
January 1988

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Recommended Citation

Vernon O. Teofan & O'Neill E. O'Neill, *Creditor and Consumer Rights*, 42 Sw L.J. 199 (1988)
<https://scholar.smu.edu/smulr/vol42/iss1/8>

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CREDITOR AND CONSUMER RIGHTS

by

Vernon O. Teofan* and Jeanne E. O'Neill**

I. INTRODUCTION

THIS Article surveys Texas law with respect to significant legislative enactments and judicial decisions in the areas of usury, consumer credit, and creditors' rights from October, 1986, through October, 1987. During the Survey period, the Texas legislature adopted the Uniform Fraudulent Transfer Act,¹ enacted chapter 18 of the Business and Commerce Code² to regulate credit service organizations, amended the Property Code³ to create an exemption for certain pension plans, amended the Insurance Code⁴ to enlarge the available exemption for money or benefits payable under life, health and accident policies or annuities, and changed the notice requirements for real property foreclosures. The legislature also modified the Texas Consumer Credit Code (Credit Code)⁵ and the Manufactured Housing Standards Act.⁶ The Texas courts, in addition, rendered important decisions dealing with usury, consumer credit, deceptive trade practices, and homesteads.

II. USURY

In the area of usury Texas courts rendered three noteworthy decisions during the survey period. In *Benser v. Independence Bank*⁷ the Dallas court of appeals held that junior lienholders do not possess the necessary standing to raise a borrower's potential usury claim against a senior lienholder.⁸ In the second case, *El Paso Development Co. v. Berryman*,⁹ the Corpus Christi court of appeals determined that a purchaser of real estate established a probable right to recover under a usury claim and validated the lower court's issuance of a temporary injunction prohibiting foreclosure of the

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1. TEX. BUS. & COM. CODE ANN. §§ 24.001-24.013 (Vernon 1987).
2. *Id.* §§ 18.01-18.15.
3. TEX. PROP. CODE ANN. §§ 1.001-201.072 (Vernon 1984 & Supp. 1988).
4. TEX. INS. CIV. STAT. ANN. arts. 1.01-25.10 (Vernon 1981 & Supp. 1988).
5. *Id.* arts. 5069-1.01 to 5069-51.19 (Vernon 1987 & Supp. 1988).
6. *Id.* art. 5221f.
7. 735 S.W.2d 566 (Tex. App.—Dallas 1987, writ ref'd n.r.e.).
8. *Id.* at 569.
9. 729 S.W.2d 883 (Tex. App.—Corpus Christi 1987, no writ).

property.¹⁰ The court reached its decision despite a time price differential defense raised by the mortgagee. In the third decision, *Danzinger v. San Jacinto Savings Association*,¹¹ the Texas Supreme Court determined that a pay-off quote reflecting excessive interest constituted the prohibited "charging"¹² of usurious interest, notwithstanding the borrower's failure to make or attempt to make a payment based upon the excessive quote.¹³ The court further held that a lender cannot purge a usury violation by subsequently crediting the excessive interest.¹⁴

In the *Benser* case junior lien claimants sought to avoid foreclosure of a senior lien by commencing an action under the Credit Code. The claimants alleged that funds paid by a debtor-property-owner under a renewal and extension agreement constituted additional interest payments, as opposed to consideration for halting foreclosure proceedings.¹⁵ The junior lienholders further alleged that the payment of such additional interest resulted in the senior lienholder collecting interest at more than twice the lawful rate and, therefore, that the senior lien became void due to the payment of usurious interest.¹⁶ On cross-motions for summary judgment, the district court found in favor of the junior lien claimants, and the senior lienholder appealed.

On rehearing, the Dallas court of appeals recited the well-established rule that the usury statutes¹⁷ provide a right of redress only to the original parties of the loan contract.¹⁸ The court recognized that only a debtor may raise an affirmative usury claim, and concluded that the junior lienholders lack standing to attack the senior lien unless they establish an exception to the general rule.¹⁹

The junior lien claimants argued that two old Texas cases²⁰ entitled subordinate lienholders to discharge a prior encumbrance by paying off the valid amount of the senior debt. These claimants further contended that they should have standing to demonstrate to the court that the entire balance of the senior debt is usurious and therefore void. The *Benser* court distinguished the two cases cited by the junior lienholders based upon the wording

10. *Id.* at 888-89.

11. 732 S.W.2d 300 (Tex. 1987).

12. TEX. REV. CIV. STAT. ANN. arts. 5069-1.06, 5069-8.01 (Vernon 1987).

13. 732 S.W.2d at 302.

14. *Id.* at 302-03.

15. *Benser v. Independence Bank*, 735 S.W.2d at 566, 567 (Tex. App.—Dallas 1987, writ ref'd n.r.e.).

16. See TEX. REV. CIV. STAT. ANN. arts. 5069-1.01(a), 5069.101(d) (Vernon 1987). The *Benser* court assumed, but did not determine that the transaction in question was usurious. 735 S.W.2d at 568.

17. TEX. REV. CIV. STAT. ANN. art. 5069-1.06 (Vernon 1987) (recipient of usurious interest forfeits principal and interest to obligor).

18. 735 S.W.2d at 568 (citing *Houston Sash & Door Co. v. Heaner*, 577 S.W.2d 217, 222 (Tex. 1979); *Micrea, Inc. v. Eureka Life Ins. Co.*, 534 S.W.2d 348, 354 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.)). The *Benser* court conceded that those in privity with the debtor might have standing to assert a usury claim, provided one bases such a claim on the debtor's claim. 735 S.W.2d at 568.

19. 735 S.W.2d at 570.

20. *Maloney v. Eaheart*, 81 Tex. 281, 16 S.W. 1030 (Tex. 1891); *Johnson & Lasker Real Estate Assn.*, 2 Tex. Civ. App. 494, 21 S.W. 961 (1893, no writ).

of the usury statute in effect at that time.²¹ The former statute focused on the invalidity of the usurious contract, whereas the present statutory scheme focuses on the obligor's remedies under a usurious contract.²² Moreover, the court noted that although the junior lienholders had a right to pay the underlying indebtedness, they did not have an obligation to do so.²³ The court therefore declined to create an exception to the restrictive standing rule for usury claimants, and reversed the lower court's judgment.²⁴

In *El Paso Development* the parties originally negotiated a contract for the cash sale of 1620 acres of commercial property located in San Patricio and Nueces counties. The original contract stipulated a purchase price of \$4,500.00 per acre or approximately \$7.2 million dollars, payable in cash. Since the buyer could not obtain outside financing, the parties renegotiated the contract as a credit sale and raised the purchase price to \$6,172.84 per acre or approximately \$10 million dollars.²⁵

After several defaults and modifications, the buyer brought suit against the seller claiming that the additional \$2.8 million dollars of the renegotiated purchase price constituted interest in excess of double the maximum lawful rate. The buyer therefore contended that the usurious contract resulted in a forfeiture of principal and interest payable to the seller.²⁶ The seller responded by posting the property for foreclosure. Subsequently, the buyer obtained a temporary injunction enjoining the foreclosure sale pending resolution of the usury claim.

In an interlocutory appeal the seller argued, among other things,²⁷ that the additional purchase price constituted a time price differential, which is an affirmative defense to a usury claim under Texas law.²⁸ Generally, in order to establish a time price differential, the seller must demonstrate that: (1) the seller offered both a cash and a credit price; (2) the purchaser knew of the existence of both prices; and (3) the purchaser intentionally selected the higher credit price.²⁹ When a purchaser files a claim under subtitle 1 of the

21. 735 S.W.2d at 569.

22. 735 S.W.2d at 569; see TEX. REV. CIV. STAT. ANN. 5069.1.01 (Vernon 1987).

23. 735 S.W.2d at 569.

24. *Id.*

25. The purchase price consisted of a \$1.5 million cash payment and an \$8.5 million note bearing interest at 8% over four years. The note was secured by a deed of trust on 1377 of the 1620 acres. 729 S.W.2d at 884-85.

26. See TEX. REV. CIV. STAT. ANN. art. 5069-1.01(a), 1.06(2) (Vernon 1987). The court decided this case under the former usury statute; however, the relevant provisions remain unchanged. According to the buyer's calculations, the seller exacted a 26% profit by inflating the credit sale price, while the statute provided a maximum lawful rate of 10%.

27. The seller also unsuccessfully asserted that the buyer's failure to tender payment on the note precludes the granting of the injunction, that laches precluded the issuance of the injunction, that the buyer had an adequate remedy at law, and that the trial court abused its discretion in setting bond at \$15,000.00.

28. See TEX. REV. CIV. STAT. ANN. art. 5069-1.01(a) (Vernon 1987). Interest consists of "compensation . . . for the use . . . of money; provided, however, this term shall not include any time price differential however denominated arising out of a credit sale." *Id.* (emphasis added).

29. 729 S.W.2d at 887 (citing *Weis v. Taylor*, 613 S.W.2d 332, 334 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.); *Rattan v. Commercial Credit Co.*, 131 S.W.2d 399, 399-400 (Tex. Civ. App.—Dallas 1939; writ ref'd)).

usury statute,³⁰ the courts have modified the test slightly to require that the seller offer both a cash and a credit price before making a contract with the buyer.³¹ The courts also require the seller to set forth the finance charge, which is the difference between the cash and credit prices, in the contract.³²

The Corpus Christi court of appeals reserved for the trial court a determination of whether the instant contract satisfied the criteria for a valid time price differential.³³ The court specifically directed the trial court to decide whether the original cash contract constituted an existing cash price as of the time of the subsequent contract's formation.³⁴ The court concluded, notwithstanding the pendency of these issues, that the buyer had established a sufficient likelihood of success on the merits of the usury claim to sustain the issuance of the injunction and therefore affirmed the trial court's decision.³⁵

In *Danzinger* the borrowers contracted for a home improvement loan in the principal sum of \$39,350.00, with finance charges amounting to \$47,217.40 payable over a fifteen-year period.³⁶ Pursuant to the loan contract, the lender deposited the full amount of the loan proceeds into an escrow account and made periodic disbursements directly to the home improvement contractor. Under this arrangement, the lender charged interest on the entire loan balance and subsequently credited the borrower for the excessive interest charged on the undisbursed funds.

The Danzingers commenced an action against the lender, contending that the loan contract was usurious and violated the Federal Truth in Lending Act.³⁷ In its opinion the Texas Supreme Court stated that under chapter 5 of the Credit Code,³⁸ a lender should calculate interest on a cash advance beginning on the date that it advances the money.³⁹ The court indicated that the statute presumes the lender will advance the cash on the date of making of the loan.⁴⁰ The court accordingly held that a lending institution may not lawfully charge interest from the date of a loan's inception on the

30. TEX. REV. CIV. STAT. ANN. art. 5069-1.06 (Vernon 1987).

31. 729 S.W.2d at 887 (citing *Rotello v. Int'l Harvester Co.*, 624 S.W.2d 249, 251 (Tex. App.—Dallas 1981, writ ref'd n.r.e.); *Rotello v. Twin City Int'l. Inc.*, 616 S.W.2d 318, 319 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.); see also *Mid States Homes, Inc. v. Sullivan*, 592 S.W.2d 29, 31 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.) (time price differential in sale of real estate valid if contract showed on face both cash and time prices and specifically set forth finance charge).

32. 729 S.W.2d at 887 (citations omitted).

33. *Id.*

34. *Id.*

35. *Id.*

36. The loan's annual percentage rate amounted to 12.34% in accordance with the maximum rate permitted by TEX. REV. CIV. STAT. ANN. art. 5069-5.02 (Vernon 1987).

37. 15 U.S.C. §§ 1601-1667 (1982); 12 C.F.R. §§ 226 (1986). The district court rejected the Danzinger's contentions and entered a take-nothing judgment. The Houston Court of Appeals affirmed the district court's judgment. *Danzinger v. San Jacinto Sav. Ass'n*, 708 S.W.2d 1 (Tex. App.—Houston [1st Dist.] 1986), *rev'd*, 732 S.W.2d 300 (Tex. 1987).

38. TEX. REV. CIV. STAT. ANN. arts. 5069-8.02 (Vernon 1987 & Supp. 1988).

39. *Danzinger v. San Jacinto Sav. Ass'n*, 732 S.W.2d 300, 303 (Tex. 1987).

40. *Id.* at 302 (citing TEX. REV. CIV. ANN. art. 5069-5.02(2); 5069-2.01(g) (Vernon 1987)).

entire principal balance when the lender distributes the principal in portions over time.⁴¹ The court further concluded that even if the lending institution credits back the overcharged interest when it periodically distributes principal, the loan remains usurious.⁴² In declining to permit the lender to purge the interest overcharges, the court noted that the Credit Code provides for rebates of excessive interest only if the borrowers prepays the loan.⁴³ Thus, once the lender contracts for, charges, or receives interest in excess of the maximum permitted by the Credit Code,⁴⁴ corrective measures are ineffective to avoid imposition of penalties.⁴⁵

The court next considered the borrowers' allegations that the lender charged usurious interest by providing a pay-off quote that reflected the excessive interest. The lender argued that a borrower cannot allege that a lender charged a usurious rate of interest until the borrower repays the loan and the lender completes a final accounting to determine the amount of interest actually paid.⁴⁶ Since the Danzingers did not attempt to pay off the loan, the lender disputed the usurious charging claim.

To support a usury claim based upon charging, the lender must have made a unilateral claim or demand for excessive interest.⁴⁷ In *Danzinger* the court cited monthly statements,⁴⁸ demand letters,⁴⁹ statements of account,⁵⁰ and affidavits and pleadings⁵¹ as examples of acts of charging.⁵² The court concluded that a pay-off quote, which states an amount of interest exceeding the maximum lawful rate, constitutes the usurious charging of interest.⁵³ The court considered it immaterial to the claim of usurious charging whether the borrowers actually relied on the pay-off quote.⁵⁴

In addition to the statutory usury claim, the court held that the Danzingers had properly pled and preserved their common law usury cause of action.⁵⁵ The Danzingers, therefore, became entitled to the recovery of interest previously paid under the loan contract and the cancellation of interest

41. *Id.*

42. *Id.*

43. *Id.*; see TEX. REV. CIV. STAT. ANN. art. 5069-1.07(a) (Vernon 1987).

44. TEX. REV. CIV. STAT. ANN. arts. 5069-8.01, 5067-1.06 (Vernon 1987).

45. *Id.* Since the interest did not exceed twice the lawful rate, the statute did not entitle the Danzingers to the additional penalties provided by article 5069-8.02. See 732 S.W.2d at 303.

46. 732 S.W.2d at 303.

47. *Id.* at 304; see also *Windhorst v. Adcock Pipe and Supply*, 547 S.W.2d 260, 261 (Tex. 1977).

48. *Id.* (citing *Wright Way Spraying Serv. v. Butler*, 690 S.W.2d 897, 898 (Tex. 1985)).

49. *Id.* (citing *Dryden v. City Nat'l Bank of Laredo*, 666 S.W.2d 213, 221 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.)).

50. *Id.* (citing *Windhorst*, 527 S.W.2d at 261).

51. *Id.* (citing *Moore v. Sabine Nat'l Bank of Port Arthur*, 527 S.W.2d 209, 212 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.)).

52. *Id.* The court stated that "[a] usurious charge may be contained in an invoice, a letter, a ledger sheet or other book or document . . . and the vehicle for the claim or demand is immaterial except as an evidentiary fact." *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

not yet paid, in addition to the remedies provided by the Credit Code.⁵⁶ Justice Gonzalez, in a concurring opinion, disagreed with the dicta implicit in the majority opinion, which indicated that the filing of a pleading, in and of itself, can constitute usurious charging even when the underlying loan documents are not usurious.⁵⁷ Although acknowledging that the issue remains open, Justice Gonzalez argued that the majority's position promotes form over substance.⁵⁸

Finally, with respect to the Danzingers' claims under the Federal Truth in Lending Act⁵⁹ and Regulation Z,⁶⁰ the court determined that the loan documents contained inaccurate disclosures concerning the effect of the disbursement and credit system relative to the total finance charges.⁶¹ The lender's argument that it orally disclosed the information to the borrowers did not constitute compliance, since both the statute and the regulations require written disclosures.⁶² The court, accordingly, reversed the judgments of the lower courts and entered judgment in favor of the Danzingers on all counts.⁶³

III. CONSUMER CREDIT

A. Credit Service Organizations

Effective September 1, 1987, the Texas legislative enacted chapter 18 of the Texas Business and Commerce Code⁶⁴ to regulate credit service organizations.⁶⁵ The act generally prohibits deceptive trade practices in connection with the rendering of credit services.⁶⁶ This legislation requires credit service organizations to register with the secretary of state⁶⁷ and to obtain a

56. *Id.* (citing *First State Bank of Bedford v. Miller*, 563 S.W.2d 572, 576-77 (Tex. 1978); *Commercial Credit Equip. Corp. v. West*, 677 S.W.2d 669, 679 (Tex. App.—Amarillo 1984, writ ref'd n.r.e.)).

57. *Id.* at 305-306 (Gonzalez, J., concurring).

58. *Id.* at 306. Justice Gonzalez stated: "construing a claim asserted only in a pleading filed in a law suit as an interest charge triggering the draconian penalties of usury would do little to serve any reasonable purpose of the statute." *Id.* (quoting *Fibergrate Corp. v. Research-Cottrell, Inc.*, 481 F. Supp. 570, 572 (N.D. Tex. 1979)).

59. 15 U.S.C. §§ 1601-1667 (1982).

60. 12 C.F.R. § 226 (1986).

61. 732 S.W.2d at 304-05.

62. *See* 15 U.S.C. §§ 1631; 1639(b) (1976) (recodified at 15 U.S.C. § 1638 (1982)); 12 C.F.R. §§ 226.6(a), 226.8(a) (1980) (recodified at 12 C.F.R. § 226.17 (1986)).

63. 732 S.W.2d at 305.

64. TEX. BUS. & COM. CODE ANN. §§ 18.01-.15 (Vernon 1987).

65. *Id.* § 18.02(a).

A credit service organization is a person who, with respect to the extension of credit by others and in return for the payment of money or other valuable consideration, provides, or represents that the person can or will provide, any of the following services:

- (1) improving a buyer's credit record, history, or rating;
- (2) obtaining an extension of credit for buyer; or
- (3) providing advise or assistance to a buyer with regard to Subdivision (1) or (2) of this subsection.

Id. Under this statute, banks, credit unions and certain other regulated entities are excluded from this definition of credit service organizations. *Id.* § 18.02(b).

66. *Id.* § 18.03.

67. *Id.* § 18.05.

surety bond⁶⁸ prior to doing business in the state of Texas. The act further mandates that the credit service organization make certain disclosures to the buyer regarding the services it will provide and the cost of such services, as well as disclosures to the buyer regarding his remedies with respect to the surety bond.⁶⁹ The contract for credit services must contain certain specified terms, including notice of the buyer's right to cancel.⁷⁰ An injured buyer may bring a civil action against a credit service organization for actual and punitive damages resulting from a violation of this chapter.⁷¹ The offending credit service organization may also become subject to criminal liability.⁷²

B. *Manufactured Housing*

The Texas legislature amended the Texas Manufactured Housing Standards Act⁷³ effective June 18, 1987, to provide greater protection to consumers of manufactured housing. The primary component of the amendment is the Manufactured Homeowners' Recovery Fund, which the legislature created to assure that consumers who obtain unsatisfied judgments against a manufacturer, retailer, broker, or installer under the act will receive compensation.⁷⁴ An additional \$10.00 fee charged in connection with title transactions⁷⁵ will generate revenues for the fund, which a special board of trustees will administer.⁷⁶ A consumer seeking to recover from the fund must comply with the claim procedures set forth in the act.⁷⁷

The amendments also impose a standard of habitability with respect to the sale or lease of a used manufactured home that the consumer will occupy as a dwelling.⁷⁸ The act stipulates that a home will qualify as habitable only if it is free from any defect, damage, or deterioration that causes a dangerous or unsafe situation.⁷⁹ The statute specifically requires that heating and electrical systems operate safely, that the home is structurally sound, and that its exterior doors and windows are properly installed.⁸⁰ The amendments further establish procedures for resolving warranty disputes between the consumer, retailer, and manufacturer in connection with their respective rights and obligations.⁸¹

The 1987 amendments further require, with respect to consumer credit transactions involving manufactured homes, that a creditor comply with the

68. *Id.* § 18.04.

69. *See id.* § 18.06.

70. *See id.* § 18.07.

71. *See id.* § 18.09. Section § 18.11 provides that a violation of the statute also constitutes a deceptive trade practice under TEX. BUS. & COM. CODE ANN. ch. 17.

72. TEX. BUS. & COM. CODE ANN. § 18.13 (Vernon 1987) provides that a violation of this chapter constitutes a class B misdemeanor.

73. TEX. REV. CIV. STAT. ANN. art. 5221f (Vernon 1987 & Supp. 1988).

74. *See id.* art. 5221f, § 13A.

75. *Id.* art. 5221f, § 13A(c).

76. *Id.* art. 5221f, § 13A(a).

77. *Id.* art. 5221f, §§ 13A(f)-(i).

78. *Id.* art. 5221f, § 8(b).

79. *Id.* art. 5221f, § 8(c).

80. *Id.* art. 5221f, § 8(c).

81. *Id.* art. 5221f, § 14.

disclosure requirements of the Federal Home Loan Bank Board in connection with the foreclosure, repossession, or acceleration of the indebtedness on a manufactured home.⁸² The amendments also authorize a creditor who pays any outstanding taxes assessed against a manufactured home to add the amount of such taxes to the balance the debtor owes the creditor under the credit documents together with interest at the contract rate.⁸³ Finally, the amendments add a new section⁸⁴ concerning the respective lien rights and procedures for enforcing these rights between a creditor with a perfected security interest in a manufactured home and the owner of the real property on which the home rests.⁸⁵

C. Extension Agreements

The legislature amended the Credit Code effective September 1, 1987 with respect to the modification, extension, amendment, restatement, or rescheduling of a secondary mortgage loan contract.⁸⁶ The amendment adds a new section that provides that the parties to such an agreement must reduce it to writing.⁸⁷ The parties must also sign and date the agreement and provide the address of each borrower and lender.⁸⁸ Additionally, the borrower must receive a copy of the agreement.⁸⁹

In *Prime Ventures, Ltd. v. Manhattan Savings Bank*⁹⁰ the United States District Court for the Northern District of California rendered a decision concerning the renewal and extension of a deed of trust lien under Texas law. The dispute focused on the validity of the underlying lien on a Houston apartment complex, which was the subject of a pending bankruptcy proceeding. Payment defaults in 1975 by the debtor's predecessor in interest caused the lender to accelerate the debt secured by the lien on the apartments. The lender and the debtor's predecessor then executed a forbearance agreement in January 1976, which provided for a resumption of payments. The agreement also stipulated that the parties would later execute a renewal and extension note and a renewal deed of trust. The forbearance agreement did not renew and extend the debt, but it provided for the tolling of the four-year statute of limitations for an action to foreclose the lien.⁹¹ Under the agreement, the statute of limitations was tolled until the earlier of July 1, 1977, or the delivery of the renewal documents. Payments resumed pursuant to the forbearance agreement; however, the parties never executed the renewal doc-

82. *Id.* art. 5069-6A, § 10(2).

83. *Id.* art. 5069-6A, § 12(5).

84. *Id.* art. 5069-6A, § 18.

85. *Id.*

86. *See id.* art. 5069-5.02.

87. *See id.* art. 5069-5.02, § (8).

88. *Id.*

89. *Id.*

90. 68 Bankr. 686 (N.D. Cal. 1986).

91. *See* TEX. REV. CIV. STAT. ANN. art. 5520 (Vernon 1958) (recodified at TEX. CIV. PRAC. & REM. CODE ANN. § 16.036 (Vernon 1986)).

uments.⁹² The debtor's predecessor in interest later executed and recorded a wraparound deed of trust in November 1976.⁹³ Although the wraparound deed of trust did not purport to renew and extend the first lien, it provided for payment of the underlying debt by the second lienholder and made specific reference to the existence and priority of the first lien.

In the debtor's bankruptcy proceeding, the trustee commenced an adversary proceeding to determine the validity of the first lien pursuant to section 544(a)(3) of the Bankruptcy Code.⁹⁴ The trustee argued that the period in which the first lienholder could have enforced its lien commenced on July 1, 1977, and expired on June 30, 1981.⁹⁵ The first lienholder asserted that the recordation of the wraparound deed of trust effectively extended its lien so as to suspend the four-year statute of limitations.⁹⁶

On cross-motions for summary judgment, the bankruptcy court found in favor of the first lienholder, and the trustee appealed. The district court, on appeal, examined the criteria for a valid extension agreement⁹⁷ and determined that the wraparound deed of trust satisfied the necessary elements, even though the first lienholder did not sign the agreement.⁹⁸ In reaching its decision, the court distinguished precedent that appeared to require mutuality and consideration as conditions precedent to the renewal and extension of a lien and affirmed the bankruptcy court's judgment.⁹⁹

IV. DECEPTIVE TRADE PRACTICES¹⁰⁰

During the Survey period, the Texas courts rendered a number of significant decisions dealing with deceptive trade practices. The three most important cases decided were *Houston Title Company v. Ojeda de Toca*,¹⁰¹ *Home Savings Association v. Guerra*,¹⁰² and *MBank Fort Worth, N.A. v. Trans-Meridian Inc.*¹⁰³

92. Under Texas law, resumption of payment on the debt does not by itself toll the limitations period. *Id.*; see 68 Bankr. at 688.

93. The first lienholder did not become a party to the wraparound deed of trust.

94. 11 U.S.C. § 544(a)(3) (1982). This section permits the trustee to avoid such obligations of the debtor if a bona fide purchaser of real property can avoid the obligations. *Id.* However, the statute charges the trustee with notice of the status of the property's title under state law. *Id.*; see 68 Bankr. at 688 (citing *In Re Gurs*, 27 Bankr. 163 (9th Cir. 1983)).

95. See TEX. REV. CIV. STAT. ANN. art. 5520 (Vernon 1958) (recodified at TEX. CIV. PRAC. & REM. CODE ANN. § 16.036 (Vernon 1986) (four-year statute of limitations).

96. *Id.*

97. "[A] 'contract of extension' must be 'signed and acknowledged . . . by the party . . . obligated to pay such indebtedness . . . and filed for record in the county clerk's office . . .'" 68 Bankr. at 688 (citing TEX. REV. CIV. STAT. ANN. art. 5522 (Vernon 1958) (recodified at TEX. CIV. PRAC. & REM. CODE ANN. § 16.036 (Vernon 1986))). The debtor's predecessor in interest, as previously indicated, properly executed and duly filed the wraparound deed of trust in the appropriate county records.

98. 68 Bankr. at 688.

99. *Id.* at 689-690.

100. TEX. BUS. & CIV. CODE ANN. §§ 17.41-.63 (Vernon 1987) (hereinafter Deceptive Trade Practices Act or DTPA).

101. 733 S.W.2d 325 (Tex. App.—Houston [14th Dist.] 1987, writ granted).

102. 733 S.W.2d 134 (Tex. 1987).

103. 820 F.2d 716 (5th Cir. 1987).

In *Houston Title Company v. Ojeda de Toca*¹⁰⁴ a real estate buyer brought suit against the seller and title company because the property he had purchased was subject to a recorded demolition order. Subsequent to the sale, the property was demolished. The trial court rendered judgment against the title company based upon its negligence and found the seller guilty of violating both the Deceptive Trade Practices-Consumer Protection Act¹⁰⁵ and the Fraud in Real Estate and Stock Transactions statutes.¹⁰⁶

On appeal, the Houston court of appeals determined that the title company's only duty under its policy was to guaranty the title's status and to indemnify the insured buyer for any loss incurred as a result of title defects.¹⁰⁷ The court imposed no duty on the title company to discover and disclose to the insured buyer the existence of the recorded demolition order.¹⁰⁸ Because no evidence existed regarding any active misrepresentation by the title company necessary to sustain tort liability, the court reversed the lower court's judgment and held the title company not liable to the insured buyer.¹⁰⁹

Additionally, with respect to the seller, the court of appeals concluded that the recordation of the demolition order served as constructive notice to the buyer¹¹⁰ and barred the insured buyer's DTPA¹¹¹ and real estate fraud claims.¹¹² Accordingly, the court reversed and rendered judgment in favor of the seller.

In *Home Savings Association v. Guerra*¹¹³ the Texas Supreme Court considered the extent to which an assignee of a retail installment contract could be held derivatively liable for the original seller's misconduct.¹¹⁴ The contract provided that the seller would make home improvements to Guerra's

104. 733 S.W.2d 325 (Tex. App.—Houston [14th Dist.] 1987, writ granted).

105. TEX. BUS. & COM. CODE ANN. §§ 17.41-63 (Vernon 1987).

106. TEX. PROP. CODE ANN. § 13.002 (Vernon 1984). The court awarded the buyer damages in the sum of \$19,037.95, plus pre-judgment interest against all of the defendants. With respect to the seller, the court also awarded the buyer \$2,000.00 in DTPA damages, \$5,000.00 in exemplary damages, plus attorneys' fees. 733 S.W.2d at 326.

107. 733 S.W.2d at 327 (citing *Tamburine v. Center Savings Ass'n*, 583 S.W.2d 942, 947 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.), *Pendergast v. Southern Title Guaranty Co.*, 454 S.W.2d 803, 807 (Tex. Civ. App.—Houston [14th Dist.] 1970, writ ref'd n.r.e.), *Wolff v. Commercial Standard Ins. Co.*, 345 S.W.2d 565, 569 (Tex. App.—Houston 1961, writ ref'd n.r.e.)).

108. *Id.*

109. *Id.* (distinguishing *Gibbs v. Main Bank of Houston*, 666 S.W.2d 554, 559 (Tex. App.—Houston [1st Dist.] 1984, no writ) (court recognized that DTPA protects buyer when title company conspires with seller to conceal prior lien); *Great American Mortgage Investors v. Louisville Title Ins. Co.*, 597 S.W.2d 425, 430 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.) (title company held liable when negligently misrepresented absence of deed restrictions).

110. TEX. PROP. CODE ANN. § 13.002 (Vernon 1984) (recordation of instrument is notice to all persons of the instrument's existence).

111. See *Medallion Homes, Inc. v. Thermar Investments, Inc.*, 698 S.W.2d 400, 402 (Tex. App.—Houston [14th Dist.] 1985, no writ); *Jernigan v. Page*, 662 S.W.2d 760 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.).

112. 733 S.W.2d at 328; see *NRC, Inc. v. Pickhardt*, 667 S.W.2d 292, 294 (Tex. App.—Texarkana 1984, writ ref'd n.r.e.).

113. 733 S.W.2d 134 (Tex. 1987).

114. The consumer executed a ten-year note containing a time-price differential payable monthly in installments of \$125.69. *Id.*

house for the principal sum of \$7,700.00. The improvements included the addition of exterior rock siding.

Subsequent to the assignment of the note and contract to Home Savings Association, the rock siding deteriorated and Guerra brought suit against the seller and the assignee for violation of the DTPA¹¹⁵ and the Home Solicitation Act.¹¹⁶ The trial court rendered judgment against the seller and assignee, jointly and severally, for \$25,000.00, plus attorneys' fees in the sum of \$10,000.00. In addition, the court declared Guerra's promissory note null and void. The court of appeals affirmed the trial court's judgment.¹¹⁷ Thereafter, the assignee brought this appeal, claiming that recovery against an assignee of commercial paper is limited to the amount paid by the consumer under the contract pursuant to regulations promulgated by the Federal Trade Commission (FTC).¹¹⁸

The Texas Supreme Court in *Home Savings* noted that the FTC promulgated the regulation to abrogate the holder in due course rule in consumer credit transactions and to preserve the consumer's claims and defenses against the assignee.¹¹⁹ As set forth in the notice, an assignee's derivative liability under a consumer credit contract is limited to the amount paid by the consumer.¹²⁰ This limitation, however, does not affect any other rights of the consumer under federal, state, or local law.¹²¹ Thus, when the consumer establishes an independent right of recovery against the assignee, the FTC rule will not operate to limit or bar recovery.¹²²

In *Home Savings* the consumer failed to plead or prove any wrongdoing on the assignee's part to support an independent DPTA claim.¹²³ Thus, the

115. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon 1987).

116. 16 C.F.R. § 433.2 (1976).

117. 720 S.W.2d 636 (Tex. App.—San Antonio, *aff'd in part, rev'd in part*, 733 S.W.2d 134 (Tex. 1987).

118. See 16 C.F.R. § 433.2 (1976). The Federal Trade Commission regulation requires that a consumer credit contract contain the following language: "ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER." *Id.* (emphasis added). The consumer in *Home Savings* had paid a total of \$1,256.90 under the note and contract. 733 S.W.2d at 135.

119. See 733 S.W.2d at 135 (citing Statement of Basis and Purpose, 40 Fed. Reg. 53,506, 53,522 (1975) (setting out basis and purpose of 16 C.F.R. § 433.2 (1976); Guidelines on Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 41 Fed. Reg. 20,022, 20,023 (1976)). Absent the Trade Regulation Rule Concerning Preservation of Consumer Claims and Defenses, the seller's breach would not have excused the consumer from liability to the assignee under the note. 733 S.W.2d t 135.

120. 16 C.F.R. § 433.2 (1976).

121. 733 S.W.2d at 135-36 (citing J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE app. at 1144 (2d ed. 1980), Comment, *The FTC Holder in Due Course Rule: Neither Creditor Ruination Nor Consumer Salvation*, 31 Sw. L.J. 1097, 1108-09 (1977). The *Home Savings* court, however, disapproved of the holding in *De La Fuente v. Home Savings Ass'n*, 669 S.W.2d 137, 141 (Tex. App.—Corpus Christi 1984, no writ). 733 S.W.2d at 135-36.

122. 733 S.W.2d at 135-36.

123. *Id.* at 136-37; see, e.g., *Weitzel v. Barnes*, 691 S.W.2d 598, 600 (Tex. 1985) (although consumer need not establish contractual privity with defendant in DTPA suit, he must establish that defendant's deceptive act caused damages); *Light v. Wilson*, 663 S.W.2d 813, 814

Texas Supreme Court reversed the trial court's damage award and rendered judgment for the consumer against the assignee in the sum of \$1,256.90, which equalled the amount Guerra had paid under the credit contract. The court affirmed that part of the lower court's judgment declaring the note to be null and void and awarding attorneys' fees of \$10,000.00.¹²⁴

In *MBank Fort Worth, N.A. v. Trans-Meridian Ind.*¹²⁵ the United States Court of Appeals for the Fifth Circuit considered a bank's claim to recover the balance due on two promissory notes from a debtor who had participated in certain oil and gas leases. The debtor counterclaimed under state and federal securities laws, the DTPA, common law fraud, and the Racketeer Influenced and Corrupt Organizations Act (RICO).¹²⁶ After a jury trial, the district court rendered a take-nothing judgment¹²⁷ from which the bank and debtor both appealed.

The court of appeals made an initial determination that although the acquisition of the oil and gas lease could be classified as a security transaction for purposes of applying the securities laws, the acquisition could also be characterized as a transaction involving goods and services for purposes of the DTPA.¹²⁸ Moreover, the court of appeals found the bank's argument that it was not a seller of goods subject to the provisions of the DTPA without merit because the loan proceeds were specifically earmarked for the acquisition of the debtor's oil and gas lease.¹²⁹ Thus, the appellate court reasoned that the debtor's DTPA counterclaims applied to the bank's conduct.¹³⁰

The court of appeals considered the bank's assertion that the two-year statute of limitations barred the DTPA counterclaims.¹³¹ In order to refute

(Tex. 1983) (DTPA does not attach derivative liability to defendant based upon innocent involvement in business transaction); *Flenniken v. Longview Bank and Trust Co.*, 661 S.W.2d 705, 707-08 (Tex. 1983) (to hold creditor liable, must show that creditor connected with sale or deceptive act related to financing transaction).

124. The assignee failed to object at trial to the special issue of attorneys' fees and waived any right to appeal the failure to segregate the fees as to each claim. 733 S.W.2d at 135-36.

125. 820 F.2d 716 (5th Cir. 1987).

126. The notes were given as part of the bank's financing of the participant's acquisition of the leasehold interests and were secured by the leases. The participant's co-venturer, who was also indebted to the bank, was named as a cross-defendant in the suit, but did not join in the appeal. The cross-claims were premised on the bank's failure to disclose the co-venturer's poor loan history.

127. *MBank Fort Worth, N.A. v. Trans-Meridian Inc.*, 625 F. Supp. 1274 (N.D. Tex. 1985), *aff'd*, 806 F.2d 716 (5th Cir. 1987).

128. See 820 F.2d at 719 (citing *Vick v. George*, 671 S.W.2d 541, 550 (Tex. App.—San Antonio 1983) (claims arising from sale of oil and gas leases can be brought under DTPA), *rev'd on other grounds*, 686 S.W.2d 99 (Tex. 1984)).

129. *Id.* at 719.

130. *La Sara Grain v. First Nat'l Bank of Mercedes*, 673 S.W.2d 558, 566 (Tex. 1984); *Flenniken v. Longview Bank & Trust Co.*, 661 S.W.2d 705, 706 (Tex. 1983) (if lender and seller inextricably intertwined, then equally responsible for conduct of sale).

131. TEX. BUS. & COM. CODE ANN. § 17.565 (Vernon 1987). An action under the DTPA must be brought "within two years after the date on which the . . . deceptive act occurred or . . . [was] discovered or . . . should have [been] discovered." *Id.* In the instant case, the District Court found that the participant discovered or should have discovered the bank's deceptive acts on or before January 9, 1981. The participant's original answer was filed January 10, 1983, and did not contain a counterclaim under the DTPA. See 820 F.2d at 719.

the alleged time-bar, the debtor asserted a creative interpretation of the rules of civil procedure pertaining to amended pleadings and counterclaims. The debtor essentially argued that its amended answer containing the DTPA counterclaim related back to the original answer.¹³² Moreover, the debtor urged the court to deem the original answer timely pursuant to the rule extending the answer date for 30 days on otherwise time-barred counterclaims.¹³³ The court of appeals declined to permit the debtor to "piggyback" the two sections and to extend the limitations period for more than 30 days.¹³⁴ Although the statute of limitations barred affirmative recovery under the DTPA, the appellate court held that under Texas law the debtor's counterclaims constituted a defense to the bank's recovery of the debt.¹³⁵

The court of appeals devoted a major portion of its decision to the issue of whether the debtor's conduct resulted in a waiver of the DTPA counterclaims. Notwithstanding the apparent clarity of the statute,¹³⁶ the court of appeals concluded that Texas courts had construed the statute to prevent the use of unequal bargaining power to circumvent the DTPA's protection to consumers by including an antiwaiver provision in the DTPA.¹³⁷ The appellate court interpreted the antiwaiver provision to cover contractual clauses that prevent the assertion of a DTPA claim.¹³⁸ The court noted that this interpretation was not uniform and that some Texas Courts had approved warranty disclaimers.¹³⁹ Furthermore, the court held that "[c]onduct that is knowing and intelligent, and that is inconsistent with the assertion of DTPA rights, can constitute a waiver of those rights."¹⁴⁰ The *MBank* court, therefore, partially reversed the lower court and held that the debtor's conduct

132. See TEX. CIV. CODE ANN. § 16.068 (Vernon 1986) (relation back of amended and supplemental pleading). The participant filed its amended answer on January 10, 1984. 820 F.2d at 719-720.

133. TEX. CIV. CODE ANN. § 16.069 (Vernon 1986) (30 day extension if arising out of the same transaction or occurrence). The court concluded that this section was intended to "prevent plaintiffs from waiting to file their claims until the statute of limitations had run on the defendant's counterclaim." 820 F.2d at 720 (citing Fluor Engineers & Constructors, Inc. v. Southern Pacific Transportation Co., 753 F.2d 444, 448 (5th Cir. 1985)).

134. 820 F.2d at 720.

135. *Id.* at 720 (citing *Bodovsky v. Texoma National Bank of Sherman*, 584 S.W.2d 868, 874 (Tex. App.—Dallas 1979, writ ref'd n.r.e.)). The court of appeals noted contrary authority from other jurisdictions, but applied the law in accordance with their construction of existing Texas law. *Id.*

136. The DTPA provides that "[a]ny waiver . . . of the provisions of this subchapter is contrary to public policy and is unenforceable and void." TEX. BUS. & COM. CODE ANN. § 17.42 (Vernon 1987).

137. 820 F.2d at 721 (citations omitted).

138. *Id.* at 721-22.

139. *Id.* The court of appeals noted that the Texas Supreme Court had not explicitly explored the scope of the anti-waiver provision. *Id.* (citing *GWL, Inc. v. Robichaux*, 643 S.W.2d 392, 394 (Tex. 1982), *overruled*, *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 355 (Tex. 1987) for proposition that implied warranty of fitness could be waived in home construction contract). In *Robichaux*, however, the Texas Supreme Court did not address directly the DTPA's anti-waiver provision. 643 S.W.2d at 393-94.

140. 820 F.2d at 721-22 (Tex. App.—Houston 1984, writ ref'd n.r.e.); *Rocha v. U.S. Home/Homecraft Corp.*, 653 S.W.2d 53, 56-57 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

established a voluntary and intentional waiver of its rights under the DTPA.¹⁴¹ In all other respects, the appellate court affirmed the lower court's judgment and remanded the case for a new trial on the alleged securities violations.¹⁴² In denying the petitions for rehearing,¹⁴³ the court of appeals considered two recently issued opinions of the Texas Supreme Court and concluded that neither adversely affected its holdings in *MBank*.¹⁴⁴

V. CREDITOR'S RIGHTS

A. *Fraudulent Transfers*

In its 1987 session the Texas legislature enacted the Texas Uniform Fraudulent Transfer Act (TUFTA).¹⁴⁵ TUFTA replaces the antiquated Texas Fraudulent Transfer Act (the Act).¹⁴⁶ As of September 1, 1987, a transfer or obligation is fraudulent as to present or future creditors whose claims arose within a "reasonable time" of the transfer of obligation if it is made or incurred by the debtor: (1) with actual fraudulent intent, or (2) for less than reasonably equivalent value if the debtor was engaged in an undercapitalized business or if the debtor intended to incur or believed he would incur debts in excess of his ability to pay.¹⁴⁷ A transfer or obligation is also fraudulent with respect to the debtor's present creditors, if it is made or incurred: (1) for less than reasonably equivalent value and the debtor was or thereby became insolvent, or (2) the debtor made the transfer to an insider of the debtor on account of an existing debt and the insider knew or should

141. 820 F.2d at 722. This holding was consistent with the factual findings of the jury. *Id.*

142. *Id.* at 726.

143. 826 F.2d 391 (5th Cir. 1987).

144. *Id.* at 391-92. The first of these cases, *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349 (Tex. 1987), overruled *G.W.L., Inc. v. Robichaux*, 643 S.W.2d 392, 394 (Tex. 1982), and determined that an implied warranty concerning repairs could not be waived by a provision contained in a pre-printed, standard disclaimer form. 741 S.W.2d at 355. That holding directly conflicts with the *MBank* waiver, which was based upon voluntary conduct subsequent to the contract. 820 F.2d at 391. In the second case, *EF Hutton and Co., Inc. v. Youngblood*, 741 S.W.2d 363 (Tex. 1987), the Texas Supreme Court examined a sale of securities by a stock brokerage firm and concluded that the due diligence defense under the Texas Securities Act is inconsistent with the DTPA's strict liability standards. *Id.* at 364. The court of appeals distinguished the *EF Hutton* holding from that of *MBank*, because the latter involved the sale of both a property interest and a security interest. Accordingly, the *MBank* court found no such conflicting standards of liability present. 826 F.2d at 391-92.

145. TEX. BUS. & COM. CODE ANN. §§ 24.001-.013 (Vernon 1987). TUFTA represents a modified version of the Uniform Fraudulent Transfer Act (UFTA), which was adopted by the National Conference of Commissioners on Uniform State Laws in 1984 and approved by the House of Delegates of the American Bar Association in 1985.

146. Former TEX. BUS. CORP. ACT ANN., ch. 24, repealed by Act of 1967, ch. 788, § 4 was based upon the Statute of 13 Elizabeth and was awkward and ineffective in the context of modern commercial transfers. A discussion of the relative virtues of UFTA, TUFTA and the Act is contained in Teofan, *Voidable Transfers* ADVANCED BUSINESS BANKRUPTCY SHORT COURSE (South Texas College of Law, 1988).

147. TEX. BUS. & COM. CODE ANN. § 24.005 (Vernon 1987). The Texas legislature made two non-uniform modifications to this section. First, the legislature added the "reasonable time" limitation to the claims of present and future creditors. *Id.* Second, the legislature deleted the phrase "reasonably should have believed" from the provision regarding the debtor's intent to incur or belief that he would incur excessive debt. *See id.*

have known that the debtor was insolvent.¹⁴⁸ Additionally, TUFTA provides that a gift of the debtor's tangible personal property is void unless the transferee obtains possession of the personalty or a recorded deed or probated will evidences the gift.¹⁴⁹

TUFTA's definitional provisions, including the definitions of insider,¹⁵⁰ insolvency,¹⁵¹ and value¹⁵² are all loosely derived from the corresponding provisions of the Bankruptcy Code. TUFTA contains a non-uniform definition of reasonably equivalent value, which includes the price range that the debtor would have accepted from a purchaser in an arms length transaction.¹⁵³ Unlike the Bankruptcy Code, TUFTA also specifically provides that a person gives reasonably equivalent value if such person acquired the debtor's property at or through a regularly conducted, noncollusive foreclosure sale.¹⁵⁴

The Texas legislature also included in TUFTA several nonuniform provisions designed to protect community property rights. TUFTA defines a claim as specifically including a party's right to property.¹⁵⁵ Moreover, TUFTA defines a creditor to expressly include a spouse, minor, or ward who holds a claim against the debtor.¹⁵⁶

An aggrieved creditor may generally bring an action under TUFTA attacking a transfer or obligation as fraudulent within four years from the date the debtor made or incurred such transfer or obligation.¹⁵⁷ A transfer or obligation made or incurred with actual fraudulent intent may be attacked within the later of four years from the date of the transfer or obligation or one year after the transfer or obligation could have been discovered.¹⁵⁸ If the debtor preferentially transfers property to an insider who knew or should

148. *Id.* § 24.006. The first subsection of this provision is derived from the fraudulent transfer section of the Bankruptcy Code. See 11 U.S.C. § 548 (1982). Similarly, the second subsection is loosely based on the Bankruptcy Code's preferential transfer provision. See 11 U.S.C. § 547 (1982). TUFTA, however, requires that the transferee knew or should have known of the debtor's insolvency as a prerequisite to avoidance of the transfer. TEX. BUS. & COM. CODE ANN. § 24.006 (Vernon 1987).

149. TEX. BUS. & COM. CODE ANN. § 24.013 (Vernon 1987). A similar provision concerning incomplete gifts was contained in V.F.T.A. TEX. BUS. & COM. CODE ANN. art. 24.04 (Vernon 1987).

150. See TEX. BUS. & COM. CODE ANN. § 24.002(7) (Vernon 1987), 11 U.S.C. § 101(30) (1982).

151. Compare TEX. BUS. & COM. CODE ANN. § 24.003 (Vernon 1987) (debtor who generally is not able to pay debts as they mature presumed to be insolvent) with 11 U.S.C. § 101(31) (1982); UFTA § 2, *supra* note 145 (debtor presumed to be insolvent if generally not paying debts as they mature).

152. Compare TEX. BUS. & COM. CODE ANN. § 24.004 (Vernon 1987) with 11 U.S.C. §§ 547(a)(2), 548(d)(2)(A) (1982).

153. TEX. BUS. & COM. CODE ANN. § 24.004(d) (Vernon 1987).

154. TEX. BUS. & COM. CODE ANN. § 24.004(b) (Vernon 1987). Compare *Durrett v. Washington Nat'l Ins. Co.*, 621 F.2d 201 (5th Cir. 1980) (transfer pursuant to foreclosure sale set aside because not for fair equivalent value) with *In re Madrid*, 21 Bankr. 424 (9th Cir. 1982) (foreclosure of deed of trust not set aside even though purchase price significantly less than fair market value).

155. TEX. BUS. & COM. CODE ANN. § 24.002(3) (Vernon 1987).

156. *Id.* § 24.002(4).

157. *Id.* § 24.010(a)(2).

158. *Id.* § 24.010(a)(1).

have known of the debtor's insolvency, however, the statute of limitations is one year from the date of the preferential transfer.¹⁵⁹ TUFTA also includes a non-uniform limitations period, which provides that a spouse, minor, or ward may bring an action within two years after the date of the transfer or obligation or, if later, within one year after the transfer or obligation could have been discovered.¹⁶⁰

The remedies available to an aggrieved creditor under TUFTA include: (1) avoidance of the transfer to the extent necessary to satisfy the creditors' claim, (2) attachment of the asset or other provisional remedy, (3) issuance of an injunction against further transfers, (4) appointment of a receiver.¹⁶¹ In addition, if the creditor has obtained a judgment against the debtor, the creditor may obtain court approval to levy on the asset or its proceeds.¹⁶² A transfer made with actual fraudulent intent is not voidable against a good faith transferee who gave reasonably equivalent value or against a subsequent transferee.¹⁶³ Furthermore, TUFTA contains a non-uniform provision that protects a good faith transferee to the extent that he has made improvements to the transferred property.¹⁶⁴

B. Real Property Foreclosure

Effective January 1, 1988, the legislature amended the Texas Property Code to require more specific notice of the time and place of a sale of real property under a contract lien.¹⁶⁵ The amendments require that notice of the sale include a statement revealing the earliest time at which the sale will occur and that the sale begin within three hours of the stated time.¹⁶⁶ The notice must also describe the area of the county courthouse where the sale is to be held, and the sale must be conducted in that area.¹⁶⁷ Furthermore, the amendments provide that, notwithstanding an agreement to the contrary, a creditor must provide notice of default to the debtor by certified mail if the debt is secured by a contractual lien on real property used by the debtor as a residence.¹⁶⁸ Finally, the creditor must give the debtor at least twenty days to cure the default prior to acceleration of the debt.¹⁶⁹

C. Exemptions

During the Survey period, the legislature liberalized the personal property exemptions available to debtors under state law. Effective September 1,

159. *Id.* § 24.010(a)(3).

160. *Id.* § 24.010(b).

161. *Id.* § 24.008; see also 11 U.S.C. § 550 (1982).

162. TEX. BUS. COM. CODE ANN. § 24.008 (Vernon 1987).

163. *Id.* § 24.009.

164. *Id.* § 24.009(d).

165. TEX. PROP. CODE ANN. § 51.002 (Vernon Supp. 1988).

166. *Id.* §§ 51.002(b), (c).

167. *Id.* § 51.002(a). The amendments provide that "[t]he commissioners court shall designate the area at the courthouse where the sales are to take place and shall record the designation in the real property records . . ." *Id.*

168. *Id.* § 51.002(b)(3).

169. *Id.* § 51.002(d).

1987, the Property Code provides that, in addition to the assets specified in section 42.001, the debtor may exempt his interest in a qualified pension, profit-sharing, or stock-bonus plan.¹⁷⁰ This exemption includes assets invested in a plan for self-employed persons or in an individual retirement account, but only to the extent that the Internal Revenue Code permits deductions for those assets.¹⁷¹

The legislature also amended the Insurance Code effective March 24, 1987, to exempt any "money or benefits of any kind to be paid or rendered to the insured under any policy of insurance issued by a life, health or accident insurance company . . . or under any plan or program of annuities and benefits in use by any employer . . ." ¹⁷² Prior to the amendment, such money or benefits were exempt only to the extent that they were payable on a periodic or installment basis.¹⁷³ By including lump sum payments in this provision, the legislature indirectly increased the \$30,000.00 aggregate personal property exemption provided by the Property Code.¹⁷⁴

During the Survey period, several courts decided cases involving personal property exemptions under Texas law. In *Seagraves v. Weitzel*¹⁷⁵ the court held office furniture utilized by an architect in his business not exempt as "tools used in a trade or profession."¹⁷⁶ In *Salem v. American Bank of Commerce*¹⁷⁷ the court determined that a paycheck ceases to be exempt as "current wages" once the debtor receives it; the paycheck becomes subject to attachment or turnover.¹⁷⁸ In *In re Bessant*¹⁷⁹ the court ruled that a debtor claiming exemptions under Texas law cannot utilize the lien avoidance provision of the Bankruptcy Code to convert secured property into exempt property.¹⁸⁰ Finally, in *In re Goff*¹⁸¹ the court determined that although a self-settled trust is void as to creditors, the trust itself is valid; only the spendthrift clause is void.¹⁸² Thus, in *Goff* a creditor's recordation of an abstract of judgment against the debtor did not result in the attachment of a judgment lien to property held by the trust; although creditors could reach the debtor's equitable interest in the trust property, legal title to the property

170. *Id.* § 42.0021.

171. *Id.*

172. TEX. INS. CODE ANN. art. 21.22, § 1 (Vernon Supp. 1988).

173. *Id.*

174. TEX. PROP. CODE ANN. §§ 42.001 and 42.002 (Vernon 1984).

175. 734 S.W.2d 773 (Tex. App.—Fort Worth 1987, writ ref'd n.r.e.); see also TEX. PROP. CODE ANN. § 42.002(3)(B) (Vernon 1984).

176. 734 S.W.2d at 776.

177. 717 S.W.2d 948 (Tex. App.—El Paso 1986 no writ); see TEX. CONST. art. XVI, § 28; TEX. PROP. CODE ANN. §§ 42.001, 42.002(8) (Vernon 1984).

178. 717 S.W.2d at 948-49.

179. 74 Bankr. 436 (N.D. Tex. 1987); see 11 U.S.C. § 522(f) (1982).

180. 74 Bankr. at 437-38.

181. *In re Goff*, 812 F.2d 931 (5th Cir. 1987). In *Goff* a judgment creditor claimed that the judgment lien attached to property held in the debtors' spendthrift trust. The court of appeals concluded, notwithstanding invalidation of the spendthrift clause, that legal title to the property remained in the trust; therefore, the lien did not attach. *Id.* at 933; see TEX. PROP. CODE ANN. § 52.001 (Vernon 1984).

182. 812 F.2d at 933.

remained in the trust.¹⁸³

With respect to real property, the United States Court of Appeals for the Fifth Circuit in the case of *In Re Niland*¹⁸⁴ determined that the debtor could assert a homestead claim to real property, even though he had executed several affidavits designating certain other condominium property as his homestead.¹⁸⁵ Creditors had relied on those affidavits when they extended credit to Niland. The court concluded that the overt acts of homestead usage and Niland's intention to claim the land as a homestead overcame the contradicting affidavits.¹⁸⁶ Once it established the homestead character of the property, the court refused to estop Niland from enforcing his constitutional and statutory rights to the property.¹⁸⁷ The court, therefore, held the foreclosure sale of the homestead property null and void, the creditor's lien invalid, and the foreclosure sale purchaser's interest subrogated to the foreclosing creditor's unsecured debt.¹⁸⁸

An interesting twist to the Niland saga is his recent conviction on criminal charges stemming from the false homestead waivers. In the criminal action, United States District Court Judge Barefoot Sanders sentenced Mr. Niland to two years in prison and five years of probation based upon false representations that he made to a federally insured lending institution. In addition, Judge Sanders ordered Niland to pay \$384,000.00 to the foreclosure sale purchaser or else forfeit the homestead property.¹⁸⁹

183. *Id.* at 933.

184. *In re Niland*, 825 F.2d 801 (5th Cir. 1987). This decision followed a ruling of the Bankruptcy Court upholding the debtor's homestead claim, 50 Bankr. 468 (N.D. Tex. 1985), which was affirmed in part and reversed in part by the District Court in an unpublished opinion. Subsequently, the court of appeals reversed the lower court ruling, 809 F.2d 272 (5th Cir. 1987), and the debtor brought this petition for rehearing, 825 F.2d 801 (5th Cir. 1987).

185. 825 F.2d at 803-04. Contrary to the assertions contained in the homestead affidavits, Niland occupied the real estate more or less continuously since 1979 and did not reside at the condominium. *Id.* at 803.

186. *Id.* at 807 (citing *Lifemark Corp. v. Merit*, 655 S.W.2d 310, 314 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.)).

187. *Id.* at 808 (citing *Texas Land & Loan Co. v. Blalock*, 76 Tex. 75, 89 (Tex. 1890). The court stated that "no estoppel can arise in favor of a lender who has attempted to secure a lien on homestead in actual use and possession of the family, based on declarations of the [property owners]." *Id.* at 808; see TEX. CONST. art. XIV, § 50 (1955, amended 1973), TEX. CONST. art. XIV, § 51; see also TEX. PROP. CODE ANN. § 41.002 (Vernon 1984) (statutory homestead exemption).

188. 825 F.2d at 810-13. Recognizing the harshness of the result, the court stated that: [I]n this case, with [the foreclosing creditor's] lien being invalid due to the homestead character of the property, and Niland having filed for relief under Chapter 13, subrogation to [the creditor's] unsecured note is not the best of remedies for [the purchaser]. It is, however, the remedy accorded him by Texas law.

Id. at 813.

189. See *The Los Angeles Times*, Jan. 15, 1988 (Sports) at 2, col. 2.