



January 1980

Creditor and Consumer Rights

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Recommended Citation

William V. Dorsaneo, *Creditor and Consumer Rights*, 34 Sw L.J. 253 (1980)
<https://scholar.smu.edu/smulr/vol34/iss1/9>

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CREDITOR AND CONSUMER RIGHTS

by

William V. Dorsaneo, III*

THE most significant occurrence of the survey period is the legislative response given to problems of debtors, creditors, and consumers, both at the federal and state level. Accordingly, this article summarizes and analyzes the major legislative developments under the Deceptive Trade Practices—Consumer Protection Act¹ and the Texas Consumer Credit Code.² Temporary developments at the federal level in connection with suspension of the state usury ceiling also are discussed.³ In addition, expanded treatment is given to the subject of sworn account practice as a result of continued interpretive difficulties with respect to rule 185 of the Texas Rules of Civil Procedure.

I. EXTRAORDINARY REMEDIES AND EXECUTION

A. Garnishment

Several garnishment cases of note were decided during the survey period. In *Ferrell v. First National Bank*⁴ the bank instituted a post-judgment garnishment proceeding against another bank. The judgment debtor intervened and moved to quash the writ of garnishment on grounds that the application was fatally deficient because the garnishor averred in its application for writ of garnishment that “defendant [Ferrell] has not within Affiant’s knowledge, property in his possession subject to execution sufficient to satisfy the Judgment,” but failed to include the words ‘within this State’ after the word ‘possession.’”⁵ Intervenors based their contention on the statutory language of article 4076,⁶ which provides that for post-judgment garnishment, the garnishor should aver that “the defendant has not, within his knowledge, property in his possession *within this State*, subject to execution, sufficient to satisfy such judgment.”⁷ The court of civil appeals reasonably concluded that the allegation that the defendant did not have property subject to execution necessarily included the allegation that he did not have property “in this state” subject to execution.

The subject of garnishment of military retirement pay was considered

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1. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1980).

2. TEX. REV. CIV. STAT. ANN. art. 5069 (Vernon 1971).

3. See Act of Dec. 28, 1979, Pub. L. No. 96-161, 93 Stat. 1233.

4. 576 S.W.2d 677 (Tex. Civ. App.—Waco 1979, no writ).

5. *Id.* at 678.

6. TEX. REV. CIV. STAT. ANN. art. 4076 (Vernon 1966).

7. *Id.* (emphasis added).

again during the survey period by the courts of civil appeals. In *United States v. Wakefield*⁸ the Fort Worth court of civil appeals considered the question of whether military retirement pay constitutes current wages for personal service not subject to garnishment under article XVI, section 28 of the Texas Constitution.⁹ In concluding that military retirement pay does not constitute current wages, the court stated:

Military retirement pay is based on the serviceman's length of service and base pay upon retirement. It is not based on what the military perceives to be the present value of a retiree standing by for possible recall. The retirement benefits are paid for a period of time in which the retired serviceman was not recalled. Should he be recalled he would receive active duty pay instead of retirement pay. The retired serviceman receives retirement benefits because of his past military service, not because he is presently standing by waiting to be recalled. Therefore, the fact that he is standing by is not controlling and military retirement pay is not current wages under Texas law.¹⁰

In *United States v. Miranda*¹¹ the plaintiff contended that military retirement pay was paid to assure the ex-serviceman's availability for future contingencies. Following the logic of the *Wakefield* case, however, the San Antonio court of civil appeals concluded that retirement pay is not current wages for personal service as described by the Texas Constitution.¹²

Two significant cases during the survey period involved the subject of wrongful garnishment. In *Chandler v. Cashway Building Materials, Inc.*¹³ Cashway obtained a judgment against Chandler in the principal amount of \$1,583.75.¹⁴ Subsequently, Cashway instituted a garnishment proceeding against El Paso National Bank by the filing of an application for writ of garnishment in which Cashway erroneously asserted that the amount of the judgment was \$1,833.75.¹⁵ Despite this error, and after Chandler filed a "Motion to Dismiss Garnishment," an agreed judgment was made whereby Cashway received \$1,000 in settlement of the original proceeding

8. 572 S.W.2d 569 (Tex. Civ. App.—Fort Worth 1978, writ dismissed).

9. "No current wages for personal service shall be subject to garnishment." TEX. CONST. art. XVI, § 28. See also TEX. REV. CIV. STAT. ANN. art. 4099 (Vernon 1966).

10. 572 S.W.2d at 572.

11. 581 S.W.2d 711 (Tex. Civ. App.—San Antonio 1979, no writ).

12. Prior to the enactment of 42 U.S.C. § 659 (1976) the government was immune from garnishment proceedings authorized by state law. The federal statute removed the government's sovereign immunity from suits to enforce legal obligations to provide child support or make alimony payments. Nevertheless, if military retirement pay is subject to garnishment in Texas, federal restrictions on the amounts that can be garnished would apparently be applicable. Pursuant to 15 U.S.C. § 1673(b)(2) (1976), as amended by Consumer Credit Protection Amendments of 1977, Pub. L. No. 95-30, §§ 501(e)(1)-(3), 91 Stat. 166, the maximum amount of an individual's aggregate disposable earnings per work week that can be garnished to enforce an order for the support of another person is limited to 50% of the individual's disposable earnings of that week when that individual is supporting a spouse or dependent child other than one to whom the support order pertains. When an individual is not supporting such a spouse or child, the amount to be garnished cannot exceed 60% of weekly disposable earnings.

13. 584 S.W.2d 950 (Tex. Civ. App.—El Paso 1979, no writ).

14. *Id.* at 952.

15. *Id.* at 953.

against Chandler, which sum had been deposited into the registry of the court by the garnishee. Subsequently, Chandler filed a wrongful garnishment proceeding, contending that the facts set forth in the application for writ of garnishment were untrue. Cashway moved for summary judgment on grounds that "(1) there was no final judgment, but merely an agreed judgment of the garnishment case, (2) the suit was barred under the doctrine of *res judicata*, and (3) the claim was barred under the doctrine of estoppel by judgment."¹⁶ Summary judgment was granted to Cashway, and Chandler appealed. With respect to the first ground the court of civil appeals concluded that "[w]hether a garnishment is wrongful depends upon whether the steps taken by the parties seeking the writ comply with the statute authorizing such relief [article 4076], and not the type of judgment entered."¹⁷ In this connection the court of civil appeals stated that the garnishment is wrongful if the facts set forth in the affidavit prescribed by article 4076 are untrue.¹⁸

In addition to the discrepancy with respect to the amount of the judgment debt, the court of civil appeals noted that the petition in the wrongful garnishment proceeding alleged that Cashway's attorney was advised by a deputy sheriff who had attempted to complete a writ of execution of the location and value of sufficient nonexempt property to satisfy the judgment debt. Since there was no summary judgment evidence rebutting this allegation, the court of civil appeals held that Cashway's first contention did not support the granting of the motion for summary judgment. Moreover, the court of civil appeals concluded that the wrongful garnishment action was not barred by the doctrine of *res judicata*, the doctrine of estoppel by judgment, or the compulsory counterclaim principles set forth in rule 97(a) of the Texas Rules of Civil Procedure.¹⁹ In other words, the court of civil appeals determined that the wrongful garnishment action was a different "cause of action" from the strictly statutory action involved in the garnishment proceeding, that the issue of wrongful garnishment was not actually litigated in the garnishment proceeding, and that the wrongful garnishment claim did not arise out of the same transaction or occurrence or series of transactions or occurrences that was the subject of Cashway's claim. The court added that even if the wrongful garnishment claim did arise out of the same transaction or occurrence or series thereof, the compulsory counterclaim rule would not be applicable under the proviso in rule 97 concerning agreed judgments.²⁰ Accordingly the case was reversed and remanded for further proceedings in the trial court.

16. *Id.* at 952.

17. *Id.*

18. *Id.* See also *Peerless Oil & Gas Co. v. Teas*, 138 S.W.2d 637 (Tex. Civ. App.—San Antonio 1940), *aff'd*, 138 Tex. 301, 158 S.W.2d 758 (1942).

19. 584 S.W.2d at 953-54.

20. TEX. R. CIV. P. 97(a) states "that a judgment based upon a settlement or compromise of a claim of one party to the transaction or occurrence prior to a disposition on the merits shall not operate as a bar to the continuation or assertion of the claims of any other party to the transaction or occurrence unless the latter has consented in writing that said judgment shall operate as a bar."

In *Newsom v. Starkey*²¹ appellee filed an application for writ of garnishment before judgment against certain garnishees. The trial judge gave the debtor notice and a hearing prior to the issuance of the writ of garnishment, even though no statute or rule of civil procedure required it at the time.²² Despite the safeguards employed by the trial court, the court of civil appeals held that since article 4084²³ was declared unconstitutional prior to the issuance of the writ of garnishment,²⁴ the seizure of property under the statute was wrongful since the trial court could not remedy a constitutional defect in a statute by supplying the procedure missing from the statute. The court reasoned that the seizure was wrongful for "no procedure for prejudgment garnishment existed that could have been utilized."²⁵ Although it is possible to construe the *Newsom* opinion to mean that the 1977 amendments to the rules of civil procedure did not eliminate due process problems in connection with prejudgment garnishment proceedings, it would appear that the opinion only stands for the position that such problems existed prior to the amendment.

B. Sequestration

The formal sufficiency of an application for a writ of sequestration was considered in *Monroe v. General Motors Acceptance Corp.*²⁶ G.M.A.C. instituted suit against Monroe for damages caused by the breach of a retail installment contract and also sought foreclosure of its security interest in a 1976 Chevrolet automobile. In connection with the lawsuit, G.M.A.C. filed an affidavit for writ of sequestration. The court granted the request for the writ, and the sheriff took possession of the automobile pursuant to the writ. Thereafter, Monroe filed a motion to dissolve the writ of sequestration, which the trial court overruled. After a trial on the merits, the trial court rendered judgment for G.M.A.C. for the unpaid balance of the installment contract, attorney's fees, and for foreclosure of the security interest in the automobile.²⁷ On appeal, Monroe contended that the sequestration statute²⁸ was unconstitutional in that it did not provide for notice and opportunity for a hearing before seizure of the property and that, in any event, the affidavit supporting the ex parte issuance of the writ of sequestration did not satisfy the statutory requirements that "[t]he application for the issuance of the writ shall be made under oath and shall set

21. 572 S.W.2d 29 (Tex. Civ. App.—Dallas 1978, no writ).

22. *Id.* at 29-30. The opinion reflects that the "garnishee" was given notice and a hearing. This seems to be a "slip of the typewriter." TEX. R. CIV. P. 663a was subsequently promulgated to require notice to or joinder of the debtor. See generally Soules, *Attachment, Sequestration and Garnishment: The 1977 Rules*, 32 Sw. L.J. 753 (1978); see also Dorsaneo, *Creditors' Rights, Annual Survey of Texas Law*, 32 Sw. L.J. 245, 279-80 (1978) [Hereinafter cited as Dorsaneo, *1978 Annual Survey*].

23. TEX. REV. CIV. STAT. ANN. art. 4084 (Vernon 1966).

24. See *Southwestern Warehouse Corp. v. Wee Tote, Inc.*, 504 S.W.2d 592, 594 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ).

25. 572 S.W.2d at 30.

26. 573 S.W.2d 591 (Tex. Civ. App.—Waco 1978, no writ).

27. *Id.* at 592.

28. TEX. REV. CIV. STAT. ANN. art. 6840 (Vernon Supp. 1980).

forth specific facts stating the nature of the plaintiff's claim, the amount in controversy, if any, and the facts justifying the issuance."²⁹ The court of civil appeals held that the Texas statute satisfied constitutional due process requirements because the debtor may immediately seek dissolution of the writ, and the statute requires that a hearing be held, at which the party who secured the issuance of the writ must prove the specific facts alleged and the grounds relied on for the issuance of the writ, not later than ten days after a motion to dissolve the writ is filed.³⁰ The court relied upon the United States Supreme Court decision in *Mitchell v. W.T. Grant Co.*,³¹ in which the Supreme Court held that the Louisiana sequestration statute was constitutional because "it comports with due process to permit the initial seizure on sworn *ex parte* documents, followed by the early opportunity to put the creditor to his proof."³²

With respect to the contention that the affidavit was not sufficiently specific, the court of civil appeals held that the following affidavit was sufficient:

plaintiff sues for the title and possession of the hereinafter described property and for foreclosure of a security interest therein [describing the 1976 Chevrolet] of the value of \$6,987.96; the said property is now in the possession of the defendant . . . and the plaintiff fears that there is immediate danger that the defendant in possession thereof will conceal, dispose of, ill treat, waste or destroy such property, or remove the same out of the jurisdiction of this court during the pendency of this suit.³³

Although the allegations with respect to "immediate danger" could be characterized as conclusory in nature, the court of civil appeals noted that an automobile is a "rapid depreciation" chattel that is diminishing in value so long as the defendant retained possession of the vehicle without making payments.³⁴ This "use equals waste" logic has substantial support in the Supreme Court's opinion in *Mitchell*.³⁵ The preferred practice would be for the affidavit or application to spell out exactly why "there is immediate danger that the defendant in possession" will damage or destroy the property.³⁶ A rule of procedure provides that the specific facts in the affidavit may be stated upon information and belief if the grounds for such belief are specifically stated.³⁷

C. Execution

The relationship of article 3773³⁸ with article 5532³⁹ was considered in

29. *Id.* § 2. See also TEX. R. CIV. P. 696-716.

30. *Id.* § 3.

31. 416 U.S. 600 (1974). See also *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975).

32. 416 U.S. at 609.

33. 573 S.W.2d at 593.

34. *Id.*

35. 416 U.S. at 604.

36. See 2 W. DORSANEO, TEXAS LITIGATION GUIDE § 40.100 (1978).

37. TEX. R. CIV. P. 696.

38. TEX. REV. CIV. STAT. ANN. art. 3773 (Vernon 1966) provides in part: "If the first

Estate of Stonecipher v. Estate of Butts.⁴⁰ In that case a judgment for approximately \$21,000 was rendered on December 20, 1950. On the first day of May 1951 a judgment creditor had executions issued and delivered to the sheriff of Orange County, Texas, who returned them nulla bona. Although some \$5,000 was paid on the judgment, no other executions were issued. Thereafter, in May 1971 a judgment creditor sought to have his judgment revived by an action of debt. The judgment creditor also alleged that

Defendant Elmer Newman together with Thomas Lee Butts his then wife, Irene Miller Butts, conspired and knowingly, willfully, wantonly and fraudulently set about to defraud the Plaintiff herein by conveying property owned by the said Thomas Lee Butts and wife, Irene Miller Butts, into the name of the Defendant Elmer Newman in order to avoid collection of said judgment awarded by said jury.⁴¹

The defendant responded by pleading that the judgment was dormant and barred by limitations. The case was tried to a jury, which found that Newman had conspired with the original judgment debtors in concealing assets.⁴² Despite this finding the defendant's motion for judgment non obstante verdicto was granted. The court of civil appeals concluded that under both of the articles cited above the judgment was legally dead and not subject to revival.⁴³ Moreover, in reliance upon a decision of the Supreme Court of Oklahoma,⁴⁴ the court of civil appeals concluded that since the judgment was legally dead prior to the time the fraudulent conveyance law suit was instituted, the judgment creditor has suffered no recoverable damage. The Texas Supreme Court disagreed holding that a judgment creditor, with a lien on the property made the basis of a cause of action can recover damages on another cause of action for a postjudgment conspiracy to prevent the collection of the lien.⁴⁵ This holding was, however, of no help to the plaintiff because there was no judgment lien on the property concealed. The supreme court also held, however, that the limitation periods contained in the statutes would be tolled upon a finding that the judgment creditor exercised reasonable diligence to discover assets of the judgment debtor but was unsuccessful because the assets were con-

execution has issued within the ten years [after rendition], 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."

39. *Id.* art. 5532 (Vernon 1958) provides: "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."

40. 579 S.W.2d 27 (Tex. Civ. App.—Beaumont 1979), *rev'd*, 23 Tex. Sup. Ct. J. 124 (Dec. 19, 1979).

41. 579 S.W.2d at 28.

42. *Id.*

43. *Id.* at 29. *See also* Commerce Trust Co. v. Ramp, 135 Tex. 84, 93, 138 S.W.2d 531, 536 (1940) (judgment creditors may "prolong the life of the judgment indefinitely by merely having executions timely issued as provided by Article 3773").

44. Lallathin v. Keaton, 198 Okla. 312, 178 P.2d 101, 103 (1947).

45. 23 Tex. Sup. Ct. J. at 126-27.

ceeded fraudulently.⁴⁶ The latter holding constitutes a major departure from prior law.

The penalty provisions of rule 652 of the Texas Rules of Civil Procedure,⁴⁷ dealing with a bidder's failure to pay the amount bid at the sheriff's sale, were construed in *Jackson v. Universal Life Insurance Co.*⁴⁸ At a sheriff's sale conducted on June 6, 1978, Jackson bid \$175,000 for 585.3 acres of land and gave his personal check to the sheriff. After Jackson's bank did not honor the check, the judgment creditors filed a motion pursuant to rule 652. Subsequently, a hearing was held and the trial court granted a judgment in favor of the judgment creditors against Jackson for the sum of \$35,000 plus interest at the rate of nine percent per annum. On appeal Jackson contended, *inter alia*, that he made a good faith effort to pay the amount of his bid. Furthermore, he argued that there was no finding in the record as to the value of the land and, therefore, no basis for computing the amount of the penalty. With respect to the first contention, the court of civil appeals held that when a bidder fails to comply with the terms of an execution sale he becomes liable under the express provisions of rule 652, "whether or not he acted in good faith."⁴⁹ With respect to the second contention the court held that the stipulation by Jackson's counsel that the acreage would be worth \$175,000 "if the title to the property is clear," was binding on Jackson.⁵⁰ Consequently, after the stipulation, he had the burden to offer evidence and to secure a finding by the trial court as to any title encumbrances to avoid the impact of the stipulation.⁵¹

D. Receivership

Article 1396—7.05⁵² provides that a court can appoint a receiver for the assets and business of a nonprofit corporation "in any action where receivers have heretofore been appointed by the usages of the court of equity."⁵³ This provision was construed during the survey year in *Greater Fort Worth & Tarrant County Community Action Agency v. Mims*,⁵⁴ involving a dispute between the board of directors of a nonprofit corporation that was the designated community action agency for Tarrant County, Texas, and the agency's executive director, Mims. Although no party requested the ap-

46. *Id.*

47. TEX. R. CIV. P. 652. Rule 652 provides that if a bidder fails to pay the amount of his winning bid at a sheriff's sale,

he shall be liable to pay the plaintiff in execution twenty per cent on the value of the property thus bid off, besides costs, to be recovered on motion, five days notice of such motion being given to such purchaser; and should the property on a second sale bring less than on the former, he shall be liable to pay to the defendant in execution all loss which he sustains thereby, to be recovered on motion as above provided.

48. 582 S.W.2d 207 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.).

49. *Id.* at 209.

50. *Id.* at 208.

51. *Id.* at 209-10.

52. TEX. REV. CIV. STAT. ANN. art. 1396—7.05 (Vernon 1962).

53. *Id.*

54. 574 S.W.2d 870 (Tex. Civ. App.—Fort Worth 1978, writ dismiss'd).

pointment of a receiver, the trial court placed the agency's board of directors in receivership and appointed a receiver to hold meetings, to fill vacancies on the board of directors, to bring its membership in compliance with the bylaws of the nonprofit corporation, and then to elect agency officers.⁵⁵ The agency appealed on the basis that the appointment of the receiver was improper because it was on the court's own motion and also because the trial court abused its discretion in making the appointment. The court of civil appeals held that a trial court has discretion to appoint a receiver on its own motion⁵⁶ and that under the circumstances of the case, appointment of a receiver was appropriate.⁵⁷

In *Covington Knox, Inc. v. State*⁵⁸ a temporary receivership was imposed upon appellant pursuant to article 581—25—1 of the Texas Securities Act.⁵⁹ The appellant filed a motion to dissolve the receivership and after a hearing, the trial court overruled the motion. On appeal, Covington Knox asserted that imposition of the receivership without notice and opportunity to be heard deprived appellant of its property without due process of law. The appellate court disagreed with this contention for two reasons. First, Texas case law states that "when a defendant appears and requests dissolution of an ex parte order imposing a receivership, he waives any error in the appointment of a receiver without notice."⁶⁰ Secondly, under the express provisions of the Texas Securities Act, appellant had the statutory right to request a hearing at which the state retains the burden of producing sufficient evidence to justify the continuation of the receivership.⁶¹ The appellant also contended that there was no evidence or insufficient evidence concerning the propriety and the necessity of a receivership. The court of civil appeals noted, however, that although the evidence could have been more satisfactorily developed concerning the necessity for the appointment of a receiver to conserve and protect the assets of appellant, since it was not necessary for the state to prove that it would ultimately prevail in the law suit, based on the record, it could not be said that the trial judge abused his discretion.⁶²

The construction and effect of a receiver's deed was at issue in *Cox v.*

55. *Id.* at 871.

56. *Id.* (citing *Crawford v. Crawford*, 163 S.W. 115 (Tex. Civ. App.—Texarkana 1913, no writ)).

57. According to the appellate opinion, the nonprofit corporation was acting in violation of its own bylaws. Moreover, its mission of assisting the indigent of Tarrant County through the implementation of poverty programs funded by tax dollars was in a state of confusion. 574 S.W.2d at 872. See also *Meis v. Sanitas Serv. Corp.*, 511 F.2d 655, 658 n.3 (5th Cir. 1975) ("The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." (Citations omitted)).

58. 577 S.W.2d 323 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ).

59. TEX. REV. CIV. STAT. ANN. art. 581—25—1 (Vernon Supp. 1980).

60. 577 S.W.2d at 325 (citing *Whitaker Oil Co. v. Ward*, 396 S.W.2d 158 (Tex. Civ. App.—Tyler 1965), *motion to certify overruled*, 398 S.W.2d 155 (Tex. 1965); *Salas v. Gonzalez*, 181 S.W.2d 821 (Tex. Civ. App.—San Antonio 1944, no writ)).

61. TEX. REV. CIV. STAT. ANN. art. 581—25—1C (Vernon Supp. 1980). See also cases cited at note 31 *supra*.

62. 577 S.W.2d at 326.

Gutman.⁶³ The Delmore Corporation was placed in receivership in Dallas County in 1932. During the pendency of that proceeding and as the result of a judicial sale, the receiver appointed by the trial court executed a receiver's deed in early 1933 to A.E. Cox, the predecessor in interest to the claimants of the same name in this proceeding. Thereafter, in October 1933, a second receiver's deed was executed to the predecessor in interest of Gutman. Despite the fact that the first deed and the confirmation order of the same date provided for the conveyance of the "full fee simple title, to said land" the court denied Cox's claim of title to a royalty interest in the property.⁶⁴ Prior to the time that the receiver was appointed, the property at issue in this proceeding had been conveyed to a party who was not a formal party to the receivership proceeding. Thus the royalty interest was not conveyed by the receiver's deed since Texas case law provides that a grantor cannot convey to a grantee a greater title than the grantor holds.⁶⁵

II. SWORN ACCOUNTS

Several cases of major significance were decided during the survey period with respect to sworn account practice pursuant to rule 185.⁶⁶ In *Larcon Petroleum, Inc. v. Autotronic Systems, Inc.*⁶⁷ the court of civil appeals concluded that the "special contract"⁶⁸ defense did not apply in a case in which the plaintiff sought the procedural benefits of rule 185. The plaintiff claimed a breach of a contract by a failure to pay a liquidated money demand based upon a written contract on which a systematic record had been kept for the sale of barrels of gasoline. Defendant Larcon relied upon the landmark case of *Meaders v. Biskamp*⁶⁹ for the proposition that a suit upon a "special contract" may not be brought pursuant to rule 185. Without attempting to define the meaning of the term "special contract," the court of civil appeals recognized that *Meaders* dealt not with a suit upon a sworn account but with the question of the recovery of attorney's fees under article 2226.⁷⁰ Along with *Larcon*, several other recent cases have held that rule 185 is applicable so long as the transaction is one of

63. 575 S.W.2d 661 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.).

64. *Id.* at 663.

65. *Id.* at 664 (citing *Collum v. Neuhoff*, 507 S.W.2d 920 (Tex. Civ. App.—Dallas 1974, no writ); *Abraham v. Crow*, 382 S.W.2d 756 (Tex. Civ. App.—Amarillo 1964, no writ)).

66. TEX. R. CIV. P. 185.

67. 576 S.W.2d 873 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ).

68. A "special contract" has been defined as "one with peculiar provisions or stipulations not found in the ordinary contract relating to the same subject matter and such provisions are such as, if omitted from the ordinary contract, the law will never supply." *Eisenbeck v. Buttgen*, 450 S.W.2d 696, 702 (Tex. Civ. App.—Dallas 1970, no writ).

69. 159 Tex. 79, 316 S.W.2d 75 (1958).

70. 576 S.W.2d at 875. Another court of civil appeals has indicated that rule 185 "does not apply to transactions between parties resting upon special contracts *other than those giving rise to the transactions mentioned in the rule.*" *Hollingsworth v. Northwestern Nat'l Ins. Co.*, 522 S.W.2d 242, 244 (Tex. Civ. App.—Texarkana 1975, no writ) (emphasis added). *See also Juarez v. Dunn*, 567 S.W.2d 223 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.); *Dorsaneo, Creditor and Consumer Rights, Annual Survey of Texas Law*, 33 Sw. L.J. 265, 274-78 (1979) [Hereinafter cited as *Dorsaneo, 1979 Annual Survey*]; 1 W. DORSANEO, *supra* note 36,

those expressly mentioned in the rule.⁷¹

Technical requirements imposed upon a party seeking to take advantage of the procedural benefits of rule 185 were considered by several courts of civil appeals during the survey period. In *Boots, Inc. v. Tony Lama Co.*⁷² a writ of error appeal was taken from a default judgment. Despite the lack of a statement of facts and the certification of the court reporter that she did not attend the trial, the plaintiff contended that presentation of evidence was unnecessary because the proceeding was one pursuant to rule 185, and no sworn denial had been filed. The court of civil appeals concluded that the requirements of rule 185 were not met because the sworn account petition, including its exhibits, did not show with reasonable certainty the nature of each item, the date, and the charge.⁷³ The Beaumont court of civil appeals noted that the advent of computerized accounting systems has provided modern day enterprises with two options: "(a) they may translate their computerized records into the form required by Rule 185 and the many cases construing the rule and the earlier statute; or (b) they can seek a revision of the rule by appropriate amendatory procedures."⁷⁴

In *Steves Sash & Door Co. v. WBH International*⁷⁵ the invoices incorporated in the plaintiff's petition as a "statement of account" contained, *inter alia*, the following abbreviations and symbols: "Back Ordered From S.O. #373 Invoice #9672, dated 8-30-77"; "FD 3/0 x 6/8 x 13/4 LH HW 6 F15 D9 Line Item #38, Reg. No. CH-S60-09-0066"; and "3/0 x 6/8 13/8 UC RH HW5 F14 D4."⁷⁶

Not surprisingly, the court of civil appeals held that the account, ledger sheets, and invoices failed to show with reasonable certainty the nature of each item, the date, and the charge therefor.⁷⁷ In *Howard v. Weisberg*⁷⁸ plaintiffs sued for recovery of \$3,700 for legal services rendered to defendant pursuant to an express contract for a fee of \$6,000. The affidavit of Alfred Weisberg, which was incorporated by reference, recited that an

§ 1107 (1978), for a discussion of the common misconstruction placed upon the *Meaders* case. See also TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1980).

71. See *Caro v. Haywood*, 585 S.W.2d 354, 356 (Tex. Civ. App.—Austin 1979, no writ); *Carr Well Serv. Inc. v. Skytop Rig Co.*, 582 S.W.2d 500, 502 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.). *But cf.* *Ferguson v. Yorfino*, 570 S.W. 422, 426-27 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.) (suit to recover excess money allegedly paid for construction of house under written contract is not suit on sworn account pursuant to rule 185); *Morgan v. Morgan*, 406 S.W.2d 347, 351 (Tex. Civ. App.—San Antonio 1966, no writ) (suit to recover amount allegedly due from wife is not suit on sworn account pursuant to art. 2226).

72. 584 S.W.2d 583 (Tex. Civ. App.—Beaumont 1979, no writ).

73. *Id.* at 584. The invoices attached to the petition were in tabular form and referred to the merchandise as "Style 41R3" and indicated the unit price and the quantity. *Cf.* *Larcon Petroleum, Inc. v. Autotronic Systems, Inc.*, 576 S.W.2d 873, 876 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ) (account describing product in terms of the number of barrels or gallons of gasoline sold and referencing each invoice to the purchase order held to meet the requirements of rule 185).

74. 584 S.W.2d at 585 (emphasis in original).

75. 575 S.W.2d 355 (Tex. Civ. App.—San Antonio 1978, no writ).

76. *Id.* at 357.

77. *Id.*

78. 583 S.W.2d 920 (Tex. Civ. App.—Dallas 1979, no writ).

agreement was made for the payment of a fee of \$6,000 plus costs for representation in a law suit. The affidavit also recited performance of certain actions including "settlements efforts, the filing and dismissal of a quo warranto proceeding, and other related services."⁷⁹ Finally, the affidavit concluded that plaintiff had spent more than four hundred hours prosecuting defendant's claim and had been paid only \$2,300. The court of civil appeals held that the affidavit was insufficient because it did not constitute an itemization that showed a systematic record of the services performed concerning either the details of the services or an itemization of the credits related to the particular services.⁸⁰ A petition lacking such itemization will not place a burden on the defendant to specifically deny one or more of the claims against him or to deny the existence of the entire contract.⁸¹

During the survey period, several courts of civil appeals continued to require the defendant's answer to a petition on a verified account to be in the precise terminology of rule 185. In *Zemaco, Inc. v. Navarro*⁸² the plaintiff contended that it sold and delivered merchandise to the defendant. The defendant filed a general denial and also specifically alleged in his original answer the following: "Defendant further alleges that the Account made the basis of Plaintiffs [*sic*] Petition by reason of the matters set forth in the invoices attached to Plaintiffs [*sic*] Petition, is not due, just and true, and owing by this Defendant; of which judgment this Defendant prays judgment of this Court."⁸³ Moreover, in response to the plaintiff's motion for summary judgment, the defendant filed an affidavit in opposition that contained the statement that "each and every item [set forth in appellant's invoices] is not just and true"⁸⁴ The plaintiff's motion for summary judgment was denied, and, after a bench trial, judgment was rendered that the plaintiff take nothing. The trial court made findings of fact that the defendant did not order the merchandise or authorize anyone else to order or receive the merchandise. The court of civil appeals reversed on grounds that the defendant's answer did not comply with the literal requirements of rule 185 and rule 93(k).⁸⁵ The court of civil appeals also held that even if the statements contained in the affidavit in opposition to the plaintiff's motion for summary judgment satisfied the technical requirements of the applicable rules of civil procedure,⁸⁶ the rules require that the necessary language "must appear in a pleading of equal dignity with the plaintiff's petition, and therefore must appear in the defendant's answer."⁸⁷ Although there is no mention of the matter in the opinion, it does not appear the argument was advanced that the issue of the justness

79. *Id.* at 921.

80. *Id.* at 922.

81. *Id.*

82. 580 S.W.2d 616 (Tex. Civ. App.—Tyler 1979, writ *dism'd*).

83. *Id.* at 619.

84. *Id.* at 618.

85. *Id.* at 619.

86. Technically speaking, it should have stated that "each and every item is not just or true." TEX. R. CIV. P. 93(k), 185 (emphasis added).

87. 580 S.W.2d at 620.

or truth of the plaintiff's account was tried by consent.⁸⁸

The most significant case during the survey period with respect to the proper form of a defendant's answer to a sworn account petition was that decided by the Texas Supreme Court in *Rizk v. Financial Guardian Insurance Agency, Inc.*⁸⁹ Suit was filed by the insurance agency to recover insurance premiums allegedly owed by Rizk and three other individuals. The principal question considered by the supreme court was the sufficiency of the verified answer filed by Rizk. In addition to a general denial the answer contained the following paragraph: "Each and every item in Plaintiff's account attached to the Original Petition as Exhibit A is not just or true *in whole or in part*. Defendant did not request plaintiff to furnish the items listed therein or agree or promise to pay plaintiff for the charges shown therein."⁹⁰ Rizk supported the answer with an affidavit stating that the facts and statements contained in the answer were true and correct to his own personal knowledge.⁹¹ The trial court granted summary judgment to the plaintiff, and the court of civil appeals affirmed, concluding that the defendant's answer contained inconsistencies that nullified the effectiveness of the quoted paragraph to rebut plaintiff's prima facie case.⁹² The Texas Supreme Court reversed because it did not agree with the court of civil appeals that the verified denial that each and every item "is not just or true in whole or in part" was nullified or destroyed by the other parts of the answer. The supreme court agreed, however, with the holding of the court of civil appeals that Rizk's verified answer satisfied the technical requirements of rule 185, and without expressly so stating, overruled cases to the contrary.⁹³ Therefore, it appears that when a defendant files an answer in the form used by Mr. Rizk, the words "in whole or in part" should be treated merely as surplusage.⁹⁴

Several cases decided during the survey period addressed the recovery of attorney's fees in the context of sworn account practice. In *Zemaco, Inc. v. Navarro*⁹⁵ the trial court, in rendering judgment for the appellee,⁹⁶ did not award attorney's fees to the plaintiff. On appeal, the court of civil appeals concluded that article 2226⁹⁷ is expressly applicable to suits on sworn accounts and that a plaintiff is entitled to recover reasonable attorney's fees if the plaintiff pleads and proves presentment of the claim and

88. See TEX. R. CIV. P. 67. For a case involving a general denial sworn to by defendant's attorney "to the best of his knowledge," see *Duval County Ranch Co. v. Clark Pipe & Supply, Inc.*, 572 S.W.2d 357, 358 (Tex. Civ. App.—San Antonio 1978, no writ). See also *Gerdes v. Tygrett*, 584 S.W.2d 350 (Tex. Civ. App.—Texarkana 1979, no writ) (unsworn general denial insufficient to avoid plaintiff's prima facie case).

89. 584 S.W.2d 860 (Tex. 1979).

90. *Id.* at 862 (emphasis added).

91. *Id.* Rizk apparently appended a proper jurat to his answer.

92. 576 S.W.2d 110 (Tex. Civ. App.—Houston [1st Dist.] 1978, *rev'd*, 584 S.W.2d 860 (Tex. 1979).

93. 584 S.W.2d at 863.

94. See 576 S.W.2d at 112.

95. 580 S.W.2d 616 (Tex. Civ. App.—Tyler 1979, writ *dism'd*).

96. See notes 82-88 *supra* and accompanying text.

97. TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1980).

that the defendants failed to pay within thirty days thereafter.⁹⁸ The court of civil appeals also concluded that the appellant was entitled to recover reasonable attorney's fees as a matter of law, but since the reasonableness of attorney's fees is a question of fact, the court remanded the attorney's fees issue for further proceedings in the trial court.⁹⁹

In *Security & Communications Systems, Inc. v. Hooper*¹⁰⁰ Hooper sued Security for sales commissions pursuant to the express provisions of an employment contract. After a jury trial, the trial court awarded Hooper attorney's fees under article 2226. The defendant contended that the contract sought to be enforced by Hooper was a "special contract" to which article 2226 did not apply.¹⁰¹ The court of civil appeals noted that the so-called "special contract" doctrine had its genesis in the case of *McCaman v. Batsell*,¹⁰² but that the landmark case of *Meaders v. Biskamp*¹⁰³ "has been the most widely misconstrued holding in this area."¹⁰⁴ The court explained that the "special contract" limitation applied only to the "sworn account" provision of article 2226 and, despite earlier attempts to inject a specific meaning into the term "special contract,"¹⁰⁵ the term means simply a contract other than one arising from an open account.¹⁰⁶ Accordingly, the court held that the existence of a "special contract" for providing services, labor, or materials does not preclude granting attorney's fees under article 2226.¹⁰⁷

In *Patton v. Archer*¹⁰⁸ Patton sued for breach of three cattle purchase contracts and also sought recovery of attorney's fees pursuant to the provisions of article 2226. The district court granted the plaintiff's request for attorney's fees,¹⁰⁹ but the Fifth Circuit Court of Appeals determined that the award was improper because the suit was based on a breach of three express written agreements with "fixed and certain terms" not implied-in-

98. 580 S.W.2d at 620. There is no discussion in the opinion about the special definition of a "sworn account" within art. 2226 as being limited to an open account for the sale of personality. See *Meaders v. Biskamp*, 159 Tex. 79, 316 S.W.2d 75 (1958).

99. 580 S.W.2d at 621.

100. 575 S.W.2d 606 (Tex. Civ. App.—Dallas 1978, no writ).

101. *Id.* at 609; see note 70 *supra*.

102. 59 Tex. 363 (1883).

103. 159 Tex. 79, 316 S.W.2d 75 (1958).

104. 575 S.W.2d at 609. In *Meaders* the court defined a "sworn account" as limited to "transactions between persons, in which there is a sale upon one side and a purchase upon the other, whereby title to *personal* property passes from one to the other, and the relation of debtor and creditor is thereby created by general course of dealing (which may include only one transaction between the parties). It does not mean transactions between parties resting upon special contract." 316 S.W.2d at 78 (emphasis by the court). See Dorsaneo, 1979 *Annual Survey*, *supra* note 70, at 275-80 for a thorough discussion of interpretive difficulties created by *Meaders*.

105. See note 68 *supra*.

106. 575 S.W.2d at 609; see Dorsaneo, 1979 *Annual Survey*, *supra* note 70, at 280, suggesting that the "special contract" limitation should be abandoned. As a result of the 1977 amendment, art. 2226 "suits founded on oral or written contracts" are within the purview of the statute. TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1980).

107. 575 S.W.2d at 610.

108. 590 F.2d 1319 (5th Cir. 1979).

109. *Id.* at 1323.

fact contracts.¹¹⁰ Accordingly, the suit was not "founded upon a sworn account or accounts" within the meaning of article 2226. The plaintiff apparently did not argue that any of the other provisions of article 2226 were applicable.¹¹¹ Although the Fifth Circuit's holding on the attorney's fees issue is understandable in light of the widespread misconstruction of the *Meaders* case, it appears that the result reached in *Patton* is precisely the result disapproved by the Dallas court of civil appeals in the *Hooper* case.

In an attempt to eliminate the necessity for expert testimony on the question of the reasonableness of attorney's fees in actions controlled by article 2226, the Sixty-sixth Legislature amended the statute to provide that the usual and customary fees for similar cases are presumed to be reasonable when the claim for attorney's fees is governed by the statute, although the *presumption* can be rebutted by competent evidence. Moreover, the amendment provides that the usual and customary fee, together with the contents of the case file, may be within the judicial knowledge of the court and the fee may be set by the court without further evidence in (1) a case tried before the court or (2) a jury case, if the parties agree to submit the issue of the amount of attorney's fees to the court for determination.¹¹²

A further development of significance in the context of the recovery of attorney's fees is set forth in the supreme court's opinion in *F.R. Hernandez Construction & Supply Co. v. National Bank of Commerce*.¹¹³ The sole issue in the case concerned an award of attorney's fees based upon a fixed percentage of the principal and interest due under the express terms of a promissory note. In reviewing the precedent in the area the Texas Supreme Court held that the obligor of a note can challenge the reasonableness of the contractual attorney's fees but that in order to make a "proper showing" that the fees should be reduced, the obligor must first plead and prove that the contractual fee is unreasonable and must also prove a lesser amount that is reasonable under the circumstances.¹¹⁴ "These two elements comprise the affirmative defense of unreasonableness of attorney's fees."¹¹⁵

III. USURY

A. Legislation

The most significant development on the subject of usury occurred after the survey period with Congress' passage of Public Law 96-161.¹¹⁶ The

110. *Id.* at 1324.

111. The opinion reflects that the version of the statute under consideration restricted statutory coverage to claims "for personal services rendered, labor done, material furnished, overcharges on freight or express, lost or damaged freight or express, or stock killed or injured, or suits founded on a sworn account or accounts." *Id.* at 1323.

112. TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1980).

113. 578 S.W.2d 675 (Tex. 1979).

114. *Id.* at 677.

115. *Id.*

116. Act of Dec. 28, 1979, Pub. L. No. 96-161, § 101, 93 Stat. 1233.

Act provides that the provisions of the constitution or law of any state expressly limiting the rate or amount of interest, discount points, or other charges that may be charged, taken, received or reserved shall not apply to any loan, mortgage, or advance secured by a first lien on residential real property or by a first lien on stock in a residential cooperative housing corporation made between the date of enactment and the date of expiration, March 31, 1980.¹¹⁷ Special provisions were also made for "business and agricultural loans" in the amount of \$25,000 or more.¹¹⁸

At the state level, major modifications have been made to chapter one of the Texas Consumer Credit Code.¹¹⁹ Article 1.03¹²⁰ was amended to provide that interest at the rate of six percent per annum can be charged on all accounts and contracts ascertaining the sum payable when no rate of interest is agreed upon, "commencing on the thirtieth (30th) day from and after the time when the sum is due and payable."¹²¹

The penalty provision applicable to transactions covered by chapter one of the Code, which is set forth in article 1.06¹²² underwent major change. Prior to the amendment, the penalty for contracting for, charging, or receiving interest in excess of the amount authorized by law was twice the amount of interest "contracted for," "charged," or "received."¹²³ For example, assuming a ten percent maximum rate, if a lender contracted with a borrower to loan \$10,000 at twelve percent per annum for a one-year term, under the "old" law the lender would forfeit twice the amount of the total interest. Thus, since the interest contracted for is 12% x \$10,000, or \$1,200, the amount forfeited is \$2,400, plus reasonable fees. The lender would lose \$2,400 of the principal plus an amount attributable to reasonable fees. The computation involved in this simple hypothetical assumes that no payments have been made. The penalty is changed to three times the amount by which the total interest contracted for, charged, or received exceeds the amount of interest allowed by law, but in no event will the penalty be less than two thousand dollars or twenty percent of the principal, whichever is

117. *Id.* § 201.

118. *Id.*

119. TEX. REV. CIV. STAT. ANN. art. 5069—1.01 to—1.09 (Vernon 1971 & Supp. 1980).

120. TEX. REV. CIV. STAT. ANN. art 5069—1.03 (Vernon Supp. 1980).

121. *Id.* Although the problem is not eliminated, the "charging" of interest during a period when the "charge" is not permitted is greatly ameliorated by the amendment. *See Houston Sash & Door Co. v. Heaner*, 577 S.W.2d 217 (Tex. 1979), *discussed in Dorsaneo*, 1979 *Annual Survey*, *supra* note 70, at 282.

122. TEX. REV. CIV. STAT. ANN. art 5069—1.06(1) (Vernon Supp. 1980).

123. 1967 Tex. Gen. Laws, ch. 274, § 2, at 610. Moreover, a lender who contracts for, charges, or receives interest in excess of twice the lawful maximum may also be penalized by loss of the right to receive the principal "as an additional penalty." TEX. REV. CIV. STAT. ANN. art. 5069—1.02(2) (Vernon 1971) (not amended in 1979). The words "contracted for" and "charged" were added to the usury penalty provision in 1967 when the Texas Consumer Credit Code was promulgated. The word "charged" has received substantial judicial construction of late. It is clear that the "charge" need not be pursuant to an agreement. *Windhorst v. Adcock Pipe & Supply Co.*, 547 S.W.2d 260 (Tex. 1977) ("By describing the conditions precedent to recovery of penalties in the disjunctive, the Legislature made it clear that only one such condition need occur to trigger penalties; either a contract for, a charge of, or receipt of usurious interest." *Id.* at 261 (emphasis in original)). *See also* discussion of "charging" cases at notes 135-46 *infra*.

the smaller sum.¹²⁴

When the same hypothetical loan considered above is tested under the amended statute, the first step will be to compute the amount of interest allowed by law on the principal advance. Since there are no "true principal" computation problems posed by the hypothetical, this can be accomplished by applying the maximum permissible rate to the principal. Assuming the rate is ten percent, the maximum chargeable interest is \$1,000. The sum of the total principal and interest that the lender was entitled to charge for the period in question is \$11,000. The second step is to compute the amount of interest actually contracted for, charged, or received. That sum is \$1,200. Hence, the amount of the excess is \$200 and three times the excess is \$600. *But*, as a result of the *exception* contained in the amended statute, the forfeiture is never less than the lesser of \$2,000 or twenty percent of the principal. In the foregoing hypothetical, twenty percent of the principal is \$2,000, and the amount "forfeited" is \$2,000.¹²⁵

Major modification has also been made with respect to the rates of interest that may be contracted for, charged, or received in connection with certain residential mortgage loans¹²⁶ and for loans or other extensions of credit in the principal amount of \$250,000 or more.¹²⁷ Generally, under prior law, the maximum rate of interest applicable to loans (or agreements to loan) made to private persons and secured, or to be secured, by a first lien on real property was ten percent per annum unless the loan (or agreement to loan) involved was in excess of \$500,000.¹²⁸ The amendment adding article 1.07(d) increased the permissible rate of interest "on any loan or agreement to loan" secured in whole or in part by a lien or mortgage on real property on which dwelling units for not more than four families, in the aggregate, are located. The increase is to the lesser of twelve percent per annum or

a rate equivalent to the average per annum market yield rate adjusted to constant maturities on ten-year United States Treasury notes and bonds as published by the board of governors of the Federal Reserve System for the second calendar month preceding the month in which the lender becomes legally bound to make the loan plus an additional two percent per annum rounded off to the nearest quarter of one percent per annum.¹²⁹

124. TEX. REV. CIV. STAT. ANN. art. 5069—1.06(1) (Vernon Supp. 1980). It should also be noted that the statutory proviso "that there shall be no penalty for any usurious interest which results from an accidental and bona fida error" has been retained.

125. Reasonable attorney's fees are also still recoverable against the offending lender. *Id.*

126. TEX. REV. CIV. STAT. ANN. art. 5069—1.07(d)(1) (Vernon Supp. 1980). *See also* Rawdin, *House Bill 409—Texas Raises the Ceiling on Residential Mortgage Loans*, 33 Sw. L.J. 823 (1979).

127. *Id.* art. 5069—1.07(b).

128. *See id.* art. 5069—1.02 (Vernon 1971); 1975 Tex. Gen. Laws, ch. 26, § 1, at 47-48 (art. 5069—1.07 as originally enacted).

129. *See id.* art. 5069—1.07(d)(1) (Vernon Supp. 1980). The "sliding scale" portion of the formula may be subject to challenge on the basis of the Texas Constitution that requires the legislature to "define interest and fix maximum rates . . ." TEX. CONST. art. XVI, § 11. It could be argued that the adoption of a sliding scale with an upper limit does not fulfill the

Finally, it should be noted that, once the maximum permissible rate is determined, the lender may not contract for the rate to float above the ceiling.¹³⁰

Two other amendments to the Consumer Credit Code deserve mention. First, the statutory amendment to article 1.07(b)¹³¹ provides that:

[A]ny person may agree to pay, and may pay pursuant to such an agreement, any rate of interest not exceeding 18 percent per annum, if such agreement is evidenced by a written bond, note, or other contract of such person providing for a loan or other extension of credit in the original principal amount of \$250,000¹³²

requirements. The legislative draftsmen were obviously aware of this potential problem because they adopted an alternative provision that reads:

(d)(1) On any loan or agreement to loan secured or to be secured in whole or in part by a lien, mortgage, security interest, or other interest in or with respect to real property on which is located one or more single family dwellings, or dwelling units for not more than four families in the aggregate, interest may be charged at the rate of 12 percent per annum. A "dwelling unit" shall mean for the purpose of this section a unified combination of rooms that is designed for residential use by one family.

1979 Tex. Gen. Laws, ch. 715, § 3, at 1767 (in the event that the floating rate provisions of art. 5069—1.07(d) are held to be unconstitutional, then the section is amended by adding a new subsection (d) to art. 5069—1.07 in lieu thereof).

See also TEX. ATT'Y GEN. LA-119 (1977):

We note that Texas courts have assumed "fix" in this provision to be interchangeable with "establish" We believe the Constitution [TEX. CONST. art. XVI § 11] authorizes the Legislature to enact statutes establishing a precise figure as the maximum interest rate. If it does not enact such statutes, or if for other reasons there is no legislation fixing maximum interest rates for any class of transactions, the Constitution itself fixes a ten percent maximum.

(Citations omitted.)

130. See TEX. REV. CIV. STAT. ANN. art. 5069—10.7(d)(i)(ii) (Vernon Supp. 1980). When does a lender become "legally bound to make a loan"? A lender may become contractually committed to make a loan in the future upon payment by the future borrower of a commitment fee, "a fee which commits the lender to make a loan at some future date" *Gonzales County Sav. & Loan Ass'n v. Freeman*, 534 S.W.2d 903, 906 (Tex. 1976). The fee "purchases an option which permits the borrower to enter into the loan in the future." *Id.* On the other hand, it could be contended that the lender is not legally bound to make the loan unless the option is exercised properly. In short, when a commitment fee is secured, the lender could be said to be legally bound (a) on the date the fee is paid, or (b) the date the option is exercised in accordance with its terms.

A lender may also be legally bound by a bilateral contract otherwise enforceable under contract law. Since an agreement to make a loan in the future is, in effect, an agreement to make a future contract, to be enforceable it "must specify all its material and essential terms, and leave none to be agreed upon as a result of future negotiations." *Parker Chiropractic Research Foundation v. Fairmont Dallas Hotel Co.*, 500 S.W.2d 196, 201 (Tex. Civ. App.—Dallas 1973, no writ). Also, the statute of frauds should be considered. See *Edward Scharf Assoc. v. Skiba*, 538 S.W.2d 501 (Tex. Civ. App.—Waco 1976, no writ), *cited in* Rawdin, *supra* note 126, at 831 n.49. The important point is that the lender may become "legally bound" even if no commitment fee is involved. The statute also provides that "no prepayment charge or penalty may be collected on any loan transaction of the class defined in Subsection (d)(1) bearing a rate of interest in excess of that authorized by Article 1.04 [10%] . . . except where such collection is required by an agency created by federal law." TEX. REV. CIV. STAT. ANN. art. 5069—1.07(d)(4) (Vernon Pam. Supp. 1971-1979).

131. *Id.* art. 5069—1.07(b).

132. The statutory provision is inapplicable to loans secured by "a lien on a building, constructed or to be constructed, which both is used or intended to be used as a single one-to-four-family residence and is occupied or intended to be occupied by the person obligated to pay" *Id.*

Secondly, article 1.07(e),¹³³ proscribing antidiscrimination and antiredlining activities on the part of lenders in connection with residential loans, was added to chapter one by the Sixty-sixth Legislature. The effective date of the foregoing legislation was August 27, 1979.¹³⁴

B. "Charging" Cases

The holding of the Texas Supreme Court in *Windhorst v. Adcock Pipe & Supply Co.*¹³⁵ that a charge of usurious interest triggers statutory usury penalties even if the charge is not pursuant to an agreement,¹³⁶ continued to cause trouble during the survey period. In *Thomas Conveyor Co. v. Portec, Inc.*¹³⁷ the plaintiff affixed red labels or stickers to invoices sent to the defendant. Since the labels provided that "OUR TERMS ARE 30 DAYS NET - 1-1/2% PER MONTH FINANCE CHARGE APPLICABLE THEREAFTER,"¹³⁸ the defendant contended that it had been charged interest in excess of the amount allowed by law. The court of civil appeals concluded that merely affixing the labels to invoices sent to customers did not constitute charging of interest because "no action was ever taken to actually charge or collect such finance charge."¹³⁹ In *Carr Well Service, Inc. v. Skytop Rig Co.*¹⁴⁰ the plaintiff's petition contained an allegation that interest was due and owing on invoices previously presented to the defendant at the rate of one and one-half percent per month from the due date of the invoices. The invoices were incorporated in the petition in the usual manner for suits on verified accounts.¹⁴¹ Since there was no agreement by the corporation to pay interest,¹⁴² however, the interest rate

133. *Id.* art. 5069—1.07(e).

134. The transition section of the Act that contains the penalty revisions provides: "Sec. 2. This Act shall be applicable to all claims of forfeiture made after the effective date of this Act but, with respect to claims of forfeiture in litigation pending at such effective date, the amount forfeited shall be determined under the provisions of this subsection as originally enacted." 1979 Tex. Gen. Laws, ch. 281, § 2, at 605. By its literal terms, the amendatory act is made "applicable to all *claims* of forfeiture *made* after the effective date of this Act." Literally, this would include transactions entered into before the effective date of the Act as well as transactions made thereafter. There is a specific exception "with respect to claims of forfeiture in litigation pending at . . . [the] effective date." It provides that "the amount forfeited shall be determined under the provisions of this subsection as originally enacted." As explained above, under the statutory section as originally enacted, the forfeiture is three times the amount contracted for. The method of computation is set forth in *First State Bank v. Miller*, 563 S.W.2d 572 (Tex. 1978). Therefore, the old penalty statute will be applicable to actions in litigation as of Aug. 27, 1979, but all actions filed subsequent to that date will be governed by the new provision.

135. 547 S.W.2d 260 (Tex. 1977).

136. *Id.* at 261. See also *Houston Sash & Door Co. v. Heaner*, 577 S.W.2d 217 (Tex. 1979), discussed in Dorsaneo, *1979 Annual Survey*, *supra* note 70, at 282-83.

137. 572 S.W.2d 361 (Tex. Civ. App.—Waco 1978, no writ).

138. *Id.* at 363.

139. *Id.* Reliance was placed on *Killebrew v. Bartlett*, 568 S.W.2d 915 (Tex. Civ. App.—Amarillo 1978, no writ).

140. 582 S.W.2d 500 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.).

141. *Id.* at 501.

142. Plaintiff contended that TEX. REV. CIV. STAT. ANN. art. 1302—2.09 (Vernon Supp. 1980), which authorizes certain corporations to contract for a rate of interest, not in excess of 1 1/2% per month for loans in excess of \$5,000, applied. See also *Watson v. Cargill, Inc.*, 573 S.W.2d 35 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.).

was deemed usurious and the defendant was entitled to a setoff for double the amount of interest contracted for, charged, or received. Because the defendant never sought forfeiture of the principal in the trial court, the recovery was limited to the penalty provided by article 5069—1.06(1).¹⁴³

In *Matador Sales Co. v. Wells Companies*¹⁴⁴ the court of civil appeals held that the trial court erred in rendering judgment in favor of a defendant on a usury counterclaim after the plaintiff invoiced the defendant for the amount due "plus interest at the rate of 1-1/2% per month in an invoice."¹⁴⁵ The curious basis for the court's holding was that article 5069—1.03 did not apply because there was no pleading or proof of a written contract "ascertaining the sum payable."¹⁴⁶ The opinion does not cite *Windhorst* or any of its progeny and is out of step with other precedent.

C. Guaranty/Suretyship Obligations

Several key opinions were handed down during the survey period concerning the circumstances under which a guarantor may assert the claim or defense of usury. In *Dicker v. Lomas & Nettleton Financial Corp.*¹⁴⁷ one of the defendant-guarantors alleged by way of counterclaim that the plaintiff violated the usury statutes by requiring the defendants to form a corporation as a subterfuge to evade the interest ceiling applicable to private persons.¹⁴⁸ The court of civil appeals disagreed, holding that a lender may lawfully require that the loan be made to a corporation rather than to an individual borrower "even though the purpose of the requirement is to permit the lender to charge a higher rate of interest."¹⁴⁹

Another suit against Lomas & Nettleton, *Lawler v. Lomas & Nettleton Financial Corp.*,¹⁵⁰ was brought to enjoin the foreclosure sale of land pursuant to a deed of trust executed by a trustee in behalf of a family trust. The deed of trust secured a loan made by Lomas & Nettleton to a corporation owner by others. Apparently the interest rate for the loan exceeded the rate applicable to noncorporate borrowers.¹⁵¹ The court of civil appeals held that the trustee was precluded from making a claim or defense of usury by virtue of article 1302—2.09¹⁵² and the Texas Supreme Court's opinion in *Universal Metals & Machinery, Inc. v. Bohart*.¹⁵³

143. TEX. REV. CIV. STAT. ANN. art. 5069—1.06(2) provides for forfeiture of the *principal* by "[a]ny person who contracts for, charges or receives interest which is in excess of double the amount of interest allowed by [arts. 5069—1.01 to—1.09]."

144. 583 S.W.2d 679 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ).

145. *Id.* at 681.

146. *See* text at notes 119-21 *supra*.

147. 576 S.W.2d 672 (Tex. Civ. App.—Texarkana 1978, writ *ref'd n.r.e.*).

148. *Id.* at 676.

149. *Id.* Reliance was placed upon *Houston Furniture Distrib., Inc. v. Bank of Woodlake, N.A.*, 562 S.W.2d 880 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ); *American Century Mortgage Investors v. Regional Center, Ltd.*, 529 S.W.2d 578 (Tex. Civ. App.—Dallas 1975, writ *ref'd n.r.e.*). *See* Dorsaneo, 1979 *Annual Survey*, *supra* note 70, at 280.

150. 583 S.W.2d 810 (Tex. Civ. App.—Dallas 1979, no writ).

151. *See* TEX. REV. CIV. STAT. ANN. art. 5069—1.02 (Vernon 1971) (10% per annum).

152. TEX. REV. CIV. STAT. ANN. art. 1302—2.09 (Vernon Supp. 1980).

153. 539 S.W.2d 874 (Tex. 1976) (guarantor of payment may not assert claim or defense

In *Ferguson v. McCarrell*,¹⁵⁴ the Austin court of civil appeals considered the question of whether endorsers and guarantors of payment on promissory notes could be sued without resort to and the joinder of the original maker of the note. The defendant-guarantors contended that it was improper for the trial court to sever the corporate maker of the notes and to proceed to judgment against them in the absence of pleading and proof that the corporate maker was "actually or notoriously insolvent."¹⁵⁵ In rejecting this contention, the court of civil appeals held that the guarantors became "primary obligors" who could be sued without the joinder of the original maker of the instruments.¹⁵⁶

D. *The Meaning of "Interest"*

According to the Texas Consumer Credit Code "interest is the compensation allowed by law for the use, or forbearance or detention of money; provided however, this term shall not include any time price differential however denominated arising out of a credit sale."¹⁵⁷ The "time price differential" aspect of the definition was considered in *International Harvester Co. v. Rotello*.¹⁵⁸ Rotello had entered into a retail installment contract for the purchase of a farm tractor. The contract on its face stated a cash price and a larger deferred payment price and denominated the difference as a finance charge at an annual rate of 15.9 percent. In rejecting the argument that the "finance charge" constituted interest, the court of civil appeals stated that the following test should be used:

[I]f the retail installment contract shows on its face that there is a cash price and a deferred payment price which are revealed to the purchaser at the time of the making of the contract, and that the finance charges are set forth as such, the amount of such finance charges will not be deemed interest, but a time-price differential paid for privilege

of usury in situations where party accommodated cannot do so), *discussed in* Dorsaneo, *Creditor's Rights, Annual Survey of Texas Law*, 31 Sw. L.J. 213, 232-34 (1977) [Hereinafter cited as Dorsaneo, 1977 *Annual Survey*]; *cf.* *Sud v. Morris*, 492 S.W.2d 335 (Tex. Civ. App.—Beaumont 1973, no writ) (allowing a suit of usury by individual who is co-maker of note with corporation).

154. 582 S.W.2d 539 (Tex. Civ. App.—Austin), *writ ref'd n.r.e. per curiam*, 588 S.W.2d 895 (Tex. 1979).

155. *See* TEX. REV. CIV. STAT. ANN. art. 1987 (Vernon 1964). *See also id.* arts. 1988, 2088; TEX. R. CIV. P. 31.

156. 582 S.W.2d at 541; *see* TEX. BUS. & COM. CODE ANN. § 3.416(a) (Vernon 1968), providing that guarantor on an instrument who places the words "payment guaranteed" or their equivalent on an instrument agrees that if the instrument is not paid when due, the guarantor will pay it without resort by the holder to any other party. Moreover, "[w]ords of guaranty which do not otherwise specify guarantee payment." *Id.* § 3.416(c). *See also* *Universal Metals & Mach., Inc. v. Bohart*, 539 S.W.2d 874 (Tex. 1976), *discussed in* Dorsaneo, 1977 *Annual Survey*, *supra* note 153, at 232-34.

In refusing the writ in *Ferguson*, the supreme court expressly disapproved of the decision of the court of civil appeals in *Cook v. Citizens Nat'l Bank*, 538 S.W.2d 460 (Tex. Civ. App.—Beaumont 1976, no writ). In *Cook* a separate "Guaranty Agreement" was apparently executed. Nonetheless *Cook* is disapproved, and the *Ferguson* per curiam opinion indicates: "We conclude that Section 3.416(a) . . . controls this case." 588 S.W.2d at 895.

157. TEX. REV. CIV. STAT. ANN. art. 5069—1.01(a) (Vernon 1971).

158. 580 S.W.2d 418 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

of purchasing goods or services to be paid for by the buyer in installments over a period of time.¹⁵⁹

In other words, if the seller offers only one price to the purchaser the contract is not a time-price contract.¹⁶⁰

A similar problem was presented in *Argonaut Insurance Co. v. ABC Steel Products Co.*¹⁶¹ ABC had agreed to sell and install certain merchandise for a contractor whose contractual undertaking was guaranteed by Argonaut. The underlying contract provided that the contractor would have a "25% cash discount for payment by 15th of month after installation."¹⁶² In the trial court Argonaut contended that the twenty-five percent discount constituted interest, but upon the submitted question the jury disagreed. On appeal, the Texarkana court of civil appeals concluded that the appellant had the burden of persuasion on the issue of whether or not the discount constituted interest and that the appellant had not introduced sufficient evidence to satisfy this burden. Moreover, the court of civil appeals implicitly concluded that the question of whether or not the trade discount constituted interest was for the jury by stating that "[u]nless such a discount is a sham or is otherwise used for fraud or collusion, it does not constitute interest."¹⁶³

The most significant case with respect to the definition of interest is *Stedman v. Georgetown Savings & Loan Association*,¹⁶⁴ decided just after the survey period, in which the Texas Supreme Court held that a pre-disbursement fee charged to a borrower constituted a bona fide commitment fee even though the lender and the borrower denominated the fee as "interest" and there was no express or implied finding by the trial court that the fee was "reasonable."¹⁶⁵ Stedman needed a permanent loan commitment in order to obtain interim construction funds to finance the construction of a place of business. After Stedman made application to the association, the association sent him a letter offering to lend \$60,000 for a period of fifteen years at ten percent interest. The letter also contained the following provisions: "1) A-0-% loan fee shall be payable in advance. . . . 8) Upon acceptance hereof the Association will set aside and escrow the

159. *Id.* at 421. See also the definitions of "time price differential" contained in the Consumer Credit Code, TEX. REV. CIV. STAT. ANN. arts. 5069—6.01(h), 5069—6A.02(M) (Vernon Supp. 1980), art. 5069—7.01(i) (Vernon 1971).

160. 580 S.W.2d at 421.

161. 582 S.W.2d 883 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.).

162. *Id.* at 885.

163. *Id.* at 888.

164. 23 Tex. Sup. Ct. J. 98 (Dec. 15, 1979).

165. See dissenting opinion of Spears, J., *id.* at 104 ("Because Mr. Stedman specifically objected and requested that the trial court make additional findings of fact and conclusions of law on the fee's reasonableness and the trial court refused, reasonableness cannot be presumed found in favor of the judgment."). It should be noted that there are several finding of fact cases that indicate that a failure to find constitutes a finding against the contention requested. See *Thompson v. Lee Roy Crawford Produce Co.*, 149 Tex. 357, 233 S.W.2d 295, 297 (1950); *Sauer v. Johnson*, 520 S.W.2d 438, 441 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.). Moreover, some of the trial court's findings could be construed as being "reasonableness" findings. See 23 Tex. Sup. Ct. J. at 101-02.

funds for the project and *interest shall begin to accrue from that date.*"¹⁶⁶ During an approximate eight-month period after his acceptance of the letter, Stedman made the "interest" payments, which were computed on a monthly basis at a ten percent per annum rate. Thereafter the \$60,000 loan was made in accordance with the terms of the letter. Ultimately, Stedman filed suit alleging that by charging ten percent interest before any funds were advanced and by continuing to charge ten percent after advancing the funds, the association had contracted for, charged, or received interest in an amount greater than ten percent. A nonjury trial was conducted after which the trial judge made findings of fact to the effect that the predisbursement fees did not constitute interest because the fee was paid by Stedman in return for a commitment to make a loan in the future and therefore was a separate and additional consideration apart from the subsequent loan. The court of civil appeals affirmed,¹⁶⁷ concluding that the opinion of the Texas Supreme Court in *Gonzales County Savings & Loan Association v. Freeman*,¹⁶⁸ was controlling. In *Gonzales* a court of civil appeals had concluded that a fee paid as compensation for allowing borrowers the opportunity to make another loan in the future constituted a "commitment fee" and that a "commitment fee" constituted interest. On appeal, the Texas Supreme Court stated that:

We disagree with that statement made by the court of civil appeals. . . . A charge which is in fact compensation for the use, forbearance or detention of money is, by definition, interest On the other hand, a fee which commits the lender to make a loan at some future date does not fall within this definition. Instead, such a fee merely purchases an option which permits the borrower to enter into the loan in the future It entitles the borrower to a distinctly separate and additional consideration apart from the lending of money. *Therefore, the lender may charge extra for this consideration without violating the usury laws.*

. . . .

Where there is a dispute in the evidence as to whether the charge is merely a device to conceal usury, a question of fact is raised for the jury For example, whether or not a charge labeled a "commitment fee" is merely a cloak to conceal usury may depend upon whether or not the fee is unreasonable¹⁶⁹

The apparent thrust of Stedman's argument in the supreme court was that the fee was "unreasonable" because the usual commitment fee was one or two percent of the principal to be advanced in the future as compared to what amounted to a 5.6 percent fee charged to Stedman in installments. The majority was not persuaded by this argument because the percentage increase represented an increase that was proportionate to the time that the

166. 23 Tex. Sup. Ct. J. at 99 (emphasis added).

167. 575 S.W.2d 415 (Tex. Civ. App.—Fort Worth 1978), *aff'd*, 23 Tex. Sup. Ct. J. 98 (Dec. 15, 1979).

168. 534 S.W.2d 903, 906 (Tex. 1976), *discussed in* Dorsaneo, *1977 Annual Survey, supra* note 153, at 237-38.

169. 534 S.W.2d at 906 (emphasis added; citations omitted).

option was outstanding.¹⁷⁰ The court went on to say the following: "In any event the reasonableness of the amount charged would not constitute usurious interest since it was consideration for a bona fide commitment fee."¹⁷¹ This somewhat puzzling sentence suggests that so long as the commitment fee is computed at a rate not higher than the highest legal rate ultimately applicable to the loan transaction, it is prima facie "bona fide." Justice Spears argues that the majority opinion permits lenders to charge greatly in excess of the legal interest rate and that a "loophole" has been created because loans are now likely to develop an automatic "commitment period" during which the lender retains the use of the money and collects interest from the borrower.¹⁷² Lenders would be well advised, however, not to interpret the majority opinion as authorizing such behavior.

In *Loomis v. Blacklands Production Credit Association*¹⁷³ the Waco court of civil appeals considered whether money paid to purchase stock in a production credit association chartered by the federal government under the regulations of the Farm Credit Act of 1971¹⁷⁴ should be considered as a front end fee constituting interest. The purchase of the stock was a prerequisite to the borrowing pursuant to the federal statutory scheme. The court of civil appeals held that the purchase was not a front end charge because the stock had an actual value equivalent to the amount paid by the borrower to the production association for it.¹⁷⁵

Finally, the nagging question of whether points charged to a seller of property to secure a loan financing the purchase of the seller's property constitute interest received no illumination during the survey period.¹⁷⁶

170. 23 Tex. Sup. Ct. J. at 100. The dissenting opinion of Justice Spears finds persuasive the argument made by Stedman that the community standard should govern on the issue of reasonableness. *Id.* at 103-08.

171. *Id.*

172. *Id.* at 109.

173. 579 S.W.2d 560 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.).

174. 12 U.S.C. §§ 2001-2259 (1976).

175. 579 S.W.2d at 563.

176. Although the collection of "seller's points" is widespread, there is no definitive Texas case law on the subject of whether they should be considered "interest." In *Goodman v. Seely*, 243 S.W.2d 858, 859-60 (Tex. Civ. App.—San Antonio 1951, writ ref'd), the seller of land agreed to pay a lender a fee of \$5,000 if the lender would make a loan to the purchaser. The court of civil appeals concluded "that the agreement to pay a bonus as found by the jury, does not constitute an agreement to pay 'interest,' and hence was not usurious." *Id.* at 860. The standard applied by the court was taken from *Corpus Juris*:

Ordinarily, a bonus given or paid by a stranger to a contract of loan or forbearance, for his own purposes or reasons sufficient to himself, to induce the making of such contract by the lender, does not affect the contract with usury, particularly where it is without the knowledge or consent of the debtor, the purpose underlying usury statutes, which is the protection of debtors against hardship and oppression, having no relevancy where the only loss or detriment is to a stranger.

Id. at 859 (quoting 66 C.J. *Usury* § 165 (1934)).

More recently, a district court made the following statement in *American Sav. & Loan Ass'n v. United States of America & King Parkway, Ltd.*, No. H-77-833 (S.D. Tex., Nov. 13, 1978) in an order denying a motion for summary judgment:

In consideration of the *Goodman* and *Gonzales* cases, the court believes that

IV. CONSUMER CREDIT

During the survey period considerable appellate activity occurred with respect to the disclosure requirements in consumer credit transactions imposed by both state and federal law. Several cases involved the application of the "one-side" rule of regulation Z¹⁷⁷ promulgated under section 128(b) of the Federal Truth in Lending Act.¹⁷⁸

In *Gray-Taylor, Inc. v. Tennessee* a consumer purchased a used automobile on credit. The purchaser executed a two-sided document entitled: "RETAIL INSTALLMENT CONTRACT-MOTOR VEHICLE & SECURITY AGREEMENT." Both sides of the document provided information concerning the nature and extent of the security interest granted and contained the wording: "NOTICE: SEE OTHER SIDE FOR IMPORTANT INFORMATION." The space for the purchaser's signature appeared on the face of the document. The court of civil appeals affirmed the trial court's holding that the contract violated regulation Z "by failing to provide a signature line following the full content of the document representing the retail installment contract."¹⁸⁰ The court's affirmance was based on a Federal Reserve Board interpretation of regulation Z¹⁸¹ concerning the location of disclosures when a contract and security agreement are combined in a single document.¹⁸² The Texas Supreme Court con-

the primary purpose of the Texas usury laws in question is protection of the borrower from excessive loss or detriment (rather than a prohibition against lenders from receipt of excessive gain or benefit regardless of the source). Therefore, the court finds that where such a loan discount is truly—albeit indirectly—paid by a borrower, the Texas Supreme Court would find such payment to be interest, such as where the debtor is obligated to reimburse the one making the payment or where the purchase price of property is increased above the market value to reflect the contemplated payment of a loan discount by the seller to induce the making of a loan to the buyer.

Id. at 4-5.

177. 12 C.F.R. § 226.8(a) (1979).

178. Truth in Lending Act, tit. 1, § 128(b), 82 Stat. 155 (1968) (codified at 15 U.S.C. § 1638(b) (1976)).

179. 587 S.W.2d 668 (Tex. 1979).

180. *Gray-Taylor, Inc. v. Tennessee*, 573 S.W.2d 859, 863 (Tex. Civ. App.—Houston [1st Dist.] 1978), *rev'd*, 587 S.W.2d 668 (Tex. 1979). The opinion of the court of civil appeals was handed down prior to the opinion of the Texas Supreme Court in *General Elec. Credit Corp. v. Smail*, 584 S.W.2d 690 (Tex. 1979). For a discussion of *Smail*, see Dorsaneo, 1979 *Annual Survey*, *supra* note 70, at 286-87. Several other courts of civil appeals confronted the same problems during the survey period. See *Chapman v. Miller*, 575 S.W.2d 581 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.). See also *Yates v. Mobile Am. Sales Corp.*, 582 S.W.2d 509 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.) (information on back of contract did not constitute "meaningful information with respect to the cost of credit").

181. Federal Reserve Board interpretations are not subject to the procedural review requirements of § 4 of the Administrative Procedure Act, 5 U.S.C. § 553(b) (1976). While the interpretations are entitled to "great deference," they do not have the same effect as regulation Z itself, which has the force and effect of federal law. 587 S.W.2d at 670 n.4.

182. 587 S.W.2d at 670-71. Regulation Z provides:

Where a creditor elects to combine disclosures with the contract, security agreement, and evidence of a transaction in a single document, the disclosures required under § 226.8 shall, in accordance with § 226.6, be made on the face of that document, on its reverse side, or on both sides: *Provided*, That the amount of the finance charge and the annual percentage rate shall appear on the face of the document, and, if the reverse side is used, the printing on both

cluded that the interpreted section, section 226.801(b), applies only to documents designed for processing by mechanical or electronic equipment.¹⁸³ Section 226.8(a),¹⁸⁴ which is a regulation and not an interpretation, provides, however, that all of the disclosures required by section 226.8(b)¹⁸⁵ must be made together on the same side of the page and above the customer's signature. Among these required disclosures is the disclosure of whether after-acquired property or future indebtedness will be covered by the security interest.¹⁸⁶ Although not all of the disclosures were made in compliance with the "one-side" rule, the Supreme Court of Texas concluded that it would not consider these alleged violations because they were being raised for the first time on appeal.¹⁸⁷

In *Smith v. Greater Houston Bank*¹⁸⁸ the consumer-debtor had executed a security agreement in favor of the bank in connection with a purchase of a boat for personal use. The debtor alleged that the agreement violated regulation Z because it did not inform the borrower that the security interest in after-acquired consumer goods was limited by law to consumer goods acquired within ten days of the date the lender gave value.¹⁸⁹ The specific section of regulation Z at issue was section 226.8(b)(5).¹⁹⁰ The trial court held that the debtor was not entitled to recover damages because the disclosure was clear and accurate and no actual damages were suffered as a result of the alleged violation.¹⁹¹ The court of civil appeals reversed, holding that failure to disclose the ten-day consumer rule constituted a truth-in-lending violation.¹⁹² The court also noted that a showing of actual damage is not required to recover the statutory penalty under the Federal Truth in Lending Act.¹⁹³

sides of the document shall be equally clear and conspicuous, both sides shall contain the statement, "NOTICE: See other side for important information," and the place for the customer's signature shall be provided following the full content of the document.

12 C.F.R. § 226.801(b) (1979) (emphasis in the original).

183. 587 S.W.2d at 670.

184. 12 C.F.R. § 226.8(a) (1979) provides in part: "All of the disclosures shall be made together on either: (1) the note or other instrument evidencing the obligation on the same side of the page and above the place for the customer's signature; or (2) one side of a separate statement which identifies the transaction."

185. 12 C.F.R. § 226.8(b) (1979).

186. 12 C.F.R. § 226.8(b)(5) (1979) provides in part:

If after-acquired property will be subject to the security interest, or if other or future indebtedness is or may be secured by any such property, this fact shall be clearly set forth in conjunction with the description or identification of the type of security interest held, retained, or acquired.

See also 15 U.S.C. § 1639(a)(8) (1976) (creditor making a consumer loan or extending consumer credit shall describe the security interest and identify the property to which it relates).

187. 587 S.W.2d at 671.

188. 580 S.W.2d 165 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

189. See TEX. BUS. & COM. CODE ANN. § 9.204(d)(2) (Tex. UCC) (Vernon 1968).

190. 12 C.F.R. § 226.8(b)(5) (1979).

191. 580 S.W.2d at 166.

192. *Id.* at 166-67; see *Garza v. Allied Fin. Co.*, 566 S.W.2d 57 (Tex. Civ. App.—Corpus Christi 1978, no writ), discussed in *Dorsaneo, 1979 Annual Survey, supra* note 70, at 287-88.

193. 580 S.W.2d at 167; see 15 U.S.C. § 1640(a) (1976) (statutory penalty is twice amount of finance charge "except that the liability under this subparagraph shall not be less than

Section 226.8(b)(5) of regulation Z was also interpreted in *Olson v. Holmes*.¹⁹⁴ In *Olson* the security agreement was a two-sided document with the remedies for default set out on the backside. The debtor contended that section 226.8(b)(5) was violated because "those remedies were necessarily a part of the description of the type of security interest taken."¹⁹⁵ A similar argument had been made successfully in *McDonald v. Savoy*.¹⁹⁶ The Austin court of civil appeals, however, did not follow the *Savoy* opinion, holding that since a listing of the creditor's rights is not required by statute or regulation, the fact that the lender unnecessarily listed his remedies on the backside of the instrument did not constitute a violation.¹⁹⁷

The applicability of regulation Z was again considered in *Sandridge v. Merritt*.¹⁹⁸ The transaction in *Sandridge* involved a written agreement to repair water damage and make improvement on a family residence for a cost-plus fifteen percent price. At trial the defendant-homeowner contended that the construction company was a creditor as defined in both the federal¹⁹⁹ and state²⁰⁰ disclosure statutes because the fifteen percent figure constituted a finance charge. The trial court rejected this contention,²⁰¹ and, on appeal, the homeowner maintained for the first time that a finance charge arose by operation of law under article 5069—1.03.²⁰² Because the argument was not raised in the trial court, the Amarillo court of civil appeals refused to consider it.²⁰³

In *Tom Benson Chevway Rental & Leasing, Inc. v. Allen*²⁰⁴ the transaction involved a "Motor Vehicle Lease" and a "Finance Lease Addendum." Under these documents the "lessee" was obligated to make thirty-six monthly installments of \$150 each, and at the end of the three year period buyer-appellee could purchase the property leased for one dollar. Tom

\$100 nor greater than \$1,000" plus court costs and reasonable attorney's fees). See also *Chapman v. Miller*, 575 S.W.2d 581, 585 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.).

194. 571 S.W.2d 211 (Tex. Civ. App.—Austin 1978), writ ref'd n.r.e. per curiam, 587 S.W.2d 678 (Tex. 1979).

195. 571 S.W.2d at 213.

196. 501 S.W.2d 400 (Tex. Civ. App.—San Antonio 1973, no writ) ("mere recital that 'a security interest' is being retained falls short of satisfying the requirement that the security interest be described").

197. 571 S.W.2d at 213; see *Grant v. Imperial Motors*, 539 F.2d 506 (5th Cir. 1976); *Yates v. Mobile Am. Sales Corp.*, 582 S.W.2d 509 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.); *Hight v. Jim Bass Ford, Inc.*, 552 S.W.2d 490 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.).

198. 581 S.W.2d 247 (Tex. Civ. App.—Amarillo 1979, no writ).

199. 15 U.S.C. § 1602(f) (1976); see 12 C.F.R. § 226.2(s) (1979).

200. 1975 Tex. Gen. Laws, ch. 184, § 1, at 421 (formerly TEX. REV. CIV. STAT. ANN. art. 5069—14.01(6)).

201. 581 S.W.2d at 249. The evidence established that the 15% addition represented other expenses and profits. *Id.*

202. 1967 Tex. Gen. Laws, ch. 274, § 2, at 609 provides: "When no specified rate of interest is agreed upon the parties, interest at the rate of six percent per annum shall be allowed on all written contracts ascertaining the sum payable, from and after the time when the sum is due and payable." 581 S.W.2d at 249.

203. *Id.*

204. 571 S.W.2d 346 (Tex. Civ. App.—El Paso 1978), cert. denied, 99 S. Ct. 2861, 61 L. Ed. 2d 298 (1979).

Benson contended that the transaction constituted a lease and that the Truth-in-Lending Act was therefore inapplicable.²⁰⁵ The court of civil appeals rejected this argument, holding that the transaction was a credit sale within the meaning of section 226.2(t) of regulation Z.²⁰⁶

Several legislative amendments to subtitle two (Consumer Credit)²⁰⁷ of the Texas Consumer Credit Code were made by the Sixty-sixth Legislature during the survey period. The most significant amendments are outlined below.

In an apparent effort to simplify the disclosure requirements in consumer credit transactions, the Texas Legislature (a) eliminated many of the specific credit disclosures from chapter 3 (Regulated Loans),²⁰⁸ chapter 4 (Installment Loans),²⁰⁹ chapter 5 (Secondary Mortgage Loans),²¹⁰ chapter 6 (Retail Installment Sales),²¹¹ and chapter 7 (Motor Vehicle Installment Sales),²¹² and (b) repealed chapter 14 (Alternative Disclosure Requirements).²¹³ In addition, two new chapters were added to subtitle two. Chapter 6A, Manufactured Homes,²¹⁴ provides for rates of interest and disclosure requirements in connection with the financing of mobile and modular homes. Chapter 15, Revolving Loan and Revolving Triparty Accounty,²¹⁵ provides for an open line of credit directly from a bank, such as the American Express Gold Card System. Chapter 15 also enables the use of an open line of credit through purchase of a credit card from a third party participant with interest determined by specified rates keyed to an average daily account balance. Finally, the penalty provisions of chapter 8²¹⁶ were amended by adding specific provisions concerning class action litigation similar to those found in the Federal Truth in Lending Act.²¹⁷ Under the Texas statute, class members may recover actual damages proximately caused by the violation.²¹⁸ In addition, the court may assess a penalty in favor of each obligor who is named as a class representative equal to the amount that could be recovered by such person under chapter

205. 571 S.W.2d at 348.

206. *Id.* at 348. 12 C.F.R. § 226.2(t) (1979) provides:

"Credit sale" means any sale with respect to which consumer credit is extended or arranged by the seller. The term includes any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or for a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract.

207. TEX. REV. CIV. STAT. ANN. arts. 5069—2.01 to —8.06 (Vernon 1971 & Supp. 1980).

208. *See id.* arts. 5069—3.19, .20(4) (Vernon Supp. 1980).

209. *See id.* arts. 5069—4.03, .04(4).

210. *See id.* arts. 5069—5.04, .05(3).

211. *See id.* arts. 5069—6.02, .03.

212. *See id.* art. 5069—7.02.

213. 1975 Tex. Gen. Laws, ch. 184, § 1, at 421.

214. TEX. REV. CIV. STAT. ANN. art. 5069—6A (Vernon Supp. 1980).

215. *Id.* art. 5069—15.

216. 1979 Tex. Gen. Laws, ch. 672, § 50, at 1594.

217. 15 U.S.C. § 1640 (1976).

218. TEX. REV. CIV. STAT. ANN. art. 5069—8.04(b) (Vernon Supp. 1980).

8 of the Consumer Credit Code.²¹⁹ The court may also allow other members of the class to recover a penalty, apparently in an amount within the court's discretion and without a required minimum.²²⁰ The statute provides, however, an overall limitation on the total recovery in any class action or series of class actions arising out of the same noncompliance by the same defendant. The total recovery in those cases cannot exceed the lesser of \$100,000 or five percent of the net worth of the defendant.²²¹ A provision for awarding the successful litigant costs of court and attorney's fees is also included.²²² In summary, the Texas Legislature eliminated certain disclosure requirements, repealed chapter 14, added two new chapters, and amended the penalty provisions of chapter 8. Consumer transactions are, however, still subject to the disclosure requirements imposed by federal law.²²³

V. DECEPTIVE TRADE PRACTICES ACT

The Sixty-sixth Legislature made the following amendments to the Texas Deceptive Trade Practices—Consumer Protection Act.²²⁴

1. Section 17.43²²⁵ as amended states that no recovery of both actual damages and penalties for the same act is permitted under both the DTPA and another law. Moreover, provisions were added to the effect that violations of other laws are not ipso facto violations of the Act. A violation of "another law" gives rise to a cause of action under the Act only if the other law so provides or if the conduct is proscribed by the Act.

2. Under section 17.50, whether the conduct of the defendant was committed knowingly will have a bearing on an award of treble damages. Consequently, the definition of knowingly in section 17.45(9) was amended to provide that:

'Knowingly' means actual awareness of the falsity, deception, or unfairness of the act or practice giving rise to the consumer's claim or, in an action brought under subdivision (2) of subsection (a) of Section 17.50, actual awareness of the act or practice constituting the breach of warranty, but actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.²²⁶

3. Section 17.46²²⁷ declares deceptive trade practices to be unlawful and sets forth a laundry list of violations. This section has been amended in several significant respects. Most importantly, for purposes of consumer

219. *Id.* art. 5069—8.04(b)(i).

220. *Id.* art. 5069—8.04(b)(ii).

221. *Id.*

222. *Id.* art. 5069—8.04(b)(iii).

223. 15 U.S.C. §§ 1601-1665 (1976). *See also* 12 C.F.R. § 226.8 (1977).

224. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1980). The amendments became effective Aug. 27, 1979.

225. *Id.* § 17.43.

226. *Id.* § 17.45(9).

227. *Id.* § 17.46.

actions brought pursuant to section 17.50(a)(1),²²⁸ the term "false, misleading, or deceptive acts or practices" is limited to the laundry list enumerated in specific subdivisions of section 17.46(b).²²⁹ Although the consumer protection division of the attorney general's office may take action against deceptive practices not included in the laundry list,²³⁰ consumers alleging a deceptive practice must bring their claim within one or more of the items in the list.

A similar change was made to section 17.46(d).²³¹ For purposes of consumer actions brought under the Act, 17.46(d) also limits the term "false, misleading, or deceptive acts or practices" to the violations set forth in the laundry list. In this connection, section 17.46(c)(2)²³² was also amended to provide that in construing the Act "the Court shall not be prohibited from considering relevant and pertinent decisions of courts in other jurisdictions."²³³

Section 17.46(b)(22)²³⁴ prohibits distant forum abuse by including in its list of deceptive practices suits based on a written obligation to pay money arising out of a consumer transaction in a county other than the county in which the defendant resides or in which the defendant signed the contract. Prevention of distant forum abuse has been furthered by the deletion of the following two exceptions: "it is not a violation of this subsection where the defendant resides in a county having a population of less than 250,000 and the suit was filed in the nearest county having a population of 250,000 or more" and provided further that a violation of this Act shall not occur by the joinder of multiple parties to an obligation where venue is otherwise proper as to the primary obligor or to any joint obligor.²³⁵

Finally, a new item has been added to the laundry list: Section 17.46(b)(23) provides that the failure to disclose information concerning goods or services that was known at the time of the transaction constitutes a false, misleading, or deceptive act or practice "if such failure to disclose was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed."²³⁶

4. Section 17.50, Relief for Consumers,²³⁷ has been the subject of major modification. First, the section now provides that a consumer may maintain an action when the use or employment by any person of a false, misleading, or deceptive act or practice that is specifically enumerated in section 17.46(b) constitutes a *producing cause* of actual damages. The

228. *Id.* § 17.50(a)(1) (consumer may maintain action for damages caused by act or practice enumerated in section 17.46(b)).

229. *Id.* § 17.46(b).

230. *Id.* § 17.46(a).

231. *Id.* § 17.46(d).

232. *Id.* § 17.46(c)(2).

233. The provision in § 17.46(a) concerning the interpretations of section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C.A. § 45 (Supp. 1979) was deleted apparently because consumers are limited to actions based on specific laundry list violations.

234. TEX. BUS. & COM. CODE ANN. § 17.46(b)(22) (Vernon Supp. 1980).

235. 1977 Tex. Gen. Laws, ch. 336, § 1, at 892.

236. TEX. BUS. & COM. CODE ANN. § 17.46(b)(23) (Vernon Supp. 1980).

237. *Id.* § 17.50.

words "a producing cause of actual damages" also apply to consumer actions alleging breach of warranty, unconscionable action, or violation of article 21.21 of the Texas Insurance Code.²³⁸ Secondly, the 1979 amendments to section 17.50 significantly alter the provisions concerning calculation of damages. Previously, a consumer who prevailed in a suit under the Act could recover three times the amount of actual damages.²³⁹ As amended, the section provides that a consumer who prevails may obtain "the amount of actual damages found by the trier of fact. In addition, the court shall award two times that portion of the actual damages that does not exceed \$1,000. If the trier of fact finds that the conduct of the defendant was committed knowingly, the trier of fact may award not more than three times the amount of actual damages in excess of \$1,000."²⁴⁰

Although the quoted language is cumbersome, it appears that the successful consumer is always entitled to actual damages plus a penalty of either two times the damages or \$2,000, whichever is less. An additional penalty award is discretionary with the trier of fact and dependent upon a finding that the conduct of the defendant was committed knowingly. The additional penalty award, however, can in no event exceed three times that portion of the amount of actual damages that is in excess of \$1,000. To illustrate, if it is assumed that the plaintiff sustains actual damages of \$10,000 and the jury finds that the defendant's conduct was committed knowingly, the plaintiff is entitled to judgment for (1) actual damages of \$10,000; (2) an award from the court of \$2,000; and (3) an additional amount, in the discretion of the trier of fact, of no more than \$27,000 (three times \$9,000, the actual damages in excess of \$1,000). Accordingly, the possibility exists that the plaintiff may recover \$39,000, almost four times the actual damages due to the defendant's actual awareness of the falsity, deception, or unfairness of the conduct giving rise to the claim.

Newly added section 17.50(d) provides that "[e]ach consumer who prevails shall be awarded court costs and reasonable and necessary attorneys' fees."²⁴¹ More significantly, by moving the costs and attorneys' fees provision from section 17.50(b) (1) to a new section 17.50(d) and by stating that each consumer who prevails *shall* be awarded costs and attorneys' fees, the legislature has indicated that the provision applies to all forms of relief obtainable by virtue of section 17.50(b) (1)-(4).²⁴² Finally, the provisions of section 17.50(c) were amended to provide that a defendant may recover reasonable and necessary attorneys' fees and court costs if an ac-

238. TEX. INS. CODE ANN. art. 21.21 (Vernon Supp. 1980).

239. The treble damage award was mandatory. *Woods v. Littleton*, 554 S.W.2d 662, 668-72 (Tex. 1977), discussed in Dorsaneo, 1978 *Annual Survey*, *supra* note 22 at 265.

240. TEX. BUS. & COM. CODE ANN. § 17.50 (Vernon Supp. 1980).

241. *Id.* § 17.50(d). The change in the statutory language from "attorneys' fees reasonable in relation to the amount of work expended" to "reasonable and necessary attorneys' fees" may reflect a move toward uniformity in statutory provisions concerning attorneys' fees. See TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1980).

242. See *Cordrey v. Armstrong*, 553 S.W.2d 798, 799 (Tex. Civ. App.—Beaumont 1977, no writ) (holding that consumer must be awarded some relief other than costs and attorney's fees in order to prevail).

tion is groundless and brought in bad faith, or if an action is brought for the purpose of harassment.²⁴³

5. Section 17.56,²⁴⁴ dealing with venue, has also been amended. The fact that the defendant has done business in the past in a particular county is no longer, by itself, a basis for establishing venue in that county. For causes of action arising after August 27, 1979, a claim to relief under section 17.50 may be commenced in the county in which the person against whom the suit is brought (a) resides, (b) has his principal place of business, (c) has a fixed and established place of business at the time the suit is brought, (d) in the county in which the alleged act or practice occurred, or (e) in a county in which the defendant or an authorized agent of the defendant solicited the transaction made the subject of the action at bar.

6. Section 17.50A²⁴⁵ has been added to the Act. The section involves the giving of notice of a claim and offers of settlement. As a prerequisite to filing a suit for damages against any person under section 17.50(b) (1) a consumer is required to give written notice to the person at least thirty days before filing.²⁴⁶ The notice must advise the person of the consumer's specific complaint and the amount of actual damages and expenses, including attorneys' fees, if any, reasonably incurred by the consumer in asserting the claim against the defendant.²⁴⁷ If the giving of thirty days' written notice is rendered impracticable by reason of the necessity of filing suit in order to prevent the expiration of the statute of limitations or if the consumer's claim is asserted by way of counterclaim, the notice is not required. The tender provided for by sections 17.50A(c)²⁴⁸ and 17.50B(d)²⁴⁹ may, however, be made within thirty days after the filing of the suit or counterclaim.²⁵⁰ Any offer of settlement not accepted within thirty days of receipt by the consumer is deemed to have been rejected by the consumer.²⁵¹

Furthermore, a settlement offer made in compliance with section 17.50A(c), if rejected by the consumer, may be filed with the court together with an affidavit certifying its rejection.

If the court finds that the amount tendered in the settlement offer is the same or substantially the same as the actual damages found by the trier of fact, the consumer may not recover an amount in excess of the amount tendered in the settlement offer or the amount of actual damages found by the trier of fact, whichever is less.²⁵²

Finally, section 17.50A(e)²⁵³ provides that tendering an offer of settlement

243. TEX. BUS. & COM. CODE ANN. § 17.50(c) (Vernon Supp. 1980).

244. *Id.* § 17.56.

245. *Id.* § 17.50A.

246. *Id.* § 17.50A(a).

247. *Id.*

248. *Id.* § 17.50A(c).

249. *Id.* § 17.50B(d).

250. *Id.* § 17.50A(b).

251. *Id.* § 17.50A(c).

252. *Id.* § 17.50A(d).

253. *Id.* § 17.50A(e).

does not constitute an admission of liability under the Act. Evidence of a settlement offer may be introduced only to determine the reasonableness of the settlement offer and may not be used to prove that defendant was engaged in a deceptive trade practice.²⁵⁴

7. A new section, 17.50B,²⁵⁵ detailing defenses available under the Act has also been added. In an action brought by a consumer under section 17.50, the defendant may avoid liability for any damages or attorneys' fees by proving that, before consummation of the transaction, he or she gave reasonable and timely written notice to the plaintiff that the defendant relied on written information relating to the particular goods or service in question obtained from official government records or another source, or written information concerning a test required or prescribed by a government agency, if the written information was false or inaccurate and the defendant did not know and could not reasonably have known of the falsity or inaccuracy of the information.²⁵⁶ In asserting a defense under section 17.50B(a), the defendant is required to prove that the *written information* was a producing cause of the alleged damage. A finding of one producing cause does not bar recovery if other conduct of the defendant, not the subject of a defensive finding under section 17.50B(a), was a producing cause of damages of the plaintiff.²⁵⁷

In a suit in which a defense is asserted under section 17.50B(a)(2), which involves the defendant's reliance on written information relating to the particular goods or service in question obtained from a source other than official government records, suit may be asserted against the third party supplying the written information without regard to privity when the third party knew or should have reasonably foreseen that the information would be provided to a consumer.²⁵⁸ This provision makes the DTPA available to a plaintiff in a situation involving a manufacturer's written warranty or other written information provided by a manufacturer or other supplier of goods. The seller with whom the plaintiff dealt may assert the "passing along" defense, but the plaintiff may look to the source of the written information for recovery. The Act specifically prohibits a double recovery.²⁵⁹

Finally, section 17.50B(d) has replaced the old section 17.50A(2),²⁶⁰ which limited a consumer's recovery to actual damages and attorney's fees in cases where the consumer rejected defendant's tender of either the cash value of consideration received from the consumer or the cash value of the benefit promised, whichever is greater. Reimbursement for reasonable expenses and attorney's fees was also available under section 17.50A(2). Section 17.50B(d) goes beyond the old limitation on liability in consumer

254. *Id.*

255. *Id.* § 17.50B.

256. *Id.* § 17.50B(a).

257. *Id.* § 17.50B(b).

258. *Id.* § 17.50B(c).

259. *Id.*

260. 1977 Tex. Gen. Laws, ch. 216, § 6, at 604.

actions. The section provides a defense to a cause of action if the defendant proves that he received notice from the consumer advising of the nature of the consumer's specific complaint and of the amount of actual damages and expenses incurred in asserting the claim, and within thirty days after receiving the notice the defendant tenders to the consumer the amount of actual damages claimed and the expenses incurred.²⁶¹ The operation of this provision is tied to the new section 17.05A.²⁶²

8. A statute of limitations has been added to the Act.²⁶³ For causes of action arising after August 27, 1979, all actions brought under the DTPA must be commenced within two years after the date on which the false, misleading, or deceptive act or practice occurred or within two years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice. This period of limitation may be extended for a period of 180 days if the plaintiff proves that failure timely to commence the action was caused by the defendant's knowingly engaging in conduct solely calculated to induce the plaintiff to refrain from or postpone the commencement of the action.

Several case law developments interpreting the provisions of the Deceptive Trade Practices Act occurred during the survey period. In *Valley Datsun v. Martinez*²⁶⁴ the buyer of a used Volkswagen camper brought suit against the seller to recover damages for a burned-out clutch and thrown rod. The buyer-plaintiff alleged that a salesman working for the defendant had represented to him that the camper was in good mechanical condition. The jury found that the salesman made the representation, that it was untrue, and that it was a producing cause of an adverse effect. Moreover, the jury determined that the defendant automobile dealer's conduct was grossly unfair and that such conduct was a producing cause of an adverse effect. Accordingly, the buyer was awarded treble damages and reasonable attorney's fees. On appeal, defendant contended that his conduct did not constitute a deceptive trade practice and that the awards of treble damages and attorney's fees was therefore erroneous. Defendant also contended that the liability issues should not have been submitted because they were not supported by the pleadings or the evidence. The appellate court concluded that there was not a pleading to support the submission of issues on the suitability of the vehicle, but that the other issues were supported by the pleadings.²⁶⁵ The appellate court also concluded that although the deal may have been unfair to plaintiff, there was no evidence that it was grossly unfair. Most importantly, the court of appeals found no evidence of a wrongful intent to take advantage of plaintiff.²⁶⁶ Hence,

261. TEX. BUS. & COM. CODE ANN. § 17.50B(d) (Vernon Supp. 1980).

262. *Id.* § 17.50A; see notes 243-51 *supra* and accompanying text.

263. TEX. BUS. & COM. CODE ANN. § 17.56A (Vernon Supp. 1980).

264. 578 S.W.2d 485 (Tex. Civ. App.—Corpus Christi 1979, no writ).

265. *Id.* at 488.

266. See *Singleton v. Pennington*, 568 S.W.2d 367, 382 (Tex. Civ. App.—Dallas 1977, no writ), discussed in Dorsaneo, 1979 *Annual Survey*, *supra* note 70, at 292-94.

plaintiff's special issues based on unconscionability²⁶⁷ were not supported by the evidence. Finally, the appellate court concluded that plaintiff had pleaded a cause of action for breach of an express or implied warranty.²⁶⁸ Since the camper was used, the court of civil appeals concluded that plaintiff could not rely upon an implied warranty of merchantability.²⁶⁹ The representation by the salesman was, however, held to be an express warranty that had been breached. Thus the award of treble damages and attorney's fees was appropriate.²⁷⁰

A breach of warranty theory was also asserted in *Southwest Lincoln-Mercury, Inc. v. Ross*.²⁷¹ The plaintiff, Ross, took his automobile to the defendant for repairs after an automobile accident. When the repair work proved to be unsatisfactory, Ross filed suit and alleged a breach of warranty. The court of civil appeals held that there was no evidence that Ross had given notice of the breach as required by section 2.607(c)(1) of the Texas Business and Commerce Code.²⁷² Hence, plaintiff could not recover for breach of warranty.²⁷³

In *Freeman Oldsmobile Mazda Co. v. Pinson*²⁷⁴ the remedy of rescission was considered in relation to the warranty defects of a new automobile. The trial record established that the defects could be repaired for less than \$100. The court of civil appeals held that because the defect did not substantially impair the value of the automobile, the buyer could not revoke his acceptance²⁷⁵ and secure return of the purchase price.²⁷⁶

A consumer's ability to recover damages for mental anguish in the absence of physical injury was rejected by the Beaumont court of civil appeals in *Dennis Weaver Chevrolet, Inc. v. Chadwick*.²⁷⁷ Although the court of civil appeals noted that mental anguish was mentioned in *Woods v. Lit-*

267. See TEX. BUS. & COM. CODE ANN. § 17.50(a)(3) (Vernon Supp. 1980).

268. 578 S.W.2d at 489-90.

269. *Id.* at 489 (citing *Chaq Oil Co. v. Gardner Mach. Corp.*, 500 S.W.2d 877 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ) (implied warranty does not attach when buyer knows goods are used)).

270. 578 S.W.2d at 490.

271. 580 S.W.2d 2 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

272. TEX. BUS. & COM. CODE ANN. § 2.607(c)(1) (Tex. UCC) (Vernon 1968) provides that: "Where a tender has been accepted . . . the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of the breach or be barred from any remedy." See also *Import Motors, Inc. v. Matthews*, 557 S.W.2d 807 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.) (purchaser of automobile denied recovery for breach of warranty because of failure to notify dealer of the defect.).

273. Plaintiff also alleged that defendant's conduct was unconscionable under TEX. BUS. & COM. CODE ANN. § 17.50(a)(3) (Vernon Supp. 1980). This argument was rejected by the court of appeals, which held that there was insufficient evidence to support such a finding. 580 S.W.2d at 5. See also TEX. BUS. & COM. CODE ANN. § 17.45(5) (Vernon Supp. 1980) (statutory definition).

274. 580 S.W.2d 112 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.)

275. See TEX. BUS. & COM. CODE ANN. § 2.608 (Tex. UCC) (Vernon 1968). See also *id.* § 2.612 (rejection of goods in installment contracts).

276. 580 S.W.2d at 114.

277. 575 S.W.2d 619 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.); see *National Van Lines, Inc. v. Lifshen*, 584 S.W.2d 298, 301 (Tex. Civ. App.—Dallas 1979, no writ) (damages for mental suffering cannot be recovered under the Deceptive Trade Practices Act unless the wrongful action that caused the suffering was willful). See also *American Trans-*

leton,²⁷⁸ the court concluded that this reference to mental anguish did not amount to the adoption of a new tort.²⁷⁹

In *O'Shea v. International Business Machines Corp.*²⁸⁰ IBM sued to recover the contract price of a typewriter. The buyer filed a counterclaim asserting that IBM failed to comply with the DTPA by engaging in unconscionable action.²⁸¹ The jury found that the counterclaim was groundless and brought in bad faith for the purpose of harassment. On appeal, the buyer contended that, under the express terms of the DTPA the issue of the validity of the counterclaim should not have been submitted to the jury.²⁸² The court of civil appeals disagreed, however, stating that "If the evidence fails to raise jury issues . . . the suit would be 'groundless' as a matter of law. However, whether the suit is brought in 'bad faith' or 'for the purpose of harassment' would in the usual case present a jury issue."²⁸³

Finally, in *Compu-Center, Inc. v. Compubill, Inc.*²⁸⁴ the court of civil appeals concluded that for actions instituted on or after May 23, 1977, proof of a cause of action is not required by section 17.56.

fer & Storage Co. v. Brown, 584 S.W.2d 284 (Tex. Civ. App.—Dallas 1979, writ granted) (holding that damages for mental distress are not recoverable under the DTPA).

278. 554 S.W.2d 662, 672 (Tex. 1977), discussed in Dorsaneo, 1978 Annual Survey, *supra* note 22, at 264-65.

279. 575 S.W.2d at 622.

280. 578 S.W.2d 844 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ *ref'd n.r.e.*).

281. See TEX. BUS. & COM. CODE ANN. § 17.50(a)(3) (Vernon Supp. 1980).

282. See *id.* § 17.50(c) (Vernon Supp. 1980) ("On a finding by the court that an action under this section was groundless . . . the court shall award . . . fees and . . . costs." (Emphasis added.)).

283. 578 S.W.2d at 848. Other interpretive holdings by the court of civil appeals on the construction of section 17.50(c) have been superseded by the statutory amendments discussed above.

284. 580 S.W.2d 88 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ). See also Temple News Agency v. Want Ads, 573 S.W.2d 269 (Tex. Civ. App.—Waco 1978, no writ).

