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## Commercial Transactions

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# COMMERCIAL TRANSACTIONS

by  
John Kraemer\*

This Article discusses particular case and legislative developments in commercial transactions that were reported during the survey period. While the 1981 crop of commercial transactions cases was meager in number, several of the reported decisions should be of interest to commercial lawyers. Very little new commercial legislation was enacted. Only two amendments were passed that directly bear on the commercial law area. The first amendment added two sections to the Texas Manufactured Housing Standards Act.<sup>1</sup> The second amendment enacted a uniform filing fee for the perfection of certain security interests.<sup>2</sup>

The 1980 voter approval of the Texas constitutional amendment<sup>3</sup> permitting the use of automated teller machines and electronic fund transfer systems has caused a rapid increase in the number of automated tellers in many Texas cities. The automated teller, however, is apparently still too new a device in Texas to have been the subject of reported cases during the survey period.<sup>4</sup>

As has become traditional with the Commercial Transactions Article, the topics have been organized to reflect the topical order of the Uniform Commercial Code.<sup>5</sup>

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1. TEX. REV. CIV. STAT. ANN. art. 5221f, §§ 19, 20 (Vernon Pam. Supp. 1971-1981). Section 19 relates to manufactured home titles. Section 20 requires the delivery of notice containing a warning about formaldehyde gas, by a retailer or manufacturer of manufactured homes before transferring title of such homes. For a discussion of these sections, see notes 31-35, 178-80 *infra* and accompanying text.

2. TEX. BUS. & COM. CODE ANN. §§ 9.403(e), .404(c), .405(d), .406 (Vernon Supp. 1982). For a discussion of uniform filing fee, see notes 188-89 *infra* and accompanying text.

3. The amendment was proposition one on the November 1980 ballot; the full text of the amendment appears at TEX. CONST. art. XVI, § 16(b).

4. Bank lawyers may be interested in reading N. PENNEY & D. BAKER, THE LAW OF ELECTRONIC FUND TRANSFER SYSTEMS (1981).

5. The Uniform Commercial Code first became effective in Texas on July 1, 1966. 1965 Tex. Gen. Laws, ch. 721, §§ 1—101 to 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 chs. 1 through 11 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. 1982).

I. GENERAL PROVISIONS  
(CHAPTER 1)

*Choice of Law by Agreement.* Section 1.105(a) of the Code provides, "when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties."<sup>6</sup> In a Fifth Circuit bankruptcy case, *Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Development Co.*,<sup>7</sup> a Mississippi secured creditor had entered into an equipment lease financing agreement with a Texas debtor. The agreement provided for payment of an interest rate in excess of that permitted by Texas law, but allowed under Mississippi law. The agreement further specified Mississippi law as the governing law. Texas clearly had the more significant contacts with the transaction, but equally clearly, both Texas and Mississippi bore "reasonable relationships" to the transaction. In the first hearing, the Fifth Circuit held that the more significant Texas contacts should control the choice of law, and applied the Texas usury law to the case.<sup>8</sup> Upon rehearing, the court carefully explored the ramifications of the "significant contacts" doctrine in the general conflicts law and the "reasonable relationship" test stated by the Code and concluded that a federal court sitting in a bankruptcy case should apply the Code standard of "reasonable relationship" when that standard had been statutorily adopted in both of the jurisdictions involved in the transaction.<sup>9</sup> The prior opinion was withdrawn and an opinion applying section 1.105(a) was substituted,<sup>10</sup> stating that because Mississippi had a reasonable relationship to the transaction, even though it did not have the most significant contacts, the parties' choice of Mississippi law could stand and the transaction would not be usurious.<sup>11</sup>

In another choice of law opinion<sup>12</sup> the Houston court of civil appeals held that the "reasonable relationship" test under section 1.105(a) of the Code should govern the parties' choice of Louisiana law instead of Texas law when the transaction had a reasonable relation to Louisiana.<sup>13</sup> The factors that supported the court's finding that such a relationship existed were: the plaintiff's principal place of business was in Louisiana; the contract and related documents were negotiated and signed in Louisiana; and the contract was performed in Louisiana.<sup>14</sup>

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6. TEX. BUS. & COM. CODE ANN. § 1.105(a) (Tex. UCC) (Vernon Supp. 1982).

7. 642 F.2d 744 (5th Cir. 1981).

8. *Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Dev. Co.*, 626 F.2d 401, 414 (5th Cir. 1980).

9. *Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Dev. Co.*, 642 F.2d 744, 750, 753-54 (5th Cir. 1981).

10. *Id.* at 745.

11. *Id.* at 746.

12. *First Commerce Realty Investors v. K-F Land Co.*, 617 S.W.2d 806 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.).

13. *Id.* at 809.

14. *Id.*

II. SALES TRANSACTIONS  
(CHAPTER 2)

A. Formation of Sales Contracts

*Additional Written Terms following Oral Agreement.* One of the most important changes in the common law of contracts that was made by chapter 2 of the Code was the rejection of the "mirror-image rule" of contract formation.<sup>15</sup> Under that common law doctrine, no contract could be formed unless there was a precise match between the terms of an offer and an acceptance.<sup>16</sup> The doctrine had the inherent appeal of simplicity and logical precision; it also, however, had the difficulty of being a legal rule that was out of step with the way the business world operated. All too often, the parties might exchange forms that did not precisely match, or might reach oral agreements that were followed by slightly varying written confirmations, or might deal on terms that were comfortable for human beings, but failed to meet the strait jacket exactness of the mirror-image rule. Under the doctrine, the parties could deal with each other for some period of time and then, when a dispute arose, learn that an enforceable contract had never been formed.<sup>17</sup>

The Code solution to this problem is found in section 2.207,<sup>18</sup> which permits the formation of a contract even though an offer and acceptance may differ on several terms. New terms contained in an acceptance or confirmation are treated as proposals for addition to the contract and, between merchants, such terms become part of the contract unless: (1) the offer limits acceptance to the terms of the offer or, (2) objection is made to the additional terms or, (3) the additional terms materially alter the original contract.<sup>19</sup> A further change made by the Code is the ability of the contracting parties to "fill in" the terms of an agreement, which is otherwise silent, by the parties' course of performance. In such cases, section 2.207(c)<sup>20</sup> operates to form a contract and section 2.208<sup>21</sup> applies to determine the terms developed by a course of performance.

In *Preston Farm & Ranch Supply, Inc. v. Bio-Zyme Enterprises*<sup>22</sup> the Dallas court of civil appeals held that a service charge included on monthly invoice statements became part of the contract between a merchant-seller

15. TEX. BUS. & COM. CODE ANN. § 2.207(a) (Tex. UCC) (Vernon 1968).

16. See, e.g., *Poel v. Brunswick-Balke-Collender Co.*, 216 N.Y. 310, 110 N.E. 619 (1915) when the defendants accepted plaintiff's offer to sell subject to terms other than those proposed in the offer, the court held that this was equivalent to absolute rejection.

17. Many of the difficulties caused by the mirror-image rule were described in hearings held before the New York Law Revision Commission while the Code was being drafted. The testimony is reported in 1 N.Y. STATE LAW REVISION COMMISSION, 1954 REPORT 119 (1954).

18. TEX. BUS. & COM. CODE ANN. § 2.207 (Tex. UCC) (Vernon 1968).

19. *Id.* § 2.207(b).

20. *Id.* s 2.207(c).

21. *Id.* § 2.208.

22. 615 S.W.2d 258, 261 (Tex. Civ. App.—Dallas 1981), *aff'd*, 25 Tex. Sup. Ct. J. 70 (Nov. 25, 1981). Note that the *Texas Writs of Error Table* does not show the history of this case subsequent to the court of appeals decision.

and two merchant-buyers because, under section 2.207,<sup>23</sup> the monthly invoice statements were proposals for addition to the contract to which no objection was made. On appeal, the supreme court affirmed the lower court decision, but not on the section 2.207 rationale of additional terms contained in an acceptance or confirmation.<sup>24</sup> The supreme court held, instead, that the course of conduct by the defendant in making continued purchases and payments according to the invoice terms amounted to an acceptance of the term imposing a service charge.<sup>25</sup> Section 2.208 was not cited by the court in reaching this decision, but the opinion seems to be based on grounds encompassed by that section.<sup>26</sup>

*Open Price Terms.* The Code contains a number of "gap-fillers" designed to supply contract terms omitted by the parties in their agreement.<sup>27</sup> *Landrum v. Devenport*<sup>28</sup> is the most recent addition to the Texas law applying the gap-filling provisions of the Code. In *Landrum* the court found that the parties had intended to make a contract even though the price term was left open, and further held that the price should be determined by the jury.<sup>29</sup>

*Precontractual Warning Notice of Health Hazard.* In the 1981 legislative session the Texas Legislature amended the Texas Manufactured Housing Standards Act.<sup>30</sup> Professional sellers of manufactured homes are now required to provide consumers with a health warning notice describing the hazards of formaldehyde gas before any contract of sale is signed.<sup>31</sup> Although the statute specifies a form of notice,<sup>32</sup> the Texas Department of Labor and Standards was given the power to prescribe a different form,<sup>33</sup> and the department modified the notice by regulation effective August 26,

23. TEX. BUS. & COM. CODE ANN. § 2.207 (Tex. UCC) (Vernon 1968).

24. *Preston Farm & Ranch Supply, Inc. v. Bio-Zyme Enterprises*, 25 Tex. Sup. Ct. J. 70 (Nov. 25, 1981).

25. *Id.* at 73.

26. TEX. BUS. & COM. CODE ANN. § 2.208(a) (Tex. UCC) (Vernon 1968) provides:

Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

27. See, e.g., TEX. BUS. & COM. CODE ANN. §§ 2.305(a) (price), .308(1) (place of delivery), .309(a) (time for delivery) (Tex. UCC) (Vernon 1968). For a discussion of this area see Krahrmer, *Commercial Transactions, Annual Survey of Texas Law*, 35 Sw. L.J. 191, 194 (1981).

28. 616 S.W.2d 359 (Tex. Civ. App.—Texarkana 1981, no writ).

29. *Id.* at 362. TEX. BUS. & COM. CODE ANN. § 2.204(c) (Tex. UCC) (Vernon 1968) 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."

30. TEX. REV. CIV. STAT. ANN. art. 5221f (Vernon Supp. 1982).

31. *Id.* §§ 20(a), (b).

32. *Id.* § 20(b).

33. *Id.* § 20(c)(4).

1981.<sup>34</sup> An attorney who represents sellers of manufactured homes should be careful to advise the sellers to use the most recent form of notice prescribed by the department because a defective notice is "evidence of wan-

34. Tex. Dept. of Labor & Standards, Reg. 063.55.09.004, 6 Tex. Reg. 3837 (1981) provides:

The caption or heading of the notice shall be in all capital letters in at least 20-point size type. The body of the notice shall be in all capital letters in at least 10-point size type. The other portions of the form shall be in type which is eight points in size. The notice shall read as follows:

NOTICE TO PROSPECTIVE PURCHASERS OF  
MANUFACTURED HOMES

WARNING

THE TEXAS DEPARTMENT OF LABOR AND STANDARDS IS CONDUCTING RESEARCH ON FORMALDEHYDE VAPORS AND INDOOR AIR QUALITY. BUILDING PRODUCTS OR MATERIALS NORMALLY USED IN THE CONSTRUCTION OF RESIDENTIAL DWELLINGS MAY RELEASE AIRBORNE CONTAMINANTS OR FORMALDEHYDE VAPORS INTO YOUR HOME.

STRINGENT CONSTRUCTION STANDARDS SET BY THE GOVERNMENT TO CONSERVE ENERGY HAVE LED TO CONCERN OVER RESULTING INDOOR AIR QUALITY. WITH REDUCED AIR INFILTRATION AND AIR EXCHANGE RATES, AIRBORNE VAPORS OR CONTAMINANTS TEND TO ACCUMULATE IN THE HOME. THESE VAPORS OR CONTAMINANTS APPEAR TO BE GENERATED BY EMISSIONS FROM BUILDING PRODUCTS OR MATERIALS, SMOKING, COOKING, FUEL BURNING APPLIANCES, CARELESS USE OF SPRAYS OR CLEANING SOLUTIONS OR SEALANTS, EXCESS HUMIDITY, FURNISHINGS, CLOTHING, OR ACTIVITIES WHICH ALTER THE QUALITY OF THE INDOOR AIR. THERE ARE NO GOVERNMENTAL STANDARDS OR REQUIREMENTS RELATING TO THE EMISSION OF VAPORS OR CONTAMINANTS FROM RESIDENTIAL BUILDING PRODUCTS OR MATERIALS.

THESE FACTORS (SINGLY OR TOGETHER) MAY, OR MAY NOT, CAUSE OR CONTRIBUTE TO DISCOMFORT, IRRITATION, SYMPTOMS, OR HEALTH PROBLEMS. ADEQUATE VENTILATION OF YOUR HOME SHOULD HELP REDUCE THE LEVEL OF VAPORS OR CONTAMINANTS IN THE INDOOR AIR; THEREFORE, PERIODIC AIRING OF YOUR HOME IS ADVISED. PERSONS WITH ALLERGIES, ASTHMA, OR SENSITIVITIES MUST TAKE SPECIAL CARE TO CONTROL THEIR INDOOR ENVIRONMENTS.

THIS NOTICE, REQUIRED BY TEXAS LAW AND REGULATION, MAY BE REVISED OR DISCONTINUED BASED ON FINDINGS FROM THIS RESEARCH. IF YOU HAVE HEALTH CONCERNS OR PROBLEMS, CONSULT YOUR DOCTOR. IF YOU HAVE QUESTIONS ON INDOOR AIR QUALITY OR THIS NOTICE, CONTACT THE TEXAS DEPARTMENT OF LABOR AND STANDARDS:

TEXAS DEPARTMENT OF LABOR  
AND STANDARDS  
P.O. BOX 12157  
CAPITOL STATION  
AUSTIN, TEXAS 78711-2157  
TELEPHONE: (512) 475-5712

DATE \_\_\_\_\_  
I (WE) CERTIFY THAT  
THIS WARNING WAS  
GIVEN TO ME (US) ON THE  
DATE SHOWN AND PRIOR  
TO THE SIGNING OF ANY  
BINDING AGREEMENT TO  
PURCHASE THE HOME  
AND THAT I (WE) HAVE  
READ AND UNDERSTAND  
IT.

ton disregard for the health and safety of the consumer."<sup>35</sup>

### B. Performance of Sales Contracts

*Risk of Loss Before Delivery of Goods.* In the absence of agreement to the contrary, the risk of loss does not pass to a buyer of goods until they are delivered or otherwise come into the buyer's control (as in F.O.B. shipment contracts).<sup>36</sup> The Amarillo court of civil appeals in *McClellan v. Scardello Ford, Inc.* held that the seller of a truck continued to have the risk of loss until delivery under the provisions of the Code.<sup>37</sup> The trial court's holding that the buyer was liable to the seller for the purchase price of the truck that was destroyed by fire prior to delivery was therefore reversed.<sup>38</sup>

*Bona Fide Purchasers and Certificates of Title.* In *Drake Insurance Co. v. King*<sup>39</sup> the Texas Supreme Court held that the purchaser of a stolen truck who failed to demand that his seller comply with the Texas Certificate of Title Act<sup>40</sup> could not qualify as a bona fide purchaser to acquire a title superior to that of the true out-of-state owner.<sup>41</sup> Although the court did not discuss the effect of its holding on the various good faith purchase provisions in the Code,<sup>42</sup> it emphasized the buyer's duty to ensure compliance with the Certificate of Title Act<sup>43</sup> before purchasing a motor vehi-

(type name of retailer)	X
(type retailer address)	(signature, prospective purchaser)
(city, state, zip)	(signature, prospective purchaser)
(type name of home manufacturer)	(type name(s) of purchaser(s))
(type plant location)	(purchaser's address)
(type identification number(s) of home)	(city, state, zip)

35. TEX. REV. CIV. STAT. ANN. art. 5221f, § 20(d) (Vernon Pam. Supp. 1971-1981). This proviso would bear on the warranties created by TEX. BUS. & COM. CODE ANN. §§ 2.314, .315 (Tex. UCC) (Vernon 1968), as well as on suits based on common law negligence and strict liability theories. The statute specifically states, however, that its provisions "shall not be deemed to imply or infer that the retailer or manufacturer had, or did not have, prior to the passage of this Act any duty to warn any consumer concerning the possible effects of formaldehyde." TEX. REV. CIV. STAT. ANN. art. 5221f, § 20(d) (Vernon Pam. Supp. 1971-1981).

36. TEX. BUS. & COM. CODE ANN. § 2.509(2) (Tex. UCC) (Vernon 1968).

37. 619 S.W.2d 593, 596 (Tex. Civ. App.—Amarillo 1981, no writ).

38. *Id.* at 597.

39. 606 S.W.2d 812 (Tex. 1980).

40. TEX. REV. CIV. STAT. ANN. art. 6687—1, §§ 51, 53 (Vernon 1977).

41. 606 S.W.2d at 817.

42. The most important of the good faith purchase provisions in the Code are TEX. BUS. & COM. CODE ANN. §§ 2.403 (Tex. UCC) (Vernon 1968), 9.307 (Tex. UCC) (Vernon Supp. 1982).

43. TEX. REV. CIV. STAT. ANN. art. 6687—1 (Vernon 1977 & Supp. 1982).

cle,<sup>44</sup> leaving little doubt that a good faith purchase under the Code includes a duty to follow the requirements of the certificate of title legislation.<sup>45</sup>

*C.I.F. Contracts.* The Fifth Circuit in *Steuber Co. v. Hercules, Inc.*<sup>46</sup> confronted whether a C.I.F. destination contract required the seller or the buyer to be responsible for the off-loading of goods upon arrival at the port of destination. The court held that under the Code, a C.I.F. destination contract required a buyer to pay for the goods upon tender of the documents unless the parties agreed otherwise. After tender, the buyer had the duty to secure the unloading of the goods.<sup>47</sup> A fact issue remained as to whether there was an "agreement otherwise," and the case therefore was remanded to the trial court for determination of that issue.<sup>48</sup>

### C. Warranties

*Implied Warranties.* In *Clark v. DeLaval Separator Corp.*<sup>49</sup> the Fifth Circuit addressed a question of first impression under the Texas Commercial Code.<sup>50</sup> The novel issue was whether an implied warranty of merchantability explicitly extended to the future performance of goods.<sup>51</sup> The court, finding no Texas cases on the point, reviewed case law in other jurisdictions and held that, by its very nature, "an implied warranty cannot explicitly extend to future performance."<sup>52</sup> Judgment was rendered for the seller.<sup>53</sup> The decision seems eminently sound because an implied warranty, as an obligation imposed by law, is not a contract term explicitly stated by the contracting parties in their agreement.

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44. 606 S.W.2d at 817. The court cited numerous cases, most of which were pre-Code, that support a good faith rule, including: *Texas Automotive Dealers Ass'n v. Harris County Tax Assessor-Collector*, 149 Tex. 122, 229 S.W.2d 787 (1950); *Boswell v. Connell*, 556 S.W.2d 624 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.); *Mossler Acceptance Co. v. Burke*, 252 S.W.2d 749 (Tex. Civ. App.—Galveston 1952, writ ref'd n.r.e.); *Deahl v. Thomas*, 224 S.W.2d 293 (Tex. Civ. App.—Amarillo 1949, writ ref'd n.r.e.); *Ball v. Sorenson*, 191 S.W.2d 908 (Tex. Civ. App.—Fort Worth 1945, no writ).

45. An interesting question that arises from the holding in *Drake* is whether the conflict of law rules in TEX. BUS. & COM. CODE ANN. §§ 9.103(b)(2), (4) (Tex. UCC) (Vernon Supp. 1982) will operate to protect a Texas buyer or secured party against an out-of-state lienholder, as contrasted to an owner, after the expiration of the four-month period of perfection there specified. While the decision in *Drake* seems to be correct on its own facts, the case raises a question because of the possible breadth of its holding.

46. 646 F.2d 1093 (5th Cir. 1981).

47. *Id.* at 1097; see TEX. BUS. & COM. CODE ANN. §§ 2.320, 2.504 (Tex. UCC) (Vernon 1968).

48. 646 F.2d at 1099.

49. 639 F.2d 1320 (5th Cir. 1981).

50. The court also addressed questions of disclaimers and evidence. *Id.* at 1324-26.

51. TEX. BUS. & COM. CODE ANN. § 2.725(b) (Tex. UCC) (Vernon 1968) provides that the cause of action for breach of any contract accrues when the breach occurs, and a breach of warranty occurs when tender of delivery is made. An exception exists, however, when the warranty explicitly extends to the future performance of the goods, that allows for accrual of the cause of action at the time of actual or constructive discovery of the breach.

52. 639 F.2d at 1325 (emphasis in original).

53. *Id.* at 1327.



*Chrysler Corp. v. Roberson*,<sup>54</sup> an implied warranty case before the Waco court of civil appeals, involved a number of procedural issues, in particular several special issues concerning warranty and deceptive trade practices were raised. In a lengthy opinion, the court addressed each of the challenges made by the defendants and concluded that the judgment of the trial court should stand.<sup>55</sup> The case is worth studying on special issue submission in warranty actions because of the careful and comprehensive discussion by the court.<sup>56</sup>

*Implied Warranties in the Sale of Used Goods.* In two cases Texas courts of civil appeals held that there was no implied warranty in the sale of used goods in Texas.<sup>57</sup> Both cases involved the additional question of whether an implied warranty would extend not simply to used goods, but to used houses. In each case the court answered this question in the negative.<sup>58</sup> Neither case considered whether *Mid Continent Aircraft Corp. v. Curry County Spraying Service, Inc.*<sup>59</sup> stated a contrary rule for used goods cases.<sup>60</sup>

#### D. Remedies

*Statute of Limitations in Sales Cases.* A new and rather intriguing issue has been raised following the case of *Garcia v. Texas Instruments, Inc.*,<sup>61</sup> decided by the Texas Supreme Court. *Garcia* involved two issues: (1) whether an implied warranty action for personal injuries would lie without privity between the seller and the injured party, and (2) whether such an action would be within the two-year tort statute of limitations<sup>62</sup> or within the four-year sales statute of limitations.<sup>63</sup> The court held that privity was not required, and that the four-year statute would govern.<sup>64</sup>

The question remaining after *Garcia* is whether the statute of limitations begins to run upon tender of delivery, the Code standard, or whether the statute begins to run upon occurrence of the injury. The issue arises in part from *Garcia* and in part from the interpretation placed upon that deci-

54. 619 S.W.2d 451 (Tex. Civ. App.—Waco 1981, no writ).

55. *Id.* at 462.

56. *Id.* at 458-59. The court held a complaint was not preserved for appeal after an original complaint was acted on by the court and no additional or subsequent complaint was articulated. *Id.*

57. *Thornton Homes, Inc. v. Greiner*, 619 S.W.2d 8, 9 (Tex. Civ. App.—Eastland 1981, no writ); *Cheney v. Parks*, 605 S.W.2d 640, 642 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

58. 619 S.W.2d at 9; 605 S.W.2d at 642.

59. 572 S.W.2d 308 (Tex. 1978) (discussion of effect of use of term "as is" in contract for sale of used aircraft implying existence of implied warranty in sale of used goods).

60. This question is discussed in some detail in *Krahmer*, *supra* note 27, at 198-99. The *Mid Continent* issue is one that should be clarified in the used goods cases.

61. 610 S.W.2d 456 (Tex. 1980). For a discussion, see *Krahmer*, *supra* note 27, at 196-97.

62. TEX. REV. CIV. STAT. ANN. art. 5526(4) (Vernon Supp. 1982).

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

64. 610 S.W.2d at 465.

sion in *Cleveland v. Square-D Co.*,<sup>65</sup> a subsequent court of civil appeals case. In *Garcia* the court noted early in the opinion that the injuries occurred approximately three years and eight months before suit was brought,<sup>66</sup> but the court also noted that the sale had occurred over a period of time ranging from four years and two months to three years and eight months before the suit was filed.<sup>67</sup> At the very end of its opinion, however, the court shifted ground and said that the implied warranty action had been "filed approximately three years and eight months after the sale of the sulfuric acid."<sup>68</sup> The lack of clarity in *Garcia* as to the event that triggered the running of the four-year limitation period, the tender of delivery or the time of injury, led the court of civil appeals in *Cleveland* to hold that the four-year statute of limitations applied to a personal injury case brought on a warranty theory. There was no discussion in the opinion of the date when the sale occurred, and apparently the court assumed that the date of injury controlled.<sup>69</sup> Based on *Garcia* and its progeny, a serious question exists as to *when* the four-year sales statute of limitations begins to run in personal injury warranty cases.

### III. COMMERCIAL PAPER (CHAPTER 3)

#### A. Form of Negotiable Instruments

*The Requirement of an Unconditional Promise.* In *Mitchell v. Riverside National Bank*<sup>70</sup> the court of civil appeals held that a statement contained in a note that said the note was "subject to and governed by" the terms of an extrinsic contract created a condition on the promise to pay, and rendered the note non-negotiable.<sup>71</sup> In support of the conclusion, the court cited a 1928 civil appeals decision,<sup>72</sup> and never referred to section 3.105 of the Code,<sup>73</sup> that clearly would have led to the same result.

#### B. Enforcement of Commercial Paper

*Rights of a Holder in Due Course.* Under the Code, when the signatures on an instrument are admitted or established, production of the instrument entitles a holder to recover provided a defense is not established.<sup>74</sup> If a

65. 613 S.W.2d 790 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

66. 610 S.W.2d at 457.

67. *Id.* (emphasis added). Deliveries began on Aug. 16, 1974; suit, however, was not begun until Oct. 18, 1978.

68. *Id.* at 465.

69. 613 S.W.2d 790, 791-92 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

70. 613 S.W.2d 802 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.).

71. *Id.* at 803.

72. *American Exch. Nat'l Bank v. Steeley*, 10 S.W.2d 1038 (Tex. Civ. App.—Dallas 1928, writ ref'd). (Reference to an extrinsic contract in trade acceptances did not make the instruments non-negotiable).

73. TEX. BUS. & COM. CODE ANN. § 3.105(b)(1) (Tex. UCC) (Vernon 1968). The provision states that "[a] promise or order is not unconditional if the instrument . . . states that it is subject or governed by any other agreement."

74. *Id.* § 3.307(b) provides that "when signatures are admitted or established, produc-

defense is shown to exist, the holder is then required to prove that all of the requirements for holding "in due course" have been met.<sup>75</sup> In *Favors v. Yaffe*<sup>76</sup> the Houston court of civil appeals properly considered and applied these Code rules to decide that the maker of a note had not effectively rebutted the holder's evidence of holding in due course, and that, therefore, the defense of fraud was ineffective.<sup>77</sup> The case is a brief, but good, analysis of the holder in due course rules set forth in chapter 3 of the Code.

*Rights of One Not a Holder in Due Course and the Jus Tertii.* The case of *Landscape Design & Construction, Inc. v. Warren*<sup>78</sup> was discussed in the last *Annual Survey*.<sup>79</sup> In that case the court held: (1) that a maker or drawer could not raise the jus tertii defense of a failure of consideration between a payee and the payee's immediate indorsee, and (2) that a payee was absolutely liable to an indorsee on the payee's contract of indorsement, whether or not the payee received consideration.<sup>80</sup> The first holding in *Landscape Design* was correct, the second, however, was simply wrong. The court in *Landscape Design* cited only pre-Code cases as its authority, and misinterpreted those.<sup>81</sup> Fortunately, a case reported during this survey period utilized proper Code analysis in addressing the same issues. In *Davis v. Watson Bros. Plumbing, Inc.* the Dallas court of civil appeals held that, under the Code, a maker or drawer could not raise the jus tertii defense of failure of consideration in situations paralleling those discussed in *Landscape Design*.<sup>82</sup> This portion of the opinion simply puts the jus tertii analysis on a Code ground. In resolving the second issue, the Dallas court discussed the right of the payee to raise a defense of failure of consideration under sections 3.306(3) and 3.408 of the Code.<sup>83</sup> The *Davis* case is on solid ground and should help to correct the erroneous second portion of the *Landscape Design* decision.<sup>84</sup>

### C. Liability of Parties

#### *Liability of Parties Signing in a Representative Capacity. Womack v. First*

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tion of the instrument entitles a holder to recover on it unless the defendant establishes a defense."

75. *Id.* § 3.307(c).

76. 605 S.W.2d 342 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.).

77. *Id.* at 345.

78. 598 S.W.2d 38 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.).

79. Krahmer, *supra* note 27, at 208-10.

80. 598 S.W.2d at 40.

81. Culberson v. Hawkins, 321 S.W.2d 140 (Tex. Civ. App.—Houston 1959, no writ). See Krahmer, *supra* note 27, at 209-10. The *Landscape* court held the payee was liable regardless of the payment of consideration while § 3.306 provides the payee with a defense upon failure of payment of consideration. TEX. BUS. & COM. CODE ANN. § 3.306 (Tex. UCC) (Vernon 1968).

82. 615 S.W.2d 844, 846-47 (Tex. Civ. App.—Dallas 1981, no writ).

83. *Id.* at 846; see TEX. BUS. & COM. CODE ANN. §§ 3.306(3), 3.408 (Tex. UCC) (Vernon 1968).

84. For a discussion about the erroneous second portion of the opinion, see Krahmer, *supra* note 27, at 209-10.

*National Bank*<sup>85</sup> is the latest in the long series of Texas cases dealing with the liability of parties who sign instruments in a representative capacity.<sup>86</sup> *Womak* adds to this body of law the point that, absent ratification or estoppel, no person is liable for an instrument without a valid signature thereon.<sup>87</sup>

*Liability of Indorser on Dishonored Check.* Many commercial paper cases can be decided by a summary judgment if the instrument and supporting documents are in order. A good example of this principle is *Barham v. Sugar Creek National Bank*,<sup>88</sup> in which the collecting bank as holder of a check, upon learning that payment had been stopped and the check dishonored, gave prompt notice of dishonor to its indorser. In an action to recover the amount due on the indorsement contract, the bank moved for summary judgment after having introduced the check and an affidavit by the bank's vice president and cashier describing the actions taken upon dishonor. Because the indorsement also constituted a contract debt that was unpaid for more than thirty days, the bank sought recovery for attorney's fees as part of its case under article 2226 of the Texas statutes.<sup>89</sup>

85. 613 S.W.2d 548 (Tex. Civ. App.—Tyler 1981, writ filed).

86. See, e.g., *Griffin v. Ellinger*, 538 S.W.2d 97 (Tex. 1976) (president of corporation held personally liable); *Seale v. Nichols*, 505 S.W.2d 251 (Tex. 1974) (signor of promissory note who did not reveal his representative capacity held personally liable); *Wolf v. Little John Corp. of Liberia*, 585 S.W.2d 774 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.) (court refused to disregard the corporate form to hold shareholders and officers liable); *Walker v. Republic Nat'l Bank*, 559 S.W.2d 438 (Tex. Civ. App.—Tyler 1977, no writ) (defendant mistakenly signed note in individual capacity).

87. 613 S.W.2d at 552. The relevant Code sections are TEX. BUS. & COM. CODE ANN. §§ 3.401, .404(a) (Tex. UCC) (Vernon 1968).

88. 612 S.W.2d 78 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

89. TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1982) provides:

Any person, corporation, partnership, or other legal entity having a valid claim against a person or corporation for services rendered, labor done, material furnished, overcharges on freight or express, lost or damaged freight or express, or stock killed or injured, or suits founded upon a sworn account or accounts, or suits founded on oral or written contracts, may present the same to such persons or corporation or to any duly authorized agent thereof; and if, at the expiration of 30 days thereafter, payment for the just amount owing has not been tendered, the claimant may, if represented by an attorney, also recover, in addition to his claim an costs, a reasonable amount as attorney's fees. The usual and customary fees in such cases shall be presumed to be reasonable, but such presumption may be rebutted by competent evidence. In a proceeding before the court, or in a jury case where the issue of amount of attorney's fees is submitted to the court for determination by agreement, the court may in its discretion take judicial knowledge of the usual and customary fees in such matters and of the contents of the case file without receiving further evidence. The provisions hereof shall not apply to contracts of insurers issued by insurers subject to the provisions of the Unfair Claim Settlement Practices Act (Article 21.21—2, Insurance Code), nor shall it apply to contracts of any insurer subject to the provisions of Article 3.62, Insurance Code, or to Chapter 387, Acts of the 55th Legislature, Regular Session, 1957, as amended (Article 3.62—1, Vernon's Texas Insurance Code), or to Article 21.21, Insurance Code, as amended, or to Chapter 9, Insurance Code, as amended, and each such article or chapter shall be and remain in full force and effect. This Act shall be liberally construed to promote its underlying purposes.

Summary judgment was granted, and the recovery of attorney's fees was allowed, and both were affirmed on appeal.<sup>90</sup> *Barham* is a model of well-handled commercial litigation.<sup>91</sup>

*Warranty Liability or Commercial Paper.* Under chapter 3 every indorser makes two distinct representations to subsequent holders. The first representation under a contract of indorsement is that the indorser will pay the instrument if it is dishonored, provided that the conditions precedent, presentment, dishonor, and notice of dishonor, are fulfilled.<sup>92</sup> The second representation goes to the quality of the instrument, and amounts to a warranty that the instrument and its prior transfer(s) are valid.<sup>93</sup> As is true in the sale of goods, the warranty is breached upon transfer.<sup>94</sup> When it exists, warranty liability is more absolute than the contract of indorsement liability because no presentment, dishonor, or notice of dishonor is required to bring an action for the breach of warranty.<sup>95</sup> The stricter nature of warranty liability is also apparent by noting the difference a "without recourse" indorsement has on contract liability as contrasted to warranty liability. A "without recourse" indorsement completely disclaims the contract of indorsement liability,<sup>96</sup> but only slightly limits the scope of the warranty obligation.<sup>97</sup>

This difference in the theoretical underpinnings of contract liability and warranty liability was recognized by the court in *Vandergriff Chevrolet Co.*

90. 612 S.W.2d at 80-81.

91. By way of contrast, see *New Hampshire Ins. Co. v. Bank of the Southwest*, 584 S.W.2d 560 (Tex. Civ. App.—Amarillo 1979, no writ) discussed in Krahmer, *Commercial Transactions, Annual Survey of Texas Law*, 34 Sw. L.J. 199, 215-16 (1980).

92. TEX. BUS. & COM. CODE ANN. § 3.414(a) (Tex. UCC) (Vernon 1968). The conditions precedent to enforcement of a contract of indorsement are set out in *id.* § 3.501.

93. *Id.* § 3.417(b) provides:

Any person who transfers an instrument and receives consideration warrants to his transferee and if the transfer is by indorsement to any subsequent holder who takes the instrument in good faith that

- (1) he has a good title to the instrument or is authorized to obtain payment or acceptance on behalf of one who has a good title and the transfer is otherwise rightful; and
- (2) all signatures are genuine or authorized; and
- (3) the instrument has not been materially altered; and
- (4) no defense of any party is good against him; and
- (5) he has no knowledge of any insolvency proceeding instituted with respect to the maker or acceptor or the drawer of an unaccepted instrument.

The warranty also extends to collecting banks. *Id.* § 4.207(b).

94. *Id.* § 2.725(b) provides that "[a] breach of warranty occurs when tender of delivery is made." This provision is applicable to an indorsement contract because *id.* § 3.417, comment 1, states that "[t]he obligations imposed by this section are stated in terms of warranty. Warranty terms, which are not limited to sale transactions, are used with the intention of bringing in all the usual rules of law applicable to warranties . . . ."

95. Indorsement liability is hedged with fairly technical conditions precedent while warranty liability has almost no procedural impediments to enforcement. Compare *id.* § 3.414(a) with *id.* §§ 3.417(b), 4.207(b). Section 3.414(a) requires dishonor, notice of dishonor, and protest. Language to that effect is absent from § 3.417 and § 4.207(b).

96. *Id.* § 3.414(a).

97. *Id.* § 3.417(c).

*v. Forum Bank*.<sup>98</sup> A retail installment contract was assigned by a car dealer to a bank under a "without recourse" assignment. The court applied an approach similar to that under chapter 3 in the pure negotiable instrument cases to the assignment of the retail installment contracts. The assignment agreement contained a statement of warranties that were made "regardless of the form of the assignment."<sup>99</sup> The court therefore held that while the "without recourse" assignment would effectively disclaim the contractual liability, it would not affect the warranty liability of the assignor.<sup>100</sup> Damages were allowed for a warranty breach as a permissible alternative remedy to the repurchase obligation stated in the assignment agreement. The court stated that there was no indication that repurchasing should be the exclusive remedy.

*Waiver of Right to Accelerate.* While chapter 3 generally permits the inclusion of an acceleration clause in an instrument,<sup>101</sup> the right of acceleration must be exercised in good faith.<sup>102</sup> In *McGowan v. Pasol* the court held that an attempt by a holder to accelerate a debt was improperly made because the note was not in default.<sup>103</sup> The court stated that, alternatively, there was evidence to support the view that the holder had accepted late payments in the past and was merely seeking to coerce the maker into paying the full balance under risk of foreclosure.<sup>104</sup>

#### D. Discharge of Liability

*Discharge by Estoppel.* Under the negotiable instruments law, only an *instrument* could be discharged.<sup>105</sup> Under the Code, however, a *party* is discharged<sup>106</sup> and the right to assert the discharge is treated as a personal defense.<sup>107</sup> Section 3.601 contains a listing of the several ways in which the discharge of a party may occur,<sup>108</sup> and includes a general catch-all statement that "[a]ny party is also discharged from his liability on an instrument to another party by any other act or agreement with such party which would discharge his simple contract for the payment of money."<sup>109</sup>

During the survey period, the Houston [14th District] court of civil appeals decided *Airline Commercial Bank v. Wilburn*.<sup>110</sup> The court held that a party could be discharged from liability on an instrument by the equitable estoppel of a holder who had knowingly made misrepresentations of

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98. 613 S.W.2d 68 (Tex. Civ. App.—Fort Worth 1981, no writ).

99. *Id.* at 69.

100. *Id.* at 71.

101. TEX. BUS. & COM. CODE ANN. § 3.109(a)(3) (Tex. UCC) (Vernon 1968).

102. *Id.* § 1.208.

103. 605 S.W.2d 728, 731-32 (Tex. Civ. App.—Corpus Christi 1980, no writ).

104. *Id.* at 732.

105. UNIFORM NEGOTIABLE INSTRUMENT LAW § 200 (The UCC was approved in 1952, replacing the UNIFORM NEGOTIABLE INSTRUMENT LAW).

106. TEX. BUS. & COM. CODE ANN. § 3.601 (Tex. UCC) (Vernon 1968).

107. *Id.* §§ 3.305, .306, .601.

108. *Id.* § 3.601(a).

109. *Id.* § 3.601(b).

110. 609 S.W.2d 813 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).

fact that were relied on to the detriment of the maker.<sup>111</sup> Although section 3.601 was not cited by the court, the decision is consistent with the quoted provisions of that section.<sup>112</sup>

*F.D.I.C. Charge-Off Does Not Discharge Liability.* In *F.D.I.C. v. Manning*<sup>113</sup> the Federal Deposit Insurance Corporation (F.D.I.C.) had charged off part of an unpaid note as an unbankable asset in the liquidation of the Northeast Bank.<sup>114</sup> Subsequently, the F.D.I.C. sued the maker for the full balance due on the note. The maker defended on the ground that the charge-off amounted to a discharge.<sup>115</sup> On appeal the court considered the provisions of section 3.601 and concluded that the charge-off was merely a bank examiner's bookkeeping entry in the liquidation process and was not intended as a discharge.<sup>116</sup> Although not cited, section 3.605<sup>117</sup> seems to support the court's position by requiring that a discharge by the holder be an intentional act designed to relieve a party from further liability on an instrument.

#### IV. BANK TRANSACTIONS (CHAPTER 4)

##### A. Bank Contractual Obligations to Non-Customers

*No Liability to Holder of Check.* In *Happy Cattle Feeders, Inc. v. First National Bank*<sup>118</sup> the court properly held that a check did not operate as an assignment of the funds in a drawer's account and that a bank had no direct liability to the holder of a check drawn against those funds.<sup>119</sup> The bank was entitled to pay other checks drawn on the same account and could choose which of the several checks to pay and which to dishonor.<sup>120</sup>

*Bank Liable on Promise to Transfer Funds.* In *Harwood & Associates, Inc. v. Texas Bank & Trust*<sup>121</sup> a bank was held liable on its promise to transfer funds from the payee's account to the plaintiff in exchange for the plaintiff's sending a telegram requesting the cancellation of a stop payment order issued by a third party.<sup>122</sup> This result is consistent with the provisions

111. *Id.* at 815.

112. See TEX. BUS. & COM. CODE ANN. § 3.601 (Tex. UCC) (Vernon 1968).

113. 608 S.W.2d 270 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).

114. *Id.* at 271.

115. *Id.* at 271-72.

116. *Id.* at 271.

117. TEX. BUS. & COM. CODE ANN. § 3.605 (Tex. UCC) (Vernon 1968).

118. 618 S.W.2d 424, 427 (Tex. Civ. App.—Amarillo 1981, no writ).

119. See TEX. BUS. & COM. CODE ANN. § 3.409(a) (Tex. UCC) (Vernon 1968), which provides: "A check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it."

120. 618 S.W.2d at 427. Although not cited by the court, TEX. BUS. & COM. CODE ANN. § 4.303(b) (Tex. UCC) (Vernon 1968) would have given additional support to the decision. Section 4.303(b) provides that items may be accepted, paid, certified or charged to the indicated account of its customer in any order convenient to the bank.

121. 654 F.2d 1073 (5th Cir. 1981).

122. *Id.* at 1078.

of section 3.409(b) and section 1.103 of the Code.<sup>123</sup>

### B. Bank Obligations to Customers

*Liability for Wrongful Dishonor.* Two interesting wrongful dishonor cases were reported during the survey period.<sup>124</sup> In *Farmers & Merchants State Bank v. Ferguson*<sup>125</sup> the Texas Supreme Court held that a business customer of a bank could not qualify for treble damage recovery under the Deceptive Trade Practices Act<sup>126</sup> because the definition of "services" in existence at the time the facts of the case arose excluded services acquired for commercial or business use.<sup>127</sup> The customer was entitled, however, to recovery damages under section 4.402 of the Code<sup>128</sup> for loss of credit, loss of time, loss of funds and the use of funds, and for mental anguish. The damages for mental anguish were allowed because un rebutted evidence was found sufficient to support the jury's finding of malice in the dishonor of some checks.<sup>129</sup>

The second case was *Elizarraras v. Bank of El Paso*<sup>130</sup> in which the Fifth Circuit confronted a wrongful dishonor issue not previously addressed by the Texas courts under a Code analysis. The basic issue was whether the so-called "trader rule"<sup>131</sup> was still applicable under the Code in cases of intentional or reckless dishonor.<sup>132</sup> The Code had clearly eliminated the "trader rule" in cases of mistaken dishonor.<sup>133</sup> In a carefully researched opinion, the court concluded that the trader rule still existed in cases of intentional or reckless dishonor, but that the plaintiff should be required to show such matters as the volume of business, prior revenue, the required

123. TEX. BUS. & COM. CODE ANN. § 3.409(b) (Tex. UCC) (Vernon 1968) provides that "[n]othing in this section shall affect any liability in contract, tort or otherwise arising from any letter of credit or other obligation or representation which is not an acceptance." *Id.* § 1.103 provides that "[u]nless displaced by the particular provisions of this title, the principles of law and equity . . . shall supplement its provisions."

124. *Elizarraras v. Bank of El Paso*, 631 F.2d 366 (5th Cir. 1980); *Farmers & Merchants State Bank v. Ferguson*, 617 S.W.2d 918 (Tex. 1981).

125. 617 S.W.2d 918 (Tex. 1981).

126. The plaintiff attempted to come under the DTPA as a "consumer," which was defined at that time as "an individual, partnership, or corporation who seeks or acquires by purchase or lease, any goods or services." 1975 Tex. Gen. Laws, ch. 62, § 1(4), at 149. "Services" were defined at that time as "work, labor, or service purchased or leased for use, for other than commercial or business use, including services furnished in connection with the sale or repair of goods." *Id.* § 1(2), at 149. The definition was broadened in 1977 and now include services acquired for commercial or business use. TEX. BUS. & COM. CODE ANN. 17.45(2) (Vernon Supp. 1982). The treble damages recovery has, however, been deleted. *Id.* § 17.50.

127. 617 S.W.2d at 920-21.

128. TEX. BUS. & COM. CODE ANN. § 4.402 (Tex. UCC) (Vernon 1968).

129. 617 S.W.2d at 921.

130. 631 F.2d at 366 (5th Cir. 1980).

131. At common law the "trader rule" permitted the recovery of substantial damages for loss of reputation and loss of credit by those engaged in business without the need to prove actual damages. Damages in the case of a business were, in effect, presumed. *See, e.g.*, *First Nat'l Bank v. N.R. McFall & Co.*, 144 Ark. 149, 222 S.W. 40 (1920). *See generally*, Annot., 126 A.L.R. 206, 220-25 (1940).

132. TEX. BUS. & COM. CODE ANN. § 4.402 (Tex. UCC) (Vernon 1968).

133. *Id.*, comment 3.



use of credit by the business, and the prospects for future income to reduce speculation by the jury on the amount of damage.<sup>134</sup> The case was remanded for a new trial on the damage issue.<sup>135</sup> Note that *Elizarraras* is a federal case seeking to determine and apply Texas law in an area where the Texas courts have not yet spoken. Whether the federal court was correct in its reasoning is a matter still to be determined by the state courts.

### C. Right of Set-Off

*The Texas Equitable Set-Off Rule.* In *Continental National Bank v. Great American Management & Investment, Inc.*<sup>136</sup> the Texas court of civil appeals applied the "equitable" set-off rule<sup>137</sup> to deny a bank the right to set off a debt against the account of a depositor. The case contains a statement of the equitable set-off rule that is remarkable for its clarity and deserves full quotation for the benefit of lawyers who deal with set-off problems:

When a bank which has no knowledge or notice that funds on deposit in an account of one with the bank are held as fiduciary it has the right to apply the funds on deposit against the depositor's individual indebtedness and to retain them until it is established that they were in fact held in the account by the depositor in a fiduciary capacity for another; and, even should the fact subsequently be proved, yet may have the right to retain them if, by reason of the lack of notice and because of justified reliance upon the depositor's apparent ownership, the bank has changed its position to its injury. Conversely, the bank has not the right to seize and so apply the funds where it (a) does have such knowledge, or (b) by reason of the circumstances is "on notice" thereof or, (c) by reason of known circumstances, is charged with the duty of making the inquiry which, if made, would disclose the fact that the funds were held by the depositor as a fiduciary; and *furthermore even where innocently seized*, the funds must be yielded up to the equitable owner when the entrustment fact is established unless he who is in possession can and does show that he has changed his position to his injury [upon or after the seizure] so that it would be inequitable to require him to yield up the funds.<sup>138</sup>

Under this rule, funds held in trust accounts, custodial accounts and, quite importantly, secured transaction proceeds accounts, are immune from set-off when the bank is on notice of their character. This much of the rule is standard set-off law.<sup>139</sup> The other portion of the equitable rule requiring a detrimental change of position by the bank upon or after

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134. 631 F.2d at 376-77.

135. *Id.* at 377.

136. 606 S.W.2d 346 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.).

137. The "equitable" set-off rule, sometimes called the "federal rule," was adopted by the Texas Supreme Court in *National Indem. Co. v. Spring Branch State Bank*, 162 Tex. 521, 348 S.W.2d 528 (1961).

138. 606 S.W.2d at 348 (emphasis in original).

139. *First Nat'l Bank v. Winkler*, 146 S.W.2d 201 (Tex. Civ. App.—Austin 1940), *aff'd*, 139 Tex. 131, 161 S.W.2d 1053 (1942); *Dockstader v. Brown*, 204 S.W.2d 352 (Tex. Civ. App.—Fort Worth 1947, writ ref'd n.r.e.). See Annot., 8 A.L.R.3d 235, 239 (1966).

seizure is, however, less widely adopted.<sup>140</sup> The change of position requirement may be of particular interest to secured parties seeking to assert a claim to the proceeds in a bank account in competition with a bank's asserted right of set-off to the same funds.<sup>141</sup> To the best of the author's knowledge, the requirement of change of position has not been adjudicated in Texas under the Code.

#### D. Letters of Credit

*Letter of Credit to Pay Telephone Charges.* In *Cypress Bank v. Southwestern Bell Telephone Co.*<sup>142</sup> a bank had issued a standby letter of credit with a one-year term to guarantee payment of telephone charges incurred by its customer. Because the telephone company failed to present the required drafts and documents until after the one-year expiration date had passed, the issuing bank was held not liable under the terms of the credit.<sup>143</sup>

### V. BULK TRANSFERS (CHAPTER 6)

#### A. Burden of Proof

*Creditor Required to Prove Availability of Assets After Transfer.* In *Anderson & Clayton Co. v. Earnest*<sup>144</sup> a creditor sought to obtain judgment against the transferee of a feed store business for the amount of an unpaid debt incurred by the previous owner of the business. The creditor successfully proved noncompliance with the bulk transfer provisions of the Code,<sup>145</sup> and proved the amount of the unpaid debt. No evidence was introduced to show the value of assets sold by the transferee or the value of assets still on hand. Because of the failure of proof on the value issues, the creditor was entitled neither to a personal judgment against the transferee nor to a judgment authorizing a levy against the assets.<sup>146</sup>

140. Colorado, Indiana, Michigan, Minnesota, Nebraska, Oklahoma, Pennsylvania, South Carolina, South Dakota, and Wisconsin, in addition to Texas, are adherents of the equitable rule. See *Cox v. Metropolitan State Bank, Inc.*, 138 Colo. 576, 336 P.2d 742 (1959); *Peoples State Bank v. Caterpillar Tractor Co.*, 213 Ind. 235, 12 N.E.2d 123 (1938); *Burnett v. First Nat'l Bank*, 38 Mich. 630 (1878); *Berg v. Union State Bank*, 186 Minn. 529, 243 N.W. 696 (1932); *Allen Dudley & Co. v. First Nat'l Bank*, 122 Neb. 443, 240 N.W. 522 (1932); *Brady v. American Nat'l Bank*, 120 Okla. 159, 250 P. 1006 (1926); *Sherts v. Fulton Nat'l Bank*, 342 Pa. 337, 21 A.2d 18 (1941); *Peurifoy v. Boswell*, 162 S.C. 107, 160 S.E. 156 (1931); *Thompson v. Commercial & Sav. Bank*, 50 S.D. 154, 208 N.W. 280 (1926); *Commercial Discount Corp. v. Milwaukee W. Bank*, 61 Wis. 2d 671, 214 N.W.2d 33 (1974).

141. *Commercial Discount Corp. v. Milwaukee W. Bank*, 61 Wis. 2d 671, 214 N.W.2d 33, 39-40 (1974).

142. 610 S.W.2d 185 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.). In an earlier *Survey* article, the author speculated that the use of standby letters of credit might be increasing. *Krahmer, supra* note 91, at 199 n.3. That speculation seems to receive some support when standby credits are used to guarantee payment of telephone bills as in this case. 610 S.W.2d at 186.

143. 610 S.W.2d at 187.

144. 610 S.W.2d 846 (Tex. Civ. App.—Amarillo 1980, no writ).

145. *Id.* at 848; see TEX. BUS. & COM. CODE ANN. §§ 6.101-.111 (Tex. UCC) (Vernon 1968).

146. 610 S.W.2d at 849.

## VI. INVESTMENT SECURITIES (CHAPTER 8)

### A. *Contracts for Sale of Securities*

*Compliance with Chapter 8 Statute of Frauds.* The Corpus Christi court of appeals dealt with several interesting issues under chapter 8 of the Code in *Kenny v. Porter*.<sup>147</sup> The first issue was whether the stock of a closely held corporation was a "security" under section 8.102,<sup>148</sup> the definitional section of chapter 8. The court concluded that the definition of "security" was broad enough to encompass such stock.<sup>149</sup>

The second issue was whether the statute of frauds provision in section 8.319<sup>150</sup> had been satisfied. The court found that the statutory requirements had not been met because no written agreement had been signed, and no admission had been made in court that the alleged oral contract existed.<sup>151</sup> The court then confronted whether the doctrine of promissory estoppel could be used to avoid the operation of the statute of frauds. While the court agreed that promissory estoppel could be used in the manner urged, the plaintiff failed to show that any representation had been made that a written agreement would be signed in the future.<sup>152</sup> The judgment in favor of the defendants was affirmed.<sup>153</sup>

## VII. SECURED TRANSACTIONS (CHAPTER 9)

### A. *Applicability of the Code*

*Common Law Pledge of Deposit Account.* Although chapter 9 of the Code covers most of the secured transactions area, certain cases are excluded by section 9.104.<sup>154</sup> These interstitial cases are governed by other law, including common law pledge. In a bankruptcy case<sup>155</sup> reported during the survey period, a printing company had assigned a savings account to the Texas Comptroller of Public Accounts as security for the payment of sales taxes. The printing company later filed a bankruptcy reorganization plan under chapter 11 of the Bankruptcy Code.<sup>156</sup> As a debtor in possession,<sup>157</sup> the company challenged the security interest of the comptroller on the

147. 604 S.W.2d 297 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.).

148. TEX. BUS. & COM. CODE ANN. § 8.102 (Tex. UCC) (Vernon 1968).

149. 604 S.W.2d at 302.

150. TEX. BUS. & COM. CODE ANN. § 8.319 (Tex. UCC) (Vernon 1968).

151. 604 S.W.2d at 302-03.

152. *Id.* at 303-05.

153. *Id.* at 306.

154. TEX. BUS. & COM. CODE ANN. §§ 9.104(1)-(12) (Tex. UCC) (Vernon Supp. 1982). Most of the excluded cases deal with transactions that (1) are preempted by federal law, (2) are nonconsensual liens, or (3) involve collateral of a special nature where public policy is a consideration. *Id.*

155. *In re Tigert Printing Co.*, 648 F.2d 364 (5th Cir. 1981).

156. 11 U.S.C. §§ 1101-1501 (Supp. III 1979).

157. Under the Bankruptcy Code a debtor in possession has the rights and powers of a trustee in a liquidation proceeding to avoid security interests. 11 U.S.C. §§ 544, 1107 (Supp. III 1979).

ground that the interest in the savings account was not properly perfected by recording under the terms of the Texas taxation statutes.<sup>158</sup>

The court noted that the transfer of an interest in a deposit account was specifically excluded from the coverage of chapter 9, thereby making the validity of the comptroller's interest turn on application of common law pledge requirements.<sup>159</sup> Upon consideration of the common law of pledge, the court concluded that possession of the collateral was an essential element for creation and perfection of a security interest.<sup>160</sup> The court held that the comptroller had gained sufficient possession of the savings account by the notice to the bank of the assignment to constitute a valid pledge.<sup>161</sup> The court further held that the Texas taxation statutes were not applicable to common law pledge arrangements because possession served the same function as recordation of a tax lien, and gave notice of the comptroller's claim.<sup>162</sup>

### B. *Validity of Security Agreement*

*Clauses allowing Acceleration and Repossession.* In *Woolard v. Texas Motors, Inc.*<sup>163</sup> a poor drafting job was saved from invalidity by the court's generosity in its interpretation. The security agreement contained an acceleration clause that did not exclude unearned interest from acceleration, creating a situation that might have led to a claim for the payment of usurious interest. The court held that, while the clause was susceptible to an interpretation that would violate the usury statutes, the contract as a whole did not show an intent to charge or collect usurious interest, and the clause should be interpreted as intended to comply with the law.<sup>164</sup>

Another clause in the agreement provided that the "seller shall have the right to repossess the property wherever the same may be found with free right of entry."<sup>165</sup> The buyer contended that this clause authorized the seller to unlawfully enter the buyer's premises to effect repossession, or to commit a breach of the peace in repossessing the collateral, thereby violating article 5069—7.07(3) of the Texas Consumer Credit Code.<sup>166</sup> The court held that the clause was intended as a limitation on the right of repossession; repossession is allowed only when the collateral is located in a

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158. TEX. TAX.—GEN. ANN. art. 1.07(1)(c) (Vernon 1969).

159. 648 F.2d at 365-66. The court accepted the characterization of the transaction as a common law pledge by the parties without expressing its view on the accuracy of this characterization.

160. *Id.* at 367.

161. *Id.*

162. *Id.*

163. 616 S.W.2d 706 (Tex. Civ. App.—Fort Worth 1981, no writ).

164. *Id.* at 708.

165. *Id.* at 709.

166. TEX. REV. CIV. STAT. ANN. art. 5069—7.07(3) (Vernon 1977) provides that "[n]o retail installment contract or retail charge agreement shall . . . [a]uthorize the seller or holder or other person acting in his behalf to enter upon the buyer's premises unlawfully or to commit any breach of the peace in the repossession of a motor vehicle." The Texas Consumer Credit Code is not a true code since it has not been adopted as part of the Texas codification legislation. It has, however, become generally known by that name.

place where "free right of entry" is lawful.<sup>167</sup> The judgment for the seller was affirmed.<sup>168</sup>

*Clauses Allowing the Retention of Noncollateral Personalty.* A major problem confronting secured parties who seek to repossess collateral, particularly motor vehicles, is that the debtor may have attached other personalty to the basic collateral,<sup>169</sup> or may have left other property within the collateral. Because the secured party runs the risk of conversion liability if the noncollateral personalty is lost or otherwise unaccounted for,<sup>170</sup> there is a strong incentive to limit liability by the inclusion of appropriate terms in the security agreement. A difficulty with this approach is that a secured party may be tempted not only to limit liability, but to eliminate liability altogether. A clause that goes too far may run afoul of the Texas Consumer Credit Code.<sup>171</sup> In a series of civil appeals cases,<sup>172</sup> culminating in a Texas Supreme Court decision,<sup>173</sup> the Ford Motor Credit Company learned that the following clause violates article 5069—7.07(4)<sup>174</sup>: "Any personalty in or attached to the property when repossessed may be held by Seller without liability and Buyer shall be deemed to have waived any claim thereto unless written demand by certified mail is made upon Seller within 24 hours after repossession."<sup>175</sup>

Because of the number of cases reported in which the identical clause was challenged, a fair inference is that this clause was a standard feature of Ford Motor Credit contracts for some period of time. Given the lack of success this clause has had in the courts, the courts apparently are unwilling to accept such a complete limitation of liability for a creditor who reposses other property attached to or contained within the secured property.

### C. Perfection of Security Interests

*Failure to File Proper Financing Statement.* In *Sommers v. International Business Machines*<sup>176</sup> the court held that the failure to file a financing statement or security agreement signed by the debtor<sup>177</sup> made a claimed

167. 616 S.W.2d at 709.

168. *Id.* at 710.

169. The attachment of other personalty to the basic collateral is technically termed an "accession" under TEX. BUS. & COM. CODE ANN. § 9.314 (Tex. UCC) (Vernon Supp. 1982).

170. *See, e.g.,* Southern Indus. Sav. Bank v. Greens, 224 So. 2d 416 (Fla. Dist. Ct. App. 1969) (creditor liable for loss of valuables when sufficient evidence was presented to determine damages).

171. TEX. REV. CIV. STAT. ANN. art. 5069—7.07(4) (Vernon 1961).

172. *Ford Motor Credit Co. v. Brown*, 613 S.W.2d 521 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.); *Ford Motor Credit Co. v. Corley*, 613 S.W.2d 519 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.); *Ford Motor Credit Co. v. McDaniel*, 613 S.W.2d 513 (Tex. Civ. App.—Corpus Christi 1981, no writ).

173. *Zapata v. Ford Motor Credit Co.*, 615 S.W.2d 198 (Tex. 1981).

174. TEX. REV. CIV. STAT. ANN. art. 5069—7.07(d) (Vernon 1971).

175. 615 S.W.2d at 200. The same clause was the subject of litigation in the three cases cited in note 172 *supra*.

176. 640 F.2d 686 (5th Cir. 1981).

177. The ch. 9 filing requirements are specified in TEX. BUS. & COM. CODE ANN. § 9.402(a) (Tex. UCC) (Vernon Supp. 1982).

security interest unperfected, and subject to the avoiding powers of the debtor's trustee in bankruptcy.<sup>178</sup>

*Legislative Developments.* Two state legislative amendments were enacted during the 1981 session that bear upon the perfection of security interests.<sup>179</sup> The first amendment was the revision of the Manufactured Housing Standards Act to provide that after March 1, 1982, security interests in manufactured homes held as inventory by a dealer are to be perfected by filing a security agreement with the Texas Department of Labor and Standards.<sup>180</sup> The agreement is to be in a form that contains any information that may be required by the department.<sup>181</sup> Lawyers should note that this amendment will probably require the filing of a document other than the short U.C.C.-1 form.<sup>182</sup> Filing of a U.C.C.-1 with the office of the secretary of state, therefore, will no longer be effective to perfect a security interest in manufactured home inventory.<sup>183</sup> By the same amendment, the department of labor and standards was designated as the appropriate agency to issue certificates of title on manufactured homes sold to purchasers from a dealer's inventory.<sup>184</sup>

The author of this *Survey* feels compelled to criticize the amendment to the Manufactured Housing Standards Act,<sup>185</sup> not so much on substantive grounds, as on the technical ground that the amendment creates one more filing location for a specific type of collateral that is not properly cross-referenced in section 9.302 of the Code.<sup>186</sup> Section 9.302 contains a specific clause for the cross-referencing of other perfection statutes,<sup>187</sup> but the

178. 640 F.2d at 689-92. Upon the filing of a petition in bankruptcy, the trustee is invested with the rights of a hypothetical lien creditor under 11 U.S.C. § 544 (Supp. III 1979). TEX. BUS. & COM. CODE ANN. § 9.301(a)(2) (Tex. UCC) (Vernon Supp. 1982) provides that a lien creditor is entitled to priority over a holder of an unperfected security interest.

179. TEX. REV. CIV. STAT. ANN. art. 5221f, § 19 (Vernon Pam. Supp. 1971-1981); TEX. BUS. & COM. CODE ANN. §§ 9.404-406 (Tex. UCC) (Vernon Supp. 1982).

180. TEX. REV. CIV. STAT. ANN. art. 5221f, § 19(i) (Vernon Pam. Supp. 1971-1981).

181. *Id.*

182. The contents of the standard U.C.C.-1 are described in TEX. BUS. & COM. CODE ANN. § 9.402(c) (Tex. UCC) (Vernon Supp. 1982). The form itself is prescribed by the Texas Secretary of State.

183. TEX. REV. CIV. STAT. ANN. art. 5221f, § 19(k) (Vernon Pam. Supp. 1971-1981) provides that registration and recordation with the Texas Department of Labor and Standards serves as notice of liens on manufactured homes. TEX. BUS. & COM. CODE ANN. § 9.401(a)(3) (Tex. UCC) (Vernon Supp. 1982) requires financing statements covering inventory to be filed in the office of the secretary of state if filing is the proper method of perfection. Whether or not filing of a financing statement is the proper method of perfection is covered in *id.* § 9.302(c)(2).

184. TEX. REV. CIV. STAT. ANN. art. 5221f, §§ 19(b)-(g) (Vernon Pam. Supp. 1971-1981).

185. *Id.* art. 5221f.

186. TEX. BUS. & COM. CODE ANN. § 9.302(c)(2) (Tex. UCC) (Vernon Supp. 1982).

187. The statute provides:

The filing of a financing statement otherwise required by this Chapter is not necessary or effective to perfect a security interest in property subject to

- (2) the following statutes of this state: the Certificate of Title Act, as amended (Article 1436—1 Vernon's Texas Penal Code) [now TEX. REV. CIV. STAT. ANN. art. 6687—1 (Vernon 1977)]; but during any period in which collateral is inventory held for sale by a person who is

list contained in that section has not been amended since its original passage in 1968 and is now sadly out of date.<sup>188</sup> In the author's opinion, a technical corrections bill is needed to help prevent inadvertent good faith filing errors.

The second amendment<sup>189</sup> provides a uniform filing fee for the perfection of security interests in timber, minerals, and fixtures. The amendment provides that the uniform fee shall be \$3.00 for the standard financing statement forms and \$6.00 for nonstandard forms "plus, in each case when the original financing statement was filed pursuant to Subsection (e) of Section 9.402, an amount equal to the fee prescribed by law for recording and indexing in the real property records of the county clerk."<sup>190</sup> The uniform fee for the standard and nonstandard forms has been added to the several Code sections that deal with filing fees.<sup>191</sup>

#### D. Priorities

*Claim of Secured Party Superior to that of Unpaid Cash Seller.* In *Villa v. Alvarado State Bank*<sup>192</sup> the unpaid cash seller of an automobile was held to have a claim subordinate to that of a secured party holding a properly perfected security interest in the after-acquired property of the debtor-buyer.<sup>193</sup> This decision is consistent with that in the well-known final opinion in *Samuels & Co. v. Mahon*.<sup>194</sup>

#### E. Proceedings After Default

*Exemplary Damages for Wrongful Repossession.* Two cases reported during the survey period held that a secured party could be liable for the willful and malicious repossession of collateral.<sup>195</sup> One case involved substantial damage to a garage by the repossession agent.<sup>196</sup> The other

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in the business of selling goods of that kind, the filing provisions of this Chapter (Subchapter D) apply to a security interest in that collateral created by him as debtor; or Subchapter A, Chapter 35, Title 4, Business & Commerce Code . . . .

*Id.* (footnotes omitted).

188. The list currently refers only to the Certificate of Title Act, and subchapter A, chapter 35, title 4, Business & Commerce Code. Due to revisions and new acts, the list should include the motor vehicle Certificate of Title Act (TEX. REV. CIV. STAT. ANN. art. 6687-1 (Vernon 1977 & Supp. 1982)); the motor boating Certificate of Title Act (TEX. PARKS & WILD. CODE ANN. §§ 31.045-.055 (Vernon 1976 & Supp. 1982)); and the Texas Manufactured Housing Standards Act (TEX. REV. CIV. STAT. ANN. art. 5221(f), § 19 (Vernon Supp. 1982)).

189. 1981 Tex. Gen. Laws, ch. 325, §§ 1-4, at 908-09.

190. *Id.*

191. See TEX. BUS. & COM. CODE ANN. §§ 9.404-.406 (Tex. UCC) (Vernon Supp. 1982).

192. 611 S.W.2d 483 (Tex. Civ. App.—Waco 1981, no writ).

193. *Id.* at 487-88.

194. 526 F.2d 1238 (5th Cir. 1976) (UCC subordinates claim of unpaid seller to that of individual holding interest properly perfected prior to sale). See also 611 S.W.2d at 487-88.

195. *Meyers v. Ford Motor Credit Co.*, 619 S.W.2d 572 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ); *Chandler State Bank v. Dorsey*, 618 S.W.2d 113 (Tex. Civ. App.—Tyler 1981, no writ).

196. *Meyers v. Ford Motor Credit Co.*, 619 S.W.2d 572, 573 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

case involved misrepresentations by a secured party concerning the basis for repossession, and the requirements the debtor had to meet to redeem the collateral.<sup>197</sup> Both cases are intensely factual in nature, as are most wrongful repossession cases,<sup>198</sup> and should be read in their entirety.

*Discharge of Co-Maker by Wrongful Resale.* In *O'Hara v. First National Bank*<sup>199</sup> an accommodation co-maker was discharged from liability on a note because the secured party failed to give the co-maker notice of the proposed sale of collateral under section 9.504<sup>200</sup> of the Code. Although not cited by the court, section 3.606<sup>201</sup> would lend support to the determination that a discharge had occurred.

*"Rebuttable Presumption" Rule in Improper Sale of Collateral Cases No Longer Reliable.* When a secured party has sold repossessed collateral and applied the proceeds of sale to the secured debt, a deficiency frequently results.<sup>202</sup> Under the Code, the secured party is entitled to recover this deficiency from the debtor.<sup>203</sup> A recurring problem in deficiency cases is that a debtor may be able to show that the secured party sold the collateral in a way that violated the disposition of collateral rules in section 9.504(c).<sup>204</sup> When such a showing has been made by a debtor, a recurring legal problem has been whether the secured party should be absolutely barred from recovering a deficiency, or whether some lesser penalty should be imposed. The courts have split on this question. A number of jurisdictions have barred the recovery of any deficiency upon a showing of creditor misconduct in the sale of collateral.<sup>205</sup> Other jurisdictions have

197. *Chandler State Bank v. Dorsey*, 618 S.W.2d 113, 116 (Tex. Civ. App.—Tyler 1981, no writ).

198. Many of the fact patterns that have been held to constitute a wrongful repossession are discussed in J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 1094-1102 (2d ed. 1980).

199. 613 S.W.2d 306 (Tex. Civ. App.—Fort Worth 1980, no writ).

200. *Id.* at 308. TEX. BUS. & COM. CODE ANN. § 9.504(c) (Tex. UCC) (Vernon Supp. 1982) requires that notice of a proposed sale of collateral be given to the debtor, which includes an accommodation party. Under TEX. BUS. & COM. CODE ANN. § 3.415(e) (Tex. UCC) (Vernon 1968) an accommodation co-maker is given a right of recourse after paying the instrument, thereby requiring his notification prior to the sale of the collateral.

201. TEX. BUS. & COM. CODE ANN. § 3.606(b) (Tex. UCC) (Vernon 1968) discharges a party to the instrument with a right of recovery if the holder agrees to release the collateral acting as security for the instrument without the prior party's consent.

202. See Shuchman, *Profit on Default: An Archival Study of Automobile Repossession and Resale*, 22 STAN. L. REV. 20 (1969).

203. TEX. BUS. & COM. CODE ANN. § 9.504(b) (Tex. UCC) (Vernon Supp. 1982).

204. *Id.* § 9.504(c). The disposition of collateral rules stated in this section may be violated in any of several ways. A required notice of the sale may not be sent prior to the sale, *Conti Causeway Ford v. Jarossy*, 114 N.J. Super. 382, 276 A.2d 402 (Ocean County Ct. 1971), *aff'd* 118 N.J. Super. 521, 288 A.2d 872 (Super Ct. App. Div. 1972); the notice may not be sent at all, *O'Hara v. First Nat'l Bank*, 613 S.W.2d 306 (Tex. Civ. App.—Fort Worth 1980, no writ); the notice may not be publicly advertised, *In re Bishop*, 11 U.C.C. REP. SERV. (CALLAGHAN) 1079, *aff'd*, 482 F.2d 381 (4th Cir. 1973); or the manner of conducting the sale may be improper, *Mercantile Fin. Corp. v. Miller*, 292 F. Supp. 797 (E.D. Pa. 1968).

205. See, e.g., *Wilmington Trust Co. v. Conner*, 415 A.2d 773 (Del. 1980); *Herman Ford-Mercury, Inc. v. Betts*, 251 N.W.2d 492 (Iowa 1977); *Maryland Nat'l Bank v. Wathen*, 414 A.2d 1261 (Md. 1980); *First Nat'l Bank v. Rose*, 197 Neb. 392, 249 N.W.2d 723 (1977).



adopted the rule that if a debtor successfully shows that the secured party has improperly sold the collateral, a rebuttable presumption arises that the value of the collateral was equal to the amount of the debt, and the burden of showing why a lesser amount was received from the sale is placed on the secured party.<sup>206</sup> This is commonly called the "rebuttable presumption rule."

For some years the Texas courts of civil appeals have been applying the rebuttable presumption rule,<sup>207</sup> but this rule has never been directly approved by the Texas Supreme Court.<sup>208</sup> During the survey period the Texas Supreme Court issued a per curiam opinion refusing an application for writ of error in *Ward v. First State Bank*<sup>209</sup> casting great doubt on whether the rebuttable presumption rule is actually the law in Texas. In that opinion, the supreme court said:

This action [denying an application for writ of error] should not be interpreted as an approval of the writing of the court of civil appeals that the "rebuttable presumption" rule applies in Texas. . . . This court reserves the question of whether the "rebuttable presumption" rule, or the absolute bar to recovery rule of "no notice, no deficiency" will control in Texas in suits for deficiency on a note after a secured party has sold the collateral without reasonable notice to either the debtor, the guarantor of the debt, or both.<sup>210</sup>

Secured parties should carefully consider the per curiam opinion in *Ward* and guard against the risk it represents by following proper notice and sale procedures in disposing of collateral after default.

The author should note that, for whatever reason, the per curiam opinion in *Ward* does not appear in the *South Western Reporter, 2d Series*, and the *Texas Writs of Error Table* shows only that a writ of error was refused, n.r.e., in the case.<sup>211</sup> To the best of the author's knowledge, the per curiam opinion has not been withdrawn and is currently reported only in the *Texas Supreme Court Journal*<sup>212</sup> and in the *Uniform Commercial Code Re-*

206. See, e.g., *Valley Mining Corp. Inc. v. Metro Bank*, 383 So. 2d 158 (Ala. 1980); *Bank of Okla. v. Little Judy Indus., Inc.*, 387 So. 2d 1002 (Fla. Dist. Ct. App. 1980); *Levers v. Rio King Land & Inv. Co.*, 93 Nev. 95, 560 P.2d 917 (1977); *Clark Leasing Corp. v. White Sands Forest Prod., Inc.*, 87 N.M. 451, 535 P.2d 1077 (1975).

207. See, e.g., *Roylex, Inc. v. E.F. Johnson Co.*, 617 S.W.2d 760 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ); *Tackett v. Mid-Continent Refrigerator Co.*, 579 S.W.2d 545 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.); *O'Neil v. Mack Trucks, Inc.*, 533 S.W.2d 832 (Tex. Civ. App.—El Paso 1974), *rev'd on other grounds*, 551 S.W.2d 32 (Tex. 1977).

208. The only case involving the rebuttable presumption rule that reached the Texas Supreme Court was *O'Neil v. Mack Trucks, Inc.* 533 S.W.2d 832 (Tex. Civ. App.—El Paso 1974), but this decision was reversed on other grounds, 551 S.W.2d 32 (Tex. 1977), and the supreme court never reached the question of the propriety of the rebuttable presumption rule.

209. 605 S.W.2d 404 (Tex. Civ. App.—Amarillo 1980), *writ ref'd n.r.e. per curiam*, 24 Tex. Sup. Ct. J. 170 (Dec. 31, 1980).

210. 24 Tex. Sup. Ct. J. 170 (Dec. 31, 1980).

211. This is the second error in the *Writs of Error Table* (13th ed. 1980) that the author discovered during the survey period. See note 22 *supra*. *Shepard's Texas Citations* also does not reflect the per curiam opinion in *Ward*.

212. 24 Tex. Sup. Ct. J. 170 (Dec. 31, 1980).

*porting Service*.<sup>213</sup> The failure to report this opinion may have led to an erroneous decision in *Roylex, Inc. v. E. F. Johnson Co.*<sup>214</sup> Although decided after the per curiam opinion in *Ward*,<sup>215</sup> *Roylex* gave no hint that the court was aware of the reservations stated by the supreme court in *Ward*.<sup>216</sup>

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213. *Ward v. First State Bank*, 30 U.C.C. REP. SERV. (CALLAGHAN) 769 (Tex. 1980).

214. 617 S.W.2d 760 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ) (noncompliance with Code's notice requirement created rebuttable presumption that proceeds from sale of collateral equalled debt).

215. *Ward v. First State Bank*, 24 Tex. Sup. Ct. J. 170 (Dec. 31, 1980).

216. After this Article was completed, the supreme court answered the question reserved in *Ward* by adopting the absolute bar rule of "no notice, no deficiency" in *Economics Laboratory, Inc. v. Tannenbaum*, 25 Tex. Sup. Ct. J. 210 (March 8, 1982).

