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## Commercial Transactions

John Krahrmer

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# COMMERCIAL TRANSACTIONS

by

John Kraemer\*

**B**EGINNING last year the subject of the Commercial Transactions article was revised to better reflect the significant impact of bank insolvency cases on commercial issues. The revision took the form of a separate article covering banking law developments<sup>1</sup> during the 1989 Survey period<sup>2</sup> including the continuing expansion of the *D'Oench, Duhme* doctrine,<sup>3</sup> the scope of the FDIC's receiver authority to transfer assets of a failed bank without compliance with state law,<sup>4</sup> and several regulatory and lender liability issues. Since this coverage revision continues this year, this Article will merely note cases that are covered more fully in the Banking Article.<sup>5</sup> The reader should, therefore, consult both articles in overlap areas of commercial law and banking law.<sup>6</sup> The cases discussed in this Article concentrate on matters litigated under the Uniform Commercial Code, adopted in

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\* B.A., J.D., University of Iowa; LL.M. Harvard University. Professor of Law and Foundation Fellow of Commercial Law, Texas Tech University.

1. See Weinstock, *Banking Law Developments 1990, Annual Survey of Texas Law*, 44 Sw. L.J. 709-43 (1990).

2. A Survey period generally covers cases and legislation affecting Texas law reported from November of one year through October of the following year. Of necessity, this is an arbitrary division, and some overlap exists for cases modified on rehearing or appeal from approximately November through February.

3. The *D'Oench, Duhme* doctrine derives from the Supreme Court decision in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) and precludes a borrower from asserting a defense against collection of an obligation by the FDIC following a bank insolvency if the borrower "lent himself to a scheme or arrangement whereby the banking authority on which the respondent [the FDIC] relied in insuring the bank was or was likely to be misled." *Id.* at 460. The *D'Oench, Duhme* doctrine was subsequently enacted in the Federal Deposit Insurance Act of 1950, Pub. L. No. 81-797, § 2(13)(e), 64 Stat. 931 (codified as amended at 12 U.S.C. § 1823(e) (1988)). The Resolution Trust Corporation, created by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183, is managed by the FDIC and has rights paralleling those of the FDIC. See § 401(f)(1), 103 Stat. at 356.

4. See, e.g., *First Nat'l Bank of Andrews v. FDIC*, 707 F. Supp. 265, 269-70 (W.D. Tex. 1989) (FDIC has authority to transfer trust assets of failed state bank without complying with state trust law); *NCNB Texas Nat'l Bank v. Cowden*, 712 F. Supp. 1249, 1254-55 (W.D. Tex. 1989), *aff'd*, 895 F.2d 1488 (5th Cir. 1990) (similar authority exists for transfer of assets by FDIC for national banks).

5. See *Campbell Leasing, Inc. v. FDIC*, 901 F.2d 1244 (5th Cir. 1990); *FSLIC v. T.F. Stone-Liberty Land Assocs.*, 787 S.W.2d 475 (Tex. App.—Dallas 1990, writ granted); *FDIC/Manager Fund v. Larsen*, 793 S.W.2d 37 (Tex. App.—Dallas 1990, writ granted).

6. In addition to this principal division of coverage in the subject of Commercial Law, the Survey contains other articles that may be of interest to the reader. Matters concerning warranty law may also be discussed in the Deceptive Trade Practices and Commercial Torts article and issues involving creditors may also be covered in the article on Creditor and Consumer Rights.

Texas as the Texas Business and Commerce Code (the "Code").<sup>7</sup>

## I. GENERAL PROVISIONS

### A. *Good Faith, Fair Dealing and Acceleration Clauses*

#### 1. *Good Faith and Fair Dealing*

In *FDIC v. Coleman*<sup>8</sup> the Supreme Court of Texas held that a delay in effecting the sale of collateral does not violate any duty of good faith and fair dealing.<sup>9</sup> In *Coleman*, after defaulting on a real estate loan, the corporate debtor filed for bankruptcy. The lending bank thereafter moved in the bankruptcy court for foreclosure against the property securing the loan, and filed a state court action against two guarantors of the corporate debt. The bank subsequently became insolvent and the FDIC succeeded to the bank's position in the respective proceedings. Although the FDIC obtained approval of the bankruptcy court to sell the property securing the debt, the property was not actually sold until almost another year had passed. The FDIC then moved for summary judgment in the state court action against the guarantors.

In arguing that this foreclosure delay violated a duty of good faith and fair dealing, the guarantors asserted that such a duty arose from one or more of the following sources: (1) section 1.203 of the Code, (2) state common law, or (3) federal common law. The court questioned the application of the Code duty of good faith and fair dealing to a guaranty agreement but the court believed that if such a duty existed, it had not been breached by the delay.<sup>10</sup> The court stated, "[t]he UCC defines 'good faith' as 'honesty in fact.' The guarantors' complaint in this case is not that the FDIC was dishonest, but that it was not diligent. The Code does not require diligence for good faith."<sup>11</sup> As to state common law, the court pointed out that the Code imposes a duty of good faith only in cases where the aggrieved party can show a special relationship or a disparity in bargaining power and that no such showing had been made in this case.<sup>12</sup> The court then found that the federal common law duty of good faith and fair dealing required that a creditor properly conduct a foreclosure sale so as to receive the highest possible price.<sup>13</sup> Since the guarantors were not complaining about the conduct of the

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7. As adopted in Texas, the Uniform Commercial Code (Code) was enacted as TEX. BUS. & COM. CODE ANN. §§ 1.101-11.108 (Tex. UCC) (Vernon 1968 & Supp. 1990). The articles in the Code, renamed as chapters in the Texas version, are organized as follows: Chapter 1, General Provisions; Chapter 2, Sales; Chapter 3, Commercial Paper; Chapter 4, Bank Deposits and Collections; Chapter 5, Letters of Credit; Chapter 6, Bulk Sales; Chapter 7, Documents of Title; Chapter 8, Investment Securities and Chapter 9, Secured Transactions.

8. 795 S.W.2d 706 (Tex. 1990).

9. *Id.* at 707.

10. *Id.* at 708-09.

11. *Id.* at 708 (citations omitted). "Good faith" is defined in TEX. BUS. & COM. CODE ANN. § 1.201(19) (Tex. UCC) (Vernon 1968).

12. 795 S.W.2d at 708-09.

13. *Id.* at 709. This conclusion was reached by reviewing *Frederick v. United States*, 386 F.2d 481 (5th Cir. 1967), cited by the guarantors in support of their argument.

sale or the price received, but only about the delay in holding the sale,<sup>14</sup> the court said that the federal common law standard was not violated.<sup>15</sup>

The court further noted that imposing a generalized duty of good faith and fair dealing on foreclosure proceedings would create an impossible burden for creditors,<sup>16</sup> because creditors would be forced to guess whether a market was rising or falling in trying to determine the best time to sell collateral.<sup>17</sup> The court believed that the issues of material fact resulting from a general duty of good faith and fair dealing would be inimicable to the commercial need for predictability and certainty in the sale of collateral.<sup>18</sup>

## 2. Acceleration

The acceleration of a note following default is expressly permitted by section 1.208 of the Code.<sup>19</sup> A recurring problem with acceleration is a charge of usurious interest resulting from the possibility that an instrument may accelerate not only the principal balance due, but also the unearned interest or finance charges. The supreme court noted this problem in *Jim Walter Homes, Inc. v. Schuenemann*,<sup>20</sup> and suggested the use of a savings clause as a solution.<sup>21</sup> In *Myles v. Resolution Trust Corp.*<sup>22</sup> the maker alleged that language used in a note amounted to the contracting for usurious interest in the event of default and acceleration. To evaluate the validity of this allegation, the court first correctly noted that under Texas law a note is presumed to be non-usurious if the instrument's language is doubtful or reasonably subject to both a usurious and non-usurious construction.<sup>23</sup> The court then reviewed the language of the note as a whole, including a savings clause that disclaimed an intent to charge or collect usurious interest.<sup>24</sup> The court concluded that the note did not contract for and did not attempt to charge usurious interest.<sup>25</sup>

In contrast to *Myles*, the court in *Brookshire v. Longhorn Chevrolet Co.*<sup>26</sup> considered an installment contract containing an acceleration clause that

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14. 795 S.W.2d at 709.

15. *Id.*

16. *Id.* at 710.

17. *Id.*

18. *Id.*

19. TEX. BUS. & COM. CODE ANN. § 1.208 (Tex. UCC) (Vernon 1968).

20. "In literally scores of cases, the courts of this state have been called upon to decide whether a contract is usurious because it contains an acceleration provision which allows the collection of unearned interest or finance charges." 668 S.W.2d 324, 333 n.6 (Tex. 1984).

21. "[W]e fail to understand why acceleration clauses are drafted which do not include a sentence expressly disavowing any intention to collect excessive unearned interest or finance charges in the event the obligation is accelerated." *Id.*

22. 787 S.W.2d 616 (Tex. App.—San Antonio 1990, no writ).

23. *Id.* at 618. The presumption of legality when usury is alleged is of such long-standing under Texas law that it was specifically retained even when the supreme court abandoned the presumption for other terms in consumer installment contracts. See *Gonzalez v. Gainan's Chevrolet City, Inc.*, 690 S.W.2d 885, 886 (Tex. 1985).

24. 787 S.W.2d at 618. The savings clause was a well-drafted, "plain English" clause that might be a useful sample clause for commercial attorneys to review when drafting note and installment contract forms.

25. *Id.* at 619.

26. 788 S.W.2d 209 (Tex. App.—Fort Worth 1990, no writ).

stated upon default "the entire *unpaid balance of the Total of Payments* shall at the option of seller become immediately due and payable."<sup>27</sup> The contract had no savings clause. The court agreed with the debtors that under established law a clause containing such language was usurious.<sup>28</sup> The debtors also argued that the type size used in some portions of the contract was smaller than the ten-point bold type required by the Consumer Credit Code.<sup>29</sup> Evidence conflicted on whether the type was ten-point or eight to nine-point bold type. The creditor argued that the variation was *de minimis*. No cases were cited on this issue and the court held that the variation in type size was an issue of material fact that should be tried.<sup>30</sup>

## II. SALES TRANSACTIONS

### A. *Scope of Chapter 2: Installation of Goods*

Contracts often cover both the sale of goods and their installation. Because the Code only applies to the sale of goods, courts frequently apply a "predominate purpose" test to the transaction to determine whether the sales portion warrants application of the Code.<sup>31</sup> In *Geotech Energy Corp. v. Gulf States Telecommunications & Information Systems*<sup>32</sup> the court held that the sale and installation of a sophisticated telephone system requiring significant expertise for both the physical installation and the programming of the system was predominately a service and not a sale of goods transaction.<sup>33</sup> As an independent ground for holding Chapter 2 inapplicable, the court also noted that the system was financed through a third-party leasing company.<sup>34</sup> In resolving the issue at bar, the court applied a substantial performance test and concluded that the installer had sufficiently fulfilled the contract to recover any unpaid balance for the installation, as well as profits

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27. *Id.* at 211 (emphasis added).

28. *Id.* at 211-12. The court noted that the earlier case of *Commercial Credit Corp. v. Chasteen*, 565 S.W.2d 342, 345 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.), had previously held a similar clause usurious.

29. TEX. REV. CIV. STAT. ANN. art. 5069-7.02(2) to .02(4) (Vernon 1987) require certain notices and disclosures to be in ten-point bold type.

30. 788 S.W.2d at 213. Although seemingly trivial, the issue of type size is important because of the automatic penalties that attend the use of smaller type as a violation of the Consumer Credit Code. TEX. REV. CIV. STAT. ANN. art. 5069-8.01(b) (Vernon 1987). Apparently neither the court nor the parties were aware of *Hight v. Jim Bass Ford, Inc.*, 552 S.W.2d 490, 492 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.), which held the difference between ten-point bold and nine-point bold condensed type to be *de minimis* and not in violation of the Consumer Credit Code. The application of the *de minimis* doctrine to Consumer Credit Code issues was later approved by the supreme court in *Yates Ford, Inc. v. Ramirez*, 692 S.W.2d 51, 54-55 (Tex. 1985) (applying *de minimis* doctrine to "odd-days" calculation of interest charges and citing *Hight*).

31. See, e.g., *Easterly v. HSP of Texas, Inc.*, 772 S.W.2d 211, 214 (Tex. App.—Dallas 1989, no writ) (whether medical transaction was sale or service required analysis of dominant purpose); *Montgomery Ward & Co. v. Dalton*, 665 S.W.2d 507, 511 (Tex. App.—El Paso 1983, no writ) (whether sale and installation of roofing materials was covered by Chapter 2 required determination of "essence" of transaction).

32. 788 S.W.2d 386 (Tex. App.—Houston [14th Dist.] 1990, no writ).

33. *Id.* at 389.

34. *Id.*

lost as a result of the purchaser's refusal to pay for installing the system.<sup>35</sup>

## B. Warranties

### 1. "Puffing" and Expressions of Opinion

Under section 2.313 of the Code, a statement by the seller that is only the seller's opinion or a commendation of the goods does not create an express warranty.<sup>36</sup> If a statement goes beyond mere "puffing," to the level of affirmation of material fact, an express warranty is created.<sup>37</sup> While the Code is clear that seller puffing and other expressions of opinion are valid defenses to a breach of warranty claim, the Texas Deceptive Trade Practices Act ("DTPA") is not so clear.<sup>38</sup> Under the DTPA, representations that goods or services have characteristics, uses, or benefits that they do not have,<sup>39</sup> or that goods or services are of a particular quality or grade when they are of another,<sup>40</sup> can be the subject of an independent claim regardless of whether an associated claim is asserted for breach of warranty.<sup>41</sup> In *Autohaus, Inc. v. Aguilar*<sup>42</sup> the seller argued that statements made by its salesman were merely puffing or expressions of opinion for which an action would not lie under the DTPA. Although no prior case had squarely addressed the issue, the court agreed with the seller that puffing and expressions of opinion claims were defenses under the DTPA.<sup>43</sup> Consequently, the court held the salesman's remarks that the car in question was "the best engineered car in the world" and that the buyer "probably would not have mechanical difficulties"<sup>44</sup> were too general to be actionable misrepresentations under the DTPA.<sup>45</sup> A vigorous dissent argued that the legislative intent of the DTPA

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35. *Id.* at 392.

36. TEX. BUS. & COM. CODE ANN. § 2.313(b) (Tex. UCC) (Vernon 1968).

37. *Id.* § 2.313(a)(1).

38. The Deceptive Trade Practices Act appears as TEX. BUS. & COM. CODE ANN. §§ 17.41-63 (Vernon 1987 & Supp. 1991).

39. *Id.* § 17.46(b)(5).

40. *Id.* § 17.46(b)(7).

41. *See, e.g.,* Donwerth v. Preston II Chrysler-Dodge, Inc., 775 S.W.2d 634, 636 (Tex. 1989) (representation that brakes were in good condition amounted to representation of standard, quality or grade actionable under DTPA; no warranty claim joined in the action); Metro Ford Truck Sales, Inc. v. Davis, 709 S.W.2d 785, 789-90 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.), *aff'd on rehearing*, 711 S.W.2d 145 (Tex. App.—Fort Worth 1986, no writ) (though "as is" disclaimer may bar warranty action, disclaimer not effective to waive separate cause of action for misrepresentation under DTPA).

In *Teague v. Bandy*, 793 S.W.2d 50, 56 (Tex. App.—Austin 1990, writ denied), decided during the Survey period, the court noted that the absence of an implied warranty under the Code does not foreclose a DTPA action. *Id.* at 56. The case involved the sale of future embryos to be produced by embryo transfer to an identified cow. The buyer argued that TEX. BUS. & COM. CODE ANN. § 2.316(f) (Tex. UCC) (Vernon Supp. 1991) excludes implied warranties in the sale of livestock and its unborn young. The court held that whether or not implied warranties existed in the transaction was not relevant to the maintenance of a DTPA claim under TEX. BUS. & COM. CODE ANN. § 17.46(b)(5) (Tex. UCC) (Vernon 1987 & Supp. 1991).

42. 794 S.W.2d 459 (Tex. App.—Dallas 1990, no writ).

43. *Id.* at 462.

44. *Id.* at 464.

45. *Id.*

does not allow puffing and expressions of opinion as defenses.<sup>46</sup> The dissent viewed the salesman's statements as sufficient to support the misrepresentation claim.<sup>47</sup>

## 2. Implied Warranties

In *Davidson Oil Country Supply Co. v. Klockner, Inc.*<sup>48</sup> the buyer alleged that the oil field pipe delivered by its seller would not pass without objection in the trade because of weld seam splitting. The buyer argued that the sale of such pipe violated the implied warranty of merchantability. The trial court had excluded evidence that other pipe from the same manufacturer exhibited the same tendency to split along the weld seams. The Fifth Circuit Court of Appeals reversed and remanded on this issue because it regarded the offered evidence as clearly relevant to determining whether a breach of warranty had occurred.<sup>49</sup>

## 3. Disclaimer of Warranties

Under the Code a disclaimer is not effective unless it is conspicuous.<sup>50</sup> In *Cate v. Dover Corp.*<sup>51</sup> the supreme court held that a disclaimer printed in the same color, size, and typeface as the rest of the descriptive text contained in a brochure was not conspicuous, particularly when the text was introduced by a heading in contrasting half-inch type that emphasized the making of a warranty rather than a disclaimer.<sup>52</sup> The court also held, however, that even an inconspicuous disclaimer can be effective if the seller can prove that the buyer had actual knowledge of the disclaimer, as might occur if the seller specifically called the buyer's attention to it.<sup>53</sup> In a separate concurring opinion, Justice Spears suggested that the legislature simply prohibit all disclaimers of the Code's implied warranties of merchantability and fitness for a particular purpose.<sup>54</sup> In his view, the economic realities of the marketplace have displaced freedom of contract—where disclaimers might actually rep-

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46. *Id.* at 465.

47. *Id.* at 466.

48. 908 F.2d 1238 (5th Cir. 1990), *modified on rehearing*, 917 F.2d 185 (5th Cir. 1990).

49. *Id.* at 1245. The court also noted that the same evidence was relevant on an alternative claim asserted by the buyer alleging bad faith by the seller in dealing with the buyer's complaints about defects in the pipe. This issue and an associated usury issue were more thoroughly discussed on rehearing, 917 F.2d 185, where the court modified its original remand of the warranty and good faith issues to include remand of the usury issue as well.

50. TEX. BUS. & COM. CODE ANN. § 2.316(b) (Tex. UCC) (Vernon 1968).

51. 790 S.W.2d 559 (Tex. 1990).

52. *Id.* at 562. The warranty and the accompanying disclaimer are reprinted in an appendix to the opinion, providing useful guidance in determining if a disclaimer meets the requirement of conspicuousness. *Id.* at 563.

53. *Id.* at 561-62. Justice Ray, in a concurring and dissenting opinion, agreed with the majority that a disclaimer must be conspicuous to a reasonable person, but disagreed that a buyer's actual knowledge of a disclaimer should constitute an exception to the conspicuousness requirement. In Justice Ray's view a bright line test would avoid "swearing matches as to actual awareness in particular cases." *Id.* at 567.

54. *Id.* at 564. The warranty of merchantability is imposed by TEX. BUS. & COM. CODE ANN. § 2.314 (Tex. UCC) (Vernon 1968) and the warranty of fitness for a particular purpose is imposed by TEX. BUS. & COM. CODE ANN. § 2.315 (Tex. UCC) (Vernon 1968).

resent bargained terms—with contracts of adhesion.<sup>55</sup>

### C. Remedies

#### 1. Revocation of Acceptance and Rescission

In *Carrow v. Bayliner Marine Corp.*<sup>56</sup> buyers of a motor yacht discovered numerous defects within one month after the yacht had been delivered and, despite this knowledge, made payment for the yacht. After discovering additional defects, the buyers notified both the seller and the manufacturer and demanded that repairs be made. The manufacturer attempted to make repairs, but was not able to fix the boat to the buyers' satisfaction, upon which the buyers sued for damages and rescission. The court allowed the award of damages for repairs, but denied revocation of acceptance of the yacht or contract rescission.<sup>57</sup> The buyers' action was brought under the DTPA and, although the court agreed that the Code remedy of revocation was incorporated into the DTPA,<sup>58</sup> the buyers had the burden of pleading and proving they had met the Code requirements for revocation.<sup>59</sup> The court held that the buyers failed to meet this burden and, thus, were not entitled to revoke acceptance.<sup>60</sup> The court further held that the buyers had failed to plead and prove an independent basis for rescission under the DTPA itself because they had not shown timely notice to the seller nor tender of return of the goods.<sup>61</sup> As an independent ground for denying rescission, the court noted that the buyers had not purchased the boat directly from the manufacturer, but from a dealer and, in the absence of a contract with the manufacturer, there was nothing to rescind.<sup>62</sup>

#### 2. Action for the Price

In *F & P Builders v. Lowe's of Texas, Inc.*<sup>63</sup> the buyer accepted goods delivered by the seller, but did not pay for them. In the seller's action for the price, the buyer argued that the seller had a duty to mitigate damages by accepting return of the goods. The court held that, even if a duty to mitigate damages by accepting return of the goods existed at common law, section 2.709 of the Code supersedes this duty,<sup>64</sup> and the seller was not required to accept return.<sup>65</sup> The seller was allowed to recover the price of the goods

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55. 790 S.W.2d at 565.

56. 781 S.W.2d 691 (Tex. App.—Austin 1989, no writ).

57. *Id.* at 695-96.

58. *Id.* at 695. Revocation of acceptance is permitted by TEX. BUS. & COM. CODE ANN. § 2.608 (Tex. UCC) (Vernon 1968). The availability of revocation in a DTPA action is discussed at length in *Green Tree Acceptance, Inc. v. Pierce*, 768 S.W.2d 416, 419-20 (Tex. App.—Tyler 1989, no writ).

59. 781 S.W.2d at 695-96.

60. *Id.*

61. *Id.* at 696.

62. *Id.*

63. 786 S.W.2d 502 (Tex. App.—Dallas 1990, no writ).

64. TEX. BUS. & COM. CODE ANN. § 2.709(a)(1) (Tex. UCC) (Vernon 1968).

65. 786 S.W.2d at 503.



delivered to the buyer.<sup>66</sup>

### 3. *Liquidation and Limitation of Damages*

The Code permits the parties to a sales contract to stipulate liquidated damages in a reasonable amount and to make such liquidated damages the sole remedy for breach.<sup>67</sup> In *McFadden v. Fuentes*<sup>68</sup> a contract for the sale of restaurant equipment required a deposit of twenty thousand dollars by the buyer. If the buyer failed to pay the balance of the purchase price, the seller was entitled to retain the deposit and cancel the agreement. After the buyer failed to pay the balance due, the seller retained the deposit and sued for consequential damages. The court held that the clause requiring a deposit was not intended as a liquidated damages clause under the Code, and that the contract did not make the deposit clause the sole remedy for breach.<sup>69</sup> The court determined that the seller was entitled to maintain an action for consequential damages.<sup>70</sup>

### 4. *Arbitration*

Although Chapter 2 does not include provisions regarding the arbitration of sales disputes, section 2 of the Federal Arbitration Act<sup>71</sup> permits parties to a contract involving commerce to agree to arbitration as a means of dispute resolution.<sup>72</sup> Several sales cases during the Survey period enforced arbitration,<sup>73</sup> although one case denied arbitration on the ground that alleged misrepresentations violating the DTPA were not within the scope of the arbitration clause in the sales contract.<sup>74</sup> The court denying arbitration expressly noted that it did not reach the question of whether a consumer can ever agree to a waiver of the right to litigate DTPA claims.<sup>75</sup>

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66. *Id.*

67. TEX. BUS. & COM. CODE ANN. §§ 2.718, 2.719(a)(1) (Tex. UCC) (Vernon 1968).

68. 790 S.W.2d 736 (Tex. App.—El Paso 1990, no writ).

69. *Id.* at 738.

70. *Id.*

71. 9 U.S.C. § 2 (1988).

72. *Id.*

73. *See, e.g., Mewbourne Oil Co. v. Blackburn*, 793 S.W.2d 735, 737 (Tex. App.—Amarillo 1990, mand. overr.) (breach or repudiation of contract does not affect validity of arbitration agreement, but only raises questions to be determined by arbitrators); *USX Corp. v. West*, 781 S.W.2d 453, 455-56 (Tex. App.—Houston [1st Dist.] 1989, no writ) (claims for actual and punitive damages arising from buyer's alleged breach of sales contract subject to arbitration); *Valero Energy Corp. v. Wagner & Brown, II*, 777 S.W.2d 564, 566-68 (Tex. App.—El Paso 1989, writ denied) (tort claim directly related to seller's rights under contract held subject to arbitration under language of arbitration clause in contract).

74. *Decision Control Sys., Inc. v. Personnel Cost Control, Inc.*, 787 S.W.2d 98 (Tex. App.—Dallas 1990, no writ).

75. *Id.* at 100. Fraud in the inducement of an arbitration agreement is not itself arbitrable. 9 U.S.C. § 2 (1988); *cf. Merrill Lynch, Pierce, Fenner, & Smith, Inc. v. Longoria*, 783 S.W.2d 229 (Tex. App.—Corpus Christi 1989, no writ).

## III. COMMERCIAL PAPER

## A. Form of Instruments

The rules of Chapter 3 are applicable to negotiable instruments,<sup>76</sup> and to instruments that are non-negotiable only because they are not payable to order or to bearer.<sup>77</sup> In *Dann v. Team Bank*<sup>78</sup> the guarantor's name, corporate office, and the name of the corporation were typewritten immediately below the handwritten signature of the guarantor. Under the Code, an instrument signed in this form is presumptively a signature made in a representative capacity and does not impose personal liability on the signer.<sup>79</sup> The court held that the guaranty failed in several respects to meet the Chapter 3 negotiability requirements and, thus, should be construed by common law standards rather than the rules applicable to negotiable instruments.<sup>80</sup> Applying these standards, the court found that the corporate designation following the signature merely identified the signer and did not relieve the guarantor of personal liability.<sup>81</sup> A similar result was reached in *NCL Studs, Inc. v. Jandl*<sup>82</sup> where the signature of the guarantor was followed by the designation of her office, but without the name of the corporation. In this case, however, the guarantee was printed on the back of a promissory note. The court concluded that under Chapter 3 the instrument's form of signature made the guarantor personally liable because the name of the corporation had not been included on the guarantee side of the instrument.<sup>83</sup>

The purpose of negotiability is to permit the negotiation of an instrument in such form that the transferee can become a holder<sup>84</sup> and, if the necessary requirements are met, a holder in due course<sup>85</sup> with the right to enforce the instrument without regard to the existence of various defenses.<sup>86</sup> Rights paralleling those of a holder in due course can also be obtained under a contractual waiver of defenses clause.<sup>87</sup> The use of a negotiable instrument or a waiver of defenses clause in consumer credit transactions has been largely circumscribed by the Federal Trade Commission (FTC) Holder in

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76. TEX. BUS. & COM. CODE ANN. § 3.104 (Tex. UCC) (Vernon 1968).

77. *Id.* § 3.805.

78. 788 S.W.2d 182 (Tex. App.—Dallas 1990, no writ).

79. TEX. BUS. & COM. CODE ANN. § 3.403(c) (Tex. UCC) (Vernon 1968).

80. 788 S.W.2d at 186.

81. *Id.* at 185.

82. 792 S.W.2d 182 (Tex. App.—Houston [1st Dist.] 1990, writ denied).

83. *Id.* at 187.

84. TEX. BUS. & COM. CODE ANN. § 3.202(a) (Tex. UCC) (Vernon 1968).

85. *Id.* § 3.302.

86. *Id.* § 3.305; see, e.g., *Williams v. Stansbury*, 649 S.W.2d 293, 296 (Tex. 1983) (holder in due course took free of any defenses or claims arising from garnishment proceedings of which holder had no knowledge when instrument was taken); *Favors v. Yaffe*, 605 S.W.2d 342,345 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.) (defense of fraud ineffective against holder in due course). See generally J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 545 (3d ed. 1988).

87. TEX. BUS. & COM. CODE ANN. § 9.206(a) (Tex. UCC) (Vernon Supp. 1991).

Due Course Rule<sup>88</sup> and by state statute<sup>89</sup> and decision.<sup>90</sup> In *Alaniz v. Yates Ford, Inc.*<sup>91</sup> a consumer credit contract complied with the FTC Holder in Due Course Rule when it included the required notice on the front of the contract. The contract, however, arguably violated the Texas Consumer Credit Code when it included a clause on the back of the contract that could be interpreted as a waiver of defenses.<sup>92</sup> The court held that under the rule announced by the supreme court in *Gonzalez v. Gainan's Chevrolet City, Inc.*<sup>93</sup> the legality of the questioned clause would not be presumed, and that the terms of the clause amounted to a waiver of defenses prohibited by the Consumer Credit Code.<sup>94</sup>

### B. Holding in Due Course and the Shelter Principle

Even if an instrument qualifies as a negotiable instrument, the holder must take an instrument for value, in good faith, and without notice of claims or defenses to become a holder in due course.<sup>95</sup> An important attribute of holding in due course is the ability to transfer the rights of a holder in due course to a subsequent transferee. This ability to transfer the rights of a holder in due course is commonly referred to as the "shelter principle."<sup>96</sup>

One of the most important developments during the Survey period was a decision by the Fifth Circuit Court of Appeals in *Campbell Leasing, Inc. v. FDIC*.<sup>97</sup> The court held that the FDIC and subsequent holders "enjoy holder in due course status whether or not they satisfy the technical requirements of state law."<sup>98</sup> The court reached this decision as a matter of federal common law to promote needed uniformity in the disposition of assets of failed financial institutions.<sup>99</sup> *Campbell* represents an extension of the fed-

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88. 16 C.F.R. §§ 433.1-3 (1989). The Federal Trade Commission holder in due course rule requires that any consumer credit contract contain a notice that the holder remains subject to any claims and defenses that the debtor could assert against the seller of the goods or services provided under the contract.

89. TEX. REV. CIV. STAT. ANN. art. 5069-7.07(6) (Vernon 1987).

90. *Knight v. International Harvester Credit Corp.*, 627 S.W.2d 382, 386-87 (Tex. 1982) (Texas Consumer Credit Code forbids the waiver of a buyer's claims and defenses against a seller or holder).

91. 790 S.W.2d 38 (Tex. App.—San Antonio 1990, no writ).

92. TEX. REV. CIV. STAT. ANN. art. 5069-7.07(6) (Vernon 1987) prohibits waiver of defense clauses in consumer credit contracts.

93. 690 S.W.2d 885 (Tex. 1985).

94. 790 S.W.2d at 40-41. The clause in question stated that "[a]ll rights of seller in, to and under this agreement and in and to said property shall pass to and may be exercised by seller's assignee. Purchaser agrees that in the event of assignment by seller, purchaser's liability to assignee shall be immediate and absolute and not affected by any default of seller." *Id.* at 39. The court reasoned that a "default of seller" could include a breach by the seller of the underlying purchase contract and the language used in the clause could be read to cut off the buyer's right to assert the breach against the assignee.

95. TEX. BUS. & COM. CODE ANN. § 3.302 (Tex. UCC) (Vernon 1968).

96. J. WHITE & R. SUMMERS, *supra* note 86, at 616.

97. 901 F.2d 1244 (5th Cir. 1990).

98. *Id.* at 1249.

99. *Id.* In addition to the freedom from defenses that the FDIC may obtain by qualifying as a holder in due course, the FDIC is also protected by the estoppel doctrine of *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), and by the codification of *D'Oench, Duhme* in 12 U.S.C. § 1823(e) (1988). *D'Oench, Duhme* and § 1823(e) were considered in several cases de-

eral holder in due course doctrine previously recognized by the fifth circuit in *FSLIC v. Murray*.<sup>100</sup> The ability of the FDIC to acquire holder in due course status without complying with the requirements of state law under the Code was subsequently applied in *Sunbelt Savings v. Amrecorp Realty Corp.*<sup>101</sup> In *Sunbelt* the district court for the northern district of Texas reversed its prior decision<sup>102</sup> on the basis of *Campbell*. The district court noted that it regarded *Campbell* as a broader interpretation of the federal holder in due course doctrine than that adopted in other circuits.<sup>103</sup>

Once holder in due course status is acquired by the FDIC, whether under the Code or under federal common law, the shelter principal allows the FDIC to transfer those rights to subsequent transferees.<sup>104</sup> In *NCNB Texas National Bank v. Campise*<sup>105</sup> a state court recognized the ability of the FDIC to transfer such rights as part of a purchase and assumption transaction in winding up the affairs of a failed bank.<sup>106</sup>

### C. Liability and Discharge of Parties

#### 1. Contract of Maker

The maker of a note engages to pay the instrument according to its tenor at the time of his engagement.<sup>107</sup> In some situations, as in the sale of real estate by the borrower to a subsequent purchaser, the purchaser may contract to assume the maker's liability on the instrument.<sup>108</sup> In *Schultz v.*

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cided during the Survey period. See, e.g., *Olney Sav. & Loan Ass'n v. Trinity Banc Sav. Ass'n*, 885 F.2d 266, 275 (5th Cir. 1989) (*D'Oench, Duhme* and § 1823(e) could not be raised for first time on appeal by FSLIC (now FDIC) after entry of final judgment against bank and subsequent appointment of FSLIC as receiver); *Deposit Guar. Bank v. Hall*, 741 F. Supp. 1287, 1290 (S.D. Tex. 1990) (oral agreements between maker and bank cut off by *D'Oench, Duhme* and § 1823(e)); *FDIC v. Byrne*, 736 F. Supp. 727, 732-33 (N.D. Tex. 1990) (*D'Oench, Duhme* and § 1823(e) protect FDIC from defenses based on failure of bank to credit payments on loan); *Carico v. First Nat'l Bank of Bogata*, 734 F. Supp. 768, 770 (E.D. Tex. 1990) (oral representation by bank that overdrafts would be honored not enforceable under *D'Oench, Duhme* and § 1823(e)); *Aero Support Sys., Inc. v. FDIC*, 726 F. Supp. 651, 654 (N.D. Tex. 1989) (oral agreement that bank would not foreclose on collateral barred by *D'Oench, Duhme* and § 1823(e)); *FSLIC v. T.F. Stone-Liberty Land Assocs.*, 787 S.W.2d 475, 478 (Tex. App.—Dallas 1990, writ granted) (rejecting *Olney* and holding *D'Oench, Duhme* and 1823(e) can be raised post-judgment by FSLIC (now FDIC)); *FDIC/Manager Fund v. Larsen*, 793 S.W.2d 37,43 (Tex. App.—Dallas 1990, writ granted) (same); *FDIC v. Zoubi*, 792 S.W.2d 825, 829 (Tex. App.—Dallas 1990, no writ) (same). The *D'Oench, Duhme* doctrine and § 1823(e) are further discussed in the Banking article.

100. 853 F.2d 1251, 1256 (5th Cir. 1988). The federal holder in due course doctrine was applied in *Sunbelt Sav. v. Cashin Constr. Co.*, 737 F. Supp. 41 (E.D. Tex. 1990), decided during the Survey period before the *Campbell* decision was handed down.

101. 742 F. Supp. 370 (N.D. Tex. 1990).

102. 730 F. Supp. 741 (N.D. Tex. 1990).

103. The district court cited the following cases in support of this proposition: *FDIC v. Grupo Girod Corp.*, 869 F.2d 15, 16-18 (1st Cir. 1989) (applying Puerto Rican law to defeat FDIC's holder in due course status); *FDIC v. Turner*, 869 F.2d 270, 273 (6th Cir. 1989) (retaining traditional requirements of good faith and knowledge); *FDIC v. Gulf Life Ins. Co.*, 737 F.2d 1513, 1518 (11th Cir. 1984) (same).

104. *Campbell Leasing, Inc. v. FDIC*, 901 F.2d 1244, 1249 (5th Cir. 1990).

105. 788 S.W.2d 115 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

106. *Id.* at 118-19.

107. TEX. BUS. & COM. CODE ANN. § 3.413(a) (Tex. UCC) (Vernon 1968).

108. Of course, the assumption contract is itself not a negotiable instrument, but rather a

*Weaver*<sup>109</sup> the purchasers agreed to pay the note's unpaid principal in accordance with its terms. The note itself provided that the payee was to look only to the property securing the note for payment and that the maker was to have no personal liability on the instrument. The court held that because of these provisions the purchasers incurred no greater obligation than that of the maker and that the payee was limited to foreclosing on the property to satisfy the debt.<sup>110</sup>

## 2. Contract of Indorsers

Under section 3.414 of the Code, the contract of an indorser runs to the holder of an instrument or to any subsequent indorser following dishonor.<sup>111</sup> In *Knopf v. Dallas-Fort Worth Roofing Supply Co.*<sup>112</sup> the drawer of a check made jointly payable to a contractor and a roofing supply company argued that section 3.414 imposed a legal duty on an indorser to ascertain the drawer's reason for making the check jointly payable. The court firmly rejected this argument, correctly pointing out that the indorser's duty runs only to subsequent holders and indorsers and not to the drawer or maker of an instrument.<sup>113</sup> The drawer also asserted that the custom and usage of the roofing trade created an expectation that a jointly payable check was intended to be used for the purchase of supplies. The drawer claimed that, because of this custom, the supplier was negligent when it indorsed the check and turned over the proceeds to the contractor instead of applying the money toward supply purchases. The court agreed that the evidence of custom and usage created an independent ground on which a duty to contact the drawer might be based.<sup>114</sup>

## 3. Discharge of Liability

Section 3.601 of the Code contains an extensive list of provisions describing the several ways a party's liability on an instrument may be discharged.<sup>115</sup> In *C.F. Southern Region, Inc. v. Marshall*<sup>116</sup> an interest free loan was made to an employee in exchange for a promissory note. When the employee later quit his job, the employer sued to recover on the note. The former employee defended on the ground that his liability on the note had been released by agreement with the employer. The answer was later amended to include counterclaims for fraud, unpaid commissions, and liqui-

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third party beneficiary contract with the original obligee as an intended beneficiary of the contract between the original obligor and the purchaser. Such an agreement to pay a debt to a third party was, in fact, the origin of third party beneficiary theory in the American law of contracts. See *Lawrence v. Fox*, 20 N.Y. 268 (1859), discussed in *Waters, The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 HARV. L. REV. 1109 (1985).

109. 780 S.W.2d 323 (Tex. App.—Austin 1989, no writ).

110. *Id.* at 325.

111. TEX. BUS. & COM. CODE ANN. § 3.414(a) (Tex. UCC) (Vernon 1968).

112. 786 S.W.2d 37 (Tex. App.—Dallas 1990, no writ).

113. *Id.* at 39.

114. *Id.* at 41.

115. TEX. BUS. & COM. CODE ANN. § 3.601 (Tex. UCC) (Vernon 1968 & Supp. 1990).

116. 787 S.W.2d 471 (Tex. App.—Houston [14th Dist.] 1990, no writ).

dated damages. At trial, the former employee testified that he had orally agreed with the employer to waive any claims he might have for termination pay in exchange for release of his liability on the note. The credibility of this testimony was enhanced by the inability of the employer to produce the note at the time of trial. The court held that the evidence was sufficient to permit the jury to find that the employer had released the note and destroyed it, discharging any liability.<sup>117</sup>

Under section 3.606 of the Code, a party may be discharged by the holder if the holder unjustifiably impairs any collateral given to secure payment of the instrument.<sup>118</sup> A party may consent in advance, however, to permit the holder to deal with collateral in a way that might impair its value.<sup>119</sup> In *FDIC v. Nobles*<sup>120</sup> a secured creditor failed to perfect a security interest in inventory and accounts receivable with the result that a judgment creditor of the principal obligor was able to effectively seize and sell the collateral. A guarantor of the note argued that the seizure and sale constituted an impairment of collateral that released him from liability on the instrument. The guarantor also argued that two paragraphs in the guaranty purporting to give consent to such impairment were ineffective because the creditor had a duty of good faith that could not be waived by agreement under the Code. The court first held that the guaranty was in a separate document from the note and, therefore, was not governed by the Code, but by general contract law.<sup>121</sup> Under the general contract law of Texas, the court believed the duty of good faith could be waived.<sup>122</sup> The court then held that, assuming the guaranty was governed by the Code, section 3.606 expressly permitted a party to consent in advance to actions that impaired collateral.<sup>123</sup> The court deemed the language used in the guaranty to be an effective consent.<sup>124</sup>

#### 4. *Effect of Instrument on Underlying Obligation*

According to the Code, unless otherwise agreed, when a check is taken in payment, liability on the underlying obligation is suspended until the check is presented.<sup>125</sup> If the check is paid, liability on both the check and the obligation are discharged; if the check is dishonored, an action may be main-

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117. *Id.* The facts described in the opinion would effect a discharge under two separate provisions of the Code TEX. BUS. & COM. CODE ANN. § 3.601(b) (Tex. UCC) (Vernon 1968) (discharge by an agreement that would discharge a simple contract for the payment of money); *Id.* § 3.605(a)(1) (discharge by the intentional destruction of an instrument).

118. TEX. BUS. & COM. CODE ANN. § 3.606(a)(2) (Tex. UCC) (Vernon 1968).

119. *Id.* § 3.606(a).

120. 901 F.2d 477 (5th Cir. 1990).

121. *Id.* at 480.

122. *Id.* (citing *Simpson v. MBank Dallas, N.A.*, 724 S.W.2d 102, 106 (Tex. App.—Dallas 1987, writ ref'd n.r.e.)). On this issue, compare *FDIC v. Coleman*, 795 S.W.2d 706 (Tex. 1990), discussed in text, *supra* note 8.

123. 901 F.2d at 481.

124. *Id.* Earlier in the opinion the court noted that “[l]ess sweeping language has been found effectively to waive any right that a guarantor might have to require a creditor to file a financing statement.” *Id.* at 480.

125. TEX. BUS. & COM. CODE ANN. § 3.802(a)(2) (Tex. UCC) (Vernon 1968).

tained on either the check or on the obligation.<sup>126</sup> In *Tam Nu La v. Aetna Life Insurance Co.*<sup>127</sup> the court considered the effect of a postdated check on the obligation to pay the initial premium due under a life insurance policy. When the insured was killed in a robbery shortly before the date stated on the check, the insurer denied coverage on the theory that the insured and the insurance agent had agreed that the insured did not intend to pay the premium until the date written on the check.<sup>128</sup> The court held that, under the Code, a genuine issue of material fact was presented on the question of whether the insured had intended not to pay the premium until the stated date, or the insured had intended the check as conditional payment for the premium so as to suspend the underlying obligation to pay.<sup>129</sup> Summary judgment for the insurer was reversed, and the case was remanded for trial.<sup>130</sup>

#### IV. BANK TRANSACTIONS

##### A. Forged and Missing Indorsements

###### 1. Breach of Warranty Because of Forged Indorsement

The transfer of an instrument carries with it a warranty that the person transferring the instrument has good title or is authorized to obtain payment or acceptance on behalf of one who has good title.<sup>131</sup> In *White v. Independence Bank*<sup>132</sup> one of the joint payees on a draft signed his own name as indorser and typed the name of the other payee on the back of the draft. He then deposited the instrument for collection. When the draft was presented, payment was refused for lack of proper indorsement and the item was returned to the collecting bank. The collecting bank charged back a provisional credit entered for the item and notified the payee who had deposited the draft that it had been dishonored. The payee sued the collecting bank on the theory that it had failed to notify him of the dishonor within twenty-four hours after the bank learned of the dishonor. The court noted that the payee, by his own admission, knew that the draft had not been properly indorsed and had breached the warranty of good title.<sup>133</sup> The court further held that the payee acted fraudulently by seeking to obtain payment on the draft when he was aware that the other payee had not indorsed the instrument.<sup>134</sup> Because of the breach of warranty and the fraud, the court upheld

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126. *Id.*

127. 781 S.W.2d 630 (Tex. App.—Houston [14th Dist.] 1989, writ dismissed).

128. According to the deposition of the insurance agent, the date was written on the check by the agent at the instruction of the insured.

129. *Id.* at 633.

130. *Id.* at 635.

131. Under TEX. BUS. & COM. CODE ANN. §§ 3.417(b)(1), 4.207(b)(1) (Tex. UCC) (Vernon 1968), this warranty runs in favor of subsequent transferees. Under TEX. BUS. & COM. CODE ANN. §§ 3.417(a)(1), 4.207(a)(1) (Tex. UCC) (Vernon 1968), the warranty runs to the payor or acceptor.

132. 794 S.W.2d 895 (Tex. App.—Houston [1st Dist.] 1990, writ requested).

133. *Id.* at 898-99.

134. *Id.* at 899.

summary judgment in favor of the bank.<sup>135</sup>

Another issue arising from forged or unindorsed instruments is the possible liability of a collecting bank for the proceeds paid on the improper indorsement. In *Stone v. First City Bank of Plano*<sup>136</sup> debtors made arrangements with a mortgage company to provide interim financing for the construction of a residence. To facilitate the arrangement, debtors deposited sixty thousand dollars with the mortgage company to be applied later against the price of the house. For unknown reasons, the mortgage company issued two drafts against the sixty thousand dollar deposit while construction was still in progress. One draft was issued on July 25, 1985, for thirty-nine thousand dollars and was made jointly payable to the contractor and one of the debtors. The second draft was issued on September 4, 1985, for thirteen thousand dollars and was also made jointly payable to the contractor and the same debtor. The debtor's indorsement was forged on the first draft and was completely missing on the second draft. Nonetheless, both drafts were paid by the bank on which they were drawn. The debtors remained unaware of the drafts until February 1986. Following settlement of their claims with the mortgage company, debtors sued the contractor's bank, through which the drafts had been collected, asserting actions for conversion, for money had and received, and breach of the warranty of good title. The bank argued that the debtors were not entitled to recover on any theory because they were never holders and never had possession of either draft. The court rejected this proposition on the ground that possession of the draft by one of the payees, in this case the contractor, was constructive possession by the other payee sufficient to permit a suit based on a forged or missing indorsement.<sup>137</sup> On the action for conversion, the court held that the claim was barred on the first draft by the two-year statute of limitations governing tort claims, but was not barred on the second draft because it was paid at a later date.<sup>138</sup> As to the action for money had and received, the bank argued that such actions had been abrogated by adoption of the Code. The court found no Texas cases on this issue, but agreed with two federal cases construing Texas law that actions for money had and received survived the adoption of the Code.<sup>139</sup> The court did not mention section 3.419 of the Code which lends additional support to the continued validity of actions for money had and received.<sup>140</sup> The court noted that both Code defenses and common law defenses would be available in the action for money had and

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135. *Id.* at 901.

136. 794 S.W.2d 537 (Tex. App.—Dallas 1990, writ denied).

137. *Id.*

138. *Id.* at 543; TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon 1986).

139. *Peerless Ins. Co. v. Texas Commerce Bank*, 791 F.2d 1177, 1181 (5th Cir. 1986); *International Indus., Inc. v. Island State Bank*, 348 F. Supp. 886, 888 (S.D. Tex. 1971).

140. TEX. BUS. & COM. CODE ANN. § 3.419(c) (Tex. UCC) (Vernon 1968) (emphasis added) provides, in part, "a representative, including a depository or collecting bank . . . is not liable in conversion or otherwise to the true owner beyond the amount of any proceeds remaining in his hands." Curiously, the bank also did not mention § 3.419(c). If the proceeds it received from the drafts had already been paid out, this section might have provided a strong defense. See *Steven-Daniels Corp. v. Commercial Nat'l Bank*, 673 S.W.2d 651, 652-53 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).



received.<sup>141</sup>

## B. Responsibilities of Payor Banks

### 1. Return of Dishonored Items

Under Texas law a payor bank is accountable for the late return of a dishonored item.<sup>142</sup> In the case of a demand item, the instrument must be returned by midnight of the banking day following the banking day of receipt of the item.<sup>143</sup> A "banking day" is defined as "that part of any day on which a bank is open to the public for carrying on substantially all of its banking functions. . . ."<sup>144</sup> In *Texas American Bank/Farmers Branch v. Abrams Centre National Bank*<sup>145</sup> the court held that four checks delivered to the data processing center for a payor bank after 3:00 p.m. on a Friday afternoon arrived after the banking day and could be deemed to have been received the following Monday.<sup>146</sup> A return of the checks by midnight on Tuesday was, therefore, a timely return and the payor bank was not accountable for the amount of the items.<sup>147</sup> The collecting bank argued that the rules of the Dallas Clearinghouse Association varied the terms of the Code by using the term "business day" instead of "banking day." According to the collecting bank, the term "business day" extended to midnight on Friday under the clearinghouse rules, thereby requiring return of the items by midnight on Monday. The court rejected this interpretation and held that the clearinghouse rules did not clearly vary the terms of the Code.<sup>148</sup>

In *Texas Commerce Bank-New Braunfels v. Townsend*<sup>149</sup> the issue was the dishonor of an item drawn on an account with the payor bank. The bank refused to pay a check upon presentation because a writ of garnishment had been served on the bank prohibiting the payment of funds from the account. The drawer sued for wrongful dishonor and negligence arguing that as a trust account, the bank should have been aware that the garnishment was invalid. The bank defended on the basis that the garnishment legally justified the refusal to pay. The court held that the bank was not required to determine the validity of the garnishment order and so was not

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141. 794 S.W.2d at 543. One of the defenses asserted by the bank was the "impostor defense" under TEX. BUS. & COM. CODE ANN. § 3.405(a)(1) (Tex. UCC) (Vernon 1968). The court held that this defense was not applicable to the second draft because of the missing indorsement of the purchaser, but that such defense raised an issue of fact on the first draft.

142. TEX. BUS. & COM. CODE ANN. § 4.302(1) (Tex. UCC) (Vernon 1968); see, e.g., *Hamby Co. v. Seminole State Bank*, 652 S.W.2d 939, 941-42 (Tex. 1983) (payor bank accountable for face amount of item not timely returned); *Pecos County State Bank v. El Paso Livestock Auction Co.*, 586 S.W.2d 183, 185-86 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.) (payor liable for late return of item).

143. TEX. BUS. & COM. CODE ANN. § 4.302(1) (Tex. UCC) (Vernon 1968). The time period stated is defined as the "midnight deadline." *Id.* § 4.104(a)(8).

144. TEX. BUS. & COM. CODE ANN. § 4.104(a)(3) (Tex. UCC) (Vernon 1968).

145. 780 S.W.2d 814 (Tex. App.—Dallas 1989, writ denied).

146. *Id.* at 815.

147. *Id.* at 816.

148. *Id.*

149. 786 S.W.2d 53 (Tex. App.—Austin 1990, writ denied).

liable for its compliance with an order of the court.<sup>150</sup>

## 2. Stop Orders

In the consolidated cases of *Guaranty Federal Savings Bank v. Horseshoe Operating Co.*<sup>151</sup> and *University Savings Association v. Intercontinental Consolidated Co.*<sup>152</sup> the Texas Supreme Court held that under section 4.403 of the Code savings associations are entitled to stop payment on checks drawn on accounts maintained with other financial institutions just as any other bank customer.<sup>153</sup> The court also held that, in actions by the holders against the savings associations that drew the checks, the issues of holding in due course and the availability of claims and defenses involved issues of fact that could not be resolved on summary judgment.<sup>154</sup>

## 3. Dishonor of Documentary Drafts

In *Rheinberg Kellerei GmbH v. Brookfield National Bank of Commerce Bank*<sup>155</sup> the court considered the novel issue whether the Uniform Rules for Collections promulgated by the International Chamber of Commerce required a U.S. presenting bank to notify a German collecting bank of collection problems regarding a documentary draft.<sup>156</sup> Under Article 20(iii)(c) of the Uniform Rules for Collections, a presenting bank must send "without delay advice of non-payment or advice of non-acceptance" to the prior collecting bank.<sup>157</sup> A few days before the arrival of the goods covered by the documents, the presenting bank notified the named drawee that the draft and documents had arrived. The drawee asked the bank to hold the items while the drawee sought funds to pay the draft. The bank did nothing further until it was advised by the importer that the goods had arrived some weeks before and were still at the port. At that time, the bank requested further instructions from the collecting bank. During this interval the goods remained at Houston harbor and deteriorated to a fraction of their value. The German bank sued the American bank for negligence in delaying notification that the draft had not been paid. The court reviewed the Uniform Rules for Collections in light of section 4.502 of the Code<sup>158</sup> and the court concluded that the Rules and the Code were in harmony in requiring the presenting bank to notify the collecting bank of any difficulties in collection and not simply to notify of non-payment.<sup>159</sup> This rule held even if presentment took place before arrival of the goods and the buyer was unwilling to

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150. *Id.* at 56.

151. 793 S.W.2d 652 (Tex. 1990).

152. *Id.*

153. *Id.* at 654; TEX. BUS. & COM. CODE ANN. § 4.403 (Tex. UCC) (Vernon 1968).

154. 793 S.W.2d at 656.

155. 901 F.2d 481 (5th Cir. 1990).

156. The court noted that it had found only a single case making an oblique reference to the Uniform Rules for Collections. *Id.* at 484.

157. International Chamber of Commerce, *Uniform Rules for Collection*, No. 322, art. 20(iii)(c) (1978).

158. TEX. BUS. & COM. CODE ANN. § 4.502 (Tex. UCC) (Vernon 1968).

159. 901 F.2d at 484.

pay before arrival.<sup>160</sup> The court characterized the presenting bank's duty, both required by the Rules and by the Code, as one of prudence and due care.<sup>161</sup>

## V. LETTERS OF CREDIT

### A. Injunctions Against Honor

Letters of credit issues concerned injunctive relief sought against one or more parties to a letter of credit transaction,<sup>162</sup> and claims associated with the dishonor of documents drawn under a credit.<sup>163</sup> In *Philipp Bros. v. Oil Country Specialists, Ltd.*<sup>164</sup> the letter of credit beneficiary represented that payment was due when, in fact, the beneficiary had breached the contract with the issuer of the credit and so performance on the underlying contract was excused.<sup>165</sup> In emphasizing the independent nature of the letter of credit contract, the court held that payment should not be enjoined on the basis of untrue statements contained in the documents presented by a beneficiary unless those statements also constituted fraud to vitiate the entire transaction.<sup>166</sup> The court specifically rejected the court of appeals opinion<sup>167</sup> that implied that presentment could be enjoined "merely upon a showing that the letter of credit beneficiary's actions excused the credit account party from its underlying contractual liability."<sup>168</sup> *Philipp Bros.* lends strong support to the independence principal of the letter of credit transaction.<sup>169</sup>

In *Lamar Builders, Inc. v. Guardian Sav. & Loan Ass'n*<sup>170</sup> a contractor

160. *Id.*

161. *Id.*

162. *Philipp Bros., Inc. v. Oil Country Specialists, Ltd.*, 787 S.W.2d 38 (Tex. 1990); *Lamar Builders, Inc. v. Guardian Sav. & Loan Ass'n*, 789 S.W.2d 373 (Tex. App.—Houston [1st Dist.] 1990, no writ), *prior opinion*, 786 S.W.2d 789 (Tex. App.—Houston [1st Dist.] 1990, no writ).

163. *FDIC v. Texas Bank of Garland*, 783 S.W.2d 604 (Tex. App.—Dallas 1989, no writ); *S.B. Int'l, Inc. v. Union Bank of India*, 783 S.W.2d 225 (Tex. App.—Dallas 1989, no writ); *New Braunfels Nat'l Bank v. Odiorne*, 780 S.W.2d 313 (Tex. App.—Austin 1989, writ denied).

164. 787 S.W.2d 38 (Tex. 1990).

165. At an earlier stage in the litigation, the customer had obtained a temporary injunction against the beneficiary enjoining the presentment of documents under the letter of credit on the theory that the beneficiary had committed fraud in the performance of the underlying contract justifying injunctive relief. *Philipp Bros., Inc. v. Oil Country Specialists, Ltd.*, 709 S.W.2d 262 (Tex. App.—Houston [1st Dist.] 1986, writ dismissed). When the case was tried on the merits, the jury found that the beneficiary breached the underlying contract, but was not guilty of fraud in the transaction. 787 S.W.2d at 40.

166. 787 S.W.2d at 40-41.

167. 762 S.W.2d 170, 179 (Tex. App.—Houston [1st Dist.] 1986, no writ).

168. 787 S.W.2d at 40.

169. The decision reinforces a point made earlier by the court in *CKB & Assocs. v. Moore McCormack Petroleum, Inc.*, 734 S.W.2d 653 (Tex. 1987), where the court said:

The very object of a letter of credit is to provide a near foolproof method of placing money in the beneficiary's hands when he complies with the terms of the letter itself. Parties to a contract may use a letter of credit in order to make certain that contractual disputes wend their way towards resolution with money in the beneficiary's pocket rather than in the pocket of the contracting party.

*Id.* at 655 (citation omitted).

170. 789 S.W.2d 373 (Tex. App.—Houston [1st Dist.] 1990, no writ).

sought to enjoin presentment under a letter of credit established, in lieu of a performance bond, to insure completion of a construction project. The contractor alleged that the beneficiary had defrauded the contractor by changing the payment schedule called for under the original contract, by threatening to throw the contractor off the job, and by refusing to make payments to cover various change orders affecting work on the project. Citing *Philipp Bros.*,<sup>171</sup> the court held that whether the beneficiary's actions amounted to fraud was not clearly established by the facts and that it was possible to view the actions of the beneficiary simply as the exercise of its rights under the contract.<sup>172</sup> The court denied injunctive relief because the evidence of fraud was conflicting.<sup>173</sup>

### B. Dishonor of Documents Under a Letter of Credit

Under the Code the issuer is to make payment under a letter of credit only if the documents presented to the issuer comply with the terms of the credit.<sup>174</sup> This rule has been interpreted to mean that documents must strictly comply with the credit.<sup>175</sup> Two cases<sup>176</sup> decided during the Survey period nicely illustrate the proper application of the strict compliance rule. In *New Braunfels National Bank v. Odiorne*<sup>177</sup> the letter of credit required presentment of a draft referring to "Irrevocable Letter of Credit Number 86-122-S."<sup>178</sup> The draft that was presented referred to "Irrevocable Letter of Credit No. 86-122-5."<sup>179</sup> In the opinion, the court recognized two distinct types of cases involving the strict compliance rule. One type deals with discrepancies in the documents that relate to the business of banking, not the commercial impact of the discrepancies. The court placed in this group, cases where terms of the credit discrepancies could be resolved by the exercise of banking discretion. One example is where a letter of credit, issued by a Clarksville, Tennessee bank, required a legend on a draft to state "drawn under Bank of Clarksville Letter of Credit Number 105" and the draft presented said, "drawn under Bank of Clarksville, Tennessee letter of Credit Number 105." The addition of the descriptive word "Tennessee" and the use of a lower-case "l" in the word "letter" could be expected to have no

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171. *Philipp Bros., Inc. v. Oil Country Specialists, Ltd.*, 787 S.W.2d 38 (Tex. 1990), discussed *supra* text accompanying note 164.

172. 789 S.W.2d at 375.

173. *Id.* at 375-76. This decision is consistent with a decision by the same court at an earlier stage of the litigation where it denied a temporary injunction against honor in an interlocutory appeal. *Lamar Builders, Inc. v. Guardian Sav. & Loan Ass'n*, 786 S.W.2d 789 (Tex. App.—Houston [1st Dist.] 1990, no writ).

174. TEX. BUS. & COM. CODE ANN. § 5.114(a) (Tex. UCC) (Vernon 1968).

175. *See, e.g.*, *Westwind Exploration, Inc. v. Homestate Sav. Ass'n*, 696 S.W.2d 378, 381 (Tex. 1985) (documents must strictly comply with letter of credit); *Temple-Eastex Inc. v. Addison Bank*, 672 S.W.2d 793, 798 (Tex. 1984) (documents must strictly comply with letter of credit).

176. *S.B. Int'l, Inc. v. Union Bank of India*, 783 S.W.2d 225 (Tex. App.—Dallas 1989, no writ); *New Braunfels Nat'l Bank v. Odiorne*, 780 S.W.2d 313 (Tex. App.—Austin 1989, writ denied).

177. 780 S.W.2d 313 (Tex. App.—Austin 1989, writ denied).

178. *Id.* at 315 (emphasis added).

179. *Id.* at 316 (emphasis added).

commercial impact, and to be recognized as a *de minimis* variation in the required legend.<sup>180</sup> The second type of case involves discrepancies that concern the commercial details of the transaction that extend beyond the bank's expertise. The court gave as an example of this class a letter of credit calling for "dried grapes" and the transaction documents listing the goods as "raisins."<sup>181</sup> In such instances, the document examiner should not be expected to judge whether the descriptions are conforming. In the case at bar, the court concluded that the abbreviation of the word "Number" to "No." and the substitution of the number "5" for an upper-case "S" were insignificant, particularly since the bank never issued letters of credit that ended with a numeral, and the original letter of credit was attached to the draft.<sup>182</sup> The court was careful to point out that its holding did not retreat from a rule of strict compliance with the terms of a credit to one of mere "substantial compliance;" the holding meant only that strict compliance did not mean "perfect compliance."<sup>183</sup> The court also held that the bank had a right to setoff against a compensating balance the bank had required from the customer when the letter of credit was issued.<sup>184</sup>

In contrast to the clerical or typographical errors described in *New Braunfels*, the discrepancies involved in *S.B. International, Inc. v. Union Bank of India*<sup>185</sup> concerned descriptions with a potential commercial impact beyond the expected expertise of the issuing bank. The credit called for goods described as "Claded three ply stainless steel circles with 55% to 60% Iron. . . ."<sup>186</sup> The bills of lading presented under the credit described the goods as "(SECONDARY DEFECTIVE SCRAP)."<sup>187</sup> The court, in applying the *New Braunfels* test, held that a bank should not be expected to know if the two descriptions were equivalent in the shipping industry.<sup>188</sup> As a result, dishonor of the documents presented under the credit was held to be

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180. The court drew this example from *Tosco Corp. v. FDIC*, 723 F.2d 1242 (6th Cir. 1983).

181. This example was quoted by the court from J. DOLAN, *THE LAW OF LETTERS OF CREDIT* S6-8 (Supp. 1989), from which other passages were quoted to describe the distinction at greater length. The court properly stated, "We think the distinction made by Professor Dolan is a sensible and salutary one." 780 S.W.2d at 317. The case involving the dried grapes/raisins situation is *Bank of Italy v. Merchants Nat'l Bank*, 236 N.Y. 106, 140 N.E. 211 (1923).

182. 780 S.W.2d at 318.

183. *Id.*

184. *Id.* at 320. The court noted that, although the bank did not have a security interest in the funds because setoffs are excluded from the coverage of Chapter 9 of the Code by TEX. BUS. & COM. CODE ANN. § 9.104(9) (Tex. UCC) (Vernon 1968 & Supp. 1991), the bank had a common law right of setoff based on agreement with the customer. 780 S.W.2d at 319-20. Although not mentioned by the court, the facts described seem to fit the requirements of a common law security interest in a bank account under the rationale of *San Felipe Nat'l Bank v. Caton*, 668 S.W.2d 804 (Tex. App.—Houston [14th Dist.] 1984, no writ).

185. 783 S.W.2d 225 (Tex. App.—Dallas 1989, no writ).

186. *Id.* at 226.

187. *Id.*

188. *Id.* at 227. Although this case arose under the INTERNATIONAL CHAMBER OF COMMERCE, *Uniform Customs and Practice for Documentary Credits*, No. 290 (1974 Revision) [hereinafter UCP] instead of TEX. BUS. & COM. CODE ANN. §§ 5.101-.117 (Tex. UCC) (Vernon 1968 & Supp. 1991), this difference does not affect application of the strict compliance rule.

proper.<sup>189</sup> Since notice of dishonor was given to an advising bank and to the beneficiary—the party actually affected by the dishonor—the court also held that failure by the issuing bank to provide the remitting bank with prompt notice of dishonor did not vitiate the effectiveness of the dishonor.<sup>190</sup>

In a third wrongful dishonor case,<sup>191</sup> the dishonor occurred because the bank claimed the bank officer, who was both the bank's chief executive officer and its chairman of the board, had no actual or apparent authority to issue letters of credit.<sup>192</sup> There was no evidence that the issuer had communicated its letter of credit policy to the customer or to the beneficiary. The court had little difficulty holding that a reasonably prudent person could believe that a person holding significant positions within a bank would have authority to issue letters of credit.<sup>193</sup>

### C. Duty to Draw Under a Credit

In *Lacy v. Ticor Title Ins. Co.*<sup>194</sup> the court decided whether, following a proper request, a beneficiary named in a letter of credit for the benefit of another person, violated a fiduciary duty to that person by failing to draw under the credit.<sup>195</sup> The named beneficiary, a title insurance company, held the letter of credit as an earnest money deposit from a prospective real estate purchaser for the benefit of the owner of the property. When the purchaser breached the land purchase contract, the land owner instructed the title company, as named beneficiary, to make a draw under the letter of credit. The title company then received a conflicting request from the bank customer who had procured the issuance of the credit. The title company ultimately chose not to draw any funds under the credit. The court held that the terms of the credit obligated the title company to follow the instructions of the land owner as the person for whose benefit the credit had been issued.<sup>196</sup> Failure to draw under the credit resulted in loss of the earnest money that had been specified as liquidated damages under the purchase contract.<sup>197</sup> The title company was held liable for the full amount that could have been drawn under the credit.<sup>198</sup>

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189. 783 S.W.2d at 228.

190. *Id.* This arose under UCP art. 8(e) requiring notice of dishonor to be sent to a remitting bank. Chapter 5 of the Code does not have an equivalent provision.

191. *FDIC v. Texas Bank of Garland*, 783 S.W.2d 604 (Tex. App.—Dallas 1989, no writ).

192. *Id.* at 605.

193. *Id.* at 607.

194. 794 S.W.2d 781 (Tex. App.—Dallas 1990), *aff'd per curiam on other grounds*, 34 Tex. Sup. Ct. J. 132 (Nov. 28, 1990).

195. *Id.* at 787.

196. *Id.* at 788.

197. *Id.* at 789.

198. *Id.*

## VI. DOCUMENTS OF TITLE

A. *Liability of Carriers and Warehousemen for Damage or Loss of Goods*

In *Farmland Industries v. Andrews Transport Co.*<sup>199</sup> the court held that an action against a carrier for the loss of two loads of fuel was one in contract and not tort because the fuel had been shipped under bills of lading issued by the carrier.<sup>200</sup> Under Texas law, since a bill of lading represents both a receipt for the goods as well as a contract for shipment,<sup>201</sup> the longer contract statute of limitations was, therefore, applicable to the case.<sup>202</sup> In *Common Carrier Motor Freight Association v. NCH Corp.*<sup>203</sup> the court held that a carrier could not limit its liability for damage or loss except by written agreement with the shipper. The court further held that the Texas Railroad Commission had exceeded its authority in adopting a tariff that, unless the shipper declared a greater value in writing when the goods were shipped, automatically released a carrier from liability for amounts greater than fifty dollars.<sup>204</sup> The court held that the authority of the Commission to adopt such a tariff is limited by statute,<sup>205</sup> and that nothing in the Code expands that authority.<sup>206</sup>

In *Nelson v. Schanzer*<sup>207</sup> a tenant evicted by a forcible entry and detainer action was forced to recover his belongings from a warehouse after they had been sent there from his home by two deputy constables and some employees of the warehouse. Following much breakage due to an alleged warehouse burglary, a hypothetical warehouseman's sale of the belongings to a "little old couple," and the involvement of a thinly capitalized warehouse corporation with a history of involved bankruptcies and several name changes, the tenant sued the warehouse and its president.<sup>208</sup> The tenant brought the action under the DTPA as a consumer of services from the warehouse, albeit an involuntary one, for the unconscionable actions of the warehouse in dealing with his goods. The court sided with the tenant and affirmed an award

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199. 888 F.2d 1066 (5th Cir. 1989).

200. *Id.* at 1068.

201. *Id.* The court cited *Hines v. Scott*, 112 Tex. 506, 248 S.W. 663, 665 (Tex. 1923) as authority for this point. TEX. BUS. & COM. CODE ANN. §§ 7.101, 7.603 (Tex. UCC) (Vernon 1968) do not expressly state whether a bill of lading is both a receipt and a contract of shipment. TEX. BUS. & COM. CODE ANN. § 7.309(a) (Tex. UCC) (Vernon 1968) incorporates pre-Code law on the issue of a carrier's liability by providing that "[t]his subsection does not repeal or change any law or rule of law which imposes liability upon a common carrier for damages not caused by its negligence." *Id.*

202. 888 F.2d at 1068.

203. 788 S.W.2d 207 (Tex. App.—Austin 1990, writ requested).

204. *Id.* at 209.

205. TEX. REV. CIV. STAT. ANN. art. 883 (Vernon Supp. 1991).

206. The carriers argued that TEX. BUS. & COM. CODE ANN. § 7.309(b) (Tex. UCC) (Vernon 1968) authorized limitations of liability by tariff, but the court noted that TEX. BUS. & COM. CODE ANN. § 7.103 (Tex. UCC) (Vernon 1968) expressly makes Chapter 7 of the Code subject to any state or federal regulatory statute such as TEX. REV. CIV. STAT. ANN. art. 883 (Vernon Supp. 1991).

207. 788 S.W.2d 81 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

208. The sequence of events, both real and fictional, is detailed at length in the opinion. *Id.* at 82-85. The description is worth reading.

of damages of more than thirty-six thousand dollars.<sup>209</sup> In *Central Freight Lines v. Naztec, Inc.*<sup>210</sup> the shipper was permitted to recover for goods damaged during shipment under a repair cost basis instead of the usual measure of differential market value before and after the damage.<sup>211</sup> Recovery by the shipper on the shipment of goods in another instance was denied, however, because the shipper did not prove that the damage had occurred before delivery to the consignee.<sup>212</sup>

## VII. INVESTMENT SECURITIES

### A. Time When Transfer of a Security Occurs

Code section 8.313 identifies ten alternative events that mark the effective transfer of a security to a purchaser.<sup>213</sup> In *Matter of Estate of Crawford*,<sup>214</sup> a will provided that one beneficiary would inherit all of the testator's cash and certificates of deposit (the "cash beneficiary") and a second beneficiary would inherit the testator's stock (the "stock beneficiary"). The cash beneficiary helped the hospitalized testator indorse several stock certificates in preparation for sale, and the stock was sold through the New York Stock Exchange and the proceeds paid to the cash beneficiary. Thereafter, the stock beneficiary sued the cash beneficiary for conversion alleging that, since the testator died four days after indorsing the certificates, the stock had not been effectively transferred to a purchaser. To determine whether transfer occurred before or after the testator's death, the court carefully reviewed all ten events of transfer contained in section 8.313<sup>215</sup> and concluded that none of the events had taken place before the testator died.<sup>216</sup> Because the stock had not been effectively transferred before the time of death, the court affirmed an award in favor of the stock beneficiary.<sup>217</sup> Generally, *Estate of Crawford* provides a good review of the several events of transfer for stock certificates under the Code.

## VIII. SECURED TRANSACTIONS

### A. Validity of Security Interest

#### 1. Elements for Attachment

A security interest attaches and is enforceable against the debtor and third parties when the last of the following occurs: (1) the debtor executes a written agreement granting a security interest to the secured party or the secured

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209. *Id.* at 87-88.

210. 790 S.W.2d 733 (Tex. App.—El Paso 1990, no writ).

211. *Id.* at 734-35. The court noted that the market value rule was not a "hard and fast rule" when repair of the goods was economically feasible. *Id.* at 734.

212. *Id.* at 735-36.

213. TEX. BUS. & COM. CODE ANN. § 8.313 (Tex. UCC) (Vernon Supp. 1991).

214. 795 S.W.2d 835 (Tex. App.—Amarillo 1990, no writ).

215. TEX. BUS. & COM. CODE ANN. § 8.313(a)(1)-(a)(10) (Tex. UCC) (Vernon Supp. 1991).

216. 795 S.W.2d at 840.

217. *Id.*



party receives possession of the collateral, (2) value has been given, and (3) the debtor has rights in the collateral.<sup>218</sup> In *McGrath v. Bank of the West*<sup>219</sup> the secured party possessed a note and security agreement signed by Armstrong and, subsequently, with McGrath's written consent, took possession of the collateral, a certificate of deposit owned by McGrath. Funds were then advanced to Armstrong. When Armstrong defaulted on the loan, the bank setoff the amount of the debt against the certificate of deposit. McGrath sued, contending that the bank did not have a valid security interest in the certificate. The court reviewed the requirements for an attached security interest, giving particular emphasis to the requirement that the debtor have rights in the collateral.<sup>220</sup> Because the Code definition of "debtor" includes the owner of collateral if the person who owes payment is not the owner of the collateral,<sup>221</sup> the court correctly concluded that the "debtor" had rights in the collateral and so a valid security interest had attached.<sup>222</sup> Consequently, the court allowed setoff against the certificate of deposit.<sup>223</sup>

### B. Priorities

#### 1. Bankruptcy Code Time Periods Prevail

Chapter 9 of the Code contains only two instances where perfection of a security interest after the debtor receives possession will be effective against parties who intervene between the time of possession and the time of perfection.<sup>224</sup> In both, Texas has adopted a non-uniform amendment to the Code increasing the time period for the length of these grace periods from ten days to twenty days.<sup>225</sup> When combined with the Bankruptcy Code requirements as illustrated in *In re Hamilton*, this amendment can be a trap for the unwary.<sup>226</sup> The secured creditor in this case perfected a security interest in an automobile eleven days after the debtor received possession of the collateral. Under Texas law the secured creditor had acted within the grace period. Under the Bankruptcy Code, however, the allowed grace period for delayed perfection is only ten days.<sup>227</sup> When the debtor filed for bankruptcy within ninety days after the purchase, the trustee challenged the security interest as an avoidable preference.<sup>228</sup> In the interest of uniformity, the court found no difficulty concluding that the ten days allowed by the Bankruptcy Code prevailed over the twenty days allowed by state law.<sup>229</sup>

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218. TEX. BUS. & COM. CODE ANN. § 9.203(a) (Tex. UCC) (Vernon Supp. 1991).

219. 786 S.W.2d 754 (Tex. App.—Houston [1st Dist.] 1990, no writ).

220. *Id.* at 757.

221. TEX. BUS. & COM. CODE ANN. § 9.105(a)(4) (Tex. UCC) (Vernon Supp. 1991).

222. 786 S.W.2d at 757.

223. *Id.*

224. TEX. BUS. & COM. CODE ANN. §§ 9.301(b), 9.312(d) (Tex. UCC) (Vernon Supp. 1991).

225. *Id.*

226. 892 F.2d 1230 (5th Cir. 1990).

227. 11 U.S.C. § 547(c)(3)(B), (e)(1)(2)(A) (1982 & Supp. V 1987).

228. 892 F.2d at 1230. The avoidance of preferences by a trustee in bankruptcy is the subject of 11 U.S.C. § 547 (1982 & Supp. V 1987).

229. 892 F.2d at 1235.

## 2. Rights of Secured Party Against Materialman's Lien

In *MBank El Paso v. Featherlite Corp.*<sup>230</sup> a secured party took a valid and perfected security interest in all of a contractor's accounts receivable, both then-owned and after-acquired. During a subsequent construction project, a subcontractor purchased goods on credit from a masonry supplier, and the supplier properly filed a materialman's lien covering the price of the goods. When the project was completed, the general contractor notified the supplier that a check would be issued jointly to the subcontractor and the supplier upon which the supplier immediately filed a release of its lien. According to the court,<sup>231</sup> by releasing its valid lien, the subcontractor lost its priority over the claim of the secured party to the retainage funds paid by the owner to the contractor.<sup>232</sup>

## 3. Priorities Between Secured Parties

In *Borg-Warner Acceptance Corp. v. Tascosa National Bank*<sup>233</sup> the court considered whether the holder of a properly created and properly perfected purchase money security interest in inventory has priority over the floating lien of an earlier secured party when the purchase money interest includes a future advance clause and an after-acquired property clause. While the purchase money interest clearly had an initial priority in the new inventory purchased with the purchase money loan, there was significant question whether the purchase money loan lost its character as such when future advances were made and additional inventory was acquired.<sup>234</sup> The court noted that two lines of authority support different approaches to this issue.<sup>235</sup> One follows the transformation rule, which holds that exercising a future advance clause and an after-acquired property clause contained in a purchase money security agreement transforms the purchase money interest into an ordinary security interest with a consequent loss of the special purchase money priority.<sup>236</sup> The other line of authority follows the dual

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230. 792 S.W.2d 472 (Tex. App.—El Paso 1990, writ denied).

231. *Id.* at 476.

232. *Id.* The court noted that under TEX. PROP. CODE ANN. §§ 53.123, .124 (Vernon 1984) a filed materialman's lien has priority over a security interest that has not yet attached to the account receivable. 792 S.W.2d at 475.

233. 784 S.W.2d 129 (Tex. App.—Amarillo 1990, writ denied).

234. *Id.* at 134-35.

235. *Id.*

236. The transformation rule originated in bankruptcy cases involving the refinancing of consumer debt. *See, e.g.,* Dominion Bank of Cumberland v. Nuckolls, 780 F.2d 408, 411-12 (4th Cir. 1985) (under Virginia law, bank's security interest, which secured loan made to refinance purchase money consumer debt, was not a purchase money security interest); Matthews v. Transamerica Fin. Serv., 724 F.2d 798, 800-01 (9th Cir. 1984) (refinancing of purchase money consumer debt by same lender caused loan to lose purchase money status under California law); *In re Faughn*, 69 Bankr. 18, 20-21 (Bankr. E.D. Mo. 1986) (under Missouri law refinancing of old loan extinguished purchase money character of security interest). This line of authority was extended into non-bankruptcy cases under Article 9 by Southtrust Bank v. Borg-Warner Acceptance Corp., 760 F.2d 1240, 1242 (11th Cir. 1985) (in applying the transformation rule there is no policy reason to distinguish between consumer and commercial transactions or between bankruptcy and non-bankruptcy contexts). The court discusses *Southtrust Bank* in detail. *See* 784 S.W.2d at 134.

status rule which holds that the presence of a non-purchase money interest does not destroy the purchase money aspect.<sup>237</sup> After reviewing the competing rules, the court adopted the dual status rule regarding it as more consonant with the underlying purpose of purchase money security interests.<sup>238</sup> In a second issue in the case, the court held that the purchase money party had the right to draw under two letters of credit issued by the other secured party that named the purchase money party as the beneficiary, and that the issuer had wrongfully dishonored a draw under the credits.<sup>239</sup>

In *MBank Alamo v. Raytheon Co.*<sup>240</sup> two creditors entered into security agreements with a distributor. Both held perfected security interests in the distributor's present and future accounts receivable, and one creditor even held a perfected interest in presently owned and after-acquired inventory. A manufacturer agreed to ship equipment to the distributor in exchange for an assignment of accounts receivable. When the distributor defaulted, the secured parties demanded payment from the manufacturer from the collected accounts receivable. The manufacturer claimed a purchase money security interest in the accounts receivable superior to the claims of the other creditors. The court found that the first-to-file rule of Code section 9.312<sup>241</sup> determined the priority of an interest.<sup>242</sup> While a valid purchase money interest would defeat this general rule, the manufacturer failed to create such an interest.<sup>243</sup>

The court viewed the relationship between the manufacturer and the distributor as a two-step transaction: first, the manufacturer advanced machines for the distributor to sell, and second, the accounts were assigned and the interest of the manufacturer was in the inventory, and not the accounts

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237. See, e.g., *Billings v. Avco Colorado Indus. Park*, 838 F.2d 405, 409 (10th Cir. 1988) (Colorado law permits refinancing of purchase money loan without extinguishing purchase money status); *Pristas v. Landaus of Plymouth, Inc.*, 742 F.2d 797, 800 (3d Cir. 1984) (Pennsylvania law permits retention of purchase money security interest in goods to extent original items secure unpaid part of own price); *In re Hemingson*, 84 Bankr. 604, 606-08 (Bankr. D. Minn. 1988) (refinancing and consolidation of purchase money debt does not destroy purchase money character under Minnesota law).

238. 784 S.W.2d at 135. The court seems to have gone too far, however, in stating that "[t]he legislature has made clear that when the inventory financier has complied with the requirements of the Texas Business and Commerce Code, the financier has a PMSI in existing and after acquired inventory, in effect a floating lien over the mass of changing goods available for sale by the debtors to others, with priority over other conflicting security interest." *Id.* Read literally, this goes beyond the "dual status" rule and covers all of the inventory with the cloak of the purchase money security interest, whether financed by the purchase money lender or not. In effect, this would be a "transformation" working in reverse. Considering the length of time the inventory had been financed by the purchase money lender, it is possible there was no "old" inventory left and that everything in the debtor's hands was purchased with advances from the purchase money lender.

239. *Id.* at 137. The parties apparently did not raise, and the court does not mention, the intriguing question whether the first secured party would be able to assert the rights of the purchase money secured party by way of subrogation to the extent of its payment under the letters of credit. See *French Lumber Co. v. Commercial Realty & Fin. Co.*, 346 Mass. 716, 195 N.E.2d 507 (Mass. 1964).

240. 886 F.2d 1449 (5th Cir. 1989).

241. TEX. BUS. & COM. CODE ANN. § 9.312(e)(1) (Tex. UCC) (Vernon Supp. 1991).

242. 886 F.2d at 1454.

243. *Id.* at 1452.

receivable.<sup>244</sup> Furthermore, the special priority for purchase money interests in inventory extends only to cash proceeds from the sale of inventory and not to accounts generated by such sales.<sup>245</sup> To allow the manufacturer a special priority in accounts would extend the purchase money interest beyond the limits of the statute.<sup>246</sup> The court also noted that the holder of a purchase money interest in inventory must notify competing creditors before the debtor receives possession of the inventory, which this manufacturer did not do.<sup>247</sup>

### C. Repossession and Disposition of Collateral

#### 1. Liability for Wrongful Repossession

In *First National Bank of Missouri City v. Gittelman*<sup>248</sup> a car was towed to a dealership following a fire in the engine compartment. During ongoing discussions between the debtor, the dealer, and the secured party about repair or sale of the car, the secured party took possession of the car and sold it without notice to the debtor.<sup>249</sup> The debtor sued for conversion and for improperly disposing of collateral under Code section 9.504.<sup>250</sup> The court held that conversion had occurred, and that sufficient evidence supported an award of damages for the conversion.<sup>251</sup> The court also upheld a punitive damage award for the secured party's oppressive conduct.<sup>252</sup> The secured party was awarded judgment with interest on a counterclaim seeking payment of an outstanding note consolidating several loans to the debtor.<sup>253</sup>

In a significant ruling, *Sanchez v. Mbank of El Paso*,<sup>254</sup> the court summarized the repossession of collateral as an inherently dangerous activity creating a nondelegable duty in the secured party to avoid breach of the peace.<sup>255</sup> In *Sanchez* two repossession company employees came to the debtor's home in a tow truck. While the debtor was mowing the lawn, the two employees hooked the tow truck to a car parked in the debtor's driveway and when asked to explain the actions, the employees ignored the debtor. Attempting to halt the repossession until the police or her husband arrived, the debtor

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244. *Id.*

245. 886 F.2d at 1452-53 (referring to TEX. BUS. & COM. CODE ANN. § 9.312(c) (Tex. UCC) (Vernon Supp. 1991)).

246. 886 F.2d at 1452-53.

247. *Id.* at 1453.

248. 788 S.W.2d 165 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

249. *Id.* at 167. The evidence conflicted as to whether the car was actually sold, but the court seems to have accepted the bank's statement that the car was sold.

250. TEX. BUS. & COM. CODE ANN. § 9.504(c) (Tex. UCC) (Vernon Supp. 1991).

251. 788 S.W.2d at 168-69.

252. *Id.* at 170.

253. *Id.* at 172. While the court upheld a finding by the trial court that the secured party had violated TEX. BUS. & COM. CODE ANN. § 9.504(c) (Tex. UCC) (Vernon Supp. 1991) requiring notice of the sale of collateral, the court did not discuss the "deficiency bar" rule adopted in Texas by *Tanenbaum v. Economics Laboratory, Inc.*, 628 S.W.2d 769 (Tex. 1982), and apparently the secured party did not include a deficiency on the consolidated car loan as part of its counterclaim.

254. 792 S.W.2d 530 (Tex. App.—El Paso 1990, writ granted).

255. *Id.* at 532.

locked herself in the car. After towing the car into the street, the men gave her notice of the repossession and asked her to leave the vehicle or spend the weekend with their Doberman pinscher. When she refused, she was taken on a high speed ride to a fenced and locked repossession yard patrolled by an unchained guard dog. She was rescued later by her husband and the police. In her suit against the secured party, the debtor alleged that the duty to avoid a breach of the peace was nondelegable and that such duty had been willfully violated. The court not only agreed with this proposition, but announced its general rule that repossession is inherently dangerous.<sup>256</sup> The court noted that other jurisdictions had also made repossession a nondelegable duty and imposed liability on a secured party for the tortious acts committed by an independent contractor during the repossession of collateral.<sup>257</sup>

In contrast to *Sanchez*, the court in *Surko Enterprises v. Borg-Warner Acceptance Corp.*<sup>258</sup> upheld the grant of a temporary injunction to prevent the purchaser of a debtor's business from interfering with the right of the secured party to take possession of the collateral and to collect accounts owing to the debtor.<sup>259</sup>

## 2. Sale of Collateral

In recent years, a serious split has developed among the various courts of appeals on whether the secured party or the debtor has the burden to plead and prove the commercial reasonableness of a sale of collateral;<sup>260</sup> this split continued during the Survey period. In *Greathouse v. Charter National Bank-Southwest*<sup>261</sup> the court revived the debtor's burden to plead the lack of commercial reasonableness, with the burden shifting to the secured party to prove that notice and sale were commercially reasonable.<sup>262</sup> This rule, adopted in *Sunjet, Inc. v. Ford Motor Credit Co.*,<sup>263</sup> was subsequently overruled in *Chase Commercial Corp. v. Datapoint Corp.*<sup>264</sup> The *Chase* court adopted a rule that places both burdens on the secured party.<sup>265</sup> The court

256. *Id.*

257. *Id.* The court cited *Nichols v. Metropolitan Bank*, 435 N.W.2d 637 (Minn. App. 1989), and *General Fin. Corp. v. Smith*, 505 So. 2d 1045 (Ala. 1987), both repossession cases, in support of its adoption of this rule.

258. 782 S.W.2d 223 (Tex. App.—Houston [1st Dist.] 1989, no writ).

259. *Id.* at 225.

260. Compare *Molyneaux v. MBank Corpus Christi*, 776 S.W.2d 744, 746 (Tex. App.—Corpus Christi 1989, no writ) (notice of sale and commercial reasonableness of sale constitute elements of secured party's cause of action); *Chase Commercial Corp. v. Datapoint Corp.*, 774 S.W.2d 359, 364 (Tex. App.—Dallas 1989, no writ) (secured party has burden of pleading and proving commercial reasonableness) with *Folkes v. Del Rio Bank & Trust Co.*, 747 S.W.2d 443, 445 (Tex. App.—San Antonio 1988, no writ) (failure to dispose of collateral in commercially reasonable manner is affirmative defense); *Stra, Inc. v. Seafirst Commercial Corp.*, 727 S.W.2d 591, 595 (Tex. App.—Houston [1st Dist.] 1987, no writ) (burden of proving lack of commercial reasonableness on debtor).

261. 795 S.W.2d 1 (Tex. App.—Houston [1st Dist.] 1990, writ granted).

262. *Id.* at 2-3.

263. 703 S.W.2d 285 (Tex. App.—Dallas 1985, no writ), *overr.*, *Chase Commercial Corp. v. Datapoint Corp.*, 774 S.W.2d 359 (Tex. App.—Dallas 1989, no writ).

264. 774 S.W.2d 359, 364 (Tex. App.—Dallas 1989, no writ).

265. *Id.*

characterized its decision as consistent with its earlier decision in *Stra, Inc. v. Seafirst Commercial Corp.*<sup>266</sup> *Stra*, however, can be read to retain the "presumption rule" rejected by the supreme court in *Tanenbaum v. Economics Laboratory, Inc.*<sup>267</sup> In *ITT Commercial Finance Corp. v. Riehn*<sup>268</sup> the court held that the creditor had failed to prove that a sale was conducted in a commercially reasonable manner.<sup>269</sup> The court also held that the debtor could not recover attorney's fees because it was not the prevailing party; the deficiency bar rule is only defensive, with no recovery of actual damages.<sup>270</sup> The grant of a writ of error in *Greathouse* may herald a supreme court clarification of the confusion in this area.

In *Greater Southwest Office Park, Ltd. v. Texas Commerce Bank*<sup>271</sup> and *Georgetown Associates v. Home Federal Savings & Loan Association*<sup>272</sup> the courts strongly criticized the short line of cases theorizing that a significant disparity between the sale price and fair market value of collateral should give the debtor a deficiency offset measured by the market value when the secured creditor is the successful bidder.<sup>273</sup> Both cases relied upon *American Savings & Loan Association v. Musick*<sup>274</sup> to firmly reject this theory.<sup>275</sup>

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266. 727 S.W.2d 591, 595 (Tex. App.—Houston [1st Dist.] 1987, no writ). In *ITT Commercial Fin. Corp. v. Riehn*, 796 S.W.2d 248 (Tex. App.—Dallas 1990, no writ), the court held that even if a sale was not conducted in a commercially reasonable manner and no deficiency could be recovered, the debtor was not entitled to recover attorney's fees because the debtor was not the "prevailing party" under TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (Vernon 1986) since the deficiency bar rule is only defensive and there is no recovery of damages. 796 S.W.2d at 256.

267. 628 S.W.2d 769 (Tex. 1982). If a sale is not conducted in a commercially reasonable manner, the presumption rule creates a presumption that the value of the collateral was equal to the amount of the debt and places the burden on the secured party to rebut the presumption. In *Tanenbaum* the court held that failure to conduct a commercially reasonable disposition was a complete bar to recovery of a deficiency. *Id.* at 772. The author has previously criticized *Stra* for its apparent misreading of *Tanenbaum*. See Krahmer, *Commercial Transactions, Annual Survey of Texas Law*, 42 Sw. L.J. 247 n.299 (1988). Another decision that is subject to serious question is *Piney Point Inv. Corp. v. Photo Design, Inc.*, 691 S.W.2d 768 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.). *Piney Point* was raised in *ITT Commercial Fin. Corp. v. Riehn*, 796 S.W.2d 248 (Tex. App.—Dallas 1990, no writ), during the Survey period, but the court concluded that it did not have to explore the soundness of the decision. Krahmer, *supra*, at 252. *Piney Point* is discussed further in Krahmer, *Commercial Transactions, Annual Survey of Texas Law*, 40 Sw. L.J. 217 (1986).

268. 796 S.W.2d 248 (Tex. App.—Dallas 1990, no writ).

269. *Id.* at 256.

270. *Id.* The rule permitting the prevailing party in a contract action to recover attorneys' fees appears in TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (Vernon 1986).

271. 786 S.W.2d 386 (Tex. App.—Houston [1st Dist.] 1990, writ denied).

272. 795 S.W.2d 252 (Tex. App.—Houston [14th Dist.] 1990, no writ).

273. *Olney Sav. & Loan Ass'n v. Farmers Mkt. of Odessa, Inc.*, 764 S.W.2d 869 (Tex. App.—El Paso 1989, writ denied); *Halter v. Allied Merchants Bank*, 751 S.W.2d 286 (Tex. App.—Beaumont 1988, writ denied); *Lee v. Sabine Bank*, 708 S.W.2d 582 (Tex. App.—Beaumont 1986, writ ref'd n.r.e.).

274. 531 S.W.2d 581 (Tex. 1975).

275. In *Georgetown Assocs. v. Home Fed. Sav. & Loan*, 795 S.W.2d 252 (Tex. App.—Houston [14th Dist.] 1990, writ dism'd w.o.j.), the court described *Olney* as having "no precedential value" because the "panel" decision garnered only one vote with the other members merely concurring in the result. *Olney*, therefore, has no *ratio decidendi* and the other cases are clearly *obiter dicta*.

