislation extending Chapter 12 (family farmer bankruptcy) for what was then six months.³ As of this writing, it is impossible to tell whether Chapter 12 will be extended beyond this date. Recent history indicates, however, that it is reasonable to assume an extension will pass, unless there are some unanticipated developments in related legislation that could stall further extension legislation.

1. *E.g.*, homesteads, exemptions, dischargeability, automatic stay, debt collection, *etc.*

2. Judge Leif Clark provides a thorough analysis of bankruptcy developments in the Fifth Circuit in the Fifth Circuit Symposium published annually by the Texas Tech Law Review. *See* Leif Clark, *Bankruptcy, Survey Articles*, 33 TEX. TECH L. REV. 579 (2002); Leif Clark, *Bankruptcy, Survey Article*, 32 TEX. TECH L. REV. 667 (2001); Leif Clark, *Bankruptcy, Survey Articles*, 31 TEX. TECH L. REV. 405 (2000); Leif Clark, *Bankruptcy, Survey Articles*, 30 TEX. TECH L. REV. 441 (1999); Leif Clark, *Bankruptcy, Fifth Circuit Survey June 1996-May 1997*, 29 TEX. TECH L. REV. 355 (1998); Leif Clark, *Bankruptcy, Survey Articles*, 28 TEX. TECH L. REV. 299 (1997). For other, broader surveys that focus exclusively on bankruptcy law developments, see Elizabeth Warren & Jay Westbrook, *Recent Developments*, University of Texas Law School Annual Bankruptcy Conference (2002) (national survey, with supplement limited to Texas and Fifth Circuit case summaries); Gerit Pronske, *Recent Developments*, 19 STATE BAR OF TEX. ADVANCED BUSINESS BANKRUPTCY COURSE (2002).

3. *See generally* 11 U.S.C. § 1201-1208 (2002).

III. BANKRUPTCY IN THE SUPREME COURT AND COURTS OF APPEALS

A. TOLLING OF LIMITATIONS DURING BANKRUPTCY

In *Young v. United States*,⁴ the Internal Revenue Service (IRS) sought an unpaid balance of taxes owed by a Chapter 7 debtor. The debtor claimed that the tax claim fell outside the “three year look back period” because it arose out of a tax return due more than three years prior to their Chapter 7 filing.⁵ The bankruptcy court re-opened the Chapter 7 case; however, because the three year look back period was tolled⁶ during the pendency of the debtor’s prior Chapter 13 case, the court concluded that the earlier tax debt had not been discharged. The district and circuit courts both affirmed, as did the unanimous Supreme Court.⁷

B. MATTERS PENDING IN SUPREME COURT

The Supreme Court granted certiorari in *Archer v. Warner*, after the Fourth Circuit held that a pre-petition settlement of claims, arising out of an alleged fraud or intentional tort, effectively extinguished the non-dischargeable nature of the underlying tort claim in a subsequent bankruptcy.⁸ The Fourth Circuit found such a settlement agreement to be a novation, which substituted a dischargeable contract claim for what had been a potentially non-dischargeable tort claim.⁹ With this holding, the Supreme Court was faced with a split among the circuits,¹⁰ thus certiorari

4. *Young v. United States*, 535 U.S. 43 (2002).

5. See 11 U.S.C. § 507(a)(8)(A)(i) (2000).

6. The court in *Young* stated

It is hornbook law that limitations periods are “customarily subject to ‘equitable tolling,’” unless tolling would be “inconsistent with the text of the relevant statute[.]” Congress must be presumed to draft limitations periods in light of this background principle. That is doubly true when it is enacting limitations periods to be applied by bankruptcy courts, which are courts of equity and “apply the principles in rules of equity jurisprudence.”

Young, 535 U.S. at 49-50. The court continued:

Tolling is in our view appropriate regardless of petitioners’ intentions when filing back-to-back Chapter 13 and Chapter 7 petitions—whether the Chapter 13 petition was filed in good faith or solely to run down the lookback period. In either case, the IRS was disabled from protecting its claim during the pendency of the Chapter 13 petition, and this period of disability tolled the three-year lookback period when the Youngs filed their Chapter 7 petition.

Id. at 50-51. See generally *Irwin v. Dep’t of Veteran’s Affairs*, 498 U.S. 89, 95 (1990) (adopting a general rule to govern the applicability of equitable tolling in suits against the government).

7. *Young*, 535 U.S. at 54. *But cf. In re Froehle*, 286 B.R. 94 (B.A.P. 8th Cir. 2002) (filing of bankruptcy did not toll running of debtor’s post-foreclosure redemption period under Iowa state law).

8. *Archer v. Warner*, 536 U.S. 938 (2002).

9. See also *In re Warner*, 283 F.3d 230, 236-37 (4th Cir. 2002).

10. Compare *In re West*, 22 F.3d 775 (7th Cir. 1994) (obligation on note dischargeable for fraud), and *In re Fisher*, 116 F.3d 388 (9th Cir. 1997) (claims arising from sale did not qualify as nondischargeable debt) with *United States v. Spicer*, 57 F.3d 1152 (D.C. Cir. 1995), and *Greenberg v. Schools*, 711 F.2d 152 (11th Cir. 1983) (debt not dischargeable in bankruptcy because the parties entered into a settlement agreement).

was granted. As of press time, the Court had not disposed of this case; however, a decision was anticipated by the end of the Court's term.

C. COURTS OF APPEALS

1. *Preferential Transfers—Ordinary Course of Business Defense*

*In re Gulf City Seafoods, Inc.*¹¹ originated in a Mississippi bankruptcy court; however, it has significant implications for preference cases throughout the Fifth Circuit. This case dealt with the ordinary course of business defense, more specifically, whether payments made by the debtor during the 90-day preference period were made "according to ordinary business terms."¹² As with most preference cases, some recitation of the facts is necessary.

Gulf City purchased, processed, and resold seafood products. Ludwig was a seafood supplier to Gulf City. As part of a long-standing relationship, Gulf City would take delivery of seafood and write Ludwig one or more checks. Ludwig would not cash the checks right away, but instead, would cash the checks when Gulf City indicated that it had sufficient funds to cover the check. Typically, 40-45 days elapsed between the delivery of seafood and the date that the check or checks for delivery actually cleared. During the preference period, 24 checks cleared the debtor's account, of which 17 cleared within 40-45 days, with the remaining seven checks clearing within 10-18 days.

The bankruptcy court found, based on past practices between the parties, that the checks all constituted payments in the ordinary course of business, and denied the debtor's preference recovery. The district court affirmed.¹³

The Fifth Circuit began its analysis by noting the policy behind the preference statute, namely to discourage favoring particular creditors during a debtor's slide into bankruptcy.¹⁴ The court concluded, however, that if a payment is made in the ordinary course of business, the Code precludes the trustee from avoiding that transfer. "In other words, the ordinary course of business defense provides a safe haven for a creditor who continues to conduct normal business on normal terms," which is also a critically important policy consideration.¹⁵

11. *In re Gulf City Seafoods, Inc.*, 296 F.3d 363 (5th Cir. 2002).

12. Under § 547, payments made on account of an antecedent debt may be recovered by the trustee or debtor in possession. Section 547 provides for numerous defenses, one of which is that the payment was made in the ordinary course of business. 11 U.S.C. § 547(c)(2) (2000).

13. *Gulf City Seafoods, Inc.*, 296 F.3d at 366.

14. *Id.* at 367 (citing *In re Tolona Pizza Prods. Corp.*, 3 F.3d 1029, 1031 (7th Cir. 1993) (Posner, J.)).

15. *Id.* The court continued:

Without this defense, the moment that a debtor faced financial difficulties, creditors would have an incentive to discontinue all dealings with that debtor and refuse to extend new credit. Lacking credit, the debtor would face almost insurmountable odds in its attempt to make its way back from the edge of bankruptcy.

The court attempted to discern between payments that are truly “ordinary” between the debtor and the creditor and those that represent a collusive arrangement designed to favor a particular creditor during the debtor’s financial hardship. Thus, the court noted the three elements to the ordinary course defense: (a) the creditor must prove that the transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the creditor; (b) made in the ordinary course of business or financial affairs of the debtor and the transferee; and (c) *according to ordinary business terms*.¹⁶

The first two elements focus on the relationship between the debtor and the creditor. The third factor, however, deals with the issue of whether payments were made “according to ordinary business terms.”¹⁷ This was the determinative factor in *Gulf City*. In short, the court found that this third prong focused not on the relationship between the parties, but rather on payment practices within the industry.¹⁸

The *Gulf City* opinion notes that this inquiry should be a supposedly objective one, in other words, a comparison with the credit arrangements between other similarly situated parties in the debtor’s industry. Citing Judge Posner’s analysis in *In re Tolona Pizza Products Corp.*,¹⁹ the court recognized that strict conformity to particular industry standards may be inappropriate, noting that “ordinary business terms” refers to a range of terms and encompasses the practices among firms similar in some general way. The court further noted that “only dealings so idiosyncratic as to fall outside that broad range should be deemed extraordinary and therefore outside the scope of subsection C.”²⁰ Unfortunately for the transferee in *Gulf City* there was no evidence presented on the standards within the industry. Therefore, the Fifth Circuit reversed the lower courts, remanding the case, which would presumably allow the transferee to put on such evidence.²¹ To reiterate—this was a remand, and the court did not render any decision regarding the ultimate treatment of these payments.

2. Avoidance Actions—Standing of Creditor’s Committees

No discussion of preferences and avoidance actions would be complete without a mention of *In re Cybergenics*.²² In that case, a panel of the

Id.

16. *Id.* (citing 11 U.S.C. § 547(c)(2) (2000)) (emphasis added). In general, the ordinary course of business defense requires a “peculiarity” tactical analysis. See generally *In re Gateway Pacific Corp.*, 153 F.3d 915, 917 (8th Cir. 1998).

17. *Gulf City Seafoods, Inc.* 296 F.3d at 367.

18. *Id.* at 367-68 (citing *Lawson v. Ford Motor Co. (In re Roblin Indus., Inc.)*, 78 F.3d 30, 39 (2d Cir. 1996)); *In re Molded Acoustical Prods., Inc.*, 18 F.3d 217, 223 (3d Cir. 1994).

19. *In re Tolona Pizza Prods. Corp.*, 3 F.3d 1029, 1032-33 (7th Cir. 1993).

20. *Gulf City Seafoods, Inc.*, 296 F.3d at 368 (citing *In re Tolona Pizza Prods. Corp.*, 3 F.3d at 1033).

21. *Id.* at 369-70. For an example of the expert testimony that may be dispositive on this issue, see *In re Bros. Gourmet Coffee, Inc.*, 271 B.R. 456, 462 (Bankr. D. Del. 2002).

22. The original opinion was reported at 304 F.3d 316 (3d Cir. 2002). But that opinion has been withdrawn from publication pending an *en banc* hearing.

Third Circuit initially found that a committee of unsecured creditors lacked standing to assert avoidance actions, in particular a preference claim. The Third Circuit subsequently ruled *en banc* to withdraw the opinion from publication, and rehearing *en banc* was granted. As of this publication, the Third Circuit's disposition of this issue was not known. This is an important case, however, and it could have possible ramifications for practice in other circuits.

IV. BANKRUPTCY COURT CASES

A. HOMESTEADS AND EXEMPTIONS

1. *Only Individuals May Claim a Homestead*

In *In re Monsivais*,²³ senior bankruptcy judge John Akard again writes on the homestead issue. In this case, the debtors claimed an urban homestead exemption.²⁴ The debtors, however, did not hold direct title to the property. Rather, title to the property was held by their family limited partnership. Under the entity theory of partnerships,²⁵ however, the partnership was essentially the owner of the property, not the individual debtors. Therefore, the trustee's objection to their exemption claim was upheld. This is consistent with earlier decisions that only individuals may claim a homestead exemption to property when they have a direct ownership interest.²⁶

Apparently, family limited partnerships and similar entities have become popular estate planning tools. That said, the concept of individual ownership of a homestead, reinforced by the *Monsivais* decision, survives.

2. *Violation of Due on Sale Clause Does Not Affect Homestead Claim*

In *In re Rodriguez*,²⁷ the debtor and his father executed a deed of trust containing a due on sale clause. The father conveyed his undivided interest in the property to his ex-wife in a divorce settlement that the ex-wife then conveyed to the debtor. The debtor subsequently claimed that property as his homestead in his later bankruptcy. The court found that although the conveyance may have violated the due on sale clause, giving the mortgagee a contractual remedy, it did not deprive the debtor of his homestead claim.²⁸

23. *In re Monsivais*, 274 B.R. 263 (Bankr. W.D. Tex. 2002).

24. Under Texas law, a family may claim an urban homestead exemption consisting of up to ten acres. TEX. PROP. CODE ANN. § 41.002(a) (Vernon 2000).

25. Section 7.01 of the Texas Revised Limited Partnership Act states that "[a] partnership interest is personal property. A partner has no interest in specific limited partnership property." TEX. REV. CIV. STAT. ANN. art. 6132a-1, § 7.01 (Vernon Supp. 2003).

26. See e.g., *In re Cole*, 205 B.R. 382, 385-86 (Bankr. E.D. Tex. 1997) (holding that a family had abandoned a portion of their homestead by conveyance to their family limited partnership). See also *In re Pierce*, 128 B.R. 632, 636 (Bankr. N.D. Tex. 1990), *rev'd*, 935 F.2d 709 (5th Cir. 1991); *In re Brooks*, 103 B.R. 123, 125 (Bankr. S.D. Tex. 1988).

27. *In re Rodriguez*, 282 B.R. 194 (Bankr. N.D. Tex. 2002).

28. *Id.* at 197-98.

B. DISCHARGEABILITY

1. Trust Fund Taxes—Responsible Person Liability

Generally, all debts arising prior to the filing of an individual's Chapter 7 bankruptcy will be discharged. Section 523 of the Code, however, provides a number of exceptions to that presumption.²⁹ Among these exceptions is a debt arising from a tax or custom duty "with respect to which debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax."³⁰ *In re Johnson*³¹ applied this exception in the context of a debtor who had been a "responsible person" of a corporation that failed to pay over withholding taxes to the federal government.

Generally, the Internal Revenue Code requires employers to withhold an employee's share of social security taxes and income taxes from his or her wages. That money is withheld, effectively in trust, for the benefit of the United States.³² As "trust funds," those funds do not belong to the employer, and they are not to be used in the general operations of the business. If these taxes are not paid over, the employee is nevertheless credited for the payment of those taxes, and the government may not otherwise have any recourse for the collection of those taxes. Accordingly, an additional layer of protection provided to the government is the imposition of a "penalty" in an amount equal to the unpaid trust fund taxes against any person who is under a duty to perform the act (or to provide for the performance of the act) of forwarding those trust fund taxes.³³

A threshold issue for the *Johnson* court was determining who constituted a responsible person that would be exposed to the responsible person penalty. The court noted two elements: first, the person must be one "required to collect, truthfully account for, or pay over any tax."³⁴ This is commonly the definition of a "responsible person." The second requirement for imposition of a penalty is that the person "willfully" failed to perform one of those three functions.³⁵ Critically, the *Johnson* court noted substantial authority to the effect that the responsible person have some power, authority, or control over the process, regardless of whether

29. Among the debts excepted from discharge by § 523(a) are debts incurred as a result of fraud, reasonable reliance upon false financial statements, debts arising from a willful and malicious injury, fraud in a fiduciary capacity, embezzlement, and numerous others. 11 U.S.C. § 523(a)(1) (2000). See generally, Annotation, *Exception from Discharge of Taxes Under § 523(a)(1) of Bankruptcy Code (11 U.S.C.A. § 523(a))*, 145 A.L.R. FED. 1 (1998).

30. 11 U.S.C. § 523(a)(1)(C) (2000).

31. *In re Johnson*, 283 B.R. 694 (Bankr. N.D. Tex. 2000). This case was apparently decided in 2000; however, the opinion was first published during the Survey period. Given its importance and the thorough analysis of both trust fund tax liability and the dischargeability of that type of debt, the opinion is discussed in this Survey issue.

32. See 26 U.S.C. §§ 3102(a), 3402(a) (2000). See also 26 U.S.C. § 7501(a) (2000). See generally *Slodov v. United States*, 436 U.S. 238, 242-43 (1978).

33. 26 U.S.C. § 6672 (2000).

34. *In re Johnson*, 283 B.R. at 701.

35. *Id.*; see 11 U.S.C. § 6672 (2000); see also *Howard v. United States*, 711 F.2d 729, 733 (5th Cir. 1983).

he actually exercised it.³⁶

In *Johnson*, the debtor apparently argued that he had delegated or attempted to delegate the responsibility for paying the withholding taxes to another person within the organization. Although not stated literally, the court effectively found that this duty was non-delegable, noting that the Fifth Circuit “looks at a number of circumstantial indicia of responsible person status when a party lacks the precise responsibility of withholding or paying the employees’ taxes.”³⁷ Among the various factors identified by the Fifth Circuit, it is also important to note that no one element of control or authority is necessarily dispositive.³⁸ The *Gustin* court cautions that mere access to corporate funds does not necessarily make one a responsible person.

Finally, an important factor in *Johnson* is that the plaintiff continued to write checks to other creditors at a time when he knew or should have known about the unpaid payroll taxes. “Evidence that a responsible person had actual knowledge of payments to other creditors after he was aware of the failure to pay withholding tax is sufficient for summary judg-

36. *In re Johnson*, 283 B.R. at 701. “The crucial inquiry is whether the individual had the effective power to pay the taxes.” *Id.* 0(quoting *Barnett v. Internal Revenue Service*, 988 F.2d 1449, 1454 (5th Cir. 1993)).

37. *Id.* at 701. These elements include the following:

- (1) the holding of corporate office;
- (2) the ownership of stock;
- (3) the authority to sign corporate checks, either alone or jointly with another officer;
- (4) the authority to obtain financing or loans for the corporation;
- (5) the authority to execute corporate loans for the corporation;
- (6) personally guaranteeing the debts of the corporation;
- (7) the authority to negotiate contracts for the corporation;
- (8) the authority to hire and fire employees;
- (9) the holding of a position as a member of the board of directors;
- (10) the effective power to decide what creditors are to be paid; and
- (11) the authority to purchase corporate assets.

Id. at 702 (citations omitted).

38. For example, the Fifth Circuit has held:

- (1) [t]here is no requirement that a responsible person be a corporate officer[;]
- (2) [t]here is no requirement that a responsible person have access or control over books and financial records[;]
- (3) [t]here is no requirement that a responsible person be an authorized check signer[;]
- (4) [t]here is no requirement that a responsible person be a member of the board of directors[;]
- (5) [t]here is no requirement that a responsible person be a stockholder[;]
- (6) [t]he hope that sufficient money will be available later to pay the taxes is not a defense[;] and
- (7) [i]t is not stealing for an authorized check signer to pay taxes to the Internal Revenue Service.

Id. at 702-03 (citations omitted). The court continued: “One does not cease to be a responsible person merely by delegating that responsibility to others, nor do instructions from a superior not to pay the taxes or the threat of being fired if one pays the taxes make one not a responsible person under the statute.” *Id.* at 703 (quoting *Gustin v. United States*, 876 F.2d 485, 491-02 (5th Cir. 1989)).

ment on the issue of willfulness.”³⁹ In other words, there is a duty to use any available, unencumbered funds to pay an unsatisfied withholding obligation, and the failure to do so when there is knowledge of that obligation constitutes willfulness for purposes of the officer and director penalty.

Moving to the dischargeability context, the court merely had defined conduct (either a commission or a culpable omission) and willfulness on the part of the individual debtor seeking the discharge. As noted, the conduct element does not require an actual overt act; rather, a culpable omission or failure to exercise the known duty will satisfy the conduct element. As to willfulness, the court applied a three prong test: (i) whether the debtor had a duty to pay taxes; (ii) whether the debtor knew he had that duty; and (iii) whether the debtor voluntarily and intentionally violated that duty.⁴⁰ In light of a list of detailed findings of fact, which traced the various layers of authority enjoyed by the plaintiff, combined with the plaintiff's failure to pay or cause the payment of the unpaid taxes, the court found that the responsible person penalty imposed on the debtor was not subject to discharge.⁴¹

Obviously, the foregoing analysis digressed a bit from the narrow issue of bankruptcy dischargeability. The *Johnson* case is important, however, to any prospective debtor's counsel involving a small business bankruptcy. Anecdotally, this author has noted that unpaid withholding taxes is a common problem among many closely held businesses. Thus, although not apparent to the uninitiated, an unresolved trust fund tax issue provides many traps for the unwary, including potential conflicts of interest between the corporation and the individual principal. Additionally, given this analysis of what constitutes a “responsible person,” the universe of persons within the organization who might be exposed to these penalties is probably much broader than most bankruptcy practitioners would realize.

2. *Materially False Financial Statements*

Among the other exceptions to dischargeability are debts that are incurred upon a creditor's reasonable reliance upon a materially false financial statement submitted with an intent to deceive the creditor.⁴² *In*

39. *In re Johnson*, 283 B.R. at 704 (citing *Mazo v. United States*, 591 F.2d 1151, 1157 (5th Cir.), cert. denied sub nom., *Lattimore v. United States*, 444 U.S. 842 (1979)).

40. *In re Johnson*, 283 B.R. at 706.

41. *Id.* Among the various findings of fact, the plaintiff had been a licensed attorney for numerous years, describing himself as a “wills and trust” lawyer who knew estate tax law. *Id.* at 699.

42. 11 U.S.C. §523(a)(2)(B) excepts from discharge any debt “for money, property, services, or an extension, renewal, or refinancing of credit,” to the extent that the debt is obtained by the following:

(B) use of a statement in *writing*—

(i) that is materially false;
(ii) respecting the debtor's or an insider's financial condition;
(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

*re Slonaker*⁴³ provides a good example of a court's analysis of a false financial statement in a dischargeability context, especially the "reasonable reliance" element necessary to establish non-dischargeability. In *Slonaker*, the court first found that in order to be "materially false," the statement must contain information that is "substantially inaccurate."⁴⁴ The court continued that a financial statement is materially false if it "paints a substantially untruthful picture of a financial condition by misrepresenting information of the type which would normally affect the decision to grant credit . . .," and this may include material omissions.⁴⁵ In *Slonaker*, the debtor omitted from his financial statement the existence of approximately \$115,000.00 in loans outstanding from the debtor to his parents. It also showed no encumbrance against property that was supposedly gifted from the parents to the debtor.⁴⁶

More problematic for a bank in this situation is the satisfaction of the supposedly objective reasonable reliance standard. Judge McGuire found that this issue is a factual determination made in the context of the totality of the circumstances,⁴⁷ and this reasonableness should be judged by comparing the creditor's actual conduct with its own normal business practice and the standards and customs of the industry, in light of the surrounding circumstances at the time.

The court acknowledged that some additional investigation would have been appropriate; however, the court concluded that an apparent act of concealment of the loan was the type of omission "that would not have been discovered through investigation."⁴⁸ Accordingly, the court found reasonable reliance, noting that "[e]ven partial reliance is sufficient"⁴⁹

Finally, the court analyzed the "intent to deceive" element, noting again that the court should consider the totality of circumstances to make an inference regarding whether a financial statement was submitted with

(iv) that the debtor cause to be made or published with intent to deceive[.]
Id. (emphasis added).

43. *In re Slonaker*, 269 B.R. 595 (Bankr. N.D. Tex. 2001). This opinion was issued before the Survey period; however, it was published after the deadline for last year's Survey. Therefore, it is included in this year's Survey.

44. *Id.* at 603.

45. *Id.*

46. *Id.*

47. Among the circumstances mentioned by the court were:

(1) whether the creditor had a close personal relationship or friendship with the debtor; (2) whether there had been previous business dealings with the debtor that gave rise to a relationship of trust; (3) whether the debt was incurred for personal or commercial reasons; (4) whether there were any "red flags" that would have alerted an ordinarily prudent lender; and (5) whether even minimal investigation would have revealed the inaccuracy of the representations.

Id. at 604 (citing *In re Ledford*, 970 F.2d 1556, 1560 (6th Cir. 1992)). The court noted that the *Ledford* factors had been approved or used by the Fifth Circuit in *In re Coston*, 991 F.2d 257, 261 (5th Cir. 1993). See also *In re Patch*, 24 B.R. 563, 567 (D. Md. 1982).

48. *Slonaker*, 269 B.R. at 605.

49. *Id.* (citing *In re Nance*, 70 B.R. 318, 323 (Bankr. N.D. Tex. 1987)).

an intent to receive. This includes a reckless disregard for the truth or falsity of a statement, combined with the magnitude of the resulting misrepresentation.⁵⁰ In conclusion, the court found the debt to be non-dischargeable to the extent of the material omissions. The court also awarded the creditor attorney's fees based upon contractual provisions of the guaranty agreement giving rise to the debtor's obligation.⁵¹

C. CHAPTER 13 PRACTICE

1. Secured Claims—Valuation and Lien Stripping

*In re Gray*⁵² addressed valuation of a motor vehicle in a Chapter 13 cram-down context. Generally, "a debtor is permitted to keep property over the objection of a secured creditor if the creditor retains its lien . . . and the debtor provides . . . payments, over a time not to exceed the life of the debtor's Chapter 13, plan that will total the present value of the allowed secured claim (*i.e.*, the present value of the collateral)."⁵³

In effect, *Gray* is an example of how a Chapter 13 secured claim is treated in the post *Rash*⁵⁴ era, which in effect held that valuation would be determined based upon the cost the debtor would incur to obtain a like asset for the same proposed use.⁵⁵ This is commonly referred to as a "replacement value" approach.⁵⁶ That said, however, the bankruptcy court is left as the trier of fact on this issue.⁵⁷

In *Gray*, the debtors proffered a Kelly Blue Book private party value, while the secured creditor contended that the NADA retail value should apply. The creditor further argued that given the debtors' credit condition, they would be forced to obtain sub-prime financing, which would have generally been available only through a dealership sale.

The court used the NADA value as a benchmark; however, that retail value included other hidden costs such as sales commissions, detailing and refurbishment of the vehicle, limited warranties, and storage costs, which should not be included in determining a replacement value in this context. The court, therefore, adopted a mid-value approach between the Kelly Blue Book private party value and the NADA retail. The court indicated that it may have used the NADA retail value as a starting point, but there had been no evidence presented on the specific add-on discounts that should be applied. Thus, the court used a mid-point

50. *Id.* (citing *In re Norris*, 70 F.3d 27, 30 n.12 (5th Cir. 1995) ("Reckless disregard for the truth or falsity of a statement combined with the sheer magnitude of the resultant misrepresentation may combine to produce the inference of intent to deceive").

51. *Slonaker*, 269 B.R. at 606-07. The court disallowed a portion of the attorney's fees claim; however, for purposes of this holding, the critical issue is that attorney's fees were included in the judgment of non-dischargeability.

52. *In re Gray*, 285 B.R. 379 (Bankr. N.D. Tex. 2002).

53. *Id.* at 381; see generally, *Time & Method of Valuation Under 11 U.S.C.A. § 506, of Security Held by Creditor of Bankruptcy Estate*, 134 A.L.R. FED. 439 (1996).

54. *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953 (1997).

55. *Rash*, 520 U.S. at 965.

56. *Gray*, 285 B.R. 379 at 383.

57. *Id.* (citing *Rash*, 520 U.S. at 965 n.6).

approach.⁵⁸

The court then moved on to the applicable interest rate. While the court acknowledged that the contract rate of 21% was “exorbitantly high,” the court nevertheless found that rate applicable. The court noted the Fifth Circuit’s rebuttable presumption in favor of the contract rate.⁵⁹ The court noted that this presumption is rebuttable; however, a court’s general knowledge of a reduction in the cost of money is insufficient to controvert that presumption.⁶⁰

Finally, the court provided an in-depth analysis of whether a lien release must be provided upon completion of the plan payments. The court found that nothing in § 1322 prohibited inclusion of a lien release provision in a plan.⁶¹ In effect, this allowed what has been called lien stripping, which the court reconciled with earlier decisions on this issue.⁶²

2. Secured Claims—Post-Petition Interest and Attorney’s Fees

Under Bankruptcy Code § 506(b), an over-secured creditor is generally allowed post-petition interest and reasonable fees provided for under the original contract.⁶³ *In re Cummins Utility L.P.*⁶⁴ indicates that this concept is not as simple as it appears.

In effect, *Cummins* amounted to an orderly liquidation while the debtor was in Chapter 11, pursuant to one or more asset sales allowed under § 363.⁶⁵ The court expressed concern about using § 363 essentially to liquidate the debtor without the accompanying disclosure require-

58. *Gray*, 285 B.R. at 384.

59. *Id.* (citing *Greentree Fin. Servicing Corp. v. Smithwick*, 121 F.3d 211, 215 (5th Cir. 1997)).

60. *Id.*

61. *Id.* at 386-87. See also 11 U.S.C. § 1322(b)(10) (2000) (providing that a plan may include any appropriate provision not inconsistent with the Bankruptcy Code); see also 11 U.S.C. § 1322(b)(9) (providing that a plan may provide for vesting of property on confirmation or at a later time in the debtor).

62. *Gray*, 285 B.R. at 387-88. Compare *Dewsnup v. Timm*, 502 U.S. 410 (1992) (holding that Chapter 7 could not “stripdown” creditor’s lien on real property), with *In re Thompson*, 224 B.R. 360 (Bankr. N.D. Tex. 1998) (holding that debtors could not obtain a release of secured creditors’ lien until debtors successfully completed their confirmed plans and received discharge). See also *In re Castro*, 285 B.R. 703 (Bankr. Ariz. 2002) (finding a lien release appropriate upon satisfaction of second claim and holding that *Dewsnup* does not apply to personal property or to Chapter 13 cases).

63. Section 506(b) provides as follows:

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

11 U.S.C. § 506(b) (2000). Subsection (c) provides for a surcharge against the secured creditor’s interest for the expense of preserving or disposing of property to the extent of a benefit to the secured creditor.

64. *In re Cummins Util. L.P.*, 279 B.R. 195 (Bankr. N.D. Tex. 2002).

65. 11 U.S.C. § 363 (2000). Generally, § 363 governs the use, sale, or lease of property outside the ordinary course of business. This sort of procedure, however, had previously been approved in other cases. See e.g., *In re First S. Sav. Assn.*, 820 F.2d 700 (5th Cir. 1997); *In re Braniff Airways, Inc.*, 700 F.2d 935 (5th Cir. 1983).

ments found elsewhere in Chapter 11; however, it appeared to the court that this "going concern" liquidation was supported by the secured lenders (referenced collectively in the opinion as "the banks") and the unsecured creditors' committee.⁶⁶ Thus, the court allowed this liquidation, in which the banks apparently concurred and participated.

Ultimately, the banks, whose claims were over secured, sought recovery of their interest at a post-maturity (*i.e.*, default) rate, together with recovery of a substantial amount of professional fees. The request for interest included both pre- and post-petition interest.

The court first began its analysis under § 506(b) by limiting its holding to post-petition interest, finding that the pre-petition interest and fees would constitute part of the underlying secured claim, which would be addressed by way of the claim objection process.⁶⁷ The court also noted another limitation, arising out of § 506(c), which permits the interest of a secured creditor to be assessed to the extent of the holding and disposition costs incurred by the estate. Although there was no actual § 506(c) surcharge sought, the court found an analysis under that section useful in supporting the view that "the benefits to secured creditors of a bankruptcy case ought to be considered in assessing their cost to unsecured creditors," noting that in effect the extent of the allowance of fees and expenses to a secured creditor effectively comes out of the pockets of the unsecured creditors.⁶⁸ The court noted that the primary beneficiaries of the going concern liquidation were the banks, whose claims were reduced by over \$10 million, while the debtor accumulated substantial unsecured trade debt.⁶⁹

Focusing on the interest claim, the court noted at the outset that the default rate would be applicable, unless application of a lower rate is appropriate upon "a balancing of the equities."⁷⁰ The court found that it had broad equitable powers to consider a variety of facts and circum-

66. Although approved by other courts in certain situations (see the preceding footnote), many courts and commentators have struggled with the propriety of using § 363 to liquidate a Chapter 11 estate or otherwise circumvent the disclosure requirements typically found in Chapter 11. See generally *In re Lionel Corp.*, 722 F.2d 1063 (2d Cir. 1983) (earlier case expressing concerns about use of § 363); Richard I. Aaron, *BANKRUPTCY LAW FUNDAMENTALS* § 9:5 (2000 Supp.) ("Can a § 363 sale liquidate the Chapter 11 debtor?"); George W. Kinney, *Misinterpreting Bankruptcy Code Section 363(F) and Undermining the Chapter 11 Process*, 76 AM. BANKR. L. J. 235 (2002) (analyzing different ways to interpret § 363(f)); Craig A. Sloane, *The Sub Rosa Plan of Reorganization: Side-Stepping Creditor Protections in Chapter 11*, 16 BANKR. DEV. J. 37 (1999) (analyzing the organization of the sub rosa plan). See also Bruce H. White & William L. Medford, *Section 363 Sales: Let the Buyer Beware*, 21 AM. BANKR. INST. J. 28 (2002) (analyzing Fairchild Aircraft, Inc. v. Campbell).

67. *Cummins Util.*, 279 B.R. at 201. The court denied recovery of the pre-petition fees and interest, without prejudice to recovery of those matters through the banks' proof of claim.

68. *Id.* at 201.

69. *Id.* at 201-02.

70. *Id.* at 202 (citing *In re Southland Corp.*, 160 F.3d 1054, 1060 (5th Cir. 1998)); *In re Laymon*, 958 F.2d 72, 75 (5th Cir. 1992); *In re Maywood, Inc.*, 210 B.R. 91, 93 (Bankr. N.D. Tex. 1997).

stances of the case, in addition to a finite set of factors suggested by the banks.⁷¹ The court noted that the banks had not imposed default interest for more than a year pre-petition, and the court also discarded the banks' arguments that the Chapter 11 filing added to their risk. "On the contrary, the layers of protection afforded a secured creditor by the Bankruptcy Code . . . the oversight of the [d]ebtor by the United States Trustee and the court, and the [d]ebtor's duty as a fiduciary for its creditors, including the banks . . . should have given the [b]anks added comfort that their collateral was protected."⁷² The court disposed of the three part test urged by the creditor, including the relatively small "spread" between the contract rate and the default rate in this case (approximately 2%). The court found that because of the relatively insignificant return to unsecured creditors, the amount of the spread took on additional importance, noting additionally that "the impact on other creditors is the most important issue in deciding and whether default interest is appropriate."⁷³

In conclusion, and perhaps most importantly for future guidance, the court simply held that "[w]here unsecured creditors are not being paid in full (or at least close to it), allowing interest at the default rate is inappropriate."⁷⁴ Thus, the court allowed interest at the original contract rate, but denied the request for interest at the default rate.

Moving on to professional fees, the court looked somewhat skeptically upon the creditor's request for substantial professional fees, noting that the case was in effect a "Chapter 3" case rather than a complex Chapter 11 case, given its focus on a quick sale of assets under § 363. Moreover, the court found that the banks should have realized early in the case (perhaps as early as the petition date) that they would be paid in full. Thus, the analysis was undertaken in this context.⁷⁵ The court applied a "reasonableness" standard under federal bankruptcy law, rather than state law, considering the secured creditors' attorney's fees under the same standards as those applied to counsel for a trustee or debtor in possession, considering also "the nature of the case and the manner of its administration."⁷⁶

Noting the early reduction of the banks' collateral to cash, the court found that only limited professional fees were warranted. That said, the

71. The banks urged a three part test: "[i)] that the charge [would] not harm other creditors; [(ii)] that the difference between the default and the regular rate is not punitively great; and [(iii)] that the over-secured creditor has not obstructed the bankruptcy process." *Cummins Util.*, 279 B.R. at 200. The banks asserted this three part test was dispositive; however, the court disagreed. *Id.* at 202.

72. *Id.* at 202 (citing *In re Smyth III*, 207 F.3d 758, 761 (5th Cir. 2000)); *Sherr v. Winkler*, 552 F.2d 1367, 1374 (10th Cir. 1997) (emphasis added).

73. *Cummins Util.*, 279 B.R. at 203. The case further notes the allowance of a default rate in *In re Southland Corp.*, where most other classes of creditors were "unscathed" by that bankruptcy. *Id.* at 203 (quoting *In re Southland Corp.*, 160 F.3d at 1060).

74. *Id.* at 203 (citing *In re Maywood, Inc.*, 210 B.R. at 93); *In re Trinity Meadows Raceway, Inc.*, 252 B.R. 660, 669 (2000).

75. *Cummins Util.*, 279 B.R. at 203-04.

76. *Id.* at 204 (citing *In re Hudson Ship Builders, Inc.*, 794 F.2d 1051, 1056-58). Additionally, the court was to determine whether the services were duplicative or unnecessary.

court allowed costs incurred in defending against what was apparently some wide ranging discovery in an effort to challenge the banks' secured claims.⁷⁷ The court then reviewed individual fee applications and limited them accordingly. The court also denied recovery of one lender's costs of in house counsel,⁷⁸ separate outside counsel for one of the bank group members,⁷⁹ and a collateral monitoring fee, calling the latter "an egregious example of over reaching."⁸⁰

3. *Post-Confirmation Chapter 13 Plan Modification*

During the Survey period, at least three different bankruptcy courts were faced with this issue: whether a post-confirmed Chapter 13 plan may be modified to provide for surrender of collateral, the retention of which was originally contemplated and confirmed in the plan. The net effect of such a modification would be to relieve the debtor of the remaining monetary obligations of the confirmed secured claim. For the reasons described below, however, the answer is not as easy as it would appear. As of the Survey period, these three cases reflect conflict among Texas bankruptcy courts. This is also indicative of a conflict among the courts nationwide.⁸¹

First, in *In re Coffman*,⁸² the debtors had confirmed a plan under which they retained a vehicle securing a local credit union's claim. After confirmation, the debtors experienced substantial mechanical problems with the car, and ultimately "decided to rid themselves of the car by parking it on [the credit union's] parking lot."⁸³ Thereafter, the debtors filed a plan modification, which provided for surrender of the car and a substantial reduction in the monthly plan payments. The credit union objected.⁸⁴ Judge Jones denied the modification.

Although the court recognized the conflict among the various courts, the court first found that § 1327 of the Bankruptcy Code specifically provides that a confirmed plan is binding on the debtor and each of the debtor's creditors. Therefore, under the doctrine of *res judicata*, a confirmed Chapter 13 plan bars all issues that could have or should have

77. *Id.* at 205.

78. The court found this item was a part of the lender's overhead. *Id.* at 207.

79. *Id.* at 206-07. The court found the involvement of this lender's separate counsel, "though undoubtedly well-performed," unnecessary and duplicative. The court acknowledged situations where separate representation of a bank group member would be reasonable and appropriate; however, the court held that it was unnecessary in this particular case. *Id.* at 209 n.36.

80. *Id.* at 208.

81. *See, e.g., In re Goos*, 253 B.R. 416, 420 (Bankr. W.D. Mich. 2000) (summarizing the various and conflicting case law on this issue); *see also In re Coffman*, 271 B.R. 492, 495 n.2 (Bankr. N.D. Tex. 2002).

82. *In re Coffman*, 271 B.R. 492 (Bankr. N.D. Tex. 2002).

83. *Id.* at 494.

84. Interestingly, despite the surrender of the car and the resulting reduction in the proposed obligations of the debtor, the return to unsecured creditors was also reduced from 9% to 0%. *Id.*

been litigated at the confirmation hearing.⁸⁵ The court also recognized that § 1329(a) authorizes certain modifications of confirmed Chapter 13 plans; however, that exception was found to be quite limited. This was consistent with the court's apparent reliance on the Sixth Circuit's decision in *In re Nolan*,⁸⁶ in which the court noted that § 1329(a) does not expressly permit a modification that reclassifies or changes the nature of a claim but, rather, only permits the debtor to alter the amount or timing of certain payments.⁸⁷

The court also noted the inequity of the debtor's retaining the collateral for a certain period of time but, after a period of substantial depreciation, surrendering the vehicle and in effect transferring the risk of depreciation to the creditor. The court stated, "It is only fair that the [debtors] bear the burden of depreciation."⁸⁸

Finally, the court rejected another argument that § 502(j), which allows reconsideration of the allowance or disallowance of a claim for cause, would authorize the modification. The court found there to be no evidence of any extraordinary or exceptional circumstances, such as that justifying relief under an analogous procedure.⁸⁹ Because the debtors failed to satisfy the "cause" standard, the court did not further address the equities of a re-classification of the claim under § 502(j). Therefore, the modification was not allowed.

Approximately two months later, Judge Houser addressed a similar situation (with slightly different facts) in *In re Cameron*.⁹⁰ In *Cameron*, the secured lender did not file a proof of claim, with the following effect: it was allowed a secured claim in an amount equal to the value of the property securing its claim, and any unsecured deficiency claim was in effect disallowed. As in *Coffman*, the debtor allegedly experienced some difficulty with the car, and she filed a modification proposing a surrender to the secured creditor. The secured creditor objected to the modification.⁹¹ The court recognized Judge Jones' recent opinion in *In re Coffman*, and it also noted the Sixth Circuit's opinion in *Nolan*. The court applied a somewhat more direct analysis than in *Nolan* and *Coffman*, but it reached

85. *Id.* at 495; see also 11 U.S.C. § 1327(a) (2000) (establishing that provisions of a confirmed plan bind the debtor and each creditor). See generally *Sanders v. City of Brady*, 936 F.2d 212, 215 (5th Cir. 1991) (appellee arguing that bankruptcy proceedings barred all of appellant's claims under the doctrine of *res judicata*).

86. *In re Nolan*, 232 F.3d 528 (6th Cir. 2000).

87. *Coffman*, 271 B.R. at 496 (citing *Nolan*, 232 F.3d at 532-33). See also 11 U.S.C. § 1329(a)(1) (2000) (stating that the debtor may modify amount of payments on claims).

88. *Coffman*, 271 B.R. at 496. As the court quoted *Nolan*: "There is no indication that Congress intended to allow debtors to reap a windfall by employing a subterfuge that unfairly shifts away depreciation, deficiency, and risk voluntarily assumed by the debtor through her confirmation of the Chapter 13 plan." *In re Nolan*, 232 F.3d at 534.

89. *Coffman*, 271 B.R. at 498 (discussing the concept of "cause" in light of § 502(j) and Rule 60(b) of the Federal Rules of Civil Procedure).

90. *In re Cameron*, 274 B.R. 457 (Bankr. N.D. Tex. 2002).

91. *Id.* at 459. The creditor proposed repossessing the car, subject to the debtor's remaining liable for the deficiency, to be treated under the plan with interest until that portion of the claim was paid in full. This did not have any direct bearing, however, on the court's analysis.

the same conclusion—that is, that the debtor was not allowed to modify her plan.

In effect, the court found that § 1325 allowed the debtor three alternatives: first, she could negotiate an agreement with the secured lender; second, she could confirm the plan over objection by the lender by satisfying cram-down requirements; or third, she could surrender the car to the lender.⁹² Once the plan was confirmed, however, it became binding on the debtor and each creditor. As stated in *Coffman*, § 1329(a) provided the debtor with very limited options regarding post-confirmation modifications, none of which addressed the situation faced by the debtor. Applying simple rules of statutory construction, the court found that the modification was not among the options specifically delineated by statute, and therefore, this was not available to the debtor.⁹³

The third case in this trilogy is *In re Hernandez*,⁹⁴ in which Judge Steen of the Southern District reached a different conclusion. As in the other cases, the debtors' confirmed plan provided for retention of a vehicle (a pickup secured by Household Auto Finance), which claim would be paid under the confirmed plan.⁹⁵ After an earlier confirmation to modify treatment of another claim, the debtors filed a subsequent modification to surrender their pickup in satisfaction of Household's claim, and Household objected.⁹⁶ Unlike the other cases, the motion to modify was based upon a number of other circumstances that had befallen the debtors, rather than mechanical complaints about the pickup. According to the court, Household did not offer any evidence to rebut the debtor's modification.

The court noted that two of the three commentators addressing this issue had opined in favor of allowing post-confirmation modification.⁹⁷ Further, the court also recognized the *Coffman* and *Cameron* opinions; however, the court found that it had the discretion to allow modification. The court also found a somewhat broader application of §§ 502(j) and 506(a), which in turn provide for reconsideration of allowance or disallowance of a claim and the determination of the amount of an allowed secured claim. The court found that § 506(a) could be invoked "in conjunction with any hearing on a plan affecting such creditor's interest."⁹⁸

The court also questioned the extent to which the concept of *res judicata* is absolutely applicable to all Chapter 13 confirmations, especially before completion of a plan and receipt of a discharge.⁹⁹ Finally, the

92. *Id.* at 460.

93. *Id.* at 460-61.

94. *In re Hernandez*, 282 B.R. 200 (Bankr. S.D. Tex. 2002).

95. According to the court, Household did not participate in the confirmation process. *Id.* at 202.

96. The court noted that Household did not allege or offer any evidence that the current value of the pickup was less than the original secured claim. *Id.*

97. *Id.* at 203 (citing 8 COLLIER ON BANKRUPTCY, ¶ 1329.02 (15th ed. Rev. 2001) and KEITH LUNDIN, CHAPTER 13 BANKRUPTCY, § 264.1 (3d ed. 2000)).

98. *Id.* at 204 (citing 11 U.S.C. § 506(a)).

99. *Id.* at 205.

court also found a slightly broader application of § 1329(a)'s provisions authorizing post-confirmation modifications, especially when read in light of § 1325, which permits surrender of collateral as a method of satisfying plan confirmation. Thus, the court concluded that there is no absolute bar to post-confirmation modification nor that confirmation of a Chapter 13 plan is necessarily *res judicata* as to all issues of a secured creditor's claim.¹⁰⁰

Given that analysis, the court reached a conclusion contrary to *Coffman* and *Cameron* and allowed the plan modification. The net effect of these decisions, however, is an unresolved conflict among Texas-based bankruptcy courts.

V. OTHER CREDITORS' RIGHTS CASES

A. FORECLOSURE

1. Waiver of Fair Market Value Defense by Guarantor

In *La Salle Bank National Association v. Sleutel*,¹⁰¹ the Fifth Circuit affirmed a post-foreclosure deficiency judgment against the guarantor of a mortgage debt, effectively validating the guarantor's contractual waiver of what is commonly known as the fair market value defense.

The statute in question is section 51.003 of the Texas Property Code, which governs the recovery of a deficiency judgment and provides a potential defensive offset against the deficiency to the extent of the actual fair market value of the property foreclosed.¹⁰² In *La Salle Bank*, the deficiency defendant was a third-party guarantor (as opposed to the maker of the note). As a threshold issue, the court determined that sec-

100. *Id.* at 207.

101. *LaSalle Bank Nat'l Ass'n v. Sleutel* 289 F.3d 837 (5th Cir. 2002).

102. Section 51.003 provides as follows:

§ 51.003 Deficiency Judgment

- (a) [i]f the price at which real property is sold at a foreclosure sale under Section 51.002 [non-judicial foreclosure] is less than the unpaid balance of the indebtedness secured by the real property, resulting in a deficiency, any action brought to recover the deficiency must be brought within two years of the foreclosure sale and is governed by this section.
- (b) [a]ny person against whom such a recovery is sought by motion may request that the court in which the action is pending determine the fair market value of the real property as of the date of the foreclosure sale . . . [list of nonexclusive factors in setting fair market value omitted].
- (c) [i]f the court determines that the fair market value is greater than the sale price of the real property at the foreclosure sale, the persons against whom recovery of the deficiency is sought are entitled to an offset against the deficiency in the amount by which the fair market value, less the amount of any claim, indebtedness, or obligation of any kind that is secured by a lien or encumbrance on the real property that was not extinguished by the foreclosure, exceeds the sale price . . .

TEX. PROP. CODE ANN. § 51.003 (Vernon Supp. 2002).

The statute provides additional detail regarding how the fair market value is determined, including specific factors to be considered, including marketing time, holding costs, costs of sale, present value cash flow discounts, etc. Critically, if no person requests a fair market value determination, the actual sales price is used to establish the deficiency. *Id.*

tion 51.003 applied to guarantors.¹⁰³

The documents executed by the guarantor included a broad form contractual waiver of setoffs and defenses.¹⁰⁴ The enforceability of such a waiver in the context of the deficiency statute was a matter of first impression.

The court used established principles of statutory construction used by Texas courts, including that known as *inclusio unius est exclusio alterius*. This effectively means that the inclusion of certain terms in one portion of a statute implies that, where those terms are missing elsewhere, the exclusion was intentional. In this case, the court noted that, although section 51.003 did not address waiver, there were express waiver preclusions in other portions of the Property Code. Thus, the court of appeals assumed that the legislature intended to omit any anti-waiver provisions in this particular statute.¹⁰⁵ Additionally, the court rejected the guarantor's public policy arguments, noting in part that none of the authority urged by the guarantor dealt with transactions between lenders and third party guarantors.¹⁰⁶

The Fifth Circuit specifically limited its holding to the waiver of offset rights by a guarantor, withholding any opinion regarding waiver by any other party (*i.e.*, the maker or primary obligor).¹⁰⁷ In addition to the statutory construction used by the court, this holding is also consistent with holdings in other jurisdictions,¹⁰⁸ and it is consistent with other Texas cases enforcing guaranty agreements as written.¹⁰⁹ One would assume,

103. *La Salle Bank*, 289 F.3d at 840 n.1 (citing *Long v. NCNB-Texas Nat'l Bank*, 882 S.W.2d 861, 865 (Tex. App.—Corpus Christi 1994, no writ)).

104. The entire guaranty was not included in the opinion; however, the broad form waiver language that the court found to be dispositive was as follows:

To the extent allowed by applicable law, Guarantor expressly waives and relinquishes all rights and remedies now or hereafter accorded by applicable law to guarantors or sureties, including, without limitation: . . . (III) any defense, right of offset or other claim which Guarantor may have against Borrower or which Borrower may have against Lender or the Holder of the Note; . . . and (VI) all rights of redemption, homestead, dower, and other rights or exemptions of every kind, whether under common law or by statute.

Id. at 840.

105. *Id.* at 840. According to the Fifth Circuit, this is consistent with the statutory construction used by Texas courts. *See, e.g.*, *Collins v. County of El Paso*, 954 S.W.2d 137, 147 (Tex. App.—El Paso 1997, pet. denied) (“Texas courts have adopted the principle of statutory interpretation expressed as *inclusio unius est exclusio alterius*, meaning that we are to assume that the purposeful inclusion of certain terms implies the purposeful exclusion of terms that are absent.”) (emphasis added).

106. *La Salle Bank*, 289 F.3d at 840-841.

107. *Id.* at 841 n.4.

108. *See e.g.*, *Founders Bank & Trust Co. v. Upsher*, 830 P.2d 1355, 1363-64 (Okla. 1992); *Valley Bank v. Larson*, 663 P.2d 653, 655 (Idaho 1983).

109. *See e.g.*, *El Paso Ref., Inc. v. Scurlock Permian Corp.*, 77 S.W.3d 374, 386 (Tex. App.—El Paso 2002, pet. denied) (guarantor lacked standing as an “obligor” under usury statute; guarantor also waived its right to assert obligor’s defenses); *Boyd v. Diversified Fin. Sys.*, 1 S.W.3d 888, 894 (Tex. App.—Dallas 1999, no pet.) (guarantor waived defense of impairment of or failure to perfect security interest); *SEI Bus. Sys., Inc. v. Bank One Texas, N.A.*, 803 S.W.2d 838, 840 (Tex. App.—Dallas 1991, no writ) (guarantor waived right to have secured lender dispose of collateral before enforcing guaranty); *see generally Ginsberg 1985 Real Estate P’ship v. Cadle Co.*, 39 F.3d 528, 534 (5th Cir. 1994); *Houston*

focusing on the statutory construction analysis, that the same rationale would apply to the primary obligor, especially if faced with more specific contractual waiver language. That issue, however, was not before the *La Salle* court.

This same rationale was followed in the more recent state court case of *Segal v. Emmes Capitol, L.L.C.*,¹¹⁰ which had not been released for publication as of the end of the Survey period. The Houston Court of Appeals [First District] found that a more specific waiver¹¹¹ in a guaranty agreement did not violate public policy, and specifically cited *La Salle Bank* in finding that the statutory scheme in Chapter 51 did not preclude a waiver of the anti-deficiency statute.¹¹²

Another issue raised by the guarantors in *Segal* was whether the sale of land situated in more than one county was void by a single sale in only one of the counties where the land was located. Although the court found that the statute authorizing such a sale was ambiguous, it invoked the concept of “statutory acceptance” of a prior published opinion authorizing such a sale.¹¹³

From a practitioner’s standpoint, the following bears repeating: the release signed by the guarantor was a broad form general release of all defenses and rights of offset.¹¹⁴ It was apparently this broad waiver of

Sash & Door Co. v. Heaner, 577 S.W.2d 217, 222 (Tex. 1979); *Rucker v. Bank One Texas, N.A.*, 36 S.W.3d 649 (Tex. App.—Waco 2000, pet. denied.) (guarantor’s summary judgment evidence regarding possible fraud in the inducement and breach of contract precluded summary judgment on guaranty).

110. *Segal v. Emmes Capitol, L.L.C.*, No. 01-01-00460-CV (Tex. App.—Houston [1st Dist.] Oct. 10, 2002, no pet.) (not designated for publication), 2002 WL 31266203.

111. The guaranty in this case contained the following waiver: “To the maximum extent permitted by applicable law, the Guarantor hereby waives all rights, remedies, claims and defenses based upon or related to Sections 51.003, 51.004 and 51.005 of the Texas Property Code, to the extent the same pertain or may pertain to any enforcement of this Guaranty.” *Id.* at *4.

112. *Id.* at *5 (citing *La Salle Bank*, 289 F.3d at 841-42).

113. *Id.* at *12. Section 51.002(a) states the following:

A sale of real property under a power of sale conferred by a deed of trust or other contract lien . . . must take place at the county courthouse in the county in which the land is located, or if the property is located in more than one county, the sale may be made at the courthouse in any county in which the property is located.

TEX. PROP. CODE ANN. § 51.002(a) (Vernon 1995). The court apparently found the statute was ambiguous because of the mixed use of the phrases “the lien” and “the property” within the statute. Fortunately, the court reached a conclusion that was consistent with the obvious intent of the statute, based upon the so-called doctrine of “legislative acceptance,” under which the court assumed the legislature intended to follow the holding of *Bateman v. Carter-Jones Drilling Co.*, 290 S.W.2d 366 (Tex. Civ. App.—Texarkana 1956, writ ref’d n.r.e.). In *Bateman*, the sale of five tracts of land in one single sale was valid even though four of the five tracts were located in another county. In any event, the court appears to have reached the correct conclusion, despite taking a somewhat tortured path to that end.

114. As mentioned *supra* note 103, the guaranty agreement provided:

To the extent allowed by applicable law, Guarantor expressly waives and relinquishes all rights and remedies now or hereafter accorded by applicable law to guarantors or sureties, including, without limitation: . . . (III) any defense, right of offset or other claim which Guarantor may have against Borrower or which Borrower may have against Lender or the Holder of the

offset rights that ultimately provided the waiver of the specific anti-deficiency fair market value defense. As discussed following the *Reece Supply* case below, it is of paramount importance for any counsel representing a guarantor to convey the potential impact of such a broad form waiver.

B. ABSOLUTE NATURE OF GUARANTY AGREEMENTS

*Farmers & Merchants State Bank of Crumb v. Reece Supply Co.*¹¹⁵ is also instructive on the absolute nature of guaranty agreements as enforced by Texas courts. In short, Farmers provided Reece with a written agreement to pay the amount due for certain goods shipped by Reece to a third party. Apparently, the third party contended that the goods shipped by Reece were non-conforming or otherwise defective. The third party refused to pay and instructed Farmers to make no payment either. Neither the third party nor Farmers paid, and this suit resulted.

The court found that the guaranty was an unconditional guaranty, and the obligations were absolute and not conditional.¹¹⁶

Because of the apparent non-compliance with the underlying contract, Farmers asserted a failure of consideration and a claim for offset, based upon the apparently non-conforming goods and the ultimate repossession of those goods by Reece. The court was not convinced, however, reiterating that "Farmers was the primary, absolute, unconditional obligor. Therefore, the asserted defenses of offset and failure of consideration because the transformers were unfit are not available to Farmers."¹¹⁷ Accordingly, the summary judgment granted by the trial court was affirmed.

The obvious lesson from *La Salle Bank* and *Reece Supply* is that guaranty agreements continue to be enforced by Texas courts in accordance with their literal terms. A recent trend in bank generated loan documents is to contain broad form waivers like the one found in *La Salle Bank* above. That language, together with the continuing unconditional nature of most guaranty forms, leaves a guarantor with little in the way of defenses. The negotiation of appropriate guaranty agreements should, for most practitioners, become an even more critical part of the loan negotiation process. Otherwise, unwitting guarantors may be left to virtually unlimited exposure with little in the way of a defense.

Note, . . . and (VI) all rights of redemption, homestead, dower, and other rights or exemption, of every kind, whether under common law or by statute.

La Salle Bank, 289 F.3d at 840.

115. *Farmers & Merch. State Bank of Krum v. Reece Supply Co.*, 79 S.W.3d 615 (Tex. App.—Eastland 2002, pet. denied).

116. *Reece* (the plaintiff) relied upon *Universal Metals and Mach., Inc. v. Bohart*, 539 S.W.2d 874 (Tex. 1976), which the *Reece* court found controlling. In part, *Bohart* provides: "A number of judicial precedents have held that guaranties, like the one in this case, are absolute rather than conditional, primary rather than secondary, and guarantees of payment rather than guarantees of collection." *Bohart*, 539 S.W.2d at 877.

117. *Reece*, 79 S.W.2d at 619 (citing *Houston Sash & Door Co., Inc. v. Heaner*, 577 S.W.2d 217 (Tex. 1979)).

C. GARNISHMENT

*In re Arturo Rodriguez*¹¹⁸ arose in a bankruptcy court, but it involves a determination of the ownership of funds that were subject to a writ of garnishment. A judgment creditor of the debtor successfully served a writ of garnishment on the debtor's bank, at which time the bank held \$8,364.51 in an account maintained by the debtors. The judgment creditor and the bank agreed to a judgment awarding the garnished funds to the creditor (with a small allowance for the bank's attorney's fees). Twenty-seven days after the state court signed the agreed judgment, the debtors filed bankruptcy. At this point, the automatic stay of § 362 took effect. The debtors thereafter sought turnover of the garnished funds. The bankruptcy court found that the judgment had been entered prematurely because of the debtors' pending motion to dissolve the writ.¹¹⁹

Crucially, the court found that the judgment of garnishment was not self-executing. Quoting an earlier bankruptcy court decision, the court noted, "In Texas, ownership of property subject to a judgment does not transfer until a writ of execution is issued and levied."¹²⁰ Accordingly, the court found that it was not the service of the writ or the entry of a judgment that transfers title. Rather, it is the service of a writ of execution that ultimately transfers title in garnished funds.¹²¹ Because execution could not issue before the expiration of thirty days following the signing of the judgment, the bankruptcy filing and the imposition of the stay took effect before execution could issue.

Analyzing the turnover action, the court found that as Chapter 13 debtors, they had standing to seek turnover under § 542 of the Bankruptcy Code, even though the property would ultimately be turned over to the trustee.¹²² With the garnishee effectively serving as a "receiver or officer of the court," and with no legal title to the funds under Texas law, the bank was required to turn over the property to the trustee. Additionally, given the debtor's claim of exemption in those funds, the debtors were also permitted to avoid the creditor's judicial lien under § 522(f) of the Bankruptcy Code.¹²³ The court discusses, but does not necessarily decide, whether and to what extent a refusal to relinquish garnished funds constitutes a violation of the stay. The court notes several cases, however, that have addressed this issue.¹²⁴ Given the facts of the case, it was not necessary for the court to address whether and to what extent the imposition of the garnishment lien would have constituted an avoidable preference

118. *In re Arturo Rodriguez*, 278 B.R. 749 (Bankr. N.D. Tex. 2002).

119. *Id.* at 752.

120. *Id.* at 753 (quoting *In re Benson*, 262 B.R. 371, 378 (Bankr. N.D. Tex. 2001), which in turn quoted *Baytown State Bank v. Nimmons*, 904 S.W.2d 902, 906-07 (Tex. App.—Houston [1st Dist.] 1995, writ denied)).

121. *In re Rodriguez*, 278 B.R. at 753.

122. *In re Rodriguez*, 278 B.R. at 754 n.2.

123. *Id.* at 755. See 11 U.S.C. § 522(f)(1) (2000) (holding that a debtor may avoid the fixing of a lien against property to the extent that the lien impairs an exemption to which the debtor would have been entitled).

124. *Id.* at 754 n.1.

under § 547. One would conclude that a preferential transfer action may have been avoidable to the trustee had the turnover and lien avoidance remedies not been available.¹²⁵

D. TEXAS TURNOVER STATUTE—THIRD PARTIES

In *Maiz v. Virani*,¹²⁶ the Fifth Circuit addressed the applicability of the Texas Turnover Statute¹²⁷ to property owned by a non-debtor entity. Specifically, the court found that the Texas Turnover Statute could not be used to strip a corporation of assets prior to a final adjudication actually piercing the corporate veil.¹²⁸

In short, the effect of the court's ruling was to reiterate that the turnover statute cannot be a substitute for an adjudication of a third party's property rights. Thus, the turnover statute applies to property that the debtor actually owns.¹²⁹

E. APPLICABILITY OF SIX YEAR STATUTE OF LIMITATIONS

In *Aguero v. Ramirez*,¹³⁰ a creditor sought judgment on a note more than four years, but less than six years, after it had matured. The note had been secured by real property; however, the creditor was seeking only a monetary judgment on the note.

The issue before the court was whether the four-year statute of limitations on real property lien foreclosure, or the six-year limitation found in

125. Section 547(b) of the Bankruptcy Code provides for the avoidance of certain transfers, both voluntary and involuntary, made within the 90 days prior to a bankruptcy filing. 11 U.S.C. § 547(b) (2000).

126. *Maiz v. Virani*, 311 F.3d 334 (5th Cir. 2002).

127. The turnover statute is codified at section 31.002 of the Texas Civil Practice and Remedies Code. In pertinent part, that section provides:

(a) A judgment creditor is entitled to aid from a court of appropriate jurisdiction through injunction or other means in order to reach property to obtain satisfaction on the judgment if the judgment debtor owns property, including present or future rights to property, that:

(1) cannot readily be attached or levied on by ordinary legal process; and
(2) is not exempt from attachment, execution, or seizure for the satisfaction of liabilities.

(b) The court may:

(1) order the judgment debtor to turn over nonexempt property that is in the debtor's possession or is subject to the debtor's control . . .

TEX. CIV. PRAC. & REM. CODE ANN. § 31.002 (Vernon Supp. 2002).

128. *Id.* at 346-47. The court relied, in part, on its earlier decision in *Resolution Trust Corp. v. Smith*, 53 F.3d 72 (5th Cir. 1995). In that case, the Fifth Circuit affirmed a turnover order regarding stock owned by the judgment debtor; however, it reversed a ruling invalidating a stock pledge to a third party. *See id.* at 80. *See also* *Beaumont Bank v. Buller*, 806 S.W.2d 223, 227 (Tex. 1991).

129. As the court stated,

As we see it, [the turnover statute's] requirement that turnover property be in the debtor's possession or control must be read *in para materia* with subsection (a) to mean that a court may order turnover of non-exempt property that is in the debtor's possession or subject to the debtor's control *only when the judgment debtor owns (has title to) the property in the first place.*

Maiz, 311 F.3d at 343 (emphasis added).

130. *Aguero v. Ramirez*, 70 S.W.3d 372 (Tex. App.—Corpus Christi 2002, pet. denied).

the Texas Business & Commerce Code, applied.¹³¹ The court acknowledged the applicability of the four-year limitation would have precluded foreclosure of the underlying deed of trust lien; however, the court found that “[w]here there is a debt secured by a note, which is, in turn, secured by a lien, the note and the lien constitute separate obligations.”¹³² Therefore, the four-year limitation would not apply to a suit directly on the note, which was governed by the six-year statute of limitations.¹³³

F. HOMESTEADS—JUDICIAL ESTOPPEL

In *National Loan Investors, L.P. v. Taylor*,¹³⁴ the state court found that debtor statements in earlier filed schedules in a Chapter 7 bankruptcy proceeding constituted judicial estoppel¹³⁵ in a later action for foreclosure on property claimed as the debtor’s homestead. Specifically, the debtors had purchased a modular home and borrowed money from the former United Bank of Waco. The bank made the advance, and it appeared that the loan proceeds were disbursed to the seller. The debtors alleged, however, that the lender and the other parties to the original transaction did not comply with the constitutional and statutory requirements regarding construction of residential improvements on a homestead. The court did not need to address that issue, however, because the debtors had earlier listed United Bank as a secured creditor in their Chapter 7 bankruptcy schedules. The court found that the concept of judicial estoppel applied to those schedules, which precluded the debtors from taking an inconsistent position in the state court litigation.¹³⁶

131. Compare TEX. CIV. PRAC. & REM. CODE ANN. § 16.035 (Vernon 2002) (four year limitation on foreclosure of a lien secured by real property), with TEX. BUS. & COM. CODE ANN. § 3.118(a) (Vernon 2002) (six year statute of limitation on enforcement of promissory note).

132. *Aguero*, 70 S.W.3d at 374 (citing *Wittington v. Wittington*, 853 S.W.2d 193, 195 (Tex. App.—Beaumont 1993, no writ)). The court also cited numerous cases, finding that one remedy could be invoked while the other may have been barred. See e.g., *Henson v. C.C. Slaughter Co.*, 206 S.W. 375, 377 (Tex. Civ. App.—El Paso 1918, no writ) (debt held time barred, but real property lien foreclosed); *Adams v. Harris*, 190 S.W. 245, 246 (Tex. Civ. App.—Texarkana 1916, no writ) (debt enforced, but action to foreclose liens held to be barred). *But cf.* *Univ. Sav. & Loan Ass’n v. Sec. Lumber Co.*, 423 S.W.2d 287, 292 (Tex. 1967) (lien given priority).

133. *Id.* The court found that section 3.118 applied to an action to enforce the obligation of a party to pay a note while section 16.035 applied to a suit “for the recovery of real property.” *Id.*

134. *Nat’l Loan Investors, L.P. v. Taylor*, 79 S.W.3d 633 (Tex. App.—Waco 2002, pet. denied).

135. “Judicial estoppel protects the integrity of judicial proceedings by precluding a party from asserting a position in a legal proceeding which is inconsistent with a position previously taken by the party.” *Id.* at 636. See also *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988); *In re Phillips*, 124 B.R. 712, 720 (Bankr. W.D. Tex. 1991).

136. *Taylor*, 79 S.W.3d at 636-37. The court found that the bankruptcy schedules met the requirements of judicial estoppel because it:

- [1.] was filed in a prior judicial proceeding;
- [2.] was inconsistent with their current position;
- [3.] was made under oath;

VI. FAIR DEBT COLLECTION PRACTICES ACT

The Fifth Circuit addressed two cases involving the Fair Debt Collection Practices Act (FDCPA).¹³⁷ Of most practical importance to the creditor's rights lawyer is *Peter v. G.C. Services, LP*.¹³⁸ *Peter* addressed the initial "Miranda" style warning required by the statute and the possible "overshadowing" effect of potentially contradictory statements in the same letter.¹³⁹ In the context of the "overshadowing" issue, practitioners have awaited a specific Fifth Circuit decision on the standard that is used to determine whether a communication is confusing. Some courts use a "least sophisticated consumer standard," while others employ the more lenient inquiry of whether a reasonable consumer would be confused. The Fifth Circuit still refused to adopt any one standard other than to refer to an earlier decision, which came close to (but still fell short of) adopting a least sophisticated consumer standard.¹⁴⁰

In *Peter*, the statement in question stated that "full collection activity will continue" until paid in full.¹⁴¹ The court found that when the letter was read as a whole, those words did not misrepresent, contradict, or overshadow the language explaining the debtor's statutory rights under the Act.¹⁴²

The court noted, with apparent approval, earlier cases in which a key factor was the specific time that payment or other activity was demanded in comparison to the thirty-day notice in the statute. The court observed

[4.] worked an advantage to the Taylors, because it lulled [the creditor] into not taking action within the bankruptcy, [which would have been a more appropriate time to seek a lien validity determination];

[5.] was not made inadvertently or because of mistake, fraud, or duress, and

[6.] was deliberate, clear, and unequivocal.

Id. at 637. Accordingly, the court found that the Taylors were judicially estopped to assert that the present owner of the note did not have a lien against their purported homestead property.

137. 15 U.S.C. § 1692-1962(o) (2000). This statute applies to the collection of debts incurred for personal, family, or household use.

138. *Peter v. G.C. Servs., L.P.*, 310 F.3d 344 (5th Cir. 2002).

139. Section 1692(g) governs initial communications. It requires that within five days of the initial communication to a consumer debtor, a debt collector provide written notice containing the amount of the debt and the name of the creditor to whom the debt is owed. It also requires a written statement explaining that unless the debtor "disputes the validity of the debt" within thirty days, the debt collector will assume the debt is valid; that if the debtor notifies the collector the debt is disputed, "the debt collector will obtain verification of the debt . . ."; and upon the debtor's request, the debt collector will provide the name and address of the original creditor. If the debtor requests verification, the debt collector must cease collection efforts until the requested information is mailed to the consumer. (The statute does not, however, require the debt collector to tell the debtor that it must cease collection under these circumstances). 15 U.S.C. § 1692g (2000); see 15 U.S.C. § 1692(a)-(b) (2000).

140. *Peter*, 310 F.3d at 349 n.1 (discussing the distinctions between the "least sophisticated consumer," "reasonable consumer," and "unsophisticated consumer standards") (citations omitted). The court noted its reluctance to adopt specifically any one of these standards. The court referred to its earlier opinion in *Taylor v. Perrin, Landry, Delaunay, & Dorand*, 103 F.3d 1232 (5th Cir. 1997).

141. *Peter*, 310 F.3d at 347.

142. *Id.* at 350.

that the common thread among cases finding a violation was demand for payment within a specific time less than thirty days, while cases involving either no specific deadline or a demand of greater than thirty days found no violation.¹⁴³ The court concluded that because the challenged language in the instant case “did not demand payment in a specific time period shorter than 30 days, we conclude that the letter did not violate § 1692(g).”¹⁴⁴ The Fifth Circuit did not specifically hold in *Peter* that a demand for payment within less than thirty days in the first notice violates the FDCPA, but some may argue that the implication is present.

The court did find a violation of the FDCPA because of the creditor’s envelope, which contained the name and address of the United States Department of Education, as well as a “penalty for private use” notice. This was misleading and violated the FDCPA. The Fifth Circuit rejected the collection agency’s argument that the language on the outside of the envelope was “benign,” finding that its “impersonation of the Department of Education is certainly not benign.”¹⁴⁵ Because of the misleading nature of the envelope, the court found a violation of the statute and remanded the case for entry of judgment for statutory damages, costs, and attorney’s fees.

The court also addressed the FDCPA in a slightly different context in *Hamilton v. United Healthcare of Louisiana, Inc.*¹⁴⁶ In that case, which arose in a district court in Louisiana, the Fifth Circuit held that a group health insurer’s contractual subrogation claim was in the nature of a “debt.” Thus, the subrogation enforcement activities were subject to the requirements of the FDCPA.¹⁴⁷

143. *Id.* at 349-50. Compare *Bartlett v. Heibl*, 128 F.3d 497, 501 (7th Cir. 1997) (“[T]he juxtaposition of the one-week and thirty-day crucial periods is to turn the required disclosure into legal gibberish.”), and *Swanson v. S. Or. Credit Servs., Inc.*, 869 F.2d 1222, 1226-27 (9th Cir. 1989) (demand for payment within 10 days confused least sophisticated consumer), with *Terran v. Kaplan*, 109 F.3d 1428, 1434 (9th Cir. 1997) (request for immediate phone call did not contradict printed notice), and *Vasquez v. Gertler & Gertler, Ltd.*, 987 F. Supp. 652, 657 (N.D. Ill. 1997) (request for payment without “further delay” did not contradict thirty day notice).

144. *Peter*, 310 F.3d at 350. According to the Fifth Circuit, the district court relied upon a Third Circuit opinion which approved use of the word “immediately” in what was phrased as a request rather than a demand. *Id.* at 350 n.4 (citing *Wilson v. Quadramed Corp.*, 225 F.3d 350 (3d Cir. 2000)).

145. *Id.* at 351-52. Some authority cited in the opinion indicates that “benign language” on an envelope does not violate the Act; however, the court did not reach the issue of whether the Act actually contains such an exemption that was unnecessary, given the court’s reaction to the impersonation of a government agency. The envelope was held to violate the Act’s prohibition of the use of any business, company, or organization name other than the true name of the debt collector. *Id.* at 352 (citing 11 U.S.C. § 1692(e)(14)).

146. *Hamilton v. United Healthcare of La., Inc.*, 310 F.3d 385 (5th Cir. 2002).

147. *Id.* at 388-89.