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COMMERCIAL TRANSACTIONS

by
John Krahmer*

SINCE the enactment of the Uniform Commercial Code in Texas in 1966,¹ the courts have gradually become more familiar with and more sophisticated in their treatment of this complex body of commercial law.² The cases reported during the current survey period are no exception to this general observation and, along with a number of the expected, routine commercial problems, several difficult and well-handled commercial law cases have been decided. Of particular note during the last year are those cases that involve the interaction of the Code with other bodies of law, including tort law,³ the Texas Deceptive Trade Practices—Consumer Protection Act (DTPA),⁴ and statutory lien creditor remedies.⁵

While there was no state legislation during the last year, enactment of the Federal Depository Institutions Deregulation and Monetary Control Act of 1980⁶ will have a rapid and significant impact on the banking and secured transactions aspects of the commercial law field. Some particular features of this legislation are discussed later in this Article.⁷ There were a few publications during the survey period that might be of interest to those working in the commercial law area, and these have been collected in the accompanying footnote.⁸ As has become traditional with the Commercial

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1. The Uniform Commercial Code first became effective in Texas on July 1, 1966. 1965 Tex. Gen. Laws, ch. 721, §§ 1—101-10—105, at 1-316. In 1967 it became part of the Texas Business and Commerce Code. 1967 Tex. Gen. Laws, ch. 785, §§ 1-6, at 2343-2782. As amended, the Texas version of the Uniform Commercial Code now conforms closely to the 1972 official text. In this Article all references are to the Uniform Commercial Code as enacted in chapters one through eleven of the Texas Business and Commerce Code [hereinafter referred to as the Code]. TEX. BUS. & COM. CODE ANN. §§ 1.101-11.108 (Tex. UCC) (Vernon 1968 & Supp. 1980-1981).

2. This same point was previously noted in Winship, *Commercial Transactions, Annual Survey of Texas Law*, 33 Sw. L.J. 203 (1979).

3. See text accompanying notes 42-59 *infra*.

4. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1980-1981); see text accompanying notes 232-45 *infra*.

5. See text accompanying notes 269-78 *infra*.

6. Pub. L. No. 96-221, §§ 101-902, 94 Stat. 132-93 (to be codified in scattered sections of 12, 15, 22 U.S.C.).

7. See text accompanying notes 246-57 *infra*.

8. B. CLARK, *THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE* (1980); Bankruptcy Reporter (West 1980) (a specialized reporter collecting cases under the Bankruptcy Reform Act of 1978). The publication of a textual treatment on Texas commercial law is planned for 1981 by the State Bar of Texas under the title CREDITORS' RIGHTS IN TEXAS (2d ed.). The Texas Association of Bank Counsel now has available a series of continuing legal education materials and newsletters for members.

Transactions portion of the *Annual Survey*, the case discussion that follows has been organized generally to reflect the topical order of the Code.

I. GENERAL PROVISIONS
(CHAPTER 1)

A. *Choice of Law*

Choice of Law by Agreement. In *Walker v. Associates Financial Services Corp.*⁹ a Texas resident borrowed money by mail from an Indiana lender. The only office of the lender was located in that jurisdiction. The loan documents specified that the transaction was to be governed by Indiana law, and there was no claim of fraud or subterfuge about the choice of law specified in the note and loan agreement. After default, the borrower sued the loan company, contending that the transaction violated the Texas installment loan statutes¹⁰ and the Texas DTPA.¹¹ The trial court noted that Indiana law was applicable to the case and that no violation of Indiana law had occurred.¹² On appeal the court held that under both pre-Code Texas contract law and under section 1.105(a) of the Code,¹³ the parties to a transaction that had a reasonable relationship to more than one state could agree on a choice of law to govern the transaction.¹⁴ Because the choice had been fairly made without fraud, and because there was no violation of Indiana law, the court affirmed the judgment of the trial court.¹⁵ This case is consistent with prior applications of the general choice of law rules of section 1.105 in Texas¹⁶ and elsewhere.¹⁷

B. *Security Interest or Lease*

Security or Lease as a Question of Fact. A recurrent question in the law of commercial transactions has been whether an agreement that purports to be a lease is actually intended for security under section 1.201(37) of the Code.¹⁸ In *Federal Sign & Signal Corp. v. Berry*¹⁹ the Austin court of civil appeals affirmed the judgment of the trial court that an alleged lease was

9. 588 S.W.2d 416 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.).

10. 1967 Tex. Gen. Laws, ch. 274, §§ 4.01-.04, at 627-32. The current version, not applicable to this dispute, is TEX. REV. CIV. STAT. ANN. arts. 5069—4.01-.04 (Vernon Supp. 1980-1981).

11. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1980-1981).

12. 588 S.W.2d at 418.

13. TEX. BUS. & COM. CODE ANN. § 1.105(a) (Tex. UCC) (Vernon Supp. 1980-1981).

14. 588 S.W.2d at 417-18.

15. *Id.* at 418.

16. *Hi Fashion Wigs Profit Sharing Trust v. Hamilton Inv. Trust*, 579 S.W.2d 300 (Tex. Civ. App.—Eastland 1979, no writ).

17. *See, e.g., National Equip. Rental, Ltd. v. Taylor*, 225 Kan. 58, 587 P.2d 870 (1978) (applying New York law to a transaction involving a New York creditor and a Kansas debtor); *Exchange Bank & Trust Co. v. Tamerius*, 200 Neb. 807, 265 N.W.2d 847 (1978) (applying Texas law to a transaction involving a Texas lender and a Nebraska borrower).

18. TEX. BUS. & COM. CODE ANN. § 1.201(37) (Tex. UCC) (Vernon Supp. 1980-1981). The numerous cases are conveniently collected in 1 UNIFORM COMMERCIAL CODE: CASE DIGEST ¶ 1201.37(7) (Callaghan 1978 & Supp. 1980).

19. 601 S.W.2d 137 (Tex. Civ. App.—Austin 1980, no writ).

actually intended for security, and that a failure to file a financing statement left the secured party with an unperfected security interest that was subordinate to the competing claim of a judgment lien creditor.²⁰ The following quotation from the opinion is a good summary of current Texas law on the "security or lease" question:

Should the lease provide that upon compliance with its terms the lessee becomes owner of the property by the payment of a "nominal" consideration, the determination whether the lease was one intended for security is usually a question of fact. . . .

. . . [T]wo "tests" [have been] employed by courts to determine whether consideration paid to exercise the option is "nominal." Those "tests" require one to:

- (1) compare the consideration with the market value of the equipment at the time the option is to be exercised; or
- (2) ascertain whether the terms of the option are such so as to leave the lessee with no sensible alternative but to exercise the option.²¹

Under both tests, the court believed that the lease was one intended for security.²²

One last point to be emphasized about *Federal Sign & Signal* is that the secured party should have taken advantage of section 9.408,²³ which allows a permissive filing of a financing statement covering leased goods. Such a filing would have operated to perfect the security interest when the court made its determination that the transaction was really a security device and not a lease.

C. Accord and Satisfaction

Accord and Satisfaction by Acceptance of a Check. Transaction planning is an important part of commercial law, as *Federal Sign & Signal* demonstrates. *Roylex, Inc. v. S & B Engineers, Inc.*²⁴ stands for the same proposi-

20. *Id.* at 139-40.

21. *Id.* at 140. The tests described by the court are set forth in *Tackett v. Mid-Continent Refrigerator Co.*, 579 S.W.2d 545 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.), and *Davis Bros. v. Misco Leasing, Inc.*, 508 S.W.2d 908 (Tex. Civ. App.—Amarillo 1974, no writ). In *Brokers Leasing Corp. v. Standard Pipeline Coating Co.*, 602 S.W.2d 278, 281 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.), the court utilized the first test quoted in *Federal Sign & Signal* to determine that a lease was a true lease and not a conditional sales contract under § 1.201(37).

22. 601 S.W.2d at 140.

23. TEX. BUS. & COM. CODE ANN. § 9.408 (Tex. UCC) (Vernon Supp. 1980-1981). The section provides:

A consignor or lessor of goods may file a financing statement using the terms "consignor," "consignee," "lessor," "lessee" or the like instead of the terms specified in Section 9.402. The provisions of this subchapter shall apply as appropriate to such a financing statement but its filing shall not of itself be a factor in determining whether or not the consignment or lease is intended as security (Section 1.201(37)). However, if it is determined for other reasons that the consignment or lease is so intended, a security interest of the consignor or lessor which attaches to the consigned or lease goods is perfected by such filing.

24. 592 S.W.2d 59 (Tex. Civ. App.—Texarkana 1979, no writ).

tion but arises in a different form and thus should briefly be noted because the decision in that case could be mischievous. In *Roylex* a debtor tendered a check to a creditor in payment of a disputed sum. The check was clearly marked as being in full payment of the disputed debt. The creditor did not indorse the check but exchanged it for a cashier's check. The proceeds of the cashier's check were then deposited in the creditor's bank account. In a suit by the creditor to recover a further amount on the disputed debt, the debtor raised an accord and satisfaction as a defense based upon the previously accepted check. Relying on pre-Code law, the court held that the accord and satisfaction was effective.²⁵ The potentially mischievous part of the opinion is the court's statement that "[w]hen Roylex received this check it was given the choice, either to accept the check as full payment of the debt, or to return same, unaccepted, and sue S & B for its full claim."²⁶ In light of section 1.207,²⁷ which allows an assent to performance with an explicit reservation of rights, the language of the court is far too broad and ignores a third choice that Roylex could have exercised, *i.e.*, acceptance of the check under protest. This third choice that the Code affords may be a valuable option to others who find themselves in the position of Roylex. The matter has not yet been litigated in Texas, but collateral reading is cited below for further information regarding the means by which this third choice might be exercised.²⁸

II. SALES TRANSACTIONS (CHAPTER 2)

A. *Formation of Sales Contracts*

Open Terms. The common law of contracts was uneasy about transactions that left open certain terms that parties would normally agree upon, particularly open price terms.²⁹ The Code has resolved this uneasiness by allowing parties to form contracts even though the price term is not settled.³⁰ In an opinion that carefully follows the Code rules on open terms, the court in *Alamo Clay Products, Inc. v. Gunn Tile Co.*³¹ concluded that a valid contract of sale was formed by telephone conversations followed by a written confirmation even though terms regarding price, place of delivery, and time of delivery were left open.³² In each instance the Code provides a gap-filling term to meet the basic contract formation provisions of section 2.204.³³

25. *Id.* at 60.

26. *Id.*

27. TEX. BUS. & COM. CODE ANN. § 1.207 (Tex. UCC) (Vernon 1968).

28. See J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 13-21 (2d ed. 1980).

29. Prosser, *Open Price in Contracts for the Sale of Goods*, 16 MINN. L. REV. 733 (1932).

30. TEX. BUS. & COM. CODE ANN. § 2.305 (Tex. UCC) (Vernon 1968).

31. 597 S.W.2d 388 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.).

32. *Id.* at 391-92.

33. TEX. BUS. & COM. CODE ANN. § 2.204(a) (Tex. UCC) (Vernon 1968) provides that "[a] contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." *Id.*

B. Interpretation of Sales Contracts

Parol Evidence. By way of contrast to the careful attention paid to the Code in *Alamo Clay Products*,³⁴ the case of *Caviness Packing Co. v. Corbett*³⁵ deserves brief mention. In *Caviness* the plaintiff had contracted to sell cattle to the defendant. By the delivery date the cattle exceeded the weight desired by the buyer. The court approved the introduction of parol evidence to explain the weight term (which was ambiguous),³⁶ but denied the introduction of parol evidence to show that the weight term was not material.³⁷ The court cited a 1956 treatise³⁸ and various pre-Code and non-Code cases in support of this result.³⁹ At no point did the court discuss the Code parol evidence rule contained in section 2.202.⁴⁰ That section requires that a determination be made whether a writing was "intended by the parties as a final expression of their agreement with respect to such terms as are included therein."⁴¹ Such a determination was never made in *Caviness*. Whether this determination would have altered the result is not important, but use of the proper version of the sale of goods parol evidence rule would have been desirable.

C. Warranties

Tort or Contract. The Texas Supreme Court has previously attempted to draw a distinction between property damage claims based on strict products liability in tort and property damage claims based on implied warranty under the Code.⁴² As the distinction seems to stand currently, a plaintiff who suffers physical damage to property because of an unreasonably dangerous product, other than damage to the product itself, can recover in strict liability or warranty,⁴³ but a plaintiff who suffers nothing more than loss of product use or physical damage to the product itself can recover *only* in warranty;⁴⁴ strict liability will not lie for "mere" economic

§ 2.204(c) provides that "[e]ven though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy." The gap-filling terms used by the court include *id.* §§ 2.305(a) (price), .308(1) (place of delivery), .309(a) (time for delivery).

34. See note 31 *supra* and accompanying text.

35. 587 S.W.2d 543 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.).

36. *Id.* at 546.

37. *Id.* at 547.

38. 2 C. MCCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 1601 (Texas Practice 2d ed. 1956).

39. 587 S.W.2d at 545-46; see *Anderson & Kerr Drilling Co. v. Bruhlmeier*, 134 Tex. 574, 136 S.W.2d 800 (1940); *Paxton v. Spencer*, 503 S.W.2d 637 (Tex. Civ. App.—Corpus Christi 1973, no writ); *Cutrer v. Cutrer*, 334 S.W.2d 599 (Tex. Civ. App.—San Antonio 1960), *aff'd*, 345 S.W.2d 513 (Tex. 1961).

40. TEX. BUS. & COM. CODE ANN. § 2.202 (Tex. UCC) (Vernon 1968).

41. *Id.*

42. *Signal Oil & Gas Co. v. Universal Oil Prods.*, 572 S.W.2d 320 (Tex. 1978); *Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc.*, 572 S.W.2d 308 (Tex. 1978); *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77 (Tex. 1977).

43. *Signal Oil & Gas Co. v. Universal Oil Prods.*, 572 S.W.2d 320, 325 (Tex. 1978).

44. *Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc.*, 572 S.W.2d 308, 312-13 (Tex. 1978).

loss.⁴⁵ The distinction hinges on whether property *other than* the product itself was damaged by the unreasonably dangerous product.⁴⁶ This "other property" test was adopted over vigorous objection by Justice Pope.⁴⁷

The other property test was applied during the survey period in the Fifth Circuit case of *Two Rivers Co. v. Curtiss Breeding Service*.⁴⁸ In *Two Rivers* the court, applying Texas law, denied recovery to a purchaser of bull semen who suffered losses when some of the cattle owned by the purchaser, and artificially inseminated with the semen, produced calves suffering from syndactylism, a recessive genetic defect. The court very carefully analyzed the other property test and concluded:

Arguably, a calf is a continuation of the product (bull semen) so any damage was to the product itself and not to any *other* property. . . .

On the other hand, it could just as easily be argued that the product (bull semen) is a constituent part of a new product (the calf) which is *other* property.⁴⁹

Because the other property test did not resolve the question, the court turned to a consideration of the underlying policy rationales of strict products liability and implied warranty. The court stated that a central rationale for strict liability in tort is the protection of consumers from products that are dangerous to an extent not contemplated by the ordinary user with knowledge of the characteristics of the product.⁵⁰ The court noted that cattle breeders expect that bull semen will carry some recessive genes.⁵¹ On the rationale for implied warranty, the court concluded that warranty is designed to protect a purchaser against losing the benefit of his or her bargain.⁵² As the final result of this policy evaluation, the court held that the case was one of economic loss, governed by commercial law, and not a case of strict liability in tort,⁵³ but because an effective written disclaimer of implied warranties had been made, the court held that the purchaser could not successfully recover on the warranty theory.⁵⁴ The result reached in this case provoked a strong dissent by Judge Tate.⁵⁵

In another tort or contract case, the Tyler court of civil appeals held that an employee of a buyer of sulfuric acid could not maintain an implied warranty action under the Code for personal injuries sustained when a container of acid broke, because the employee was not in privity with the seller of the acid.⁵⁶ According to the court, "[t]he gravamen of [the em-

45. *Nobility Homes, Inc. v. Shivers*, 557 S.W.2d 77, 79-80 (Tex. 1977).

46. *Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc.*, 572 S.W.2d 308, 312-13 (Tex. 1978).

47. *Id.* at 313 (Pope, J., dissenting).

48. 624 F.2d 1242 (5th Cir. 1980).

49. *Id.* at 1247-48 (emphasis in original).

50. *Id.* at 1249-50.

51. *Id.* at 1249.

52. *Id.* at 1250.

53. *Id.* at 1251.

54. *Id.* at 1252-53.

55. *Id.* at 1253-55.

56. *Garcia v. Texas Instruments, Inc.*, 598 S.W.2d 24 (Tex. Civ. App.—Tyler 1980), *rev'd*, 24 Tex. Sup. Ct. J. 127 (Dec. 20, 1980).

ployee's] cause of action is an action based on strict liability in tort for the recovery of personal injuries by an allegedly defective product."⁵⁷ This holding barred the plaintiff's recovery because the two-year statute of limitations⁵⁸ had run on his tort action, and because the case was not one in warranty, the four-year statute of limitations on sales actions under the Code was rendered unavailable.⁵⁹ On appeal to the Texas Supreme Court, the civil appeals decision was reversed and the case remanded for trial on the plaintiff's implied warranty claim.⁶⁰ The supreme court held that several provisions of the Code clearly demonstrated a legislative intent to permit actions for personal injury on a theory of implied warranty.⁶¹ The court reasoned that the plaintiff's personal injury claim, therefore, properly could be maintained on a warranty theory.⁶² The court further held that privity of contract was not required in an implied warranty action brought under the Code to recover for personal injury.⁶³

Express Warranties by Sample—Privity Required? In an interesting pair of cases, the Tyler court of civil appeals⁶⁴ has gone in one direction on the issue of privity in sales by sample and the Dallas court of civil appeals⁶⁵ has gone in exactly the opposite direction. In each case a manufacturing seller had provided an intermediate seller with product samples and the intermediate seller had submitted the samples to the ultimate purchaser to induce a sale. Shipment of the goods ordered by the ultimate purchaser was made directly from the manufacturer to the purchaser, with the order being handled through the services of the intermediate seller. When the goods failed to live up to the purchasers' expectations, they sued the manufacturer on a theory of express warranty created by the samples provided to the intermediate sellers by the manufacturer.

The Tyler court of civil appeals held that privity of contract was required in actions for breach of express warranty⁶⁶ and that such privity did not exist between the purchaser and the remote seller.⁶⁷ The court noted that while *Nobility Homes of Texas, Inc. v. Shivers*⁶⁸ had eroded the doctrine of privity in implied warranty cases, the Texas Supreme Court in

57. 598 S.W.2d at 30.

58. TEX. REV. CIV. STAT. ANN. art. 5526(4) (Vernon Supp. 1980-1981).

59. TEX. BUS. & COM. CODE ANN. § 2.725 (Tex. UCC) (Vernon 1968).

60. *Garcia v. Texas Instruments, Inc.*, 24 Tex. Sup. Ct. J. 127, 134 (Dec. 20, 1980).

61. *Id.* at 129-31. The court discussed TEX. BUS. & COM. CODE ANN. §§ 2.314, .715(2)(b), .719(3), .725 (Tex. UCC) (Vernon 1968), in reaching this conclusion.

62. 24 Tex. Sup. Ct. J. at 131.

63. *Id.* at 134. The court said that a contrary conclusion would not be "consistent with our [earlier] holding in *Nobility Homes*, . . . which authorized the maintenance of an implied warranty action for economic loss in the absence of privity." 24 Tex. Sup. Ct. J. at 133.

64. *Texas Processed Plastics, Inc. v. Gray Enterprises, Inc.*, 592 S.W.2d 412 (Tex. Civ. App.—Tyler 1979, no writ).

65. *Indust-Ri-Chem Laboratory, Inc. v. Par-Pak Co.*, 602 S.W.2d 282 (Tex. Civ. App.—Dallas 1980, no writ).

66. *Texas Processed Plastics, Inc. v. Gray Enterprises, Inc.*, 592 S.W.2d 412, 415 (Tex. Civ. App.—Tyler 1979, no writ).

67. *Id.* at 417.

68. 557 S.W.2d 77 (Tex. 1977).

Nobility had said that its decision did not affect remedies based upon breach of express warranties.⁶⁹ Judgment was rendered against the purchaser.⁷⁰

In contrast, the Dallas court of civil appeals, also referring to *Nobility*,⁷¹ held that the "same policy reasons for dispensing with the privity requirement in implied warranty also exist with respect to express warranties by sample."⁷² Having decided that a lack of privity was no obstacle to the purchaser's action, the court went on to hold "that privity is not required where a manufacturer induces the purchase by furnishing samples to a middleman, knowing that the middleman will use the samples to induce sales of the product."⁷³ Because of procedural matters that had not been dealt with adequately at trial, the purchaser's action against the remote seller was remanded for a new trial.⁷⁴

Implied Warranties of Quality in Sale of Used Goods. In *Bunting v. Fodor*⁷⁵ the purchaser of a used automobile engine block sued the seller on theories of express warranty, implied warranty, and violations of the DTPA.⁷⁶ The seller consistently had honored his obligations under the express warranty, and thus no showing of breach of an express warranty could be made.⁷⁷ Noting that the DTPA did not create any warranties,⁷⁸ but rather only provided special remedies for their breach,⁷⁹ the court turned to a consideration of implied warranties under the Code to see if such warranties arose in the sale of used goods.⁸⁰ Relying on an earlier Texas decision under the Code,⁸¹ the court concluded that the implied warranty of merchantability did not apply to the sale of used goods.⁸² Therefore, no recovery under the DTPA was allowed.⁸³

While *Bunting* represents a correct reading of prior Texas law in the courts of civil appeals, this author is intrigued by a portion of the Texas Supreme Court opinion in *Mid Continent Aircraft Corp. v. Curry County Spraying Service, Inc.*⁸⁴ and its relation to implied warranties in the sale of used goods. That case involved the sale of a used aircraft and a subse-

69. 592 S.W.2d at 415 (citing *Nobility*, 557 S.W.2d at 80).

70. 592 S.W.2d at 418.

71. *Indust-Ri-Chem Laboratory, Inc. v. Par-Pak Co.*, 602 S.W.2d 282, 287 (Tex. Civ. App.—Dallas 1980, no writ).

72. *Id.*

73. *Id.*

74. *Id.* at 290.

75. 586 S.W.2d 144 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

76. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1980-1981).

77. 586 S.W.2d at 145.

78. See TEX. BUS. & COM. CODE ANN. § 17.46(b)(19) (Vernon Supp. 1980-1981).

79. See *id.* § 17.50.

80. The primary warranty considered by the court was the implied warranty of merchantability under *id.* § 2.314 (Tex. UCC) (Vernon 1968).

81. *Chaq Oil Co. v. Gardner Mach. Corp.*, 500 S.W.2d 877 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ).

82. 586 S.W.2d at 146.

83. *Id.*

84. 572 S.W.2d 308 (Tex. 1978).

quent action brought on theories of strict products liability and breach of implied warranty. Most of the opinion is devoted to a discussion of the other property test and whether strict products liability would lie for economic loss.⁸⁵ In the last three paragraphs of the opinion, however, the supreme court discusses the effectiveness of an "as is" disclaimer involved in the case and notes that "[w]ith that disclaimer Mid Continent has effectively eliminated *the implied warranties involved in the sale of the airplane*."⁸⁶ If the court did not intend to hold that implied warranties could attach to the sale of used goods, there would have been no need for the court to address the question of whether the disclaimer was effective. Therefore, one could argue that the Texas Supreme Court has recognized that implied warranties exist in the sale of used goods. To the best of this author's knowledge, this point has not been raised in a used goods case.

Implied Warranty of Title in Sale of Used Goods. One implied warranty that Texas courts consistently have imposed on the sale of used goods is the implied warranty of good title arising under section 2.312 of the Code.⁸⁷ *Mitchell v. Webb*⁸⁸ continues this trend, the court holding that an implied warranty of title runs with the goods, so that a buyer may sue a remote vendor.⁸⁹ Treble damages under the DTPA were also allowed for the warranty breach.⁹⁰

Implied Warranties of Quality—Disclaimer. Section 2.316(b) of the Code sets out the standards that a warranty disclaimer must meet to exclude implied warranties.⁹¹ In *Willoughby v. Ciba-Geigy Corp.*⁹² the Beaumont court of civil appeals held that a disclaimer that was never brought to the attention of the buyer did not qualify as an effective disclaimer of implied warranties under the Code.⁹³ The case was reversed and remanded for trial on the implied warranty claim.⁹⁴

Implied Warranties of Quality—Notice of Breach. Section 2.607(c) requires that notice of a warranty breach must be given by a buyer to his seller

85. *Id.* at 310-13; see notes 42-47 *supra* and accompanying text.

86. 572 S.W.2d at 313 (emphasis added).

87. TEX. BUS. & COM. CODE ANN. § 2.312 (Tex. UCC) (Vernon 1968); see, e.g., *Gunderland Marine Supply, Inc. v. Bray*, 570 S.W.2d 542 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.); *Trial v. McCoy*, 553 S.W.2d 199 (Tex. Civ. App.—El Paso 1977, no writ) (A part of the holding, not relevant to § 2.312, was reversed and remanded. The holding of the district court was affirmed on remand. 581 S.W.2d 792 (Tex. Civ. App.—El Paso 1979, no writ)).

88. 591 S.W.2d 547 (Tex. Civ. App.—Fort Worth 1979, no writ).

89. *Id.* at 551.

90. *Id.* at 552. The applicable provision of the DTPA permitted the trebling of actual damages for warranty breach. 1973 Tex. Gen. Laws, ch. 143, § 1, at 327. The statute has since been amended to reduce the amount of punitive damages that might be recoverable in a breach of warranty action. TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon Supp. 1980-1981).

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

92. 601 S.W.2d 385 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.).

93. *Id.* at 388.

94. *Id.* at 389.

before an action for the breach can be maintained.⁹⁵ In what might be a significant opinion on the interpretation of section 2.607(c), the El Paso court of civil appeals decided that notice of breach of an implied warranty of merchantability needs to be given *only* to the buyer's immediate seller, and that an action by the buyer could be maintained against the remote manufacturer without complying with the section 2.607(c) notice requirement.⁹⁶

D. *Performance of Sales Contracts*

Identification of Goods and Passing of Title. In *Miles v. Starks*⁹⁷ the court properly construed and applied the provisions of section 2.401⁹⁸ in concluding that the parties could agree as to the time when title would pass, and in ruling that physical delivery of the goods was not required when such an agreement had been made.⁹⁹ The court further decided that, by operation of section 2.501(a),¹⁰⁰ a buyer could obtain an insurable, special property interest in the goods by identification, even though the goods might be nonconforming and the buyer had an option to reject or return them.¹⁰¹ Under either rationale, the seller was entitled to recover under the terms of the buyer's livestock dealer's bond, which guaranteed payment for cattle purchased by the buyer.

Delegation of Performance. In a case of first impression¹⁰² the Tyler court of civil appeals interpreted the delegation of performance provisions of section 2.210.¹⁰³ The court held that the buyer of a horse who had contracted to allow the seller to use the animal twice each year for breeding purposes could effectively delegate the duty of making the horse available to the seller when the buyer resold the horse to a second buyer.¹⁰⁴ The court reasoned that the duty of performance could be enforced by either the original seller or by the first buyer.¹⁰⁵ The only prior case interpreting the delegation of duty provisions of section 2.210 was concerned with the duty to pay and not with duties to continue other contractual performances.¹⁰⁶

95. TEX. BUS. & COM. CODE ANN. § 2.607(c)(1) (Tex. UCC) (Vernon 1968).

96. *Vintage Homes, Inc. v. Coldiron*, 585 S.W.2d 886, 888 (Tex. Civ. App.—El Paso 1979, no writ).

97. 590 S.W.2d 223 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.).

98. TEX. BUS. & COM. CODE ANN. § 2.401(b) (Tex. UCC) (Vernon 1968).

99. 590 S.W.2d at 225.

100. TEX. BUS. & COM. CODE ANN. § 2.501(a) (Tex. UCC) (Vernon 1968).

101. 590 S.W.2d at 226.

102. *McKinnie v. Milford*, 597 S.W.2d 953 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.).

103. TEX. BUS. & COM. CODE ANN. § 2.210 (Tex. UCC) (Vernon 1968).

104. *McKinnie v. Milford*, 597 S.W.2d 953, 957 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.).

105. *Id.*

106. *See Tennell v. Esteve Cotton Co.*, 546 S.W.2d 346 (Tex. Civ. App.—Amarillo 1976, writ ref'd n.r.e.).

E. *Sales Remedies*

Seller's Remedies—Liquidated Damages. In *Speedi Lubrication Centers, Inc. v. Atlas Match Corp.*¹⁰⁷ the court upheld a liquidated damages clause that permitted the seller to recover fifty percent of the contract price of advertising matchbooks if the buyer repudiated before the goods had been identified to the contract. The court inquired whether fifty percent was reasonable compensation for the breach or whether that amount actually would operate as a penalty.¹⁰⁸ Based on uncontradicted testimony by an officer of Atlas to the effect that the production process involved heavy start-up costs for commissions, art work, and the like, and that such costs could not readily be allocated to particular jobs under the Atlas process-cost accounting system, the court held the liquidated damages clause to be reasonable.¹⁰⁹

Seller's Remedies—Lost Profits. Under section 2.708(b)¹¹⁰ the usual lost profits case is one in which a seller is not adequately compensated by the contract price/market price differential¹¹¹ and seeks to recover lost profits as a substitute measure of damage. A good example of this kind of case is the lost volume seller who deals in standard priced goods. The contract price/market price differential is zero in such a case, but the seller has lost a sale (*i.e.*, an opportunity to sell one more unit than would otherwise be sold). Section 2.708(b) is designed to allow recovery of the profit that the seller expected to earn on this lost sale.

In *Nobs Chemical, U.S.A., Inc. v. Koppers Co.*¹¹² the Fifth Circuit confronted a case in which the usual contract price/market price differential would have *overcompensated* the plaintiff-seller. The defendant-buyer argued that section 2.708(b) should operate to *limit* the measure of damages. The court could find no prior case law from any jurisdiction directly on point, but it did cite and discuss a number of commentaries that had considered this heretofore academic matter.¹¹³ The most persuasive argument in the court's view was that the basic philosophy of the Code is compensation and not the imposition of penalties.¹¹⁴ Because the use of the ordinary contract/market formula would overcompensate the seller and penalize the buyer, the court held that the section 2.708(b) lost profits measure of damage should control to limit the seller's recovery.¹¹⁵

107. 595 S.W.2d 912 (Tex. Civ. App.—Fort Worth 1980, no writ).

108. *Id.* at 914-15. The test used by the court is the same as that specified in TEX. BUS. & COM. CODE ANN. § 2.718(a) (Tex. UCC) (Vernon 1968), although that provision was not cited by the court.

109. 595 S.W.2d at 915.

110. TEX. BUS. & COM. CODE ANN. § 2.708(b) (Tex. UCC) (Vernon Supp. 1980-1981).

111. *Id.* § 2.708(a).

112. 616 F.2d 212 (5th Cir. 1980).

113. *Id.* at 214-15.

114. *Id.* at 215. The court cited TEX. BUS. & COM. CODE ANN. § 1.106(a) (Tex. UCC) (Vernon 1968) and J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 7-10, at 228 (1972) in its discussion of this point. 616 F.2d at 215.

115. 616 F.2d at 216.

Buyer's Remedies for Breach of Warranty—Pleading. The general measure of damages for breach of warranty is the "difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted."¹¹⁶ In an action for breach of warranty brought by a mobile home buyer, the buyer attempted to introduce evidence to show the cost of repairing the mobile home by pleadings that sought to recover for the difference between the actual value and the market value of the mobile home.¹¹⁷ The Texas Supreme Court held that there was a fatal variance between the buyer's pleadings and the offered proof, and affirmed a judgment in favor of the defendant manufacturer.¹¹⁸

Buyer's Remedies for Breach of a Warranty of Repair. In *Smith v. Kinslow*¹¹⁹ the plaintiffs sought recovery for repair costs paid by them for work done on a motor vehicle. The defendant had repaired plaintiffs' vehicle and had expressly warranted the repair for six months or 6,000 miles, whichever came first. A defect covered by the warranty was discovered within the warranty period, but the defendant refused to honor the warranty and disassembled the vehicle instead. The plaintiffs were thus deprived of the entire benefit of the prior repairs for which they had paid. In the plaintiffs' action for breach of the repair warranty and for treble damages under the DTPA,¹²⁰ the Dallas court of civil appeals held that the breach was to be measured by the amount paid for the worthless repairs¹²¹ and that this sum should be trebled under the DTPA to determine the amount of the plaintiffs' recovery.¹²² The plaintiffs were not, however, held entitled to recover the consideration paid for the repairs in addition to treble damages because the court viewed these two remedies as mutually exclusive.¹²³ Attorney's fees, as a separate element of damage under the DTPA, were allowed to the plaintiffs.¹²⁴

F. *Good Faith Purchase and Collateral Estoppel*

Sale in Exchange for Worthless Check. Section 2.403(a) of the Code provides in part that "[a] person with voidable title has power to transfer a good title to a good faith purchaser for value."¹²⁵ A common situation under this section is the delivery of goods to a person in exchange for a check that is later dishonored. When the disappointed seller tries to re-

116. TEX. BUS. & COM. CODE ANN. § 2.714(b) (Tex. UCC) (Vernon 1968).

117. *Kissman v. Bendix Home Syss., Inc.*, 587 S.W.2d 675 (Tex. 1979).

118. *Id.* at 678.

119. 598 S.W.2d 910 (Tex. Civ. App.—Dallas 1980, no writ).

120. 1973 Tex. Gen. Laws, ch. 143, § 1, at 327. The case was not affected by the 1979 amendments to the DTPA. For the current version of the applicable provision, see TEX. BUS. & COM. CODE ANN. § 17.50(b) (Vernon Supp. 1980-1981).

121. 598 S.W.2d at 914.

122. *Id.* at 915.

123. *Id.*

124. *Id.* at 916; see 1973 Tex. Gen. Laws, ch. 143, § 1, at 327 (current version at TEX. BUS. & COM. CODE ANN. § 17.50(c) (Vernon Supp. 1980-1981)).

125. TEX. BUS. & COM. CODE ANN. § 2.403(a) (Tex. UCC) (Vernon 1968).

claim the goods, he or she learns that the buyer has already transferred them to a good faith purchaser. Section 2.403(a) operates to prevent the original seller from reaching the goods in the hands of the good faith purchaser. In *Rufenacht v. Iowa Beef Processors, Inc.*¹²⁶ the federal district court for the Northern District of Texas had no difficulty in applying section 2.403(a) to bar an action by the original unpaid sellers of cattle against a meatpacking company that had purchased the cattle in good faith from an intermediate (and insolvent) cattle buyer.

To this extent, the case is merely one more citation in the growing list of cattle cases decided under section 2.403.¹²⁷ *Rufenacht* does, however, involve a further interesting aspect. One of the theories of recovery asserted by the plaintiff-sellers was that the intermediate cattle buyer had acted as an agent of the meatpacking company,¹²⁸ and that this issue of agency had already been decided adversely to the company in two prior lawsuits brought by other plaintiffs, but involving the same fact issues.¹²⁹ In *Parklane Hosiery Co. v. Shore*,¹³⁰ a 1979 decision, the United States Supreme Court expressly approved the offensive use of collateral estoppel, subject to the discretion of the trial court, to determine when such offensive use would be appropriate. The district court in *Rufenacht* examined the fact issues on the question of agency as they appeared from special interrogatories used in prior cases and concluded that offensive collateral estoppel could not be used in the case at bar because there was not sufficient factual identity with prior cases.¹³¹

Vouching In. In *CGM Valve Co. v. Gulfstream Steel Corp.*¹³² the court of civil appeals considered the use of the "vouching in" procedure under section 2.607(e)(1) of the Code.¹³³ That section allows a buyer who is sued on an obligation for which his own seller is answerable to give the seller written notice of the litigation.¹³⁴ If the notice tenders defense of the litigation to the seller and the seller does not defend, all determinations of fact in the litigation become binding on the seller in a subsequent action against him on the same obligation brought by the buyer.¹³⁵ In *CGM* the buyer gave the requisite notice and the seller did not appear to defend. The buyer then proceeded to settle the first litigation without trial of the fact issues. In an action against the seller on the obligation that was the subject matter of the settled litigation, the buyer moved for summary judgment on the ground that all fact issues had been concluded effectively against the seller

126. 492 F. Supp. 877 (N.D. Tex. 1980).

127. See, e.g., *Sorrels v. Texas Bank & Trust Co.*, 597 F.2d 997 (5th Cir. 1979); *Samuels & Co. v. Mahon*, 526 F.2d 1238 (5th Cir.), cert. denied, 429 U.S. 834 (1976).

128. 492 F. Supp. at 880.

129. *Id.* at 883; see *Valley View Cattle Co. v. Iowa Beef Processors, Inc.*, 548 F.2d 1219 (5th Cir.), cert. denied, 434 U.S. 855 (1977).

130. 439 U.S. 322 (1979).

131. 492 F. Supp. at 883-85.

132. 596 S.W.2d 161 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

133. TEX. BUS. & COM. CODE ANN. § 2.607(e)(1) (Tex. UCC) (Vernon 1968).

134. *Id.*

135. *Id.*

by the vouching in procedure and the settlement. The court held that vouching in requires a full adversary proceeding.¹³⁶ The court ruled that the settlement of the earlier lawsuit did not qualify as such a proceeding, and the buyer was held not entitled to a summary judgment because the fact issues of liability had never been actually litigated.¹³⁷ The case was remanded for trial.¹³⁸ This decision is consistent with the language in section 2.607(e)(1) and contains a good discussion of how the very useful device of vouching in should be handled.

III. COMMERCIAL PAPER (CHAPTER 3)

A. *Form of Negotiable Instruments*

Unconditional Promise to Pay a Sum Certain. Among the several formal requirements for negotiable instruments listed in section 3.104 of the Code are the requirements that an instrument must "contain an unconditional promise or order to pay a sum certain in money."¹³⁹ The Dallas court of civil appeals ruled that the deed of trust note involved in *Hinckley v. Eggers*¹⁴⁰ failed to meet both the unconditional promise and the sum certain requirements.¹⁴¹ The note in question disclaimed personal liability of the makers and provided that payment was to be made only from the proceeds of the sale of the property securing the note.¹⁴² Such a limitation clearly makes the promise conditional under section 3.105(b)(2),¹⁴³ which operates to define the basic requirement stated in section 3.104.

On the sum certain question, the note provided that the makers would be personally liable for an amount equal to any taxes and interest accrued at the time of acceleration or foreclosure, whichever occurred last.¹⁴⁴ Section 3.106 provides that the amount due must be determinable from the instrument itself (with any computation that may be necessary).¹⁴⁵ Because taxes due could not be determined without reference to an outside source, the court found that the sum certain requirement was not met.¹⁴⁶ The court also held that, even if taxes were disregarded, it would be anomalous to hold that the note was negotiable with respect to interest, because that sum was determinable when the promise to pay the principal sum did

136. 596 S.W.2d at 163.

137. *Id.* at 164.

138. *Id.*

139. TEX. BUS. & COM. CODE ANN. § 3.104(a)(2) (Tex. UCC) (Vernon 1968).

140. 587 S.W.2d 448 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

141. *Id.* at 450.

142. *Id.* at 450-51.

143. TEX. BUS. & COM. CODE ANN. § 3.105(b)(2) (Tex. UCC) (Vernon 1968) provides: "A promise or order is not unconditional if the instrument . . . states that it is to be paid only out of a particular fund or source"

144. 587 S.W.2d at 450.

145. TEX. BUS. & COM. CODE ANN. § 3.106(a) (Tex. UCC) (Vernon 1968). The underlying philosophy of the section is described in Official Comment 1 thereto. *Id.*, comment 1.

146. 587 S.W.2d at 451.

not qualify as an unconditional promise.¹⁴⁷

On the matter of the sum certain requirement, some current attempts to link the interest rate on real estate mortgage notes to a certain index figure as a method of dealing with inflationary pressures in the home mortgage market may well run afoul of section 3.106. Such notes would not be illegal or usurious because of that section, but they would be nonnegotiable. Legislation may be needed to solve this particular problem.

B. *Liability of Parties*

Liability of Parties Signing in a Representative Capacity. The question of whether a person who has signed a negotiable instrument acted in a personal capacity or only in a representative capacity has been frequently litigated in Texas.¹⁴⁸ Section 3.403 deals with signatures made in a representative capacity,¹⁴⁹ and comment 3 to that section states a useful rule that aids in understanding the operation of the section.¹⁵⁰ According to the comment, the unambiguous way to show that a signature is made in a representative capacity is to sign in the form "Peter Pringle by Arthur Adams, Agent."¹⁵¹ Any signature that is less clear than this example opens the door to a possible claim that the representative is personally obligated on the instrument.

Four cases were reported during this survey period in which agents failed to make their representative capacity sufficiently clear.¹⁵² While the results of the cases vary as to whether the agents were ultimately held personally liable, all four cases deal with the question of personal liability as an issue of fact, which is the proper method of resolving the question under section 3.403. There is no need to detail the particular factual setting of each case, but one of the cases, *Wolf v. Little John Corp. of Liberia*,¹⁵³ deserves particular mention because of its careful discussion of section 3.403 and the earlier Texas cases interpreting the legal effect of that section.¹⁵⁴ The case is a good review of the personal liability/representative capacity area in the law of negotiable instruments.

Liability of Commercial Paper Guarantors. Another area of frequent litigation has been the scope of liability of persons who act as guarantors of

147. *Id.*

148. See, e.g., *Griffin v. Ellinger*, 538 S.W.2d 97 (Tex. 1976); *Seale v. Nichols*, 505 S.W.2d 251 (Tex. 1974); *Walker v. Republic Nat'l Bank*, 559 S.W.2d 438 (Tex. Civ. App.—Tyler 1977, no writ).

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

150. *Id.*, comment 3 (Vernon Supp. 1980-1981).

151. *Id.*, comment 3(c).

152. *Antil v. Southwest Envelope Co.*, 601 S.W.2d 47 (Tex. Civ. App.—Beaumont 1979, no writ); *Mentesana v. Fabricators Int'l, Inc.*, 599 S.W.2d 694 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.); *Alsop v. Mercantile Nat'l Bank*, 591 S.W.2d 308 (Tex. Civ. App.—Corpus Christi 1979, no writ); *Wolf v. Little John Corp. of Liberia*, 585 S.W.2d 774 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

153. 585 S.W.2d 774 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

154. *Id.* at 776-77.

negotiable instruments.¹⁵⁵ There are two principal categories of guarantors under section 3.416: those who guarantee payment¹⁵⁶ and those who guarantee collection.¹⁵⁷ The liability of a guarantor of payment is equivalent to that of a co-maker, and, accordingly, such guarantors have been held absolutely liable on the guaranteed instruments.¹⁵⁸ This position was reaffirmed by the Texas Supreme Court in *Ferguson v. McCarrell*.¹⁵⁹ In a brief per curiam opinion the court refused an application for writ of error¹⁶⁰ from the decision of the court of civil appeals¹⁶¹ that had adopted the position noted above and, in the refusal, expressly disapproved the conflicting holding of *Cook v. Citizens National Bank*,¹⁶² which had cast doubt on the scope of liability of one who guarantees payment under section 3.416.¹⁶³

The category of collection guarantors was considered in *Wolfe v. Schuster*.¹⁶⁴ The court of civil appeals, in a well-reasoned opinion written by Judge Guittard, held that a guaranty of collection required the plaintiff, in a suit against the guarantor, to join the principal debtor in the action, or to plead and prove facts to excuse nonjoinder by bringing the case within one of the exceptions provided in the Texas statutes and the Texas Rules of Civil Procedure.¹⁶⁵ The Dallas court also discussed the effect of the supreme court's ruling in *Ferguson v. McCarrell*¹⁶⁶ on the joinder requirements applicable to suits brought on guaranty agreements.¹⁶⁷

C. Enforcement of Commercial Paper

Enforcement in Summary Judgment Cases. A well-established principle in the law of commercial paper is that "[w]hen signatures are admitted or established, production of the instrument entitles a holder to recover on it

155. See, e.g., *Reece v. First State Bank*, 566 S.W.2d 296 (Tex. 1978); *Hopkins v. First Nat'l Bank*, 551 S.W.2d 343 (Tex. 1977); *Universal Metals & Mach., Inc. v. Bohart*, 539 S.W.2d 874 (Tex. 1976).

156. TEX. BUS. & COM. CODE ANN. § 3.416(a) (Tex. UCC) (Vernon 1968).

157. *Id.* § 3.416(b).

158. See *Universal Metals & Mach., Inc. v. Bohart*, 539 S.W.2d 874, 877-79 (Tex. 1976).

159. 588 S.W.2d 895 (Tex. 1979).

160. *Id.*

161. 582 S.W.2d 539 (Tex. Civ. App.—Austin 1979).

162. 538 S.W.2d 460 (Tex. Civ. App.—Beaumont 1976, no writ).

163. 588 S.W.2d at 895.

164. 591 S.W.2d 926 (Tex. Civ. App.—Dallas 1979, no writ).

165. The statutes involved are TEX. BUS. & COM. CODE ANN. § 3.416(b) (Tex. UCC) (Vernon 1968) and TEX. REV. CIV. STAT. ANN. arts. 1986-1987 (Vernon 1964). The rule of civil procedure is TEX. R. CIV. P. 31. The provisions of § 3.416(b) are illustrative of the reasons why joinder is not required in certain cases. Section 3.416(b) provides:

"Collection guaranteed" or equivalent words added to a signature mean that the signer engages that if the instrument is not paid when due he will pay it according to its tenor, but only after the holder has reduced his claim against the maker or acceptor to judgment and execution has been returned unsatisfied, or after the maker or acceptor has become insolvent or it is otherwise apparent that it is useless to proceed against him.

166. 588 S.W.2d 895 (Tex. 1979); see text accompanying notes 159-63 *supra*.

167. 591 S.W.2d at 932 n.2.

unless the defendant establishes a defense.”¹⁶⁸ Because of this principle, motions for summary judgment in favor of the holder frequently are successful because of the failure of the defendant to make a *prima facie* showing that a defense exists. Several cases reported during the survey period fit this pattern.¹⁶⁹ In each case, the plaintiff holder moved for summary judgment and the maker or drawer was unsuccessful in showing that a triable issue of material fact concerning a defense existed; judgments in favor of the holders were affirmed. The failure to present more than conclusory statements about the existence of the alleged defenses was the most common difficulty faced by the defendants in resisting the motions for summary judgment. Under the standards developed by the Texas Supreme Court regarding the burden placed on the party resisting a motion for summary judgment, affidavits opposing a motion must set forth facts that would be admissible in evidence; conclusions without probative value are insufficient to raise an issue of fact.¹⁷⁰ These cases clearly illustrate that a party opposing a motion for summary judgment in a commercial paper case must *establish* that a defense exists.¹⁷¹

Proper Party to Enforce an Instrument. According to section 3.301: “The holder of an instrument . . . may . . . enforce payment in his own name.”¹⁷² One may become a holder only by negotiation and, in the case of instruments payable to order, negotiation requires delivery together with any necessary indorsement.¹⁷³ Absent negotiation, the taker of an instrument is a mere transferee and is not aided by the presumption that “production of the instrument entitles a holder to recover on it.”¹⁷⁴ All these issues were raised in *Lawson v. Gibbs*,¹⁷⁵ in which the holder of a vendor’s lien note used the note as collateral to obtain a loan from the Main Bank of Houston. The note was indorsed and delivered to the bank in exchange for the loan. The debtor subsequently defaulted on the note, and the bank, through the appointment of a substitute trustee, sold the land securing the note to the highest bidder at a trustee’s sale. In the meantime, the original vendee of the land sold the property to another purchaser. In a suit to quiet title and to declare the sale by the substitute trustee void, the court of civil appeals held that, by operation of various

168. TEX. BUS. & COM. CODE ANN. § 3.307(b) (Tex. UCC) (Vernon 1968).

169. See *Wooldridge v. Groos Nat’l Bank*, 603 S.W.2d 335 (Tex. Civ. App.—Waco 1980, no writ); *Manges v. Astra Bar, Inc.*, 596 S.W.2d 605 (Tex. Civ. App.—Corpus Christi 1980, writ ref’d n.r.e.); *Guardian Bank v. San Jacinto Sav. Ass’n*, 593 S.W.2d 860 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref’d n.r.e.); *Sims v. Wiechers*, 589 S.W.2d 471 (Tex. Civ. App.—Texarkana 1979, no writ).

170. See *Life Ins. Co. v. Gar-Dal, Inc.*, 570 S.W.2d 378, 382 (Tex. 1978); *Crain v. Davis*, 417 S.W.2d 53 (Tex. 1967).

171. See TEX. BUS. & COM. CODE ANN. § 3.307(b) (Tex. UCC) (Vernon 1968).

172. *Id.* § 3.301.

173. *Id.* § 3.202(a).

174. *Id.* § 3.307(b). This special right of a “holder” is discussed at text accompanying note 168 *supra*.

175. 591 S.W.2d 292 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref’d n.r.e.).

Code provisions,¹⁷⁶ the bank had acquired the rights of a holder and, as such, was entitled to appoint the trustee and effect a sale of the property.¹⁷⁷ As between the competing claimants, the court held that the purchaser at the trustee sale was entitled to judgment in his favor.¹⁷⁸ The *Lawson* case contains a good review of the substantial rights accorded a holder as contrasted to the rights of a mere transferee.

Jus Tertii Defenses to Enforcement of Instruments. By its very nature, commercial paper is designed to be easily negotiated from one person to another. This ease of negotiation means that a negotiable instrument may be passed out of the hands of the original payee into the hands of subsequent holders; indeed, the chain of indorsers may become so long that a separate page must be attached to the instrument to contain the indorsements.¹⁷⁹ Because remote parties may be on opposite sides of the same lawsuit in actions brought to enforce an instrument, the early law of negotiable instruments restricted the ability of a prior party to assert the defenses of other intermediate parties against the claim of the remote holder who sought to enforce the instrument.¹⁸⁰ Such third-party defenses were called *jus tertii* defenses, and those that could properly be asserted were severely limited.¹⁸¹ Section 3.306(4) of the Code¹⁸² continues this common law limitation on the ability of a maker to assert third-party (*jus tertii*) defenses. Only two such defenses can be raised: (1) the defense that the holder, or a person through whom he or she holds the instrument, acquired it by theft; and (2) the defense that payment to the holder would be inconsistent with the terms of a restrictive indorsement.¹⁸³ No other third-party defenses are available.¹⁸⁴

In *Landscape Design & Construction, Inc. v. Warren*¹⁸⁵ the maker issued a note to the payee, who indorsed and delivered the note to the indorsee. Upon default in payment, the indorsee sued both the payee and the maker.

176. The court cites TEX. BUS. & COM. CODE ANN. §§ 1.201(20), 3.202(a), .301, .302(a) (Tex. UCC) (Vernon 1968), in support of its holding. 591 S.W.2d at 294.

177. 591 S.W.2d at 294.

178. *Id.* at 295.

179. Such a separate page is called an "allonge," and its use is provided for in TEX. BUS. & COM. CODE ANN. § 3.202(b) (Tex. UCC) (Vernon 1968). *But see id.*, comment 3 (indorsement on a mortgage or other separate paper not sufficient for negotiation). The word itself is French and means "lengthened, elongated or out-stretched." CASSELL'S FRENCH DICTIONARY (1962 ed.). It has been suggested that use of the allonge developed so that negotiable instruments could serve as currency substitutes in regions where currency was scarce, such as remote areas of Indonesia during the 19th century. *See* Llewellyn, *Meet Negotiable Instruments*, 44 COLUM. L. REV. 299, 312-14 (1944). For a modern case involving the claimed use of an allonge, see *Estrada v. River Oaks Bank & Trust Co.*, 550 S.W.2d 719 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.).

180. *See, e.g.*, *Pronty v. Roberts*, 60 Mass. (6 Cush.) 19 (1850); *Brown v. Penfield*, 36 N.Y. 473 (1867).

181. *See* W. BRITTON, HANDBOOK OF THE LAW OF BILLS AND NOTES § 160 (2d ed. 1961).

182. TEX. BUS. & COM. CODE § 3.306(4) (Tex. UCC) (Vernon 1968).

183. *Id.*

184. *See id.*

185. 598 S.W.2d 38 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.).

The maker sought to defend on the ground that the indorsee had failed to perform the consideration promised to the payee in exchange for the note, but the court properly held that this third-party defense was not available to the maker as a defense to the indorsee's claim.¹⁸⁶ The court, however, did not refer to section 3.306(4) in deciding this issue, an omission that may have led to the erroneous decision of the court in the second portion of its opinion. Because the indorsee had sued both the maker and the payee jointly, section 3.306(4) would have permitted the payee to defend the action on behalf of both defendants because the alleged failure of consideration was not a third-party defense vis-à-vis the payee.¹⁸⁷ The court did not recognize this point, holding instead that in the indorsee's action against the payee, the contract of indorsement liability described in section 3.414¹⁸⁸ created an absolute liability on the part of the payee, whether or not a failure of consideration existed in the transfer between payee and indorsee.¹⁸⁹ In the language of the court: "[Payee's] liability was fixed and it became obligated to pay the note whether it received consideration or not from Warren [the indorsee]. There need be no consideration moving to the endorser in order to hold him liable on his endorsement."¹⁹⁰

This part of the decision is in direct conflict with section 3.306, which provides: "Unless he has the rights of a holder in due course any person takes the instrument subject to . . . (3) the defenses of want or failure of consideration" ¹⁹¹ If the failure of consideration had actually occurred, the indorsee-holder would not have satisfied the "value" requirement for holding in due course¹⁹² and clearly would be within the provisions of this section. *Culberson v. Hawkins*,¹⁹³ cited by the *Landscape Design* court,¹⁹⁴ involved a pure suretyship problem. In *Culberson* the court held that an accommodation indorser who had indorsed before delivery was liable to the plaintiff-holder even though the indorser had not received any direct consideration.¹⁹⁵ A consideration moving to the maker was held sufficient to bind the indorser to his surety indorsement contract.¹⁹⁶ This result would still obtain today under the Code in the area of suretyship but it is *not* applicable to ordinary problems of transfer and

186. *Id.* at 40.

187. TEX. BUS. & COM. CODE ANN. § 3.306(4) (Tex. UCC) (Vernon 1968) specifically provides: "The claim of any third person to the instrument is not otherwise available as a defense to any party liable thereon unless the third person himself defends the action for such party." Because the payee was already a party to the action, the maker would not have needed to use any procedural devices such as those suggested in the last paragraph of *id.* § 3.306, comment 5, to bring the payee into the lawsuit.

188. *Id.* § 3.414(a).

189. 598 S.W.2d at 40.

190. *Id.* (citing *Culberson v. Hawkins*, 321 S.W.2d 140 (Tex. Civ. App.—Houston 1959, no writ)).

191. TEX. BUS. & COM. CODE ANN. § 3.306 (Tex. UCC) (Vernon 1968).

192. *Id.* § 3.302(a)(1).

193. 321 S.W.2d 140 (Tex. Civ. App.—Houston 1959, no writ).

194. 598 S.W.2d at 40.

195. 321 S.W.2d at 145.

196. *Id.*

negotiation of instruments.¹⁹⁷ Accordingly, the second portion of the *Landscape Design* opinion should be disapproved.

IV. BANK TRANSACTIONS (CHAPTER 4)

A. Duties of Collecting Banks

Charge-Back of Foreign Currency Instruments. In *Austin National Bank v. Romo*¹⁹⁸ the plaintiffs purchased a \$45,000 certificate of deposit from the defendant bank on August 26, 1976. Payment for the certificate was made by means of a check for 562,500 Mexican pesos drawn on the Banco Nacional de Mexico. The check named the defendant bank as payee. As of August 26th, 562,500 Mexican pesos were equivalent to 45,000 United States dollars. Instead of taking the certificate with them, the plaintiffs left the instrument with the bank for safekeeping, and a receipt was given to them to evidence the bailment.

The check was forwarded to the Banco Nacional de Mexico for payment (presumably through banking channels, although the opinion is silent on the point), and when the check was presented to the Mexican bank for payment, it was paid in the full face amount of 562,500 pesos. Because the Mexican government had announced a devaluation of the peso shortly after August 26th,¹⁹⁹ however, the exchange yield to the defendant bank was only \$27,463.87. On September 24, 1976, the defendant bank unilaterally issued a new certificate of deposit in the sum of \$27,463.87, backdated to August 26th, and attempted to cancel the \$45,000 certificate. Plaintiffs sued to recover the difference between the two certificates. The court of civil appeals held that, because the defendant bank had failed to receive "full settlement" or "full value" for the peso check, the bank was entitled to charge back the loss resulting from devaluation pursuant to section 4.212(a) of the Code.²⁰⁰ The court briefly referred to section 4.212(f), deal-

197. TEX. BUS. & COM. CODE ANN. § 3.415 (Tex. UCC) (Vernon 1968) would apply to such cases today. The operation of § 3.415 as a part of the law of suretyship is discussed in *Eikel v. Bristow Corp.*, 529 S.W.2d 795 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ). The special problem of failure of consideration in the surety context is discussed in J. WHITE & R. SUMMERS, *supra* note 28, § 13-14, at 523-24.

198. 598 S.W.2d 30 (Tex. Civ. App.—Austin 1980, writ granted).

199. According to *Lakeway Co. v. Bravo*, 576 S.W.2d 926, 927 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.), the devaluation occurred on Aug. 31, 1976. The opinion in *Austin Nat'l Bank v. Romo* does not mention the date.

200. 598 S.W.2d at 33. The Code section referred to is TEX. BUS. & COM. CODE ANN. § 4.212(a) (Tex. UCC) (Vernon 1968), which provides in part:

If a collecting bank has made provisional settlement with its customer for an item and itself fails by reason of dishonor, suspension of payments by a bank or otherwise to receive a settlement for the item which is or becomes final, the bank may revoke the settlement given by it, charge back the amount of any credit given for the item to its customer's account or obtain refund from its customer whether or not it is able to return the items if by its midnight deadline or within a longer reasonable time after it learns the facts it returns the item or sends notification of the facts. These rights to revoke, charge-back and obtain refund terminate if and when a settlement for the item received by the

ing with the charge-back of foreign currency items,²⁰¹ and concluded that section 4.212(f) was designed "to determine the loss that the bank has incurred as a result of currency fluctuations."²⁰² According to the court, once the amount of loss is determined, section 4.212(a) could be used to charge the loss back to the customer.²⁰³ The court rendered a take-nothing judgment against the plaintiffs.²⁰⁴

The decision by the court is open to question on several grounds. Initially, a serious issue exists as to whether the bank was acting as a collecting bank or as the owner of the item. The risks of loss in the collection process and the ability of a bank to charge back losses are determined in part by deciding who owns the item being collected.²⁰⁵ The court decided that the bank was acting as a collection agent, but did not explain fully why this was so, particularly in light of the sale of the certificate of deposit to the plaintiffs.²⁰⁶ At no point does the court suggest that the sale was less than absolute.

Secondly, even if the court correctly determined that the bank was a collecting bank, the facts leave no doubt that the bank received a final settlement for the face amount of the peso check. Several Code sections make receipt of such a final settlement the operative event to terminate collecting bank status.²⁰⁷ Apparently the court recognized that receipt of a final settlement would so operate, but attempted to avoid that result by creating a requirement of full settlement or full value out of whole cloth, and by holding that receipt of a final settlement that was less than full did not terminate collecting bank status or the right to charge back.²⁰⁸ No concept of full settlement exists in chapter 4, and the engrafting of such an idea onto the statutory framework would drastically affect the operation of several Code provisions.²⁰⁹

bank is or becomes final (Subsection (c) of Section 4.211 and Subsections (b) and (c) of Section 4.213).

201. TEX. BUS. & COM. CODE ANN. § 4.212(f) (Tex. UCC) (Vernon 1968) provides: If credit is given in dollars as the equivalent of the value of an item payable in a foreign currency the dollar amount of any charge-back or refund shall be calculated on the basis of the buying sight rate for the foreign currency prevailing on the day when the person entitled to the charge-back or refund learns that it will not receive payment in ordinary course.

202. 598 S.W.2d at 33.

203. *Id.*

204. *Id.*

205. See TEX. BUS. & COM. CODE ANN. § 4.201(a) & comment 2 (Tex. UCC) (Vernon 1968).

206. The court referred to *id.* § 4.201, comment 4 (probably ¶ 3), but apparently did not recognize that comment 4 begs the question of the effect of the original transaction between the parties. *Id.*, comment 2 (last paragraph), would seem to be more directly on point on the issue of ownership. The court made only brief mention of the jury findings early in its opinion. See 598 S.W.2d at 31.

207. See, e.g., TEX. BUS. & COM. CODE ANN. §§ 4.201(a), .211(c), .212(a), .213(c) (Tex. UCC) (Vernon 1968). See also *id.* § 4.201, comment 4 (agency status of collecting bank continues until collection completed); *id.* § 4.212, comment 3 (right of charge-back exists during a provisional settlement but terminates upon final settlement); *id.* § 4.213, comment 9 (when collecting bank receives settlement it is accountable to customer for that amount).

208. See 598 S.W.2d at 32-33.

209. See, e.g., TEX. BUS. & COM. CODE ANN. §§ 4.201(a), .211(c), .212(a), .213(c) (Tex.

Finally, even if the devaluation of a foreign currency presents an appealing opportunity to create a full settlement requirement to meet a perceived need for flexibility, another method already exists under the Code without restructuring chapter 4. Section 4.212(f) provides that, in foreign currency cases, "any charge-back or refund shall be calculated on the basis of the buying sight rate for the foreign currency prevailing *on the day when the person entitled to the charge-back or refund learns that it will not receive payment in ordinary course.*"²¹⁰ Section 4.212(a) provides, in part, that "[i]f a collecting bank . . . fails by reason of dishonor, suspension of payments by a bank *or otherwise* to receive a settlement for the item which is or becomes final, the bank may revoke the settlement given by it . . . *if by its midnight deadline or within a longer reasonable time . . . it . . . sends notification of the facts.*"²¹¹ These two sections, considered together, certainly raise the possibility that a bank could be said to have learned that it will not receive payment in ordinary course when a currency devaluation is announced officially. Upon receiving such information, the reasonable course would be to require the bank to act on the information and notify the owner of an affected item within a short period of time. Section 4.212(a) normally would require action by the bank's midnight deadline,²¹² but the section explicitly allows a longer reasonable time if such longer time is needed in a particular case.²¹³ In *Romo* the court did not inquire into when the bank learned of the announced devaluation, nor did the court inquire into the reasonableness of attempting a charge-back some twenty-four days after the devaluation occurred. This line of analysis would have been better than that used in the court's opinion.

The Texas Supreme Court has granted a writ in *Romo*.²¹⁴ Its action in dealing with this case will be of particular interest because section 4.212(f) has never been interpreted in another reported case from any jurisdiction.²¹⁵

UCC) (Vernon 1968). One is reminded of the difference between the "at par" and "less than par" collection systems that existed prior to the creation of the Federal Reserve System.

210. *Id.* § 4.212(f) (emphasis added). The section is quoted in full in note 201 *supra*.

211. TEX. BUS. & COM. CODE ANN. § 4.212(a) (Tex. UCC) (Vernon 1968) (emphasis added). The section is quoted in full in note 200 *supra*.

212. The midnight deadline is defined as "midnight on [the bank's] next banking day following the banking day on which it receives the relevant item or notice." TEX. BUS. & COM. CODE ANN. § 4.104(a)(8) (Tex. UCC) (Vernon 1968).

213. *Id.* § 4.212(a); see note 200 *supra*. The bank would have the burden of proving that taking action after its midnight deadline was actually reasonable. TEX. BUS. & COM. CODE ANN. § 4.202(b) (Tex. UCC) (Vernon 1968).

214. 24 Tex. Sup. Ct. J. 95 (Dec. 6, 1980). [Author's Note: After this Article went to print, the supreme court affirmed the *Romo* decision. 24 Tex. Sup. Ct. J. 239 (Feb. 21, 1981). The opinion of the supreme court is a much better factual and theoretical analysis of the *Romo* case and meets many of the objections to the court of civil appeals' opinion that are discussed in the text above.]

215. The author has written elsewhere on the subject of foreign currency instruments under the Code and has suggested, in light of the interpretive difficulties presented by ch. 4, that a bank would be well advised to include a clause in its deposit contract spelling out the allocation of the risk of loss due to currency fluctuation. See Krahmer, *Foreign Currency Instruments Under the Uniform Commercial Code*, 86 COM. L.J. 9 (1981). A sample deposit clause is set out therein.

B. *Duties of Payor Banks*

Accountability of Payor Bank for Late Return of Items. Under section 4.302(1)²¹⁶ a payor bank becomes accountable for the amount of a demand item presented for payment if the bank fails to pay or return the item until after the midnight deadline.²¹⁷ Documentary drafts are excepted from the operation of this rule.²¹⁸ Section 4.302²¹⁹ has been characterized as imposing a standard of "strict liability" on payor banks for the late return of items.²²⁰

In *Pecos County State Bank v. El Paso Livestock Auction Co.*²²¹ the court had no difficulty determining that a delay of ten days past the midnight deadline rendered the payor bank accountable for the amount of a sight draft that the bank had delayed in returning.²²² The bank, to avoid liability, argued that it was a collecting rather than a payor bank (supporting its argument with pre-Code authority), but the court rejected this argument.²²³

Documentary drafts are treated somewhat differently under section 4.302 because such drafts frequently carry their own statement of the time limits within which action to pay or accept must be taken. A case involving twenty-six such drafts was reported during the survey period.²²⁴ In an excellent opinion, Judge Politz of the Fifth Circuit carefully traced the chapter 3 and chapter 4 treatment of documentary drafts and concluded that a payor bank that had exceeded a stated twenty-four-hour time limit for payment or return on twenty-four of the twenty-six drafts, by time periods varying from two days to twenty-three days, was accountable to the presenting bank for the amounts of the drafts on which action was delayed.²²⁵

216. TEX. BUS. & COM. CODE ANN. § 4.302(1) (Tex. UCC) (Vernon 1968).

217. The definition of "midnight deadline" appears in note 212 *supra*.

218. See TEX. BUS. & COM. CODE ANN. § 4.302(1) (Vernon 1968). Documentary drafts are treated under *id.* § 4.302(2). A case involving documentary drafts under this section is discussed in the text accompanying notes 224-25 *infra*.

219. TEX. BUS. & COM. CODE ANN. § 4.302 (Tex. UCC) (Vernon 1968).

220. See *Continental Nat'l Bank v. Sanders*, 581 S.W.2d 293, 295 (Tex. Civ. App.—El Paso 1979, no writ).

221. 586 S.W.2d 183 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.).

222. *Id.* at 187.

223. *Id.* at 185-86.

224. *Union Bank v. First Nat'l Bank*, 621 F.2d 790 (5th Cir. 1980).

225. *Id.* at 796. Judge Politz may be forgiven for being a little excessive in his metaphoric description of the Uniform Commercial Code. At the beginning of Part II of his opinion, he states:

At first glance, the U.C.C. may appear to be a compendium of confusing and seemingly contradictory rules enacted to govern myriad business transactions. Upon closer scrutiny, the U.C.C. is found to be a finely tuned statutory mechanism containing interlocking provisions designed to provide certainty in commercial transactions. Once the pieces of this puzzle are correctly aligned, the U.C.C. furnishes an answer to almost any question involving the rights and liabilities of the parties to a covered transaction.

Id. at 792.

This description may be contrasted usefully with that of another person who has at least a speaking acquaintance with the Code:

C. *Relationship Between a Payor Bank and Its Customer*

Defense of Wrongful Dishonor Action. In *Chandler v. El Paso National Bank*²²⁶ a depositor sued his bank for alleged conspiracy to abuse the garnishment process and for wrongful dishonor of various checks. The trial court granted a motion for summary judgment in favor of defendant bank,²²⁷ and the depositor appealed. The court of civil appeals reversed the judgment of the trial court and remanded the case for further proceedings because of certain defects in the proof supporting the bank's motion for summary judgment.²²⁸ As to the wrongful dishonor claim, however, the court pointed out that if the bank could show that it impounded the depositor's funds pursuant to a lawful writ of garnishment, and that it dishonored checks presented for payment out of those funds while the writ was in effect, the bank would have a valid defense to the action.²²⁹ According to the court, this defense would be valid even if the funds impounded were in excess of the garnisher's claim.²³⁰

D. *Banks and the DTPA*²³¹

Seeking a Loan Is Not Within the DTPA. In *Riverside National Bank v. Lewis*²³² the Texas Supreme Court held that a person who sought to obtain a bank loan did not fall within the definition of "consumer" as it existed in May 1975²³³ and was not entitled to maintain an action under the DTPA.²³⁴ In *Riverside* the person seeking the loan was prematurely advised that his loan application had been approved when, in fact, no approval had occurred. The application was ultimately turned down. Because of his failure to obtain the loan, the applicant incurred losses in

In many ways Article Three of the Uniform Commercial Code . . . is like a huge machine assembled by a mad inventor and comprised of assorted sprockets, gears, levers, pulleys, and belts. . . .

In their study of the intricacies of Article Three, law students . . . see that the inventor was far from mad, yet they are frustrated because they cannot see the machine in action to find out whether the gears and belts, which look as if they might not function properly, can, in fact, perform as planned. The discussion that follows will point out some places where the design looks defective. None of my complaints are fundamental. . . . Indeed, the words that follow may be simply one more person's pulling on the levers and poking at the innards of the machine.

White, *Some Petty Complaints About Article Three*, 65 MICH. L. REV. 1315, 1315 (1967). The author is, of course, J. White of J. WHITE & R. SUMMERS, *supra* note 28, albeit in his earlier literary days.

226. 589 S.W.2d 832 (Tex. Civ. App.—El Paso 1979, no writ).

227. *Id.* at 834.

228. *Id.* at 835.

229. *Id.* at 836.

230. *Id.*

231. The DTPA is codified at TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1980-1981).

232. 603 S.W.2d 169 (Tex. 1980), *opinion on remand*, 605 S.W.2d 954 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

233. 1973 Tex. Gen. Laws, ch. 143, § 1, at 323. The definition then provided: " 'Consumer' means an individual who seeks or acquires by purchase or lease, any goods or services." *Id.*

234. 603 S.W.2d at 176.

the repossession and resale of his car and in the resulting set-off of a deficiency claim against his funds by another lender. The applicant brought suit against the bank on theories of fraud and violations of the DTPA. The Texas Supreme Court determined that, to qualify as a "consumer" under the DTPA, one must seek to acquire "goods" or "services,"²³⁵ and that an attempt to obtain a loan of money did not qualify under either category.²³⁶ The court, however, declined to pass on the question of whether a bank's misrepresentation of certain other bank activities might constitute a deceptive act relating to a sale of "services."²³⁷ Although the court ruled that the DTPA claim failed, the court upheld the fraud claim and remanded the case to the court of civil appeals for a determination as to whether the evidence supported an award of exemplary damages.²³⁸ While the supreme court emphasized that the statutory provisions that governed the case were those in effect at the time of the alleged deceptive acts,²³⁹ it does not seem that the definition of "consumer" was amended in such a way that the result in this case would be different under the present version of the DTPA.²⁴⁰

Wrongful Dishonor Is Within the DTPA. Almost as if on cue, in a case decided shortly after *Riverside*, a court of civil appeals found that a bank that had wrongfully dishonored a series of its customer's checks was liable under the DTPA.²⁴¹ The court distinguished *Riverside* on the ground that the depositor in the case at bar had acquired bank checking account services in return for payment of a monthly fee and thus qualified as a "consumer."²⁴² The court said: "The facts in the instant case seem to fit squarely within the question reserved by the Supreme Court in footnote 5 because the deliberate dishonoring of checks, a wrongful performance of a routine bank service, is the specific complaint."²⁴³ The court awarded

235. *Id.* at 173-74.

236. *Id.* at 174-75. The definition of "consumer" relied on by the court appears in note 233 *supra*.

237. 603 S.W.2d at 175 n.5. The language of the opinion indicates that the DTPA action might have been sustained had the plaintiff alleged that he sought specific services besides the use of money, and had he complained about the quality of the bank's collateral activities. *Id.* at 175.

238. *Id.* at 177. On remand, the award of exemplary damages was upheld. 605 S.W.2d 954 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

239. 603 S.W.2d at 172.

240. The definition of "consumer" now provides: "'Consumer' means an individual, partnership, corporation, or governmental entity who seeks or acquires by purchase or lease, any goods or services." TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon Supp. 1980-1981). The court concentrated on the issue of whether plaintiff sought "goods" and "services" as stated in the former definition of "consumer." 603 S.W.2d at 172-76. Compare the current definition with the earlier definition set out in note 233 *supra*.

241. *Farmers & Merchants State Bank v. Ferguson*, 605 S.W.2d 320 (Tex. Civ. App.—Fort Worth 1980, writ granted).

242. *Id.* at 324.

243. *Id.* The "footnote 5" referred to is a footnote by the Texas Supreme Court in *Riverside*. See note 237 *supra* and accompanying text.

treble damages for the wrongful dishonors.²⁴⁴

E. *Banking Legislation*

DIDMCA. The Depository Institutions Deregulation and Monetary Control Act of 1980²⁴⁵ became effective in March 1980. While the Act deals with a wide range of topics, those of particular interest in the area of commercial law are the provisions that permit increased competition between commercial banks, savings and loan associations, and credit unions in two major areas: personal checking accounts and personal loans. First, the Act authorizes all three types of financial institutions to offer checking account services,²⁴⁶ although savings and loan associations and credit unions are prevented from offering business checking accounts, and must limit their services to personal or nonprofit accounts.²⁴⁷ As a new feature under the Act, any of the three types of financial institutions may pay interest on checking accounts.²⁴⁸

Because the cost of offering interest-bearing checking accounts is still unknown, many financial institutions may begin using a "truncated" system for processing checks.²⁴⁹ Under a truncated system, the customer would write his or her check on a form that contains duplicate pages, somewhat like a credit card form. The negotiable original would be given to the payee to serve as the check while the carbon copy (which probably should be pre-printed in such a way that negotiability is destroyed) would be retained by the customer to serve as a record of the transaction. The original would be handled by the payee like any other check and would be forwarded for collection through the appropriate clearing system.²⁵⁰ Upon receipt by the drawee the standard process of posting would occur,²⁵¹ but the cancelled checks would not be returned to the customer. Instead, the drawee would retain the checks and send a summary statement of transac-

244. *Farmers & Merchants State Bank v. Ferguson*, 605 S.W.2d 320, 327 (Tex. Civ. App.—Fort Worth 1980, writ granted).

245. Pub. L. No. 96-221, §§ 101-902, 94 Stat. 132-93 (to be codified in scattered sections of 12, 15, 22 U.S.C.). The acronym is pronounced "did'-e-mac."

246. *Id.* §§ 302-305, 94 Stat. 145-47. The particular effective dates for these portions of the Act were Mar. 31, 1980, for §§ 302, 304, 305 and Dec. 31, 1980, for § 303. *Id.* § 306, 94 Stat. 147. For savings and loans and credit unions the Act uses the term "negotiable order of withdrawal" (NOW) accounts, but such an instrument is functionally identical to a check. For simplicity, the term "check" is used in the discussion of these accounts.

247. *Id.* §§ 303, 305(d), 94 Stat. 146-47.

248. *Id.* §§ 302-305, 94 Stat. 145-47.

249. Such a system is currently in use at the Texins Credit Union for employees of Texas Instruments, Inc.

250. There may be a choice of clearing systems available for any particular item. The Act contemplates clearings through local clearing house associations, the Federal Reserve, the Federal Home Loan Bank Board, or the Central Liquidity Facility, a new agency established by § 309 of the Act. Pub. L. No. 96-221, § 309, 94 Stat. 146-47 (1980). The choice will probably depend on which system(s) the drawee has joined as well as the judgment of the depository bank (the first bank in the collection chain, *see* TEX. BUS. & COM. CODE ANN. § 4.105(1) (Tex. UCC) (Vernon 1968)) as to the fastest method of clearing the item (or the slowest if "float" is of concern).

251. *See* TEX. BUS. & COM. CODE ANN. § 4.109 (Tex. UCC) (Vernon 1968) for a description of such a process.

tions during a given time period to the customer. Such a system would save a considerable amount of processing time and cost. If the need arose, the customer, of course, could obtain a verified copy of the original from the drawee. The system is fully compatible with the Code.²⁵²

The second major area of new competition will be the entry of savings and loan associations into the consumer lending market. Credit unions and commercial banks, of course, have long been competing in this area. Two primary limitations under the Act will affect the ability of savings and loans to compete for consumer loan business. First, no more than twenty percent of the assets of a savings and loan association may be outstanding on consumer loans at any one time.²⁵³ Secondly, the associations are limited to making loans for "personal, family or household purposes," a qualification that parallels the definition of "consumer goods" under the Code.²⁵⁴ The similarity of the definitions, however, should not lead one to think that only those loans that are secured by consumer goods may be made under the Act; any type of collateral may be used to secure the loan. Thus, a person could pledge shares of stock ("instruments" under the Code definitions)²⁵⁵ as collateral to secure funds for the payment of family medical expenses. Because chapter 9 of the Code is a general personal property security statute,²⁵⁶ the major impact of the new federal legislation in the consumer lending area will be to require savings and loan associations to become familiar with a statutory area they rarely have confronted before. Chapter 9 is not directly affected by the legislation.

Electronic Funds Transfers (EFT). Voter approval last November of the Texas constitutional amendment to permit the use of automatic teller machines²⁵⁷ will create new litigation in the commercial law area regarding the transfer of funds by electronic means. Implementing legislation was approved during the last legislative session, to become effective if the amendment was approved.²⁵⁸ This legislation specifically provides that the Electronic Fund Transfers Act,²⁵⁹ passed by Congress in 1978, will provide the initial regulatory base for the use of such machines, subject to continuing study of the effectiveness of that act by the Texas State Banking Board and the Texas Attorney General, with periodic reports to the legislature on whether state regulation is needed.²⁶⁰

252. See, e.g., *id.* §§ 4.104(a)(7), .401, .406.

253. Pub. L. No. 96-221, § 401, 94 Stat. 151-55 (1980).

254. *Id.* For the definition of "consumer goods," see TEX. BUS. & COM. CODE ANN. § 9.109(1) (Tex. UCC) (Vernon Supp. 1980-1981).

255. TEX. BUS. & COM. CODE ANN. § 9.105(a)(9) (Tex. UCC) (Vernon Supp. 1980-1981).

256. *Id.* §§ 9.101-.507. On the general nature of ch. 9, see *id.* § 9.102.

257. The amendment was Proposition One on the November ballot. The full text of the amendment appears in 1979 Tex. Gen. Laws, Proposed Constitutional Amendments, at 3222.

258. See TEX. REV. CIV. STAT. ANN. art. 342—903a (Vernon Supp. 1980-1981).

259. 15 U.S.C. § 1693 (Supp. III 1979). For a discussion of the Electronic Fund Transfers Act, see J. WHITE & R. SUMMERS, *supra* note 28, § 16-9, at 640-46.

260. See TEX. REV. CIV. STAT. ANN. art. 342—903a, § 13 (Vernon Supp. 1980-1981).

V. SECURED TRANSACTIONS
(CHAPTER 9)

A. *Validity of Security Agreement*

After-Acquired Interest in Consumer Goods. In *Brown v. U.S. Life Credit Corp.*²⁶¹ a secured party included an after-acquired property clause in a security agreement covering consumer goods. The ten-day limitation on the effectiveness of such a clause imposed by section 9.204 of the Code²⁶² was not disclosed to the debtor. The court held that the failure to make disclosure of the ten-day limitation was a violation of the Truth In Lending Act²⁶³ that subjected the creditor to the penalty provisions within that Act.²⁶⁴ The debtor successfully asserted the violation of the Act as a counterclaim in the secured party's suit on the secured note even though the one-year statute of limitations had run.²⁶⁵ The counterclaim was allowed because the court viewed it as in the nature of a recoupment and not an independent action.²⁶⁶ This analysis of the statute of limitations is consistent with other Texas cases applying the Truth In Lending Act.²⁶⁷

B. *Priorities in Secured Collateral*

Lien Creditor Versus Secured Party. Under section 9.301 of the Code, an unperfected security interest is subordinate to the rights of a person who becomes a lien creditor before the security interest is perfected.²⁶⁸ Even if the security interest is perfected, the lien creditor has some protection against future advances made by the secured party more than forty-five days after the lien attaches.²⁶⁹ In *Fondren Southwest Bank v. Marathon LeTourneau Co.*²⁷⁰ the court held that a secured party who had obtained a security agreement and filed a financing statement was nonetheless subordinate to a lien creditor who later obtained a lien on the collateral because the secured party (who would have the theoretical first priority) had failed to show the amount of any indebtedness underlying the security

261. 602 S.W.2d 94 (Tex. Civ. App.—Fort Worth 1980, no writ).

262. TEX. BUS. & COM. CODE ANN. § 9.204(b) (Tex. UCC) (Vernon Supp. 1980-1981). In part the section provides: "No security interest attaches under an after-acquired property clause to consumer goods . . . unless the debtor acquires rights in them within ten days after the secured party gives value."

263. 15 U.S.C. §§ 1601, 1639(a)(8) (1976). The Act has been amended recently by Pub. L. No. 96-221, §§ 601-625, 94 Stat. 168-86 (1980). See note 245 *supra*.

264. 602 S.W.2d at 97-98. The court cited 15 U.S.C. § 1640(a)(2) (Supp. IV 1980), which imposes a penalty equal to twice the amount of the finance charge involved in the transaction.

265. 602 S.W.2d at 96. 15 U.S.C. § 1640(e) (1976) imposes a one-year limitation on suits brought to recover for violations of the Act.

266. 602 S.W.2d at 96.

267. See, e.g., *Garza v. Allied Fin. Co.*, 566 S.W.2d 57 (Tex. Civ. App.—Corpus Christi 1978, no writ); *Christian v. First Nat'l Bank*, 531 S.W.2d 832 (Tex. Civ. App.—Fort Worth 1975, writ ref'd n.r.e.).

268. TEX. BUS. & COM. CODE ANN. § 9.301(a)(2) (Tex. UCC) (Vernon Supp. 1980-1981).

269. *Id.* § 9.301(d).

270. 598 S.W.2d 337 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.).

agreement.²⁷¹ The court quite properly noted that section 9.203²⁷² requires the secured party to give value to create and attach a valid security interest and, that in the absence of proof of value, a theoretical first priority position will fail.²⁷³ The secured party also failed to show any advances made to the debtor before or within forty-five days after the lien arose as provided under the exceptions contained in section 9.301(d).²⁷⁴

In another lien creditor case²⁷⁵ the court properly held that a receiver for the benefit of creditors qualified as a lien creditor under the definitions of the Code²⁷⁶ and had priority under section 9.301 against the claim of an unperfected secured party.²⁷⁷

Conflicting Claims to Proceeds. In *Grandview Farm Center, Inc. v. First State Bank*²⁷⁸ the court held that, even though a secured party had filed in the wrong place, the filing was made in good faith and would be effective to protect an interest in proceeds as against a person who had knowledge of the existing security interest.²⁷⁹ This decision was reached under the "good faith filing error" provision of the Code.²⁸⁰

271. *Id.* at 338.

272. TEX. BUS. & COM. CODE ANN. § 9.203(a)(2) (Tex. UCC) (Vernon Supp. 1980-1981).

273. 598 S.W.2d at 338.

274. *Id.*; see TEX. BUS. & COM. CODE ANN. § 9.301(d) (Tex. UCC) (Vernon Supp. 1980-1981).

275. *Empire Life & Hosp. Ins. Co. v. Harris*, 595 S.W.2d 904 (Tex. Civ. App.—Austin 1980, no writ).

276. *Id.* at 905 n.1. The definition may be found at TEX. BUS. & COM. CODE ANN. § 9.301(c) (Tex. UCC) (Vernon Supp. 1980-1981).

277. *Empire Life & Hosp. Ins. Co. v. Harris*, 595 S.W.2d 904, 905 (Tex. Civ. App.—Austin 1980, no writ). The section referred to is TEX. BUS. & COM. CODE ANN. § 9.301(a)(2) (Tex. UCC) (Vernon Supp. 1980-1981). See text accompanying note 268 *supra*.

278. 596 S.W.2d 190 (Tex. Civ. App.—Waco 1980, no writ).

279. *Id.* at 192-93.

280. TEX. BUS. & COM. CODE ANN. § 9.401(b) (Tex. UCC) (Vernon Supp. 1980-1981).

That section provides:

A filing which is made in good faith in an improper place or not in all of the places required by this section is nevertheless effective with regard to any collateral as to which the filing complied with the requirements of this chapter and is also effective with regard to collateral covered by the financing statement against any person who has knowledge of the contents of such financing statement.

Courts have split on whether mere knowledge of a security interest will validate an improper filing or whether actual knowledge of the contents of the improperly filed financing statement is required. Compare *Chrysler Credit Corp. v. Bank of Wiggins*, 358 So. 2d 714 (Miss. 1978) (knowledge of security interest sufficient) with *In re County Green Ltd.*, 438 F. Supp. 693 (W.D. Va. 1977) (knowledge of contents of financing statement required). According to the court in *Grandview*, Texas has adopted the view that mere knowledge of a security interest will validate an improper filing. 596 S.W.2d at 193. Although the cases cited by the court do support this proposition, they fail to discuss the knowledge of contents requirement. See *Meadows v. Bierschwale*, 516 S.W.2d 125, 133 (Tex. 1974); *McGehee v. Exchange Bank & Trust Co.*, 561 S.W.2d 926, 929 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.); *Beneficial Fin. Co. v. Van Shaw*, 476 S.W.2d 772, 773 (Tex. Civ. App.—Eastland 1972, no writ). The Texas Supreme Court in *Meadows* did not make the knowledge of contents distinction, but cited *J. WHITE & R. SUMMERS*, *supra* note 114, § 21-3, at 832, who seem to favor the view that knowledge of the contents of an improperly filed financing statement is required for validation. Moreover, comment 5 to § 9.401 of the Code clearly requires knowledge of the contents of the financing statement. TEX. BUS. & COM. CODE ANN.

One of the most complex issues in the proceeds area is the right of a secured party to claim the proceeds of collateral that are commingled in a debtor's bank account prior to the debtor's bankruptcy. In *In re Cooper*²⁸¹ the United States Bankruptcy Court for the Southern District of Texas held that section 9.306(d)(4)(B)²⁸² of the Code operates to cut off any common law tracing right on the part of the secured party and substitutes a statutory formula for asserting a proceeds interest in an insolvent debtor's commingled bank account. The court further held that the secured party failed to qualify for protection under the statutory formula because the debtor received none of the proceeds during the ten-day period prior to institution of insolvency proceedings as required by the statute.²⁸³

Priorities in Accessions. In the first Texas case on the subject of accessions that interprets section 9.314 of the Code,²⁸⁴ a court of civil appeals held that the purchase money security interest of an accession claimant had priority over the claim of a subsequent purchaser for value who asserted an interest in the collateral as a whole.²⁸⁵ The court reached this decision on two grounds. First, because the goods involved were easily identified and readily removable, the court found that they did not become a part of the whole by accession.²⁸⁶ Secondly, even if the goods were accessions, the court ruled that the accession claimant's interest prevailed because it had been perfected prior to the subsequent purchase as provided in section 9.314.²⁸⁷ The ruling of the court on the second ground required a careful examination of section 9.314 as adopted in Texas because of an apparent printing error that caused an arguably different meaning in the Texas Code as compared to the official text of the Uniform Commercial Code.²⁸⁸ The court concluded that the Texas Code should be read to have the same meaning as the Uniform Commercial Code.²⁸⁹

Priorities in the Context of Default. As all lawyers know, there are some cases that sound like law school examination questions. *Food City, Inc. v.*

§ 9.401, comment 5 (Tex. UCC) (Vernon Supp. 1980-1981). Thus, an obvious conflict remains.

281. 2 B.R. 188 (Bankr. Ct. S.D. Tex. 1980).

282. TEX. BUS. & COM. CODE ANN. § 9.306(d)(4)(B) (Tex. UCC) (Vernon Supp. 1980-1981). An excellent Article dealing with the complexities of this Code provision is Skilton, *The Secured Party's Rights in a Debtor's Bank Account under Section 9-306(4)(d) of the Uniform Commercial Code*, 1978 S. ILL. U.L.J. 60.

283. 2 B.R. at 196.

284. TEX. BUS. & COM. CODE ANN. § 9.314 (Tex. UCC) (Vernon Supp. 1980-1981).

285. IDS Leasing Corp. v. Leasing Assocs., Inc., 590 S.W.2d 607 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.).

286. *Id.* at 609.

287. *Id.* at 609-11.

288. *Id.* The sections involved were TEX. BUS. & COM. CODE ANN. § 9.314(c)(3) (Tex. UCC) (Vernon Supp. 1980-81) and U.C.C. § 9-314(3)(c) (1978 version).

289. 590 S.W.2d at 611. Thus, a party claiming exception to the accession interest rule of § 9.314(a) must demonstrate not only that he was a subsequent purchaser for value, that he obtained a lien through judicial proceedings, or that he made subsequent advances under a prior perfected security interest, but also that he did so without knowledge of another security interest and before such interest was perfected. *Id.* at 610-11.

*Fleming Companies, Inc.*²⁹⁰ is one such case. In *Food City* secured party number one took and properly perfected a security interest in the equipment, fixtures, inventory, contract rights, and accounts of the debtor, a grocery store. Sometime thereafter, the debtor borrowed money from secured party number two, which took a security interest in equipment and fixtures, but this interest was never perfected. Upon default under the first security interest, secured party number one took steps to foreclose its security interest and ultimately entered into an agreement with the debtor for the foreclosure. Shortly after the foreclosure took place, secured party number two notified the debtor and the first secured party that it was foreclosing on its security interest because of default on its own agreement. Secured party number two then purported to purchase, for the unpaid balance of the debtor's note, the equipment and fixtures at a foreclosure sale that it conducted in the parking lot at the store. Thereafter, secured party number two sued secured party number one demanding possession of the equipment and fixtures.

The trial court made extensive findings of fact and resolved the issues of good faith, commercial reasonableness, and notice in favor of secured party number one. The legal issues of whether the first foreclosure caused the second security interest to move to a first priority position or whether the first foreclosure operated to extinguish the second security interest also were resolved in favor of secured party number one.

On appeal, in a lengthy and careful opinion, the court affirmed the judgment of the trial court.²⁹¹ Although the opinion is generally a good one, the court should have addressed more comprehensively the question of whether a secured party who retains collateral in satisfaction of a debt, or who buys collateral at a foreclosure sale, can extinguish a subordinate security interest. The court held that this result would obtain under either fact situation but failed fully to explain its reasoning.²⁹²

C. *Proceedings After Default*

Debtor's Remedies for Improper Disposition. Two reported cases involved pure default situations and present contrasting approaches to the question of whether a debtor can recover damages for allegedly improper acts committed in the course of the disposition of collateral. In *Ford Motor Credit Co. v. Garcia*²⁹³ the debtor sued the secured party for wrongful repossession of the debtor's truck under section 9.503 of the Code.²⁹⁴ On appeal from a judgment for the debtor, the court held that the debtor's pleading

290. 590 S.W.2d 754 (Tex. Civ. App.—San Antonio 1979, no writ).

291. *Id.* at 762.

292. *Id.* at 758. The issues involved are difficult ones and a textual analysis of the statute does little to resolve them. See TEX. BUS. & COM. CODE ANN. §§ 9.504(a), (d), .505(b) (Tex. UCC) (Vernon Supp. 1980-1981). Some of the problems are discussed in B. CLARK, *supra* note 8, ¶ 4.9.

293. 595 S.W.2d 602 (Tex. Civ. App.—Waco 1980, no writ).

294. TEX. BUS. & COM. CODE ANN. § 9.503 (Tex. UCC) (Vernon Supp. 1980-1981). The debtor alleged that the repossession involved a breach of the peace.

under "wrongful repossession," and not under "conversion," limited the debtor's right of recovery to the amount of the debtor's equity in the repossessed vehicle.²⁹⁵ Section 9.507 of the Code,²⁹⁶ providing penalty recoveries for the debtor if the secured party fails to follow Code procedures, was not mentioned nor, apparently, raised. In *Garza v. Brazos County Federal Credit Union*²⁹⁷ the secured party sued to recover a deficiency resulting from the sale of collateral, and the debtor sought to offset the deficiency by using the penalty provisions of section 9.507. The court agreed that the secured party had proceeded improperly in its disposition of the collateral and allowed the offset.²⁹⁸ *Garza* obviously represents the better approach for a debtor seeking recovery for improper disposition of collateral.

Foreclosure by Garnishment and Sequestration. New rules of civil procedure for garnishment and sequestration²⁹⁹ have been adopted by the Texas Supreme Court to conform these procedures to the due process requirements of *Fuentes v. Shevin*,³⁰⁰ *Mitchell v. W.T. Grant Co.*,³⁰¹ and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*³⁰²

VI. MISCELLANEOUS

Letter of Credit as Taxable Income. In *Watson v. Commissioner*³⁰³ the Fifth Circuit held that a farmer who sold cotton and received a letter of credit that expressly deferred payment under the credit until the following year was liable for the payment of income taxes on the value of the credit upon receipt of the credit rather than upon payment of the credit at a later time.³⁰⁴ The court reasoned that, because the credit was irrevocable, the taxpayer's rights in the credit had become fixed under the Texas Business and Commerce Code.³⁰⁵ Furthermore, even though the credit itself was not designated as assignable on its face, the court noted that section 5.116(b) of the Code³⁰⁶ permits a beneficiary to assign the right to proceeds

295. 595 S.W.2d at 605.

296. TEX. BUS. & COM. CODE ANN. § 9.507 (Tex. UCC) (Vernon Supp. 1980-1981).

297. 603 S.W.2d 298 (Tex. Civ. App.—Waco 1980, no writ).

298. *Id.* at 300-01.

299. TEX. R. CIV. P. 717-734 (effective Jan. 1, 1981).

300. 407 U.S. 67 (1972) (replevin statutes that fail to provide notice or hearing prior to deprivation of property are unconstitutional).

301. 416 U.S. 600 (1974) (seizure of property without prior hearing upheld because judicial control of process was maintained from beginning to end; *Fuentes v. Shevin* distinguished).

302. 419 U.S. 601 (1975) (garnishment statute unconstitutional for failing to provide notice, hearing, or judicial control over the process; corporations entitled to procedural safeguards as well as individual consumers).

303. 613 F.2d 594 (5th Cir. 1980).

304. *Id.* at 599.

305. *Id.* at 598; TEX. BUS. & COM. CODE ANN. §§ 5.106(a)(2), (b) (Tex. UCC) (Vernon 1968).

306. TEX. BUS. & COM. CODE ANN. § 5.116(b) (Tex. UCC) (Vernon 1968) (beneficiary may assign the right to proceeds even though the credit expressly states that it is nontransferable or nonassignable).

under such a credit.³⁰⁷ Because the right to receive proceeds under the credit had a present value to the taxpayer, the court held that the amount of that value constituted taxable income for the year in which the letter of credit was received.³⁰⁸

Uncertificated Securities Under Chapter 8. In 1978 the permanent editorial board for the Uniform Commercial Code promulgated a revision of article 8 of the official text of the Code to provide a statutory base for the use of "uncertificated securities."³⁰⁹ An "uncertificated security" is not represented by a stock certificate; ownership is reflected, instead, by registration on the books of the issuer or transfer agent. The purpose of such securities is to simplify transfer and to avoid the increasing delays attending the physical exchange of stock certificates through brokers and securities markets.³¹⁰ Three states have adopted the revision of article 8,³¹¹ and the revision probably will be considered by the Sixty-seventh Texas Legislature.

307. 613 F.2d at 598.

308. *Id.* at 599.

309. U.C.C. § 8-101 (1978 version). For a discussion of the details of the revision, see *Special Project: Uncertificated Securities, Articles 8 and 9 of the U.C.C., and the Texas Business Corporation Act: A New System to Accommodate Modern Securities Transactions*, 11 TEX. TECH L. REV. 813 (1980). The Article includes the full text of the article 8 revision. A limited number of reprints of the Article are available and, within the limits of availability, the author of this *Survey* Article will be happy to supply copies upon request to persons interested in the article 8 revision.

310. The orderly functioning of the securities markets has been threatened by the "paperwork crunch" caused by an increasing volume of share transfers. See AMERICAN BAR ASSOCIATION, REPORT OF THE COMMITTEE ON STOCK CERTIFICATES, SECTION OF CORPORATION, BANKING AND BUSINESS LAW I (1975).

311. See CONN. GEN. STAT. ANN. §§ 42a-8-101 to -406 (West 1979); MINN. STAT. ANN. §§ 336.8-101 to -408 (West Supp. 1980); W. VA. CODE §§ 46-8-102 to -408 (Cum. Supp. 1980).

