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Bankruptcy and Creditors' Rights

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BANKRUPTCY AND CREDITORS' RIGHTS

Roger S. Cox*

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I. INTRODUCTION

As in years past, this article will focus primarily on significant developments in Bankruptcy Law and Creditors Rights and Remedies from the perspective of the Texas practitioner. This article is not, however, an exhaustive survey of all bankruptcy developments in the Fifth Circuit or the Texas bankruptcy courts.¹ Rather, in keeping with the Survey's focus on Texas law, this article is limited to significant developments having an impact upon the creditors' rights or debtor/creditor practitioner.²

II. BANKRUPTCY

A. SUPREME COURT

In the bankruptcy case with the most practical significance addressed by the United States Supreme Court during the survey period, the Court was called upon to solve what has become known as "the banker's dilemma," which arises when a depositor/borrower against whom the bank has setoff rights files for bankruptcy relief. In *Citizens Bank v. Strumpf*,³ the Court solved, at least in part, the quandary faced when a banker is placed in the awkward position of having to take steps necessary to protect setoff rights on the one hand, while not violating the automatic stay on the other.

In *Strumpf*, the debtor sought bankruptcy relief at a time when he had a checking account with, and was in default on, the remaining balance of a loan from his bank. After Strumpf's bankruptcy filing, the bank placed what it called an administrative hold on the debtor's account to the extent of the balance the bank claimed was subject to setoff. Five days later

1. For more expansive coverage of bankruptcy developments during the survey period, see Frank W. Koger, *New Case Update*, in *Texas Tech University School of Law 11TH ANNUAL FARM, RANCH AND AGRI-BUSINESS BANKRUPTCY INSTITUTE* (1995); Gerrit M. Pronske, *Recent Developments; Texas Bankruptcy Court, Texas Federal District Court, Fifth Circuit Court of Appeals Bankruptcy Decisions*, 1994 STATE BAR OF TEXAS PROF. DEV. PROGRAM, ADVANCED BUSINESS BANKRUPTCY COURSE, L-1. Similar updates are also provided at the State Bar of Texas Advanced Consumer Bankruptcy Course and at the University of Texas School of Law Bankruptcy Conference. Additionally, the Texas Tech Law Review's Fifth Circuit Symposium typically features an annual update of bankruptcy developments in the Fifth Circuit.

2. If a case or statutory amendment does not meet these criteria, chances are that it is not covered in this article. The author has attempted to limit the focus of this article to issues arising in the enforcement of the debtor/creditor relationship. The reader is urged to review the Survey articles on Banking Law and Commercial Transactions, which address related topics such as usury, failed financial institutions, and Article 9 secured transactions.

3. 116 S. Ct. 286 (1995).

(just over ten days after the petition date), the bank filed a motion for relief from automatic stay and for setoff. In response, Mr. Strumpf filed a motion to hold the bank in contempt, claiming that the administrative hold violated the automatic stay under section 362 of the Bankruptcy Code.⁴ The Supreme Court was faced with striking the balance between the protections provided by section 362's automatic stay⁵ and the Bankruptcy Code's express recognition of setoff found in section 553(a).⁶

At the outset, the Court determined that the action taken by the bank was not a setoff because the bank refused to pay its debt to the debtor/depositor "not permanently and absolutely, but only while it sought relief under [section] 362(d) from the automatic stay."⁷ Essentially, the Court found that to disallow an action such as that taken by the bank in *Strumpf*, would render the Bankruptcy Code's recognition of setoff rights meaningless.⁸ In other words, to require the bank to pay immediately its deposit that was clearly subject to a right of setoff would effectively "divest the creditor of the very thing that supports the right of setoff."⁹

Under *Strumpf*, when a bank is in a position where it enjoys a matured right of setoff against a debtor/depositor's account, it should now take comfort in the fact that it can freeze the account pending further disposition by the Court. The prudent lender, however, should seek the most prompt and expeditious relief possible, not only so that it can achieve the setoff, but so it can bring the matter to the Court's attention as soon as possible.¹⁰

The reader is cautioned, however, that the *Strumpf* opinion does not address the situation that may arise when there is not a matured right to setoff at the time of the bankruptcy filing. In *Strumpf*, the opinion indicates that Mr. Strumpf was already in default, so it appears that Strumpf's bank was already in a position with a matured setoff right. In such a context, it may be presumptuous to read *Strumpf* for more that it allows:

4. *Id.* at 288.

5. Section 362 of the Bankruptcy Code stays most acts or actions that can be taken against a debtor under the Bankruptcy Code. *See* 11 U.S.C. § 362 (1994).

6. Section 553(a) provides in pertinent part:

a) Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case

11 U.S.C. § 553(a) (1994) (subject to certain exceptions set forth in section 553).

7. *Strumpf*, 116 S. Ct. at 289. The court held that "setoff has not occurred until three steps have been taken: (i) a decision to effectuate a setoff, (ii) some action accomplishing the setoff, and (iii) a recording of the setoff." *Id.* The Court further noted, however, that the question of whether a setoff occurred under Section 362 (a)(7) is a matter of federal law. *Id.*

8. *Id.* at 289.

9. *Id.* at 289.

10. The *Strumpf* opinion states that exercising an administrative freeze "was neither a taking of possession of respondent's property nor an exercising of control over it, but merely a refusal to perform its promise." *Id.* at 290. Nevertheless, because the lender is dealing with estate property, the matter should be brought to the court's attention as soon as possible, preferably by the lender.

"[t]he temporary refusal of a creditor to pay a debt *that is subject to setoff* against a debt owed by the bankrupt."¹¹ Although the logic of *Strumpf* is very clear, any prudent lender, or for that matter any party who claims a right of setoff, needs to be sure that the right exists before taking steps to exercise such rights.

The Supreme Court has issued at least two other opinions that are noteworthy in the context of this article. Those opinions, one of which deals with bankruptcy court jurisdiction, and the other with the Fair Debt Collection Practices Act,¹² are discussed below under the respective subject headings.

B. JURISDICTION

1. Supreme Court

In *Celotex Corp. v. Edwards*¹³, the Supreme Court addressed the issue of "related to" jurisdiction. In *Celotex*, the plaintiffs had recovered a judgment against Celotex, which was stayed, pending appeal by way of a supersedeas bond posted by Celotex. After the Fifth Circuit affirmed the judgment, Celotex filed for Chapter 11 bankruptcy protection in another district. That bankruptcy court issued an injunction that prohibited judgment creditors from proceeding against sureties without the bankruptcy court's permission. The plaintiffs filed a motion under Federal Rule 65.1¹⁴ seeking permission to execute on the bond. The district court granted the motion, which was affirmed by the Fifth Circuit. The *Celotex* bankruptcy court, however, issued what is commonly called a section 105 injunction, staying all proceedings regarding Celotex,¹⁵ which included actions against the sureties superseding the judgments against Celotex. The Supreme Court noted that the jurisdiction of the bankruptcy courts, like other federal courts, "is grounded in and limited by statute."¹⁶ Specifically, district courts have original but not exclusive jurisdiction of bankruptcy proceedings, including those "related to cases under title 11."¹⁷ The district courts may, in turn, refer bankruptcy proceedings to the bankruptcy judges for a particular district.¹⁸ In *Celotex*, the bankruptcy court's jurisdiction to enjoin the proceeding against the debtor's surety was "based on the 'arising under,' 'arising in' or 'related to' language of [sections] 1334(b) and 157(a)."¹⁹ The Court found that the

11. *Id.* at 290 (emphasis added).

12. 15 U.S.C.A. §§ 1692-1692(o) (West 1988 & Supp. V.).

13. 115 S. Ct. 1493 (1995).

14. Rule 65.1 governs proceedings against sureties on supersedeas bonds. See FED. R. CIV. P. 65.1 (West 1987).

15. *Celotex Corp.*, 115 S.Ct. at 1496. Section 105 of the Bankruptcy Code provides bankruptcy courts with broad equitable powers to issue appropriate injunctive relief. See 11 U.S.C.A. § 105(a) (West 1994) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.").

16. *Celotex Corp.*, 115 S.Ct. at 1498.

17. 28 U.S.C. § 1334(b) (1990).

18. *Id.* § 157(a).

19. *Celotex Corp.* 115 S. Ct. at 1498.

bankruptcy court had jurisdiction to stay the actions against the superseas surety because of the extent to which multiple actions against the sureties would have a direct and potentially harmful effect on any prospects the debtor might have for a reorganization.²⁰ The Supreme Court found, therefore, that the bankruptcy court had jurisdiction to issue a section 105 injunction, noting on the one hand that “[c]ongress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate”²¹ while cautioning that a bankruptcy court’s “related to” jurisdiction cannot be limitless.²²

Celotex is a useful example of where a bankruptcy court can exercise “related to” jurisdiction. But whether and to what extent “related to” jurisdiction can be exercised when the effect or impact on the bankruptcy estate is minimal or non-existent remains to be seen. Perhaps most telling about *Celotex*, however, is its admonition that “whatever test is used, . . . bankruptcy courts have no jurisdiction over proceedings that have no effect on the debtor.”²³ In a number of circuit level opinions that have been issued since *Celotex*, it is apparent that the appellate courts are taking an ever more restrictive view in allowing bankruptcy courts to exercise “related to” jurisdiction unless a direct nexus can be shown.²⁴

*U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*²⁵ was another case with jurisdictional implications. Substantively, the issue pending before the Supreme Court was whether and to what extent a new value exception to the absolute priority rule exists in the context of Chapter 11 Plan Confirmation. While *certiorari* was pending, the parties agreed to a consensual plan of reorganization.²⁶ The Supreme Court, however, refused the secured lender’s request that the Court vacate the judgment of the Court of Appeals. The Court determined that the settlement rendered the pending appeal moot, and it refused to grant the secured lender

20. The Supreme Court quoted the bankruptcy court, which found that the settlement of these insurance coverage disputes “may well be the linchpin of Debtor’s formulation of a feasible plan. Absent the confirmation of a feasible plan, Debtor may be liquidated or cease to exist after a carrion feast by the victors in a race to the courthouse.” *Id.* at 1500 (citing *In re Celotex Corp.*, (Celotex II) 140 B.R. 912, 915 (Bankr. M.D. Fla. 1992)).

21. *Celotex Corp.*, 115 S. Ct. at 1499 (citing *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3rd Cir. 1984)).

22. *Id.* (citing *Board of Governors v. MCorp. Fin.*, 502 U.S. 32, 40 (1991) (Congress has vested “limited authority” in bankruptcy courts.))

23. *Id.* at 1499 n.6 (discussing various circuit level opinions addressing “related to” jurisdiction).

24. See, e.g., *Specialty Mills Inc. v. Citizens State Bank*, 51 F.3d 770, 774 (8th Cir. 1995) (“For subject matter jurisdiction to exist in a ‘related to’ action, there must be some nexus between the civil proceeding and the Title 11 case.” In a footnote, the *Celotex Corp.* opinion provides a good analysis of the historical test for determining “related to” jurisdiction. For example, the Court cites the Third Circuit as follows: “The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy” *Celotex Corp.*, 115 S. Ct. at 1499 n.6 (citing *Pacor*, 743 F.2d at 994) (emphasis in original).

25. 115 S. Ct. 386 (1994).

26. *Id.* at 389.

the extraordinary remedy of vacatur.²⁷

2. *Bankruptcy Court Jurisdiction in the Fifth Circuit and Other Circuits*

The Fifth Circuit's most expansive analysis of "related to" jurisdiction is found in its recent opinion in *In re Zale Corporation*.²⁸ In *Zale*, the Fifth Circuit expressed a dim view toward a bankruptcy court exercising jurisdiction over disputes between third parties that have no effect upon the administration of the estate or that do not otherwise involve estate assets or the debtor/creditor relationship within the bankruptcy case.²⁹ In finding that the bankruptcy court did not have jurisdiction to issue a permanent injunction regarding a matter that did not have a direct impact upon the debtor or its estate, the Fifth Circuit noted with approval authority from other circuits that makes clear that the mere existence of shared facts between the third party action and a debtor/creditor conflict do not in and of themselves make the third party action "related to" the bankruptcy.³⁰ This principle even applies in the face of the well-settled concept of promoting judicial economy, which alone "cannot justify a court's finding jurisdiction over an otherwise unrelated suit."³¹

In this analysis, it is important to remember that it is the relationship of the dispute to the estate and not merely of one or more parties to the estate that establishes jurisdiction.³² Perhaps the best example of this concept can be found in *In re Boone*,³³ in which the Eleventh Circuit held that a debtor's suit against a creditor for tortious interference was not related to the bankruptcy proceeding even though the tortious interference claim shared common factual issues with one or more core bankruptcy proceedings arising out of the same transaction or occurrence.³⁴ Again, it is the claim or legal issue itself that must support "related to" jurisdiction, not the mere coincidence that the claim may involve the debtor or even that it arose in the same fact situation or occurrence as other "related to" or core proceedings.

27. *Id.* at 393. *Vacatur* is an equitable remedy available in exceptional circumstances, which the Court found did not exist in a situation where the mootness resulted from voluntary settlement of the pending matter. *Id.*

28. 62 F.3d 746 (5th Cir. 1995).

29. *Id.* at 751-55; see also *In re Wood*, 825 F.2d 90 (5th Cir. 1987).

30. *Id.* at 753 (citing *In re Boone*, 52 F.3d 958, 961 (11th Cir. 1995) and *Specialty Mills, Inc. v. Citizen State Bank*, 51 F.3d 770, 774 (8th Cir. 1995)).

31. *Zale*, 62 F.3d at 753-54.

32. *Id.* at 755 (citing *In re Xonics*, 813 F.2d 127, 131 (7th Cir. 1987)).

33. *In re Boone*, 52 F.3d 958 (11th Cir. 1995).

34. In *Boone*, the debtors sued a lender for tortious interference with the sale of their house. Even though the claim was brought with two other core proceedings and shared common facts and parties with those proceedings, that was not enough to give the bankruptcy court jurisdiction over what was effectively a tort claim brought by the post petition, post discharge debtors in their individual capacities that would have no impact whatsoever on their Chapter 7 estate. *Id.* at 960-61 ("Although the claim to determine the extent of the Bank's lien and the tortious interference claim will share the common factual issue . . . this 'common issue of fact between a civil proceeding and a controversy involving the bankruptcy estate does not bring the matter within the scope of § 1334(b).'")

Finally, no analysis of the Fifth Circuit's view of these jurisdictional issues would be complete without a review of its opinion in *In re Walker*,³⁵ in which a party, found in violation of section 362's automatic stay, sought contribution from another party by way of a bankruptcy court adversary proceeding. The Fifth Circuit found "related to" jurisdiction lacking because even though the claim involved a violation of the Bankruptcy Code, the dispute was purely between one creditor and another party, and it had absolutely no impact upon the administration of the estate or any assets of the estate.³⁶

C. OTHER DEVELOPMENTS IN FIFTH CIRCUIT AND BELOW

1. *Bankruptcy Rule Deadlines*

The Fifth Circuit, in a seemingly innocuous *per curiam* affirmation of a Louisiana bankruptcy court, handed down an important ruling with respect to filing deadlines found in the Bankruptcy Rules, in this instance in the context of objections to exemptions. In *In re Stoulig*,³⁷ the Fifth Circuit held that a bankruptcy court was without jurisdiction to grant an extension of the time to file objections to exemptions after the expiration of the thirty day period prescribed by Bankruptcy Rule 4003(b).³⁸ In *Stoulig*, the Chapter 7 bankruptcy trustee, two days before the expiration of the thirty day objection period, filed a motion for extension of that deadline. The bankruptcy judge failed to rule on the motion before the thirty day period expired. After a hearing on the trustee's motion, the bankruptcy court granted the deadline extension. But the district court reversed.³⁹ The district court's opinion provided what the Fifth Circuit found to be a thorough analysis of the implications of granting such a deadline extension under a rule providing a specific deadline.⁴⁰ Essentially, the district court found that the bankruptcy court no longer had jurisdiction to grant the extension, even though the motion requesting the extension was filed within the thirty day period. The district court felt that the language of 4003(b) is unambiguous, as found by the Supreme Court in a slightly different context in *Taylor v. Freeland & Cronz*.⁴¹ The Court also noted other Fifth Circuit opinions interpreting time limitations

35. 51 F.3d 562 (5th Cir. 1995).

36. *Id.* at 568-70 ("Cadle's claim against Svara has no 'conceivable effect on the administration of the estate' nor would the outcome of that claim 'alter the debtor's rights, liabilities, options, or freedom of action.'")

The Fifth Circuit has issued yet one more opinion that touches upon "related to" jurisdiction. See *In re Vitek, Inc.*, 51 F.3d 530 (5th Cir. 1995).

37. *In re Stoulig*, 45 F.3d 957 (5th Cir. 1995).

38. *Id.* at 957. Rule 4003(b) provides that objections to exemptions must be filed within thirty days following the conclusion of the creditors' meeting. See FED. R. BANKR. P. 4003(b).

39. *Stoulig v. Traina*, 169 B.R. 597 (Bankr. E.D. La. 1994).

40. *Stoulig*, 45 F.3d at 957-58.

41. 503 U.S. 638 (1992) (holding that the language of Rule 4003(b) is unambiguous, the net effect of which was to allow debtor's exemption claims regardless of their statutory basis if no objections are timely filed).

provided by similarly unambiguous bankruptcy rules.⁴² The import of this ruling is obvious. Under *Stoulig*, the cautious trustee or creditor's counsel must be sure not only to seek the extension within the initial time period, but to make absolutely sure that the requested extension is actually granted before that same deadline.

2. Retroactive Annulment of Automatic Stay

In *In re Jones*,⁴³ the Fifth Circuit joined other courts in annulling or granting *nunc pro tunc* relief from the automatic stay.⁴⁴ In *Jones*, the debtors filed a second Chapter 13 petition after the previous petition had been dismissed. Unaware of the new bankruptcy, the mortgagees conducted a foreclosure sale and purchased the property at the sale. The Fifth Circuit disagreed with the debtors' assertion that the sale was void, stating "[i]t is well settled that 'actions taken in violation of the automatic stay are not void, but rather they are merely voidable, because the bankruptcy court has the power to annul the automatic stay pursuant to section 362(d).'"⁴⁵ The Fifth Circuit further held that the court has the "power to terminate, annul, modify, or condition the automatic stay."⁴⁶ Given that the mortgagees (who were not commercial lenders) received neither actual or constructive notice of the bankruptcy filing, the Fifth Circuit held that the bankruptcy court did not abuse its discretion in affording the retroactive relief found by way of annulment of the automatic stay.⁴⁷

3. Dischargeability—Collateral Estoppel

In *In re Garner*⁴⁸, the Fifth Circuit addressed the issue of collateral estoppel in a section 523 dischargeability context arising out of a state court post answer default judgment. In *Garner*, Lehrer sued Garner in state court. Garner filed an answer but did not appear for trial. After Lehrer proceeded with trial and put on evidence, apparently in Garner's absence, the state court entered a judgment finding in part that the de-

42. *Stoulig*, 169 B.R. at 601. For the cases cited by *Stoulig* dealing with this issue, see *In re Kolstad*, 928 F.2d 171, 173-75 (5th Cir.), cert. denied, 503 U.S. 958 (1991) (Rule 3004); *In re McGuirt*, 879 F.2d 182, 183-84 (5th Cir. 1989) (Rule 4007(c)); *In re Robintech, Inc.*, 863 F.2d 393, 395-98 (5th Cir.), cert. denied, 493 U.S. 811 (1989) (Rule 9006(f)); *Neely v. Murchison*, 815 F.2d 345, 346-47 (5th Cir. 1987) (Rule 4007(c)).

43. *Jones v. Garcia (In re Jones)*, 63 F.3d 411 (5th Cir. 1995).

44. See, e.g., *In re Bresler*, 119 B.R. 400 (Bankr. E.D. N.Y. 1990) (Duberstein, C.J.) (automatic stay lifted *nunc pro tunc* to validate a foreclosure sale conducted one day after filing); see also, *In re Calder*, 907 F.2d 953 (10th Cir. 1990) (proof of claim allowed based on state court judgment entered after bankruptcy petition filed); *In re Albany Partners, Ltd.*, 749 F.2d 670 (11th Cir. 1984) (bankruptcy courts have power to "annul" stay, including retroactive validation of acts in violation of stay); *In re Philgo Realty Co.*, 185 B.R. 676, (Bankr. E.D.N.Y., 1995) (*nunc pro tunc* relief from the automatic stay based in part on the debtor having remained "stealthily silent").

45. *In re Jones*, 63 F.3d at 412 (quoting *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1990) (emphasis added)).

46. *Id.* at 413.

47. *Id.*

48. *Garner v. Lehrer (In re Garner)*, 56 F.3d 677 (5th Cir. 1995).

defendants "acted with spite, ill-will, and malice."⁴⁹ The court awarded actual and punitive damages.⁵⁰ After Garner filed for Chapter 7 relief nearly a year later, Lehrer sought to have his judgment determined non-dischargeable. In that adversary proceeding, Lehrer sought summary judgment based upon the state court judgment, which the bankruptcy court granted.⁵¹ In giving the state court judgment full faith and credit,⁵² the Fifth Circuit applied Texas rules of preclusion as they pertain to collateral estoppel, which "bars relitigation of any ultimate issue of fact actually litigated and essential to the judgment in a prior suit, regardless of whether the second suit is based upon the same cause of action."⁵³ Specifically, Texas law requires that for collateral estoppel to apply, the facts to be litigated in the second action were fully and fairly litigated in the prior action, those facts were essential to the first judgment, and the parties were adversaries in the first action.⁵⁴

Therefore, the issue was whether a post answer default judgment could give rise to collateral estoppel in a dischargeability context. The Fifth Circuit found that it can, noting some distinction between a simple default judgment where the non-answering party has essentially admitted facts plead against him and a post answer default, which "constitutes neither an abandonment of defendant's answer nor an implied confession of any issues thus joined by the defendant's answer."⁵⁵ The Court noted that under Texas law, in a post-answer default judgment situation, judgment cannot be entered on the pleadings, but the plaintiff is required to offer evidence and prove his case, which Lehrer did in the state court.⁵⁶

The other issue faced by the Fifth Circuit was whether the state court's findings of "spite, ill-will, and malice" constituted a finding of "willful and malicious injury" within the meaning of section 523's exceptions to discharge.⁵⁷ The Fifth Circuit found that it does, having defined "willful and malicious" under section 523 to mean "without just cause or excuse."⁵⁸ In other words "[w]illful means intentional[,] and malicious adds the absence of just cause or excuse."⁵⁹ Moreover, under Texas law, malice "means ill-will or evil motive or such gross indifference or reckless disregard for the rights of others as to amount to wanton and willful action

49. *Id.* at 678.

50. *Id.* at 681.

51. *Id.* at 679.

52. *Id.*

53. *Garner*, 56 F.3d at 679 (quoting *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984)).

54. *Id.* at 680.

55. *Id.* (quoting *Stoner v. Thompson*, 578 S.W.2d 679, 682 (Tex. 1979)).

56. *Id.*

57. Section 523 provides numerous exceptions to discharge, one of which is a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6) (1994).

58. *Garner*, 56 F.3d at 681.

59. *Id.*

knowingly and unreasonably done."⁶⁰ Thus, the Fifth Circuit concluded that the state court's findings included a determination that Garner acted with malice, noting also the fact that the state court awarded punitive damages.⁶¹

Under *Garner*, it is clear that collateral estoppel is still alive and well in the context of dischargeability litigation, even when the underlying judgment is in the nature of a post answer default. What *Garner* does not directly address is a situation in which a default judgment has been entered in the absence of an answer. Under *Garner*, it would seem possible that collateral estoppel might operate even where a default judgment is taken when there has been no answer, because many claims resulting in section 523 complaints involve unliquidated damages which must be "proven up" in the state court proceeding even in the absence of an answer. The lessons for the state court practitioner are obvious: from the plaintiff's perspective section 523 issues should be taken into account at both the drafting stage and if, and when, it becomes necessary to prove facts and obtain a finding from the court or fact finder. From the defendant's perspective, it is now clear that a failure to appear may result in a judgment that could be ultimately nondischargeable.⁶²

4. Exemptions—Tools of the Trade

In *In re Henry*⁶³, bankruptcy judge John C. Akard⁶⁴ allowed a debtor to avoid a lien against a welder, notwithstanding the fact that the debtor only welded on a part time basis at the time he purchased the welder. The court determined that Congress intended the phrase "tools of the trade"⁶⁵ to have a "common sense interpretation on a case-by-case basis with the key inquiry focusing on the necessity of an item to the individual debtor's particular business or employment."⁶⁶ The court also reiterated that the determination of whether and to what extent an

60. *Id.* (quoting *Dahl v. Akin*, 645 S.W.2d 506, 515 (Tex. App.—Amarillo 1982), *aff'd*, 661 S.W.2d 911 (Tex. 1983), *cert. denied*, 466 U.S. 938 (1984)).

61. *Id.* The Court noted that under Texas law, punitive damages are available only if the claimant proves that the harm resulted from either fraud, malice, or gross negligence. By elimination, the Fifth Circuit noted the district court's finding that the litigation did not involve allegations of fraud or gross negligence, therefore the exemplary damage award was based on malice. *Id.* at 682.

62. As was the case before *Garner*, counsel must always be vigilant in any state court fraud or related litigation in preparing the charge and/or jury questions or findings of fact and conclusions of law if they could ultimately have section 523 implications.

63. 183 B.R. 748 (Bankr. N.D. Texas 1995).

64. Judge Akard has issued numerous opinion pertaining to homesteads, exemptions and, in particular, tools of the trade. *See, e.g., In re Legg*, 164 B.R. 69 (Bankr. N.D. Tex. 1995) (tools of the trade); *see also In re Nerios*, 171 B.R. 224 (Bankr. N.D. Tex. 1994) (adjoining residences); *In re Cate*, 170 B.R. 582 (Bankr. N.D. Tex. 1994) (multiple residential lots); *In re Julian*, 163 B.R. 478 (Bankr. N.D. Tex. 1994) (urban homestead—multiple lots). *See generally* R. Cox, *Bankruptcy & Creditors Rights, Annual Survey of Texas Law*, 48 SMU L. REV. 875, 898-905. (1995).

65. *See* 11 U.S.C. § 522(f)(i)(B)(ii) (1994).

66. *Henry*, 183 B.R. at 750 (citing *In re Walkington*, 42 B.R. 67, 72 (Bankr. W.D. Mich. 1984)).

exemption should be allowed is based upon the date which the bankruptcy petition is filed.⁶⁷

The *Henry* court also addressed whether and to what extent the lien was for purchase money. The court found that the original loan, which had subsequently been refinanced with the advance of some additional funds, was not purchase money.⁶⁸ This finding was due in part to the fact that the agent who made the loan did not testify, nor apparently did the retailer from whom the welder was purchased. Accordingly, this lack of evidence led the court to the conclusion that there was no evidence that it was a purchase money loan.⁶⁹ Therefore, the issue of whether and to what extent a refinancing renders an original purchase money loan non-purchase money was not addressed.

5. *Rash (Collateral Valuation in Bankruptcy) Update*

The Fifth Circuit has modified *In re Rash*,⁷⁰ a case addressed in last year's survey⁷¹, to delete as dicta a substantial portion of its previous opinion. In its opinion on petition for rehearing, the Fifth Circuit reiterated its holding that valuation of personal property collateral in a reorganization context should be based upon the retail value of that collateral.⁷² The Fifth Circuit cited other opinions following its initial *Rash* decision, including those coming out of the Eighth Circuit⁷³ and the First Circuit.⁷⁴ The *Rash* saga is not over, however, because the Fifth Circuit has granted rehearing en banc.⁷⁵

6. *Abstracts of Judgment*

*In re Davis*⁷⁶ provides a reminder of the pitfalls of recording an inade-

67. *Id.* at 750-51.

68. *Id.* at 750.

69. *Id.* at 749-50. A purchase money security interest is defined as one that is taken or retained by the seller of the collateral to secure all or part of its price or is taken by a person who by making advances or incurring an obligation gives value to enable the debtor to purchase the collateral. TEX. BUS. & COMM. CODE ANN. § 9.107. Refinancing of the original purchase money does not destroy its purchase money character. See TEX. REV. CIV. STAT. ANN. art 5069-6.02(12) (Vernon 1987) (holder of retail installment contract may agree to one or more amendments to extend or defer due dates); see also *In re Crispin*, 139 B.R. 187 (Bankr. E.D. Tex. 1992) (consolidation and refinancing of purchase money does not destroy purchase money nature under Consumer Credit Code). But see *In re Hrnccirik*, 138 B.R. 835 (Bankr. N.D. Tex. 1992) (bank advanced funds to make two tractor payments; held non-purchase money).

70. 62 F.3d 685 (5th Cir. 1995).

71. 31 F.3d 325 (5th Cir. 1994); see R. Cox, *Bankruptcy & Creditor's Rights, Annual Survey of Texas Law*, 48 SMU L. REV. 875, 885 (1995).

72. *Rash*, 62 F.3d at 685.

73. See *In re Trimble*, 50 F.3d 530 (8th Cir. 1995) (following *Rash* and applying retail value).

74. See *In re Winthrop Old Farm Nurseries, Inc.*, 50 F.3d 72 (1st Cir. 1995) (hypothetical foreclosure value inappropriate in reorganization context; following reasoning in *Rash*); see also *In re McClurkin*, 31 F.3d 401 (6th Cir. 1994) (decided before initial *Rash* opinion issued, but declining to deduct hypothetical cost of sale in Chapter 13 proceeding).

75. *In re Rash*, 68 F.3d 113 (5th Cir. 1995).

76. 174 B.R. 223 (Bankr. N.D. Tex. 1994).

quate abstract of judgment. In *Davis*, the abstract of judgment omitted, *inter alia*, the defendant's address and/or other information regarding the citation and service thereof.⁷⁷ The *Davis* opinion provides an excellent review of the state law that creates judgment liens by recording an abstract. Fundamentally, however, "a judgment lien will not attach unless a judgment creditor takes the steps necessary to comply with § 52.003 of the Texas Property Code",⁷⁸ which mandates the contents of an abstract of judgment.⁷⁹ Based upon what it found to be well established Texas Law, the *Davis* court held that the omission of one or more mandatory elements of an abstract of judgment may be fatal to the creation and attachment of a judgment lien.⁸⁰

7. *Federal v. State Limitations*⁸¹

In *Davidson v. FDIC*,⁸² the Fifth Circuit addressed whether general federal statutory limitations apply to deed of trust foreclosure actions. The court found that the general statute of limitations⁸³ does not apply to mortgage foreclosures but rather is limited to actions for money damages (which would include an action on the underlying indebtedness).⁸⁴

The *Davidson* court found that state law should govern the rights held by the FDIC in its limited capacity as the receiver of a non-federal entity.⁸⁵ The bottom line in *Davidson*, however, was that because the underlying indebtedness was still alive and enforceable under FIRREA, the receiver had the right to foreclose cutting off even a bona fide purchaser, despite the fact that the state statute expressly provided for a four year limitation on real property foreclosures.⁸⁶ Despite the rather straightfor-

77. *Id.* at 225.

78. *Id.* at 226.

79. TEX. PROP. CODE ANN. § 52.003 (Vernon Supp. 1996) other provisions of Chapter 52 of the Property Code specify other environments for recording, indexing, and satisfaction of judgment liens.

80. *Id.* at 227-28; see, e.g., *Citicorp Real Estate v. Banque Arabe Internationale D'investissement*, 747 S.W.2d 926 (Tex.App.—Dallas 1988, writ denied).

81. The Federal Statutes of Limitations under the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) and otherwise are discussed *infra* notes 131-39.

82. 44 F.3d 246 (5th Cir. 1995).

83. See 28 U.S.C.A. § 2415(a) (West 1995) (general statute of limitations applicable to actions by United States).

84. *Davidson*, 44 F.3d at 249. The court noted, however, that the FIRREA statute does apply to foreclosure actions. *Id.* at 249 n.2. See 12 U.S.C.A. § 1821(d)(14) (West 1994), which has no "for money damages" limitations as is contained in § 2415(a). "Thus it is clear that FIRREA applies to foreclosure actions." *Id.*

85. *Davidson*, 44 F.3d at 250. The court noted that the capacity in which the FDIC acts may have an impact on whether state or federal law should apply. The court noted further that strong state interest such as regulation of land titles should "be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied." *Id.* at 252 n.4 (quoting *United States v. Yazell*, 382 U.S. 341, 352-54 (1966) (family law case)); see also *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048 (1994) (tort claim against former counsel for failed savings and loan).

86. *Davidson* 44 F.3d at 253-55; see also TEX. PROP. CODE ANN. § 16.0035 (Vernon Supp. 1996).

ward outcome in *Davidson*, *Davidson* is mandatory reading for the Fifth Circuit's current view regarding the interplay between state and federal law in the context of the FDIC acting in the limited capacity as a receiver.

III. DEVELOPMENTS IN THE STATE COURTS AND LEGISLATURE

A. STATE COURTS

During the Survey period, there were few significant debtor-creditor developments in state courts. Rather, the Survey period provided a number of examples of issues that are litigated in the course of creditor's rights and remedies. Some of those decisions are worthy of note not so much for any change or expansion of Texas law, but rather as examples of fairly common issues about which debtor and creditor counsel should be aware.

1. Foreclosure Notice

Two cases illustrate the problems inherent in providing notice of foreclosure sales, especially in the context of deficiency enforcement after such sales. *WTFO, Inc. v. Braithwaite*⁸⁷ deals with the notice requirements necessary to support recovery of a deficiency after a foreclosure sale. Before a holder of a debt is entitled to a deficiency judgment, the holder must prove that a valid foreclosure sale was conducted, including that notice of the sale was sent to the debtor prior to the sale in accordance with the Texas Property Code.⁸⁸ In order to establish violation of the statute, the plaintiff must show that the holder of the debt had possession of the most recent address of the debtor and failed to mail the notice by certified mail to that address.⁸⁹ Unfortunately, *Braithwaite* was a summary judgment case, and the FDIC (the prior owner of the note) failed to comply with the summary judgment requirement of a timely filed controverting affidavit, so it is not known what was contained therein. Based upon the record before the court, however, the court found that the FDIC had the borrower's most current address on file but failed to send the notice to that address.⁹⁰ Based upon that fact, the court affirmed the summary judgment granted to the borrower based on the FDIC's failure to provide notice of the sale.⁹¹

In *First Gibraltar Bank, FSB v. Farley*,⁹² a somewhat different result

87. 899 S.W.2d 709 (Tex. App.—Dallas 1995, no writ).

88. *Id.* at 719-20; see also TEX. PROP. CODE ANN. § 51.002(d)(3) (Vernon Supp. 1996).

89. *Braithwaite*, 899 S.W.2d at 720; see also, *Onwuteaka v. Cohen*, 846 S.W.2d 889, 892 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

90. *Braithwaite*, 899 S.W.2d at 720.

91. *Id.*

92. 895 S.W.2d 425 (Tex. App.—San Antonio 1995, writ denied). The court also reiterates the well established requirements for establishing ownership of a note:

[t]estimony in an affidavit that a particular person or entity owns a note is sufficient to conclusively establish ownership even in the absence of supporting documentation if there is no controverting summary judgment evidence.

was reached in part because the noteholder did not have a correct address for the party to whom the notice was to be sent. Specifically, notice of a scheduled foreclosure sale was sent to a liable party but which was returned with a notation that the person's forwarding address had expired. Apparently, the lender rescheduled the sale, but did not provide a new notice to the liable party because the lender did not have a current address for him. Essentially, the lender's position was that because it had no known address for that person, it was not required to send a notice letter. The appellate court found that there was a fact issue regarding notice to that person, and it reversed the lower court's summary judgment in favor of that guarantor. The court stated that the lender "made a good faith effort to comply with the notice provision" but that it had no known address for that guarantor.⁹³ The lesson to be learned in *Braithwaite* and *Farley* is simply that the prudent lender must be aware of the property code requirement that the notice of substitute trustee's sale must be sent to "the debtor's last known address as shown by the records of the holder of the debt."⁹⁴ Accordingly, the safer practice for lender's counsel is to require the lender to provide counsel with not only the address contained in the loan documents, but all addresses of which the lender is aware or are reflected in its files. Of course, this address requirement applies to all persons entitled to notice under the deed of trust or the property code.⁹⁵

2. *Effect of Foreclosure on Lessee*

Also in the context of real property foreclosure, *ICM Mortgage Corp. v. Jacob*⁹⁶ dealt with foreclosure on a property occupied by a third party tenant. *Jacob* simply provides that when a tenant's landlord is foreclosed upon by the landlord's mortgagee, the general rule is that the tenant's lease is terminated.⁹⁷ The court analyzes in detail, whether and to what extent there exist exceptions to this general rule (and for that matter whether the general rule is indeed the general rule); however, the net effect of *Jacob* is that the general rule remains the same: the tenant's lease is generally terminated upon foreclosure. In *Jacob*, the tenant apparently became a "tenant at sufferance," which is effectively an occupant in naked possession of property.⁹⁸ The court noted the possibility that a

[citation omitted] A photocopy of a note attached to the affidavit of the holder, who swears that it is a true and correct copy of the note, is sufficient as a matter of law to prove the status of owner and holder of a note absent controverting summary judgment evidence.

Id. at 428. The case also points out, however, that an issue of material fact may be present "when there is an unexplained gap in the chain of title" to the note. *Id.*

93. *Id.* at 430.

94. TEX. PROP. CODE ANN. § 51.002(e) (Vernon Supp. 1996).

95. Another case of interest regarding notice of sale in a personal property context is *Wilson v. GMAC*, 897 S.W.2d 818 (Tex. App.—Houston [1st Dist.] 1994, no writ).

96. 902 S.W.2d 527 (Tex. App.—El Paso 1994, no writ).

97. *Id.* at 530.

98. *Id.*

new landlord tenant relationship could evolve after foreclosure.⁹⁹ However, there was no evidence that one existed in this case. Therefore, the court held that the foreclosing lender owed no duty to the tenant that would give rise to the tenant's claims for a variety of damages.¹⁰⁰ The reader is reminded, however, that there are certain notice requirements contained in the Texas Property Code with respect to forcible entry and detainer actions following a foreclosure sale where a tenant under an existing lease is in possession of the building.¹⁰¹

3. Renewals/Forbearance Agreements

Two cases are worthy of note in the context of renewal and extension agreements and forbearance agreements. In *Rosedale Partners, Ltd. v. Walters*,¹⁰² the borrowers were successful in establishing an affirmative defense of novation based upon a written forbearance agreement entered into after a judgment.¹⁰³ Effectively, both the prior judgment and the forbearance agreement provided certain rights to foreclose on property, leading the court to believe that the obligation under the forbearance agreement extinguished the obligation under the prior judgment because the two obligations could not co-exist.¹⁰⁴

That is not to say, however, that giving a new note or signing a renewal and extension agreement extinguishes a prior note. To the contrary, *Travelers Ins. Co. v. Bosler*,¹⁰⁵ makes clear that "the giving of a new note for debt evidenced by a former note does not extinguish the old note unless expressed by the parties."¹⁰⁶ Moreover, the holder may sue on either the original note or the renewal note.¹⁰⁷

In *Bosler*, the renewal agreement contained an express non-recourse provision under which the maker of the note and its partners were expressly absolved from personal liability on the note. The court found, however, that the renewal agreement extinguished neither the old note nor the guaranty obligations thereunder.¹⁰⁸ More specifically, the court found that the continuing guaranty agreements executed by various indi-

99. *Id.* at 531-32.

100. *Id.* at 533-34.

101. See TEX. PROP. CODE ANN. § 24.005(b) (Vernon 1996) (thirty day written notice requirement to tenant who timely pays rent and is not otherwise in default under the tenant's lease).

102. 905 S.W.2d 17 (Tex. App.—Corpus Christi 1995, no writ).

103. According to the court:

To be entitled to a summary judgment on the basis of the affirmative defense of novation, a movant must conclusively prove the following elements: 1) the validity of a previous obligation, 2) an agreement among all parties to accept a new contract, 3) the extinguishment of the previous obligation, and 4) the validity of the new agreement.

Id. at 19.

104. *Id.* at 20.

105. 906 S.W.2d 635 (Tex. App.—Ft. Worth 1995, writ requested).

106. *Id.* at 643.

107. *Id.*

108. *Id.* at 644.

viduals remained in full force and effect.¹⁰⁹

4. Garnishment and the Automatic Stay

In *Baytown State Bank v. Nimmons*,¹¹⁰ the appellate court found that a garnishment action is stayed by the bankruptcy of the underlying debtor. According to *Nimmons*, a garnishee bank "in effect holds the debtor's property as an officer or receiver for the court." [citation omitted] Service of the writ of garnishment creates a lien on the judgment debtor's property, impounding the funds in the hands of the garnishee bank.¹¹¹ In *Nimmons*, the garnishment proceeding had concluded with the entry of a judgment against the garnishee bank (based on the bank's answer). But, the court found that a garnishment judgment, just like any other judgment, is not self-executing.¹¹² The court further noted that in Texas, ownership of property subject to a judgment does not transfer until a writ of execution is levied.¹¹³ Therefore, the court found that the judgment debtor's Chapter 7 bankruptcy filing deprived the trial court of jurisdiction to enforce the garnishment judgment and automatically stayed the garnishor's right to enforce the judgment.¹¹⁴

5. Federal Limitations with a Twist

By now, it has become well settled that an assignee of the FDIC acquires the six year federal statute of limitation provided by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), along with other rights arising under that or other federal statutes.¹¹⁵ In *General Financial Serv. v. Practice Place*¹¹⁶, the court upheld a temporary injunction issued in part because it appeared that the noteholder's predecessor in interest may have retained or reserved some or all

109. *Id.* at 643-44. The court also found that a limitation defense was not available, again based upon one of the modification agreements. Finally, the court also reiterated the general rule regarding recovery on a promissory note:

To recover on a promissory note, a plaintiff must establish the note at issue, that the defendant signed the note, that the plaintiff is the legal owner and holder of the note and that a certain balance is due and owing. [citation omitted] The same proof that establishes a plaintiff's right to summary judgment on a promissory note also establishes the plaintiff's right to summary judgment on a guaranty. [citation omitted]

Id. at 645.

110. 904 S.W.2d 902 (Tex. App.—Houston [1st Dist.] 1995, writ pending).

111. *Id.* at 906.

112. *Id.* "The Texas Rules of Civil Procedure provide that in garnishment actions 'execution shall issue thereon in the same manner and under the same conditions as is or may be provided for the issuance of execution in other cases.'" *Id.* (quoting Tex. R. Civ. P. 668 (Vernon Supp. 1996)).

113. *Nimmons*, 904 S.W.2d at 907.

114. *Id.*

115. See *Jackson v. Thweat*, 883 S.W.2d 171 (Tex. 1994), *cert. denied*, 115 S. Ct 196 (1994); see also, 12 U.S.C.A. § 1821(d)(14) (West 1989) (six year federal statute arising under FIRREA). This was based upon the fundamental concept that an "assignee stands in the shoes of his assignor." *Id.* at 174 (quoting *FDIC v. Bledsoe*, 989 F.2d 805, 810 (5th Cir. 1993)).

116. 897 S.W.2d 516 (Tex.App.—Fort Worth 1995, no writ).

of the federal powers in assigning the note to the current noteholder. Although this was an injunction case and the underlying substantive issue was not ultimately resolved, this case was consistent with the Dallas Court of Appeals holding in *Cadle Co. v. Estate of Weaver*.¹¹⁷ In *Weaver*, the Dallas Court of Appeals held that such a restricted assignment did in fact preclude the assignee from claiming the benefits of the federal statute.¹¹⁸

6. Limitations—Deficiency Actions

Section 51.003(a) of the Texas Property Code provides that if real property is sold at a foreclosure sale for less than the unpaid balance, “any action brought to recover the deficiency must be brought within two years of the foreclosure sale and is governed by this Section.”¹¹⁹ In *Trunkill Capital, Inc. v. Jansma*,¹²⁰ the Waco Court of Appeals was faced with the question of whether that statute is a statute of repose or a statute of limitations. That court found that it was a statute of limitations. The court cited recent Texas Supreme Court authority distinguishing between a statute of repose, which begins to run from a specified date without regard to the accrual of a cause of action, and a statute of limitations, which is a procedural limitation on the enforcement of a cause of action by one who actually possesses a cause of action.¹²¹ Unlike a statute of repose, “[a] statute of limitations runs not from a specified independent date, but from the date the cause of action accrues.”¹²² The significance of this distinction is that the creditor’s cause of action for a deficiency exists and begins running on the date of the foreclosure and runs for the following two year period.¹²³

7. Judgment Enforcement—Attorney’s Fees

In *Great Global Assur. Co. v. Keltex Properties, Inc.*,¹²⁴ the Corpus Christi Court of Appeals reversed a lower court’s denial of attorney’s fees to a judgment creditor who had successfully pursued an action under the Texas turnover statute. At the risk of oversimplification, it is safe to say that the court found that the award of attorney’s fees to a successful judgment creditor under the turnover statute is essentially mandatory.¹²⁵ The

117. 897 S.W.2d 814, 817 (Tex.App.—Dallas 1994, writ denied).

118. *Id.* at 179.

119. TEX. PROP. CODE ANN. § 51.003(a) (Vernon 1995).

120. 905 S.W.2d 464 (Tex. App.—Waco 1995, writ pending).

121. *Id.* at 467 (citing *Trinity River Auth. v. URS Consultants*, 889 S.W.2d 259 (Tex. 1994)).

122. *Jansma*, 905 S.W.2d at 467.

123. *Id.* at 468.

124. 904 S.W.2d 771 (Tex. App.—Corpus Christi 1995, no writ).

125. *Id.* at 775-76. The turnover statute provides that “the judgment creditor is entitled to reasonable costs, including attorney’s fees.” TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(e) (Vernon 1986); see also *id.* §§ 38.001-.006; see generally *Cortland Line Co., Inc. v. Israel*, 874 S.W.2d 178, 184 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (noting that the award of attorney’s fees is mandatory under Chapter 38 if there is proof of reasonableness of the fees). The court further noted that “[a] court has the discretion to fix the

court further held that the judgment creditor's apparent failure to make attempts to collect the judgment through another legal process, although a consideration in determining reasonableness of the fees, is not a basis to deny a request for fees under the turnover statute.¹²⁶

8. *No Fiduciary Relationship Between Bank and Customer*

Finally, no survey of Texas debtor-creditor law would be complete without noting at least one case in which a borrower has attempted to impose a fiduciary relationship on a bank-customer relationship. In *Berry v. First National Bank of Olney*,¹²⁷ the Berrys alleged facts to support their claim that a fiduciary relationship existed between them and their bank. The court of appeals noted that although the alleged facts supported a possible breach of a fiduciary relationship and those facts (knowledge of collateral value, superior bargaining power, and representations by the banker)¹²⁸ may have been evidence of the *breach* of a fiduciary relationship, but they were absolutely no evidence of the *existence* of a fiduciary relationship.¹²⁹ *Berry* is yet another reminder that a relationship between a bank and its customer generally does not create a special or fiduciary relationship.¹³⁰

9. *More Federal Limitations*

The federal statutes of limitation were also at issue in *Amwest Savings Ass'n v. Shatto*.¹³¹ The Austin Court of Appeals reiterated the well-established rule discussed above: FIRREA's statute of limitation is available to assignees of the government. More specifically, the plaintiff was the assignee of the FSLIC as opposed to the FDIC. The court noted, however, that FIRREA "makes clear that the FDIC succeeds to the FSLIC's rights and obligations as receiver."¹³²

Two other concepts are brought out in the *Shatto* opinion. First, *Shatto* is an instructive reminder that limitations is an affirmative defense, which in a summary judgment context requires conclusive proof of all of the

amount of attorney's fees, but it does not have the discretion in denying them if they are proper under § 38.001." *Id.* Chapter 38, the general attorney's fees statute, apparently governs claims for attorney's fees under the turnover statute. *See Carlyle Real Estate Ltd. Partnership-X. v. Leibman*, 782 S.W.2d 230, 233 (Tex. App.—Houston [1st Dist.] 1989, writ denied).

126. *Keltex*, 904 S.W.2d at 776.

127. 894 S.W.2d 558 (Tex. App.—Ft. Worth 1995, no writ).

128. Specifically, the borrowers alleged that the bank had knowledge and possession of a substantially lower appraisal for the subject real property, the bank had superior knowledge of the area surrounding the real property, the bank's superior bargaining power precluded the Berrys from exploring independent appraisal opportunities, and the banker's representation that the property was "a good deal" changed the bank's role from a mere creditor to an advisor. *Id.* at 560.

129. *Id.*

130. *Id.*; *see also* Thigpen v. Locke, 363 S.W.2d 247, 253 (Tex. 1962); *Manufacturers Hanover Trust Co. v. Kingston Investors Corp.*, 819 S.W.2d 607, 610 (Tex. App.—Houston [1st Dist.] 1991, no writ).

131. 905 S.W.2d 400 (Tex. App.—Austin 1995, writ requested).

132. *Id.* at 404.

elements of that affirmative defense or disproving at least one of the elements of the plaintiff's cause of action as a matter of law.¹³³ Second, *Shatto* reiterates the rules that the Texas Supreme Court expressly stated in *Jackson v. Thweatt*:¹³⁴ that FIRREA's statute of limitation does not create a new limitation scheme, "but merely clarifies for federal receivers the existing six year statute of limitations applicable to the federal government generally under 28 U.S.C. § 2415(a) (1988)."¹³⁵ This distinction is not inconsequential because section 2415(a) contains a number of provisions regarding tolling or renewing limitations.¹³⁶

In *Holstein v. Federal Debt Management, Inc.*,¹³⁷ the Houston Court of Appeals dealt with somewhat similar issues, also finding that FIRREA's six year statute of limitations applied to the note purchaser/plaintiff.¹³⁸ Additionally, the court analyzed the issue of due diligence in securing service of process, finding that the plaintiff's summary judgment evidence provided uncontroverted facts setting forth a reasonable explanation for a three month delay in obtaining service of process.¹³⁹

B. LEGISLATIVE DEVELOPMENTS

It is tempting to say that there was little in the way of statutory development in the areas of debt collection and the debtor-creditor relationship. The legislature was quite active, however, and some statutory amendments of interest were enacted. Perhaps the most important revision from the debtor-creditor perspective is found in the amendments to Chapter 3 of the Uniform Commercial Code dealing with negotiable instruments.¹⁴⁰ Although these revisions are addressed in the survey article on banking law, one amendment deals directly with enforcement of the debtor-creditor relationship.

Specifically, the amended Article 3 now contains an expanded statute of limitations for bringing suits on negotiable instruments, particularly promissory notes.¹⁴¹ Chapter 3 now provides that an action to enforce a note "payable at a definite time must be commenced within six years after the due date or dates stated in the note, or if a due date is accelerated, within six years after the accelerated due date."¹⁴²

The amendments also provide specific limitations for demand notes. According to the amended Chapter 3, if demand is made on a demand

133. *Id.* at 403.

134. 883 S.W.2d 171 (Tex. 1994).

135. *Shatto*, 905 S.W.2d at 404 (citing *Jackson v. Thweatt*, 883 S.W.2d 171, 177 (Tex. 1994)).

136. See 28 U.S.C. § 2415(a) (Vernon 1988) (e.g., renewal or tolling of limitations on partial payment, acknowledgement of debt, etc.).

137. 902 S.W.2d 31 (Tex. App.—Houston [1st dist.] 1995, no writ).

138. *Id.* at 34.

139. *Id.* at 36; see also *id.* n.1.

140. See TEX. BUS. & COM. CODE ANN. §§ 3.101-5.114 (Vernon Supp. 1996).

141. *Id.* § 3.118.

142. *Id.* § 3.118(a).

note, an action must be brought within six years after the demand.¹⁴³ Additionally, in the absence of a demand, the statute provides that an action on a demand note is barred if neither principal nor interest on the note has been paid "for a continuous period of 10 years."¹⁴⁴

The Uniform Commercial code comment and the State Bar Committee comments following the published amendments raise some of the more obvious questions. For example, issues of statutory interpretation will surely arise with respect to conflicting statutes of limitations found in the Texas Civil Practice & Remedies Code and elsewhere. For example, whether specific statutes like the four year limitations period regarding real estate lien debt controls over the new six year negotiable instrument limitation remains to be seen.¹⁴⁵ Likewise, retroactive application to existing notes may also be an issue.¹⁴⁶ Obviously, the interpretation and application of these issues as they affect promissory notes and other negotiable instruments may be resolved only by the courts. Meanwhile, however, the practitioner must not overlook these Chapter 3 amendments.

Chapter 51 of the Texas Property Code has been amended to address the situation involving foreclosure of a deed of trust lien after acceptance of a deed in lieu of foreclosure. The new section 51.006 provides that the holder of a deed of trust lien who accepts from the debtor a deed in lieu of foreclosure may void that deed in lieu on or before the fourth anniversary of the date the deed is executed if the debtor fails to disclose the existence of a lien or other encumbrance and the deed in lieu grantee has no actual knowledge of the undisclosed lien or encumbrance.¹⁴⁷

The amendment further provides that a third party may conclusively rely on the affidavit of the lienholder stating that the lienholder has voided the deed.¹⁴⁸ Most importantly, the statute recognizes that the priority of the original deed of trust lien will not be affected or impaired by the execution of the deed in lieu of foreclosure, and the lienholder may foreclose its deed of trust as provided therein without electing to void the deed.¹⁴⁹ Again, the priority of the deed of trust would not be affected or impaired by the deed in lieu. Effectively, this practice provides for an expressed statutory recognition of deeds in lieu of foreclosure.¹⁵⁰

Also of interest to the secured lender are the rather substantial amendments to the Texas Probate Code regarding the filing and allowance of secured claims in a probate proceeding.¹⁵¹ Analysis of the Texas Probate Code is beyond the scope of this article. However, the amendments will have a direct impact upon any secured lender attempting to enforce a

143. *Id.* § 3.118(b).

144. *Id.*

145. *See id.* cmt. (State Bar Committee).

146. *Id.*

147. TEX. PROP. CODE ANN. § 51.006(b)(1)-(2) (Vernon Supp. 1996).

148. *Id.* § 51.006(c).

149. *Id.* § 51.006(d)-(e).

150. TEX. PROP. CODE ANN. § 51.006(e).

151. TEX. PROB. CODE ANN. § 146 (Vernon Supp. 1996)

claim against a decedent's estate.¹⁵²

With respect to judgments, the legislature has attempted to correct the apparent anomaly arising from the old statute that provided that a judgment could become dormant if execution was not issued within twelve months after the date of the judgment. In amending section 31.006 of the Civil Practice and Remedies Code, the legislature has now provided that a dormant judgment may be revived not later than the second anniversary of the date that the judgment becomes dormant. The reference to execution not having been issued within twelve months after the date of the judgment has been deleted.¹⁵³

Among other amendments, the legislature has amended statutes pertaining to aircraft storage liens, motor vehicle repairs¹⁵⁴, and vehicle storage facilities.¹⁵⁵ Finally, there were extensive revisions to Chapter 4 of the Texas Business & Commerce Code dealing with bank deposits and collections. Obviously, those revisions are beyond the scope of this article; however, they are addressed in the survey article on banking law.¹⁵⁶

IV. CONSUMER CREDIT

A. APPLICABILITY OF FAIR DEBT COLLECTION PRACTICES ACT TO LAWYERS¹⁵⁷

In a long awaited decision, the United States Supreme Court finally dealt with the issue of whether the Fair Debt Collection Practices Act¹⁵⁸ "[a]pplies to a lawyer who 'regularly,' *through litigation*, tries to collect consumer debts."¹⁵⁹ In *Heintz v. Jenkins*,¹⁶⁰ the Supreme Court held that it does.

The Court mentioned two reasons for applying the Act to litigation activities of lawyers. First, Justice Breyer points out that "in ordinary English, a lawyer who regularly tries to obtain payment of consumer debts through legal proceedings is a lawyer who regularly 'attempts' to 'collect' those consumer debts."¹⁶¹ Second, the Court noted the 1986 re-

152. *Id.* § 146(a)(1). The amendments also address notice to unsecured creditors and other issues.

153. TEX. CIV. PRAC. & REM. CODE ANN. § 31.006 (Vernon Supp. 1996); *see also* TEX. PROP. CODE ANN. § 52.006 (Vernon Supp. 1996) (a judgment lien continues for ten years following recording and indexing of an abstract of judgment unless the judgment becomes dormant during that period).

154. *Id.* § 70.001 (transfer of refused check; location of vehicle repossessed after tender of insufficient check).

155. TEX. REV. CIV. STAT. ANN. art. 6687-9a, § 14a (Vernon Supp. 1996) (payment by lienholder or insurance company).

156. *See* TEX. BUS. & COM. CODE ANN. §§ 4.01 (Vernon 1987 & Supp. 1996); James W. Doyle, *Banking Law, Annual Survey of Texas Law*, 49 SMU L. REV. 695 (1996).

157. For a concise overview of the Fair Debt Collection Practices Act, see L. Lucas & A. Harrell, *What You Should Know About the Federal Fair Debt Collection Practices Act*, 18 Tex. Bank. Lawyer No. 11 (Texas Ass'n of Bank Counsel, April 1995).

158. 15 U.S.C.A. §§ 1692 - 1692(o) (West 1988 and Supp. V).

159. *Heintz v. Jenkins*, 115 S. Ct. 1489 (1995) (emphasis added by court).

160. *Id.*

161. *Id.* at 1491.

peal of the exemption that formally applied to lawyers.¹⁶² This holding ignores some legislative history to the contrary, given what the Court found to be the plain language of the statute itself.¹⁶³

The net effect of *Heintz* is that the Act now clearly applies to attorneys who regularly engage in consumer debt collection activity, "even when that activity consists of litigation."¹⁶⁴ The only way this can be rectified is by much needed amendment to the statute.¹⁶⁵

B. INAPPLICABILITY OF CONSUMER CREDIT LAWS TO COMMERCIAL TRANSACTIONS

*First Gibraltar Bank, FSB v. Smith*¹⁶⁶ cannot be described as a significant development. However, the common sense approach the court takes in the case provides some reassurance for the commercial lender and counsel. In *Smith*, the district court apparently dismissed a borrower's claim under the Federal Fair Debt Collection Practices Act and the Texas Debt Collection Act because the loan in question was commercial in nature. The Fifth Circuit affirmed, reiterating that both statutes deal with debts incurred for personal, family, or household purposes or otherwise arising out of consumer transactions.¹⁶⁷ Another apparent red herring raised by the debtor was the fact that First Gibraltar had obtained the indebtedness from another lender, so it was a "debt collector" under the federal statutes.¹⁶⁸ The Fifth Circuit did not analyze that issue in depth, but simply found that First Gibraltar was doing nothing more than "attempting to enforce an obligation under a guaranty agreement in connection with a commercial transaction."¹⁶⁹ Again, the *Smith* opinion does little more than state the obvious. Hopefully, this ruling may provide lower courts and debtor/creditor counsel some direction in avoiding unnecessary litigation over what should be a well-settled issue arising out

162. *Id.*

163. *Id.* at 1492. According to the opinion, Congressman Frank Annunzio, one of the sponsors of the Amendment noted that the Act "regulates debt collection, not the practice of law The act applies to attorneys when they are collecting debts, not when they are performing tasks of a legal nature" *Id.* (citing 132 Cong. Rec. 30842 (1986)).

164. *Id.* at 1493.

165. The Court found unpersuasive the lawyer's arguments concerning the myriad anomalies presented by literal application of the Act's provisions to litigation activities. See *id.* at 1491-92 (limitations or communications with the debtor, etc.).

166. 62 F.3d 133 (5th Cir. 1995).

167. Under the Fair Debt Collection Practices Act, a debt is defined as: "[A]ny obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services . . . are primarily for *personal, family, or household purposes*, whether or not such obligation has been reduced to judgment." 15 U.S.C. § 1692a(5) (1995) (emphasis added). Similarly, the Texas Debt Collection Act defines a debt as "any obligation or alleged obligation arising out of a consumer transaction." TEX. REV. CIV. STAT. ANN. art. 5069, § 11.01(a) (Vernon 1987). A consumer is defined as "an individual who owes or allegedly owes a debt created primarily for personal, family, or household purposes." *Id.* art. 5069, § 11.01(d).

168. The Fair Debt Collection Practices Act defines a debt collector as one who "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C.A. § 1692a(6) (West Supp. 1995).

169. *Smith*, 62 F.3d at 136.

of unambiguous statutory language limiting these state and federal statutes to protecting the only transactions they were intended to protect: consumer transactions.

