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CREDITOR AND CONSUMER RIGHTS

*Sander L. Esserman**
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INTRODUCTION

THIS Article highlights developments in Texas law in the areas of creditor and consumer rights during the period December 1990 through November 1991. During this time, the Texas legislature amended section 42 of the Texas Property Code¹ and significantly expanded the available personal property exemptions. The legislature also added provisions pertaining to deficiencies following real estate foreclosure.² Also during this period, Texas courts and the Court of Appeals for the Fifth Circuit rendered a number of important decisions pertaining to bankruptcy, foreclosure, usury and collection of debt.

I. LEGISLATIVE DEVELOPMENTS

A. *Personal Property Exemptions*

The Texas legislature amended section 42 of the Texas Property Code,³ effective May 24, 1991.⁴ The amendments liberalized the personal property exemptions. One of the more significant changes occurred in the gross dollar amount of personal property a person may exempt from seizure of attachment by his creditors. The aggregate market value of eligible exempt personal property owned by a family was raised from \$30,000 to \$60,000.⁵ The aggregate market value of eligible exempt personal property owned by a single person was raised from \$15,000 to \$30,000.⁶ The legislature also ad-

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1. TEX. PROP. CODE ANN. § 42 (Vernon Supp. 1992).

2. *Id.* §§ 51.003, 51.004, 52.004.

3. TEX. PROP. CODE ANN. (Vernon Supp. 1992).

4. Act of May 13, 1991, 72nd Leg. ch. 175, § 1, 1991 Tex. Sess. Law Serv. 789-02 (Vernon). However, section 2 of the amended act provides that the amendments "do not apply to property that is, as of the effective date . . . subject to a voluntary bankruptcy proceeding or to valid claims of a holder of final judgement who has . . . obtained rights a superior to those that would otherwise be held by a trustee in bankruptcy . . ." and significantly expanded the available personal property exemptions. *Id.*

5. Act of May 26, 1983, 68th Leg., ch. 476, § 1, 1983 Tex. Gen. Laws 3475, 3522 (amended 1991) (current version at TEX. PROP. CODE ANN. § 42.001(1)(1) (Vernon Supp. 1992)).

6. Act of May 26, 1983, 68th Leg., ch. 476, § 1, 1983 Tex. Gen. Laws 3475, 3522 (amended 1991) (current version at TEX. PROP. CODE ANN. § 42.001(a)(2) (Vernon Supp. 1992)).

ded a provision that current wages for personal services (except for the enforcement of court ordered child support payments) and prescribed health aids of a debtor or dependent of a debtor are exempted without inclusion in the aggregate limitations set forth in section 42.001(a).⁷ The legislature added a provision that up to twenty-five percent of the aggregate exemption of section 42.001(a) may be in the form of unpaid commissions for personal services.⁸

Section 42.001(c) pertaining to encumbered property was clarified. It now specifies that the exemptions do not apply to the seizure of property secured by a contractual landlord's lien or other security interest.⁹ Previously, the subsection provided that the exemption of section 42 did not apply to a debt (as contrasted with property) secured by a lien or that was due from rents or advances from a landlord to its tenant.¹⁰

Formerly, the personal property exemptions required that farming or ranching implements, tools of trade, clothing, two firearms, and athletic or sporting equipment be "reasonably necessary for the family or single adult" in order to be eligible for exemption.¹¹ This subjective standard has been deleted.¹² Now these items are included in the laundry list of eligible items without the "reasonably necessary" qualifier.¹³

The old section 42.002 exempted all passenger cars and light trucks not used for the production of personal income, and alternatively provided that, regardless of whether or not used for the production of income, an exemption existed for two of nine "categories of means of travel."¹⁴ Now, motor vehicles used in a trade or profession are included in the tools of trade exemption of section 42.002(a)(4).¹⁵ Section 42.002's farm and ranch emple-

7. TEX. PROP. CODE ANN. 42.001(b) (Vernon Supp. 1992).

8. *Id.* § 42.001(b).

9. Act of May 26, 1983, 68th Leg., ch. 476, § 1, 1983 Tex. Gen. Laws 3475, 3522 (amended 1991) (current version at TEX. PROP. CODE ANN. § 42.001(c) (Vernon Supp. 1992).

10. *Id.* Act of May 26, 1983.

11. Act of May 26, 1983, 68th Leg., ch. 276, § 1, 1983 Tex. Gen. Laws 3475, 3523 (amended 1991).

12. TEX. PROP. CODE ANN. § 42.002(a) (Vernon Supp. 1992).

13. *Id.* § 42.002(a).

14. Formerly TEX. PROP. CODE ANN. § 42.002(4) [hereinafter old § 42.002(4)], enacted as Act of May 26, 1983, 68th Leg., ch. 476, § 1, 1983 Tex. Gen. Laws 3475, 3523 read in part:

(A) two animals from the following kinds with a saddle and bridle for each:

(i) horses;

(ii) colts;

(iii) mules; and

(iv) donkeys;

(B) a bicycle or motorcycle;

(C) a wagon, cart, or dray, with reasonably necessary harness;

(D) an automobile;

(E) a truck cab;

(F) a truck trailer;

(G) a camper truck;

(H) a truck; and

(I) a pickup truck;

15. Act of May 26, 1983, 68th Leg., ch. 476, § 1, 1983 Tex. Gen. Laws 3475, 3523 (amended 1991) (current version at TEX. PROP. CODE ANN. § 42.0023(a)(4) (Vernon Supp. 1992)).

ment exemptions now include farming or ranching vehicles,¹⁶ and section 42.002(a)(8) adds bicycles to the sporting goods exemption.¹⁷ There is a new limit of one motor vehicle for each member of a family or single adult who holds a driver's license, or who is without a driver's license but depends upon another person to operate the vehicle for his benefit.¹⁸

Two horses, mules, or donkeys, along with a saddle and bridle for each, remain exempt.¹⁹ These items have been moved to a subsection containing other livestock exemptions.²⁰ The latter remain unchanged except that the separate exemption for fifty chickens has been deleted.²¹

The exemption for life insurance was liberalized by the 72nd Texas Legislature. Previously, an exemption equal to a policy's cash value was available only if the policy had been in force for more than two years.²² The legislature eliminated the two-year requirement, and an exemption now is available for the present value of the life insurance policy.²³ The exemption remains part of the eligible exemptions list of section 42.002 subject to the aggregate value limitations set forth in section 42.001.²⁴

Subsequent to the enactment of the amendments to the Texas Property Code, the Texas legislature also amended article 21.22 of the Texas Insurance Code.²⁵ Article 21.22 provides an unlimited exemption for life, health and accident insurance benefits.²⁶ The amended article now specifies that "policy proceeds and cash values" are included in its full exemption from execution, attachment, garnishment or other process, and from seizure, taking or appropriation or application of any legal or equitable process or operation of law to any debt or liability either before or after the money or benefits are to be paid or rendered, as well as from all demands in any bankruptcy proceeding of the insured or beneficiary.²⁷ Thus, it now appears that

16. Act of May 26, 1983, 68th Leg., ch. 476, § 1, 1983 Tex. Gen. Laws 3475, 3523 (amended 1991) (current version at TEX. PROP. CODE ANN. § 42.002(a)(3) (Vernon Supp. 1992)).

17. Act of May 26, 1983, 68th Leg., ch. 476, § 1, 1983 Tex. Gen. Laws 3475, 3523 (amended 1991) (current version at TEX. PROP. CODE ANN. § 42.002(a)(8) (Vernon Supp. 1992)).

18. TEX. PROP. CODE ANN. § 42.002(a)(9) (Vernon Supp. 1992).

19. *Id.* § 42.002(a)(10)(A).

20. Act of May 26, 1983, 68th Leg., ch. 576, § 1, 1983 Tex. Gen. Laws 3475, 3523 (amended 1991) (current version at TEX. PROP. CODE ANN. § 42.002(a)(10)(A) (Vernon Supp. 1992)).

21. Act of May 26, 1983, 68th Leg., ch. 576, § 1, 1983 Tex. Gen. Laws 3475, 3523 (amended 1991) (current version at TEX. PROP. CODE ANN. § 42.002(a)(10) (Vernon Supp. 1992)).

22. Act of May 26, 1983, 68th Leg., ch. 576, § 1, 1983 Tex. Gen. Laws 3475, 3524 (amended 1991).

23. TEX. PROP. CODE ANN. § 42.002(a)(12) (Vernon Supp. 1992).

24. See *In re Brothers*, 94 B.R. 82 (Bankr. N.D. Tex. 1988) where Judge Harold C. Abramson distinguished art. 21.22 of the Texas Insurance Code, which provides an unlimited exemption for payments made under an insurance policy. In his opinion, Judge Abramson found a distinction between the "cash surrender value" of an insurance policy and payments made under an insurance policy upon the occurrence of a contingency. *Id.* at 84.

25. TEX. INS. CODE ANN. (Vernon Supp. 1992).

26. TEX. INS. CODE ANN., ART. 21.22.

27. *Id.*, art. 21.22, sec. 1.(1), (2), (3) and (4).

notwithstanding sections 42.001 and 42.002 of the Texas Property Code, the cash surrender value of an insurance policy is fully exempt, without any dollar limitation. Apparently, the amendment's specific inclusion of "policy proceeds and cash value" was in response to the distinction relied on by Judge Abramson when he ruled that a policy's cash value was exempt only within the dollar limitations of the Texas Property Code.²⁸

The legislature expanded section 42.003. It now specifies that if a debtor with personal property exceeding the value of the aggregate available exemption fails, within a reasonable time, to make a designation of personal property, after having been requested to do so by the court, the court shall make the designation.²⁹ The same rule applies if the creditor contests the exemption of the designated property.

The legislature also took action in other areas affecting personal property exemptions. The statute of limitations for asserting a fraudulent transfer claim under section 42 of the Texas Property Code was shortened from four years³⁰ to two years.³¹ The legislature also added an ordinary course of business exception to transfers of nonexempt property into exempt property.³²

B. Deficiencies

The Texas legislature made a number of changes in section 51 of the Texas Property Code. It added provisions pertaining to deficiencies arising out of real estate foreclosures,³³ providing additional protection to mortgagees and guarantors. Amendments to section 52 reduce the statute of limitations for deficiency actions, and provide a mechanism and for a court determination and application against any deficiency if the bid price was lower than the fair market value of the property at the time of foreclosure. The legislature also added section 51.003, relating to deficiencies resulting from nonjudicial foreclosures. Section 51.004 was added, relating to deficiencies resulting from judicial foreclosures. Finally, the legislature added section 51.005, pertaining to guarantors.

Section 51.003 applies to nonjudicial foreclosure of real property after April 1, 1991. It requires that a mortgagee must institute any lawsuit on a deficiency within two years after a foreclosure.³⁴ The section further pro-

28. *In re Brothers*, 94 B.R. at 84.

29. Act of May 26, 1983, 68th Leg., ch. 576, § 1, 1983 Tex. Gen. Laws 3475, 3523 (amended 1991) (current version at TEX. PROP. CODE ANN. § 42.003 (Vernon Supp. 1992)).

30. Act of May 26, 1983, 68th Leg., ch. 576, § 1, 1983 Tex. Gen. Laws 3475, 3524 (amended 1991).

31. TEX. PROP. CODE ANN. § 42.004(b) (Vernon Supp. 1992).

32. *Id.* § 42.004(c) (Vernon Supp. 1992). This ordinary course of business exception parallels the one set forth in § 24.009(f)(2) of the Texas Fraudulent Transfer Act (TEX. BUS. & COM. CODE ANN. § 24.007 (Vernon 1987)), which provides that a transfer to an insider of the debtor is not voidable if the transfer was made in the ordinary course of business of the debtor and the insider.

33. Act of March 25, 1991, 72nd Leg., ch. 12, § 1, 1991 Tex. Sess. Law Serv. 39, 40 (Vernon); Act of May 25, 1991, 72nd Leg., ch. 361, § 1, 1991 Tex. Sess. Law Serv. 1410, 1410-1 (Vernon).

34. TEX. PROP. CODE ANN. § 51.003(a).

vides that "[a]ny person against whom such recovery is sought . . . may request that the court in which the action is pending determine the fair market value of the real [foreclosed] property as of the date of the foreclosure sale."³⁵

If the court determines that the fair market value exceeded the foreclosure price at the time of foreclosure, the person against whom a deficiency is sought is entitled to an offset equal to the excess amount.³⁶ The section also requires the mortgagee to credit the borrower with the proceeds of mortgage insurance. It does not, however, impair the insurer's subrogation rights.³⁷

Section 51.003 changed prior law in two important ways. The statute of limitations for bringing a deficiency action was reduced from four years³⁸ to two years.³⁹ Formerly, a debtor had to show more than inadequate price to invalidate a sale and a creditor's derivative right to collect a deficiency.⁴⁰ A debtor had to show some evidence of irregularity in the sale which "caused or contributed to cause the property to be sold for a grossly inadequate price."⁴¹

The new section 51.004 applies to judicial foreclosure sales and is identical to section 51.003 except for two items. First, the statute of limitations for bringing a suit for the determination of fair market value is ninety days, rather than two years.⁴² Additionally, if a guarantor has no notice of the judicial foreclosure proceedings, "the suit must be brought by the guarantor not later than the 90th day after the date the guarantor received actual notice of the sale."⁴³ Section 51.005 also is similar to section 51.003, and was inserted to protect guarantors when debtors fail to bring actions for determination of fair market value. The section allows a guarantor to bring its own action for such a determination.⁴⁴

II. JUDICIAL DEVELOPMENTS

A. Bankruptcy/Exemptions

The Court of Appeals for the Fifth Circuit dealt a serious blow to any attempts to resort to cramdown provisions for reorganizing debtors under Chapter 11 of the Bankruptcy Code. In *Phoenix Mutual Life Insurance Co.*

35. *Id.* § 51.003(b).

36. *Id.* § 51.003(c).

37. *Id.* § 51.003(d).

38. TEX. CIV. PRAC. § REM. CODE ANN. § 16.004(a)(3) (Vernon 1986). This statute was not repealed, it simply is the general four-year limitations provision for actions on debt that was pre-empted, in deficiency actions, by the special statute of limitations embodied in TEX. PROP. CODE ANN. § 51.003(a).

39. TEX. PROP. CODE ANN. § 51.003(a) (Vernon Supp. 1992).

40. *American Sav. & Loan v. Musick*, 531 S.W.2d 581, 587 (Tex. 1975).

41. *Id.*, *Sparkman v. McWhirter*, 263 S.W.2d 832, 837 (Tex. Civ. App. —Dallas 1953, writ ref'd).

42. TEX. PROP. CODE ANN. § 51.004(b) (Vernon Supp. 1992).

43. *Id.*

44. Act of May 25, 1991, 72nd Leg., ch. 361, § 1, 1991 Tex. Sess. Law Serv. 1410, 1410-1 (Vernon).

*v. Greystone III Joint Venture (In re Greystone III Joint Venture)*⁴⁵ the circuit court held that a plan of reorganization may not classify a secured creditor's deficiency claim separately from the unsecured trade creditors' claims solely for the purpose of obtaining the affirmative vote of an impaired class necessary to confirm a cramdown plan.⁴⁶ In what arguably is *dicta*, the court further held that the "new value exception" to the absolute priority rule⁴⁷ did not survive enactment of the United States Bankruptcy Code.⁴⁸ However, on February 27, 1992, on petition for rehearing and suggestion for rehearing *en banc*, the Fifth Circuit amended its prior opinion by deleting the portion of the opinion which had reached this conclusion with respect to the "new value exception" to the absolute priority rule.⁴⁹ This case probably will have the most impact on single asset reorganizations, where secured creditors usually have large deficiency claims.

In *NCNB Texas National Bank v. Bowyer (In re Bowyer)*⁵⁰ the Court of Appeals for the Fifth Circuit reconsidered its earlier decision and upheld the district and bankruptcy courts' determination. The Fifth Circuit ruled that a debtors's conversion of nonexempt funds to exempt assets, on the eve of filing for bankruptcy, did not constitute intent to hinder, delay, or defraud a creditor within the meaning of section 727(a)(2)(A) of the United States Bankruptcy Code.⁵¹ In *Bowyer* approximately two months prior to filing bankruptcy, the debtor used nonexempt assets to satisfy the remaining \$24,000 balance on the mortgage on his homestead, to make homestead improvements worth approximately \$7,000, and to finance trips to Hawaii and to the east coast for parents' weekend at his daughter's east coast boarding school. The bank, NCNB, objected to Dr. Bowyer's discharge on the grounds that his transactions violated section 727(a)(2)(A) of the United States Bankruptcy Code.

The bankruptcy court held that the conversion of nonexempt property to

45. 948 F.2d 134 (5th Cir. 1991) *withdrawn in part, reinstated in part on reh'g.*

46. *Id.*

47. The absolute priority rule, codified at 11 U.S.C. § 1129(b)(2)(B)(ii), is a bankruptcy doctrine which provides that the holder of any claim or interest that is junior to the claims of an unsecured class may not receive any property on account of its claim or interest until the senior claims are repaid in full. A "new value exception" to the absolute priority rule evolved which enabled interests junior to a class of unsecured creditors to retain their interests even where those unsecureds were not paid in full, if the interest holders contributed "new value" to the reorganized debtor. *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939). Subsequent to the enactment of the 1978 Bankruptcy Code, courts recognizing the "new value exception" have required that *In re U.S. Truck Co.*, 800 F.2d 581, 588 (6th Cir. 1986). As discussed in *Greystone*, the United States Supreme Court has expressly declined to rule on whether or not the "new value exception" survived enactment of the Bankruptcy Code. *Phoenix Mutual Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture)*, 948 F.2d 134 (5th Cir. 1991), citing *Northwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988).

48. 948 F.2d at 139.

49. 948 F.2d at 142.

50. 932 F.2d 1100 (5th Cir. 1991) (per curiam).

51. 11 U.S.C. § 727(a)(2)(A) (1991) provides that a debtor shall not be granted a discharge if "with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property . . . has transferred, removed, destroyed, mutilated, or concealed . . . property of the debtor, within one year before the date of the filing of the petition[.]"

exempt property was a permissible objective of pre-bankruptcy planning, rather than an intent to hinder, delay, or defraud creditors. Upon rehearing, the Fifth Circuit concluded that the debtor had not intended to defraud the bank. It was important to the court that, during the same time period Dr. Bowyer had made the transactions converting nonexempt assets to exempt ones, Dr. Bowyer and his wife withdrew \$25,000 from their savings and paid it to the bank as advance, unscheduled payments due under their obligations to the bank.⁵²

In *Dyer v. Echols*⁵³ the Houston court of appeals held that a beneficiary of a will may disclaim her inheritance, pursuant to section 37A of the Texas Probate Code,⁵⁴ even where such a disclaimer defeats the rights of a judgment creditor.⁵⁵ The judgment creditor asserted that the debtor's disclaimer was a transfer within the ambit of the Texas Fraudulent Transfer Act.⁵⁶ The appellate court reasoned that ownership is implicit in the act of transferring property.⁵⁷ Since disclaimed property passes as if the beneficiary had predeceased the testator, the disclaiming beneficiary never owns the disclaimed property.⁵⁸

B. FDIC/RTC

During the survey period, the Fifth Circuit did nothing to weaken the Goliath position enjoyed by the government agencies whose alleged purpose is to solve the ongoing crisis confronting this country's financial institutions. In *RTC v. Marshall*⁵⁹ the Fifth Circuit affirmed a holding that in spite of the fact that the original holder, a savings and loan association, had not endorsed the note either to the RTC or to a new successor association, RTC nevertheless was the holder of the note and of the related guaranty agreement. Consequently, RTC had the ability to enforce the guaranty against the guarantor.⁶⁰

The Fifth Circuit relied on the *D'Oench Duhme* doctrine⁶¹ to bar a guarantor's affirmative defense of breach of agreement to fund. In *FSLIC v. Griffin*⁶² perhaps the most persuasive of the debtor's arguments⁶³ against

52. 932 F.2d at 1102.

53. 808 S.W.2d 531 (Tex. App.—Houston [14th Dist.] 1991, writ dismissed).

54. TEX. PROB. CODE ANN. § 37A (Vernon 1980 & Supp. 1992).

55. *Id.* at 534.

56. TEX. BUS. COM. CODE ANN. ch. 24 (Vernon 1987).

57. 808 S.W.2d at 534, citing TEX. BUS. & COM. CODE ANN. § 14.007(4) (Vernon 1987), which provides that "[A] transfer is not made until the debtor has acquired rights in the asset transferred[.]" (brackets in original).

58. 808 S.W.2d at 534.

59. 939 F.2d 274, 278 (5th Cir. 1991).

60. *Id.*

61. *D'Oench Duhme v. FDIC*, 315 U.S. 447 (1942). The asserted purpose of the doctrine is the protection of the FDIC and its assignees from unrecorded side agreements which are not reflected in a failed financial institution's records.

62. *FSLIC v. Griffin*, 935 F.2d 691, 697 (5th Cir. 1991), *petition for cert. filed* Nov. 18, 1991.

63. Debtor, Griffin, argued that *D'Oench Duhme* should not apply because the choice of law provisions in the agreements specified Texas law (not federal law), that Gibraltar was engaging in inequitable conduct by ignoring the agreements' choice of law provisions and rely-

D'Oench Duhme was that the doctrine should not apply to a transferee of FSLIC.⁶⁴ The guaranty in *Griffin* was executed in favor of First Texas, which thereafter was placed in receivership. FSLIC then sold substantially all of First Texas' assets to First Gibraltar, the party asserting the *D'Oench Duhme* doctrine. The debtor argued that section 1823(e) of FIRREA⁶⁵ preempted *D'Oench Duhme* and applied to FDIC and other entities included by Congress, but not to transferees of those entities. The court rejected the debtor's assertion on two grounds. First, the court held that section 1823(e) does not preempt *D'Oench Duhme*, but instead serves as an adjunct to the federal policy enunciated in the decision.⁶⁶ Second, the court cited its own controlling precedent that the doctrine of *D'Oench Duhme* is applicable for the benefit of an assignee or transferee/purchaser from FDIC or FSLIC.⁶⁷ The Fifth Circuit further specified that, in order for *D'Oench Duhme* to apply, agreements need not be secret, but only outside a bank's records.⁶⁸

In *Clay v. FDIC*⁶⁹ the Fifth Circuit affirmed the lower courts' refusal to issue an injunction on the foreclosure of property securing the guaranteed obligation. The court denied the guarantors' request for affirmative relief as a result of the predecessor bank's alleged negligence, unconscionable conduct and breach of fiduciary duties.⁷⁰ Again, the *D'Oench Duhme* doctrine and section 1823(e) were the basis for such denial.⁷¹ The circuit court specified that even where bank documents raise an inference of a secret agreement, such an inference is not enough to support a judgment against FDIC, where FDIC is one of the parties involved in a bank transfer.⁷²

In *FDIC v. Gettysburg Corp.*⁷³ the federal district court held that the

ing instead on *D'Oench Duhme*, and impairment of constitutional right to contract. 935 F.2d at 697-98.

64. 935 F.2d at 698.

65. Financial Institutions Reform, Recovery and Enforcement Act of 1989, (Pub. L. No. 101-73, 103 Stat. 183 (1989)). Section 1823(e) provides that

"No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either was security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement-

(1) is in writing,

(2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(4) has been, continuously, from the time of its execution, an official record of the depository institution." *Id.*

66. 934 F.2d 69 (5th Cir. 1991).

67. 935 F.2d at 698, citing *Petroplex Sav. Ass'n.*, 903 F.2d 379, 381 (5th Cir. 1990); *Bell & Murphy & Assoc. v. Interfirst Bank Gateway*, 894 F.2d 750, 754, *cert. denied*, 111 S.Ct. 244 (1991).

68. *Id.*

69. 934 F.2d at 73, citing *Beighley v. FDIC*, 868 F.2d 776, 782-83 (5th Cir. 1989); *Bowen v. FDIC*, 915 F.2d 1013, 1016 (5th Cir. 1990).

70. 760 F. Supp. 115, 117 (S.D. Tex. 1990).

71. *Id.*

72. 760 F. Supp. 115, 117 (S.D. Tex. 1990).

73. 760 F. Supp. 115, 117 (S.D. Tex. 1990).

D'Oench Duhme doctrine, codified in FIRREA,⁷⁴ and the holder in due course doctrine together barred the guarantor's defense that the guaranty had been back-dated.⁷⁵ Further relying on *D'Oench Duhme*, the district court refused to consider the defenses of failure of consideration, estoppel, and duress.⁷⁶

C. Personal Property Foreclosure

During the survey period, there were two important decisions addressing the adequacy of personal property foreclosures. The Fifth Circuit upheld a foreclosure sale in *FDIC v. Lanier*.⁷⁷ The guarantors challenged the commercial reasonableness and the sufficiency of the notice of the foreclosure sale on a number of grounds. They alleged the notice was insufficient because it did not specify whether the sale would be public or private. The guarantors further challenged the notice because the notice letter specified that the foreclosure sale would occur ten days after the notice was sent, but the actual private sale did not occur until four months after the letter was sent.

The Fifth Circuit, relying on Texas law, held that failure to specify that a foreclosure sale will be private does not render notice deficient.⁷⁸ Relying on the distinction in Texas law between a private and a public foreclosure sale, the circuit court pointed out that, for a private foreclosure sale, a creditor only must provide notice of the time after which any private sale will occur.⁷⁹ The Fifth Circuit conceded that a sale conducted too much later than the indicated date could become stale, but held that such a conclusion could not be reached in the situation before it.⁸⁰ Finally, the Fifth Circuit upheld the commercial reasonableness of the sale, because the guarantors showed no evidence of any procedural irregularities, bad faith, or other reasons explaining the allegedly low sale price.⁸¹

In *Knights of Columbus Credit Union v. Stock*⁸² the Dallas court of appeals held that a letter from a creditor to a debtor notifying the debtor of a foreclosure by private sale, where the letter did not provide the debtor with notice of the time and place of the foreclosure sale, failed to provide reasonable notification as required by the statute.⁸³ The San Antonio court of appeals held that the reasonable notification requirement of section 9.504 of the Texas Business & Commerce Code does not apply when the parties to a loan agreement sell the collateral by agreement, in order to bring the note current

74. 12 U.S.C. § 1823(e) (1989).

75. 760 F. Supp. at 117.

76. *Id.* The district court also relied on *Langley v. FDIC*, 484 U.S. 86 (1987) to bar the claim of economic duress.

77. 926 F.2d 462 (5th Cir. 1991).

78. *Id.*

79. 926 F.2d at 462 quoting TEX. BUS. & COM. CODE ANN. § 9.504(c).

80. 926 F.2d at 467.

81. 926 F.2d at 467.

82. 814 S.W.2d 427, 430-31 (Tex. App.—Dallas 1991, writ denied).

83. *Id.*, citing TEX. BUS. & COM. CODE ANN. § 9.504(c) (Vernon Supp. 1991).

and lower the remaining indebtedness.⁸⁴

D. Real Estate Foreclosures

Pending before the Texas supreme court is a case involving the correct method for computing the twenty-one day notice required prior to foreclosure sales of real property pursuant to deeds of trust. In *Bryant v. Texas American Bank*⁸⁵ the court of appeals ruled that the proper method to compute the twenty-one day period is to exclude the day of the sale as the first day and then count backward twenty-one days. The twenty-first day is the date on which notice must be given.⁸⁶ Points of error on which the writ was granted include the reverse counting of the twenty-one days and the effective inclusion of the day of the sale in the period.⁸⁷

In *Fairfield Financial Group, Inc. v. Gawerc*⁸⁸ the Houston court of appeals held that the doctrine of waiver applies where the lender accepts non-conforming payments under a loan agreement without making any demand for conformance. In *Gawerc*, the debtor originally was indebted to the bank pursuant to three promissory notes secured by various properties, including the debtor's homestead. Following default by the debtor, he and the bank reached a written settlement agreement which consolidated the three notes, reduced the total outstanding indebtedness, and provided for a new repayment schedule. The court found the record clearly showed that the actual payments made pursuant to this new agreement materially varied from the revised schedule, but that the bank never demanded conformity with the new agreement or initiated acceleration or foreclosure proceedings.⁸⁹ The bank subsequently sold the notes and assigned its liens to two investors who were aware of the workout agreement and the payment history under the new agreement. Approximately two months later, the investors gave notice of acceleration. Upon acceleration and demand, the obligor offered the full payment required pursuant to the terms of the revised agreement that previously had been reached with the bank. The court, however, found that the lender instead demanded a sum unrelated to any agreement between the parties.⁹⁰ Thus, the court requires that banks seeking to preserve their rights to accelerate and foreclose must demand that borrowers conform with agreed payment schedules. They otherwise risk waiving their rights to accelerate and foreclose.

84. *Adcock v. First City Bank of Alice*, 802 S.W.2d 305, 307 (Tex. App.—San Antonio 1990, no writ).

85. 795 S.W.2d 915 (Tex. App.—Amarillo 1990, writ granted Feb. 27, 1991; cause set for submission April 17, 1991).

86. 795 S.W.2d at 916.

87. 34 Tex. Sup. Ct. J. 366. See *Newman v. Woodhaven Nat'l Bank*, 762 S.W.2d 374, 376 (Tex. App.—Fort Worth 1988, no writ) (it is not necessary to exclude both day of posting and day of sale in computing 21-day statutory notice period).

88. 814 S.W.2d 204, 208-09 (Tex. App.—Houston [1st Dist.] 1991, no writ).

89. *Id.*

90. *Id.*

E. Usury/Debt Collection

The Texas supreme court issued a decision of special significance for lenders in *Victoria Bank & Trust v. Brady*.⁹¹ The Texas supreme court ruled that a lender's requirement that a borrower assume the pre-existing debt of the borrower's partner to a different lender did not constitute usury.⁹² The court distinguished its decision in *Alamo Lumber Co. v. Gold*,⁹³ where it held that when a lender requires a borrower to pay or assume debt owed by another to the same lender, the amount of the pay-off or assumed debt will be considered interest in determining whether or not the loan is usurious.⁹⁴ The *Brady* court held that the requirement that the borrower assume debt to a third party had the same legal effect as a bona fide charge or fee, and therefore could not constitute interest charged by the lender.⁹⁵

A collection agency was justly held liable for statutory usury penalties,⁹⁶ in spite of the fact that it was not a party to the original loan transaction. In *Lupo v. Equity Collection Service*⁹⁷ the Houston court of appeals pointed out that, were it to hold otherwise, one not a party to an original loan transaction would be able to try to collect usurious interest without fear of the usury penalties.⁹⁸

Two courts of appeals decisions involved usury charges in connection with demands made by attorneys. In *Heine v. Schendel*⁹⁹ the Corpus Christi court of appeals held a creditor not bound by his attorney's conduct, when the attorney had sent a letter to a debtor allegedly containing various demands not authorized by the creditor.¹⁰⁰ In a second case, an attorney forgot to reduce the per diem postjudgment interest demand in his second demand letter to a remaining obligor, where two of the three obligors already had paid their share of the judgment.¹⁰¹ Without a hearing, the Texas supreme court reversed and remanded a holding by the San Antonio court of appeals that, as a matter of law, postjudgment interest is not interest within the meaning of the usury statute.¹⁰² The court of appeals held that there had to be an actual loan of money before the usury statutes could be triggered.¹⁰³ Relying most heavily on its previous characterization of prejudgment interest as being for the use of money owed to another, the Texas supreme court concluded that postjudgment interest is within the ambit of

91. 811 S.W.2d 931 (Tex. 1991).

92. *Id.*

93. 661 S.W.2d 926 (Tex. 1983).

94. *Id.* at 928.

95. 811 S.W.2d at 936-37.

96. *Id.*, citing TEX. REV. CIV. STAT. ANN. art. 5069-8.02. (Vernon 1987).

97. 808 S.W.2d 122, 124-25 (Tex. App.—Houston [1st Dist.] 1991, no writ).

98. *Id.*

99. 797 S.W.2d 278 (Tex. App.—Corpus Christi, 1991, writ denied March 20, 1991; reh'g of writ overr. April 17, 1991).

100. *Id.* at 280-81.

101. *Solomon v. Briones*, 805 S.W.2d 916, 918 (Tex. App.—San Antonio) (relying on TEX. REV. CIV. STAT. ANN. art. 5069-1.01(a) (Vernon 1987)) *rev'd*. 1991 WL 227909 (Tex. Nov. 6, 1991) (not released for publication).

102. *Id.*

103. 805 S.W.2d at 918.

the usury statute.¹⁰⁴

F. Miscellaneous

In *Parker Plaza West Partners v. UNUM Pension & Insurance Co.*¹⁰⁵ the Fifth Circuit reversed the district court and upheld the enforceability of a note provision requiring payment of a prepayment premium upon the borrower's default and acceleration by the lender of the note. Despite the debtor's assertions to the contrary, the Fifth Circuit held such a provision complies with Texas public policy and is enforceable.¹⁰⁶

The Houston court of appeals upheld a savings account assignment by a debtor in *Mobil Oil Corp. v. Texas Commerce Bank — Airline.*¹⁰⁷ With the bank's knowledge, a debtor assigned its savings account to a creditor, pursuant to a valid assignment. The court concluded it was wrong for the bank to have offset the debtor's debt to the bank against the assigned account and then to have returned the balance to the debtor without first satisfying the debtor's obligation to the creditor.¹⁰⁸

The Texas supreme court reversed the Dallas court of appeals and held applicable to guarantors the rule that sureties are released from liabilities where there is a material alteration in or deviation from the terms of a contract without the surety's consent and to its prejudice.¹⁰⁹ The Texas supreme court repeatedly reversed judgments based on waiver of notice of default, notice of intent to accelerate and notice of acceleration provisions in promissory notes.¹¹⁰ Each time, the court held that the waiver provisions were effective to waive presentment and notice of acceleration, but not acceleration without notice of intent to accelerate.¹¹¹

104. *Id.*, citing *Steves Sash & Door Co. v. Ceco Corp.*, 751 S.W.2d 473, 476 (Tex. 1988); *Cavnar v. Quality Control Parking*, 696 S.W.2d 549, 554-55 (Tex. 1985); *Hayek v. Western Steel Co.*, 478 S.W.2d 786 (Tex. 1972).

105. 941 F.2d 349, 356 (5th Cir. 1991).

106. 941 F.2d at 354-56.

107. 813 S.W.2d 607, 609-10 (Tex. App.—Houston [1st Dist.] 1991, no writ).

108. *Id.*

109. *Skyline Equip. Co. v. Byrd*, 808 S.W.2d 463 (Tex. 1991).

110. *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890 (Tex. 1991); *Athari v. Hutcheson*, 801 S.W.2d 896 (Tex. 1991).

111. 801 S.W.2d at 894-95; 801 S.W.2d at 897. In *Shumway* the waiver provision stated "If I default under this Note, you may require that the entire unpaid balance of the Amount of Loan plus accrued interest and late charges be paid at once without prior notice or demand." 801 S.W.2d at 892. In *Athari* the waiver provision stated that the holder could accelerate the note "without further demand, notice or presentment." 801 S.W.2d at 897.