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January 2005

## Commercial Transactions

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### Recommended Citation

John Krahrmer, *Commercial Transactions*, 58 SMU L. REV. 657 (2005)  
<https://scholar.smu.edu/smulr/vol58/iss3/9>

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# COMMERCIAL TRANSACTIONS

*John Kraemer\**

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**B**ECAUSE 2004 was not a legislative year, there were no statutory changes in the Texas Uniform Commercial Code (“Code”) during the Survey period.<sup>1</sup> There were, however, some significant cases decided under Chapters 2 and 3 of the Code dealing with the sale of goods and negotiable instruments, respectively. In addition, several other cases were decided that clarify or affirm the interpretation of the Code in a variety of contexts. Because the Code is also a (more or less) uniform law, this Survey discusses some legislative action in other jurisdictions of

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1. The Texas enactment of the Uniform Commercial Code is contained in the first eleven chapters of the Texas Business and Commerce Code (“Code”). See TEX. BUS. & COM. CODE ANN. §§ 1.101-11.108 (Vernon 1994, 2002 & Supp. 2004). 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; Sales of Accounts and Chattel Paper

interest to Texas practitioners. This article follows the usual format of discussing these decisions and developments in the same order as that of the Code itself.

## I. GENERAL PROVISIONS

Last year's Survey noted that, as of January 2004, only Texas, Virginia, and the Virgin Islands had adopted revised Article 1 of the Code.<sup>2</sup> In both Texas and Virginia, the legislatures rejected the liberalized choice of law rules contained in the proposed Official Text of revised section 1-301 and retained the "reasonable relationship" test provided in the former Official Text of section 1-105.<sup>3</sup> Only the Virgin Islands adopted the revised choice of law rules.<sup>4</sup>

As of January 2005, five more states enacted revised Article 1 and all of them have also rejected the revised choice of law rules in favor of retaining the rules contained in the former section 1-105.<sup>5</sup> With this evident resistance to the revised choice of law rules, it would not be surprising to find the National Conference of Commissioners on Uniform State Laws revisiting these rules with an eye toward retaining the former rules in an attempt to speed up the adoption process.<sup>6</sup>

## II. SALE OF GOODS

### A. SCOPE OF CHAPTER 2

Section 2.102 of the Code provides that Chapter 2 applies to "transactions in goods."<sup>7</sup> "Goods" are separately defined in section 2.105 to include specially manufactured goods and growing crops.<sup>8</sup> In *Propulsion*

2. John Kraemer, *Commercial Transactions*, 57 SMU L. REV. 699, 700 (2004) [hereinafter *Commercial Transactions—2004*].

3. The differences between the choice of law rules in the former section 1-105 and the revised section 1-301 are described in *Commercial Transactions—2004*, at 700-01.

4. See *Commercial Transactions—2004*, *supra* note 2, at 700.

5. See ALA. CODE § 7-1-301 (Supp. 2005); DEL. CODE ANN. tit. 6, § 1-301 (Supp. 2005); HAW. REV. STAT. § 490:1-301 (Supp. 2005); IDAHO CODE § 28-1-301 (Michie Supp. 2005); and MINN. STAT. ANN. § 336.1-301 (West Supp. 2005). In all of the enacting jurisdictions, the choice of law rules have been renumbered to conform to their designation as section 1-301 in the Official Text, but the content is derived from the former section 1-105.

6. As compared to the adoption of the 1999 revision of Article 9 of the Code by all fifty states within a three year period, the adoption of the 2002 revision of Article 1 has been moving very slowly. A summary of the adoptions of Article 9 may be found in UNIFORM COMMERCIAL CODE REPORTING SERVICE: STATE VARIATIONS, *Table of Enactments of 1999 Amendments (Revised Article 9)* xxv.

7. TEX. BUS. & COM. CODE ANN. § 2.102 (Vernon 1994). This section excludes any transaction that is in the form of a sale of goods, but that is intended to operate as a secured transaction. Secured transactions are governed by Chapter 9 of the Code. See TEX. BUS. & COM. CODE ANN. § 9.109 (Vernon 2002). Section 2.102 also provides that nothing in Chapter 2 impairs or repeals "any statute regulating sales to consumers, farmers or other specified classes of buyers."

8. TEX. BUS. & COM. CODE ANN. § 2.105(a) (Vernon 1994) provides, "'Goods' means all things (including specially manufactured goods) which are moveable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Chapter 8) and things in action. § 2.105(a). 'Goods' also includes the unborn young of animals and growing crops and other identified things attached

*Technologies, Inc. v. Attwood Corp.*,<sup>9</sup> a contract called for a seller to produce boat propeller castings for a buyer. The seller was to manufacture the castings according to specifications provided by the buyer. A dispute eventually developed about whether the seller had misappropriated the buyer's trade secrets during the course of manufacturing the castings. In the buyer's action against the seller, a major issue was whether the contract was for the sale of goods or for the provisions of services. The Fifth Circuit Court of Appeals held that this was an issue of contract interpretation to be decided as a matter of law and not a question of fact for the jury.<sup>10</sup> On this basis, the court reviewed several cases addressing hybrid contracts containing both sale and service elements. Noting that manufacturing always involves a service element, and that Chapter 2 includes "specially manufactured goods" within its scope, the court held that the predominant purpose of the contract was the sale of goods.<sup>11</sup> The court distinguished several cases involving hybrid contracts where the service element was found to predominate on the ground that those cases involved installation or construction to be performed by the seller after delivery of the goods.<sup>12</sup> In the case at bar, the seller was not required to perform any services after the castings were delivered. The buyer argued that the castings, as delivered, were in rough, unfinished form and required finishing by the buyer before use. The court pointed out that additional work provided by the buyer was irrelevant in determining whether this was a sales or a services contract.<sup>13</sup>

Because the contract was within the scope of Chapter 2, the court next turned to the question of enforceability under the Chapter 2 Statute of Frauds.<sup>14</sup> Although a writing did exist describing the transaction between the parties, it did not contain a quantity term and merely stated that the seller was "to establish minimum order requirements . . . on an annual basis" that were suitable to both the buyer and the seller. The court did not regard this as a sufficient statement of a quantity term to satisfy the

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to realty as described in the section on goods to be severed from realty (section 2.107)."  
*Id.*

9. 369 F.3d 896 (5th Cir. 2004).

10. *Id.* at 906.

11. *Id.* at 901.

12. *Id.* at 902. The court identified the following cases as being in this category: *Ranger Constr. Co. v. Dixie Floor Co., Inc.*, 433 F. Supp. 442, 445 (D.C.S.C. 1977) (contract to install flooring); *Cacace v. Morcaldi*, 435 A.2d 1035, 1038 (Conn. Super. Ct. 1981) (contract to complete a chimney); *Gulash v. Stylarama, Inc.*, 364 A.2d 1221, 1223 (Conn. C.P. 1975); *Peltz Constr. Co. v. Dunham*, 436 N.E.2d 892, 894 (Ind. Ct. App. 1982) (contract to install drainage system); *Ben Constr. Corp. v. Ventre*, 23 A.D.2d 44 (N.Y. 1965) (contracts to install or construct swimming pool); *G-W-L v. Robichaux*, 643 S.W.2d 392, 394 (Tex. 1982) (contract to build house); *Montgomery Ward & Co., Inc. v. Dalton*, 665 S.W.2d 507, 511 (Tex. App.—El Paso 1983, no writ) (contract to shingle roof). *Propulsion Techs., Inc.*, 369 F.3d at 902.

13. *Id.* at 905. On this point, the court noted that, "When a materialman delivers materials to be incorporated or constructed by a buyer or general contractor, the things are 'goods' sold; services to be provided later by others are not even considered in that determination." *Propulsion Techs., Inc.*, 369 F.3d at 903.

14. *Id.* at 904. TEX. BUS. & COM. CODE ANN. § 2.201 (Vernon 1994) provides that contracts for the sale of goods for a price greater than \$500.00 must be in writing.

Statute of Frauds and the contract was, therefore, unenforceable. Judgment in favor of the buyer was reversed and a judgment was rendered in favor of the seller.<sup>15</sup>

*McManus-Wyatt Produce Co. v. Texas Department of Agriculture Produce Recovery Fund Board*<sup>16</sup> also involved the scope of Chapter 2, this time with regard to the sale of growing crops, but in a unique context. The contract called for the seller to grow carrots for sale to the buyer at a fixed price per ton. The seller was responsible for growing the carrots and the buyer was to provide labor and equipment for harvesting. After some carrots were harvested, the buyer refused to harvest the remainder of the crop on the ground that the carrots did not meet the size and grade specifications of the contract. The seller contended that the contract required the buyer to complete harvesting. The seller filed a complaint with the Texas Department of Agriculture Produce Recovery Fund Board ("Board").<sup>17</sup> The buyer filed suit in the State District Court of Hidalgo County and requested a jury trial. The Board eventually awarded damages in favor of the seller. The buyer then filed suit in the Travis County district court challenging the authority of the Board to make such an award on the ground that the buyer had been deprived of the right to a jury trial. The Travis County District Court affirmed the decision of the Board and the buyer appealed.<sup>18</sup>

Upon reviewing the administrative procedure applicable to proceedings before the Board, the Austin Court of Appeals held that the buyer had indeed been deprived of the right to a jury trial. The court ruled that the order of the Board as applied to the buyer was unconstitutional. The judgment of the district court was reversed and the order of the Board was vacated.<sup>19</sup>

## B. OPEN PRICE TERMS

Section 2.305 of the Code permits the parties to enter into a contract for the sale of goods even though the price is left open.<sup>20</sup> In such cases, the price is a reasonable price at the time of delivery unless the parties have agreed on a method by which the price is to be fixed. One such method is for the parties to agree that the seller (or buyer) is to fix a price. If this method is chosen, the price fixed must be one that is fixed

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15. *Propulsion Techs., Inc.*, 369 F.3d at 906.

16. 140 S.W.3d 826 (Tex. App.—Austin 2004, pet. filed).

17. The Texas Department of Agriculture Produce Recovery Fund ("Fund") is a trust fund established to reimburse persons for losses caused by the action of merchants or retailers licensed under the Texas Agricultural Code. See TEX. AGRIC. CODE ANN. §§ 103.001-.019 (Vernon 2004). The Board is charged with the duty to hear and evaluate claims made against licensees. See TEX. AGRIC. CODE ANN. §§ 103.005-.008 (Vernon 2004).

18. *McManus-Wyatt Produce Co.*, 140 S.W.3d at 827-29.

19. The court was careful to point out that its decision was limited to the constitutionality of the Board's order as applied to the buyer and that it was not making a decision regarding the general constitutionality of the Fund or the authority of the Board. *Id.* at 833.

20. See TEX. BUS. & COM. CODE ANN. § 2.305(a) (Vernon 1994).

“in good faith.”<sup>21</sup> Good faith is defined as “honesty in fact and the observance of reasonable commercial standards of fair dealing,” a combination of both subjective and objective tests of good faith conduct.<sup>22</sup>

In *Shell Oil Co. v. HRN, Inc.*,<sup>23</sup> several hundred gasoline station operators signed contracts to lease gas stations from Shell and to buy gasoline at prices fixed by Shell. The dealers alleged that the prices fixed by Shell put them at a competitive disadvantage and that Shell was attempting to drive the dealers out of business so their stations could be converted to company-owned stations that would be more profitable to Shell. Because the price fixed by Shell was within the range of prices charged by other refiners, the dealers did not contest the commercial reasonableness of the price. They argued instead that Shell did not act in subjective good faith because it had the motive to drive them out of business. The court of appeals agreed with the dealers and held that merely because a price was commercially reasonable, a seller might still violate the standard of good faith conduct if the price was set with the motivation to harm a buyer.<sup>24</sup> The Texas Supreme Court rejected this argument, reasoning that the purpose of the good faith standard in section 2.305(b) is to prevent discriminatory pricing between similarly situated buyers, a situation that would occur if, for example, Shell charged one price to some of the franchised dealers, but charged a different price to other franchised dealers.<sup>25</sup> Because all of the franchised dealers were charged the same commercially reasonable price, there was no price discrimination and, therefore, no violation of the standards for either subjective or objective good faith.<sup>26</sup> The supreme court reversed the court of appeals and rendered a take nothing judgment against the plaintiffs.<sup>27</sup>

### C. WARRANTIES

Perhaps the most significant decision under Chapter 2 reported during the Survey period was *Compaq Computer Corp. v. Lapray*,<sup>28</sup> a class action brought by purchasers of Compaq computers who alleged that the computers contained defective floppy disk controllers. While much of the opinion discusses the interpretation of Rules 42(b)(2) and (b)(3) regard-

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21. TEX. BUS. & COM. CODE ANN. § 2.305(b) (Vernon 1994) provides, “A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.”

22. See TEX. BUS. & COM. CODE ANN. § 1.201(b)(20) (Vernon Supp. 2004).

23. 144 S.W.3d 429 (Tex. 2004).

24. See *HRN, Inc. v. Shell Oil Co.*, 102 S.W.3d 205 (Tex. App.—Houston [14th Dist.] 2003), *rev'd*, 144 S.W.3d 429 (Tex. 2004) (discussed in *Commercial Transactions—2004*, *supra* note 2, at 705).

25. *Shell Oil Co.*, 144 S.W.3d at 437.

26. On this point, the Texas Supreme Court rejected the market definition used by the court of appeals which compared prices charged to the franchised dealers with prices charged to jobbers, non-franchised dealers, and company-owned stores operated by other refiners. As stated by the Texas Supreme Court, “Evidence that different prices are available to different classes of trade is not evidence of bad faith under [s]ection 2.305.” *Shell Oil Co.*, 144 S.W.3d at 438.

27. *Id.*

28. 135 S.W.3d 657 (Tex. 2004).

ing class certification,<sup>29</sup> the interplay between class certification and warranty law is of particular note. The trial court certified a nationwide class of some 1.8 million purchasers of thirty-seven different models of Compaq Presario computers; this certification was upheld by the court of appeals.<sup>30</sup> The Texas Supreme Court reversed, holding that variations in the warranty law of the several states made nationwide class certification improper.<sup>31</sup> It is this part of the opinion that is of special interest under Chapter 2.

In this portion of the opinion, the supreme court stated, "While this case involves a Uniform Commercial Code breach of express warranty claim, it seems that "the Uniform Commercial Code is not uniform . . . ." <sup>32</sup> The supreme court then described four areas of difference among the states in their interpretation and application of the Code.<sup>33</sup>

*Notice of Breach.* Under section 2-607(3)(a) in the Official Text of the Code, an aggrieved buyer is required to notify the seller of a breach or be barred from any remedy.<sup>34</sup> The supreme court pointed out that there is a split among the states as to whether notice by the buyer is sufficient if the buyer notifies only the immediate seller or whether the buyer must also notify remote sellers, such as the manufacturer who placed the goods in the chain of distribution.<sup>35</sup> The supreme court also noted that this split sometimes exists within a single state, citing the Texas case of *Wilcox v. Hillcrest Memorial Park of Dallas*<sup>36</sup> as an example.<sup>37</sup>

*Reliance.* Section 2-313(1)(a) in the Official Text provides that a seller creates an express warranty when an affirmation of fact or promise, a description of the goods, or a sample or model becomes "part of the basis of the bargain."<sup>38</sup> The supreme court observed that the states tend to fall into three categories in their interpretation of the meaning of "basis of the bargain." Some states hold that this phrase requires reliance by the buyer, others hold that no reliance is required, and still others have not addressed the question.<sup>39</sup>

*Remedies for Breach.* The supreme court also noted variation among the states regarding whether damages for breach of warranty are recover-

29. See TEX. R. CIV. P. 42(b)(2), (b)(3).

30. *Compaq*, 135 S.W.3d at 661-62 (describing the history of the case).

31. *Id.* at 661.

32. *Id.* at 673 (quoting *Walsh v. Ford Motor Co.*, 807 F.3d 1000, 1016 (D.C. Cir. 1986)).

33. *Id.* at 674-81. In its discussion, the supreme court cited numerous cases from several jurisdictions to illustrate the variation among the states. With a few exceptions, these citations have not been repeated in this article.

34. Section 2-607(3)(a) in the Official Text was enacted in Texas as TEX. BUS. & COM. CODE ANN. § 2.607(c)(1) (Vernon 1994).

35. *Compaq*, 135 S.W.3d at 674.

36. 701 S.W.2d 842, 843 (Tex. 1986). Further discussion of *Wilcox* and notice of breach may be found in *Commercial Transactions—2004*, *supra* note 3, at 709.

37. *Compaq*, 135 S.W.3d at 674 (citing *Wilcox*, 701 S.W.2d at 845).

38. Section 2-313(1)(a) in the Official Text was enacted in Texas as TEX. BUS. & COM. CODE ANN. § 2.313(a)(1) (Vernon 1994).

39. *Compaq*, 135 S.W.3d at 675-77.

able for “unmanifested defects.”<sup>40</sup> The supreme court found only a few cases addressing this issue in the context of express warranties, but even those few cases reached different results. Furthermore, the court found that the law of most states (including Texas) was unclear as to whether damages were recoverable for products that had not actually malfunctioned.<sup>41</sup>

*Most Significant Relationship.* The last area noted by the supreme court as being problematic for purposes of nationwide class certification in an express warranty case is the difference between the “appropriate relationship” test and the “most significant relationship” test. Both tests deal with the choice of appropriate law to govern a dispute when there is no choice of law clause in the agreement of the parties. The tests differ, however, in that the Code only requires that a transaction have an “appropriate relation” to a given state to apply the law of that state (including the provisions of the Code), while the general choice of law rule as contained in the Restatement of Conflicts is directed toward choosing the law of the jurisdiction that has the “most significant relationship” with a transaction.<sup>42</sup> The trial court had determined that Texas had the “most significant relationship” to the computer sales because Compaq was incorporated and headquartered in Texas. The supreme court ruled that this was an abuse of discretion because the class members were domiciled in all fifty states and the District of Columbia. Under the law of these jurisdictions, the most significant relationship might well be the jurisdiction where the purchaser was located rather than the jurisdiction where the manufacturer was located.<sup>43</sup>

The net result of the Texas Supreme Court’s analysis was that nationwide class certification for breach of an express warranty claim was improper under Rules 42(b)(2) and (b)(3) because questions of law common to the members of the purported class did not predominate over questions affecting individual members of the class. The class certification

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40. *Id.* at 677-80.

41. *Id.* at 679.

42. Compare TEX. BUS. & COM. CODE ANN. § 1.301 (Vernon Supp. 2004), with RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971). The supreme court did not discuss the difference between the Official Text version of section 1-301(a) and the non-uniform version of that section derived from section 1-105 in the former Official Text that has been adopted in all but one of the jurisdictions that have enacted revised Article 1 of the Code. See text accompanying note 1 (discussing the enactment of revised Article 1). An interesting sidelight on the choice of law issue is that of the apparently missing choice of law clause, which is almost a staple in sales contracts for consumer goods. No mention of such a clause appears in the opinion and no such clause seems to have been raised by either party. Given the opinion of the supreme court, a manufacturer of consumer products might have second thoughts about including a choice of law clause in its sales contracts because choosing the law of a specific state to govern disputes would obviate the problem of varying state laws that formed the basis for the denial of class certification in this case.

43. *Compaq*, 135 S.W.3d at 681. Obviously, each of these jurisdictions would have an “appropriate relation” under the Code for purchases made by buyers located within the jurisdiction.



order was reversed and the case remanded for further proceedings.<sup>44</sup>

For slightly more than thirty years, warranty law in Texas has been intertwined with the Texas Deceptive Trade Practices Act ("DTPA").<sup>45</sup> This linkage has occurred because, since its inception, the DTPA has allowed warranty claims as one of the causes of action for which relief may be sought.<sup>46</sup> The ability to assert warranty claims under the DTPA has led to a complex interplay between the warranty provisions in the Code. In *PPG Industries, Inc. v. JMB/Houston Centers Partners L.P.*, the Texas Supreme Court addressed for the first time whether DTPA claims can be assigned.<sup>47</sup> In 1989, the plaintiff purchased an office building that had been built in 1978. As part of the sale, the building owner made a general assignment of all warranties covering the building. Two years later, extensive problems developed with the insulating window units that covered the exterior of the building. The purchaser sued the window manufacturer for breach of warranty and for DTPA violations, obtaining a judgment for approximately seventeen million dollars. The court of appeals affirmed the judgment.<sup>48</sup>

Noting a split among the courts of appeals on the issue of assignability of DTPA claims, the Texas Supreme Court held that DTPA claims are generally not assignable.<sup>49</sup> In its holding, the court specifically added that it was not deciding "whether DTPA claims survive to a consumer's heirs, a related but sometimes distinct inquiry."<sup>50</sup> The court further stated:

[W]e also reserve for another day the assignment of claims that were created within and could not be brought without the DTPA, such as false going-out-of-business sales or price-gouging during a disaster. Finally, our holding does not prohibit equitable assignments, such as a contingent-fee interest assigned to a consumer's attorney.<sup>51</sup>

In contrast to the DTPA claims, the supreme court held that the war-

44. *Id.* In *Vanderbilt Mortg. & Finan., Inc. v. Posey*, 146 S.W.3d 302 (Tex. App.—Texarkana 2004, no pet.), decided shortly after *Compaq* was reported, the Texarkana Court of Appeals stated, "While in the past it was permissible to postpone choice of law analysis until after [class] certification, the Texas Supreme Court now requires performance of choice of law analysis before a class is certified." *Vanderbilt*, 146 S.W.3d at 312 (citing *Compaq*, 135 S.W.3d at 672).

45. The Texas Deceptive Trade Practices Act [hereinafter DTPA] was enacted in the 1973 Legislative Session and became effective on May 21, 1973. See Deceptive Trade Practices-Consumer Protection Act, 63rd Leg., R.S., ch. 143, § 1, 1973, Tex. Gen. Laws 322 (codified at TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon 2002 & Supp. 2004-05)).

46. TEX. BUS. & COM. CODE ANN. § 17.50(a) (Vernon 2002) (providing that a consumer may maintain an action for (1) false, misleading, or deceptive acts or practices enumerated in the DTPA itself, (2) *breach of an express or implied warranty*, (3) an unconscionable action or course of action, and (4) use or employment of an act or practice that violates Article 21.21 of the Texas Insurance Code).

47. 146 S.W.3d 79 (Tex. 2004).

48. *Id.* at 82-83.

49. *Id.* at 92.

50. *Id.* at 91.

51. *Id.* at 91-92 (internal footnotes omitted).

ranty claims were assignable.<sup>52</sup> One of the warranty claims was based on a five-year warranty contained in the contract under which the window units had been sold when the building was constructed. The supreme court ruled that this claim was barred by limitations because suit was brought long after the five-year period expired.<sup>53</sup> A second warranty claim, however, was based on a statement in an advertisement by the manufacturer that the window units had a twenty-year warranty. As to this warranty, the supreme court held that the assignee was entitled to an opportunity to prove that the twenty-year warranty was part of the bargain for the purchase and installation of the window units.<sup>54</sup>

The judgment of the lower court was reversed on the issue of the assignability of DTPA claims and on the claim based on the five-year warranty. The claim based on the twenty-year warranty was remanded for trial on the fact issue of whether that warranty was part of the basis of the bargain for purchase of the windows.<sup>55</sup>

As to warranty law itself, disclaiming warranties has become a complex matter in Texas law and requires consideration of the source of the warranty (Code or common law), the type of property being sold (goods, real estate, or services), and the particular warranties being disclaimed. One common thread, however, tends to run through this entire matter—a disclaimer must either be conspicuous or known to the buyer.<sup>56</sup>

In *Bynum v. Prudential Residential Service, L.P.*,<sup>57</sup> the Houston Court of Appeals held that an inconspicuous “as is” clause was nonetheless effective because the buyers were sophisticated consumers with experience in the purchase of real estate and they read the “as is” clause at the time the agreement was signed.<sup>58</sup> The court held that the “as is” clause was effective to disclaim warranties, and it also defeated the producing cause element of the buyers’ claims for DTPA violations and negligent misrepresentation. In the face of the “as is” clause, the buyers could not prove that they relied on the representations of the seller or the real estate broker with whom the buyers dealt.<sup>59</sup>

52. *Id.* at 92 (citing TEX. BUS. & COM. CODE ANN. § 2.210(b) (Vernon 1994 & Supp. 2004)).

53. *Id.* at 98. In reaching this conclusion, the supreme court rejected an argument that the limitations period had been tolled by representations made by the manufacturer that problems with the window units had been remedied.

54. *Id.* at 99-100.

55. *Id.* at 100.

56. There are two seminal cases on this issue. In *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993), the Texas Supreme Court announced that the Code definition of “conspicuous” contained in TEX. BUS. & COM. CODE ANN. § 1.201(10) (Vernon 1994) (now TEX. BUS. & COM. CODE ANN. § 1.201(b)(10) (Vernon Supp. 2004)) would apply to contracts of all types, whether or not they were otherwise governed by the Code. In *Cate v. Dover Corp.*, 790 S.W.2d 559, 561-62 (Tex. 1990), the Texas Supreme Court held that a disclaimer that was known to the buyer would be effective to disclaim warranties even if the disclaimer was inconspicuous.

57. 129 S.W.3d 781 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).

58. *Id.* at 789-90.

59. *Id.* at 796.

## D. GOOD FAITH PURCHASE

A buyer of goods may qualify as both a good faith purchaser under Chapter 2 of the Code and as a buyer in the ordinary course of business under Chapter 9.<sup>60</sup> In both instances, the rights of the buyer may be greater than those of the seller vis-a-vis third parties who assert claims to the goods.<sup>61</sup> While the basic rules are simple, application of these rules becomes difficult if the goods are motor vehicles covered by a certificate of title. The difficulty arises because the Texas Certificate of Title Act provides that the sale of a vehicle is void if the certificate of title is not transferred to the buyer at the time of sale.<sup>62</sup> The Act also provides, however, that the Code preempts the Act when they conflict.<sup>63</sup> On several occasions, Dallas Court of Appeals reasoned that if a sale is void unless the certificate of title is transferred, there is no conflict between the Code and the Act because no sale has occurred and the Code does not apply.<sup>64</sup> Thus, because the Act controls, there is no need to refer to the provisions of the Code.

In *First National Bank of El Campo v. Buss*,<sup>65</sup> a floor-plan financier had a perfected security interest in a dealer's inventory of used cars. The financier retained possession of the certificates of title for the cars. Several buyers purchased cars from the dealer and completed applications for title certificates. The dealer was to complete the application process and have new certificates of title issued to the buyers. Before this process was completed, the dealer defaulted on his loan and the financier demanded that the buyers return the vehicles. The buyers sought a declaratory judgment that their purchases gave them ownership of the vehicles. The financier counterclaimed, asserting that its security interest was the superior claim. The trial court ruled in favor of the buyers.<sup>66</sup>

The Corpus Christi Court of Appeals acknowledged the line of "no-conflict-if-the-sale-is-void" cases, but reasoned that the legislative policy underlying the preemption provision in the Certificate of Title Act was better served by applying the Code provisions instead of the Act. In the

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60. See TEX. BUS. & COM. CODE ANN. § 9.320 (Vernon 2002); TEX. BUS. & COM. CODE ANN. § 2.403 (Vernon 1994).

61. For example, a seller may have acquired goods under circumstances that gave the seller only a voidable title to the goods. In this case, a good faith purchaser acquires title to the goods superior to that of the seller and would be protected from claims by the third party who provided the seller with the goods. See TEX. BUS. & COM. CODE ANN. § 2.403(a) (Vernon 1994). Alternatively, a seller may have granted a security interest in the goods to a lender. In this case, a buyer in the ordinary course of business takes the goods free of the security interest, even if the security interest is perfected. See TEX. BUS. & COM. CODE ANN. § 9.320 (Vernon 2002).

62. See TEX. TRANSP. CODE ANN. § 501.073 (Vernon 1999).

63. See TEX. TRANSP. CODE ANN. § 501.005 (Vernon 1999).

64. See, e.g., *Gallas v. Car Biz, Inc.*, 914 S.W.2d 592, 594-95 (Tex. App.—Dallas 1995, writ denied); *Morey v. Page*, 802 S.W.2d 779, 783-84 (Tex. App.—Dallas 1990, no writ); *Pfluger v. Colquitt*, 620 S.W.2d 739 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.). The Fifth Circuit has reached a similar result. See *Bank One Texas, N.A. v. Arcadia Fin. Ltd.*, 219 F.3d 494, 498 (5th Cir. 2000).

65. 143 S.W.3d 915 (Tex. App.—Corpus Christi 2004, pet. filed).

66. *Id.* at 916-18.

court's opinion, this promoted the goal of uniformity mandated by the Code, complied with the legislative history of the Act, and was consistent with earlier cases decided by the court. Judgment in favor of the buyers was affirmed.<sup>67</sup> A petition for review has been filed, giving the Texas Supreme Court an opportunity to clarify the contradictory approaches currently existing in Texas regarding the relationship between the Code and the Certificate of Title Act.

*Park Cities L.P. v. Transpo Funding Corp.*<sup>68</sup> also involved the sale of vehicles without the transfer of certificates of title. The case differed, however, in that the parties, both of whom were car dealers, dealt with each other in the past. Under their practice, the seller delivered cars to the buyer for inspection. After determining which cars the buyer wanted, the buyer wrote checks in the name of the seller and retained the checks until the seller delivered the certificates of title. On this particular occasion, the intended buyer never voluntarily delivered the checks to the seller; instead, the seller apparently stole the checks and never delivered the titles. A few weeks later, the seller used the same cars as collateral for a loan and delivered the titles to the financier as part of the transaction. When the seller's dealings came to light, the alleged buyer and the financier each sought a declaratory judgment for ownership of the vehicles. There was no evidence in the record that the seller paid for the vehicles, possessed the titles, or had authority to sell the cars at the time he delivered them to the purported buyer for inspection. Furthermore, the checks were stolen by the seller; this made it difficult to find that a "sale" had taken place. Under these circumstances, the Dallas Court of Appeals affirmed the decision of the trial court in favor of the financier who actually obtained the titles as part of its loan transaction with the seller.<sup>69</sup>

#### E. REMEDIES

Arbitration has become a common method of dispute resolution in cases involving the sale of goods and services.<sup>70</sup> While public policy favors arbitration and challenges to the enforceability of arbitration clauses often fail, a seller (who is usually the drafter of sales contracts) must still avoid overbroad clauses. In *In re Palm Harbor Homes, Inc.*,<sup>71</sup> the Houston Court of Appeals held an arbitration clause to be unconscionable

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67. *Id.* at 924.

68. 131 S.W.3d 654 (Tex. App.—Dallas 2004, pet. denied).

69. *Id.* at 660. In addition to discussing the problematic nature of the "sale," the court also noted that the evidence did not support the buyer's arguments that the financier entrusted the cars to the seller or gave the seller authority to sell them because the seller did not approach the financier until *after* the seller delivered the cars to the buyer. *Id.* at 660-61.

70. *See, e.g., In re FirstMerit Bank*, 52 S.W.3d 749 (Tex. 2001) (holding an arbitration clause enforceable against buyers of mobile home); *In re American Homestar of Lancaster, Inc.*, 50 S.W.3d 480 (Tex. 2001) (holding an arbitration clause enforceable against purchasers of manufactured home); *In re Rangel*, 45 S.W.3d 783 (Tex. App.—Waco 2001, no pet.) (holding an arbitration was proper in a contract for extermination services).

71. 129 S.W.3d 636 (Tex. App.—Houston [1st Dist.] 2003, orig. proceeding [mand. pending]).

where the clause required the purchasers of a mobile home to submit any claims to binding arbitration, but contained a provision allowing the manufacturer, any lender, or any mortgagee to “opt-out” of arbitration. The court reasoned that the contract lacked mutuality of remedy because of the unlimited opt-out provision. Additionally, the court found disparity in bargaining power between the seller and the purchasers; the purchasers “were not afforded a meaningful opportunity to negotiate a fair and mutually binding opt-out provision.”<sup>72</sup> Because the clause and the circumstances surrounding the making of the contract involved both procedural and substantive unconscionability, the court upheld the decision of the trial court that the clause was unenforceable.<sup>73</sup>

Although the Code permits specific performance in limited circumstances for breach of a sales contract, damages are the more common remedy.<sup>74</sup> In *Ford Motor Co. v. Cooper*,<sup>75</sup> a car buyer sought to recover damages for breach of warranty and for alleged DTPA misrepresentations. The Texarkana Court of Appeals held that an owner can testify as to the market value of the goods, but found that, in this case, the owner’s testimony pertained to the intrinsic value of the goods to him and not the market value. Because there was no evidence of market value, judgment in favor of the buyer was reversed. However, because there was evidence that the seller breached the agreement and engaged in deceptive practices, the court granted a new trial to give the plaintiff an opportunity to offer proper proof of damages.<sup>76</sup>

The basic limitation period for breach of a contract for the sale of goods is four years from the time the cause of action accrues.<sup>77</sup> A breach of warranty occurs upon tender of delivery of the goods unless the warranty explicitly extends to future performance.<sup>78</sup> By agreement, the parties can shorten a limitations period to a period of not less than one year.<sup>79</sup>

In *Conquest Drilling Fluids, Inc. v. Tri-Flo International, Inc.*,<sup>80</sup> the Beaumont Court of Appeals addressed the question of when tender occurred for purposes of determining when the four year limitations period

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72. *Id.* at 646.

73. *Id.* at 645-46.

74. TEX. BUS. & COM. CODE ANN. § 2.716 (Vernon 1994 & Supp. 2004) allows a buyer to seek specific performance where the goods “are unique or in other proper circumstances.” Although not denominated as such, a seller’s action for the price under TEX. BUS. & COM. CODE ANN. § 2.709 (Vernon 1994) is the functional equivalent of an action for specific performance because payment of the price is the buyer’s performance under a sales contract.

75. 125 S.W.3d 794 (Tex. App.—Texarkana 2004, no pet. h.).

76. *Id.* at 795, 805.

77. TEX. BUS. & COM. CODE ANN. § 2.725(a) (Vernon 1994).

78. TEX. BUS. & COM. CODE ANN. § 2.725(b) (Vernon 1994). As to a warranty that extends to future performance, see *PPG Indus., Inc. v. JMB/Houston Centers Partners L.P.*, 146 S.W.3d 79 (Tex. 2004). *PPG Indus.* is also discussed at note 40 (buyer asserted a breach of warranty claim based on an advertisement by the seller that the goods were warranted for twenty years).

79. TEX. BUS. & COM. CODE ANN. § 2.725(a) (Vernon 1994).

80. 137 S.W.3d 299 (Tex. App.—Beaumont 2004, no pet. h.).

began to run on a claim for breach of express warranty. The seller requested a jury instruction paralleling the definition of tender of delivery contained in section 2.503, but the trial court failed to submit the requested instruction.<sup>81</sup> On appeal, the court approved the instruction, reversed the trial court, and remanded the case for trial to determine the factual issue of when tender of delivery occurred.<sup>82</sup>

In *Hewlett-Packard Co. v. Benchmark Electronics, Inc.*,<sup>83</sup> a buyer and seller entered into a contract for the seller to manufacture computer motherboards for the buyer using chipsets supplied by the buyer. Under their arrangement, the seller was to bill the buyer for delivered motherboards and the buyer would periodically send a “debit memo” to the seller for reimbursement for the chipsets the buyer supplied. The contract contained a two-year limitations period for claims arising under it, including claims arising from the failure of the buyer to pay the seller’s invoices for motherboards. The contract was silent, however, as to the time period for the seller to reimburse the buyer under the debit memos.

When the parties decided to end their relationship, the buyer sent a final debit memo to the seller. The seller failed to make payment on this final memo and the buyer sued. The seller argued that more than two years had passed since the date of the memo and the claim was barred by the contractual limitations period. The Houston Court of Appeals disagreed, holding that the two-year limitations period did not apply because the contract was silent with regard to the time for payment of the debit memos.<sup>84</sup> Summary judgment in favor of the seller was reversed and the case was remanded.<sup>85</sup>

### III. NEGOTIABLE INSTRUMENTS AND BANK TRANSACTIONS

#### A. ENFORCEMENT AND DEFENSES

Defenses to enforcement of a negotiable instrument fall into two broad categories: (1) defenses that are viable against any person seeking to enforce an instrument, including holders in due course, and (2) defenses that can be asserted only against persons who do not qualify as holders in

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81. TEX. BUS. & COM. CODE ANN. § 2.503 (Vernon 1994) provides:

- (a) 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. The manner, time and place for tender are determined by the agreement and in particular
- (1) tender must be at a reasonable hour, and if it is of goods they must be kept available for the period reasonably necessary to enable the buyer to take possession; but
  - (2) unless otherwise agreed the buyer must furnish facilities reasonably suited to the receipt of the goods.

82. *Conquest*, 137 S.W.3d at 308.

83. 142 S.W.3d 554 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).

84. *Id.* at 557-59, 562.

85. *Id.* at 565.

due course.<sup>86</sup> Defenses in the former category are often termed “real defenses.” Defenses in the latter category are generally known as “personal defenses.”

In *Bassett v. American National Bank*,<sup>87</sup> a bank obtained summary judgment against the makers of a promissory note. On appeal, the makers contended that their defenses of lack of consideration and conditional delivery (both of which are personal defenses) precluded enforcement of the note. The Fort Worth Court of Appeals held that, while the makers were not entitled to judgment as a matter of law, they had produced sufficient summary judgment evidence on these defenses to raise issues of material fact. The case was remanded for trial on these issues.<sup>88</sup>

In *CSH Restaurant Group, Inc. v. General Electric Capital Business Asset Funding Corp.*,<sup>89</sup> summary judgment in favor of the holder of two promissory notes was reversed because the holder failed to show the amount due and owing on the notes. Internal discrepancies in the summary judgment proof submitted by the holder made it impossible to determine the balance due on the notes; therefore, the case was remanded for trial on this issue.<sup>90</sup>

In *Lee v. Martin Marietta Materials Southwest, Ltd.*,<sup>91</sup> the plaintiff sued to recover the amount due under a guaranty.<sup>92</sup> The guarantor argued that the guaranty was not enforceable because it was issued in favor of the plaintiff's predecessor and not in favor of the plaintiff. Under the rule of strict interpretation as applied to guaranties, the guarantor contended that he was not liable for debts incurred by the principal debtor to the plaintiff.<sup>93</sup> While conceding this general rule, the San Antonio Court of Appeals determined that the plaintiff was in fact the same entity because it existed merely by a change of organizational structure and a name change, not by creation of a new entity. The court distinguished the situation relied upon by the guarantor where two companies merged to form a new corporation that did not previously exist. Because the plaintiff remained the same company, albeit with a new organizational form and a new name, the guarantor remained liable on his guaranty.<sup>94</sup>

In *Suttles v. Thomas Bearden Co.*,<sup>95</sup> the Houston Court of Appeals addressed the question of whether a signature in the form:

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86. TEX. BUS. & COM. CODE ANN. § 3.305(a)(1)-(2) (Vernon 2002).

87. 145 S.W.3d 692 (Tex. App.—Fort Worth 2004, no pet. h.).

88. *Id.*

89. 145 S.W.3d 822 (Tex. App.—Dallas 2004, no pet. h.).

90. *Id.*

91. 141 S.W.3d 719 (Tex. App.—San Antonio 2004, no pet. h.).

92. Under Chapter 3 of the Code, guarantors may be liable by placing a signature on an instrument as an accommodation party or by signing a separate contract of guaranty. See TEX. BUS. & COM. CODE ANN. §§ 3.419, 3.605 (Vernon 2002).

93. The law generally requires that the terms of a guaranty must be strictly followed and may not be extended beyond its precise terms. See *McKnight v. Virginia Mirror Co.*, 463 S.W.2d 428, 430 (Tex. 1971).

94. *Lee*, 141 S.W.3d at 721-22.

95. 152 S.W.3d 607 (Tex. App.—Houston [1st Dist.] July 22, 2004, no pet. h.).

TS Clare, Inc., General Partner  
Tracy Suttles, President  
/s/Tracy Suttles

made Tracy Suttles liable as a co-maker of the note. When the note defaulted, the payee sued both the TS Clare company and Suttles. The trial court granted summary judgment for the payee and the defendants appealed.<sup>96</sup>

Suttles contended that the trial court erred because the form of his signature showed unambiguously that he had signed in a representative capacity. The payee argued that the judgment of the court below was correct because the signature was ambiguous as to Suttle's personal liability for three reasons.

First, the body of the note referred to multiple borrowers and provided for joint and several liability among the borrowers. The court rejected this argument on the ground that, "we look only to the 'form of the signature' to insure that the signature, itself, unambiguously shows representative capacity."<sup>97</sup>

Second, the payee contended that identifying himself as "President" did not indicate that Suttles was signing only to show who placed the signature of the company on the note; instead, the payee argued, he should have preceded his signature with the word "by." The court rejected this argument as well on the ground that section 3.402(b)(1) of the Code does not require "an obsequious adherence to a specific signature form."<sup>98</sup> The court concluded that "a preposition was not required to show Suttles's representative capacity; it was enough that the signature identify TS—Clare, Suttles, and the capacity in which Suttles signed on behalf of TS—Clare."<sup>99</sup>

Third, the payee urged that a handwritten amendment in a blank space at the bottom of the note modifying the interest terms and the date of one installment payment that Suttles signed without identifying himself as President made his capacity ambiguous. The court found this argument to be without merit, reasoning that placement of the signatures on the amendment merely showed that the amendment was authorized and did not make Suttles individually liable nor did it create ambiguity with respect to his signature in the body of the note.<sup>100</sup>

The court administered its coup de grace by holding that, as a matter of law, Suttles was not individually liable on the note and the trial court had erred in granting summary judgment against him.<sup>101</sup>

The importance of this case is its unequivocal holding that a signature in the form, "Richard Roe, John Doe, Agent," insulates the agent from

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96. *Id.* at 610.

97. *Id.* at 613.

98. *Id.*

99. *Id.*

100. *Id.* at 613-14.

101. *Id.* at 614.



personal liability regardless of the intention of the parties, even when the action is between the immediate parties to the instrument. An ironic aspect of this case is that while the court deplors "obsequious adherence to a specific signature form," it seems to have adopted a rule that is equally obsequious to another signature form.<sup>102</sup>

In *Alma Group, L.L.C. v. Palmer*,<sup>103</sup> the maker of a note contended that the FDIC had improperly transferred the note to an assignee in violation of an anti-assignment provision contained in an underlying agreement between the maker and the FDIC. The note itself did not contain an anti-assignment clause and did not reference the underlying agreement. The Corpus Christi Court of Appeals held that under the Financial Institutions Reforms, Recovery and Enforcement Act of 1989 ("FIRREA"), the assignment was valid because FIRREA preempts state law and allows assignees of the FDIC to become holders in due course even without technical compliance with the requirements of state law.<sup>104</sup>

In *Southwest Bank v. Information Support Concepts, Inc.*,<sup>105</sup> an employee stole 183 checks that were payable to her employer over a period of eighteen months. She deposited them into her personal account at a bank where the employer did not have an account. There was no indorsement by the employer, whether real or forged, on any of the checks. The employer sued the depository bank for conversion under section 3.420 of the Code.<sup>106</sup> The bank argued the employer was contributorily negligent by failing to adequately supervise the employee, that the employer had assumed the risk of the employee's dishonesty, and that the employer failed to mitigate damages. The bank sought to join the employee in the suit as a responsible third party under the terms of the gen-

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102. TEX. BUS. & COM. CODE ANN. § 3.402 (Vernon 2002) is derived from the former section 3.403. Acts 1967, 60th Leg., p. 2343, ch. 785, § 1, amended by Acts 1995, 74th Leg., R.S., ch. 921, § 1, 1995 Tex. Sess. Law Serv. 921. Under the former version, the intent of the parties controlled in actions between the immediate parties to an instrument if a signature was ambiguous; intent, of course, would be a question of fact.

A careful reading of Official Comment 3 to the former section 3.403 and Official Comment 2 to the current section 3.402 indicates that the drafters omitted any discussion of a signature in the form "Richard Roe, John Doe Agent." The closest the current Comment comes to dealing with a similar situation is the parenthetical statement that a signature in the form ("P, by A, Treasurer") is a signature that unambiguously shows "A" signed in a representative capacity.

Based on its interpretation of the current section 3.402, the court in *Suttles* essentially converts what was a question of fact into a question of law in its treatment of the word "by" as "obsequious adherence" to the use of a preposition.

103. 143 S.W.3d 840 (Tex. App.—Corpus Christi 2004, pet. denied).

104. *Id.* at 845. In reaching this conclusion, the court cited *Jackson v. Thweatt*, 883 S.W.2d 171 (Tex. 1994) (holding that preemptive effect of FIRREA allowed assignee to use six-year limitations period of federal law instead of four-year limitations period of state law for enforcement of notes) and *Bailey, Vaught, Robertson & Co. v. Remington Inv., Inc.*, 888 S.W.2d 860 (Tex. App.—Dallas 1994, no writ) (holding that assignee could enforce note at a reasonable rate of interest even though note no longer stated a "sum certain" as required by state law because prime rate could no longer be determined due to bank failure).

105. 149 S.W.3d 104 (Tex. 2004).

106. See TEX. BUS. & COM. CODE ANN. § 3.420 (Vernon 2002).

eral proportionate responsibility statute.<sup>107</sup> Both the trial court and the court of appeals held that the employee could not be joined because Chapter 3 does not provide for a comparative allocation of responsibility in conversion cases.

The Texas Supreme Court reviewed the legislative history of the amendments made in Texas during the 1995 legislative session, particularly the history relating to the comparative fault provisions in sections 3.405, 3.406, and 4.406.<sup>108</sup> The supreme court rejected an argument that the general statute should apply because Chapter 3 provides a comparative fault rule for forged endorsement cases, but does not have a similar rule for conversion cases.<sup>109</sup> Finding no Texas cases on point, the supreme court discussed and approved, the decision in *John Hancock Financial Services, Inc. v. Old Kent Bank*,<sup>110</sup> in which the Sixth Circuit Court of Appeals held that the Michigan Tort Reform Act did not apply to a conversion claim brought under section 3-406. Emphasizing that the underlying purposes and policies of the UCC include a directive “to make uniform the law among the various jurisdictions,” the supreme court stated, “Were we to impose Texas’s proportionate responsibility scheme on Revised Article 3, parties litigating UCC-based conversion claims in Texas would face a unique liability scheme, overriding the UCC’s express purpose of furthering uniformity among the states.”<sup>111</sup> The supreme court held that the trial court and the court of appeals properly denied the bank’s motion to join the employee as a responsible third party because the UCC provides the rules for loss allocation in a negotiable instruments

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107. See TEX. CIV. PRAC. & REM. CODE ANN. § 33.004 (Vernon Supp. 2004).

108. The Official Text of Article 3 was substantially revised in 1990. See U.C.C. Rept. Serv., *Revised Article 3 Negotiable Instruments: 1990 Official Text with Comments* 1-139 (West 2005). These amendments were adopted in Texas in 1995. See Act of May 28, 1995, 74th Leg., R.S., ch. 921, secs. 1-2 (codified as TEX. BUS. & COM. CODE ANN. §§ 3.101 -605 (Vernon 2002 & Supp. 2004)).

109. 149 S.W.3d at 108-09. On this point, the supreme court said:

[Amici] assert that Revised Article 3 provides its own comparative negligence scheme in the case of forged endorsements but is silent on missing endorsements, such as the one in this case. Accordingly, amici contend that chapter 33 is uniquely applicable to missing endorsement cases. If that were the case, however, the thief’s liability would be submitted to the jury in a missing endorsement case but not in a forged endorsement case. Certainly, a bank should bear more culpability in the former situation than the latter, but under the result proposed by amici, the opposite would be true. A bank that paid a check bearing absolutely no endorsement could escape liability if the jury determined the thief was at fault, while a bank that paid on a forged but seemingly genuine endorsement would not be able to submit the thief’s liability to the jury. A more reasonable construction is that the Texas Legislature and the UCC drafters considered and rejected comparative fault in missing endorsement cases, but elected to permit it in forged endorsement ones. . . . We should not disturb that decision by applying Chapter 33 to those UCC-based conversion claims for which the drafters and the Legislature chose *not* to apportion responsibility.

*Id.* (emphasis in original).

110. 346 F.3d 727 (6th Cir. 2003).

111. *Southwest Bank*, 149 S.W.3d at 109-10.

setting.<sup>112</sup>

#### IV. LETTERS OF CREDIT

In *Sava Gumarska in Kemijsk Industrija v. Advanced Polymer Sciences, Inc.*,<sup>113</sup> the beneficiary under a standby letter of credit attempted to draw on the credit after the account party allegedly failed to fulfill its obligations on the underlying contract. The trial court enjoined the issuer from honoring the letter of credit and ultimately held that the letter of credit was void. In a cross-action by the account party against the beneficiary, the account party prevailed. The beneficiary appealed.

The Dallas Court of Appeals noted that under the “independence principle” applicable to letters of credit, the obligation of an issuer of a letter of credit is independent of any underlying dispute between an account party and a beneficiary.<sup>114</sup> Unless there is material fraud by the beneficiary that vitiates the entire transaction, an injunction should not issue against payment of a letter of credit. Because the actions of the beneficiary did not rise to the level of material fraud, the trial court should not have found the letter of credit to be void. However, because the claim by the account party against the beneficiary on the underlying contract had been adjudicated in the same action, with judgment in favor of the account party on its contract claim, the error was moot because the beneficiary would not be entitled to retain any of the proceeds of the letter of credit even if payment had been made.<sup>115</sup>

#### V. SECURED TRANSACTIONS

##### A. CREATION OF SECURITY INTERESTS

In *Baldwin v. Castro County Feeders I, Ltd.*,<sup>116</sup> the South Dakota Supreme Court addressed two principal questions. First, was the description of collateral in a security agreement sufficient to create a security interest in the collateral? Second, should an arbitration clause requiring the parties to arbitrate disputes in Amarillo, Texas be enforced?

112. *Id.* at 110. Recognizing that the comparative fault provisions in Chapter 3 and the general proportionate responsibility statute were both adopted in the same legislative session, the supreme court stated its reasoning as follows:

UCC Revised Article 3, as adopted in Texas, represents a comprehensive legislative fault scheme singularly applicable to claims involving negotiable instruments. Its provisions are more specific than Chapter 33, and they were adopted by the same Legislature that amended Chapter 33 to provide for responsible third party liability. We conclude that the Legislature did not intend to upset the UCC's carefully balanced liability provisions by applying Chapter 33 to a UCC-based conversion claim. To hold otherwise would ignore the UCC itself and thwart its underlying purpose.

*Id.* at 111.

113. 128 S.W.3d 304 (Tex. App.—Dallas 2004, no pet.).

114. *Id.* at 318-19 (citing TEX. BUS. & COM. CODE ANN. § 5.103(d) (Vernon 2002 & Supp. 2004)). A leading case discussing and applying the independence principle is *Phillip Bros., Inc. v. Oil Country Specialists, Ltd.*, 787 S.W.2d 38 (Tex. 1990).

115. *Sava Gumarska*, 128 S.W.3d at 319-20.

116. 2004 SD 43, 678 N.W.2d 796.

Regarding the first question, the security agreement defined “collateral” as being “[A]ll of Feeder’s interest in farm products, limited to livestock . . . such livestock being specifically located in Lot(s) # \_\_\_\_\_ at Castro County Feeders, I, Ltd., Hart, Castro County, Texas.”<sup>117</sup> Because the blank for lot numbers was not filled in, the debtor contended the description was inadequate. The South Dakota Supreme Court held that a description of the collateral by category was sufficient under section 9-108 of the South Dakota Code since both farm products and livestock were defined terms under the Code.<sup>118</sup> The South Dakota Supreme Court also stated that it was reasonable for the parties to omit the lot numbers because the security interest attached to the cattle upon delivery to the feedlot complex and the cattle were not usually located in one of Castro County’s lots when they were sold.<sup>119</sup>

In response to the second question, the South Dakota Supreme Court found that the arbitration clause was clear and unambiguous. Arbitration of the right to proceeds of the collateral (the cattle having been sold) was ordered to be held in Amarillo in accordance with the agreement of the parties.<sup>120</sup>

## B. ASSIGNMENT OF RIGHTS

Under section 9.406, an account debtor may continue to pay an assignor and discharge the account debtor’s obligation under a security agreement until notice is received from the assignee that the amount due has been assigned and that future payments are to be made to the assignee.<sup>121</sup> Obviously, documented receipt of notice is ideal. Unfortunately, reality sometimes falls short of this goal as occurred in *First Capital Corp. v. Norfolk Southern Railway Co.*<sup>122</sup>

In *First Capital*, the assignee alleged that it had given both written and oral notice to the account debtor. However, the written notice was sent to a different entity than that required by the invoices. Furthermore, the oral notice, if any, was given to an employee of the account debtor whose duties consisted of loading and unloading shipments and did not include transmission of notices about assignments. Because the written notice was sent to the wrong entity, and the giving of oral notice was disputed, the court concluded, as a matter of law, that the assignee “had no communications with [account debtor’s] employees that constitute effective

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117. 2004 SD 43 at \*\*8, 678 N.W.2d at 799.

118. 2004 SD 43 at \*\*10, 678 N.W.2d at 800-01 (citing S.D. CODIFIED LAWS § 57A-9-108(b)(2) which is identical to TEX. BUS. & COM. CODE ANN. § 9.108(b)(2) (Vernon 2002)). The definition of “farm products” includes “livestock” under both S.D. CODIFIED LAWS § 57A-9-102(34) and TEX. BUS. & COM. CODE ANN. § 9.102(a)(34) (Vernon 2002 & Supp. 2004).

119. *Baldwin*, 2004 SD 43 at \*\*11, 678 N.W.2d at 801.

120. 2004 SD 43 at \*\*15, 678 N.W.2d at 802.

121. See TEX. BUS. & COM. CODE ANN. § 9.406 (Vernon 2002).

122. *First Capital Corp. v. Norfolk S. Ry. Co.*, No. 3:03-CV-214-M, 2004 WL 718975 (N.D. Tex. March 31, 2004).

notice under the UCC of an assignment . . . of the invoices."<sup>123</sup> Summary judgment was granted in favor of the defendant account parties.

### C. ENFORCEMENT OF SECURITY INTERESTS

In *Mehan v. Wamco XXVIII, Ltd.*,<sup>124</sup> a secured party had a priority security interest in inventory. The inventory, however, was located on property that had been leased by the debtor, and the lessor refused to give the secured party access to the premises to repossess the collateral or to sell in its place. The secured party sought a declaration that it had a first priority in the inventory and an order that it be permitted to sell the inventory on the property where it was located.<sup>125</sup>

The lessor defended on the ground that the secured party had constructively trespassed on the property by failing to remove the inventory within a reasonable time, thereby depriving the lessor of the use of the property. The Fort Worth Court of Appeals rejected this argument, stating that it could find no authority indicating that a secured party commits a trespass by failing to foreclose or repossess collateral located on real property owned by a third party.<sup>126</sup>

The court noted that section 9.609 of the Code permits a secured party to resort to judicial process to aid of repossession and upheld the order of the trial court that the secured party be granted access to prepare the inventory for sale and to sell it on the premises.<sup>127</sup> The court also upheld two trial court rulings that the secured party pay rent to the lessor for its entry on the property and that any inventory left on the property after the sale would be deemed abandoned to the lessor.<sup>128</sup>

Section 9.609 also permits a secured party to use self-help repossession to recover collateral after a debtor defaults.<sup>129</sup> Of course, this presupposes that the collateral can be found. In *First Valley Bank of Los Fresnos v. Martin*,<sup>130</sup> a bank and a borrower had a falling out after the bank setoff one of the borrower's deposits against the borrower's defaulted cattle loan. The borrower subsequently hired an attorney who sent a letter to the bank indicating three ranches where the collateral—seventy-five head of cattle—could be located. As described by the Texas Supreme Court, the ranches "covered more than 250 square miles of rough country and contained skittish cattle belonging to many owners, so those belonging to a particular owner could not be identified except by scouring the whole

123. *Id.* at \*3. Revised TEX. BUS. & COM. CODE ANN. § 1.202 (Vernon Supp. 2004) restates the provisions concerning the giving and receiving of notices required by various provisions in the Code. With the advent of electronic communication, some thought should be given to regarding how to verify the receipt of notices, particularly if given in electronic form.

124. 138 S.W.3d 415 (Tex. App.—Fort Worth 2004, no pet. h.).

125. *Id.* at 416-17.

126. *Id.* at 417.

127. *Id.* at 418 (citing TEX. BUS. & COM. CODE ANN. § 9.609 (Vernon 2002)).

128. *Id.* at 419-20.

129. See TEX. BUS. & COM. CODE ANN. § 9.609(a)(1) (Vernon 2002).

130. 144 S.W.3d 466 (Tex. 2004).

area and corralling them all.”<sup>131</sup> The bank was able to locate only twenty of the cattle. Frustrated by this turn of events, the bank complained to the sheriff’s department and a deputy sheriff tried his luck at finding the cattle; no more could be found. The deputy filed a report with the district attorney and the debtor was eventually indicted for hindering a secured creditor.<sup>132</sup> The indictment was later dismissed. In an action by the bank to recover the deficiency, the borrower counterclaimed on several theories, including malicious prosecution. The jury found in favor of the bank in the amount of \$50,000 on its deficiency claim, but also found in favor of the borrower in the amount of \$18,000,000, including punitive damages, on his claims for malicious prosecution, fraud, and loss of credit reputation. The court of appeals affirmed recovery on the malicious prosecution claim, but reversed on the fraud and loss of credit reputation claims, resulting in the reduction of damages to an amount of \$4.33 million.<sup>133</sup>

The Texas Supreme Court, the supreme court reviewed the statutory elements for a charge of hindering a secured creditor and found that the borrower had admitted each of the necessary elements at trial. The supreme court then reasoned that,

When the objective elements of a crime reasonably appear to have been completed, a private citizen has no duty to inquire whether the suspect has some alibi or explanation before filing charges. Accordingly, as a matter of law, [the borrower] cannot establish the absence of probable cause, as he must do to prove malicious prosecution.<sup>134</sup>

The judgment for malicious prosecution was reversed, thereby avoiding any liability on the part of the bank, and judgment was affirmed in favor of the bank on its \$50,000 deficiency claim.<sup>135</sup>

*Al Gailani v. Riyadh Bank, Houston Agency*<sup>136</sup> is further proof that the wheels of justice can move exceeding slow.<sup>137</sup> In its latest iteration, the El Paso Court of Appeals addressed the question of whether a secured party properly conducted a foreclosure sale of accounts pledged as collateral for a loan. The case arose before the effective date of revised Chapter 9 of the Code, therefore the court applied the law under the former Chap-

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131. *Id.* at 469.

132. *Id.* The Texas Penal Code makes it a criminal offense for a debtor to remove, conceal, or sell collateral with an intent to appropriate the collateral or its proceeds. *See* TEX. PEN. CODE ANN. § 32.33 (Vernon 2003).

133. *First Valley Bank*, 144 S.W.3d at 468. The court of appeals reversed the judgment on claims for damage to credit reputation and fraud, the court reduced the amount of punitive damages. *See* *First Valley Bank of Los Fresnos v. Martin*, 55 S.W.3d 172, 194 (Tex. App.—Corpus Christi 2001), *rev’d*, 144 S.W.3d 466 (Tex. 2004). The decision by the court of appeals is discussed in John Krahmer, *Commercial Transactions*, 55 SMU L. REV. 747, 772-73 (2002).

134. *First Valley Bank*, 144 S.W.3d at 470.

135. *Id.* at 472.

136. 144 S.W.3d 1 (Tex. App.—El Paso 2003, pet. denied).

137. The case first appeared in the reports in 2000. *See* *Al Gailani v. Riyadh Bank, Houston Agency*, 22 S.W.3d 560 (Tex. App.—El Paso 2000). It was reversed and remanded in 2001 by *Al Gailani v. Riyadh Bank, Houston Agency*, 61 S.W.3d 353, 357 (Tex. 2001), and reappeared on December 29, 2003 as *Al Gailani*, 144 S.W.3d at 1. The decisions at earlier stages of the case are discussed in Krahmer, *supra* note 129, at 773-74.

ter 9. The court required a secured party to prove that the disposition of collateral was accomplished in a commercially reasonable manner if the debtor put the matter in issue.<sup>138</sup>

The accounts in question had a face value of two million dollars and had been generated in transactions with companies conducting business in Saudi Arabia. Notice of the sale was posted in the courthouse and published twice in a newspaper about ten days before the sale was held. The secured party, who was the only bidder at the foreclosure sale, purchased the accounts for ten dollars. The court held that the sale had been inadequately advertised, particularly where contrary evidence indicated that no effort was made to reach Saudi investors, who were the most likely audience to have an interest in purchasing the accounts.<sup>139</sup> The secured party argued that because the loan had been made in Texas, there was no requirement that publicity be given to persons outside Texas. The court rejected this argument, noting that the secured party had cited no authority for this proposition and the court was unaware of any such authority.<sup>140</sup> The secured party also argued that proper advertising of the sale was irrelevant because the records documenting the accounts had been destroyed in a fire and the accounts were, therefore, worthless. The court agreed there was evidence that some of the records had been destroyed, but there was also evidence that not all of the records had been destroyed. In addition, there was an affidavit from one of the account debtors acknowledging the debt and proposing a payment plan. Under these circumstances, the accounts could not be declared worthless as a matter of law.<sup>141</sup> Summary judgment in favor of the secured party was reversed and the case remanded for further proceedings.<sup>142</sup>

Although *Gailani* was decided under the former Chapter 9 by applying the rules of pleading and proof announced in *Greathouse v. Charter National Bank—Southwest*,<sup>143</sup> it should be noted that similar rules have now been incorporated in revised Chapter 9 in section 9.626.<sup>144</sup>

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138. *Al Gailani*, 144 S.W.3d at 3. Revised Chapter 9 was adopted in Texas during the 1999 legislative session with an effective date of July 1, 2001. See Act of June 18, 1999, 76th Leg., R.S., ch. 414, § 1.01, 1999 Tex. Gen. Laws 2639.

139. *Al Gailani*, 144 S.W.3d at 3.

140. *Id.* at 4.

141. *Id.* at 5.

142. *Id.*

143. 851 S.W.2d 173, 176-77 (Tex. 1992). Prior to the decision in *Greathouse*, there was uncertainty as to whether the secured party or the debtor had the burden of pleading and proving the commercial reasonableness (or unreasonableness) of a foreclosure sale. Numerous cases illustrating this uncertainty are collected in the opinion.

144. See TEX. BUS. & COM. CODE ANN. § 9.626(a)(1)-(2) (Vernon 2002).