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Bankruptcy & (and) Creditors' Rights

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BANKRUPTCY & CREDITORS' RIGHTS

Roger S. Cox*

TABLE OF CONTENTS

I. BANKRUPTCY	877
A. BANKRUPTCY REFORM ACT OF 1994	877
1. <i>Chapter 13 Eligibility</i>	878
2. <i>Lien Avoidance / Exemptions</i>	878
3. <i>Small Business Election</i>	879
4. <i>Single Asset Cases</i>	880
5. <i>Federal Exemptions Increased</i>	880
6. <i>Higher Trustee Fees Authorized</i>	880
7. <i>Expedited Hearing on Automatic Stay</i>	881
8. <i>Reaffirmation</i>	881
9. <i>Status Conferences; Case Progress</i>	881
10. <i>Other Issues</i>	881
B. UNITED STATES SUPREME COURT	882
1. <i>Fraudulent Transfers — Foreclosure Sales</i>	882
2. <i>Absolute Priority Rule — New Value Exception</i>	884
C. SELECTED BANKRUPTCY CASES — FIFTH CIRCUIT AND BELOW	885
1. <i>Collateral Valuation in Reorganization Proceedings</i> ...	885
2. <i>Dischargeability</i>	887
a. <i>Maintenance, Alimony, and Support</i>	887
3. <i>Avoidance of Judicial Liens on Homestead Property</i> ..	888
a. <i>Abstracts of Judgment</i>	888
b. <i>“Equitable” Liens</i>	889
4. <i>Automatic Stay Following Repossession and Before Disposition of Collateral</i>	890
5. <i>Durrett Rule</i>	891
6. <i>Property of the Estate — Disclaimers as Transfers</i> ...	892
7. <i>Property of the Estate — Beneficial Interest in Family Trust</i>	892
8. <i>Miscellaneous</i>	893
II. HOMESTEADS AND EXEMPTIONS	894
A. HOMESTEADS	894
1. <i>General</i>	894

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2. <i>Urban Residential Homestead — Multiple Lots</i>	898
3. <i>Business Homestead — Multiple Lots</i>	900
4. <i>Homestead Disclaimers — Estoppel</i>	900
B. PERSONAL PROPERTY EXEMPTIONS	902
1. <i>Tools of the Trade</i>	902
2. <i>Life Insurance</i>	902
3. <i>After Acquired Property</i>	905
4. <i>Retirement Accounts</i>	905
C. HOMESTEADS AND EXEMPTIONS — WHAT IS A “FAMILY”?	905
D. TIMELY OBJECTIONS TO EXEMPTIONS CLAIMED IN BANKRUPTCY	906
III. CREDITORS RIGHTS	906
A. FDIC / RTC	907
1. <i>Statutes of Limitation (Six-Year and Four-Year)</i>	907
2. <i>Missing Interest Rate Index</i>	909
3. <i>Tax Liens vs. The FDIC</i>	910
B. REAL PROPERTY FORECLOSURE	911
1. <i>Notice</i>	911
2. <i>Deficiencies</i>	913
C. OVERDRAFT CHARGES REVISITED	913
D. RECOVERY ON LOST NOTE	914
E. PARTNERS AND PARTNERSHIPS — STATUTES OF LIMITATIONS	915
F. ARTICLE 9 — DISPOSITION OF COLLATERAL — COMMERCIAL REASONABLENESS	916
IV. CONSUMER CREDIT	917
A. FAIR DEBT COLLECTION PRACTICES ACT	917

THIS Article will focus primarily on developments in Bankruptcy Law and Creditors Rights and Remedies from the perspective of the Texas practitioner. Significant bankruptcy developments will be reviewed, including the sweeping changes to the Bankruptcy Code enacted by Congress last year; however, where possible, the emphasis is on Texas law, including that arising in a bankruptcy context. This Article is not an exhaustive survey of all bankruptcy developments in the past year, especially those that deal with the more specialized areas of the Bankruptcy Code that do not involve some area of state law.¹ For recent developments that focus exclusively on bankruptcy law, the reader is encouraged to review one of the numerous commentaries contained in CLE materials and at least one other Texas law review.² Foremost

1. The author has attempted to highlight developments in the bankruptcy courts that feature a state law “twist.” If a case does not apply Texas law or feature some aspect of interest to a state practitioner, chances are the case is not reviewed in this article. This is in keeping with the Survey’s focus on Texas law.

2. Most advanced continuing legal education courses also feature very useful summaries of recent cases. See, e.g., M. Howard, *Recent Supreme Court and Circuit Court Deci-*

among these are the Texas Tech Law Review's Fifth Circuit Symposium³ and Professors Warren and Westbrook's "Recent Developments" presentation at the University of Texas Bankruptcy Conference.⁴

Although the author has focused on state law developments in the bankruptcy courts, no review of bankruptcy developments would be complete without a summary of selected 1994 amendments to the Bankruptcy Code. After that, this Article reviews bankruptcy related developments in the Supreme Court, Fifth Circuit, and Texas Bankruptcy Courts. Again, the focus is on bankruptcy developments of interest to a Texas practitioner. Finally, under the heading of "Creditors' Rights", this article will review a limited number of cases of interest that are illustrative of the problems and issues encountered by creditors and debtors. In that regard, the reader should also review the articles elsewhere in this Survey regarding Banking Law, Commercial Transactions, and Real Property.

I. BANKRUPTCY

A. BANKRUPTCY REFORM ACT OF 1994

Congress recently passed a variety of significant amendments to the Bankruptcy Code in the Bankruptcy Reform Act of 1994, which took effect October 22, 1994.⁵ The bill was organized into seven titles, with the primary areas of interest being Improved Bankruptcy Administration,

sions, in TEXAS TECH UNIV. SCHOOL OF LAW, ANNUAL FARM, RANCH, AND AGRIBUSINESS BANKRUPTCY INSTITUTE (1994); M. White, *Recent Agricultural Bankruptcy Cases*, in TEXAS TECH UNIV. SCHOOL OF LAW, FARM, RANCH AND AGRIBUSINESS BANKRUPTCY INSTITUTE (1994); Honorable Leif M. Clark, *Supreme Court Case Law Update*, in STATE BAR OF TEXAS PROF. DEV. PROGRAM, ADVANCED CONSUMER BANKRUPTCY COURSE (1994); Honorable Richard S. Schmidt and Julie C. Perez, *Fifth Circuit and Below Case Law*, in STATE BAR OF TEXAS PROF. DEV. PROGRAM, ADVANCED CONSUMER BANKRUPTCY COURSE (1994); Gerrit M. Pronske, *Overview of Current Case Law*, in STATE BAR OF TEXAS PROF. DEV. PROGRAM, ADVANCED BUSINESS BANKRUPTCY COURSE (1994); Elizabeth Warren and Jay Westbrook, *Recent Developments*, in UNIV. TEX. BANKRUPTCY CONF. (1994); Lawrence P. King, *S. 540 and Other New Legislation*, in UNIV. TEX. BANKRUPTCY CONF. (1994).

3. The Texas Tech Law Review's annual Fifth Circuit Symposium typically features an excellent review of bankruptcy developments in the Fifth Circuit. See, e.g., Leif M. Clark, *Bankruptcy, Fifth Circuit Survey*, 25 TEX. TECH L. REV. 477 (1994); John C. Akar & M. Jo White, *Bankruptcy, Fifth Circuit Survey*, 24 TEX. TECH L. REV. 415 (1993).

4. Professors Elizabeth Warren and Jay Westbrook present an update on recent bankruptcy developments at the University of Texas Bankruptcy Conference held each November. See Elizabeth Warren and Jay Westbrook, *Recent Developments*, in UNIV. TEX. BANKRUPTCY CONF. (1994). This article typically features synopses of dozens of cases from throughout the country. Most recently, their focus was on the following areas: 1) Future Claims. See, e.g., *Lemelle v. Universal Mfg. Corp.*, 18 F.3d 1268 (5th Cir. 1994); *In re Piper Aircraft Corp.*, 168 B.R. 434 (S.D. Fla. 1994); *In re Piper Aircraft Corp.*, 162 B.R. 619 (Bankr. S.D. Fla. 1994); see generally Ralph R. Mabey and Jamie A. Gavrin, *Constitutional Limitations on the Discharge of Future Claims in Bankruptcy*, 44 S.C.L. Rev. 745 (1993). 2) Executory Contracts and Leases. See, e.g., *matter of Austin Development Co.*, 19 F.3d 1077 (5th Cir. 1994). 3) Liability of Officers and Directors. See, e.g., *In re Schepps Food Stores, Inc.*, 160 B.R. 792 (Bankr. S.D. Tex. 1993). 4) Lawyers. See, e.g., *In re Perez*, 30 F.3d 1209 (9th Cir. 1994) (unsettling opinion regarding responsibility of debtor's counsel for neutral administration of Chapter 11 case). 5) Supreme Court. 6) Partners and Partnerships. See, e.g., *In re Jones*, 161 B.R. 180 (Bankr. N.D. Tex. 1993).

5. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994).

Commercial Bankruptcy Issues, and Consumer Bankruptcy Issues. Some of the most significant amendments address the following issues: Chapter 13-Eligibility, Lien Avoidance, Chapter 11-Small Business, Chapter 11-Single Asset, Federal Exemptions, and Case Administration. Numerous other issues were also covered in the legislation, some of which are reviewed below.⁶

1. Chapter 13 Eligibility

Congress has substantially increased the eligibility limits for Chapter 13. A debtor is now eligible for Chapter 13 relief if that person has less than \$250,000 in non-contingent, liquidated, unsecured debts, and less than \$750,000 in non-contingent, liquidated, secured debts.⁷ The limits were previously \$100,000 and \$350,000 respectively. Although the typical consumer Chapter 13 deals with debts substantially less than even the old limitations, it is logical to assume that there could be somewhat of an increase in Chapter 13 filings; Chapter 13, however, is still available only to individuals.

2. Lien Avoidance / Exemptions

Almost hidden in the breadth of the amendments was one remnant of a previously filed bill regarding avoidance of non-purchase money liens against tools of the trade and implements. As reported in last year's Survey, section 522(f) of the Bankruptcy Code (which provides for avoidance of non-purchase money liens against certain exempt property) had been applied by at least one Texas bankruptcy court to allow avoidance of a non-purchase money, non-possessory security interest in farm equipment. This was based on a determination that farm equipment and implements were tools of the trade and therefore exempt under the Texas Property Code.⁸ Based on this holding, it became possible for a farmer to avoid a non-purchase money lien against farm equipment and implements, which typically secured an operating loan. Given the extent of the Texas personal property exemptions, this could affect up to \$60,000 worth of property. In the short run, this was quite beneficial to a farmer who found himself in bankruptcy. The long-term effect, however, was to deprive

6. For an excellent review of the highlights of the legislation, see *Legislative Update*, 13-NOV AM. BANKR. INST. J. (1994). This review of the bill features a section by section review, with a brief summary of the net effect of each amendment. See also Lawrence P. King, *The Bankruptcy Reform Act of 1994* COLLIER SPECIAL SUPPLEMENT, (1994) (review and commentary on major provisions of 1994 act by Lawrence P. King, editor in chief of COLLIER ON BANKRUPTCY).

7. 11 U.S.C. § 109(e) (1988) (amended 1994).

8. See Roger S. Cox, *Bankruptcy and Creditors' Rights, Annual Survey of Texas Law*, 47 SMU L. REV. 749, 761-63 (1994) [hereinafter Cox, 1994 Annual Survey]. The author reviewed Judge John C. Akard's ruling *In re Davis*, 148 B.R. 473 (Bankr. N.D. Tex. 1992), which was based in part on the Supreme Court's holding in *Owen v. Owen*, 500 U.S. 305 (1991). The Texas Property Code includes "farming or ranching vehicles and implements; . . . tools, equipment, books, and apparatus . . . used in a trade or profession" among the categories of personal property that may be claimed as exempt. See TEX. PROP. CODE ANN. § 42.002(a) (Vernon Supp. 1995).

many farmers of a source of collateralizing a much needed operating loan, because the threat of lien avoidance rendered farm equipment of little or no value for securing a non-purchase money loan.

Congress has apparently attempted to address both perspectives. The amendments have preserved the ability to avoid such a lien; however, lien avoidance is now limited to the first \$5000 in value of the covered property. Specifically, section 522(f) was amended to provide that in a case in which state law permits a person to waive voluntarily a right to claim exemptions and prohibits avoidance of a consensual lien on property otherwise exempt, "the debtor may *not* avoid the fixing of a lien on an interest of the debtor . . . if the lien is a nonpossessory, nonpurchase-money security interest in implements, professional books, or tools of the trade . . . to the extent the value of such implements, professional books, tools of the trade, animals, and crops exceeds \$5,000."⁹

The impact of this amendment on agricultural lenders and debtors is obvious. Rather than be faced with the possibility of avoidance of up to \$60,000 worth of non-possessory, non-purchase money farm equipment liens, the agricultural lender's exposure should now be limited to \$5000. In the long run, this should enhance credit availability for farmers now that a lender's ability to retain a non-purchase money farm equipment lien is greatly enhanced, even in the face of a borrower's bankruptcy filing. For those farmers whose financial situation forces a bankruptcy filing, however, the \$5000 allowance still provides some limited relief.

3. *Small Business Election*

Congress added a so-called "small business" election that can be made by a person engaged in commercial or business activities if that person's aggregate, non-contingent, liquidated debts do not exceed \$2,000,000.¹⁰ This would not apply, however, to a person whose primary activity is the business of owning or operating real property (*but see*, the discussion of single asset cases below). Under this election, the debtor would have the exclusive right to file a plan for 100 days, and all plans would have to be filed within 160 days.¹¹ A court may conditionally approve a disclosure statement, and permit the solicitation of acceptances and rejections of a plan, with the disclosure statement hearing and the confirmation hearing to be combined.¹²

Theoretically, the net effect is that the substantive law would remain somewhat the same, but this would put small business cases on a shorter fuse, resulting in a less expensive and time consuming proceeding. As a practical matter, however, these amendments may provide more opportunity for litigation, expense, and uncertainty. Congress has provided little guidance with respect to numerous unresolved issues. For example: What

9. 11 U.S.C. § 522(f) (1988) (amended 1994) (emphasis added).

10. *Id.* § 101(51C).

11. *Id.* §§ 1121(e) (1)-(2).

12. *Id.* § 1125(f).

happens after the 160 days? What if the disclosure statement is found to be inadequate at the confirmation hearing? How is the small business "election" effected — does it take a motion and order, can a creditor object? These and other issues remain unresolved.

4. *Single Asset Cases*

One troubling issue in Chapter 11 has been the so-called single asset real estate case, typically involving one parcel of real estate, supposedly income-producing in nature, but facing certain foreclosure. In the case of a "single asset real estate" bankruptcy, the new bill allows for relief from the automatic stay, unless a plan (that has a reasonable possibility of being confirmed) is filed within ninety days, or the debtor has commenced monthly payments to each secured creditor in an amount equal to "interest at a current fair market rate on the value of the creditor's interest in the real interest."¹³ The theory behind this is to avoid the filing of a Chapter 11 on the eve of foreclosure, only to be followed by four to six months of unreasonable delay in a case that has no expectation of reorganization. This was a major issue in many of the larger cities during the last downturn in real estate.

5. *Federal Exemptions Increased*

The so-called "federal exemptions" found in the Bankruptcy Code have been doubled.¹⁴ These exemptions have been of limited consequence in Texas, because the vast majority of Texas debtors choose to rely on the Texas exemption laws. Debtors should be utilizing the federal exemption laws more often now that the limits have increased.

6. *Higher Trustee Fees Authorized*

Chapter 7 trustees will now be compensated based upon monies disbursed at the rate of 25% on the first \$5000 or less, 10% from \$5000 to \$50,000, and 5% from \$50,000 to \$1,000,000, with fees of 3% for amounts in excess of \$1,000,000. This should have the positive side effect of trustees more actively administering smaller Chapter 7 cases. In the past, with the trustee's fee essentially capped at 3%, it was unrealistic for a trustee to administer cases with less than \$10,000 in unencumbered assets, and in many cases, trustees had been abandoning property of an even greater value back to a debtor, rather than incur the time and expense necessary in administering property. Now, trustees should have a greater incentive to administer even smaller cases. Following that logic, one would also assume that avoidance actions may be more aggressively pursued as well.

13. *Id.* § 362(d)(3)(B).

14. *Id.* § 522(d). For example, the real property limitation has been increased to \$15,000, with aggregate household furnishings, wearing apparel, etc., now set at \$8000. The wild card amount is now \$800 per item and \$7500 aggregate. These and other dollar amounts are now subject to periodic inflation adjustments. *Id.* § 104 (3-year adjustments based on the Consumer Price Index).

7. Expedited Hearing on Automatic Stay

Section 362(e) is amended to provide that the final hearing on termination of the automatic stay will now be "concluded" instead of "commenced" not less than thirty days after conclusion of the preliminary hearing. The thirty-day period may now be extended with the consent of the parties or for a specific time that the court finds is required by compelling circumstances.¹⁵

8. Reaffirmation

Section 525 has been clarified to provide that a separate hearing is not mandatory for reaffirmation of an indebtedness when the debtor is adequately represented by counsel. The amendment adds safeguards, however, to ensure that a debtor's reaffirmation is knowing and voluntary.¹⁶

9. Status Conferences; Case Progress

Numerous sections were amended to provide that the court or a party-in-interest may request a status conference and issuance of an order to facilitate expeditious handling of a case. This includes setting a date for filing a disclosure statement and plan, soliciting acceptance of a plan, and combining the disclosure statement hearing and confirmation hearings.¹⁷ Additionally, implementation of three member bankruptcy appellate panels in all circuits is now provided, subject to certain exceptions.¹⁸

10. Other Issues

There are numerous other issues covered in the new legislation. Some topics of interest include the following: limitation on preference liability of non-insider transferees,¹⁹ perfection of purchase money security interest,²⁰ rejection of unexpired leases of real property,²¹ seller's right of reclamation,²² oil and gas production payments,²³ protection of post-petition rents and hotels/motels revenues,²⁴ limitation on modifying residential

15. *Id.* § 362(e).

16. *Id.* § 524(c).

17. *Id.* § 105.

18. *Id.* § 158(b) (1988) (amended 1994).

19. 11 U.S.C. §§ 547(b) and 550 (1988) (amended 1994). The amendment is intended to overrule the holding in *Deprizio*. *Levit v. Ingersoll Rand Fin. Corp.* (In re *Deprizio*), 874 F.2d 1186 (7th Cir. 1989). The amendment provides that if a transfer is made between 90 days and one year pre-petition, the transfer is avoidable as a preferential transfer, and was made for the benefit of a creditor who was an insider; the trustee may no longer recover from the non-insider.

20. 11 U.S.C. § 547 (1988) (amended 1994); TEX. BUS. & COM. CODE ANN. § 9.301(b) (Vernon Supp. 1995). The amendment provides consistency with 20-day grace periods found in most state versions of the UCC.

21. 11 U.S.C. § 365 (1988) (amended 1994). The amendment provides additional protection for lessees faced with rejection of an unexpired lease by a debtor/lessor.

22. *Id.* § 546. The amendment extends the 10-day time period for affecting reclamation to 20 days.

23. *Id.* §§ 101(42A), (56A), and 541(b)(4)(B).

24. *Id.* § 552(b) and 363(a).

mortgages under Chapter 11,²⁵ non-dischargeability of credit card payments for federal taxes,²⁶ curing of defaults on mortgages secured by principal residences,²⁷ child support and alimony non-dischargeability,²⁸ jury trials,²⁹ security interests in aircraft equipment and vessels,³⁰ security interests in rolling stock,³¹ and more substantial bankruptcy crime legislation.³²

Finally, Congress authorized the creation of a nine-member bankruptcy review commission, which may take up to two years to investigate and study bankruptcy problems and make formal recommendations on needed reforms. Three members of the commission will be appointed by the President, four by Congress, and two by the Chief Justice.

B. UNITED STATES SUPREME COURT

1. *Fraudulent Transfers — Foreclosure Sales*

In its only significant bankruptcy decision issued during this Survey period, the Supreme Court in *BFP v. Resolution Trust Corp.*³³ addressed the issue of reasonable equivalent value in the context of a mortgage foreclosure sale. BFP, the debtor, filed bankruptcy after taking title to a home subject to a deed of trust in favor of Imperial Savings Association. Imperial foreclosed, and the home was purchased by a third party after a properly noticed foreclosure sale. After filing bankruptcy, BFP filed a complaint to set aside the sale to Osborne as a fraudulent transfer, claiming that the home was worth nearly twice the sales proceeds obtained at the foreclosure.

The complaint was filed under section 548 of the Bankruptcy Code, which permits avoidance of fraudulent transfers, including involuntary or constructively fraudulent transfers. Essentially, section 548 permits avoidance

if the trustee can establish (1) that the debtor had an interest in property; (2) that a transfer of that interest occurred within one year of the filing of the bankruptcy petition; (3) that the debtor was insolvent at the time of the transfer or became insolvent as a result thereof; and (4) that the debtor received "less than a reasonably equivalent value in exchange for such transfer."³⁴

25. *Id.* § 1123(b)(5). Modification of a mortgage covering only the debtor's principal residence is now barred. Under *Nobelman v. American Sav. Bank*, 113 S. Ct. 2106 (1993), it would now appear that the entire debt is treated as secured and bifurcation of the claim would not be permitted.

26. 11 U.S.C. § 523(a)(14) (1988) (amended 1994).

27. *Id.* § 1322(c).

28. *Id.* §§ 101(12A), 362(b)(2), 507(a)(7), 522(f)(1)(A), 523(5), and 547(c)(7).

29. 28 U.S.C. § 157(e) (1988) (amended 1994). (Jury trials may be conducted by bankruptcy courts in certain situations, with the consent of all parties.)

30. 11 U.S.C. § 1110 (1988) (amended 1994).

31. *Id.* § 1168.

32. 18 U.S.C. §§ 152-154.

33. 114 S. Ct. 1757 (1994).

34. *BFP*, 114 S. Ct. at 1760 (citing 11 U.S.C. § 548(a)(2)(A) (1988)).

In *BFP* the Court addressed the last of those four issues (reasonably equivalent value), on which courts of appeal had previously been divided.³⁵ Texas practitioners are perhaps most familiar with the Fifth Circuit's holding in *Durrett v. Washington National Insurance Co.*,³⁶ where the court held that a foreclosure sale yielding fifty-seven percent (50%) of the property's fair market value could be set aside, indicating in dicta that any sale for less than seventy percent (70%) of fair market value should be invalidated.³⁷ This resulted in the development of the so-called "*Durrett Rule*," which has been applied by other courts applying section 548 of the Bankruptcy Code.³⁸

After a detailed analysis of the development of the law of fraudulent transfers and the comparison of the *Durrett Rule* with opinions issued by the courts,³⁹ the Supreme Court held "that a fair and proper price, or a 'reasonably equivalent value,' for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with."⁴⁰ Therefore, *Durrett* has effectively been overruled,⁴¹ and the Supreme Court has "abandoned any tie to the use of fair market value when analyzing validly-conducted mortgage foreclosure sales under § 548(a)(2)(A)."⁴²

The Court noted, however, that its opinion did not render section 548(a)(2)(A) ineffective, because the reasonably equivalent value criteria will continue to have some meaning outside the foreclosure context. Additionally, section 548 may continue to be a means of invalidating foreclosure sales, such as those that are conducted with intent to hinder, delay, or defraud creditors.⁴³

35. Compare, *Durrett v. Washington Nat'l Ins. Co.*, 621 F.2d 201, 203 (5th Cir. 1980) with *Matter of Bundles*, 856 F.2d 815, 820 (7th Cir. 1988) and *Lawyers Title Ins. Corp. v. Madrid (In re Madrid)*, 21 B.R. 424 (Bankr. 9th Cir. 1982), *aff'd on other grounds*, 725 F.2d 1197 (9th Cir.), *cert. denied*, 469 U.S. 833 (1984). "Most circuits addressing the issue have employed a case-by-case approach, considering all of the relevant facts." *Gutierrez v. Lomas Mortgage (In re Gutierrez)*, 160 B.R. 788, 791 n.6 (Bankr. W.D. Tex. 1993) (citing numerous circuit level decisions).

36. 621 F.2d 201 (5th Cir. 1980).

37. *Id.* at 203-04.

38. See, e.g., *In re Littleton*, 888 F.2d 90, 92 n.5 (11th Cir. 1989); *Willis v. Borg-Warner Acceptance Corp. (In re Willis)*, 48 B.R. 295, 300-01 (S.D. Tex. 1985); but cf. *Gutierrez*, 160 B.R. at 791 (Decisions after *Durrett* indicate "that the Fifth Circuit has not adopted a mechanical, one factor analysis in the determination of reasonably equivalent value.").

39. The Court noted that it could not find another case prior to *Durrett* where a court "had ever applied the 'grossly inadequate price' badge of fraud under fraudulent transfer law to set aside a foreclosure sale." *BFP*, 114 S. Ct. at 1764.

40. *Id.* at 1765. At least one circuit other than the Ninth Circuit had previously reached the same conclusion. See *Matter of Winshall Settlor's Trust*, 758 F.2d 1136, 1139 (6th Cir. 1985).

41. *Id.* at 1761. See generally ENDING THE THREAT OF "DURRETT," 212 N.Y.L.J. 5 (1994). See also *In re McGrath*, 170 B.R. 78 (Bankr. D. N.J. 1994) (applying *BFP* to a tax foreclosure sale).

42. *In re T.F. Stone Companies*, 170 B.R. 884, 891 (Bankr. N.D. Tex. 1994).

43. *BFP*, 114 S. Ct. at 1765.

The Supreme Court emphasized that its opinion was limited to mortgage foreclosures of real estate.⁴⁴ One Texas bankruptcy court has, however, applied the *BFP* rationale to a tax foreclosure. Chief Judge Robert McGuire ruled in *In re T.F. Stone Companies, Inc.*⁴⁵ that the price obtained at a non-collusive tax foreclosure sale meets the "present fair equivalent value" standard of section 549(c) of the Bankruptcy Code, which deals with post petition transactions.⁴⁶

Again realizing that *BFP* was issued in the context of fraudulent conveyances, the fact is that the United States Supreme Court has stated unequivocally that the price obtained at a nonclusive foreclosure sale conclusively establishes reasonably equivalent value. This raises the question of whether and to what extent the Texas Property Code provisions⁴⁷ regarding possible credit for fair market value following a foreclosure sale are affected by the Supreme Court's holding. In other words, could *BFP* be applied in deficiency litigation in opposition to a borrower seeking to establish a fair market value greater than the actual sales price? That remains to be seen.

2. Absolute Priority Rule — New Value Exception

In what could have been a significant case regarding the longstanding issue of whether and to what extent a new value exception to the absolute priority rule exists, the United States Supreme Court in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*⁴⁸ refused to vacate the Ninth Circuit holding in *In re Bonner Mall Partnership*.⁴⁹ In *Bonner Mall* the Ninth Circuit described the new value exception as allowing "the shareholders of a corporation in bankruptcy to obtain an interest in the reorganized debtor in exchange for new capital contributions over the objections of a class of creditors that has not received full payment on its claims."⁵⁰ The Ninth Circuit held that a plan relying on that new value exception should be confirmed. Certiorari was granted by the Supreme Court; however, the parties agreed to a consensual plan while the matter was pending. The Supreme Court refused, however, to vacate the ruling of the Ninth Circuit; the net effect of which was to leave the Ninth Circuit's acknowledgment of the new value exception standing, while expressing no view whatsoever on the issue.⁵¹

44. *Id.* at 1761 n.3.

45. *In re T.F. Stone Companies*, 170 B.R. 884 (Bankr. N.D. Tex. 1994).

46. *Id.* at 892. See also *In re McGrath*, 170 B.R. 78 (Bankr. D. N.J. 1994) (applying *BFP* to a tax foreclosure sale); see also 11 U.S.C. § 549 (1988).

47. See discussion *infra* Part III.B.2 - Deficiencies.

48. 115 S. Ct. 386 (1994).

49. 2 F.3d 899 (9th Cir. 1993), *aff'd by*, 115 S. Ct. 386 (1994).

50. *Id.* at 901.

51. *Bonner Mall*, 115 S. Ct. at 389 n.1. In *In re Greystone III Joint Venture*, the Fifth Circuit's original opinion indicated that the Fifth Circuit did not recognize a new value exception; on rehearing, however, that portion of the opinion was withdrawn. See *Phoenix Mutual Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture)*, 995 F.2d 1274 (5th Cir.), *cert. denied*, 113 S. Ct. 72 (1992). In her dissent on rehearing,

C. SELECTED BANKRUPTCY CASES — FIFTH CIRCUIT AND BELOW

1. Collateral Valuation in Reorganization Proceedings

Perhaps the most significant decision of the Fifth Circuit in terms of its practical application to most Texas bankruptcies is found in *In re Rash*.⁵² In *Rash*, a Chapter 13 debtor's plan was challenged as inequitable because of what the creditor claimed was an under-valuation of its collateral for purposes of treatment in the debtor's Chapter 13 plan. The Fifth Circuit held that the debtor was required to use "retail value" for purposes of valuation of an undersecured creditor's secured claim.⁵³

Because of the practical importance of this case, some review of the facts and the court's analysis is in order. In 1989, Rash purchased a commercial truck at a retail value of \$73,700. Three years later, Rash filed for protection under Chapter 13 of the Bankruptcy Code. In his plan, Rash proposed that the creditor, Associates Commercial Corporation (ACC), retain its lien and be paid what amounted to \$28,500 plus interest at nine percent (9%) per annum. At a hearing in bankruptcy court, ACC's expert testified that the market value of the truck was \$41,000, based upon what the expert stated was "what an individual, average individual off the street' would pay for the truck"⁵⁴ Rash's expert testified, however, that the market value should be determined by a wholesale valuation, which he stated was \$31,875. There was no dispute regarding the retail value of the truck; rather, the experts disagreed as to whether a retail or wholesale valuation should be used. The bankruptcy court confirmed the plan, adopting the measurement offered by Rash's expert.⁵⁵

The Fifth Circuit reversed, however, basing its holding on its interpretation of section 506 of the Bankruptcy Code.⁵⁶ As it has in the past, the Fifth Circuit attempted to determine the plain meaning of the statute.⁵⁷

The Fifth Circuit noted the two different approaches taken to valuation. The first being the so-called "foreclosure approach," which was fol-

however, Judge Edith Jones reiterated her view that there is no new value exception in the Bankruptcy Code. *Id.* at 1285.

52. *Associates Commercial Corp. v. Rash* (Matter of Rash), 31 F.3d 325 (5th Cir. 1994).

53. *Id.* at 331.

54. *Id.* at 328.

55. *Id.*

56. Section 506(a) provides in pertinent part:

An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property

11 U.S.C. § 506(a) (1988).

57. *Matter of Rash*, 31 F.3d at 328 (citing *Patterson v. Shumate*, 112 S. Ct. 2242, 2246 (1992)).

lowed by the lower courts in *Rash*.⁵⁸ Relying on the second sentence of section 506(a), the Fifth Circuit determined that the more appropriate valuation is based upon the *purpose* of the valuation and the *proposed disposition or use* of the collateral. The court referred to this as the "replacement model" of valuation.⁵⁹ The court made the following observation: "Under this 'replacement model,' the 'value of the lien should be based on the retail value of the collateral since such is the replacement value to the debtor; and the costs associated with sale of the collateral should not be deducted since no sale is contemplated.'"⁶⁰

The court continued, "[w]e agree that the replacement cost approach is the only one that gives full effect to the language of § 506(a)."⁶¹ When considering the purpose of the valuation and the proposed disposition or use of property by the debtor, the "replacement value accounts for the debtor's proposed use of the property, whereas foreclosure value does not."⁶²

The court was also concerned with avoiding what would amount to a windfall for the debtor. In essence, under the foreclosure approach, a debtor could purchase an item at retail, then utilize the bankruptcy process to "knock-down the secured creditor's interest to wholesale value, then turn around and resell the collateral at retail blue-book value and pocket the difference."⁶³ The Fifth Circuit emphasized that its efforts are focused upon preserving the party's original bargain wherever possible, so that bankruptcy is not used "to generate a windfall for one party or the other."⁶⁴ The court concluded as follows: "Thus, retail value is the proper measurement for purposes of determining an undersecured creditor's allowed amount of a secured claim under § 506(a). Both wholesale valuation and techniques that average wholesale and retail values undercompensate the secured creditor and provide an invalid windfall to the debtor."⁶⁵

The *Rash* opinion was issued in the context of a Chapter 13 case, and it dealt with valuation of a motor vehicle. Nowhere in the opinion, however, does it appear that the court's reasoning is limited to Chapter 13 cases or, for that matter, to motor vehicles. Therefore, it is logical to conclude that in the context of collateral valuation, the replacement model or retail valuation should apply to most situations arising in cases under Chapters 11, 12, or 13. What is not yet known, however, is whether and to what extent this valuation should apply to valuation of items

58. See *In re Rash*, 149 B.R. 430, 433 (Bankr. E.D. Tex. 1993), *rev'd*, 3 F.3d 325 (5th Cir. 1994).

59. *Matter of Rash*, 31 F.3d at 329.

60. *Id.* (quoting *In re Green*, 151 B.R. 501, 504 (Bankr. D. Minn. 1993)).

61. *Id.* at 329.

62. *Id.*

63. *Id.* at 330.

64. *Id.*

65. *Id.* at 331 (citation omitted). As is apparent from the quote, the court disapproved of the compromise approach taken by many bankruptcy courts. See, e.g., *In re Carlan*, 157 B.R. 324 (Bankr. S.D. Tex. 1993).

claimed as exempt in schedules filed in non-Chapter 7 cases filed by individuals. Given the breadth of the court's rationale, one can conclude that because the exemption claim contemplates continued use by the debtor (especially in a non-Chapter 7 case), the same logic should apply.

2. Dischargeability

a. Maintenance, Alimony, and Support

As stated elsewhere in this article, Congress has reinforced the nondischargeability of certain obligations arising out of marriage dissolution. In two opinions issued during the Survey period, the Fifth Circuit was consistent with this approach, reiterating that obligations in the nature of maintenance, alimony, and support are nondischargeable.

First, in *Matter of Joseph*⁶⁶ the Fifth Circuit held that a debtor's obligation to pay his ex-wife's attorneys' fees arising out of a divorce proceeding are nondischargeable. Specifically, the debtor's ex-wife's former lawyer intervened in a divorce proceeding, seeking a joint and several judgment against his former client and the debtor. The divorce court ultimately rendered a judgment against both the debtor and his ex-wife for the lawyer's fees. The husband then filed a voluntary petition under Chapter 7. The Fifth Circuit reasoned that the attorneys' fee award would be nondischargeable if the award reflects a balancing of the parties' respective financial needs. Upon considering the disparity in earning power, relative business opportunities, and other factors, the court concluded that the attorneys' fee award was nondischargeable.⁶⁷

Subsequently, the Fifth Circuit held in *In re Dennis*⁶⁸ that the debtor's obligation to pay taxes on his ex-wife's interest in the debtor's retirement benefits was in the nature of a nondischargeable support award. The Fifth Circuit so held, despite the fact that the non-debtor spouse had successfully argued in state court that the agreement to pay taxes was part of the property division and was not in the nature of support or alimony. The Fifth Circuit held that collateral estoppel was not applicable, because there was no state court finding or evidence that the parties or the state court designed the settlement agreement and consent decree with federal bankruptcy standards in mind. The court held that the dischargeability issue was strictly a matter of federal bankruptcy law and not state law. The court then relied on its earlier ruling in *Joseph* and found that the tax obligation was nondischargeable.⁶⁹

66. *Joseph v. J. Huey O'Toole, P.C.*, 16 F.3d 86 (5th Cir. 1994).

67. See also *In re Meadows*, 75 B.R. 695 (Bankr. N.D. Tex. 1987). "[A]n obligation to pay attorneys' fees is so intertwined with the support obligation as to be in the nature of alimony or support and excepted from discharge." *Id.* at 699.

68. *Dennis v. Dennis (Matter of Dennis)*, 25 F.3d 274 (5th Cir. 1994), cert. denied, 115 S. Ct. 732 (1995).

69. *Id.* at 279.

3. Avoidance of Judicial Liens on Homestead Property

a. Abstracts of Judgment

In *In re Henderson*⁷⁰ the Fifth Circuit addressed the issue of whether debtors may avoid a abstract of judgment lien against their homestead. The court allowed the debtors to avoid the lien based upon the Fifth Circuit's interpretation of Texas law regarding the affect of judgment abstracts on a debtor's homestead.

In *Henderson* the debtors filed for relief under Chapter 7 of the Bankruptcy Code. Although they were denied their discharge under section 727 of the Bankruptcy Code, the debtors moved to avoid a lien against their homestead evidenced by an abstract of judgment. The debtors' motion was filed pursuant to section 522(f)(1) of the Bankruptcy Code.⁷¹ Under section 522, a debtor may avoid a lien on exempt property if the debtor shows: "(1) that the lien is a judicial lien; (2) that the lien is *fixed against an interest* of the debtor in property; and (3) that the lien *impairs an exemption* to which the debtor would otherwise be entitled."⁷²

The court continued, "We believe that the plain language of § 522(f)(1) allows a debtor to avoid a lien only when the judicial lien fastens a liability to *and* impairs the debtor's exempt property."⁷³ Therefore, the court had to determine whether an abstract of judgment "fixes" a lien against a homestead and whether such a lien "impairs" the debtor's exemption under section 522(f). The court relied on state law to determine the first issue. The court noted that numerous Texas cases have stated that an abstract of judgment never attaches to a homestead so long as the affected property retains its homestead character.⁷⁴ The court recognized that it is possible to conclude that a judicial lien in Texas does not fasten a liability on the homestead; however, "homestead property is exempt from the *enforcement* of a judicial lien."⁷⁵ In other words, the homestead is not actually exempt from the lien itself. Rather, the homestead is exempt from any seizure attempting to enforce the perfected lien. Therefore, the court held, the judicial lien did "fix" a liability against the debtor's homestead.⁷⁶

70. *Henderson v. Belknap* (Matter of *Henderson*), 18 F.3d 1305 (5th Cir. 1994).

71. Section 522(f)(1) of the Bankruptcy Code provides:

Notwithstanding any waiver of exemptions, . . . the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is . . . a judicial lien . . .

11 U.S.C. § 522(f)(1) (1988).

72. *Henderson*, 18 F.3d at 1308 (emphasis added).

73. *Id.*

74. *Id.* See, e.g., *Hoffman v. Love*, 494 S.W.2d 591 (Tex. Civ. App.—Dallas), *writ ref'd n.r.e. per curiam*, 499 S.W.2d 295 (Tex. 1973). "[A] judgment, though duly abstracted, never fixes a lien on the homestead so long as it remains homestead." *Id.* at 593-94.

75. *Henderson*, 18 F.3d at 1309.

76. *Id.* at 1309. See *Exocet, Inc. v. Cordes*, 815 S.W.2d 350 (Tex. App.—Austin 1991, no writ). "The debtor's homestead is not exempt from the perfected lien; rather, the homestead is exempt from any seizure attempting to *enforce* the perfected lien." *Id.* at 352.

The court next moved to the second issue of whether the lien "impairs" a debtor's exemption, which was a question of federal law. The court recognized that there was not really a legal impairment as such, but in reviewing one Texas case, the court noted the practical effect of an abstract of judgment when an individual attempts to sell his or her homestead. The Fifth Circuit used *Tarrant Bank v. Miller*⁷⁷ as an example of a debtor who could not obtain title insurance for the purchaser of his homestead due to an abstract of judgment.⁷⁸ Based upon the *Miller* example, the Fifth Circuit concluded that the "unenforceable" lien in fact created a cloud on the debtors' title to their homestead, "making it difficult if not impossible to obtain title insurance . . ."⁷⁹ Therefore, the Fifth Circuit concluded that the judicial lien impaired the debtor's homestead and affirmed the district court's ruling that the lien should be avoided.⁸⁰

As a practical matter, most judgments obtained against individuals are abstracted, resulting in the very situation presented by the *Henderson* and *Miller* cases discussed above. Both of these cases are required reading for both creditors' and debtors' counsel. From the perspective of a creditor, *Tarrant Bank* is instructive regarding the risk and benefit of refusing to issue a partial release when a judgment debtor is attempting to sell a homestead. From the debtor's perspective, however, it is important not to overlook an opportunity to avoid a judicial lien when appropriate.

b. "Equitable" Liens

In *Matter of Parrish*⁸¹ the Fifth Circuit affirmed the avoidance of an equitable lien imposed by a Texas divorce decree. The lien was held avoidable as a judgment lien under section 522(f), which allows a debtor to avoid the fixing of a judicial lien on property made exempt as homestead.⁸² As the *Parrish* court noted, relying on *Farrey v. Sanderfoot*,⁸³ the protection of section 522(f) is limited to the extent that a debtor cannot avoid a lien on an interest acquired after the lien attached. The court noted that Mr. Parrish acquired the property in question through inheritance as his separate property prior to the fixing of the lien. Therefore, the divorce decree did not create a new property interest, which made the case distinguishable from *Sanderfoot*.⁸⁴

77. 833 S.W.2d 666 (Tex. App.—Eastland 1992, writ denied).

78. In *Tarrant Bank*, the state court concluded that the lien could cast a cloud on the defendant's title. The creditor had been requested to grant a partial release in order to allow the debtors to sell their homestead, which the creditor refused. Because of that refusal, the title company refused to issue an owner's title policy, and the debtors were unable to complete the sale of their home. The state court concluded there was a justiciable controversy in the subsequent suit against the creditor for slander of title. *Id.* at 668.

79. *Henderson*, 18 F.3d at 1310.

80. *Id.* at 1310-11.

81. 7 F.3d 76 (5th Cir. 1993).

82. *Id.* at 77. See 11 U.S.C. § 522(f)(1) (1988).

83. 500 U.S. 291 (1991).

84. "Since Parrish's interest existed before the divorce and continued unaltered afterwards, we find that the lien attaching to that property was avoidable under section 522." *Parrish*, 7 F.3d at 78.

One example of the application of these principles is found in Judge Sharp's treatment of the issue in *In re Buffington*.⁸⁵ In that case, Judge Sharp granted the debtor's motion for lien avoidance to the extent of the debtor's one-half interest in his homestead that was vested prior to his divorce. As to the one-half interest the debtor acquired from his ex-wife in the divorce proceedings, the court denied the motion and granted the ex-wife relief from the automatic stay to foreclose her lien. Effectively, the court noted that the conveyance of the wife's one-half community interest to the husband and the granting of the lien were simultaneous. Therefore, lien avoidance as to that one-half interest was not applicable.⁸⁶

4. *Automatic Stay Following Repossession and Before Disposition of Collateral*

What happens if a bankruptcy is filed and a secured party or possessory lien claimant is in possession of collateral that has not yet been sold or otherwise disposed of? This issue presents the classic struggle between the very broad protections provided debtors by the automatic stay of section 362⁸⁷ and the right of a secured creditor for adequate protection for its interest in an item of collateral.⁸⁸ There is no textbook answer to this question; however, three bankruptcy court cases arising during the Survey period are illustrative of the continuing struggle, providing some guidance for parties found in this no man's land.

Two cases⁸⁹ dealt with possessory liens under the Texas Property Code.⁹⁰ In both of those situations, the courts balanced the debtor's protection under section 362 and the need for an item of property such as a vehicle on the one hand, and the requirement that a secured creditor be provided with adequate protection on the other. In both of those cases, adequate protection was apparently a prerequisite to affording the debtor turnover relief. In one case, the court simply refused to grant turnover relief because of the possessory nature of the lien claim and the fact that the debtor had not even proposed a scheme of adequate protection.⁹¹ In the other case, which also dealt with a possessory lien, the court granted turnover relief to the debtor; the turnover relief, however, was condi-

85. 167 B.R. 833 (Bankr. E.D. Tex. 1994).

86. *Id.* at 836-37.

87. Section 362 of the Bankruptcy Code stays nearly all actions to enforce a debt owed by a bankruptcy debtor, effective immediately upon the filing of the case. 11 U.S.C. § 362(a) (1988).

88. Section 361 provides for adequate protection of a secured party's interest in property. *Id.* § 361. See also *id.* §§ 362, 363.

89. See *In re Deiss*, 166 B.R. 92 (Bankr. S.D. Tex. 1994); *In re Crowe*, 160 B.R. 299 (Bankr. N.D. Tex. 1993).

90. Chapter 70 of the Texas Property Code provides liens for persons who provide labor, materials, or other items or services. These include a worker's lien for one who works on a motor vehicle, a stablekeepers lien, and an aircraft repairs and maintenance lien. TEX. PROP. CODE ANN. §§ 70.001-70.306 (Vernon 1984 & Supp. 1995).

91. *Crowe*, 160 B.R. at 301-02.

tioned on a fairly complex mechanism for providing adequate protection.⁹²

Before assuming that a secured creditor may always condition return of the collateral upon adequate protection, one need only read *In re Coats*⁹³ for an example of the risk involved when a secured creditor in this position refuses to turn over property that may be subject to the automatic stay. *Coats* involved a county constable attempting to enforce a judgment held by a private party. After levying upon certain personal property, the constable was notified of the debtors' subsequent bankruptcy filing. As a result of the constable's refusal to surrender the property back to the debtors, the court held that the constable had committed a willful violation of section 362 and awarded the debtors a substantial judgment for actual damages and attorneys' fees.⁹⁴

If a conclusion can be drawn from these three cases, it would be that courts seem reluctant to deprive a possessory lien holder of its lien position if surrendering the property without adequate protection operates to deprive the lien claimant of its lien.⁹⁵ On the other hand, the situation involving the constable is indicative of the risks ones faces when possibly violating the automatic stay. The cautious secured creditor whose lien is perfected by means other than possession would be better served in deferring to the provisions of section 362 and surrendering the collateral.

5. *Durrett Rule*

As discussed above, the United States Supreme Court has effectively invalidated the so-called "*Durrett Rule*."⁹⁶ One Texas bankruptcy court opinion, however, is worthy of review, if for no other reason than as a study of the nature of the *Durrett Rule* and a blind application thereof. In *In re Gutierrez*⁹⁷ Judge King, in a harbinger of things to come from the United States Supreme Court, urged that the Fifth Circuit did not adopt "a mechanical, one factor analysis"⁹⁸ in the determination of reasonably equivalent value in the context of a foreclosure sale. While *BFP* is clearly the law of the land, *Gutierrez* provides a thorough analysis of the *Durrett Rule* and its shortcomings and is another indication of why the Supreme Court ruled as it did in *BFP*.⁹⁹

92. *Deiss*, 166 B.R. at 94.

93. 168 B.R. 159 (Bankr. S.D. Tex. 1993).

94. The court denied relief under § 525 (bankruptcy-related discrimination) and 42 U.S.C. § 1983 (1988) (civil rights violations) finding instead that § 362 provided the appropriate relief. *Coats*, 160 B.R. at 163-167. The court refused, however, to grant the constable immunity under § 362. *Id.* at 167-68.

95. Most of the Chapter 70 liens are possessory in nature and relinquishment of possessions may destroy the lien.

96. *See BFP v. RTC*, 114 S. Ct. 1757 (1994). *See supra* notes 33-47.

97. 160 B.R. 788 (Bankr. W.D. Tex. 1993).

98. *Id.* at 791.

99. *See id.* at 790-92.

6. *Property of the Estate — Disclaimers as Transfers*

In *Matter of Simpson*¹⁰⁰ the Fifth Circuit held that a debtor's disclaimer of a testamentary disposition by his father one day prior to his bankruptcy filing was not a fraudulent transfer.¹⁰¹ Quite simply, the court referred to state law concepts that the effect of a disclaimer is that property passes as if the recipient had predeceased the testator; the net effect of which is that the beneficiary (in this case, the debtor) never received any property interest.¹⁰² This opinion effectively overrules Judge Clark's analysis and holding in *In re Brajkovic*,¹⁰³ which was reported in last year's Survey issue.¹⁰⁴ The holding in *Simpson* is consistent with Texas common law on this issue.¹⁰⁵

7. *Property of the Estate — Beneficial Interest in Family Trust*

In *In re Shurley*¹⁰⁶ Bankruptcy Judge Ronald King provides an extensive analysis of the effect of a partially self-settled family trust and whether and to what extent the debtor's beneficial interest constitutes property of the bankruptcy estate. In *Shurley* one of the debtors participated in the settling of a family trust, contributing a 10,000 acre ranch and certain mineral properties (in addition to substantial other property contributed by other family members). The debtor and her sister became equal lifetime income beneficiaries of the trust with special powers of appointment. The trust contained both spendthrift and discretionary language. The court provided a detailed analysis of the concepts of spendthrift and discretionary trusts, both of which were present in the family trust at issue in *Shurley*, which the court called a discretionary spendthrift trust.¹⁰⁷

100. *Simpson v. Penner*, 36 F.3d 450 (5th Cir. 1994). This opinion was actually issued after the expiration of the Survey period. Because *Simpson* effectively overrules a case that was reported in the last Survey issue, this case is nevertheless reported in this Survey period.

101. The Texas Probate Code allows the recipient of a bequest for inheritance to disclaim the whole or any part of such property, i.e. decline to accept, provided the disclaimer complies with statutory requirements and is executed within the time allowed by the statute. TEX. PROB. CODE ANN. § 37(A) (Vernon Supp. 1995). An effective disclaimer is effective as of the date of death of the decedent and relates back. *Id.* "The effect of the relation back doctrine is that a beneficiary never gains possession of disclaimed property." *Simpson*, 36 F.3d at 452.

102. *Id.*

103. 151 B.R. 402 (Bankr. W.D. Tex. 1993).

104. Cox, 1994 *Annual Survey*, *supra* note 8, at 760.

105. See *Dyer v. Eckols*, 808 S.W.2d 531, 534-35 (Tex. App.—Houston [14th Dist.] 1991, writ dismissed by agreement) (distinguishing ability to disclaim from general power of appointment; applying "relation back" doctrine to hold that a disclaimer is not a transfer in the context of the state Fraudulent Transfer Act). See generally Sara L. Johnson, Annotation, *Creditor's Right to Prevent Debtor's Renunciation of Benefit Under Will or Debtor's Election to Take Under Will*, 39 A.L.R. 4th 633 (1985).

106. *Texas Commerce Bank-San Angelo, N.A. v. Shurley (In re Shurley)*, 171 B.R. 769 (Bankr. W.D. Tex. 1994).

107. *Id.* at 780; see also *Wilson v. United States (In re Wilson)*, 140 B.R. 400, 404-06 (Bankr. N.D. Tex. 1992).

Because the debtor was a settlor of the trust, the spendthrift and discretionary provisions of the trust did not protect her interests, and the court held that her entire beneficial interest in the trust constituted property of her bankruptcy estate.¹⁰⁸ The self-settling nature of the trust was dispositive; however, the court went on to write that the debtor retained sufficient dominion and control over the trust assets to defeat the otherwise protective character of the trust. The court noted that the debtors were regularly able to obtain unrestricted distributions and loans of corpus, and that the debtors represented Mrs. Shurley's beneficial interest in the trust as an asset for purposes of various financial statements submitted to creditors. The court's observations are important for purposes of analyzing family trusts and similar interests set up by individuals. Finally, because the trustee had discretion to distribute to the beneficiaries (including Mrs. Shurley) not only property that had been settled or contributed by them, but what amounted to the entire beneficial interest, then that entire interest was available as property of the estate.¹⁰⁹

8. Miscellaneous

Obviously, space does not permit a review of all bankruptcy-related developments; however, a number of other opinions deal with issues that are of interest. Among those (in no particular order) are: unsecured or unnotified creditors,¹¹⁰ collateral estoppel,¹¹¹ interest on secured claims,¹¹² modification of home mortgage,¹¹³ who bears the cost of Chapter 13 trustee's fees,¹¹⁴ bank setoff,¹¹⁵ non-residential leases,¹¹⁶ other executory contracts,¹¹⁷ administrative priority for post-petition rents before

108. *Shurley*, 171 B.R. at 780-82. "No Texas case has required anything other than self-settling to defeat a protective trust." *Id.* at 782 (citing *Daniels v. Pecan Valley Ranch, Inc.*, 831 S.W.2d 372, 378 (Tex. App.—San Antonio 1992, writ denied), *cert. denied*, 113 S. Ct. 2944 (1993)).

109. *Id.* at 785-86. The court did recognize the limited special power of appointment in the favor of the debtor as excluded from the estate under section 541(b)(1) of the Bankruptcy Code. Because Mrs. Shurley had no property left to appoint, any exercise of that special power was rendered meaningless. *Id.* at 787.

110. *Matter of Smith*, 21 F.3d 660 (5th Cir. 1994) (creditor listed in schedule but not on mailing matrix; added to mailing matrix three years after filing - held nondischargeable); *Matter of Stone*, 10 F.3d 285 (5th Cir. 1994) (allowing amendment of schedules to include unintentionally omitted creditors if no prejudice shown).

111. *Sheerin v. Davis (Matter of Davis)*, 3 F.3d 113 (5th Cir. 1993) (state court judgment finding that debtor acted willfully and in a breach of fiduciary duty).

112. *In re Collins*, 167 B.R. 842 (Bankr. E.D. Tex. 1994) (extensive analysis by Judge Sharp regarding appropriate interest rate to be used in Chapter 13).

113. *In re Sauls*, 161 B.R. 794 (Bankr. S.D. Tex. 1993) (interest on home mortgage arrearage must be paid at contract rate).

114. *In re Turner*, 168 B.R. 882 (Bankr. W.D. Tex. 1994) (Chapter 13 trustee's fees should not reduce amount of secured claim).

115. *In re Appel*, 166 B.R. 624 (Bankr. S.D. Tex. 1994) (cashier's check still in bank's possession).

116. *Compare In re CompuAdd Corp.*, 166 B.R. 862 (Bankr. W.D. Tex. 1994) with *In re Mr. Gatti's, Inc.*, 164 B.R. 929 (Bankr. W.D. Tex. 1994).

117. *Eastover Bank for Sav. v. Sowashee Venture (Matter of Austin Dev. Co.)*, 19 F.3d 1077 (5th Cir.) (effect of rejection of lease), *cert. denied*, 115 S. Ct. 201 (1994); *In re Von Keisler*, 166 B.R. 620 (Bankr. N.D. Tex. 1994) (contract for deed).

and after rejection,¹¹⁸ exempt nature of annuities,¹¹⁹ federal preemption of state exemption laws,¹²⁰ property of the estate (campaign funds),¹²¹ and constructive trusts.¹²²

II. HOMESTEADS AND EXEMPTIONS

A. HOMESTEADS

1. General

As usual, Texas bankruptcy courts were a source of analysis of the nature and extent of the homestead exemption found in the Texas Property Code and Texas Constitution.¹²³ Disputes regarding a debtor's assertion of a homestead claim are sometimes quite fact intensive. In that regard, the fact situations in two cases merit review for purposes of illustrating some of the factual issues with which courts must deal in order to determine the validity of a homestead claim.

In *In re McCain*¹²⁴ a judgment creditor objected to a Chapter 7 debtor's rural homestead. The debtor and her husband collectively owned a 5.056 acre tract in the middle of a 28 acre platted development. The debtor and her family moved onto the property in December of 1984; however, both prior and subsequent to that time, a number of lots were sold from the platted development surrounding the five acre tract. In 1987, debtor and her husband executed and recorded a written designation of homestead, designating the five acre tract as their homestead. The development property was apparently platted, subdivided, and provided with road access in 1977; however, the actual subdivision plat was approved and accepted in February 1990. In 1992, the First National Bank of Linden, Texas obtained a judgment against the debtor, which was abstracted in May 1992.

A month later, the debtor filed for relief under Chapter 7. She claimed a exemption for seventy-one acres of property which was not specifically described in her schedules. The bank objected to the exemption. For purposes of ruling on the objection, the court determined that the debtor was claiming the five acre tract in addition to all remaining unsold lots in the developed land. The court found that the debtor had conclusively

118. *In re Johnston, Inc.*, 164 B.R. 551 (Bankr. E.D. Tex. 1994).

119. *Waldon v. McGinnes* (Matter of Waldon), 12 F.3d 445 (5th Cir. 1994) (annuity purchased by employer in settlement of litigation held exempt).

120. *First Gibraltar Bank, FSB v. Morales*, 19 F.3d 1032 (5th Cir.), *cert. denied*, 115 S. Ct. 204 (1994).

121. *In re Denton*, 169 B.R. 608, 612 (Bankr. W.D. Tex.) (state representative's campaign funds held property of the estate), *aff'd by*, 169 B.R. 612 (W.D. Tex. 1994).

122. *In re Haber Oil Co., Inc.*, 12 F.3d 426 (5th Cir. 1994).

123. As Professors Warren and Westbrook point out, for those practicing north of the border, it is reassuring to know that a riding lawn mower is not "furniture" in Oklahoma and therefore not exempt. See *In re Hall*, 169 B.R. 732 (Bankr. N.D. Okla. 1994). See generally, Elizabeth Warren and Jay Westbrook, *Recent Developments, in UNIV. TEX. BANKRUPTCY CONF.* (1994).

124. 160 B.R. 933 (Bankr. E.D. Tex. 1993). This opinion actually pre-dated the Survey period; however, it was reported after the submission deadline of the previous Survey.

established her entitlement to the five acre tract as her homestead. The real issue, however, was the status of the development property. The court held that the debtor was not entitled to claim a homestead interest in the development property, notwithstanding the cutting of timber and use of the unsold portions of land for hunting.¹²⁵

The court relied on *Matter of Bradley*¹²⁶ in noting that the debtor did exactly what the debtor in *Bradley* did, which was to purchase an undivided interest in a portion of development property and used that portion of the property as her rural homestead. As to the remainder of the development property, however, there was no change in the ownership regime or the character or use of the property, except that the debtor "may have been on the property more frequently since she moved in much closer proximity when her home was completed on the 5.056 acre tract."¹²⁷ Therefore, the debtor's actions did not support a change in intent or usage that was indicated in *Bradley*. The court also disregarded the fact that the debtor owned an undivided interest in the property. The undivided nature of an ownership interest is not a factor in considering a debtor's homestead claim, and should not hinder it.¹²⁸ Apparently, the fact that the development property had been platted and subdivided was not directly determinative of the homestead issue. The disposition of the other lots, however, was an issue that led the court to believe that the rest of the developed property had not become the debtor's homestead. Thus, the court allowed the debtor a 5.056 acre rural homestead, but disallowed the homestead interest as to the remaining development property.

A case out of the Northern District of Texas is also instructive on many issues that can arise out of a homestead claim. In *In re Julian*¹²⁹ the debtor acquired adjoining tracts known as 744 and 750 E. Jefferson Blvd. in Dallas, Texas. He leased that property to other parties until 1974, when he began using 744 E. Jefferson for his used car business. He continued leasing 750 E. Jefferson until 1989, when he added it to his car lot. Meanwhile, in 1969, he had constructed a house in a rural area near Cedar Hill, Texas, where he and his wife lived beginning in 1969.

In 1976, a loan was taken out secured by the two Dallas tracts, during the time he lived in the Cedar Hill residence. Mr. Julian moved out of the Cedar Hill residence in 1981, anticipating a divorce. He moved into an apartment on the 744 E. Jefferson property, and in 1982, following his divorce, Julian added a second story to the 744 E. Jefferson property, which contained 2300 square feet of living space. In 1984, Julian signed a note and deed of trust which were at issue in the instant case. The FDIC became the holder of that note and lien, the proceeds of which were used

125. *Id.* at 940-41.

126. 960 F.2d 502 (5th Cir. 1992).

127. *McCain*, 160 B.R. at 940-41.

128. *Id.* at 941. See *Sayers v. Pyland*, 139 Tex. 57, 161 S.W. 2d 769, 773 (1942).

129. 163 B.R. 478 (Bankr. N.D. Tex. 1994).

to pay off the earlier North Dallas bank note described above. Julian later filed bankruptcy and claimed the 744 E. Jefferson and 750 E. Jefferson properties as his homestead. The bankruptcy court was faced with a determination of the exempt character of both 744 and 750 E. Jefferson. The threshold issue before the court was the validity of the FDIC's lien on 744 E. Jefferson based upon the 1984 deed of trust. The validity of the FDIC's liens, if any, rested upon the court's determination of the validity of the homestead claims.

The court based its ruling on the Fifth Circuit's opinion in *In re Kennard*,¹³⁰ where the court held that "a claimant may establish a homestead by showing both (1) overt acts of homestead usage and (2) intent on the part of the owner to claim the land as a homestead."¹³¹ In *Julian* the overt acts were clearly present, because Julian had moved into the apartment at the 744 E. Jefferson property and began constructing large living quarters shortly thereafter. Under *Kennard*, "investigation of intention need not be made when the land is actually put to homestead uses. Such actual use of the land is the most satisfactory and convincing evidence of intention."¹³² Therefore, because Julian was using the property as his homestead, the court found it unnecessary to investigate his intent.¹³³ The FDIC asserted other claims regarding the debtor's statements about the Cedar Hill property, including prior financial statements and the fact that Julian allowed his ex-wife to remain on the Cedar Hill property until 1991 or 1992. Most significantly, Julian claimed the Cedar Hill property as his homestead in the bankruptcy, along with the car lot and homestead on E. Jefferson in Dallas. The FDIC asserted correctly, however, that the debtor could not claim both an urban and rural homestead,¹³⁴ which was resolved by a timely objection filed by the Chapter 7 trustee. The FDIC argued that Julian continued to claim the Cedar Hill property as homestead for tax purposes. The court discounted that, finding that claiming property as tax purposes is some indication as intent, but it is not conclusive.¹³⁵ Significantly, the court noted that Julian's invalid exemption claim as to the Cedar Hill property evidenced "no lack of intention to claim the East Jefferson property as exempt."¹³⁶

Next, the court addressed the issue of estoppel. Significantly, the FDIC asserted three acts on the part of the debtor on which to base its estoppel claim: a homestead affidavit signed in 1987, financial statements

130. *Kennard v. MBank Waco, N.A. (Matter of Kennard)*, 970 F.2d 1455 (5th Cir. 1992).

131. *Julian*, 163 B.R. at 481.

132. *Kennard*, 970 F.2d at 1459 (citing *Lifemark Corp. v. Merritt*, 655 S.W.2d 310, 314 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.)).

133. *Julian*, 163 B.R. at 481. See also *Napier v. FDIC (In re Napier)*, 144 B.R. 719 (Bankr. W.D. Tex. 1992).

134. See *First Nat'l Bank Mansfield v. Nelson (In re Nelson)*, 134 B.R. 838 (Bankr. N.D. Tex. 1991). One may "not have both a rural residence homestead and an urban business homestead at the same time." *Id.* at 844; see also *Farrington v. First Nat'l Bank*, 753 S.W.2d 248, 251 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

135. *Julian*, 163 B.R. at 482.

136. *Id.*

dated approximately two years prior to the 1984 loan, and a statement in the 1984 deed of trust. The court allowed that under certain circumstances, a homestead claimant's declarations may estop him from claiming a homestead exemption;¹³⁷ however, the court disregarded all three assertions, in part because the affidavit and financial statements were not contemporaneous with the loan. Regarding the statement in the deed of trust, the court noted that it was not conspicuous, nor was there any evidence that the bank relied upon the statement in the deed of trust. This may not have made any difference anyway, because as the court noted, "[a] debtor cannot be estopped by reason of a prior designation or prior disclaimer from asserting homestead rights in land that he continuously and openly lived on and used and occupied as his homestead."¹³⁸

The adjoining tract located at 750 E. Jefferson, however, presented a different outcome. The 750 E. Jefferson property was leased continuously to a third party until 1989, which was two years after the loan was taken out. Although homestead property may be leased to others without abandonment, the lease must be temporary.¹³⁹ Julian's lease of this property was not temporary, but rather "a lease of commercial property to a third party."¹⁴⁰ As the court noted, the fact that the property may have become part of the homestead in 1989 does not destroy the validity of the 1984 lien. Therefore, the court found that the FDIC retained a valid lien on the 750 E. Jefferson property.

Other issues remained. Recall that the loan secured by the FDIC was used, in part, to pay off a prior loan. The FDIC asserted that it was subrogated to the liens securing the prior loan.¹⁴¹ The court reviewed the principles of subrogation found in *Fievel v. Zuber*¹⁴² and reviewed the facts in the instant case. Three documents in evidence included a title company closing statement reflecting the prior note payoff, an affidavit of debts and liens, and a transmittal letter from the title company to the prior lender enclosing the loan proceeds and a release of lien. The court

137. *Id.* at 483. See, e.g., *First Interstate Bank v. Bland*, 810 S.W. 2d 277 (Tex. App.—Fort Worth 1991, no writ); see also *Johnson v. Masterson Irrigation Co.*, 217 S.W.2d 407 (Tex. Civ. App.—Beaumont 1919, writ ref'd).

138. *Julian*, 163 B.R. at 483; see, e.g., *Kennard*, 970 F.2d at 1459; *Patterson v. FDIC*, 918 F.2d 540 (5th Cir. 1990). Perhaps one of the more notorious cases on attempted homestead disclaimers is *Truman v. Deason (In re Niland)*, 825 F.2d 801 (5th Cir. 1987), which involved John Niland, a former offensive lineman for the Dallas Cowboys. Mr. Niland submitted a variety of false and misleading financial information to his lender in order to obtain a lien secured by property he ultimately claimed as his homestead. The Fifth Circuit begrudgingly allowed Mr. Niland's homestead claim, however, not without comment regarding Niland's behavior. (In his special concurrence, Judge Jolly noted the importance of recognizing "the deplorability of the several frauds that [Niland] . . . perpetrated on several people and acknowledge the grave injustice that [was] done . . .") *Id.* at 816. After this analysis, the *Julian* court came back to the simple conclusion that Julian openly and continuously lived on the 744 E. Jefferson property, which supported his homestead claim and invalidated the FDIC's lien. *Julian*, 163 B.R. at 483.

139. *Julian*, 163 B.R. at 483. See *In re Cooper*, 128 B.R. 632, 636 (Bankr. E.D. Tex. 1991).

140. *Julian*, 163 B.R. at 483.

141. *Id.* at 484.

142. 67 Tex. 275, 3 S.W. 273 (1887).

found that the FDIC's lien position was subrogated to that of the prior lender,¹⁴³ based upon what it found was long recognized Texas precedent.¹⁴⁴

The deed of trust did not name a trustee. The acknowledgment on the deed of trust was dated and signed, but it did not recite whose acknowledgment was taken. The note and lien were renewed and extended by a subsequent document, but the copy of that document introduced into evidence did not show an acknowledgment.¹⁴⁵ Failure to name the trustee did not invalidate the deed of trust, but it required the lender to seek judicial foreclosure or alternatively, reformation before a non-judicial sale could be held.¹⁴⁶ The court found the deed of trust binding between the parties, the problem regarding the acknowledgment notwithstanding.¹⁴⁷

Finally, the court addressed the issue of allocation of payments. Most significant to this discussion was the allocation of principal reduction, which the court directed would be applied to satisfaction of the lien against the homestead (although the FDIC lien was invalidated, the prior lien to which it was subrogated was apparently a valid lien). The court further ruled that the FDIC must foreclose on the non-homestead property located at 750 E. Jefferson first and apply all amounts received to satisfaction of the FDIC's note. Only thereafter would it be allowed to foreclose the prior lien against the 744 E. Jefferson property, the lien against which was limited to the principal remaining on the prior subrogated note.¹⁴⁸

2. *Urban Residential Homestead — Multiple Lots*

Judge Akard also faced two other cases involving multiple lots claimed as homestead by debtors. In both of these cases, however, the debtors were attempting to claim two separate residences as homestead. In both cases, the court sustained the trustee's objection to the multiple homestead claims.

First, in *In re Cate*,¹⁴⁹ the debtors owned a house across the street from their residence, in which the debtors' father, mother, and sister resided.

143. *Julian*, 163 B.R. at 485.

144. See *First Nat'l Bank v. Ackerman*, 70 Tex. 315, 8 S.W. 45 (1888); *Sanger Bros. v. Ely & Walker Dry Goods Co.*, 207 S.W. 348, 349 (Tex. Civ. App.—Fort Worth 1918, writ ref'd).

145. *Julian*, 163 B.R. at 485. "Further, it is poorly drafted and the court feels it should not be relied upon."

146. *Id.* at 485-86. See *Kimberly Dev. Corp. v. First State Bank*, 404 S.W.2d 631, 637 (Tex. Civ. App.—Houston [14th Dist.] 1966, writ ref'd n.r.e.).

147. *Julian*, 163 B.R. at 486.

148. *Id.* at 486-87. The court's primary concern was to maximize the protection of the homestead. "Where a lien is secured by both homestead and non-homestead property, the debtor has a right to have the non-homestead property sold first." *Id.* at 487. See also *Burg v. Hitzfeld*, 89 S.W.2d 272, 276-77 (Tex. Civ. App.—San Antonio 1935, writ dismissed) ("[e]very presumption and every fair and reasonable effort should be indulged and exercised to safeguard the homestead").

149. 170 B.R. 582 (Bankr. N.D. Tex. 1994).

The debtor's mother was chronically ill, his sister suffered from cerebral palsy, and his father may have also suffered a disability. At the time of the bankruptcy filing, the mother was deceased, the sister was in a nursing home, and the debtor's eighty-eight year-old father remained in the neighboring house. The debtors' claimed both their residence and the house across the street in which the relatives resided as homestead under state law.

The court noted that the homestead claimant bore the burden of establishing the homestead character of the property and that the claimant had the burden of proof as to every essential fact.¹⁵⁰ The Cates' home and the house occupied by Mr. Cate's father were "both urban in nature, are located on two separate lots divided by a city street, were purchased at separate times, and taken together do not exceed one acre."¹⁵¹ The court obviously struggled with the difficult circumstances facing the debtors; however, the court turned to the often cited phrase of the Austin Court of Civil Appeals that "a man may have two or more residences at the same time, but he cannot have more than one homestead."¹⁵² The court therefore denied the debtors' homestead claim as to the house in which the father resided.¹⁵³

On the heels of *Cate*, the court was faced with a somewhat similar situation in *In re Nerios*.¹⁵⁴ In *Nerios* the debtors purchased the house next door to their existing home. After a few months of renting the house to third parties, various relatives of both debtors lived in the house from 1978 through 1992. During this time, the debtors themselves never lived in the house. In 1992, however, the debtors experienced some marital difficulties, and Mrs. Nerios moved into the second residence. Therefore, at the time of the bankruptcy filing, Mr. Nerios lived in one residence and Mrs. Nerios, her sister, and her sister's son lived in the other. The debtors' daughter and her child lived in a small house located behind the first house. Mrs. Nerios prepared the meals for the family at the second house. Additionally, Mrs. Nerios' sister and nephew depended upon both debtors for their support, as did the debtors' children.

Citing some of the same authority relied upon in *Cate*, the court concluded that the debtors were not entitled to two homesteads, notwithstanding the fact that their marriage was facilitated by living in the two

150. *Id.* at 583. See *NCNB Texas Nat'l Bank v. Carpenter*, 849 S.W.2d 875 (Tex. App.—Fort Worth 1993, no writ); *Bank of San Antonio v. Renaldo*, 626 S.W.2d 318 (Tex. Civ. App.—Eastland 1981), *rev'd on other grounds*, 630 S.W.2d 638 (Tex. 1982).

151. *Cate*, 170 B.R. at 584.

152. *Id.* See *Wootton v. Jones*, 286 S.W. 680 (Tex. Civ. App.—Austin 1926, writ *dism'd w.o.j.*). As the bankruptcy court noted, however, it may be possible that the purchase of one lot on which two houses are constructed, followed by the occupancy of one, may support a finding that both structures are homesteads. *Cate*, 170 B.R. at 584. See *Tolman v. Overstreet*, 590 S.W.2d 635 (Tex. Civ. App.—Tyler 1979, no writ).

153. "[T]he courts cannot protect that which is not a homestead." *Cate*, 170 B.R. at 585 (quoting *Whiteman v. Burkey*, 115 Tex. 400, 282 S.W. 788 (1926) and *Gann v. Montgomery*, 210 S.W.2d 255, 258 (Tex. Civ. App.—Fort Worth 1948, writ *ref'd n.r.e.*).

154. 171 B.R. 224 (Bankr. N.D. Tex. 1994).

separate houses, even located on adjoining lots. The court again noted that while homestead claims are to be given a liberal construction, courts cannot apply such protection to property that is not a homestead.¹⁵⁵ All of the cases cited by the court refer to the residence or house in singular terms, "implying that the homestead is meant to be comprised of only one residence."¹⁵⁶

3. *Business Homestead — Multiple Lots*

The two cases discussed above regarding residential homesteads notwithstanding, such a limitation may not apply to an urban business homestead. One bankruptcy court opinion during the Survey period points out that the business homestead exemption "may extend to two non-contiguous lots when such lots are used as a place for the operation of the business of the head of a family."¹⁵⁷

4. *Homestead Disclaimers — Estoppel*

No discussion of Texas homestead law would be complete without an update on the ongoing battle arising from homestead disclaimers and affidavits that are executed in an effort to contravene Texas homestead laws. Two cases arising during the Survey period provide a thorough analysis of these issues, with a new twist from *D'Oench Duhme* and FIRREA.

As a general rule, a homestead claimant will not be estopped from asserting a homestead exemption despite the fact that the claimant may have executed disclaimers, loan documents, or even affidavits disclaiming homestead rights in real property in an effort to obtain a loan for purposes other than purchase money, improvements, or taxes.¹⁵⁸ Even when such borrowers have openly misled their lenders by executing such documents, the homestead exemption is allowed even when a "grave injustice" results as was the case in *In re Niland*.¹⁵⁹ Chief Judge Robert McGuire allowed such protection to a borrower who executed one or more homestead affidavits disclaiming certain business property as home-

155. *Id.* at 227.

156. *Id.* at 226.

157. *Hughes v. Team Bank (In re Hughes)*, 172 B.R. 205, 210 (Bankr. N.D. Tex. 1993) (citing *Ford v. Aetna Ins. Co.*, 424 S.W.2d 612, 616 (Tex. 1968)). Both *Hughes* and *Ford* condition the noncontiguous business homestead exemption on both lots being essential to and necessary for the business and "not merely being used in aid of the business." *Hughes*, 172 B.R. at 210. "Lots which are used 'in aid of' the business, but which are not 'essential to and necessary for' the business are not protected." *Id.*; see also *Webb v. Reserve Life Ins. Co. (In re Webb)*, 954 F.2d 1102 (5th Cir. 1992).

158. See generally *Kennard v. MBank Waco (In re Kennard)*, 970 F.2d 1455 (5th Cir. 1992); *Patterson v. FDIC*, 918 F.2d 540 (5th Cir. 1990); *Rubarts v. First Gibraltar Bank (In re Rubarts)*, 896 F.2d 107 (5th Cir. 1990); *Truman v. Deason (In re Niland)*, 825 F.2d 801 (5th Cir. 1987); *In re Howard*, 65 B.R. 498 (Bankr. W.D. Tex. 1986). As discussed at note 138, *supra*, the *Niland* case is perhaps the most well known, given the notoriety of the debtor, a former professional football player.

159. *Truman v. Deason (In re Niland)*, 825 F.2d 801, 816 (5th Cir. 1987) (Jolly, J. specially concurring). See *supra* note 138.

stead.¹⁶⁰ Aside from the fact that some of the funds had already been advanced prior to the disclaimers, the basis of Judge McGuire's ruling, as is the common thread in many of these cases, is that the debtor was in continuing possession of the property in question.¹⁶¹

In that same case, Judge McGuire was faced with the somewhat new twist of whether the plaintiff's homestead claim, in light of his prior misrepresentations, was barred by *D'Oench Duhme* and FIRREA. The court, relying on *Patterson v. FDIC*,¹⁶² held that it did not. Essentially, Judge McGuire ruled that FIRREA was not so broad as to override substantive homestead laws, the argument being that those rights exist independent of any agreement, scheme, or misrepresentation.¹⁶³

The RTC, however, was successful in defeating a homestead claim in *RTC v. Olivarez*,¹⁶⁴ where the defendants had engaged in a simulated sale to their son. Unfortunately for the parents, who were claiming the homestead exemption, they did not have record title to the property at the time the deed of trust lien was created, which deprived them of a homestead claim. In the absence of a valid homestead, the defendants did not even get to the issue of estoppel. The RTC had argued, apparently successfully, that the defendants' reliance on the simulated sale was barred by *D'Oench Duhme* and FIRREA.¹⁶⁵ The *Olivarez* decision points out that the ability of a homestead claimant to disregard all prior actions or misrepresentations is not unlimited. The often cited general rule is that estoppel will be applied when the owners, not occupying the property, are using it in a manner that renders the homestead character dubious; when owners engage in a disguised sale; or when owners represent that existing notes are valid mechanic's lien notes or improvements secured by a properly executed mechanic's lien.¹⁶⁶

As of now, it appears that in appropriate cases, substantive homestead law may still trump *D'Oench Duhme* and FIRREA (assuming the validity of the underlying homestead claim); however, if the debtor is not in possession of the property, there is a sham or disguised sale or transaction, if a mechanic's lien is involved, or if facts or circumstances trigger *D'Oench Duhme* or FIRREA, estoppel and even *D'Oench Duhme*/FIRREA may apply. Unfortunately, what is left unresolved is a balance between protecting homestead claimants (yes, even from themselves) while not en-

160. *Hughes*, 172 B.R. at 212.

161. *Id.*

162. 918 F.2d 540 (5th Cir. 1990).

163. *Id.* at 544-45. See *Hughes*, 172 B.R. at 213.

164. 29 F.3d 201 (5th Cir. 1994).

165. *Id.* at 202-03 (citing *D'Oench Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) and *Templin v. Weisgram*, 867 F.2d 240 (5th Cir. 1989), *cert denied*, 493 U.S. 814 (1989), and 12 U.S.C. § 1823(e) (1988)).

166. See, e.g., *Smith v. United Nat'l Bank-Denton*, 966 F.2d 973, 978 (5th Cir. 1992) (FDIC took real estate lien note and contract in good faith, for value, and without knowledge of fraud and was therefore an innocent third party purchaser that could rely on the validity of the apparent mechanic's lien); *Patterson v. FDIC*, 918 F.2d 540, 547 (5th Cir. 1990).

couraging and effectively validating knowing misrepresentations by debtors that can later be disregarded.¹⁶⁷

B. PERSONAL PROPERTY EXEMPTIONS

1. *Tools of the Trade*

Judge Akard has provided another instructive opinion on the Texas Exemption Statute as it pertains to tools of the trade. In *In re Legg*¹⁶⁸ the court addressed a Chapter 7 trustee's objections to a debtor's exemption claims regarding a front-end loader, Mack truck, radios, a radio tower, and a trailer. The debtor had been engaged in what he called the "fertilizer business" for approximately sixteen years, and he utilized the loader, the radios, and the Mack truck in connection with that business. The court defined the issue as whether it is necessary for property to be claimed as a tool of trade to be particularly adapted to a debtor's business, given that some of the property could be utilized in a variety of other businesses.

The *Legg* opinion traces the development of the statutory exemption for tools of the trade. Some of the more recent amendments added the phrase "equipment" to the exemption and deleted requirements that the tools of the trade be "reasonably necessary for the family."¹⁶⁹ The court acknowledged that it had previously limited this exemption to items "peculiarly adapted to [a] trade or profession."¹⁷⁰ The court concluded, however, that based upon the legislature's "ever-widening and modernizing the Texas exemption laws," the debtor's "fertilizer business" was a trade for exemption purposes. The court allowed the exemption.¹⁷¹

Prior to the bankruptcy amendments discussed above, this opinion had a substantial potential impact to the extent that it broadened the ability to set aside non-possessory, non-purchase money liens in these items. Congress has since limited the lien avoidance provisions of section 522(f) to the first \$5000 in value. *Legg* remains instructive, however, on the broader issue of claiming tools of the trade as exempt under Texas law.

2. *Life Insurance*

As most practitioners know, Chapter 42 of the Texas Property Code contains the personal property exemptions claimed by most debtors seeking relief under the Bankruptcy Code or from a judgment creditor. Typically, this exemption is limited at \$30,000 in aggregate fair market value for a single adult or \$60,000 for a family.¹⁷² Included in the various cate-

167. By the time this Survey is published, the Texas Legislature will likely have revisited the Texas homestead exemptions. Of course, the scope and effect of what legislation is actually passed is not yet known.

168. 164 B.R. 69 (Bankr. N.D. Tex. 1994).

169. *Id.* at 72.

170. *Id.* See *In re Nash*, 142 B.R. 148, 152 (Bankr. N.D. Tex. 1992).

171. *Legg*, 164 B.R. at 73.

172. See TEX. PROP. CODE ANN. § 42.001(a)(1) (Vernon Supp. 1995).

gories of property that can be claimed as exempt is "the present value of any life insurance policy."¹⁷³ What may not be as widely known, however, is the unlimited exemption of insurance benefits provided under the Texas Insurance Code. This exemption is unlimited in amount and includes "all money or benefits of any kind, including policy proceeds and cash values"¹⁷⁴

What is less than clear is whether and to what extent there is a conflict or inconsistency between the two Code provisions. On the one hand, the Texas Property Code exemption statute contains the monetary limitations described above, while the Insurance Code contains no such limitations, and in fact is expressly "unlimited." At least three bankruptcy courts struggled with this issue during the Survey period, reaching somewhat inconsistent results. While it is logical to assume that by the time of publication of this article, the Texas Legislature or the Fifth Circuit may have addressed this issue, the decisions of the three bankruptcy courts are noteworthy.

Two cases issued virtually back to back dealt with the most basic issue presented by the potential conflict: whether and to what extent a claim under the Insurance Code counts against the monetary limitations in the Property Code. Both courts recognized the unlimited nature of the exemption provided by the Insurance Code; however, they reached different results with respect to the impact of that exemption on the limitations found in the Texas Property Code.

In *In re Shurley*¹⁷⁵ Judge King found that the unlimited exemption under the Insurance Code was not subject to the limitations imposed by Chapter 42 of the Property Code. In overruling the trustee's objections to exemptions, the court allowed the insurance exemption without includ-

173. The specific provision includes the following: "The present value of any life insurance policy to the extent that a member of the family of the insured or a dependent of a single insured adult claiming the exemption is a beneficiary of the policy." *Id.* § 42.002(a)(12).

174. TEX. INS. CODE ANN., art. 21.22, § 1 (Vernon Supp. 1995). The Insurance Code provides as follows:

Notwithstanding any provision of this code other than this article, all money or benefits of any kind, including policy proceeds and cash values, to be paid or rendered to the insured or any beneficiary under any policy of insurance or annuity contract issued by a life, health, or accident insurance company . . . or under any plan or program of annuities and benefits in use by any employer or individual, shall: (1) inure exclusively to the benefit of the person for whose use and benefit the insurance or annuity is designated in the policy or contract; (2) be fully exempt from execution, attachment, garnishment or other process; (3) be fully exempt from being seized, taken or appropriated or applied by any legal or equitable process or operation of law to pay any debt or liability of the insured or of any beneficiary, either before or after said money or benefits is or are paid or rendered; and (4) be fully exempt from all demands in any bankruptcy proceeding of the insured or beneficiary.

Id.

175. 163 B.R. 286 (Bankr. W.D. Tex. 1993).

ing it in the \$60,000 limitation.¹⁷⁶ Approximately three weeks later, Judge Akard of the Northern District reached a somewhat different conclusion. In *In re Bowes*¹⁷⁷ the debtors sought to exempt both personal property worth approximately \$57,000 and life insurance with a cash value of approximately \$77,000. The court noted that the 1991 Texas Legislature amended both statutes and could have deleted the reference to insurance policy cash values from the Property Code, which it did not do. The court allowed the debtors to claim the full \$77,000 insurance cash value under the Insurance Code; most notably, however, the court found that the insurance exemption claim exhausted the \$60,000 allowed under the Texas Property Code.¹⁷⁸

Subsequent to both *Shurley* and *Bowes*, Judge Donald Sharp of the Eastern District weighed in with his opinion in *In re Young*.¹⁷⁹ The facts presented to the court were somewhat different and more expansive. In *Young* the debtor claimed as exempt life insurance proceeds accounts totalling nearly \$2,000,000. These insurance proceeds were created as a result of the death of the debtor's husband approximately two and a half years before the debtor's bankruptcy filing. The court, noting the legislative history under the Insurance Code exemption to the effect that one purpose of that statute was to protect surviving spouses and children, found that the entire insurance proceeds were exempt.¹⁸⁰ Moreover, the court further held that the insurance proceeds, once paid, did not evolve into non-exempt cash.¹⁸¹ The court took a somewhat different approach to the Property Code — Insurance Code conflict regarding the cash surrender value of a policy on the life of the debtor. The *Young* court found that the debtor could not have claimed the cash surrender value on the policies in question, given the lack of "family" status for this debtor. Thus, the court was able to distinguish *Bowes*, because the debtor would not have been entitled to claim the cash surrender value under the Property Code in any event. The court nevertheless allowed the exemption of the cash surrender value of the policies under the Insurance Code.¹⁸²

Again, all of these courts struggled with statutory construction. By the time this Survey article is published, this problem may have been cured

176. *Id.* at 292-96. The court also overruled the objection to exemptions regarding the debtor's jewelry. That had nothing to do with the insurance exception; however, it is important to note that the court clearly placed the burden regarding valuation on the objecting party, a burden the trustee failed to meet in this case. *Id.* at 289-91.

177. 160 B.R. 290 (Bankr. N.D. Tex. 1993).

178. *Id.* at 293-94.

179. 166 B.R. 854 (Bankr. E.D. Tex. 1994).

180. *Id.* at 858.

181. *Id.*

182. *Id.* at 860-61. In a footnote, Judge Sharp notes that while *Bowes* may have been distinguishable in this situation, he was not necessarily in agreement with Judge Akard's statutory construction. Judge Sharp suggested that the statutory construction aid in § 311.023 of the Texas Government Code, which instructs consideration of the "object sought to be attained" would suggest that the Insurance Code provisions should prevail over anything to the contrary in the Property Code. *Id.* at 861 n.9. See also TEX. GOV'T CODE ANN. § 311.023 (Vernon 1988).

by the Texas Legislature. As of the publication date, however, no such cure had been introduced. From the practitioner's standpoint, however, the importance of all three of these cases is to note the fact that there is an additional exemption under the Texas Insurance Code, which is quite extensive in nature and should not be overlooked.¹⁸³

3. *After Acquired Property*

In *In re Magness*¹⁸⁴ the debtor filed bankruptcy, inherited approximately \$15,000 after the filing (which was included in the bankruptcy estate under section 541 of the Bankruptcy Code), and subsequently amended her exemptions to claim a portion of the inherited money as exempt.¹⁸⁵ The bankruptcy court allowed the amendment, reasoning that the inherited property was "property of the estate," even though it was actually received by the debtor after the bankruptcy filing. Because it was property of the estate, the debtor was allowed to amend her schedules to claim the exemption.¹⁸⁶

4. *Retirement Accounts*

Courts continue to struggle with the exempt nature of various retirement accounts and annuities. One relatively simple example of this struggle is found in *Youngblood v. FDIC*,¹⁸⁷ in which the Fifth Circuit held that funds rolled over from a qualified retirement account into an IRA are exempt. The court simply referred to the Texas Property Code provision allowing "nontaxable rollover contributions . . . as exempt . . ." and deferred to the determination of the Internal Revenue Service that the retirement plan from which the rollover was made was in fact a qualified plan.¹⁸⁸

C. HOMESTEADS AND EXEMPTIONS — WHAT IS A "FAMILY"?

In *United States v. Coffman*¹⁸⁹ the district court affirmed a ruling of the bankruptcy court allowing a widow "family" status under the \$60,000 personal property exemption allowance.¹⁹⁰ The court based its finding upon

183. Similarly, annuities should not be overlooked. See, e.g., *Walden v. McGinneys (In re Walden)*, 12 F.3d 445 (5th Cir. 1994) (annuity purchased by employer in settlement of litigation held exempt).

184. 160 B.R. 294 (Bankr. N.D. Tex. 1993).

185. Section 541 of the Bankruptcy Code includes as property of the estate any property inherited by the debtor within 180 days after the bankruptcy filing, to the extent that property would have been includable in the estate. 11 U.S.C. § 541(a)(5)(A) (1988).

186. *Id.* at 298-99. The Rules of Bankruptcy Procedure allow amendment of schedules as a matter of course at any time before the case is closed. See FED. R. BANKR. PROC. 1009 (1994).

187. *In re Youngblood*, 29 F.3d 225 (5th Cir. 1994).

188. *Id.* at 227-29. "We are persuaded that the legislature intended for its own state courts (or bankruptcy court applying Texas law) to defer to the IRS in determining whether a retirement plan is 'qualified' under the Internal Revenue Code." *Id.* at 229.

189. *In re Coffman*, 163 B.R. 766 (Bankr. N.D. Tex. 1994).

190. The Texas Property Code exempts from garnishment, attachment, execution, or other seizure certain specified property in the aggregate fair market value of \$60,000 for a

similar case law and statutes regarding real property homestead exemptions for surviving spouses. The court relied upon state common law regarding what comprises a family, which the court summarizes as a three-part test: (1) the family relationship is one of social status, rather than of contract; (2) the head of the family must be legally or morally obligated to support at least one other family member; and (3) there must be a corresponding dependence on the other member for this support.¹⁹¹ This finding is consistent with prior authority of the Fifth Circuit where a single grandmother supporting her daughter and granddaughter, both of whom lived with her, was entitled to an entire 200-acre rural homestead.¹⁹²

D. TIMELY OBJECTIONS TO EXEMPTIONS CLAIMED IN BANKRUPTCY

It is worth reiterating that in a bankruptcy proceeding, an objection to a debtor's claim of exemption must be filed within thirty (30) days after the conclusion of the meeting of creditors.¹⁹³ The Fifth Circuit has recently applied this requirement in the context of an amendment to a previously filed schedule or claim of exemptions. In *In re Sadkin*¹⁹⁴ the Fifth Circuit has held that a debtor's amendment of its schedules does not violate an affected creditor's due process if that creditor has actual notice. The thirty-day requirement is again triggered and the exemption will be allowed, even if the claimed exemption is wholly without merit.¹⁹⁵

III. CREDITORS RIGHTS

Due to space limitations and in order to avoid unnecessary redundancy, this article will provide only a limited review of FDIC/RTC matters, real property foreclosure, and Article 9 issues. The FDIC/RTC issues should be covered in the articles on banking law and real property law, and there is some coverage of Article 9 issues in Professor Krahmer's Commercial Transactions article.

family or \$30,000 for a single adult. See TEX. PROP. CODE ANN. §§ 42.001 and 42.002 (Vernon 1984 & Supp. 1995).

191. *Coffman*, 163 B.R. at 768.

192. See *Zielinski v. Hill (In re Hill)*, 972 F.2d 116 (5th Cir. 1992).

193. Bankruptcy Rule 4003(b) provides that "[t]he trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors . . . or the filing of any amendment . . . unless, within such period, further time is granted by the court." FED. R. BANKR. PROC. 4003(b) (1994).

194. *Coie v. Sadkin (In re Sadkin)*, 36 F.3d 473 (5th Cir. 1994).

195. *Id.* at 475-78. Outside the 30-day period, an affected party "cannot contest the exemption . . . whether or not [the debtor] had a colorable statutory base for claiming it." *Taylor v. Freeland & Kronz*, 112 S. Ct. 1644, 1648 (1992). "Deadlines may lead to unwelcome results, but they prompt parties to act and they produce finality." *Id.* at 1648-49.

A. FDIC / RTC

The law applicable to the FDIC and the RTC, especially that arising under *D'Oench Duhme*¹⁹⁶ and FIRREA¹⁹⁷ continues to develop; however, much of that development is beyond the scope of this article. This article will highlight, however, statutes of limitation, missing interest indices, and foreclosure procedure affecting FDIC liens. As mentioned above, much of this development is discussed in the banking law article and to a lesser extent, in the real property article found elsewhere in this issue. One Supreme Court case that is worthy of note, however, is that of *O'Melveny & Myers v. FDIC*,¹⁹⁸ in which Justice Scalia urged a very narrow and limited application of federal common law. The effect of *O'Melveny* is yet to be seen.¹⁹⁹

1. Statutes of Limitation (Six-Year and Four-Year)

In its much anticipated opinion issued in *Jackson v. Thweatt*,²⁰⁰ the Texas Supreme Court followed what has become a substantial majority, including the Fifth Circuit,²⁰¹ in holding that the six-year statute of limitations accorded the FDIC applied equally to its assignees. The opinion was issued in connection with two consolidated cases that had reached opposite results on the issue.²⁰² The court applied the new six-year statute of limitations enacted as part of the Financial Institution Reform, Recovery, and Enforcement Act, commonly known as "FIRREA," which generally provides that the statute of limitations for an action brought by the FDIC is the longer of the six-year period beginning on the date the claim accrues or the period under applicable state law.²⁰³ Determination of the date on which a claim accrues is based upon the later of (i) the date of appointment of the FDIC as conservator or receiver, or (ii) the date on which the cause of action actually accrues.²⁰⁴

The argument was made that the specific references in section 1821 apply only to the FDIC and not to assignees. The court held, however, that the FDIC's successors-in-interest are entitled to those benefits, based on the common law principle that "[a]n assignee stands in the shoes of his

196. See *D'Oench Duhme & Co. v. FDIC*, 315 U.S. 447 (1942).

197. See 12 U.S.C. § 1823 (1988).

198. 114 S. Ct. 2048 (1994).

199. See generally *Resolution Trust Corp. v. Maplewood Invs.*, 31 F.3d 1276, 1292-94 (4th Cir. 1994); see also *FDIC v. Massingill*, 30 F.3d 601, 604 (5th Cir. 1994).

200. 883 S.W.2d 171 (Tex.), cert. denied, 115 S. Ct. 196 (1994).

201. See *FDIC v. Bledsoe*, 989 F.2d 805 (5th Cir. 1993).

202. Compare *Jackson v. Thweatt*, 838 S.W.2d 725 (Tex. App.—Austin), rev'd 883 S.W.2d 171 (Tex. 1993) with *Federal Debt Management, Inc. v. Weatherly*, 842 S.W.2d 774 (Tex. App.—Dallas), rev'd 883 S.W.2d 171 (Tex. 1994).

203. 12 U.S.C. § 1821(d)(14)(A) (1988).

204. *Id.*

assignor."²⁰⁵ This holding is consistent with the substantial majority of previously reported cases.²⁰⁶

The supreme court also noted that the other special powers accorded the FDIC under FIRREA have long applied to assignees of the FDIC.²⁰⁷ The court noted the public policy rationale that, "for assets to be marketable in the hands of the FDIC, its protections must be available to purchasers."²⁰⁸

Finally, the court applied section 1821(d)(14) retroactively, noting that FIRREA did not create an entirely new limitations scheme, but rather, clarified and amended existing law under the general federal statute that had long been in effect.²⁰⁹ Although the court's statement was made in the context of retroactivity, it is also significant in noting the Texas Supreme Court's interpretation that the FIRREA statute did not supersede the prior federal statute of limitations, which includes provisions regarding renewed accrual on payment or written acknowledgment of the debt²¹⁰ and even an unlimited time for establishing title to or possession of property.²¹¹

In *per curiam* opinions, the Texas Supreme Court also reversed two similar cases from the Dallas Court of Appeals, which had previously

205. *Jackson*, 883 S.W.2d at 174 (citing *FDIC v. Bledsoe*, 989 F.2d 805, 810 (5th Cir. 1993)).

206. See, e.g., *Bledsoe*, 989 F.2d at 810; *Davidson v. Mills*, 821 F. Supp. 1176 (W.D. Tex. 1993), *aff'd sub nom. Davidson v. FDIC*, No. 93-8335, 1995 WL 27117 (5th Cir. Jan. 25, 1995); *Mountain States Fin. Resources v. Agrawal*, 777 F. Supp. 1550, 1552 (W.D. Okla. 1991); *The Cadle Co. v. Matheson*, 870 S.W.2d 548, 549 (Tex. App.—Houston [1st Dist.] 1994, writ denied); *Jon Luce Builder, Inc. v. Gibraltar Bank, F.S.B.*, 849 S.W.2d 451, 455 (Tex. App.—Austin 1993, writ denied); *Pineda v. PMI Mortgage Ins. Co.*, 843 S.W.2d 660, 669 (Tex. App.—Corpus Christi 1992), *writ denied per curiam*, 851 S.W.2d 191 (Tex. 1993). See also *Investment Co. of the S.W. v. Reese*, 875 P.2d 1086, 1091 (N.M. 1994); *Central States Resources, Corp. v. First Nat'l Bank in Morrill*, 501 N.W.2d 271, 278 (Neb. 1993), *cert. denied*, 114 S. Ct. 1613 (1994); *Cadle Co. II, Inc. v. Lewis*, 864 P.2d 718 (Kan. 1993). See generally Brian J. Woram, *FIRREA's Statutes of Limitations: Their Availability to Purchasers from the FDIC*, 110 BANKING L.J. 292 (1993); James J. Boteler, Comment, *Protecting the American Taxpayers: Assigning the FDIC's Six Year Statute of Limitations to Third Party Purchasers*, 24 TEX. TECH. L. REV. 1169 (1993).

207. *Jackson*, 883 S.W.2d at 175; see, e.g., *Victor Hotel Corp. v. FCA Mortgage Corp.*, 928 F.2d 1077, 1083 (11th Cir. 1991); *B.L. Nelson & Assoc. v. Sunbelt Sav.*, 733 F. Supp. 1106, 1112 (N.D. Tex. 1990).

208. *Jackson*, 883 S.W.2d at 175.

209. "Retroactive application of section 1821(d)(14) is especially appropriate since it does not create an entirely new limitations scheme, but rather merely clarifies and amends the existing law under 28 U.S.C. § 2415(a)." *Jackson*, 883 S.W.2d at 177.

210. See 28 U.S.C. § 2415(a) (1988) ("[I]n the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment . . .").

211. *Id.* § 2415(c) ("Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property."). "[M]ost courts have interpreted section 1821(d)(14) as well as the predecessor limitations provision in 28 U.S.C. § 2415(a) as extending to purchasers from the FDIC." *Jackson*, 883 S.W.2d at 174 (emphasis added). This is significant because of the other provisions of that statute such as the provisions governing renewal, extension, and/or tolling of limitations, unlimited limitations with respect to interests in property, and other provisions that deal generally with limitations issues. See 28 U.S.C. § 2415 (1988).

held the state four-year statute applicable.²¹² This should resolve all conflicts among the various courts of appeals.

2. *Missing Interest Rate Index*

It has long been a common practice in commercial loan transactions to tie a variable interest rate to an index such as a "prime" rate or "base" rate.²¹³ More specifically, these notes typically provide for an interest rate that is a number of points above the applicable index rate. These index rates are often published internally by the lending institution itself. In the event of a failure, insolvency, or similar proceeding regarding a bank, however, when the bank no longer exists, the index is no longer published and essentially vanishes.

During the Survey period, opinions from the Dallas Court of Appeals and the Fifth Circuit provide some guidance with respect to computation of interest in the absence of such a rate.²¹⁴ At the risk of oversimplification, it is safe to say that in the absence of such a rate, a comparable rate will be provided. The Fifth Circuit joined other federal courts in allowing the substitution of an assuming bank's prime rate for that of the defunct lender,²¹⁵ and the state court held that a "reasonable" rate of interest should be applied.²¹⁶ The state court opinion dealt with a subsequent holder who had purchased the note from the FDIC, and there was no assuming or successor institution. The common thread running through all of the opinions is that the courts will consistently apply "the Texas policy of giving a reasonable construction to a note that avoids usury."²¹⁷ The Texas court, however, leaves open the possibility of a fact issue with respect to what is a "reasonable" rate. Unfortunately, this may provide an unnecessary (and perhaps unintended) impediment to disposition of note cases by summary judgment, contrary to the admonishment of the

212. See *EKA Liquidators v. Phillips*, 883 S.W.2d 178 (Tex. 1994); *Cadle Co. v. Weaver*, 883 S.W.2d 179 (Tex. 1994).

213. Black's Law Dictionary defines prime rate as "the most favorable interest rates charged by a commercial bank on short term loans to its best (i.e. most credit worthy customers)." BLACK'S LAW DICTIONARY 813 (6th ed. 1990). Often, a definition is found in the note itself.

214. See *FDIC v. Massingill*, 24 F.3d 768 (5th Cir. 1994); *Bailey, Vaught, Robertson and Co. v. Remington Invs., Inc.*, No. 05-93-00911-CV, 1994 WL 521911 (Tex. App.—Dallas Sept. 27, 1994).

215. See *Massingill*, 24 F.3d at 780. See also *FDIC v. Blanton*, 918 F.2d 524, 532 (5th Cir. 1990); *FDIC v. Law Rambla Shopping Ctr., Inc.*, 791 F.2d 215, 223 (1st Cir. 1986); *FDIC v. Condo Group Apartments*, 812 F. Supp. 694, 699 (N.D. Tex. 1992); *FDIC v. Cage*, 810 F. Supp. 745, 747 (S.D. Miss. 1993).

216. *Remington Invs.*, 1994 WL 521911, at *5.

217. *Petroscience Corp. v. Hammond Geophysical, Inc.*, 684 S.W.2d 668, 669 (Tex. 1994) (discussing "reasonableness" and interest rates). See also *Blanton*, 918 F.2d at 532 n.8, where the court specifically references what is apparently a usury savings clause in the subject note, which the court found to be the embodiment of "the intent of the parties to comply with the usury laws" *Id.*

federal courts,²¹⁸ where summary judgments are in appropriate circumstances encouraged by the federal courts.²¹⁹

Thus, these opinions have applied a common sense, but potentially incomplete, approach to this situation. Most of the case law seems to be on the right track; however, if state law does not develop either statutorily or through case law beyond the concept of applying a "reasonable" rate, then courts may be left with disposing of unnecessary fact issues in cases that should otherwise be ripe for disposition.²²⁰ One other issue that remains unresolved is whether and to what extent a subsequent holder of a note with a missing index is a holder in due course. The Dallas Court of Appeals says no, even in the case of an FDIC assignee.²²¹

3. *Tax Liens vs. The FDIC*

Another issue that no doubt arises in the context of failed banks is that of ad valorem tax liens against real property collateral. The issue arises in the context of the federal statute providing that no "property" of the FDIC is subject to levy, attachment, garnishment, foreclosure, or sale, without the consent of the FDIC.²²² The Fifth Circuit addressed such a situation on two occasions during the Survey period. The threshold issue facing the FDIC was whether a lien was "property" of the FDIC, which was necessary for the statute to apply. This was easy, however, as it has long been settled federal law that "property" embraces both fee and lien interests.²²³ The court thus held that the taxing entities could not fore-

218. The Fifth Circuit has noted on more than one occasion that summary judgment is particularly appropriate for disposition of suits on promissory notes. *See, e.g.,* Resolution Trust Corp. v. Marshall, 939 F.2d 274, 276 (5th Cir. 1991); FDIC v. Cardinal Oil Well Serv. Co., 837 F.2d 1369, 1371 (5th Cir. 1988) ("Typically, suits on promissory notes provide fit grist for the summary judgment mill.")

219. "In proper circumstances, awarding summary judgment is not disfavored in the federal courts: 'Summary judgment reinforces the purpose of the Rules, to achieve the just, speedy, and inexpensive determination of actions, and, when appropriate, affords a merciful end to litigation that would otherwise be lengthy and expensive.'" FDIC v. Floyd, 854 F. Supp. 449, 450-51 (N.D. Tex. 1994) (citing Fontenot v. Upjohn Co., 780 F.2d 1190, 1197 (5th Cir. 1986)).

220. For instance, the cases cited above have been reluctant to apply the standard 6% rate of interest that is applied under state law in the absence of an agreement, the theory being that when an index rate was used, the parties had reached agreement on a rate. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.03 (Vernon 1987) (In the absence of an agreement, interest accrues at the rate of 6% per annum).

221. *Remington Invs.*, 1994 WL 521911, at *3. The Dallas court, however, has never done any favors for assignees of the FDIC. Recall that the Dallas court remained in the minority on the statute of limitations issue, despite overwhelming authority to the contrary. *See* Federal Debt Management, Inc. v. Weatherly, 842 S.W.2d 774 (Tex. App.—Dallas 1992), *rev'd*, 883 S.W.2d 171 (Tex. 1994), *cert. denied*, 115 S. Ct. 196 (1994) (held that assignee of FDIC did not enjoy benefits of federal 6-year statutes of limitation, contrary to Fifth Circuit and majority of Texas appellate courts). *See also* EKA Liquidators v. Phillips, 883 S.W.2d 178 (Tex. 1994); Cadle Co. v. Weaver, 883 S.W.2d 179 (Tex. 1994), and discussion at note 201, *supra*.

222. 12 U.S.C. § 1825(b)(2) (1988).

223. *Matagorda County v. Law*, 19 F.3d 215, 221 (5th Cir. 1994). According to the Fifth Circuit, the issue was one of federal law. "No basis in law exists for treating mortgage interests of federal instrumentalities differently from other property of the United States."

close their liens absent FDIC consent, even in the face of a "taking" challenge by the taxing entities.²²⁴ This holding was reiterated in a second case²²⁵ issued approximately a month later, which was consistent with *Matagorda County* and also a prior opinion of a Texas court of appeals.²²⁶

Although not directly addressed in either Fifth Circuit opinion, the reiteration that a lien constitutes "property" has other ramifications. For example, in the federal statute of limitations that predates FIRREA, there is a virtually unlimited limitation for enforcing a property interest of the United States.²²⁷ The question then becomes whether a lien is a property interest for purposes of applying this unlimited limitation (which has been answered in the affirmative) and whether and to what extent such an unlimited limitation period applies to an assignee of the FDIC. Given the rather broad statements of both the Fifth Circuit and the Texas Supreme Court in applying the six-year statute of limitations to assignees, one could conclude that it does.²²⁸

B. REAL PROPERTY FORECLOSURE

There were no significant developments with in the law of real property foreclosure in the most recent Survey period to the extent that one defines a significant development as a change in the prevailing law. Three cases, however, are worthy of note from the perspective of some of the more common problems faced by creditors and parties with respect to notice of sale and enforcement of deficiencies after the sale.

1. Notice

In *National Commerce Bank v. Stiehl*²²⁹ the court addressed a situation involving notice of a foreclosure sale to makers of a second note that was the subject of cross collateralization and cross default provisions. In *Stiehl* Mr. and Mrs. Stiehl (the parents) along with their son and daughter-in-law (the Stiehl children) executed a note for \$24,000. The same day and as part of the same transaction, the Stiehl children executed a second note in the amount of \$20,000. Both notes contained cross collateralization and cross default provisions. The Stiehl children subsequently defaulted on the \$20,000 note, which was secured by real estate owned by the Stiehl children under a deed of trust executed only by the

Rust v. Johnson, 597 F.2d 174, 177 (9th Cir.), *cert denied*, 444 U.S. 964 (1979); *see also* Clallam County, Wash. v. United States, 263 U.S. 341 (1923).

224. *Matagorda County*, 19 F.3d at 223-25.

225. *Donna Indep. Sch. Dist. v. Balli*, 21 F.3d 100 (5th Cir. 1994).

226. *See State v. Bankerd*, 838 S.W.2d 639 (Tex. App.—San Antonio 1992, writ denied).

227. *See* 28 U.S.C. § 2415(a) (1988).

228. Both the Texas Supreme Court and the Fifth Circuit have based their prior rulings on the maxim that "an assignee stands in the shoes of his assignor." *See* *FDIC v. Bledsoe*, 989 F.2d 805, 810 (5th Cir. 1993); *Jackson v. Thweatt*, 883 S.W.2d 171, 174 (Tex. 1994). For instance, although 12 U.S.C. § 1823(e) (1988) expressly applies only to the FDIC, its protection has generally been extended to purchasers of assets from the FDIC. *Jackson*, 883 S.W.2d at 175.

229. 866 S.W.2d 706 (Tex. App.—Houston [1st Dist.] 1993, no writ).

Stiehl children. After notice and opportunity to cure, the bank declared the \$20,000 note in default and posted the property for foreclosure. All notices were provided to the children, and they referenced only the \$20,000 note.

After the foreclosure sale, the Stiehl parents defaulted on the \$24,000 note, and filed suit seeking a declaratory judgment relieving them from liability on the \$24,000 note because of the bank's failure to notify them of the foreclosure sale and other actions taken regarding the \$20,000 note. The court of appeals acknowledged that notice requirements under a deed of trust are a prerequisite to the right of the trustee to conduct a sale.²³⁰ Specifically, the holder of the debt is required to serve the "debtor in default under the deed of trust" with the required notices.²³¹ The bank served the Stiehl children (who were the debtors in default under the deed of trust) but not the parents. The court found the notice sufficient, because the only makers of the \$20,000 note were the Stiehl children, the parents did not guarantee or endorse the \$20,000 note, the Stiehl children were the sole grantors under the deed of trust, and the \$24,000 note had not been declared in default. Thus, the court held that the notice requirements had been met, notwithstanding the cross default and cross collateralization provisions in the loan documents.²³²

Similarly, in *Long v. NCNB-Texas National Bank*²³³ the Corpus Christi Court of Appeals held that guarantors of a note secured by realty do not enjoy the right to notice of the foreclosure sale. The *Long* court also concluded that the guarantor lacked standing to contest the validity of a foreclosure sale in the absence of a recognized interest,²³⁴ especially when the guarantor has waived any requirement that the creditor first liquidate collateral.²³⁵ That court's opinion is worthy of note because of its analysis of the interplay among various provisions of Chapter 51 of the Texas Property Code.²³⁶

Whether and to what extent limiting notice like in these two cases is the better practice is another question. One is only left to wonder whether, if the *Stiehl* parents and the *Long* guarantor been notified, the litigation could have been avoided. For example, the *Stiehl* parents may have even been able to provide a solution that would have obviated the

230. *Id.* at 708. See *Houston First Am. Sav. v. Musik*, 650 S.W.2d 764, 768 (Tex. 1983).

231. *Stiehl*, 866 S.W.2d at 708; see TEX. PROP. CODE ANN. § 51.002(d) (Vernon Supp. 1995).

232. *Stiehl*, 866 S.W.2d at 708.

233. 882 S.W.2d 861 (Tex. App.—Corpus Christi 1994, no writ).

234. *Id.* at 867-68 ("Historically, standing to insist upon the note maker's prerogative of personal notice of the foreclosure sale required privity of estate with the note maker.").

235. *Id.* at 870 ("... an explicit disavowal of any interest in the security apparently precludes the rights to object to the manner of the collateral's disposition."). See also *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 223 (Tex. 1992) (right to assert impairment of collateral may be waived in guaranty contract).

236. *Long*, 882 S.W.2d at 865-66. See TEX. PROP. CODE ANN. §§ 51.002, 51.003, and 51.005 (Vernon Supp. 1993).

need for a foreclosure sale. While the courts' rulings were clearly correct, counsel should always err on the side of notice.

2. Deficiencies

In *Lester v. First American Bank*²³⁷ the court addressed the issues arising out of the 1991 amendments to the Texas Property Code that now provide for credit against a deficiency based on the fair market value of property foreclosed. As amended in 1991, the Property Code now provides that a defendant in a suit for a deficiency following a non-judicial foreclosure can request determination of whether and to what extent the property's fair market value at the date of foreclosure exceeded the sales price.²³⁸ If the court determines that the value exceeded the sales price, then the difference between the two amounts is offset against the deficiency.²³⁹ Under *Lester*, those amendments have survived their first constitutional challenge.

In *Lester* the lender relied on two prior Texas Supreme Court cases that had found a similar statute unconstitutional, because it impaired the obligation of contract, thus violating the contract clause of the Texas Constitution.²⁴⁰ Subsequent to the issuance of those two opinions, however, the United States Supreme Court had addressed similar legislative enactments and held that those statutes did not violate the contract clause.²⁴¹ The net effect of those holdings is that statutes such as the one in question do not deprive a mortgagee of its contractual rights. Essentially, allowing a factfinder to make a determination regarding the value of the foreclosed property does not violate that right.²⁴² In *Lester* the court reversed a summary judgment in favor of the mortgagee, however, because there was a material issue of fact regarding the fair market value of the real property.²⁴³

C. OVERDRAFT CHARGES REVISITED

As reported in last year's Survey issue,²⁴⁴ the Houston Court of Appeals, First District, ruled that overdraft charges could constitute usury.

237. 866 S.W.2d 361 (Tex. App.—Waco 1993, writ denied).

238. TEX. PROP. CODE ANN. § 51.003(b) (Vernon 1995). See also *supra* text following note 46.

239. *Lester*, 866 S.W.2d. at 362. See TEX. PROP. CODE ANN. § 51.003(c) (Vernon Supp. 1995).

240. See TEX. CONST. art. I, § 16. The two cases on which the lender relied had held what was then known as the Texas Moratorium Act and the Texas Anti-Deficiency Judgment Law unconstitutional. See *Travelers Ins. Co. v. Marshall*, 124 Tex. 45, 76 S.W.2d 1007 (1934); *Langever v. Miller*, 73 S.W.2d 634 (Tex. Civ. App.—Fort Worth 1934, writ denied).

241. See *Gelfert v. National City Bank of N.Y.*, 313 U.S. 221 (1941); *Honeyman v. Jacobs*, 306 U.S. 539 (1939); *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*, 300 U.S. 124 (1937).

242. "Mortgagees are constitutionally entitled to no more than payment in full. [footnote omitted] They cannot be heard to complain on constitutional grounds if the Legislature takes steps to see to it that they get no more than that." *Gelfert*, 313 U.S. at 233.

243. *Lester*, 866 S.W.2d at 368.

244. Cox, 1994 Annual Survey, *supra* note 8.

Since then, the Supreme Court granted writ of error and reversed on that issue.

In *First Bank v. Tony's Tortilla Factory, Inc.*²⁴⁵ the Texas Supreme Court determined that overdraft charges (referred to in the opinion as "NSF fees") did not fit within the definition of interest, and therefore would not be considered usurious, at least in the context of the case before it. The court first noted the statutory definition of interest as "compensation for the use, forbearance, or detention of money."²⁴⁶ For a transaction to be usurious, "[t]here must be (1) a loan of money; (2) an absolute obligation to repay the principal; and (3) the exaction of a greater compensation than allowed by law for the use of the money by the borrower."²⁴⁷

The court recognized, however, that fees based upon additional charges supported by separate and additional consideration are not considered interest.²⁴⁸ With respect to overdraft charges, the court noted that in the case before it, the fees were assessed as processing fees for the additional work necessary and were charged to all customers in the same amount, regardless of whether a check was paid or rejected. Furthermore, there was no relationship between the amount of the NSF fee and the amount of the funds advanced, if any. The court further noted that whether and to what extent the fees were profitable to the bank does not make the fee usurious. Because the fees were for consideration other than the lending of money, the court held that the fees were not usurious, and it rendered judgment that the plaintiffs take nothing against the bank on the usury claim.²⁴⁹

D. RECOVERY ON LOST NOTE

*Bean v. Bluebonnet Savings Bank FSB*²⁵⁰ does not provide any new developments; however, it is noteworthy as a reminder that a creditor may recover on a lost note, regardless of its status of a "holder." In *Bean* the appellate court affirmed a summary judgment, reiterating that "[t]o recover on a promissory note, the plaintiff must prove: (1) the note in question, (2) the party sued signed the note, (3) the plaintiff is the owner or holder of the note, and (4) a certain balance is due and owing on the note."²⁵¹ The court reiterated the Texas UCC provision that an owner

245. 877 S.W.2d 285 (Tex. 1994).

246. *Id.* at 287. See TEX. REV. CIV. STAT. ANN. art. 5069-1.01(a) (Vernon 1987).

247. *Tony's Tortilla Factory*, 877 S.W.2d at 287. "Usury statutes are penal in nature and should be strictly construed." *Id.*

248. *Id.* See, e.g., *Texas Commerce Bank-Arlington v. Goldring*, 665 S.W.2d 103, 104 (Tex. 1984) (attorneys' fees); *Stedman v. Georgetown Sav. & Loan Ass'n*, 595 S.W.2d 486, 489 (Tex. 1979) (loan commitment fee); *Southland Life Ins. Co. v. Egand*, 126 Tex. 160, 166-67, 86 S.W.2d 722, 724-25 (1935) (prepayment penalty).

249. *Tony's Tortilla Factory*, 877 S.W.2d at 288.

250. 884 S.W.2d 520 (Tex. App.—Dallas 1994, no writ).

251. *Id.* at 522. See also *Cockrell v. Republic Mortgage Ins. Co.*, 817 S.W.2d 106, 111 (Tex. App.—Dallas 1991, no writ); *Sorrells v. Giberson*, 780 S.W.2d 936, 938 (Tex. App.—Austin 1989, writ denied).

may recover on a lost promissory note simply by proving that the note is lost and by proving the terms of the obligation.²⁵² Absent controverting evidence, affidavit testimony together with a true and correct copy of the note proves ownership in the context of a summary judgment.²⁵³ When the note is being enforced by a subsequent holder, the subsequent holder need only provide affidavit testimony to establish transfer of ownership by negotiation or assignment. The net effect of this is that a plaintiff need not be a holder in due course to recover on a lost note. Although this is well established law, judicial resources continue to be wasted in litigating issues pertaining to "holder" and "holder in due course" status, which in the absence of personal defenses to a note often have nothing whatsoever to do with enforcement. In *Bean* the debtor's only argument to the appellate court was that the plaintiff did not prove that it was a holder, a holder in due course, or a federal holder in due course. He did not plead any personal defenses, however, so the holder issues had nothing whatsoever to do with the plaintiff's recovery.²⁵⁴

E. PARTNERS AND PARTNERSHIPS — STATUTES OF LIMITATIONS

Any state practitioner who questions the extent to which bankruptcy courts are involved in development of substantive state law need read no further than *In re Jones*,²⁵⁵ in which the court addressed the question of whether and to what extent limitations runs in an action against general partners in a partnership against which a judgment was already rendered. In *Jones* the bankruptcy court held that following a timely judgment against a general partnership, limitations begin to run against the individual partners only when the judgment against the general partnership becomes final. Apparently, this holding was based upon the entity theory of partnerships under which "it is logical that a partner has no liability until the partnership liability is established."²⁵⁶ The court went on to note that the plaintiff or creditor was not precluded from suing the partnership and the partners at the same time, but failing that, "there is nothing wrong with the partnership being sued and, if its liability is established, a subsequent suit being filed against the partners on their personal liability for the partnership's obligation."²⁵⁷ This holding is consistent with the Fifth Circuit's ruling in a partnership case involving Louisiana law.²⁵⁸

252. *Bean*, 884 S.W.2d at 522. See TEX. BUS. & COM. CODE ANN. § 3.804 (Vernon 1994).

253. *Bean*, 884 S.W.2d at 522. See also *Zarges v. Bevan*, 652 S.W.2d 368, 369 (Tex. 1983).

254. *Bean*, 884 S.W.2d at 523.

255. 161 B.R. 180 (Bankr. N.D. Tex. 1993).

256. *Id.* at 183.

257. *Id.* "Once the liability of the partnership became fixed, the only issue remaining was whether the Defendants are partners of [the partnership]." *Id.* at 184.

258. See *Travelers Ins. Co. v. St. Jude Hosp. of Kenner, La., Inc.*, 37 F.3d 193 (5th Cir. 1994). In this case, a hospital was sued along with a partnership. The hospital was not named, however, in its role as a general partner in the partnership. After a judgment was entered against the partnership, but awarding nothing against the hospital, the plaintiff subsequently sued the hospital based upon its liability as a general partner. The hospital

F. ARTICLE 9 — DISPOSITION OF COLLATERAL — COMMERCIAL REASONABLENESS

Since the Texas Supreme Court issued its opinion in *Greathouse v. Charter National Bank-Southwest*,²⁵⁹ there appears to have been a reduction in the number of reported cases regarding disposition of personal property collateral by a secured creditor after default. This Survey period was no exception. Two federal cases, however, reflect some new twists on commercial reasonableness, and one Texas case is instructive on how not to dispose of collateral and expect to preserve a deficiency.

The first of the two federal cases comes out of the Fifth Circuit in *Steinberg v. Cinema N' Drafthouse Systems, Inc.*,²⁶⁰ where the Fifth Circuit distinguished between the rights of a "debtor" as opposed to a guarantor. More specifically, the court held that a guarantor could waive the otherwise unwaivable provisions of section 9.504,²⁶¹ which requires a secured creditor to dispose of collateral after default in a commercially reasonable manner. The Fifth Circuit acknowledged that four Texas courts of appeals and a panel of the Fifth Circuit had held that a guarantor could not waive prior to default the notice required under section 9.504. Instead, the Fifth Circuit followed reasoning found in an opinion of the First Circuit, which distinguished between protections accorded a debtor (as opposed to a guarantor) by the proscription of waiver being counterbalanced by the "riskier transaction requiring the involvement of a guarantor."²⁶² The net effect is that the Fifth Circuit has held that the guarantor of a secured transaction may waive a right to commercially reasonable disposition of collateral, unlike the debtor, whose ability to waive such a requirement remains limited.

In *Gordon & Associates v. Cullen Bank/CityWest*²⁶³ the Corpus Christi Court of Appeals provides an instructive analysis of the various aspects of commercially reasonable disposition of collateral, notice of public and/or private sale, sales expenses, accountings to debtor, and purchase by secured party (and the restrictions of such purchase at a private sale). While the opinion contains no real development or change in substantive law, it is nevertheless instructive, especially when one considers that the disposition occurred during litigation, presumably with access to counsel

asserted *res judicata*, arguing that the claim should have been brought in the first suit. The Fifth Circuit held that under Louisiana law, the partnership claim was separate and distinct. *Id.* at 196-97.

259. 851 S.W.2d 173 (Tex. 1992).

260. 28 F.3d 23 (5th Cir. 1994).

261. TEX. BUS. & COM. CODE ANN. § 9.504 (Vernon 1991) (addresses a secured party's right to dispose of collateral and also sets certain standards for notice of public and private sales). This non-waiver provision is found in § 9.501(c). See also TEX. BUS. & COM. CODE ANN. § 9.501(c) (Vernon 1991).

262. *Steinberg*, 28 F.3d at 25. The Fifth Circuit cited the First Circuit's reasoning in *United States v. H&S Realty Co.*, 837 F.2d 1, 2-3 (1st Cir. 1987), and analogized the situation faced by the Texas Supreme Court in *FDIC v. Coleman*, 795 S.W.2d 706 (Tex. 1990) (guaranty agreement waived "good faith" provision found in § 1.203 of Texas Business & Commerce Code).

263. 880 S.W.2d 93 (Tex. App.—Corpus Christi 1994, no writ).

and some court oversight.²⁶⁴ One potentially confusing statement is found, however, in a footnote where the court makes the statement that *Greathouse* makes it “abundantly clear that a creditor must *plead* and prove” commercially reasonable disposition.²⁶⁵ While this is not an incorrect statement, the footnote fails to note that a mere allegation to the effect that all conditions precedent have been satisfied may still suffice in the face of a general denial.²⁶⁶

Greathouse and its progeny are instructive, as is Article 9, when it comes to the sale or disposition of collateral. The issue that is not so specifically addressed, however, is what happens when a creditor decides not to sell collateral that it has repossessed. In *FDIC v. Floyd*²⁶⁷ the court concluded that a creditor in possession of corporate stock violated no duty to the debtor when it made the decision not to sell the stock. The court acknowledged that provisions of Article 9 require reasonable care in the preservation of collateral,²⁶⁸ however, none of the duties imposed upon a secured creditor, including the general duty to dispose of collateral in a commercially reasonable manner, imposed an affirmative duty that the creditor must sell the collateral.²⁶⁹ The reader is cautioned, however, that the *Floyd* case involved corporate stock, and it remains to be seen whether this apparent lack of a duty would apply in all situations and to all types of collateral.

IV. CONSUMER CREDIT

A. FAIR DEBT COLLECTION PRACTICES ACT

The saga of whether and to what extent the Fair Debt Collection Practices Act²⁷⁰ applies to lawyers continues; however, there may be an end in sight. The Sixth Circuit has held that the act does not apply to lawyers engaged solely in the practice of law,²⁷¹ stating that to apply the act to all lawyers “would produce absurd outcomes.”²⁷² The Supreme Court has, however, granted certiorari to review a Seventh Circuit decision to the

264. See generally *id.* at 95-98.

265. *Id.* at 98 n.5.

266. See *Greathouse*, 851 S.W.2d at 176-77; see also *Love of God Holiness Temple Church v. Union Standard Ins. Co.*, 860 S.W.2d 179 (Tex. App.—Texarkana 1993, writ denied) (This case did not deal with Article 9; however, it cites *Greathouse* for this proposition).

267. 854 F. Supp. 449 (N.D. Tex. 1994).

268. See TEX. BUS. & COM. CODE ANN. § 9.207 (Vernon 1991) (“[a] secured party must use reasonable care in the custody and preservation of collateral in his possession”).

269. The court distinguished its holding from that in *F.O. Roquemore v. National Commerce Bank*, 837 S.W.2d 212, 216 (Tex. App.—Texarkana 1992, no writ), in which the secured party sold stock after the price of the stock had dropped significantly. The distinguishing fact in *Roquemore* was that the creditor actually sold the collateral, which carried with it the burden of proving the commercial reasonableness of that sale. *Roquemore* found that the creditor had no duty to liquidate the stock and noted the irony that had the creditor not sold the stock, it would have satisfied its collateral preservation duty under § 9.207. See *Roquemore*, 837 S.W.2d at 217.

270. 15 U.S.C. § 1692 (1982).

271. *Green v. Hocking*, 9 F.3d 18 (6th Cir. 1993).

272. *Id.* at 21.

contrary.²⁷³ The Seventh Circuit recognized some of the myriad problems with regulating lawyers in their debt collection efforts; however, the court found that the statute, as amended in 1986, was broad enough to include lawyers in their debt collection activities, including litigation.²⁷⁴ Hopefully, the Supreme Court's review of this decision may provide some guidance in this area so that future "absurd outcomes" foretold by the Sixth Circuit can be avoided.

273. *Jenkins v. Heintz*, 25 F.3d 536 (7th Cir.), *cert. granted*, 115 S. Ct. 416 (1994).

274. *Jenkins*, 25 F.3d at 539.