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CREDITOR AND CONSUMER RIGHTS

by

Joseph G. Chumlea* and Michael Curry**

I. USURY AND THE CONSUMER CREDIT CODE

THE reported cases during the 1985 Survey period included several important usury opinions as well as a handful of Texas Consumer Credit Code¹ (Credit Code) cases. Usury issues included: the common law usury action; whether a pleading in a lawsuit constitutes the requisite "charging" for a usury action or defense; the bona fide error defense; an examination of the types of transactions to which the usury statutes are applicable; and other substantive and procedural issues. Credit Code cases dealt with prohibited terms in motor vehicle installment contracts, the interest free period in an installment contract for home improvements, the Credit Code as an additional remedy to the Deceptive Trade Practices Act,² and other related issues.

A. Usury

The Amarillo court of appeals breathed new life into the little-known common law action for usury. In *Commercial Credit Equipment Corp. v. West*³ the Amarillo court recognized the common law action for recovery of all interest paid upon a finding of usurious conduct under article 1.06(1) of the Credit Code.⁴ This remedy represents a significant and additional tool for the plaintiff's attorney, especially in transactions that involve front-end loaded interest, such as real estate loans. The findings in *West* did not include a violation of article 1.06(2), which requires a forfeiture of all interest and principal upon proof of an interest charge in excess of double the legal rate. Consequently, a finding of usury under article 1.06(1) and, by analogy, article 8.01 of the Credit Code,⁵ permits both the recovery and forfeiture of

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1. TEX. REV. CIV. STAT. ANN. arts 5069-1.01 to -51.19 (Vernon 1971 & Pam. Supp. 1971-86) is commonly referred to as the Texas Consumer Credit Code, and all references herein, unless otherwise noted, are made thereto.

2. TEX. BUS. & COM. CODE ANN. §§ 17.41-17.63 (Vernon Supp. 1986).

3. 677 S.W.2d 669 (Tex. App.—Amarillo 1984, writ ref'd n.r.e.).

4. TEX. REV. CIV. STAT. ANN. art. 5069-1.06(1) (Vernon 1971).

5. The transaction in *West* concerned interest and was, therefore, subject to the penalties in article 1.06. The usury penalties for charging excess time price differential under articles 8.01 and 8.02 result from the application of the same principle. See *Jim Walter Homes v.*

all interest under the contract if the common law action has been properly pleaded, regardless of the establishment of a violation of article 1.06(2) or its counterpart in article 8.02.

In a well reasoned historical analysis⁶ the Amarillo court traced the history of this common law action to the 1890 holding of the Texas Supreme Court in *Bexar Building & Loan Association v. Robinson*.⁷ The court found more recent treatment in *Ferguson v. Tanner Development Co.*,⁸ *First State Bank of Bedford v. Miller*,⁹ and *Flannery v. Bishop*.¹⁰ The opinion also scrutinized the legislative intent behind article 1.06.¹¹

The holding in *West* is significant due to the court's refusal to construe the term "usurious interest" to mean only the excess interest paid above the authorized maximum rate. Instead, the court allowed recovery of all interest that was paid.¹² The court emphasized that the common law action must be viewed in light of the present provisions of article 1.06(1), which mandate a forfeiture of three times the amount of usurious interest contracted for, charged or received.¹³ As the court observed if the lender was allowed to retain an amount of interest equal to the legal rate, the lender would actually benefit from its unlawful action and effectively escape the triple damages provision of the statute.¹⁴

Two cases dealt with the issue of whether a pleading in a lawsuit constitutes a charging of interest or time price differential for usury purposes.¹⁵ In *Petroscience Corp. v. Diamond Geophysical*¹⁶ the lower court had held that an abandoned pleading for interest was not a "charging" as a matter of law.¹⁷ The Texas Supreme Court expressly rejected that reasoning but refused the application for writ of error on other grounds.¹⁸

In *Moore v. White Motor Credit Corp.*¹⁹ the Dallas court of appeals affirmed a jury finding that a superseded pleading for unearned time price differential was an actionable charging. The court ruled that the contention that a pleading cannot constitute a charge of interest within the meaning of

Valencia, 679 S.W.2d 29, 34 (Tex. App.—Corpus Christi 1984, *aff'd as modified*, 690 S.W.2d 239 (Tex. 1985)).

6. 677 S.W.2d at 676-79.

7. 14 S.W. 227 (Tex. 1890).

8. 541 S.W.2d 483 (Tex. Civ. App.—Houston [1st Dist.] 1976, *rev'd on other grounds*, 561 S.W.2d 777 (Tex. 1977)).

9. 563 S.W.2d 572 (Tex. 1978). Although not cited in the *West* opinion, the reasoning in *Wall v. East Texas Teachers Credit Union*, 533 S.W.2d 918 (Tex. 1976), supports the same conclusion to the extent that it denied a lender the right to offset earned interest against a usury penalty.

10. 81 Wash. 2d 696, 504 P.2d 778 (1972).

11. 677 S.W.2d at 679.

12. *Id.* at 680.

13. *Id.*

14. *Id.*

15. See *Petroscience Corp. v. Diamond Geophysical*, 684 S.W.2d 668 (Tex. 1984) and *Moore v. White Motor Credit Corp.*, Cause No. 05-84-0032-CV (Tex. App.—Dallas, September 16, 1985, no writ).

16. 684 S.W.2d 668 (Tex. 1984).

17. *Id.* at 669.

18. *Id.*

19. Cause No. 05-84-0032-CV (Tex. App.—Dallas, September 16, 1985, no writ).

the Texas usury statutes was without merit.²⁰

The courts in *Moore*²¹ and *West*²² both addressed the bona fide error defense to usury. In *West* the defendant asserted a bona fide error defense under the banner of "ignorance of the law." This argument failed to find support.²³ The Amarillo court noted that the bona fide error defense does not embrace a person's lack of knowledge of Texas usury law and its application to a particular transaction.²⁴ Rather, the defense addresses whether the parties intended to make the bargain or erred in their calculations.

The opinion in *Moore* contains a more detailed treatment of the bona fide error defense. The *Moore* court ultimately ruled that the filing of a sworn petition that contains a usurious charge of interest does not prohibit the application of the bona fide error defense under article 8.02 of the Credit Code despite the fact that article 8.02 does not contain such a defense.²⁵ The court based its reasoning on the holding in *Tyra v. Bob Carrol Construction Co.*²⁶ In *Tyra* the supreme court held that articles 1.06(1) and 1.06(2) of the Credit Code allow the bona fide error defense.²⁷ The Dallas court, by analogy, found that the same reasoning also supports the availability of the defense to a claim under article 8.02.²⁸

The bona fide error defense holding in *Moore* is an oversimplification of the resemblance of articles 8.01 and 8.02 to articles 1.06(1) and (2). A single

20. *Id.*

21. *Id.*

22. 677 S.W.2d 668.

23. *Id.* at 677.

24. *Id.*

25. *Moore*, slip op. at 16.

26. 639 S.W.2d 690 (Tex. 1982).

27. *Id.* at 690. Articles 5069-1.06(1) and (2) read in pertinent part as follows:

- (1) Any person who contracts for, charges or receives interest which is greater than the amount authorized by this Subtitle, shall forfeit to the obligor three times the amount of usurious interest contracted for, charged or received, such usurious interest being the amount the total interest contracted for, charged or received exceeds the amount of interest allowed by law, and reasonable attorney fees fixed by the court except that in no event shall the amount forfeited be less than Two Thousand Dollars or twenty percent or principal, whichever is the smaller sum; provided, that there shall be no penalty for any usurious interest which results from an accidental and bona fide error.
- (2) Any person who contracts for, charges or receives interest which is in excess of double the amount of interest allowed by this Subtitle shall forfeit as an additional penalty, all principal as well as interest and all other charges and shall pay reasonable attorney fees set by the court

TEX. REV. CIV. STAT. ANN. art. 5069-1.06(1) and (2) (Vernon 1971). The Texas Supreme Court also held that the bona fide error defense was applicable to both 1.06(1) and (2). See *Tri-County Farmer's Co-Op v. Bendele*, 641 S.W.2d 208, 209 n.4 (Tex. 1982) (citing *Tyra*, 639 S.W.2d 690). *Esparza v. Nolan Wells Communications, Inc.*, 653 S.W.2d 532 (Tex. App.—Austin 1983, no writ) discussed the problem of ignorance and compared and distinguished *Tyra* on the facts. The *Esparza* court observed that in *Tyra* the attorney was unaware that the petition signed and filed by him contained a claim for interest that his creditor-client had not previously asserted. *Id.* at 536. In *Esparza*, however, the evidence showed no similar mistake, but rather suggested that the creditor's actions (i.e. not the creditor's intent to charge interest, but instead its acts in sending notices and statements charging interest) were intentional, although perhaps taken in ignorance of the usury laws. *Id.*

28. *Moore*, slip op. at 8.

article, labelled "Penalties," contains both articles 1.06(1) and (2). Subpart (1) prohibits penalties for usurious interest that results from an accidental and bona fide error.²⁹ Subpart (2) provides more severe penalties under the same article when there is an overcharge in excess of double the lawful maximum rate.³⁰ By contrast, article 8.01 is a more detailed treatment of the respective rights of the creditor and debtor in the event of usury. Not only is the penalty provision in article 8.01(1) different from its counterpart in article 1.06(1), but under article 8.01 the creditor is also given several opportunities to cure usurious conduct without incurring liability for penalties.³¹ No similar "escape valve" exists under article 1.06. The cure provisions in article 8.01 allow both bona fide mistakes and intentional acts to go unpunished.

The most notable distinction between the statutes, however, is in the language creating the bona fide error defense in article 8.01.³² The statute's intent seems clear in its grant of clemency for unintentional and bona fide errors only to those actions brought under 8.01. Article 8.02 does not mention a similar defense. Although the *Moore* opinion questioned the reasonableness of fashioning a stricter penalty under 8.02 than the penalty that is available under 1.06, this reasoning failed to consider the cure provisions under 8.01 and their salutary effect and the absence of similar provisions in 1.06.

Another Dallas court of appeals decision examined the application of article 1.03 of the Credit Code to a stated account. In *Griffith v. Geffen & Jacobsen*³³ a law firm sued a former client upon a written agreement dated August 11, 1981, that included a repayment schedule ending on October 5, 1981. The law firm filed suit in April, 1982, for default on the agreement and sought prejudgment interest at six percent per annum from October 21, 1981. The client raised the defense of usury for excessive interest under article 1.03. The court of appeals sanctioned the interest charge and, under the rationale of the 1887 supreme court opinion in *Heidenheimer v. Ellis*,³⁴ ruled that article 1.03 did not apply to this stated account.³⁵ The court thus held that the firm could recover prejudgment interest from August 11, 1981, the date of the agreement.³⁶

29. TEX. REV. CIV. STAT. ANN. art. 5069-1.06(1) (Vernon 1971).

30. *Id.* art. 5069-1.06(2).

31. See TEX. REV. CIV. STAT. ANN. art. 5069-8.01(c)(1), (2), (3), and (4) (Vernon 1971).

32. Article 8.01(f) states that:

A person may not be held liable in any action brought under this Article for a violation of this Subtitle or of Chapter 14 of this Title if such person shows by a preponderance of evidence that (1) the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid such violation or that (2) the violation was an act done or omitted in good faith in conformity with any rule, regulation, or interpretation of this Title by any state agency, board, or commission

TEX. REV. CIV. STAT. ANN. art. 5069-8.01(f) (Vernon 1971).

33. 693 S.W.2d 724 (Tex. App.—Dallas 1985, no writ).

34. 67 Tex. 426, 3 S.W. 666 (1887).

35. 695 S.W.2d at 726-27.

36. *Id.*

The court's reasoning in *Griffith* is flawed. In *Heidenheimer* the Texas supreme court interpreted the predecessor statute of article 1.03, which applied only to written contracts ascertaining the sum payable or to open accounts.³⁷ Since a "stated account," as opposed to an "open account," formed the basis of the claim in *Heidenheimer*, the court held that the statutory time periods were inapplicable and allowed pre-judgment interest from the date of acknowledgment and promise to pay.³⁸ The *Heidenheimer* holding controlled until the 1979 Legislature amended article 1.03 and made it applicable to "all accounts and contracts ascertaining the sum payable."³⁹ The additional language, "all accounts," clearly embraces stated accounts and open accounts and should include the account sued upon in *Griffith*.

The real issue in *Griffith* should have been the determination of when the sum became due and payable.⁴⁰ Pre-judgment interest under the new version of article 1.03 is allowable only upon the thirtieth day from and after the date when the sum is due and payable. The court might well have found that in a stated account the sum is due and payable upon acknowledgment. Consequently, pre-judgment interest could have been charged beginning September 10, 1981. This interpretation would not have changed the result reached in *Griffith*. The holding in *Griffith* that article 1.03 does not apply to a stated account,⁴¹ however, is contrary to the clear language of the statute as it presently reads.

A number of courts during the Survey period had the opportunity to address the availability of a usury claim to a guarantor of an obligation. The courts in *Greenway Bank & Trust v. Smith*,⁴² *Allied Supplier & Erection v. A. Baldwin & Company*,⁴³ and *Moore v. White Motor Credit Corp.*⁴⁴ each held that a guarantor could not assert a usury claim or defense. Both *Greenway Bank & Trust* and *Moore* base their holdings on the Texas Supreme Court's ruling in *Houston Sash & Door Co. v. Heaner*.⁴⁵

In *Houston Sash & Door* the court ruled that the usury defense is personal to the debtor and that the penalty forfeitures in article 1.06 apply only to the "immediate parties to the transaction creating the usury defense."⁴⁶ The court also held that a guaranty only falls with an underlying obligation when the obligation is void for illegality.⁴⁷ Consequently, the court in *Houston Sash & Door* denied a usury defense to a guarantor unless: (1) the guarantor was an "immediate party to the transaction creating the usury defense;" or (2) the underlying obligation was void for illegality.

The factual applications of the first exception appear to be limited to only

37. TEX. CIV. STAT. arts. 2976-77 (1879) (repealed 1968).

38. 3 S.W. at 666.

39. TEX. REV. CIV. STAT. ANN. art. 5069-1.03 (Vernon 1968).

40. 693 S.W.2d at 727.

41. *Id.*

42. 679 S.W.2d 592 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

43. 688 S.W.2d 156 (Tex. App.—Beaumont 1985, no writ).

44. Cause No. 05-84-00032-CV (Tex. App.—Dallas, September 16, 1985, no writ).

45. 577 S.W.2d 217 (Tex. 1979).

46. *Id.* at 222.

47. *Id.*

a few situations. Examples include when a partner executes a usurious note on behalf of the partnership so that he becomes personally liable and also personally guarantees it or when an individual personally guarantees his own usurious note. Applications of the second exception, however, are not so remote. Although the second exception apparently was not raised, it would have applied to *Moore*. Under this second exception, pursuant to articles 1.06(2) and 8.02, each contract, charge, or receipt for more than twice the maximum lawful interest or time price differential rate is specifically declared illegal and subjects the violator to a criminal misdemeanor fine. Each such contract or transaction constitutes a separate offense. Since any contract that is illegal in its formation or performance is void and unenforceable,⁴⁸ a guarantor of any note or charge involving an interest rate at more than twice the lawful maximum rate should be entitled to at least the defense of usury. To hold otherwise would permit enforcement of an illegal transaction.

Several recent cases dealt with the question of when additional charges constitute interest. In *Texas Commerce Bank v. Goldring*⁴⁹ the supreme court examined a bank's requirement that a debtor pay, as part of an agreement to renew a note in default, the bank's attorneys' fees incurred in seeking to foreclose on real estate securing the original note. The court found that this payment did not constitute interest based upon the holding in *Greever v. Persky*⁵⁰ that a lender may make an extra charge for any distinctly separate and additional consideration other than the simple lending of money without violating the usury law. Justice Spears, in a "requiem to usury,"⁵¹ reluctantly concurred with the result, not because it was proper but because it followed from a line of cases permitting charges far beyond those addressed in *Greever*. Justice Spears lamented that the court's action permitted banks to avoid the usury laws altogether by adding the expense of doing business to the interest charged on the loans.⁵² Justice Spears' concurring opinion and the dissent of Justice Robertson seem directed at the language in *Greever* that excludes from interest only those charges for which the lender provides any separate consideration other than lending money.⁵³ As both justices observed, the bank alone incurred the attorneys' fees charged in *Goldring* for the protection of the bank's interest in collateral securing the original note. The justices contended that the fees could hardly be interpreted as a consideration for the debtors.

In *Perry v. Stewart Title Co.*⁵⁴ the Fifth Circuit refused to classify es-

48. *Lewis v. Davis*, 199 S.W.2d 146, 148-49 (Tex. 1947); *Texas Employer's Ins. Ass'n v. Tabor*, 283 S.W. 779, 780 (Tex. Comm'n App. 1926, judgment adopted); 14 TEX. JUR. 3d *Contracts* § 141 (1981).

49. 665 S.W.2d 103 (Tex. 1984).

50. 165 S.W.2d 709 (Tex. 1942).

51. 665 S.W.2d at 106. Justice Spears suggests the tombstone inscription "*Requiescat in pace!*," 665 S.W.2d at 106, to which this author would add, *de mortuis nihil nisi bonum*.

52. *Id.*

53. 165 S.W.2d at 712.

54. 756 F.2d 1197 (5th Cir. 1985).

crowded taxes and insurance premiums as interest.⁵⁵ The court based its holding upon the rule that bona fide fees paid to third parties for services are not characterized as interest.⁵⁶ The court similarly refused to classify legitimate late fees as interest because the payments were not for the use, forbearance, or detention of money, but constituted bona fide fees paid to third parties for servicing the late payments.⁵⁷

The characterization of late charges was also discussed in *Tygreff v. University Gardens Homeowners Association*.⁵⁸ The opinion defines the three elements of interest in article 1.01, which are use, forbearance, and detention of money, and concludes that legitimate late fees do not fall within any element.⁵⁹ Consequently, the court held that the usury laws are inapplicable to late charges.

Litigants are increasingly attempting to apply the usury statutes beyond customary loans or use of money situations. The severity of the penalties and the prospect for recovering attorneys' fees fuels these efforts, as exemplified in *Jim Walter Homes v. Valencia*,⁶⁰ which follows in the discussion on the Consumer Credit Code.

In the usury area, two recent cases considered and denied the debtor's claim for application of the usury laws. *Bray v. McNeely*⁶¹ involved allegations that the purchase of a one-half interest in property for \$50,000.00, which included an option by which the purchaser could require the seller to repurchase the property for \$55,000.00 sixty days later, was in fact a loan. The jury found that the transaction was an investment and not a loan.⁶² The trial court, however, determined otherwise and granted judgment non obstante verdicto, concluding that the loan was usurious as a matter of law.⁶³ On appeal the court reviewed the jury's finding under the no evidence standard and reversed the trial court's judgment.⁶⁴ The appellate court found that both the testimony and documentary evidence supported the jury's finding that the transaction constituted a sale of an interest in property rather than a loan.⁶⁵

In *Wiley-Reiter Corp. v. Groce*⁶⁶ the defaulting parties to a settlement agreement appealed from a judgment entered after their default. The settlement agreement authorized the appellee to confess a judgment in his favor for three times the remaining balance owed on the agreement in the event an installment payment was not timely made. The appellants contended that

55. *Id.* at 1207.

56. *Id.*; see *Imperial Corp. v. Frenchman's Creek Corp.*, 453 F.2d 1338, 1343 (5th Cir. 1972); *Tanner Dev. Co. v. Ferguson*, 561 S.W.2d 777 (Tex. 1977); *Greever*, 165 S.W.2d at 711.

57. 756 F.2d at 1207-08.

58. 687 S.W.2d 481 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

59. *Id.* at 483-84.

60. 679 S.W.2d 29 (Tex. App.—Corpus Christi 1984, *aff'd as modified*, 690 S.W.2d 239 (Tex. 1985)); see *infra* notes 95-99 and accompanying text.

61. 682 S.W.2d 615 (Tex. App.—Houston [1st Dist.] 1984, no writ).

62. *Id.* at 616.

63. *Id.*

64. *Id.* at 620.

65. *Id.* at 618-19.

66. 693 S.W.2d 701 (Tex. App.—Houston [14th Dist.] 1985, no writ).

the trial court erroneously entered judgment based upon an agreement that, as a matter of law, was not only usurious but also allowed interest at a rate of more than double the legal maximum rate. The court of appeals disagreed because the fundamental element of a usurious transaction was missing: there was no overcharge for the use, forbearance, or detention of money.⁶⁷ The court found neither a credit transaction nor a loan of money.⁶⁸ Consequently, no basis existed for the application of the usury laws.

*Lawler v. Lomas & Nettleton Mortgage Investors*⁶⁹ addressed whether a new loan is created when a noncorporate borrower on an original note incorporates and negotiates a renewal note at corporate rates. *Lawler* involved two loans. An unincorporated borrower originally obtained a loan on March 21, 1972, in the principal sum of \$40,000.00 with interest at ten percent per annum, maturing on March 1, 1975. One year later the borrower incorporated and thereafter executed a new note in January, 1975, for \$479,500.00, due January 20, 1976, with interest at five percent over prime. A subsequent amendment reduced the rate to ten percent per annum. The renewal note otherwise permitted eighteen percent interest per annum upon default. For the first four years, the creditor sent statements that recited ten percent interest, but calculated per diem interest on the basis of a 360 day year.

The two issues raised by this loan concerned whether two loans or only one existed, and whether interest calculations used in the first note were usurious. The court found that the original note and the renewal note executed by the corporation created two separate obligations.⁷⁰ The court observed the factual differences between the two notes, such as interest rates, methods of calculating interest, and provisions regarding prepayment.⁷¹ The court also considered several references contained in the renewal note and corresponding deed of trust regarding the fact of payment of the first note.⁷² Finally, the court noted the similarity of its holding in *RepublicBank Dallas v. Shook*,⁷³ in which it sanctioned the use of a shell corporation to avoid usury restrictions when the borrower intended for the loan and the corporation to further a profit-oriented enterprise.⁷⁴

After establishing the existence of two separate notes and approving incorporation to avoid application of the usury laws in connection with a profit enterprise, the court ruled that the original loan was usurious because the bank had calculated the loan upon a per diem rate based on a 360 day year.⁷⁵ The subsequent application of this per diem rate to a 365 day calendar year

67. *Id.* at 703.

68. *Id.*

69. 691 S.W.2d 593 (Tex. 1985).

70. *Id.* at 596.

71. *Id.* at 595-96.

72. *Id.* at 595.

73. 653 S.W.2d 278 (Tex. 1983).

74. *Id.* at 281.

75. *Id.* at 296.

produced a usurious rate equalling 10.139 percent. If the bank had simply applied the per diem rate to a 360 day year by treating each month as if it had only 30 days, it could have avoided the problem.

B. Consumer Credit Code

Several cases scrutinized the boiler plate repossession provision of a standard form contract used by General Motors Acceptance Corporation. The cases ultimately found that the provision violated Chapter 7 of the Consumer Credit Code.⁷⁶ The Corpus Christi court of appeals ruled on the repossession clause in four different opinions. *Gonzales v. Gainan's Chevrolet City*,⁷⁷ *Hinojosa v. Castellow Chevrolet-Oldsmobile*,⁷⁸ *Trevino v. Castellow Chevrolet-Oldsmobile*,⁷⁹ and an unpublished opinion in *Garcia v. Gainan's Chevrolet City*⁸⁰ all challenged the following contract clause as violating article 7.07(3): "Further, in such event [of default] seller or any sheriff or other officer of the law may take immediate possession of said property without demand, . . . and for this purpose seller may enter upon the premises where said property may be and remove same."⁸¹ In each case the court cited the Dallas court of appeals decision in *Martens v. General Motors Acceptance Corp.*,⁸² which interpreted the identical contract clause, although it was challenged under a different part of the statute.⁸³ Since the Dallas court had passed favorably on the contract clause, and since the Corpus Christi court considered the reasoning in *Martens* to be just as sound when applied to the 7.07(3) challenge,⁸⁴ the Corpus Christi court ruled in each instance that the repossession clause did not authorize an unlawful entry or breach of the peace as proscribed by the statute.⁸⁵

In reversing the court of appeal's holdings, the supreme court in *Gonzales v. Gainan's Chevrolet City*,⁸⁶ *Trevino v. Castellow Chevrolet-Oldsmobile*,⁸⁷ and *Garcia v. Gainan's Chevrolet City*⁸⁸ specifically declared that the repossession clause violated article 7.07(3). The supreme court emphasized its holding in *Southwestern Investment Co. v. Mannix*⁸⁹ that the presence of such a clause in a retail installment contract deceives the very individuals whom the legislature intended to protect, the uneducated, the poor, and the

76. TEX. REV. CIV. STAT. ANN. art. 5069-7.01 to -7.10 (Vernon 1971).

77. 684 S.W.2d 740, 743 (Tex. App.—Corpus Christi 1984, *rev'd*, 690 S.W.2d 885 (Tex. 1985)).

78. 678 S.W.2d 707, 710 (Tex. App.—Corpus Christi 1984, writ *ref'd n.r.e.*).

79. 680 S.W.2d 71, 73 (Tex. App.—Corpus Christi 1984, *rev'd*, 690 S.W.2d 885 (Tex. 1985)).

80. *Garcia* was submitted as a companion case to *Gonzales*; *see supra* note 77.

81. TEX. REV. CIV. STAT. ANN. art. 5069-7.07(3) (Vernon 1971).

82. 584 S.W.2d 941, 944 (Tex. Civ. App.—Dallas 1979, no writ).

83. The identical contract clause was challenged in *Martens* under TEX. REV. CIV. STAT. ANN. art. 5069-7.07(4) (Vernon 1971).

84. *Hinojosa*, 678 S.W.2d at 711.

85. 584 S.W.2d at 944.

86. 690 S.W.2d 884, 889 (Tex. 1985).

87. 690 S.W.2d 893 (Tex. 1985).

88. 690 S.W.2d 892, 893 (Tex. 1985).

89. 557 S.W.2d 755 (Tex. 1977).

elderly, into believing that their creditors could, with the law's blessing, forcibly enter their homes at any time and remove their goods.⁹⁰

The supreme court in *Gonzales v. Gainan's Chevrolet City*⁹¹ also announced a new rule for construing those provisions in contracts that are not relevant to a determination of usury. The court accepted the rule that contracts that are allegedly usurious based on the fact that they call for collection of unearned interest should be construed to comply with the law if they are reasonably susceptible of such an interpretation.⁹² The court found, however, no reason to similarly presume the legality of terms and provisions of a contract that the Credit Code requires or prohibits and that are irrelevant to a finding of usury.⁹³ In doing so the court specifically disapproved a line of lower court authority holding to the contrary.⁹⁴

In *Jim Walter Homes, Inc. v. Valencia*⁹⁵ the Corpus Christi court of appeals considered whether, in connection with a house construction contract subject to Chapter 6 of the Credit Code,⁹⁶ a demand for payment and acceleration prior to substantial completion of construction constituted a charging of time-price differential in excess of twice the lawful maximum. Under the facts in the case, the court found such a violation.⁹⁷ After observing jury findings that the house contained numerous defects, failed to satisfy implied warranties, and would require repair costs amounting to almost one-half of the original price, the court found an absence of substantial completion under the contract.⁹⁸ In addressing the time at which one may legally "charge" under a construction contract, the court ruled that, absent an agreement to the contrary, an indebtedness does not become due under a construction contract or a contract for services until the builder substantially complies.⁹⁹ Consequently, the buyers' obligation to begin payments in *Valencia* had not been triggered, and the demands for payment and acceleration constituted a charging during the interest-free period. Under the *Houston Sash & Door Co. v. Heaner*¹⁰⁰ principle, such a charging automatically exceeded the maximum lawful rate by more than two times.

Finally, in *Kish v. Van Note*¹⁰¹ the supreme court recognized the right of an aggrieved consumer to recover damages under the Deceptive Trade Prac-

90. 690 S.W.2d at 886.

91. *Id.* at 884.

92. 690 S.W.2d at 887 (citing *Nevels v. Harris*, 129 Tex. 190, 102 S.W.2d 1046 (1937); and *Walker v. Temple Trust Co.*, 124 Tex. 575, 80 S.W.2d 935 (1935)).

93. 690 S.W.2d at 887.

94. *Id.*, disapproving *Haley v. Pagen Lewis Motors, Inc.*, 647 S.W.2d 319 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.) and *Grant v. Friendly Chrysler Plymouth, Inc.*, 612 S.W.2d 667 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.).

95. 679 S.W.2d 29 (Tex. App.—Corpus Christi 1984, *aff'd as modified*, 690 S.W.2d 239 (Tex. 1985)).

96. TEX. REV. CIV. STAT. ANN. art. 5069-6.01 to -6.09 (Vernon 1971).

97. 679 S.W.2d at 34.

98. *Id.*

99. *Id.*

100. 577 S.W.2d 217 (Tex. 1979).

101. 692 S.W.2d 463, 466 (Tex. 1985).

tices—Consumer Protection Act.¹⁰² The court also recognized penalties under the Credit Code where there is proof of violations of both statutes. The case established the possibility of a treble recovery based on the Deceptive Trade Practices Act in addition to the mandatory triple or double usury penalties¹⁰³ contained in the Credit Code.

II. ESTABLISHING AND COLLECTING CLAIMS

A. Notes and Other Credit Arrangements

Two cases reported during the Survey period presented the question of the liability of a business entity for repayment of a loan that is evidenced by a note signed by an owner in his individual capacity. In *Anderson v. Badger*¹⁰⁴ the creditor, Badger, executed a \$20,000 check payable to Anderson-Giles Building Group, a partnership composed of Anderson and Giles. In exchange for delivery of the check Badger received two \$10,000 promissory notes: one signed only by Anderson and one signed by Giles and his wife. The two notes bore different interest rates. The Anderson note was secured by partnership property, whereas the Giles note was unsecured. Badger brought suit seeking to hold Anderson liable on the Giles note or, alternatively, on the debt represented by the \$20,000 loan.

The court of appeals denied both theories of recovery.¹⁰⁵ The court first rejected the creditor's characterization of his suit as containing an alternative claim on the debt.¹⁰⁶ The court relied upon the parties' stipulation that the purpose of the case was to collect on the notes,¹⁰⁷ and held further that no debt ever existed separate from the notes.¹⁰⁸ The court refused to hold Anderson liable on the note since the note did not bear his signature.¹⁰⁹ The note had been signed by Giles individually without use of the partnership name; therefore, it was not a partnership debt.¹¹⁰ The court held that this result was proper even though Giles had deposited the proceeds in the partnership account and used them for partnership business.¹¹¹ The partnership did not ratify the Giles note since the circumstances indicated that Badger intended to deal with the partners in their individual capacities and not as

102. TEX. BUS. & COM. CODE ANN. §§ 17.41-17.63 (Vernon Supp. 1986).

103. See TEX. REV. CIV. STAT. ANN. art. 5069-1.06, 8.01-8.02 (Vernon 1971).

104. 693 S.W.2d 645 (Tex. App.—Dallas 1985, no writ).

105. *Id.* at 648.

106. *Id.* at 646-47.

107. *Id.* at 646.

108. *Id.* The court cited *First State Bank v. Dyer*, 151 Tex. 650, 254 S.W.2d 92 (1953) in support of its holding. In *Dyer* a bank sought to hold a partnership, which had received and used the proceeds of a loan, liable on the debt even though it was not liable on a note that a partner had signed in his individual capacity. The supreme court held that the note was the original debt and that there was no pre-existing debt separate and apart from the note. *Id.* at 93. The supreme court also held that the parol evidence rule excluded extraneous evidence showing any liability for the partnership on the note. *Id.*

109. 693 S.W.2d at 647. The court cited TEX. BUS. & COM. CODE ANN. § 3.401(a) (Tex. UCC) (Vernon 1968), which provides that "[n]o person is liable on an instrument unless his signature appears thereon."

110. 693 S.W.2d at 647.

111. *Id.*

agents of the partnership.¹¹² The court held that no ratification exists when the creditor intends to deal not with the principal but with the agents in their individual capacities.¹¹³

In *National Mar-Kit, Inc. v. Forest*¹¹⁴ a creditor sought to hold a closely-held corporation liable for repayment of a \$15,000 loan. The creditor had paid the corporate president in the form of a check. The president deposited the check in the corporate account, but withdrew the funds and spent them for his own personal expenses. Approximately six months after the loan, the creditor requested a promissory note to evidence the loan. The creditor accepted a note that named the corporate president personally as maker, although this note was later returned to the corporate president with a covenant not to sue on the note. Ultimately, the creditor brought suit, alleging that at the request of the corporate president he had made a loan for the corporation that had not been paid. The trial court rendered judgment in favor of the lender against the corporate defendant.

On appeal the corporation sought to treat the creditor's suit as one brought on the note and argued that: (1) since the corporation had not signed the note, it could not be obligated on the note;¹¹⁵ and (2) any parol evidence tending to show corporate liability on the note was inadmissible.¹¹⁶ The court of appeals rejected these contentions on the ground that the creditor had not brought suit on the note given by the corporate president, but had sued on the underlying obligation.¹¹⁷ The court then held that the asserted defenses did not apply to the suit as brought.¹¹⁸ Furthermore, delivery of the note by the third party corporate president did not constitute payment or release of the pre-existing debt in the absence of an express agreement to this effect by the parties.¹¹⁹ The court further ruled that the four year period of limitations applied since the loan was payable less than two years prior to the 1979 amendment that made the four year statute¹²⁰ rather than the two year statute¹²¹ applicable to oral loans. Since the limitation period had not run prior to the amendment extending the time to sue, the defendant did not have a vested right to resist the claim.¹²²

112. The court pointed to the fact that Badger had two notes with different terms, neither of which was signed by the partnership nor by the other partner. The court also noted that Badger was aware of the partnership and that the funds would be used for partnership purposes, and yet Badger still accepted individual notes from the parties. 693 S.W.2d at 647.

113. *Id.* at 647-48.

114. 687 S.W.2d 457 (Tex. App.—Houston [14th Dist.] 1985, no writ).

115. *Id.* at 459 (citing TEX. BUS. & COM. CODE ANN. § 3.401 (Tex. UCC) (Vernon 1968)).

116. 687 S.W.2d at 459.

117. *Id.* The defendant relied upon *First State Bank v. Dyer*, 151 Tex. 650, 254 S.W.2d 92 (1953), as did the defendant in *Anderson v. Badger*, 693 S.W.2d at 646. However, unlike *Badger* and *Dyer*, the debt in this case predated the note, thereby giving it an identity separate and apart from the note.

118. 687 S.W.2d at 459.

119. *Id.*

120. TEX. REV. CIV. STAT. ANN. art. 5527 (Vernon 1971).

121. TEX. REV. CIV. STAT. ANN. art. 5526 (1925), amended by Act of June 13, 1979, ch. 716, § 1, 1979 Tex. Gen. Laws 1768.

122. 687 S.W.2d at 459. In *Raley v. Wichita County*, 72 S.W.2d 577, 579 (Tex. Comm'n App. 1934, opinion adopted), it was held that "the statute of limitations in force at the time the

*Retamco, Inc. v. Dixilyn-Field Drilling Co.*¹²³ involved the liability of one who signed a note twice, once as agent of a corporation and once in his individual capacity,¹²⁴ when the note itself referred only to the corporation as the "maker."¹²⁵ The defendant signatory argued that the note only obligated the party that was identified as "maker," the corporation, and that he was acting merely as the agent for a disclosed principal and thus had no individual liability. The court rejected this argument and held that under Texas law¹²⁶ each person who signs a note as a maker is jointly and severally liable unless the instrument specifies otherwise.¹²⁷ Since the note did not so specify, the defendant was individually liable unless he established that he had signed the note in another capacity. The court held that proof that a note has been signed in a different capacity is an affirmative defense.¹²⁸ Since the defendant neither pleaded nor offered any proof of this affirmative defense in accordance with rule 94 of the Texas Rules of Civil Procedure,¹²⁹ summary judgment for the note holder was proper.¹³⁰

An attempt to assert the contractual defense of no consideration to avoid liability under a note failed in two relatively straightforward cases. In *Salt Water Resources v. Kirkpatrick & O'Donnell Construction Equipment Co.*¹³¹ the court found that evidence of a pre-existing debt was sufficient consideration to support the note. In *Broaddus v. First State Bank*¹³² a bank deposited loan proceeds directly to the account of an individual who sold cattle to the borrower. A third party holding a security interest eventually foreclosed on the cattle. The jury accepted the borrower's argument that he had received no consideration for his promise to repay the loan. The court of appeals affirmed the action of the trial court in disregarding this special issue because the issue defined consideration to mean either a benefit to the borrower or a detriment to the bank.¹³³ The bank clearly suffered a detriment

suit is brought or at least when the case is tried determines the right of a party to sue for a claim."

123. 693 S.W.2d 520 (Tex. App.—Houston [14th Dist.] 1985, no writ).

124. The note was signed:

Retamco, Inc.
By Steve Gose (signed)
Steve Gose (signed)
Individually—Steve Gose

125. The heading of the note designated only the corporation as "maker". The note also contained provisions that: "Each maker is responsible for the entire amount of this note," and "the terms Maker and Payee and other nouns and pronouns include the plural if more than one". *Id.* at 521.

126. TEX. BUS. & COM. CODE ANN. § 3.118(5) (Tex. UCC) (Vernon 1968) provides: "Unless the instrument otherwise specifies two or more persons who sign as maker, acceptor, or drawer or indorser and as part of the same transaction are jointly and severally liable even though the instrument contains words such as 'I promise to pay'."

127. 693 S.W.2d at 521.

128. *Id.* at 521 (following *Seale v. Nichols*, 505 S.W.2d 251, 254 (Tex. 1974)).

129. TEX. R. CIV. P. 94.

130. 693 S.W.2d at 521.

131. 694 S.W.2d 122, 123 (Tex. App.—Dallas 1985, no writ).

132. 681 S.W.2d 879 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.).

133. *Id.* at 882. The courts have settled that consideration may be a detriment to the promisee as well as a benefit to the promisor. *Texas Export Dev. Corp. v. Schleder*, 519 S.W.2d 134, 138 (Tex. Civ. App.—Dallas 1974, no writ).

when it advanced the funds.¹³⁴

In *Williamson v. Dunlap*¹³⁵ the Texas Supreme Court reaffirmed the rule that a demand for payment must precede a valid acceleration of a note; the notice of acceleration cannot be given contemporaneously with the demand for payment.¹³⁶ Nevertheless, even if the acceleration may be invalid, the creditor is entitled to recover past due installments plus interest.¹³⁷ The right to accelerate payments under a loan was also an issue in *Estate of Kaiser v. Gifford*.¹³⁸ That case involved the classic transaction between an uncle and his nephew—a staple in law school contract classes for years. The uncle paid approximately \$17,000 for a house and furnishings for his nephew. Although the two had not signed a written agreement, the nephew made forty-four monthly payments totaling \$6,685.14 until the uncle's death. Despite the nephew's protestation that the money was a gift, the court of appeals sustained the trial court finding that the uncle and nephew had intended the money to be a loan to be repaid in 300 monthly installments.¹³⁹ The court held that the uncle's estate was entitled to accelerate the amount due because the nephew's repudiation of the loan agreement constituted an anticipatory breach.¹⁴⁰ The court further held that the statute of frauds¹⁴¹ did not bar recovery, even though the agreement could not be performed in one year, under the general rule that full performance by one party and acceptance of benefits by the other renders the statute inapplicable.¹⁴²

In *Crimmins v. Lowry*¹⁴³ the Texas Supreme Court addressed the question of whether a comaker of a promissory note may claim the defense of impairment of collateral. In 1977 two law partners, Lowry and McNiel, executed on behalf of the partnership a promissory note in the amount of \$11,000 payable to Crimmins. Crimmins received a security interest in the office equipment and furniture; however, he did not file the financing statement until August, 1980, two years after the partnership had been dissolved. Shortly thereafter, McNiel filed for bankruptcy, and the bankruptcy court declared the security interest void as a preferential transfer.

Crimmins sued Lowry on the note, and Lowry defended by asserting that Crimmins had discharged him pursuant to section 3.606(a)(2) of the Uniform Commercial Code¹⁴⁴ when he impaired the collateral of the note by the late filing. After a detailed examination of the legislative history of the pro-

134. 681 S.W.2d at 882.

135. 693 S.W.2d 373 (Tex. 1985).

136. *Id.* at 374.

137. *Id.*

138. 692 S.W.2d 525 (Tex. App.—Houston [1st Dist.] 1985, no writ).

139. *Id.* at 527-528.

140. *Id.*

141. TEX. BUS. & COM. CODE ANN. art. 26.01(b) (Vernon Supp. 1985).

142. 692 S.W.2d at 526-27. The court also relied upon the fact that "there were 42 separate written instruments evidencing an agreement that a monthly installment of a fixed amount was payable to [the uncle] in satisfaction of the debt." *Id.* at 527.

143. 691 S.W.2d 582 (Tex. 1985).

144. TEX. BUS. & COM. CODE ANN. § 3.606(a)(2) (Tex. UCC) (Vernon 1968). That section provides: "(a) The holder discharges any party to the instrument to the extent that without such party's consent the holder. . . (2) Unjustifiably impairs any collateral for the

vision,¹⁴⁵ the Texas Supreme Court held that the words "any party" in section 3.606(a) were intended to include all parties in the position of a surety or all parties with a right of recourse. The court opined that a comaker is a surety because he has a potential right of recourse against his comaker for the excess of his pro-rata share.¹⁴⁶ A comaker is, therefore, entitled to claim the suretyship defenses of section 3.606, including a right to discharge, to the extent of his recourse for unjustifiable impairment of collateral.¹⁴⁷ In this particular case Lowry was entitled upon proper proof to a discharge for the part of the debt for which he was a surety, that is, for up to one-half of the claim.¹⁴⁸ In a concurring opinion three members of the court pointed out that had Lowry proven that he was a mere accommodation party,¹⁴⁹ he would have been entitled to a full discharge pursuant to section 3.606(a)(2).¹⁵⁰

The amount of attorneys' fees recoverable under a stipulation in a promissory note was at issue in *Long v. Tascosa National Bank of Amarillo*.¹⁵¹ The note provided that "in the event default is made. . .[and] suit is brought on same. . .then the makers agree and promise to pay ten percent (10%) additional on the amount of principal and interest then owing, as attorneys' fees." The jury found reasonable attorneys' fees to be \$3,500.00; however, the trial court disregarded their answer and awarded \$40,465.82, representing ten percent of the balance due at the time suit was filed. The court of appeals rebuffed the defendant's argument that the creditor had waived recovery of attorneys' fees in excess of the jury finding, holding that the note language entitled the holder to recover the attorneys' fees as stipulated unless the obligor pleaded and proved as an affirmative defense that the contractual fee was unreasonable and a lesser amount was reasonable.¹⁵² In the absence of such a defensive issue, the noteholder was not required to prove an agreement to pay the stipulated fee to an attorney or even that the stipulated fee was reasonable.¹⁵³

instrument given by or on behalf of the party or any person against whom he has a right of recourse." *Id.*

145. 691 S.W.2d at 584.

146. *Id.*

147. *Id.* In so holding, the court disapproved of the opinions in *Pan Am. Bank v. Nowland*, 650 S.W.2d 879 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.) and *Hooper v. Ryan*, 581 S.W.2d 237 (Tex. Civ. App.—Waco 1979, no writ) to the extent that they conflicted with the opinion of the court.

148. 691 S.W.2d at 585. The court held that since the defenses in § 3.606 are affirmative defenses, Lowry had the burden of proving the amount remaining on the debt (which was less than one-half of the original debt) for which he was a surety. Unable to prove this, Lowry failed to carry his burden. *Id.* at 585-86.

149. TEX. BUS. & COM. CODE ANN. § 3.415 (Tex. UCC) (Vernon 1968) defines an accommodation party as "one who signs the instrument in any capacity for the purpose of lending his name to another party to it."

150. 691 S.W.2d at 586.

151. 678 S.W.2d 699 (Tex. App.—Amarillo 1984, no writ).

152. *Id.* at 706. The court stated in dicta that it was not incorrect to calculate the attorneys' fees based upon the amount due at the time suit was filed rather than the time of judgment. *Id.*

153. 678 S.W.2d at 706.

In *Preston State Bank v. Jordan*¹⁵⁴ the court held that a creditor bank had failed to establish its right to summary judgment in a bank credit card case when the bank failed to prove the terms and conditions of the contract. The failure of the debtor to deny, pursuant to Texas Rule of Civil Procedure 93(7),¹⁵⁵ that a contract was executed did not relieve the bank of its burden to prove the terms of the contract. Perhaps more noteworthy than the holding of the court was its discussion of bank credit card agreements.¹⁵⁶

The proper rate of prejudgment and postjudgment interest was at issue in *Clark v. Walker-Kurth Lumber Co.*¹⁵⁷ The credit agreement between the parties contained a promise by the debtor to pay interest at the full legal rate on any delinquent amount. The debtor argued that article 1.03,¹⁵⁸ which specified a rate of six percent per annum when the parties had not agreed upon a specific rate of interest, controlled. The court of appeals held, however, that the phrase "full legal rate" indicated an intent to permit the maximum allowable prejudgment interest under the law, which at the time of the agreement was ten percent.¹⁵⁹ Since the parties intended a rate of interest equal to ten percent, the creditor was also entitled to this rate of post-judgment interest pursuant to article 1.05.¹⁶⁰

In *Spillman v. Self-Serv Fixture Co.*¹⁶¹ the Dallas court of appeals confronted the issue of whether a creditor had met its burden of explaining an alteration of an instrument upon which the suit was based. The creditor had brought suit upon a guaranty agreement that contained the words "up to \$20,000" typed over a whited-out portion of the document. The guarantor contended that the creditor made the alteration without his authorization or knowledge for the purpose of increasing the amount of his guaranty beyond \$5,000. The majority held that testimony by the creditor that the instrument was in the same condition as when received from the maker was sufficient explanation to authorize the instrument's introduction into evidence.¹⁶² The dissent strongly argued that a simple denial of responsibility for the alteration did not constitute an adequate explanation of the alteration.¹⁶³ In the dissent's view, the rule adopted by the majority would encourage fraud by

154. 692 S.W.2d 740, 744 (Tex. App.—Fort Worth 1985, no writ).

155. TEX. R. CIV. P. 93(7).

156. 692 S.W.2d at 744. The court described the "bank credit card" as a three part agreement between the bank, the merchant, and the consumer. The court distinguished it from the two party credit card agreements, such as department store credit cards. Although the court acknowledged differences, it compared a bank credit card arrangement to a letter of credit. 692 S.W.2d at 742.

157. 689 S.W.2d 275 (Tex. App.—Houston [1st Dist.] 1985, no writ).

158. TEX. REV. CIV. STAT. ANN. art. 5069-1.03 (Vernon 1971).

159. 689 S.W.2d at 282. The court distinguished *Jetty, Inc. v. Hall-McGuff Architects*, 595 S.W.2d 918 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ), in which the court held that TEX. REV. CIV. STAT. ANN. art. 5069-1.03 (Vernon 1971) controlled, because in *Jetty* the contract provided for the legal rate of interest rather than the full legal rate of interest agreed upon in this case.

160. TEX. REV. CIV. STAT. ANN. art. 5069-1.05 (Vernon 1971).

161. 693 S.W.2d 656 (Tex. App.—Dallas 1985, no writ).

162. *Id.* at 657-58.

163. *Id.* at 659.

permitting unscrupulous creditors to alter instruments and deny responsibility, secure in the knowledge that the altered instrument would be admissible.

B. Guaranty Agreements

A guaranty agreement, as a type of indemnity contract, must be supported by consideration to be enforceable.¹⁶⁴ When a party gives the guaranty contemporaneously with the promise of the primary debtor, the consideration that supports the primary obligation supports the guaranty agreement.¹⁶⁵ When parties enter into the guaranty agreement independently of the primary transaction, however, consideration distinct from that of the primary debt must support the guaranty.¹⁶⁶ A guaranty that covers future indebtedness that was not previously contracted for by the parties supplies the necessary independent consideration.¹⁶⁷

When the guaranty agreement contains a promise to pay any obligation of the debtor, the guarantor cannot rely upon the credit limitations initially imposed by the creditor upon the debtor to protect the guarantor from liability in excess of the credit limitation, according to *Clark v. Walker-Kurth Lumber Co.*¹⁶⁸ The guaranty in that case provided in part that the guarantor personally guaranteed payment of all the debtor's obligations.¹⁶⁹ The guarantor submitted the guaranty with a credit application to the creditor, who later noted on the application "OK \$1000 limit".¹⁷⁰ On appeal the guarantor argued that it was not liable over the amount of \$1000 and that the creditor breached the credit agreement by allowing purchases in excess of the credit limit. The court, although acknowledging the rule of *strictissimi juris*,¹⁷¹ held that construing the guaranty agreement as limiting liability to the credit limit would be unreasonable due to the absence of any evidence indicating that the guarantor requested, intended, or expected this limitation. Furthermore, the language of the guaranty clearly provided to the contrary. The court distinguished between limits on credit and limits on liability, holding that a credit limitation is not a condition of the contract when the guarantor agrees to guarantee payment of all credit extended to the debtor.¹⁷²

In *Bullock v. Kehoe*¹⁷³ the guarantors of a note sought to avoid liability on the ground that the note, which was executed after the guaranty agreements, was payable at the expiration of five years whereas the guaranty recited a

164. *Fourticq v. Fireman's Fund Ins. Co.*, 679 S.W.2d 562 (Tex. App.—Dallas 1984, no writ).

165. *Id.* at 564.

166. *Id.*

167. *Id.* at 565.

168. 689 S.W.2d 275 (Tex. App.—Houston [1st Dist.] 1985, no writ).

169. *Id.* at 277.

170. *Id.* at 277.

171. This rule requires an agreement to be strictly construed and not extended beyond its precise terms by construction or implication. *Id.* at 278; *Reece v. First State Bank*, 566 S.W.2d 296, 297 (Tex. 1978).

172. 689 S.W.2d at 279.

173. 678 S.W.2d 558 (Tex. App.—Houston [14th Dist.] 1984, no writ).

payment date of six years. The court acknowledged the well-established rule that a material variance in the terms of the primary obligation serves to discharge the guarantor.¹⁷⁴ The court, however, held that the guarantors failed to carry their burden of proving that the difference in the due dates caused them injury or enhanced their risk and noted that the default occurred before the date of maturity under written document.¹⁷⁵

In *Allied Supplier & Erection v. A. Baldwin & Co.*¹⁷⁶ the court reaffirmed the rule that a guarantor may not bring a claim or interpose a defense based upon usury that was committed in the course of the primary transaction.¹⁷⁷

C. Liens

Priority between lienholders was at issue in *Dallas Bank & Trust Co. v. Frigiking*.¹⁷⁸ In that case both of the named parties extended credit to a debtor and held security interests in the debtor's inventory and proceeds. Frigiking gave and perfected its security interest prior to the security interest of Dallas Bank & Trust Co. Thereafter, the debtor filed for relief under Chapter 11 of the Bankruptcy Code. Both prior to and after filing, the debtor made substantial payments to the bank. The debtor ultimately converted the bankruptcy proceeding to Chapter 7, and the existing inventory was liquidated. At issue on appeal was whether Frigiking or the bank held a superior interest in: (1) the funds paid to the bank prior to and after the filing in Bankruptcy Court, and (2) the proceeds of the liquidated inventory.¹⁷⁹ With regard to the former, the court held that the bank had accepted payments from the debtor for value,¹⁸⁰ in good faith,¹⁸¹ and without notice that any check that it had received was overdue, had been dishonored, or was subject to any claim or defense.¹⁸² Accordingly, the bank was a holder in due course,¹⁸³ which entitled it to priority over Frigiking's prior security interest. The court stated that neither Frigiking's filing of the financing statement, filing for bankruptcy, nor payments as a debtor-in-possession were notice of a claim sufficient to destroy the bank's holder in due

174. *Id.* at 559.

175. 678 S.W.2d at 559-60.

176. 688 S.W.2d 156 (Tex. App.—Beaumont 1985, no writ).

177. *Id.* at 160.

178. 692 S.W.2d 163 (Tex. App.—Dallas 1985, no writ).

179. The bank challenged the jurisdiction of the court to adjudicate the parties' interests in the funds, contending that the bankruptcy court had exclusive jurisdiction. The court noted that the bankruptcy court had abstained from hearing this proceeding and remanded the matter back to state court. The court held that the determination of priorities between secured parties is determined by state law and not subject to the exclusive jurisdiction of the bankruptcy court. 692 S.W.2d at 163-65.

180. *Id.* at 166. The bank took the checks as payment for an antecedent claim and thus took them for value. TEX. BUS. & COM. CODE ANN. § 3.303(2) (Tex. UCC) (Vernon 1968).

181. 692 S.W.2d at 166. Good faith is defined as "honesty in fact in the conduct or transaction concerned". TEX. BUS. & COM. CODE ANN. § 1.021 (Tex. UCC) (Vernon 1968).

182. 692 S.W.2d at 166.

183. TEX. BUS. & COM. CODE ANN. § 3.301 (Tex. UCC) (Vernon Supp. 1985). Section 3.301(a) provides: "A holder in due course is a holder who takes the instrument (1) for value; and (2) in good faith; and (3) without notice that it is overdue or has been dishonored or any defenses against or claim to it on the part of any person."

course status; notice of a claim means a claim against a specific instrument and not simply the insolvency of the maker.¹⁸⁴ With regard to the proceeds of the liquidated inventory in possession of the bankruptcy trustee, the bank was not a holder, and Frigiking's general security interest in the proceeds took priority over the subsequently filed security interest of the bank.¹⁸⁵

In *Ford Motor Credit Company v. First State Bank*¹⁸⁶ the Texas Supreme Court applied the provisions of section 9.312¹⁸⁷ of the Uniform Commercial Code to determine the priority between the holder of a purchase money security interest in inventory and the holder of a previously filed financing statement in the same collateral. The court held that section 9.312 creates an exception to the rule that gives priority to the creditor who is first to file a financing statement:¹⁸⁸ a holder of a purchase money security interest will have priority if he gives notice of his interest to the creditor,¹⁸⁹ which is required by section 9.312.¹⁹⁰ The court held that since the bank had failed to give notice of its purchase money security interest to Ford Motor Credit, the general priority rule controlled, and Ford's prior filed financing statement was superior.¹⁹¹

In *Barr v. White Oak State Bank*¹⁹² the court held that a financing state-

184. 692 S.W.2d at 166.

185. *Id.* at 166-67.

186. 679 S.W.2d 486 (Tex. 1984).

187. TEX. BUS. & COM. CODE ANN. § 9.312 (Tex. UCC) (Vernon Supp. 1986) provides in pertinent part:

(c) A perfected purchase money security interest in inventory has priority over a conflicting security interest in the same inventory and also has priority in identifiable cash proceeds received on or before the delivery of the inventory to a buyer if

(1) the purchase money security interest is perfected at the time the debtor receives possession of the inventory; and

(2) the purchase money secured party gives notification in writing to the holder of the conflicting security interest if the holder had filed a financing statement covering the same types of inventory (i) before the date of the filing made by the purchase money secured party. . . .and

(3) the holder of the conflicting security interest receives any required notification within five years before the debtor receives possession of the inventory; and

(4) the notification states that the person giving the notice has or expects to acquire a purchase money security interest in inventory of the debtor, describing such inventory by item or type.

(e) In all cases not governed by other rules stated in this section (including cases of purchase money security interests which do not qualify for the special priorities set forth in Subsections (c) and (d) of this section), priority between conflicting security interests in the same collateral shall be determined according to the following rules:

(1) Conflicting security interests rank according to priority in time of filing or perfection. Priority dates from the time a filing is first made covering the collateral or the time the security interest is first perfected, whichever is earlier, provided that there is no period thereafter when there is neither filing nor perfection.

188. *Id.* § 9.312(e)(1).

189. 679 S.W.2d at 487.

190. TEX. BUS. & COM. CODE ANN. § 9.312(c)(2), (3), (4) (Tex. UCC) (Vernon Supp. 1986).

191. 679 S.W.2d at 487.

192. 677 S.W.2d 707 (Tex. App.—Tyler 1984, no writ).

ment filed on collateral does not secure the creditor for a new loan to the purchaser of the collateral when the original note was paid and the creditor approved the transfer of collateral.

The question before the Texas Supreme Court in *RepublicBank Dallas v. Interkal, Inc.*¹⁹³ was whether a bank's security interest in the accounts receivable of a contractor was subordinate to a materialman's rights to those receivables under article 5472e.¹⁹⁴ That statute impresses a trust upon all funds paid to a contractor for improvements to specific realty for the benefit of those who furnish labor or materials for the improvement. The court of appeals, with one justice dissenting, had held that section 4 of the statute exempts banks and savings and loans only from criminal prosecution for receipt or disbursement of trust fund monies, not from the trust fund provisions of the statute.¹⁹⁵ The supreme court disagreed, holding that the plain language of the statute exempted lenders from coverage, and thus article 5472e did not defeat the bank's priority as a secured creditor of the funds.¹⁹⁶

In *Mercer v. Daoran Corp.*¹⁹⁷ the Texas Supreme Court held that a junior lienholder will not advance in priority upon the failure of a senior lienholder to record a valid contract that renews and extends the senior lien¹⁹⁸ if the

193. 691 S.W.2d 605 (Tex. 1985).

194. TEX. REV. CIV. STAT. ANN. art. 5472e provides in part as follows:

Section 1. All moneys or funds paid to a contractor or subcontractor or any officer, director or agent thereof, under a construction contract for the improvement of specific real property in this state, and all funds borrowed by a contractor, subcontractor, owner, or any officer, director or agent thereof, for the purpose of improving such real property which are secured in whole or in part by a lien on the specific property to be improved are hereby declared to be Trust Funds for the benefit of the artisans, laborers, mechanics, contractors or materialmen who may labor or furnish labor or material for the construction or repair of any house, building or improvement whatever upon such real property; provided, however, that moneys paid to a contractor or subcontractor or borrowed by a contractor, subcontractor, or owner may be used to pay reasonable overhead of said contractor, subcontractor or owner, directly related to such construction contract. The contractor, subcontractor, owner, or any officer, director or agent thereof, receiving such payments or funds or having control or direction of same, is hereby made and constituted a Trustee of such funds so received or under his control or direction.

Section 4. This Act shall have no application to any bank, savings and loan association or other lender or in any title company or other closing agent in connection with any transaction to which this Act is applicable. Further, moneys or funds received under a construction contract are exempt from the provisions of this Act if the full contract amount is covered by a corporate surety payment bond.

Id. art. 5472e (repealed 1983, reenacted in TEX. PROP. CODE ANN. §§ 162.001-004 (1984)). The court noted that article 5472e was in effect at the time of the events in this case and therefore was controlling. 691 S.W.2d at 607 n.1.

195. *RepublicBank Dallas v. Interkal, Inc.*, 677 S.W.2d 759, 761-62 (Tex. App.—Dallas 1984, *rev'd sub nom.*, 691 S.W.2d 605 (Tex. 1985)). The court of appeals' opinion conflicted with *Heldenfels Bros. v. First Nat'l Bank*, 657 S.W.2d 883 (Tex. App.—Corpus Christi 1983, writ *ref'd n.r.e.*).

196. 691 S.W.2d at 607-08.

197. 676 S.W.2d 580 (Tex. 1984).

198. Unless the lien is renewed and extended, it is barred after four years from the date a cause of action for foreclosure of the lien accrued. TEX. REV. CIV. STAT. ANN. art. 5520 (Vernon 1958) (repealed 1985, reenacted in CIV. PRAC. & REM. CODE § 16.035 (Vernon Supp. 1986)).

junior lienholder acquires his lien at a time when the senior lien is not barred of record.¹⁹⁹ Under these circumstances, an unrecorded valid extension is binding upon a junior lienholder.²⁰⁰ If the junior lienholder acquires his lien when the debt that secures the first lien appears of record to be barred, however, he is not bound by an unrecorded extension agreement between the debtor and the first lienholder.²⁰¹

In *Churchill v. Russey*²⁰² the creditor obtained a judgment in 1970 against the debtor. Although execution on the judgment did not issue within ten years of the date of the judgment, as required by article 3773²⁰³ to prevent the judgment from becoming dormant, the creditor filed an action to foreclose the judgment lien in 1979. The trial court ordered a sheriff's sale of certain real property owned by the debtor. The creditor bought the property at the sale subject to an outstanding vendor's lien. In an attempt to recover the property, the debtor's attorney purchased the vendor's lien and, after rejecting offers of the creditor to pay the full amount of the vendor's lien note, posted the property for foreclosure. The creditor then filed this suit enjoining the sale and paying into the registry sufficient funds to pay off the note plus interest. On appeal the court of appeals held that the creditor's suit to foreclose the judgment lien was an action of debt sufficient to revive the dormant judgment pursuant to article 5532.²⁰⁴ The court rejected the argument by the owner of the first lien that the creditor was not entitled to redeem the vendor's lien note by paying the balance plus interest without also paying attorneys' fees and costs of collection.²⁰⁵ The court held that by tendering the balance of the note plus interest, the creditor stopped the accrual of interest and precluded the lienholder from recovering attorneys' fees and costs.²⁰⁶

199. 676 S.W.2d at 582.

200. *Id.*

201. *Id.* A renewal and extension may not prejudice the rights of lienholders or purchasers subsequent who acquire their interests after the lien becomes barred of record. TEX. REV. CIV. STAT. ANN. arts. 5520 and 5522 (Vernon 1958) (repealed 1985, reenacted in CIV. PRAC. & REM. CODE §§ 16.035-.037 (Vernon Supp. 1986)).

202. 692 S.W.2d 596 (Tex. App.—Fort Worth 1985, no writ).

203. TEX. REV. CIV. STAT. ANN. art. 3773 (Vernon 1966) provided:

If no execution is issued within ten years after the rendition of a judgment in any court of record, the judgment shall become dormant and no execution shall issue thereon unless such judgment be revived. If the first execution has issued within the ten years, the judgment shall not become dormant, unless ten years shall have elapsed between the issuance of executions thereon, and execution may issue at any time within ten years after the issuance of the preceding execution. *Id.* (repealed 1985, reenacted in TEX. CIV. PRAC. & REM. CODE § 34.001 (Vernon Supp. 1986)).

204. 692 S.W.2d at 598. TEX. REV. CIV. STAT. ANN. art. 5532 (Vernon 1958) provided that "[a] judgment in any court of record, where execution has not issued within twelve months after the rendition of the judgment, may be revived by scire facias or an action of debt brought thereon within ten years after date of such judgment, and not after." *Id.* (repealed 1985, reenacted in TEX. CIV. PRAC. & REM. CODE § 31.006 (Vernon Supp. 1986)).

205. 692 S.W.2d at 598.

206. *Id.*

D. Execution on Judgments

At issue in *Rome Industries v. Intsel Southwest*²⁰⁷ was the right of a creditor of a business that had been sold pursuant to the Bulk Transfers Act²⁰⁸ to garnish a portion of the funds held by the transferee of the business for distribution to the creditors of the transferor. The issue arose when the debtor business sold substantially all of its assets, in a bulk transfer,²⁰⁹ to a buyer for a sum of money that was insufficient to pay all of the claims of the transferor. Under the terms of the purchase agreement, the parties placed the purchase money in escrow for distribution to creditors as required by section 6.106 of the Bulk Transfer Act.²¹⁰ After receiving notification of the sale, a creditor of the transferor served writs of garnishment on the escrow agent and the transferee. The trial court granted the creditor judgment in the amount of its debt, which exceeded its pro-rata share of the sale proceeds. The court of appeals reversed the judgment of the trial court and held that when the requirements of the bulk transfer provisions have been met, a creditor may not cut off the rights of the other creditors by serving a writ of garnishment.²¹¹ The court reasoned that a garnishor stands in the shoes of the debtor and may only enforce those rights that the debtor may enforce against the garnishee.²¹² The debtor had no right to payment because the Bulk Transfer Act requires the new consideration for the transfer to be paid to the creditors of the transferor on a pro-rata basis.²¹³

A garnishee holding funds that are exempt from garnishment, such as wages has a duty to raise that defense to the writ of garnishment.²¹⁴ In *Southwest Bank & Trust Co. v. Calmark Asset Management*²¹⁵ the court applied this rule both to trust funds and to funds that are not owned by the debtor but are deposited with a garnishee bank in the name of the debtor.²¹⁶ The court further held that the duty of a garnishee is not discharged by merely notifying the debtor of the garnishment action.²¹⁷

207. 683 S.W.2d 777 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

208. TEX. BUS. & COM. CODE §§ 6.101-6.111 (Tex. UCC) (Vernon 1968).

209. A bulk transfer is defined as "any transfer in bulk and not in the ordinary course of the transferor's business of a major part of the materials, supplies, merchandise or other inventory (Section 9.109) of an enterprise subject to this chapter." *Id.* § 6.102(a).

210. Section 6.106 provides in part:

(1) upon every bulk transfer. . . for which new consideration becomes payable. . . it is the duty of the transferee to assure that such consideration is applied so far as necessary to pay those debts of the transferor.

(3) If the consideration payable is not enough to pay all of said debts in full distribution shall be made pro-rata.

Id. § 6.106.

211. 683 S.W.2d at 780. In dicta the court stated that when the Act has not been complied with "creditors may ignore the transfer and pursue whatever remedies would be available to them under state laws outside the code." *Id.* at 779.

212. *Id.* at 779.

213. TEX. BUS. & COM. CODE ANN. § 6.106 (Tex. UCC) (Vernon 1968).

214. See *Missouri Pac. Ky. Co. v. Whipker*, 77 Tex. 14, 13 S.W. 639 (1890).

215. 694 S.W.2d 199 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

216. *Id.* at 200.

217. *Id.* at 201. In this case, the debtor did not intervene until after the garnishee had paid the funds pursuant to the garnishment judgment. Good practice counsels impleading the debtor so that the debtor can make its own defense.

In *Matter of Bohart*²¹⁸ the Fifth Circuit interpreted Texas law to hold that a writ of garnishment that is issued pursuant to a trial court judgment that is not superseded becomes ineffective upon reversal of the trial court judgment by the court of appeals, despite the fact that the trial court judgment is later affirmed by the Texas Supreme Court.²¹⁹ Thus, payments made by the garnishee to persons other than the garnishor during the period between the judgments of the court of appeals and the supreme court do not violate the writ of garnishment.²²⁰

The constitutionality of the Texas sequestration statute and the adequacy of the affidavit supporting issuance of the writ were at issue in *Marrs v. South Texas National Bank*.²²¹ Marrs contended that the bank's affidavit failed to include any facts to support the conclusion that the defendant would conceal or remove the property in question. Although the affidavit is not quoted in the opinion, the court held that when an affidavit discusses the plaintiff's fears that the defendant will conceal, dispose of, destroy, or remove property from the jurisdiction of the court, then it complies with the statutory requirement.²²² The court further held that the statute, as amended in 1975, met the due process requirements of the Constitution.²²³ The court's holding concerning the affidavit appears to be inconsistent with the spirit, if not the letter, of Texas Rule of Civil Procedure 696, which requires the affiant to allege the specific facts that plaintiff relied upon in order to warrant the court's required findings.²²⁴ Ironically, the post-1975 requirement of specificity has been listed as one of the bases for the constitutionality of the sequestration statute.²²⁵

In *Concrete, Inc. v. Sprayberry*²²⁶ the court held that for the purpose of notice of the sale of real estate under execution, the day of posting is properly counted as the first day. Rule 4 of the Texas Rules of Civil Procedure,²²⁷ which excludes the first day and includes the last day, does not control.²²⁸

E. Exempt Property

In *Hillock Homes v. Clafin*²²⁹ (*In re Clafin*) the Fifth Circuit considered the objection of a creditor to the homestead rights of a Chapter 11 debtor. The debtor, a divorcee, had established a homestead with her minor children in a Houston townhome. Approximately three years later she moved to Austin, remarried, and lived with her children and new husband in a home

218. 743 F.2d 313 (5th Cir. 1984).

219. *Id.* at 323.

220. *Id.* at 324.

221. 686 S.W.2d 675 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

222. *Id.* at 677-78.

223. *Id.* at 678.

224. TEX. R. CIV. P. 696.

225. BAGGET, TEXAS FORECLOSURE LAW & PRACTICE § 8.04 (1984).

226. 691 S.W.2d 771, 772 (Tex. App.—El Paso 1985, no writ).

227. TEX. R. CIV. P. 4.

228. 691 S.W.2d at 772.

229. 761 F.2d 1088 (5th Cir. 1985).

that he claimed as his homestead. In March of 1982 a creditor obtained a judgment against the debtor. In June the debtor and her family moved to rental property, although her husband still owned the Austin property. In July of that year, the debtor filed for bankruptcy and claimed her Houston townhome as homestead. The Fifth Circuit overturned the bankruptcy court determination that the Houston property was the homestead of the debtor and her family.²³⁰ The court, relying upon *Burke Royalty v. Riley*,²³¹ held that when the debtor remarried she lost her homestead claim as a single adult and could claim only the homestead of her new family.²³² The court found no evidence that the debtor's new family had established the Houston property as their homestead. Substantial evidence existed to show that they had designated the Austin property as their homestead by their actual use and occupancy of it.²³³

In *United States v. Chapman*²³⁴ the Fifth Circuit rebuffed the attempt of a taxpayer who had fraudulently conveyed real property to his children in an attempt to avoid a tax lien to claim a homestead right in the conveyed property. The court rested its holding on the testimony of the taxpayer that she and her husband were renting the property from their children.²³⁵ The court noted that, except with respect to the defrauded creditors, Texas law does not appear to support a homestead claim by a grantor who fraudulently conveys property to avoid creditors, since the grantee holds title.²³⁶

F. Constructive Trust

The rights of a beneficiary of a constructive trust versus the rights of a trustee in bankruptcy were considered in *Vineyard v. McKenzie*.²³⁷ In *Vineyard* the Fifth Circuit held that when state law imposes a constructive trust on property that is held by the debtor and the trust attaches prior to the filing of the petition in bankruptcy, the trust beneficiary may reclaim its equitable interest from the trustee.²³⁸ One other than the beneficiary, who merely claims an interest in the estate property subjected to a constructive trust, however, gains no additional rights and must yield to the strong-arm powers of the trustee.²³⁹

G. Foreign Judgments

In *Allen v. Tennant*²⁴⁰ the court held that failure to follow the procedures

230. *Id.* at 1093.

231. 475 S.W.2d 566 (Tex. 1972).

232. 761 F.2d at 1090 (quoting the Texas Supreme Court in *Burke Royalty v. Riley*, 475 S.W.2d 566, 567 (Tex. 1972): "after the new family was created by her remarriage, there was no homestead apart from that new family").

233. 761 F.2d at 1091.

234. 756 F.2d 1237 (5th Cir. 1985).

235. *Id.* at 1243.

236. *Id.* at 1243-44 (citing *Stevens v. Cobern*, 213 S.W. 925, 926 (Tex. 1919)).

237. 752 F.2d 1009 (5th Cir. 1985).

238. *Id.* at 1012.

239. *Id.* at 1014-15.

240. 678 S.W.2d 743 (Tex. App.—Houston [14th Dist.] 1984, no writ).

set forth in the Uniform Enforcement of Foreign Judgments Act²⁴¹ prevents a Texas court from obtaining jurisdiction to enforce the judgment.²⁴²

III. WRONGFUL DISPOSITION OF PROPERTY

A. Fraudulent Transfers

In *Colonial Leasing Co. v. Logistics Control Group International*²⁴³ the court held that a creditor with a pending legal action against a debtor may seek relief under the Texas Fraudulent Transfer Act²⁴⁴ even though his claim is unliquidated at the time of the alleged fraudulent transfer, provided the creditor's claim accrued prior to the transfer.²⁴⁵ Before relief is granted pursuant to the Act, however, the creditor must prove recovery of a judgment against the debtor.²⁴⁶ Although the judgment is conclusive against the transferor, it constitutes merely prima facie evidence of the underlying debt as to the transferee, who may rebut it with evidence that it is a fraudulent or collusive judgment.²⁴⁷

*United States v. Chapman*²⁴⁸ involved an attempt by a creditor whose debt arose after the creation of the suspect transfer to set aside a conveyance under the Texas Fraudulent Transfer Act. The court held that when a debt arises after the transfer, rather than prior to the transfer as in the *Colonial Leasing*²⁴⁹ case, the creditor must show that the debtor made the transfer with the intent at the time of the transfer to evade future liabilities to that creditor.²⁵⁰

B. Wrongful Disposition of Collateral

In *First City Bank—Farmers Branch v. Guez*²⁵¹ the Texas Supreme Court addressed the question of what constitutes a disposition of collateral under section 9.504²⁵² of the Uniform Commercial Code. The bank in that case had transferred possession of the repossessed collateral, a boat, to a friend of the consumer in exchange for past due payments and a note for the unpaid balance. The bank did not notify the consumer of the transfer. The bank then reversed itself, voided the note, and accepted full payment from the original consumer. By the time the consumer had recovered the boat from the friend, it had been damaged. The consumer alleged that the bank had disposed of the boat without notice to him in violation of section 9.504(c).²⁵³

241. TEX. REV. CIV. STAT. ANN. art. 2328b-5 (Vernon Supp. 1984).

242. 678 S.W.2d at 744.

243. 762 F.2d 454 (5th Cir. 1985), *aff'd on rehearing*, 770 F.2d 479 (1985).

244. TEX. BUS. & COM. CODE ANN. § 24.02(a) (Tex. UCC) (Vernon 1968).

245. 762 F.2d at 458.

246. *Id.* at 458.

247. *Id.* at 460.

248. 756 F.2d 1237 (5th Cir. 1985).

249. 762 F.2d 454 (5th Cir. 1985).

250. 756 F.2d at 1240-41.

251. 677 S.W.2d 25 (Tex. 1984).

252. TEX. BUS. & COM. CODE ANN. § 9.504 (Tex. UCC) (Vernon Supp. 1986).

253. Section 9.504(c) provides in pertinent part that "[d]isposition of the collateral may be

The supreme court agreed and held that even though title to the boat never passed to the friend, a disposition of collateral had occurred.²⁵⁴ The supreme court further held that the consumer is entitled to recover either his actual damages from the wrongful disposition or the minimum damages under the statutory formula set forth in section 9.507(a),²⁵⁵ but not both.²⁵⁶ Finally, the court held that although attorneys' fees are not recoverable pursuant to section 9.507(a), attorneys' fees are allowable under article 2226.²⁵⁷

In *Barr v. White Oak State Bank*²⁵⁸ the court held that a bank that foreclosed on its security interest in collateral without giving notice to the holders of a prior perfected security interest violated section 9.504 of the Uniform Commercial Code.²⁵⁹ Significantly, the court further held that evidence that the bank officer failed to perform a lien check with the Secretary of State's Office despite his knowledge that such a check would determine other creditors that might be entitled to notification was sufficient to raise an issue as to the bank's liability for exemplary damages.²⁶⁰

C. Attachment, Lis Pendens

In *Milberg Factors v. Hurwitz-Nordlicht*²⁶¹ the court held that joint venture assets are not subject to attachment or execution by a joint venturer's individual creditors. The court reasoned that a joint venture is a separate legal entity; the property of the joint venture is not property of the individual joint ventures since it is subject to a mutual right of control of the joint venturers. The court further held that since the creditor's suit was for collection of a debt that did not directly involve real property, a lis pendens notice was not authorized and was properly dissolved by the trial court.²⁶²

D. Bulk Sales

In *SVM Investments v. Mexican Exporters, Inc.*²⁶³ the court construed the limitations provision in section 6.111 of the Bulk Transfers Act,²⁶⁴ which bars actions under the Bulk Transfers Act after six months from the transfer unless the transfer was concealed. The court held that concealment under the Act occurs when the record discloses affirmative efforts to conceal the transfer and when the defendant has completely failed to comply with the notice provisions of the statute.²⁶⁵ The court held that when informal notice

by public or private proceedings. . ." and "reasonable notification of the . . . sale. . . shall be sent by the secured party to the debtor." *Id.* § 9.504(c).

254. 677 S.W.2d at 28.

255. TEX. BUS. & COM. CODE ANN. § 9.507(a) (Tex. UCC) (Vernon Supp. 1986).

256. 677 S.W.2d at 29-30.

257. *Id.*

258. 677 S.W.2d 707, 710-11 (Tex. App.—Tyler 1984, no writ).

259. TEX. BUS. & COM. CODE ANN. § 9.504 (Tex. UCC) (Vernon Supp. 1986).

260. 677 S.W.2d at 711.

261. 676 S.W.2d 613, 616 (Tex. App.—Austin 1984, no writ).

262. *Id.*

263. 685 S.W.2d 424 (Tex. App.—San Antonio 1985, no writ).

264. TEX. BUS. & COM. CODE ANN. § 6.101-6.111 (Tex. UCC) (Vernon 1968).

265. 685 S.W.2d at 430.

has been given so that actual knowledge is received, the mere failure to give the written notice does not constitute concealment.²⁶⁶

In *Bergen, Johnson and Olson v. Verco Manufacturing Co.*²⁶⁷ the court held that a creditor that seeks to invoke the provisions of the Bulk Transfer Act carries the burden of proving that the transfer by the debtor was a bulk transfer²⁶⁸ within the meaning of the Act. Since the creditor brought forward no proof as to what percentage of the debtor's inventory was transferred, he had not discharged his burden of proving that a major part of the inventory of the debtor had been transferred as required by the Act.²⁶⁹

In *Hanson v. Pride of Texas Distributing Co.*²⁷⁰ the court considered section 6.103(3) of the Bulk Transfers Act, which exempts from the Act "[t]ransfers in settlement or realization of a lien or other security interest."²⁷¹ The court held that the exemptions contained in section 6.103 are not affirmative defenses governed by the pleading requirements of Rule 94 of the Texas Rules of Civil Procedure.²⁷² The court further held that in order for a transfer to be exempt under section 6.103(3), the evidence must show not only a lien or security interest but also that the transferor has defaulted on its obligation, thereby giving the secured party a present right to foreclose on the lien or security interest.²⁷³

266. *Id.*

267. 690 S.W.2d 115, 118 (Tex. App.—El Paso 1985, no writ).

268. A bulk transfer is defined to include "a transfer in bulk and not in the ordinary course of the transferor's business of a major part of the materials, supplies, merchandise or other inventory (Section 9.109) of an enterprise subject to this chapter." TEX. BUS. & COM. CODE ANN. § 6.102 (Tex. UCC) (Vernon 1968).

269. 690 S.W.2d at 119.

270. 683 S.W.2d 173 (Tex. App.—Fort Worth 1985, no writ).

271. TEX. BUS. & COM. CODE ANN. § 6.103 (Tex. UCC) (Vernon 1968).

272. 683 S.W.2d at 178.

273. *Id.* This holding appears to be one of first impression under Texas law, and the court treated it as such.

