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CREDITOR AND CONSUMER RIGHTS

by

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Since 1980 significant and extensive judicial activity in the area of creditor and consumer rights has continued. Courts have reviewed a plethora of cases involving the applicability and scope of the Deceptive Trade Practices—Consumer Protection Act¹ and the Texas Consumer Credit Code,² the limitations on interest that can legally be charged in a given situation,³ and the rights of creditors to collect their debts or enforce their liens. Additionally, the Texas Legislature has enacted extensive amendments to the laws governing the right to contract for, charge, or receive interest on money advanced,⁴ as well as the law governing the credit sale of manufactured homes.⁵ Accordingly, this Article summarizes and analyzes these legislative developments and gives extensive treatment to the spate of case law involving the two major laws in Texas governing consumer rights as well as the important decisions delineating the rights of Texas creditors.

I. TEXAS CONSUMER CREDIT CODE

During the survey period considerable appellate activity occurred with respect to the disclosure requirements contained in the Texas Consumer Credit Code⁶ as well as the limitations it imposes on the amount of time

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1. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1982).

2. TEX. REV. CIV. STAT. ANN. arts. 5069—2.01 to—8.06 (Vernon 1971 & Pam. Supp. 1971-1981).

3. *Id.* arts. 5069—1.01 to—1.06.

4. See note 191 *infra*.

5. TEX. REV. CIV. STAT. ANN. arts. 5069—6A.01 to—6A.17 (Vernon Pam. Supp. 1971-1981).

6. *Id.* arts. 5069—2.01 to—8.06 (Vernon 1971 & Pam. Supp. 1971-1981). The disclosure requirements of the Credit Code are contained in Chapters 3 (regulated loans), 4 (installment loans), 5 (secondary mortgage loans), 6 (retail installment sales), 6A (sales of manufactured homes), and 7 (sales of motor vehicles). See notes 34-48 *infra* and accompanying text.

price differential that can be legally charged.⁷ Additionally, the Texas Legislature enacted a new chapter of the Credit Code to govern all sales of manufactured homes.⁸

A. Legislative Developments

In 1979 the Texas Legislature added chapter 6A to the Credit Code to govern all installment sales of manufactured homes.⁹ This new law was amended extensively in 1981 and the amendments became effective September 1, 1981.¹⁰ As amended, chapter 6A now permits sellers of manufactured homes to charge interest or time price differential equal to 13.32% per year on the unpaid balance of the indebtedness for the scheduled term of the transaction.¹¹ The parties, however, can agree by express written agreement to have the contract provide for the time price differential to be adjusted at certain regular intervals throughout the contract.¹² This adjustable time price differential must be based on changes in specific permitted indices.¹³ In addition to meeting the requirements of the Credit Code, the creditor must comply with all applicable requirements of part I of the Federal Consumer Credit Protection Act (the Truth-in-Lending Act).¹⁴ The amendment further provides that when real estate is purchased by the consumer at the same time as, or in conjunction with, the purchase of the manufactured home, with the agreement that the manufactured home will be attached to the real estate within a reasonable time, the real estate may be considered a part of the credit transaction and included in the cash price even if the real estate and the manufactured home are sold by separate parties.¹⁵

B. Case Law

Many cases involving claims by consumers that lenders or sellers violated various provisions of the Credit Code were decided during the survey period. The majority of these cases involved allegations that sellers either (a) attempted, by clauses in their contracts, to force buyers to waive rights they possessed against the sellers for the commission of illegal acts during payment collections or during repossession of the property securing the credit transaction; (b) failed to disclose the rights and obligations of buyers

7. See notes 73-78 *infra* and accompanying text.

8. TEX. REV. CIV. STAT. ANN. arts. 5069—6A.01 to—6A.17 (Vernon Pam. Supp. 1971-1981).

9. *Id.* Manufactured housing is defined as "a mobile home or a modular home or both." *Id.* art. 5221f, § 3(s). A mobile home is a transportable structure containing at least 320 square feet built on a permanent chassis. *Id.* § 3(a). A modular home is a dwelling consisting of two or more modules, manufactured at a location other than the homesite, designed to be installed on a permanent foundation. *Id.* § 3(q).

10. See *id.* arts. 5069—6A.01 to—6A.17.

11. *Id.* art. 5069—6A.03(1).

12. *Id.* art. 5069—6A.03(3).

13. *Id.* art. 5069—6A.04(1).

14. *Id.* art. 5069—6A.05(1). The applicable provisions of the federal consumer Credit Protection Act are found at 15 U.S.C. §§ 1601-1891 (1976).

15. TEX. REV. CIV. STAT. ANN. art. 5069—6A.11(1) (Vernon Pam. Supp. 1971-1981).

concerning the need to acquire or provide insurance; (c) improperly retained the right to accelerate the indebtedness due upon a buyer's default; or (d) utilized language in the acceleration clause that incorrectly entitled themselves to the collection of excess time price differential.

Waiver Clause Violations. Numerous cases involved claims of buyers that the seller had violated section 7.07(4),¹⁶ which prohibits any clause in a retail installment contract for a motor vehicle¹⁷ that purports to provide for a waiver of a buyer's rights against the seller for any illegal act committed in the collection of payments or in the repossession of the vehicle securing the credit transaction.¹⁸

The Texas Supreme Court in *Zapata v. Ford Motor Credit Co.*,¹⁹ reviewed a standard waiver clause contained in the defendant's automobile credit purchase contracts. The clause in question provided that "[a]ny 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."²⁰ The buyer contended that the part of the clause providing waiver by the buyer violated section 7.07. Both parties in *Zapata* conceded that as to the personalty in a repossessed vehicle the first part of the waiver clause merely restated the common law bailor-bailee relationship. The court noted, however, that a person in lawful possession of personalty might still be guilty of trespass or conversion for its unlawful detention, and determined that the waiver clause waived the buyer's right of action for the wrongful detention of unsecured personalty taken in repossession of a motor vehicle.²¹ The fact that the wrongful detention waived by the clause did not occur until at least 24 hours after repossession,²² and not in the repossession as required in section 7.07(4),²³ was immaterial, the court believed, because the doctrine of trespass ab initio was followed in Texas.²⁴ The court, therefore, affirmed the judgment of the trial court.²⁵

16. TEX. REV. CIV. STAT. ANN. art. 5069—7.07(4).

17. *Id.* art. 5069—7.01(a) defines a motor vehicle as including automobiles, mobile homes, trucks, truck tractors and trailers, and buses.

18. *Id.* art. 5069—7.07(4).

19. 615 S.W.2d 198 (Tex. 1981).

20. *Id.* at 200.

21. *Id.* at 201. The court stated that when the owner of personalty demands its return from a person who lawfully obtained it, retention of the personalty constitutes a trespass, and may constitute a conversion if the retention seriously interferes with the owner's right of control. *Id.*; see *Ford Motor Credit Co. v. Cole*, 503 S.W.2d 853, 856 (Tex. Civ. App.—Forth Worth 1973, writ dism'd) (contracts purporting to waive sellers' liability for conversion of unsecured property of mortgagor unenforceable as contrary to public policy).

22. For the language of the clause in question, see text accompanying notes 19-20 *supra*.

23. TEX. REV. CIV. STAT. ANN. art. 5069—7.07(4) (Vernon Pam. Supp. 1971-1981).

24. 615 S.W.2d at 202. The court cites *Humphreys Oil Co. v. Liles*, 262 S.W. 1058, 1064 (Tex. Civ. App.—Waco 1924), *aff'd*, 277 S.W. 100 (Tex. Comm'n App. 1925, judgment adopted), which defines trespass ab initio as occurring when a lawful entry is made or property taken followed by an abuse of the authority to enter or possess.

25. 615 S.W.2d at 202.

In *Redmac Leases, Inc. v. Lessner*²⁶ the defendant's contract provided that any personalty contained in the vehicle repossessed could "be held temporarily by seller without liability for return to buyer."²⁷ The court determined that this provision did not violate section 7.07(4) based upon its earlier decision in *Tradewinds Ford Sales, Inc. v. Caskey*.²⁸ After the Texas Supreme Court reversed *Tradewinds*, the court of civil appeals re-considered the contractual clause in *Redmac Leases* and determined that the clause did not provide for waiver of claims on behalf of the buyer.²⁹ Instead, the court construed the subject clause to mean that the seller was to return such personalty to the buyer after any temporary holding and that there would be no liability for such temporary holding.³⁰ The court determined that the clause merely restated the bailor-bailee relationship existing at common law and did not violate section 7.07(4).³¹

The court in *Redmac Leases* also reviewed a provision in the subject contract that provided that the "[s]eller shall have the right to repossess the property wherever the same may be found with free right of entry."³² The buyer had alleged that the quoted language violated section 7.07(3) of the Credit Code prohibiting a retail installment contract from "[authorizing] the seller or holder or other person acting on his behalf to enter upon the buyer's premises in violation of Chapter 9, Business and Commerce Code, or to commit any breach of the peace in the repossession of a motor vehicle."³³ The court determined that the contractual provision did not authorize the appellant to enter the appellee's premises unlawfully or to commit a breach of the peace in the repossession of the vehicle.³⁴ Reading the "free right of entry" language in the contract to limit the seller to his right of repossession found under the Texas Business and Commerce Code,³⁵ the court determined that the contract language meant that the seller could exercise its right to repossession only if the property were found with free right of entry.³⁶

Insurance Disclosure Violations. Section 7.06 of the Credit Code provides that a retail installment contract for the purchase of a motor vehicle may include a request or requirement that the buyer provide credit life insurance, credit health insurance, credit accident insurance, and property casu-

26. 616 S.W.2d 627 (Tex. Civ. App.—Eastland 1980, writ ref'd n.r.e.).

27. *Id.* at 628.

28. 600 S.W.2d 865 (Tex. Civ. App.—Eastland 1980), *rev'd*, 616 S.W.2d 935 (Tex. 1981).

29. 616 S.W.2d at 629-30.

30. *Id.* at 630.

31. *Id.* at 629-30.

32. *Id.* at 628.

33. TEX. REV. CIV. STAT. ANN. art. 5069—7.07(3) (Vernon Pam. Supp. 1971-1981).

34. 616 S.W.2d at 629.

35. TEX. BUS. & COM. CODE ANN. § 9.503 (Vernon Supp. 1982) provides that a secured party has the right to take possession of the collateral upon default by the debtor unless the parties have agreed to the contrary. This section also provides that "[i]n taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action." *Id.*

36. 616 S.W.2d at 629.

alty insurance as additional protection for the contract.³⁷ The cost of such insurance may be included as a separate charge in such contract.³⁸ The buyer and seller may also agree to include charges in their contract for insurance coverages that cover risk of loss or liability reasonably related to the motor vehicle, the use thereof, or business services related to the motor vehicle if the coverages are written on policies ordinarily available to the public and prescribed or approved by the State Board of Insurance.³⁹ When insurance is required in connection with the contract, the seller must furnish the buyer with a statement that clearly and conspicuously states that insurance is required, and that the buyer has the option of furnishing such required insurance either through existing policies or by procuring equivalent coverage through any insurance company authorized to transact business in Texas.⁴⁰ If the insurance is sold or procured by the seller and includes a premium not fixed or approved by the State Board of Insurance, the seller must disclose such fact to the buyer in a written statement giving the buyer the option for a ten-day period to furnish the required insurance coverage either through existing policies or by procuring equivalent insurance coverage.⁴¹

In *Ford Motor Credit Co. v. Syler*⁴² the Eastland court of civil appeals again reviewed a standard retail installment contract.⁴³ Ford did not challenge the trial court's findings that proper hazard and collision insurance was financed for a twelve-month period at a premium of \$792, that the applicable block was not checked in the contract to indicate that the premium for such insurance was at a rate "not fixed or approved" by the State Board of Insurance, that insurance was procured by Progressive County Mutual, and that Progressive County Mutual wrote insurance at rates not fixed or approved by the State Board of Insurance. The defendant attempted to cure the contract violations pursuant to section 8.01(c)(2)⁴⁴ by sending a "Correction Notice" to all of its customers prior to notification of the alleged violation. The correction notice read:

Dear Customer,

As a result of our review of your account we note the following:

37. TEX. REV. CIV. STAT. ANN. art. 5069—7.06(1) (Vernon Pam. Supp. 1971-1981).

38. *Id.*

39. *Id.* art. 5069—7.06(2).

40. *Id.* art. 5069—7.06(3).

41. *Id.*

42. 615 S.W.2d 778 (Tex. Civ. App.—Eastland 1980, writ ref'd n.r.e.).

43. For a discussion of waiver clause violations involving *Ford Motor Credit Co.*, see notes 19-25 *supra* and accompanying text.

44. TEX. REV. CIV. STAT. ANN. art. 5069—8.01(c)(2) (Vernon Pam. Supp. 1971-1981) provides:

A person has no liability to an obligor for a violation of this Subtitle or of Chapter 14 of this Title if prior to the effective date of the Act or within 60 days after the effective date of the Act such person corrects such violation as to such obligor by performing the required duty or act or by refunding any amount in excess of that authorized by law; provided, however, that such person gives written notice to such obligor of such correction prior to such obligor having given written notice of or having filed an action alleging such violation of this Subtitle or of Chapter 14 of this Title.

If physical damage insurance written by a county mutual insurance company was included in your agreement, your agreement *may not* have indicated that the rate charged for such insurance was not fixed or approved by the Texas State Board of Insurance. The rate for such insurance was not so fixed or approved. (emphasis added)

In all other respects, your agreement with us remains at [sic] stated. Please keep this notice for your records.⁴⁵

The court determined that the correction notice did not exonerate the defendant pursuant to section 8.01(c)(2) because of the emphasized conditional language the notice contained.⁴⁶ The defendant, therefore, was guilty of a violation of section 7.06(3);⁴⁷ consequently, the court held the defendant liable for the penalties imposed by section 8.01 of the Credit Code.⁴⁸

An identical contract to that in *Syler* was reviewed in *Portland Tradewinds Ford v. Lugo*, and was found to violate section 7.06(3) for an additional reason.⁴⁹ The contract contained a paragraph offering the buyer physical damage insurance to be arranged for by the seller entitled "OPTIONAL INSURANCE" that was printed in bold letters. Hidden in the body of the paragraph, however, was the statement in regular type that read: "Physical Damage Insurance is required by this contract."⁵⁰ The court determined that by using the word "OPTIONAL" in bold letters the defendant did not clearly inform the buyer that the insurance was required by law.⁵¹ The court stated that the use of the words "OPTIONAL INSURANCE" suggested that the buyer need not even buy insurance, or at least need not read the paragraph that followed if he chose not to purchase insurance from the seller.⁵² The reverse side of the contract contained a paragraph that stated: "Buyer shall obtain and maintain at his own expense for so long as any amount remains unpaid hereunder insurance protecting the interests of Buyer and Seller against loss, damage or destruction of or to the Property in such forms and amounts as Seller may require."⁵³ The court determined that the additional statement did not erase the damage done by the misleading paragraph on the front page of the contract entitled "OPTIONAL INSURANCE," and the court therefore imposed the penalties contained in section 8.01 of the Credit Code.⁵⁴

45. 615 S.W.2d at 780.

46. *Id.* at 781.

47. TEX. REV. CIV. STAT. ANN. art. 5069—7.07(3) (Vernon Pam. Supp. 1971-1981).

48. 615 S.W.2d at 781; *see* TEX. REV. CIV. STAT. ANN. art. 5069—8.01 (Vernon Pam. Supp. 1971-1981).

49. 613 S.W.2d 26, 29 (Tex. Civ. App.—Corpus Christi 1981, no writ).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 29-30. TEX. REV. CIV. STAT. ANN. art. 5069—8.01(a) (Vernon Pam. Supp. 1971-1981) provides that "[a]ny person who violates this Subtitle by contracting for, charging or receiving interest, time price differential or other charges which are greater than the amount authorized . . . shall forfeit to the obligor twice the amount of interest or time price differential . . . and reasonable attorneys' fees fixed by the court."

Right of Acceleration. The Credit Code provides that no retail installment contract or retail charge agreement shall allow the seller to "accelerate the maturity of any part or all of the amount owing thereunder unless (a) the buyer is in default on the performance of any of his obligations or (b) the seller or holder in good faith believes that the prospect of payment or performance is impaired."⁵⁵ A number of cases decided during the survey period involved allegations by a borrower that the seller's retail installment contract violated this provision.

The retail installment contract in *Grant v. Friendly Chrysler-Plymouth, Inc.*,⁵⁶ contained an acceleration provision that provided:

[I]f Buyer defaults in any payment, or fails to comply with any of the terms or conditions of this contract, or fails to procure or maintain the vehicle insurance required hereunder, or a proceeding in bankruptcy, receivership or insolvency shall be instituted by or against Buyer or his property, or if Seller deems the property in danger of misuse or confiscation, Seller shall have the right . . . to declare the unpaid portion of the Total of Payments . . . to be immediately due and payable.⁵⁷

Reviewing the buyer's claim that the provision violated section 7.07(1) of the Credit Code, the court sustained the trial court's exoneration of the defendant. The court held that the contract substantially met the requirements of 7.07(1) because each of the acts constituting grounds for acceleration would amount to an impairment of the prospect of payment or performance of the contract.⁵⁸

The Corpus Christi court of civil appeals reviewed similar acceleration and default provisions in companion cases decided the same day as *Grant*, and in both cases exonerated the defendant. In *Ford Motor Credit Co. v. McDaniel*,⁵⁹ the acceleration clause provided that "[i]n the event Buyer defaults . . . Seller shall have the right to declare all amounts due or to become due thereunder to be immediately due and payable . . ."⁶⁰ The trial court in *McDaniel* held this clause violative of section 7.03 of the Credit Code, finding that it authorized the seller in the event of default to collect all unearned interest on the accelerated indebtedness and thereby allowed the collection of time price differential in excess of that permitted by law.⁶¹ The appellate court noted that the established law in Texas was that the dominant purpose and intention of the parties embodied in the contract were to be interpreted as a whole, in light of the attending circumstances and governing rules of the law, and that parties were presumed to have intended to observe and obey the law in making a contract.⁶² The

55. TEX. REV. CIV. STAT. ANN. art. 5069—7.07(1) (Vernon Pam. Supp. 1971-1981).

56. 612 S.W.2d 667 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.).

57. *Id.* at 668.

58. *Id.* at 668-69.

59. 613 S.W.2d 513 (Tex. Civ. App.—Corpus Christi 1981, no writ).

60. *Id.* at 517.

61. *Id.*

62. *Id.* See also *Walker v. Temple Trust Co.*, 124 Tex. 575, 577, 80 S.W.2d 935, 936 (1935).

court stated further that for the contract to be usurious on its face, it must clearly and positively entitle the lender, upon the happening of a contingency, to exact interest at a rate greater than that allowed by law, and that if the contract was susceptible to more than one reasonable construction, then the construction that comported with legality should be adopted.⁶³ The court concluded that the clause providing for the collection of "all amounts due or to become due hereunder" in the event of an acceleration did not authorize the seller to collect unearned interest.⁶⁴

*Ford Motor Credit Co. v. Powers*⁶⁵ involved a default clause with the following provision regarding acceleration:

In the event Buyer defaults in any payment, or fails to obtain or maintain the insurance required hereunder, or fails to comply with any other provision hereof, or Seller in good faith believes that the prospect of payment or performance hereunder is impaired, Seller shall have the right to declare all amounts due or to become due hereunder to be immediately due and payable⁶⁶

The court determined that the seller's right to accelerate if the buyer failed to comply with any other provision of the contract did not exceed the authority provided in section 7.07(1) of the Credit Code for a seller to accelerate when a buyer failed to perform "any of his obligations," and that the reasonable meaning of the two words "provision" and "obligation" in the context of an acceleration clause was identical.⁶⁷

The buyer in *Powers* also alleged that the contract violated section 7.07(1) since it forbade the buyer to "transfer or otherwise dispose of any interest in this contract of the Property"⁶⁸ and required the buyer to "keep the Property free from all encumbrances, . . . and . . . not remove the Property from the county of his residence without the written permission of Seller"⁶⁹ Permitting acceleration for violation of these clauses, the buyer argued, was therefore unlawful. The court noted that acceleration upon a sale of encumbered collateral by the buyer without the consent of the secured party has previously been upheld by the Texas courts.⁷⁰ The court additionally noted, however, that established precedent also permitted a buyer to transfer his interest to another party regardless of a provision in a security agreement prohibiting any such transfer or making such transfer an event of default.⁷¹ Although the transfer provision was therefore unenforceable, the court stated that the acceleration clause was not thereby rendered violative of the Credit Code because the act of removing collateral from the county of the buyer's residence might justifi-

63. 613 S.W.2d at 518.

64. *Id.* at 518-19.

65. 613 S.W.2d 30 (Tex. Civ. App.—Corpus Christi 1981, no writ).

66. *Id.* at 33 (emphasis added).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*; see, e.g., *A.R. Clark Inv. Co. v. Green*, 375 S.W.2d 425 (Tex. 1964); *Beaumont Rice Mills v. Dishman*, 72 S.W.2d 365 (Tex. Civ. App.—Beaumont 1934, writ ref'd).

71. 613 S.W.2d at 34.

bly impair the seller's right or prospect of repayment. The court therefore held it proper to include such a prohibition.⁷²

Excess Time Price Differential. In *Jim Walter Homes, Inc. v. Gibbens* the appellate court reversed and remanded the decision of the trial court granting the plaintiffs' motion for summary judgment against the defendant builder for violation of the Credit Code.⁷³ The plaintiffs had entered into a contract in 1976 with the defendant that provided that the defendant would build a new home for the plaintiffs on their unencumbered property. The total price was to be \$43,542, consisting of a cash price of \$20,860 plus a finance charge of \$22,682 to be repaid in 180 monthly installments of \$241.90 each. The contract disclosed that the annual percentage rate was 11.4%. The defendant acquired a first deed of trust lien on the plaintiffs' previously unencumbered property to secure payment of this debt. After an adverse holding relating to a similar contract had been handed down,⁷⁴ the defendants, attempting to take advantage of the "cure" provisions in the Credit Code,⁷⁵ sent a letter to the plaintiffs that stated that the defendant would refund the portion of payment previously paid and attributed to the time price differential charge that was in excess of an annual percentage rate of 10%, and would decrease the amount of future monthly payments to reflect the reduction of the time price differential to an annual percentage rate of 10%.

The court rejected the defendant's position that the transaction involved was not a chapter 6 transaction.⁷⁶ Assuming the defendant was guilty of a violation of the Credit Code in the original transaction, however, the court agreed that the violation had been cured. Because the defendant had refunded the excess time price differential it had previously collected and had amended its contract to comply with the Credit Code,⁷⁷ the court found no reason to assess a penalty against the defendant for retaining a first lien on the plaintiffs' property.⁷⁸

72. *Id.* See also *Ford Motor Credit Co. v. Gamez*, 617 S.W.2d 720 (Tex. Civ. App.—Eastland 1980, writ ref'd n.r.e.); *Ford Motor Credit Co. v. Brown*, 617 S.W.2d 271 (Tex. Civ. App.—Eastland 1980, writ ref'd n.r.e.); *Peden v. Ryan Oldsmobile, Inc.*, 606 S.W.2d 53 (Tex. Civ. App.—Fort Worth 1980, no writ).

73. 608 S.W.2d 706, 713 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.).

74. The contract involved in *Gibbens* was virtually identical to the one previously reviewed by the San Antonio court of civil appeals in *Anguiano v. Jim Walter Homes, Inc.*, 561 S.W.2d 249 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.), in which the court held that a finance charge was "time price differential" and not "interest," and therefore chapter 6 of the Credit Code governed. *Id.* at 251-52.

75. TEX. REV. CIV. STAT. ANN. art. 5069—8.01(c)(1) (Vernon Pam. Supp. 1971-1981).

76. 608 S.W.2d at 709.

77. TEX. REV. CIV. STAT. ANN. art. 5069—6.05(7) (Vernon Pam. Supp. 1971-1981) requires that no retail installment contract shall:

[p]rovide for or grant a first lien upon real estate to secure such obligation, except . . . (b) such lien as is provided for or granted by a contract or series of contracts for the sale or construction and sale of a structure to be used as a residence so long as the time price differential does not exceed an annual percentage rate permitted under . . . this Chapter

78. 608 S.W.2d at 713. An identical contract provision was examined in *Jim Walter Homes, Inc. v. White*, 617 S.W.2d 767 (Tex. Civ. App.—Beaumont 1981, no writ), and the

Defenses. The Fifth Circuit examined the bona fide error defense provided by the Credit Code⁷⁹ in *LaPetina v. Metro Ford Truck Sales, Inc.*⁸⁰ In 1978 the plaintiffs purchased a 1974 model commercial tractor truck. The amount of time price differential that a creditor could charge was dependant upon the age of the vehicle purchased.⁸¹ In computing the maximum allowable time price differential, a new employee of the defendant erroneously calculated the age of the truck and consequently employed a rate in excess of the statutory maximum. In the district court the defendants successfully maintained that, although they admittedly contracted for excess time price differential in a motor vehicle retail installment contract, the charge was a result of a "bona fide error" and was therefore excusable pursuant to section 8.01(f) of the Credit Code.⁸²

The Fifth Circuit determined that the defendant's mistake resulted from its agent's misreading of the applicable provision of the Credit Code rather than clerical error.⁸³ Noting that Texas courts had not reached the precise question of whether a good faith misreading of the Credit Code constituted a defense under section 8.01(f), the Fifth Circuit indicated that the bona fide error defense does not protect creditors who *intended* to contract for, charge, or receive the interest rate at issue merely because those creditors did not understand that the rate was in fact excessive.⁸⁴ The court held that the determinative question was whether a creditor *intended to charge the rate at issue* and not whether a creditor *intended the rate to be excessive*,⁸⁵ the creditor's good faith mistake as to the rate allowed by the statute therefore could not constitute an excusable bona fide error.⁸⁶

The court in *Seitz v. Lamar Savings Association*⁸⁷ strictly construed the bona fide error defense contained in section 8.01(f) of the Credit Code. The defendant savings association accelerated a note, and despite computer methodology designed to prevent collection of unearned interest, collected unearned interest from the borrower when he paid the balance due upon demand. When the defendant attempted to credit the plaintiff's account by the amount tendered on demand, the association's computer

court similarly found that any violation had been cured by the defendant who had refunded the excess time price differential and amended the contract as to future time price differential payments to comply with the Credit Code requirements. *See also* *Jim Walter Homes, Inc. v. Chapa*, 614 S.W.2d 838 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.).

79. TEX. REV. CIV. STAT. ANN. art. 5069—8.01(f) (Vernon Pam. Supp. 1971-1981) provides that:

[a] person may not be held liable in any action brought under this Article for a violation of this Subtitle . . . if such person shows by a preponderance of evidence that (1) the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid such violation

80. 648 F.2d 283 (5th Cir. 1981).

81. TEX. REV. CIV. STAT. ANN. art. 5069—7.03(1) (Vernon Pam. Supp. 1971-1981).

82. 648 F.2d at 283.

83. *Id.* at 288.

84. *Id.* at 286-87.

85. *Id.* at 287.

86. *Id.* at 288.

87. 618 S.W.2d 142 (Tex. Civ. App.—Austin 1981, no writ).

rejected the amount of payment as excessive, yet the defendant did not notify plaintiff of the overpayment or refund the unearned interest for an unspecified period of time. The plaintiff alleged that the defendant charged and received usurious interest, and the defendant claimed the bona fide error defense. The court stated that a major factor in determining whether the bona fide error defense was available was whether the defendant has enacted and utilized procedures "reasonably adopted to avoid such violation."⁸⁸ Further, the court noted that while the defendant's procedures might have caught violations after they occurred, such procedures were not reasonably adopted to avoid a violation before the fact. No procedure existed to prevent the defendant from collecting unearned interest, although procedures did exist for the defendant to prevent the collection from becoming irretrievable.⁸⁹ The court, therefore, reversed the trial court and rendered judgment for the plaintiff.⁹⁰

The Dallas court of civil appeals in *Ballard v. Hillcrest State Bank*⁹¹ denied the use of the bona fide error defense. In *Ballard* the plaintiff claimed that the failure of the bank to give him a copy of the credit life insurance policy that he provided as security for a loan made to him by the bank was a violation of section 4.02 of the Credit Code.⁹² The bank attempted to avail itself of the bona fide error defense in seeking exoneration from the district court's judgment in favor of the plaintiff. The appellate court held that because the jury found that the defendant bank had not adopted reasonable procedures to avoid violations of the Credit Code, the bank could not take advantage of the bona fide error defense.⁹³

An example of an effective defense is found in *Garner v. East Texas National Bank*.⁹⁴ The maker of a note and his wife brought an action against the defendant bank, seeking damages under both the Credit Code and the Federal Truth-in-Lending Act⁹⁵ for the failure of the original creditor, who had transferred his interest in the note to the bank, to make proper disclosure of terms and conditions of credit. The court upheld the admission of parol evidence to show that the transfer of the note from the contractor to the bank was intended to create a security interest in favor of the bank rather than to effect an absolute assignment, despite the fact that

88. *Id.* at 147 (emphasis in original).

89. *Id.* at 146. As noted by the court, the defendant might have been successful had it claimed a defense under TEX. REV. CIV. STAT. ANN. art. 5069—1.06(1) (Vernon Pam. Supp. 1971-1981), which provides that "there shall be no penalty for any usurious interest which results from an accidental and bona fide error." 618 S.W.2d at 144 n.3. That provision easily avoids the cybernetic gymnastics necessary when trying to prove bona fide error under § 8.01(f).

90. 618 S.W.2d at 147.

91. 592 S.W.2d 373 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

92. TEX. REV. CIV. STAT. ANN. art. 5069—4.02(5) (Vernon Pam. Supp. 1971-1981). The lender must deliver the policy or certificate of insurance to the borrower within 30 days. *Id.*

93. 592 S.W.2d at 374.

94. 608 S.W.2d 939 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.).

95. See 15 U.S.C. § 1640(d) (1976).

the defendant bank subsequently extended and renewed the subject note.⁹⁶ The court held that the bank was not a "subsequent assignee"⁹⁷ of the contractor but a holder of a mere security interest in the note, thereby absolving the bank of any liability under the consumer credit laws.⁹⁸

Miscellaneous. The proper reading of the statute of limitations on actions for violations of the Credit Code was decided in *Quintanilla v. Harlingen National Bank*.⁹⁹ Section 8.04 of the Credit Code provides that "all such actions . . . shall be brought . . . within four years of the date of the loan or retail installment transaction, or within two years from the date of the final entry thereon, whichever is later."¹⁰⁰ The plaintiff in *Quintanilla* argued that the alternative language in section 8.04 providing for an action to be brought within the latter of either four years from the date of the transaction or "two years from the date of the final entry thereon" meant that in the case of an alleged "continuing violation," such as when a lender charged in excess of the statutorily permissible time price differential, the statute of limitations did not begin to run until the final payment that included excess time price differential was made and accepted by the lender. The court rejected this argument, and determined that the phrase "from the date of the final entry thereon" should be interpreted to mean when the final physical entry was made on the document.¹⁰¹ Therefore, if any blanks are left incomplete in a contract on the date of execution, the date on which such blanks are completed commences the running of the alternate two-year limitations period.

Finally, in *Ciminelli v. Ford Motor Credit Co.* the Texas Supreme Court determined that a co-signor on a buyer's note could bring an action against the lender for violation of the Credit Code.¹⁰² The co-signor was the buyer's employer, and co-signed the note merely to lend his creditworthiness to the buyer in order to enable the buyer to obtain financing for the purchase of the vehicle. After default by the buyer and repossession by the lender, the plaintiff co-signor attempted unsuccessfully to pay off the note in order to obtain rights to the automobile. The plaintiff thereafter sued the lender for violation of the disclosure requirements contained in the Credit Code.¹⁰³ Summary judgment in favor of the defendant was entered and the plaintiff co-signor appealed. The court of civil appeals ruled that the plaintiff was essentially a "guarantor" of the indebtedness and was not a "retail buyer" entitled to protection under chapter 7 of the Credit Code

96. 608 S.W.2d at 942; see *Hillcrest State Bank v. Bankers Leasing Corp.*, 544 S.W.2d 727 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.).

97. 15 U.S.C. § 1640(d) (1976) provides that with certain exceptions any action which may be brought under the section against the initial creditor in a credit transaction in which a security interest is taken in real property may be maintained against any of the initial creditor's subsequent assignees.

98. 608 S.W.2d at 941-44.

99. 612 S.W.2d 674 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.).

100. TEX. REV. CIV. STAT. ANN. art. 5069—8.04(a) (Vernon Pam. Supp. 1971-1981).

101. 612 S.W.2d at 675.

102. 624 S.W.2d 903, 906 (Tex. 1981).

103. TEX. REV. CIV. STAT. ANN. art. 5069—7.02 (Vernon Pam. Supp. 1971-1981).

and could not maintain a suit for damages thereunder.¹⁰⁴ The supreme court reversed, holding that Ciminelli qualified as a buyer under chapter 7 of the Credit Code when he signed the contract as a co-buyer.¹⁰⁵ Additionally, the court found that a person signing a motor vehicle installment contract as a co-buyer, who becomes primarily liable on the contract after the buyer's default, was an obligor as required by chapter 8 of the Credit Code to recover penalties.¹⁰⁶

II. DECEPTIVE TRADE PRACTICES—CONSUMER PROTECTION ACT

A. Legislative Developments

As reviewed in the 1980 *Survey* article, the Sixty-Sixth Legislature made numerous amendments in 1979 to the Texas Deceptive Trade Practices—Consumer Protection Act (DTPA).¹⁰⁷ The Texas Legislature again amended the DTPA in 1981. Section 17.42 regarding waivers now provides:

Any waiver by a consumer of the provisions of this subchapter is contrary to public policy and is unenforceable and void; provided, however, that a consumer, other than the State of Texas or any political subdivision thereof, with assets of at least \$25,000,000 or more at the time of such transactions, acts, or practices, may by written contract waive the provisions of this subchapter, other than Section 17.55A.¹⁰⁸

This legislative enactment clearly indicates an awareness that the original purpose for the DTPA was to protect true "consumers" from unscrupulous acts undertaken by sellers of goods and services who enjoyed a superior bargaining position. If a consumer possesses \$25,000,000 worth of assets, he hardly can be considered an unsophisticated consumer needing the protection provided by the Act.

In addition to the amendment of section 17.42 of the DTPA, the Texas Legislature also added section 18C, providing rules governing the registration and regulation of persons who perform inspections on real property, to article 6573a.¹⁰⁹ Section 18C(h) now specifically designates as a deceptive trade practice actionable under the DTPA the performing of an inspection, by a person required to register as a real estate inspector, pursuant to a written contract if the contract does not contain, in at least 10-point bold type above or adjacent to the signature of the purchaser of the inspection, the following disclosure:

NOTICE: YOU THE BUYER HAVE OTHER RIGHTS AND REMEDIES UNDER THE TEXAS DECEPTIVE TRADE PRACTICES-CONSUMER PROTECTION ACT WHICH ARE IN AD-

104. 612 S.W.2d 671, 673 (Tex. Civ. App.—Corpus Christi 1981).

105. 25 TEX. SUP. CT. J. 91, 93 (Dec. 12, 1981).

106. *Id.*

107. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1982). For a discussion of the extensive amendments made in 1979, see Dorsaneo, *Creditor and Consumer Rights, Annual Survey of Texas Law*, 34 SW. L.J. 253, 280-85 (1980).

108. TEX. BUS. & COM. CODE ANN. § 17.42 (Vernon Supp. 1982).

109. TEX. REV. CIV. STAT. ANN. art. 6573a, § 18C (Vernon Supp. 1982).

DITION TO ANY REMEDY WHICH MAY BE AVAILABLE UNDER THIS CONTRACT. FOR MORE INFORMATION CONCERNING YOUR RIGHTS, CONTACT THE CONSUMER PROTECTION DIVISION OF THE ATTORNEY GENERAL'S OFFICE, YOUR LOCAL DISTRICT OR COUNTY ATTORNEY, OR THE ATTORNEY OF YOUR CHOICE.¹¹⁰

A violation of this requirement is deemed a per se deceptive trade practice and entitles any aggrieved person to the greater of either an award of \$1,000 as a civil penalty or actual damages sustained, plus court costs and reasonable attorney's fees.¹¹¹

B. Case Law

A significant degree of judicial activity involved interpretations of the various provisions of the DTPA.

Definition of Consumer. A number of cases decided during the survey period examined the question of what actually constitutes a "consumer" entitled to bring a private lawsuit under the DTPA. In order to avail oneself of the protections of the DTPA, a party must be "an individual, partnership, corporation, or governmental entity who seeks or acquires by purchase or lease, any goods or services."¹¹² The cases focused on whether or not a party sought to acquire something by "purchase" or "lease," as well as whether the property or rights acquired constituted a "good" or "service."

In *Riverside National Bank v. Lewis*¹¹³ the plaintiff purchased a new automobile in 1975 and acquired financing for the purchase of this vehicle from a third-party bank. An officer of the bank thereafter requested that the plaintiff move the automobile loan to another bank after plaintiff had failed to make the first payment when due. The plaintiff requested a loan from the defendant bank. The loan officer of the defendant bank who helped the plaintiff complete the loan application told the plaintiff that the application would have to be approved by his superiors. Thereafter the plaintiff was informed by the loan officer that the loan had been approved and the loan officer requested that the plaintiff have the third-party bank forward to the defendant a bank draft, the title, and a \$6,000 certificate of deposit that further secured the loan at the third-party bank. Though it ultimately refused to refinance the automobile loan the defendant-bank had required the plaintiff to execute a promissory note in the amount of \$12,871.80. At trial a stipulation was made that the bank never sought to collect the note.

In *Riverside* the Texas Supreme Court considered for the first time whether a party borrowing money from a bank was a "consumer." The

110. *Id.* art. 6573a, § 18C(h).

111. *Id.* art. 6573a, § 18C(i).

112. TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon Supp. 1982).

113. 603 S.W.2d 169 (Tex. 1980).

plaintiff in *Riverside* argued that any "person" ought to be entitled to sue if aggrieved by a deceptive act. The plaintiff's argument relied upon the broad definition of "trade" and "commerce" found in the DTPA,¹¹⁴ as well as the liberal interpretation of the Act suggested by section 17.44.¹¹⁵ The supreme court disagreed with the plaintiff's position, stating that the scope of the words "trade" and "commerce" defined the acts that were illegal but did not purport to say *who* could maintain a private cause of action.¹¹⁶ The court held that the definition of "consumer" delineated the class of persons that could maintain a private cause of action, and that the rule of liberal interpretation should not be applied in a matter that negated the statutory definition of the word "consumer."¹¹⁷ Therefore, in order to maintain a private cause of action under the DTPA, the person had to purchase or lease "goods" or "services."¹¹⁸

The court also rejected the plaintiff's contention that he was a "consumer," stating that the plaintiff had sought only to borrow *money*, and that other than the plaintiff's payment for the use of money, there was nothing else for which he paid or that he sought to acquire.¹¹⁹ In determining whether money was a "good," the court looked to the definition of money found in section 1.201 of the Texas Business and Commerce Code¹²⁰ contrasting that definition to the specific definition of "goods" found in section 2.105 of the Texas Business and Commerce Code.¹²¹ Further, the court noted that section 9.105(a)(6) of the Texas Business and Commerce Code provided that "goods" included all things "which are movable at the time the security interest attaches or which are fixtures . . . but *does not include money*. . . ." ¹²² Therefore, the court held that the money that the plaintiff sought to borrow from the defendant bank was not a "good."¹²³ In addition, upon reviewing the judicial definition of "serv-

114. TEX. BUS. & COM. CODE ANN. § 17.45(6) (Vernon Supp. 1982) defines trade and commerce as:

the advertising, offering for sale, sale, lease, or distribution of any good or service, of any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value, wherever situated, and shall include any trade or commerce directly or indirectly affecting the people of the state.

115. *Id.* § 17.44 provides that the Act "shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection."

116. 603 S.W.2d at 173.

117. *Id.*

118. *Id.*

119. *Id.* at 174.

120. *Id.* TEX. BUS. & COM. CODE ANN. § 1.201(24) (Vernon 1968) defines money as "a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency."

121. TEX. BUS. & COM. CODE ANN. § 2.105(a) (Vernon 1968), defines "goods" as "all things . . . which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid"

122. *Id.* § 9.105(a)(6) (emphasis added).

123. 603 S.W.2d at 174.

ices,"¹²⁴ the court determined that the plaintiff's attempt to acquire money, or the use of money, was not an attempt to acquire services, and the plaintiff, therefore, was not a "consumer" entitled to relief under the DTPA.¹²⁵

Suit had been brought against a nonresident securities broker and its employees to recover damages for alleged misrepresentations occurring during the sale of securities in *Portland Savings & Loan Association v. Beville, Bresler & Schulman Government Securities, Inc.*¹²⁶ The court, relying on section 2.105 of the Texas Business and Commerce Code,¹²⁷ found that the plaintiff failed to allege facts sufficient to show that it was a consumer of goods or services since investment securities were not goods within the meaning of the DTPA.¹²⁸ Similarly, in *Bancroft v. Southwestern Bell Telephone Co.*¹²⁹ the plaintiff was denied relief under the DTPA because she was not a "consumer." The plaintiff had contracted for a yellow page advertisement that had been omitted. Since the defendant had not charged her for such advertisement, the court determined that the plaintiff had not "purchased" services from the phone company so as to be a "consumer" within the meaning of the DTPA.¹³⁰

The *Bancroft* decision is questionable, however, in light of the Texas Supreme Court's decision in *Cameron v. Terrell & Garrett, Inc.*¹³¹ In *Cameron* the court determined that the DTPA applied not only to deceptive trade practices committed by persons who furnished goods or services on which the complaint was based, but was designed to protect consumers from *any* deceptive trade practices made in connection with the purchase or lease of any goods or services.¹³² Therefore, the court stated, a person need not seek or acquire goods or services furnished by the defendant to be a "consumer."¹³³ The court permitted the plaintiff-buyer to recover treble damages from the defendant real estate agent who had represented the seller in a real estate transaction even though the seller, not the plaintiff, was responsible for the defendant's commissions.¹³⁴

124. *Id.* See also TEX. BUS. & COMM. CODE ANN. § 17.45(2) (Vernon Supp. 1982), which defines services as "work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods."

125. 603 S.W.2d at 175. See also *First State Bank v. Chesskin*, 613 S.W.2d 61 (Tex. Civ. App.—Amarillo), *rev'd on other grounds*, 620 S.W.2d 101 (Tex. 1981); *Genico Distributors, Inc. v. First Nat'l Bank*, 616 S.W.2d 418 (Tex. Civ. App.—Texarkana 1981, writ *ref'd n.r.e.*).

126. 619 S.W.2d 241 (Tex. Civ. App.—Corpus Christi 1981, no writ).

127. TEX. BUS. & COM. CODE ANN. § 2.105(a) (Vernon 1969) provides:

"Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Chapter 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2.107).

128. 619 S.W.2d at 245.

129. 616 S.W.2d 335 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

130. *Id.* at 337.

131. 618 S.W.2d 535 (Tex. 1981).

132. *Id.* at 541.

133. *Id.*

134. *Id.*

Reviewing the exemptions provided by section 17.49,¹³⁵ the court held that the DTPA did not provide an exemption for deceptive trade practices by persons who do not furnish the goods or services on which the complaint is based.¹³⁶ The court noted that the Act specifically exempted from its scope certain media owners and employees who published and disseminated deceptive advertisements of goods and services for third parties unless the media defendant knew of the deception in the advertisement or had a direct or substantial financial interest in the unlawfully advertised good or service.¹³⁷ The court reasoned that if the DTPA already excluded defendants who did not furnish the goods or services, as argued by the defendants, the legislature would have had no need to exempt media defendants from liability or to have provided that media defendants could be sued in the two situations mentioned above.¹³⁸ Since the presumption was that the legislature never intended to do a useless act, the court determined that the legislative intent was for the DTPA to protect consumers from *anyone* indulging in any deceptive trade practice in connection with the purchase or lease of any goods or services.¹³⁹ The court, therefore, held the seller's agent liable to the plaintiff for the misrepresentations it made regarding the size of the home.¹⁴⁰

Venue. In 1979 the Texas Legislature also amended the venue provisions of the DTPA.¹⁴¹ Venue is now proper either where the defendant resides, has his principal place of business, has a fixed and established place of business at the time of the lawsuit, or where he committed the act or solicited the transaction.¹⁴² Several cases examined this venue provision and grappled with the question of whether the defendant's conduct constituted "doing business" in the county where the lawsuit had been commenced.

In *Legal Security Life Insurance Co. v. Trevino*¹⁴³ the Texas Supreme Court examined the question of whether venue was proper against the defendant on the sole basis that its licensed agent had made an alleged misrepresentation to the plaintiffs during the sale of a hospital policy. The court, although faced with the venue provision of the Act as written prior to the 1979 amendment, determined that venue was proper in the county in which the defendant had "done business" even though the venue fact proved was the single transaction that served as the basis of the lawsuit.¹⁴⁴

Ranger County Mutual Insurance Co. v. Guinn involved a complaint against an insurer for damages resulting from the defendant's alleged failure to settle claims against its insureds within the limits of the automobile

135. TEX. BUS. & COM. CODE ANN. § 17.49(a) (Vernon Supp. 1982).

136. 618 S.W.2d at 541.

137. See TEX. BUS. & COM. CODE ANN. § 17.49(a) (Vernon Supp. 1982).

138. 618 S.W.2d at 541.

139. *Id.*

140. *Id.*

141. TEX. BUS. & COM. CODE ANN. § 17.56 (Vernon Supp. 1982).

142. *Id.*

143. 605 S.W.2d 857 (Tex. 1980) (per curiam).

144. *Id.*

policy.¹⁴⁵ The plaintiffs alleged that the defendant insurer had failed to inform the plaintiffs that settlement offers had been made, that the defendant had breached its implied warranty of good faith and fair dealing by failing to settle the case within its policy limits, and that the defendant had made a false, misleading, and deceptive representation by informing the plaintiff that it was unnecessary to hire an attorney. As a result plaintiffs claimed they were entitled to recover treble damages and attorney's fees under section 17.50 of the Act.¹⁴⁶

The court of civil appeals held that a plaintiff need only *allege* a claim to relief under the DTPA in order to maintain venue in the county of his residence.¹⁴⁷ The defendant argued that the plaintiffs had not alleged a claim to relief under section 17.50 because the plaintiffs were not "consumers."¹⁴⁸ The court overruled that argument, noting that an insurance policy was covered by the definition of services, and that it was clear under the allegations that the actions and representations of the defendant caused the plaintiffs to suffer actual damages.¹⁴⁹ Additionally, the court noted that the plaintiffs expressly pled certain deceptive acts or representations made by the defendant at the time of the issuance of the insurance policy.¹⁵⁰ Stating that the DTPA was broad in scope and should be liberally construed to protect consumers, the court ruled that venue was properly placed because the dual requirements of section 17.56 of the DTPA had been met; plaintiffs had alleged a claim to relief, and the defendant admitted to doing business in the county.¹⁵¹

Two cases decided during the survey upheld the defendant's plea of privilege because the facts developed at trial were insufficient to establish that the defendants "had done business" in the respective counties in which they were sued. In *Herfort v. Hargrove*¹⁵² the undisputed facts at the trial court indicated that the defendant lived and had his sole place of business in Rosenberg, Fort Bend County, selling all his jewelry from one store. The defendant had no advertisements in either trade journals or telephone books in Travis County, but did send receipts to customers in Travis County if they made payments on any goods purchased in his store. These sales receipts were sent to Travis County only after all negotiations and sales had been made in Fort Bend County. The Austin court of civil appeals upheld the defendant's plea of privilege, stating that the defendant

145. 608 S.W.2d 730, 730-31 (Tex. Civ. App.—Tyler 1980, writ *dism'd*).

146. *Id.*

147. *Id.* at 731. *See also* T.P. Walsh Co. v. Manning, 609 S.W.2d 636 (Tex. Civ. App.—Tyler 1980, no writ); Williamson v. J.V. Frank Constr., Inc., 616 S.W.2d 437 (Tex. Civ. App.—Fort Worth 1981, no writ).

148. TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon Supp. 1982) defines a consumer as "an individual, partnership, corporation, or governmental entity who seeks or acquires by purchase or lease, any goods or services."

149. 608 S.W.2d at 732.

150. *Id.*

151. *Id.* at 732-33. *See also* Otto, Inc. v. Cotton Salvage & Sales, Inc., 609 S.W.2d 590 (Tex. Civ. App.—Corpus Christi 1980, writ *dism'd*).

152. 606 S.W.2d 359 (Tex. Civ. App.—Austin 1980, writ *ref'd n.r.e.*).

had not "done business" in Travis County.¹⁵³

Similarly, in *Jim Walter Homes, Inc. v. Altreche* the court reversed the decision of the trial court overruling the defendant's plea of privilege.¹⁵⁴ The plaintiffs introduced into evidence at the trial court the 1979 Corpus Christi telephone directory, which listed the defendant's advertisement with a telephone number. The appellate court agreed that the introduction of such telephone directory advertisements have been held in the past to be sufficient to prove that a company had solicited business in a particular county.¹⁵⁵ The court determined, however, that the 1979 telephone directory, bearing dates subsequent to the filing of the lawsuit, was no evidence that the plaintiffs had "done business" in Nueces County *at or prior to* the time of the venue hearing, and, therefore, sustained the defendant's plea of privilege.¹⁵⁶

Unconscionable Actions and Implied Warranty Actions. Texas courts decided a number of consumer cases during the survey period involving unconscionable actions violative of section 17.45(5) of the DTPA,¹⁵⁷ and actions for breach of implied warranties under section 17.50A(a)(2).¹⁵⁸ *Cheney v. Parks*¹⁵⁹ and *Thornton Homes, Inc. v. Greiner*¹⁶⁰ involved complaints alleging breach of implied warranties in the sale of used goods. In *Cheney* the plaintiffs contended that the house they purchased failed to meet the standards of habitability that a reasonable buyer would expect and, therefore, constituted a breach of an implied warranty of habitability. The defendant answered that the jury's finding that the house failed to meet the standard of habitability was a finding of a partial failure of consideration, not a finding of a deceptive trade practice. The court agreed, noting that the plaintiff's first amended petition did not allege an implied warranty and the record failed to indicate that the issue was tried by consent.¹⁶¹ The court stated that since the DTPA did not *create* an implied warranty, "[a]ny warranty enforceable thereunder must be created independently of the act."¹⁶² Noting that under Texas law, however, no implied warranty of fitness for a particular purpose existed for used goods, the court held that plaintiffs had failed to prove a cause of action under the Act.¹⁶³ In *Thornton Homes*, the Eastland court of civil appeals reiterated

153. *Id.* at 360.

154. 605 S.W.2d 733, 735 (Tex. Civ. App.—Corpus Christi 1980, no writ).

155. *Id.* at 734; *see Dairyland County Mut. Ins. Co. v. Harrison*, 578 S.W.2d 186 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ).

156. 605 S.W.2d at 735. After the 1979 amendments to the DTPA, venue is proper where the defendant solicits business.

157. TEX. BUS. & COM. CODE ANN. § 17.45(5) (Vernon Supp. 1982).

158. *Id.* § 17.50A(a)(2).

159. 605 S.W.2d 640 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

160. 619 S.W.2d 8 (Tex. Civ. App.—Eastland 1981, no writ).

161. 605 S.W.2d at 642.

162. *Id.*; *see Bunting v. Fodor*, 586 S.W.2d 144 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

163. 605 S.W.2d at 642; *see Chaq Oil Co. v. Gardner Mach. Corp.*, 500 S.W.2d 877 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ).

the general rule of Texas law of no implied warranty for used goods, but apparently conditioned the unavailability of the implied warranty upon the fact that the purchaser had knowledge of the used condition of the goods.¹⁶⁴

In *Chrysler Corp. v. Schuenemann* the court of civil appeals sustained a judgement against the defendant for violations of the DTPA arising out of the plaintiff's purchase of a new motor home.¹⁶⁵ The plaintiffs had alleged that the defendant dealer violated certain express and implied warranties and misrepresented the characteristics or uses of the purchased vehicle. Immediately after acquisition of the vehicle, the plaintiffs developed problems necessitating eleven separate trips to the dealer. On appeal the defendant alleged that it had discharged its obligations under its express written limited warranty and therefore could not have violated the implied warranty contained in the DTPA. The court cited section 17.50(a)(2) of the Act, which allowed a consumer to maintain an action if he has been adversely affected by a breach of an express *or* implied warranty.¹⁶⁶ The court held Chrysler liable for its failure to discharge all of its obligations under both its express limited warranty and the implied warranties of fitness and suitability for the ordinary purpose for which the vehicle was sold.¹⁶⁷

In *Providence Hospital v. Truly*¹⁶⁸ the plaintiff was a patient at the defendant hospital and filed an action for negligence and violation of the DTPA after a contaminated drug was injected into her eye during the final act of cataract surgery. The hospital alleged that the furnishing of the drug during surgery constituted a "medical service" for which its liability was limited and/or excluded pursuant to the terms of the contract executed by the plaintiff, and was therefore not a "sale" governed by the Act. The court determined, however, that the exclusions from section 2.315 of the Texas Business and Commerce Code on implied warranties for fitness of goods sold for a particular purpose were limited to the furnishing of human blood, blood plasma, or other human tissues or organs from a blood bank or reservoir of other such tissues or organs.¹⁶⁹ Finding that providing the contaminated drug to the patient was not a "medical service" excluded from the warranty imposed by section 2.315, the court determined that the hospital was liable for treble damages under the DTPA.¹⁷⁰

A particularly troubling decision was rendered in *Norwood Builders, Inc. v. Toler*.¹⁷¹ The plaintiffs brought an action for damages sustained as a result of alleged defects in the construction of a new home. The court

164. 619 S.W.2d at 9.

165. 618 S.W.2d 799, 808 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.).

166. See TEX. BUS. & COM. CODE ANN. § 17.50(a)(2) (Vernon Supp. 1982) (emphasis added).

167. 618 S.W.2d at 804.

168. 611 S.W.2d 127 (Tex. Civ. App.—Waco 1980, writ dismissed).

169. *Id.* at 133; see TEX. BUS. & COM. CODE ANN. § 2.316(e) (Vernon 1971).

170. 611 S.W.2d at 133.

171. 609 S.W.2d 861 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).

determined that the plaintiffs' purchase involved the sale of a "good" entitling them to relief under the DTPA.¹⁷² Not content to stop there, however, the court found that an officer of the company in his individual capacity had held himself out as an owner of the defendant corporation, made warranties to the consumers regarding the home's characteristics, and facilitated the plaintiffs procurement of a loan to finance the purchase of the home from the defendant corporation.¹⁷³ The individual officer, therefore, was held to be personally liable for damages under the DTPA.¹⁷⁴

The court of civil appeals rendered another troubling opinion in *DeBakey v. Staggs*, in which the court affirmed the trial court's judgment rendering the plaintiff's attorney liable for damages under the DTPA.¹⁷⁵ In *DeBakey* the defendant was hired to change the name of the plaintiff's daughter. A retainer fee of \$120 was paid by the plaintiffs against an agreed total fee of \$250 for the services. Because of numerous defects and insufficiencies in the handling of the matter, the order changing the name of the minor was never signed, and the plaintiffs resorted to other counsel at a cost of \$300 to complete the proceeding. The court determined that the defendant was guilty of an unconscionable act and trebled the plaintiff's actual damages of \$170 in addition to awarding \$1,000 as reasonable attorney's fees.¹⁷⁶

Damages. In *Duncan v. Luke Johnson Ford, Inc.* the Texas Supreme Court determined that damages could not be awarded under the DTPA for mental anguish alone, absent any proof of a willful tort, gross negligence, willful disregard, or mental anguish causing physical injury.¹⁷⁷ In reversing the judgment of the lower courts, the court determined that the defendant was guilty of a deceptive trade practice in representing to the plaintiff that the van purchased had an eight-cylinder engine when in fact it had a six-cylinder engine.¹⁷⁸ The court, however, reversed the lower courts' determination that the plaintiff was entitled to \$150 in actual damages, \$3,500 in reasonable attorney's fees, and \$2,000 for mental anguish, and instead awarded only the actual damages suffered by the plaintiff plus his attorney's fees of \$3,500.¹⁷⁹

A contractor brought an action against a homeowner to recover the balance due on a cost-plus-fee contract and, in the alternative, on the theory of quantum meruit in *Beeman v. Worrell*.¹⁸⁰ The homeowner filed a treble

172. *Id.* at 862.

173. *Id.* at 863.

174. *Id.*

175. 605 S.W.2d 631, 632 (Tex. Civ. App.—Houston [1st Dist.] 1980), *writ ref'd n.r.e. per curiam*, 612 S.W.2d 924 (Tex. 1981).

176. 605 S.W.2d at 633.

177. 603 S.W.2d 777, 779 (Tex. 1980). *See also* Webster College v. Speier, 605 S.W.2d 712 (Tex. Civ. App.—Eastland 1980), *aff'd*, 616 S.W.2d 617 (Tex. 1981).

178. 603 S.W.2d at 778.

179. *Id.* at 779.

180. 612 S.W.2d 953 (Tex. Civ. App.—Dallas 1981, no writ).

damages counterclaim for violation of the DTPA. The court determined that the contractor had breached its express warranty of "fine quality construction," and that the breach was a producing cause of the defendant's damages in the amount of \$20,500.¹⁸¹ The \$20,500 was applied against the amount of money that the jury found the contractor to be entitled to on his action for breach of contract and/or quantum meruit, and a judgment in favor of the contractor for the net sum of \$37,500, plus agreed attorney's fees of \$3,000 was then rendered.¹⁸²

The defendant homeowner claimed that the jury's finding of a breach of express warranty entitled him to treble his damages of \$20,500 and thus recover the difference between his trebled damages and the amount to which the jury found the contractor to be entitled to for part performance of the contract. The court ruled, however, that a party may only treble its net recovery under the DTPA.¹⁸³ Because the damages awarded defendant for his counterclaim were less than the amount awarded the plaintiff, defendant had no net recovery that could have been trebled; therefore, the defendant was not entitled to a recovery.

In *Brunstetter v. Southern*¹⁸⁴ the plaintiff sued the listing real estate broker for treble damages. At trial proof was adduced that prior to filing the lawsuit the plaintiff had settled with the vendor of the property and the cooperating real estate broker for an amount in excess of three times the actual damages he suffered. Based upon these facts, the court denied the plaintiff's claim against the listing real estate broker and awarded the defendant its reasonable attorney's fees incurred in defending the action, finding that the action had been brought in bad faith and for the purpose of harassment.¹⁸⁵

Statute of Limitations. In *Jim Walter Homes, Inc. v. Castillo*¹⁸⁶ the court, in a case of first impression, applied the "discovery rule" to the DTPA. Under this rule the limitations period begins to run when the act complained of is discovered.¹⁸⁷ The court initially had to determine whether

181. *Id.* at 955.

182. *Id.* at 955-56.

183. *Id.* at 959.

184. 619 S.W.2d 557 (Tex. Civ. App.—San Antonio 1981, writ ref'd n.r.e.).

185. *Id.* at 559-60. See TEX. BUS. & COM. CODE ANN. § 17.50(c) (Vernon Supp. 1982).

186. 616 S.W.2d 630 (Tex. Civ. App.—Corpus Christi 1981, no writ).

187. See *Quinn v. Press*, 137 Tex. 60, 140 S.W.2d 438 (1941) (limitations period begins to run when fraud is or should have been discovered). In 1979 the Texas Legislature added to the DTPA § 17.56A, which governs the limitation period question from the effective date of August 27, 1979. TEX. BUS. & COM. CODE ANN. § 17.56A (Vernon Supp. 1982) provides:

All actions brought under this subchapter must be commenced within two years after the date on which the false, misleading, or deceptive act or practice occurred or within two years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice. The period of limitation provided in this section may be extended for a period of 180 days if the plaintiff proves that failure timely to commence the action was caused by the defendant's knowingly engaging in conduct solely calculated to induce the plaintiff to refrain from or postpone the commencement of the action.

the representations by the defendant were of themselves unlawful. The court stated that if the actions themselves were not unlawful, then the cause of action arising from the actions did not accrue until the damages were sustained.¹⁸⁸ Determining that the representation made by the defendant that the construction was to be in a good and workmanlike manner was not per se unlawful, the court therefore found that the statement only became actionable when the damage occurred.¹⁸⁹ Consequently, the statute of limitations did not commence to run until the plaintiff discovered the actionable conduct.¹⁹⁰

III. USURY

A. Legislation

Two significant pieces of legislation bearing on the question of usury were enacted since the prior Creditor and Consumer Rights Article in the *Annual Survey*. At the state level a new usury act,¹⁹¹ was signed into law on May 8, 1981. The act responds to the need for usury legislation that accounts for and reacts to market forces. Unfortunately, many of its perplexing and confusing provisions negate much of the responsiveness it would otherwise have. On the federal level, the passage of the Depository Institutions Deregulation and Monetary Control Act of 1980¹⁹² preempts much of the state usury regulation and thus affects a broad spectrum of the lending activities of Texas lenders.

Texas Legislation. The general concept behind the new Texas usury act is to allow alternative interest ceilings depending upon the type of loan, its purpose, and the amount of money involved.¹⁹³ The provisions of the act are not compulsory, and consequently, the lender uncertain of the effect of the new law can avoid problems of interpretation by safely charging interest below the minimum ceiling. A determination of the type of loan involved is crucial to an understanding and correct application of the Act. All loan transactions fall into one of four alternative categories that are subject to different interest rate ceilings and other limitations. In each instance, the proposed transaction must be identified as either (1) an open-end variable account; (2) an open-end fixed account; (3) a closed-end variable account; or (4) a closed-end fixed account. A lender's failure to identify correctly the appropriate loan classification for the particular

188. 616 S.W.2d at 633.

189. *Id.*

190. *Id.*

191. TEX. CIV. STAT. ANN. arts. 5069—1.01, —1.04, —1.07(f), —1.08, —2.07, —2.08, —3.01(3), —3.15(a), —3.16, —3.21, —4.01(8), —5.02(6), —6.02(15), —6.03(5), —6.05, —7.03 (Vernon Pam. Supp. 1971-1981). In addition TEX. REV. CIV. STAT. ANN. arts. 5069—6A.01 to —6A.17 (Vernon Pam. Supp. 1971-1981) of the Credit Code was enacted, thereby bringing credit transactions for manufactured homes under this chapter rather than chapters 6 and 7 of the Consumer Credit Code. See note 8 *supra* and accompanying text.

192. Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (codified in scattered sections of 12 U.S.C.).

193. See TEX. REV. CIV. STAT. ANN. art. 5069—1.04 (Vernon Pam. Supp. 1971-1981).

transaction could result in a violation of the interest rate ceiling. Unfortunately for lenders, the definitions for these four alternative accounts are vague or nonexistent.¹⁹⁴

Under the revised article 5069—1.04(b) one of three fixed interest rate ceilings will govern Texas loan transactions. These ceilings impose an absolute standard within which contractually agreed upon interest rate computations, changing as often as weekly, must fall or face restriction. A minimum ceiling of 18% per annum exists regardless of loan purpose or amount.¹⁹⁵ This minimum may be exceeded when other provisions under the Texas usury laws are met.¹⁹⁶ A maximum ceiling of 24% per annum may be reached when a loan is made for personal, family, household, or agricultural use, or business loans for \$250,000 or less.¹⁹⁷ The maximum rate may rise to 28% per annum if a loan exceeds \$250,000 and is made for business, commercial, investment or similar purposes.¹⁹⁸ Thus, loans made for personal, family, household, or agricultural use have a maximum ceiling of 24% per annum regardless of loan amount.

These usury ceilings are then juxtaposed against a complex alternative interest rate ceiling structure. Four alternative rate formulas exist, including the "indicated rate ceiling"¹⁹⁹ (or weekly computed rate), "monthly ceiling,"²⁰⁰ "quarterly ceiling,"²⁰¹ and "annualized ceiling."²⁰² These for-

194. TEX. REV. CIV. STAT. ANN. art. 5069—1.01(f) (Vernon Pam. Supp. 1971-1981) as amended defines open-end accounts as "any account, under a written contract under which a creditor may permit the obligor to make purchases or borrow money from time to time, and under which interest or time price differential may from time to time be computed on an outstanding unpaid balance." The term "variable account" is not defined either by previously enacted usury laws or by the Act. Nor can one look to a definition of "fixed rate account" as a guide because no such definition is provided, but the Act laboriously defines "variable rate account" by implication as follows:

The parties to any contract, including a contract for an open-end account, may agree to and stipulate for a rate or amount by contracting for any index, formula, or provision of law, by or under which the numerical rate or amount can from time to time be determined. However, the rate or amount so produced may not exceed the ceiling that may from time to time be in effect and applicable to the contract, for so long as debt is outstanding under the contract. Provided, further, that variable contract rates as described in this Section (f) are not allowed in a contract in which the interest or time price differential is precomputed and added into the amount of the contract at the time of the contract.

Id. art. 5069—1.04(f). One must assume that in the absence of a definition for "fixed rate account," it is that which is not a "variable rate account."

195. TEX. REV. CIV. STAT. ANN. art. 5069—1.04(b)(1) (Vernon Pam. Supp. 1971-1981).

196. *Id.* art. 5069—1.04(b)(1), (2).

197. *Id.* art. 5069—1.04(b)(2).

198. *Id.*

199. *Id.* art. 5069—1.04(a)(1). The "indicated rate ceiling" is arrived at by computing, for the week prior to the week the interest rate is contracted for, the auction average rate quoted on a bank discount basis for 26-week treasury bills issued by the United States Government, as published by the Federal Reserve Board, multiplied by two and rounded to the nearest one-quarter of one percent (¼%). A computation of the various rates applicable under the Act is compiled weekly by the Texas Consumer Credit Commissioner.

200. *Id.* art. 5069—1.04(c). The monthly ceiling is computed by taking the average of indicated rate ceilings for the month preceding the transaction. This monthly ceiling is computed by the consumer credit commissioner on the first business day of the calendar month.

201. *Id.* arts. 5069—1.04(a)(2), —1.04(d). The quarterly ceiling is arrived at by the con-

mulas may be utilized in most instances for any lending transaction memorialized by written contract.²⁰³ Regardless of the interest ultimately computed under the alternative rate formulas, the rates actually contracted for, charged, or collected may not exceed the appropriate ceiling allowed by sections 1.04(b)(1) and (b)(2). Thus, under this interest rate structure computations of the alternative rates will entitle lenders to charge the alternative rate chosen so long as it does not exceed the applicable maximum ceilings of 24% and 28%. Should the lender's interest yield a rate that is less than the minimum statutory rate of 18%, the lender, if the agreement so provides, will be entitled to charge interest up to 18% per annum.

In addition to this complex rate structure, the Act prescribes when each alternative ceiling may be utilized. Fixed-rate closed-end loans may use the indicated rate and quarterly ceilings,²⁰⁴ and fixed-rate open-end loans may use the indicated rate ceiling, quarterly ceiling, or annualized ceiling.²⁰⁵ Variable-rate closed-end loans for purposes other than personal, family, or household use may utilize the indicated rate ceiling, monthly ceiling, or quarterly ceiling.²⁰⁶ If personal, family, or household purposes are involved, the monthly ceiling may not be used.²⁰⁷ A variable-rate open-end loan may use any of the alternative ceilings except when the loan's purpose is for personal, family, or household use, in which case the monthly ceiling is excluded as an option.²⁰⁸ For closed-end fixed-rate loans the existing rate at the date of contract will prevail for the life of the loan, and will not change as interest rates otherwise change. In contrast, new variable-rate open-end loans and fixed-rate open-end loans are subject to interest fluctuations for charges made during the most recent rate adjustment period.²⁰⁹ Clearly, all variable rate loans are subject to the floating interest ceiling.

Besides the attendant problems with correct use of the various types of loans and their application to the alternative rates, other significant questions remain concerning the implementation of these amendments to the usury laws.²¹⁰ Also, the constitutionality of the retroactive application of

sumer credit commissioner by averaging the indicated rate ceiling for the previous three calendar months.

202. *Id.* The annualized ceiling is computed by averaging the indicated rate ceiling for the previous twelve months. The computation, made by the consumer credit commissioner on December 1, March 1, June 1, and September 1, is effective for the three-month period after January 1, April 1, July 1, and October 1, respectively.

203. *Id.* arts. 5069—1.04(a), (c), (e).

204. *Id.* arts. 5069—1.04(a)(1), (a)(2), (c), (h).

205. *Id.* arts. 5069—1.04(a), (c), (e).

206. *Id.*

207. *Id.* arts. 5069—1.04(a), (c), (e), (h).

208. *Id.* arts. 5069—1.04(h)(1).

209. *See* note 194 *supra*.

210. Section 27 of the Act amending TEX. REV. CIV. STAT. ANN. art. 5069—1.04 (Vernon Pam. Supp. 1971-1981) provides that:

This Act shall be applicable to all claims of forfeiture made after the effective date of this Act but, with respect to claims of forfeiture in litigation pending at such effective date, the amount forfeited shall be determined under the provisions of law as it existed prior to the effective date of this Act.

the Act is still open to debate.²¹¹ The judicially accepted and legislatively enacted concept of "spreading" was not abrogated by the Act. Under this doctrine courts determine the usurious nature of an extended loan by spreading the full amount of interest charged over the entire term of the note.²¹² The doctrine's application in the context of the new alternative rate structure is open to question, however, in view of the language of article 5069—1.04(c), which now states:

In contracts for which the monthly ceiling is available under this section, if the parties agree that the rate is subject to being adjusted on a monthly basis in accordance with Section (f) of this Article they may further contract that the rate from time to time in effect may not exceed the monthly ceiling from time to time in effect under this section and the monthly ceiling from time to time in effect is the ceiling on those contracts, instead of any ceiling under Article 1.04(a) of this Title.²¹³

Additionally, article 5069—1.04(f) now provides:

The parties to any contract, including a contract for an open-end account, may agree to and stipulate for a rate or amount by contracting for any index, formula, or provision of law, by or under which the numerical rate or amount can from time to time be determined. However, the rate or amount so produced may not exceed the ceiling that may from time to time be in effect and applicable to the contract, for so long as debt is outstanding under the contract. *Provided, further, that variable contract rates as described in this Section (f) are not allowed in a contract in which the interest or time price differential is precomputed and added into the amount of the contract at the time of the contract.*²¹⁴

The better interpretation is that "spreading" as authorized by Texas courts is still good law.

1981 Tex. Gen. Laws, ch. 111, § 27, at 286.

Article 5069—1A.01 entitled "Conversion of open-end accounts" provides:

Any creditor electing to implement the provisions of Article 1.04 of this Title, as amended, to an open-end account existing on the effective date of this Act and not previously subject to Article 1.04, as amended, must allow the obligor to pay the balance then existing at the rate previously agreed to and at the minimum payment terms previously agreed to. For this purpose, payments on an account may be applied by the creditor to the balance existing on the account on the effective date of this Act prior to applying same to credit extended after the effective date of this Act.

TEX. REV. CIV. STAT. ANN. art. 5069—1A.01 (Vernon Pam. Supp. 1971-1981).

211. By inference this amendment permits its retroactive application to open-end accounts entered into prior to the effective date of the Act. Furthermore, article 5069—1.04(e) states that the maximum rate on renewals or extensions is the applicable ceiling for new contracts entered into at the time of the renewal or extension. In view of this apparent legislative intent to apply the provisions of the Act retroactively, it is necessary in each case to determine if the contract for which an adjustment is contemplated provides for a change in the interest rate. Clearly, an adjustment upward would not be appropriate in a fixed-rate closed-end account entered into prior to May 8, 1981. As for other accounts, whether the upward adjustment is permissible will likely be determined through contract interpretation.

212. See *Tanner Dev. Co. v. Ferguson*, 561 S.W.2d 777 (Tex. 1977); *Nevels v. Harris*, 129 Tex. 190, 102 S.W.2d 1046 (1936).

213. TEX. REV. CIV. STAT. ANN. art. 5069—1.04(c) (Vernon Pam. Supp. 1971-1980).

214. *Id.* art. 5069—1.04(f) (emphasis added).

Lenders will have to await further authority as to the application of many of the usury provisions in the Act. In particular, the bill places great significance on words, terms, and phrases not always clearly defined or explained.²¹⁵ Although article 5069—1.04(b)(2) now permits interest rates up to 28% if a business loan over \$250,000 is involved, it does not disclose whether the dollar limit can be exceeded in a series of loan advances, nor does it offer guidance as to the relevant characteristics necessary for finding a loan to be a "business" loan.

Federal Legislation. Of no small consequence to lenders in Texas was the passage of the federal Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDA).²¹⁶ Section 501 of DIDA preempts state usury ceilings on first lien residential mortgages made by federally connected lending institutions.²¹⁷ The breadth of its coverage extends to interest rates, points and finance charges that are charged, taken, received, or reserved on either loans, mortgages, credit sales, or advances secured by first liens on residential real property,²¹⁸ first liens on stock in residential cooperative housing corporations where financing is purchase money,²¹⁹ and certain first liens on manufactured residential housing.²²⁰ The preemptive effect of DIDA can be overridden upon affirmative state action, within three years.²²¹

Further preemption of Texas usury laws occurred under section 511 of DIDA.²²² State usury ceilings applicable to business and agricultural loans over \$25,000 after March 30, 1980, were preempted by that section as to any lender, provided that the rate charged is not more than five percent in excess of the discount rate, including any surcharge thereon, on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal

215. See, e.g., *id.* art. 5069—1.04(j), which now states:

If a creditor implements an annualized or quarterly ceiling as to a majority of its open-end accounts that are under a particular plan or arrangement and are for obligors in this state, the ceiling is also the ceiling for all open-end accounts that are opened or activated under that plan for obligors in this state during the period that the election is in effect.

What constitutes a "particular plan or arrangement" for purposes of article 5069—1.04(j) is not clear.

216. Pub. L. No. 96-221, 94 Stat. 132 (codified in scattered sections of 12 U.S.C.). See also Samuels, *Usury Preemption: The Federal/State Scheme*, 98 BANKING L.J. 892 (1981); Weaver & O'Malley, *The Depository Institutions Deregulation and Monetary Control Act of 1980: An Overview*, 98 BANKING L.J. 100 (1981).

217. A federally connected lending institution is one that is either a federally chartered bank, credit union, or savings and loan association; or nonfederally chartered lenders whose accounts are insured by FSLIC, FDIC, and NCUA; or a member of the Federal Reserve System or the Federal Home Loan Bank System; or a lender participating in a mortgage insurance program supervised by the Department of Housing and Urban Development. Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 501(a)(2)(A), 94 Stat. 132 (codified in scattered sections of 12 U.S.C.).

218. *Id.* §§ 501(a)(1), (a)(1)(A).

219. *Id.* § 501(a)(1)(A).

220. *Id.* §§ 501(a)(1)(A), (c), (d).

221. *Id.* § 501(b)(2). For regulations promulgated by the Federal Home Loan Bank Board interpreting § 501, see 12 C.F.R. § 590 (1981).

222. 12 U.S.C. § 86a (Supp. IV 1980).

Reserve district where the lender is located.²²³ This preemption continues until April 1, 1983, subject to a state override provision.²²⁴ Since October 8, 1980, the qualifying loan need only exceed \$1,000 rather than the \$25,000 threshold originally enacted.²²⁵

With respect to business and agricultural loans, a loan is made if it exceeds the applicable limit in its original principal sum, or under a series of advances made in whole or in part during the period, the total sum of which exceeds the applicable amount.²²⁶ Similarly, the loan exceeds the applicable limit if it was made during the period for return of interest at a variable rate or if it arose out of an agreed modification, renewal, or extension of credit.²²⁷ The lender who knowingly takes, reserves, or charges an interest rate in excess of that allowed under section 511, forfeits interest under the loan.²²⁸ When the interest has actually been paid by the borrower, the section provides a refund of twice the interest paid.²²⁹

Section 521 of DIDA²³⁰ permits numerous lending institutions other than national banks²³¹ to charge interest of one percent over the Federal Reserve discount rate on ninety-day commercial paper currently in effect at the Federal Reserve bank in the Federal Reserve district where the depository is located.²³² This provision became effective on April 1, 1980, and it remains in effect permanently unless Texas opts out.

B. Case Law

Cases Defining "Interest." During the survey period three cases addressed the issue of the proper definition of interest. In *O'Connor v. Lamb*²³³ the defendant borrowed \$2,500 from his own bank and loaned that same amount to a third party, the principal to be repaid within ninety days plus an additional sum of \$500. In defending the usury suit brought by the third-party borrower, the defendant claimed that the additional \$500 constituted a service charge for his initial procurement of the loan. Noting that the defendant did not endorse the loan from the bank to the third party, nor act as surety or guarantor, the court concluded that the defendant's act of borrowing money to loan to another did not entitle him to

223. *Id.*

224. *Id.*

225. Housing and Community Development Act of 1980, Pub. L. No. 96-339, §§ 324(c), (d), 94 Stat. 1614.

226. *Id.* § 324(c)(1)(B).

227. *Id.*

228. 12 U.S.C. § 86a (Supp. IV 1980).

229. *Id.* The statute of limitations is two years from the date of usurious payment.

230. 12 U.S.C. § 1831d (Supp. IV 1980).

231. Section 521 applies to state chartered insured banks, insured savings banks, insured mutual savings banks, insured branches of foreign banks, federal and state chartered insured savings and loan associations, federal and state insured credit unions, and small business investment companies. 12 U.S.C. § 1831d(a) (Supp. IV 1980). National banks have the option to charge interest at the rate permitted under section 521 pursuant to section 85 of the National Bank Act of 1864, codified at 12 U.S.C. § 85 (1976).

232. *Id.*

233. 593 S.W.2d 385 (Tex. Civ. App.—Dallas 1979, no writ).

charge a fee or a commission.²³⁴ The \$500 charged, therefore, was considered interest and the loan was held to be usurious.²³⁵

In contrast, the court in *Apparel Manufacturing Co. v. Vantage Properties, Inc.* found that no interest had been charged although the plaintiff-lessee was charged a "late fee" by the defendant-lessor for delinquent rent.²³⁶ The court rejected the plaintiff's argument that the late charge, in excess of ten percent, was governed by the usury statutes, holding that a lease or rental transaction does not fall within the purview of the usury statutes.²³⁷

Finally, a "retail installment contract" was reviewed in *San Juan Pools, Inc. v. Krohn* and found by the court to be mechanically deficient to such an extent that its legality was governed by chapter 1 of the Credit Code instead of chapter 6.²³⁸ Under chapter 6 the seller must comply with rigorous disclosure requirements, however, and the court in *San Juan Pools* found that the seller's failure to do so brought the transaction within the purview of chapter 1. As a result the obligor was entitled to twice the amount of interest contracted for plus reasonable attorney's fees.²³⁹ The contract in *San Juan Pools* failed to satisfy so many of the requirements of chapter 6 that the decision, while correct, does not present a significant refinement of the law.

Cases Determining Whether Interest Had Been "Contracted For, Charged or Received." Texas courts decided several cases during the survey period interpreting controversial article 5069—1.06.²⁴⁰ In *Tyra v. Bob Carroll*

234. *Id.* at 387.

235. *Id.*

236. 597 S.W.2d 447 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.).

237. *Id.* at 449.

238. 594 S.W.2d 492 (Tex. Civ. App.—San Antonio 1979, no writ).

239. *Id.* at 494. See TEX. REV. CIV. STAT. ANN. arts. 5069—1.02, 6.01(e) (Vernon Pam. Supp. 1971-1981).

240. Article 5069—1.06 was amended by the Texas Legislature in 1979. August 27, 1979, was the effective date of the amendment. The current version of TEX. REV. CIV. STAT. ANN. art. 5069—1.06 (Vernon 1971 & Pam. Supp. 1971-1981) now provides:

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

(2) Any person who contracts for, charges or receives interest which is in excess of double the amount of interest allowed by this Subtitle shall forfeit as an additional penalty, all principal as well as interest and all other charges and shall pay reasonable attorney fees set by the court; provided further that any such person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished by fine of not more than One Thousand Dollars. Each contract or transaction in violation of this section shall constitute a separate offense punishable hereunder.

(3) All such actions brought under this Article shall be brought in any court of this State having jurisdiction thereof within four years from the date

*Construction Co.*²⁴¹ the creditor's attorney nearly caused penalties to be assessed against his client when he sued for interest not provided for in the documents creating the claim. Upon the defendant's failure to pay an undisputed amount owing for services rendered on a construction contract, demand letters were sent to the defendant, but ignored. The demand letters neither provided for nor demanded interest. Suit thereafter was filed for the amount owing on the account plus interest at one and one-half percent per month computed from the due date on the accounts. The defendant, noting that no agreement had ever been made as to interest on the accounts, asserted that by charging interest in excess of double the amount allowed by law under article 5069, the plaintiff had subjected himself to the penalties provided in article 5069—1.06(1) and (2), including three times the amount of the usurious interest charged, reasonable attorney's fees, and forfeiture of the debt.²⁴² The plaintiff's attorney asserted an "accidental and bona fide error" and amended his petition to delete the claim for interest and further denied that the creditor had ever claimed any interest on the accounts. The appellate court affirmed the trial court's determination that the weight of the evidence supported a finding that no interest had been charged, being swayed by the fact that eight invoices were sent without any charge for interest, the accounts receivable ledger reflected no charge for interest, and two demand letters were sent that made no claim for interest.²⁴³

In *Nationwide Financial Corp. v. English*,²⁴⁴ a troubling case for creditors' attorneys, the plaintiff initiated suit against the defendant for violation of numerous Credit Code provisions. The defendant responded by alleging default, accelerating the payments due under the time price differential contract, and demanding the entire unpaid balance including unearned time price differential. The plaintiff thereafter amended his petition to allege that by the counterclaim the defendant had charged in excess of twice the time price differential permitted by law.²⁴⁵ The defendant, realizing its mistake, amended its counterclaim to exclude any prayer for the unearned time price differential. The trial court held that the defend-

when the usurious charge was received or collected in the county of the defendant's residence, or in the county where the interest in excess of the amount authorized by this Subtitle has been received or collected, or where such transaction had been entered into or where the parties who paid the interest in excess of the amount authorized by this Subtitle resided when such transaction occurred, or where he resides.

241. 618 S.W.2d 853 (Tex. Civ. App.—El Paso 1981, no writ).

242. *Id.* at 854. See also *Houston Sash & Door, Inc. v. Heaner*, 577 S.W.2d 217 (Tex. 1979) (charging of interest on open account during specified interest-free period held to constitute interest in excess of double the allowed rate, thereby subjecting the creditor to the penalties).

243. 618 S.W.2d at 856. See *Mecey v. Seggern*, 596 S.W.2d 924 (Tex. Civ. App.—Austin 1980, no writ).

244. 604 S.W.2d 458 (Tex. Civ. App.—Tyler 1980, writ granted).

245. The plaintiff pleaded that he was entitled to a recovery of twice the time price differential and default charges as permitted by TEX. REV. CIV. STAT. ANN. art. 5069—8.01(a) (Vernon Pam. Supp. 1971-1981), and to a forfeiture of the entire principal and all other charges as permitted by art. 5069—8.02. 604 S.W.2d at 459.

ant's counterclaim constituted "charging" of interest notwithstanding its amendment to the counterclaim. Although reversing on other grounds, the appellate court agreed that the defendant's counterclaim constituted the "charging" of interest, and noted that:

If a creditor is to be allowed to reduce the amount that he sues for after a usury claim has been asserted against him, then the penalty provided by the statute would be totally ineffective, since any violation and penalties could be erased simply by reduction of the amount sued for.²⁴⁶

Tyra and *Nationwide* can be reconciled, but unfortunately they do not establish a definitive rule as to when a pleading does or does not constitute "charging."

Three cases dealing with "charging" that deserve mention are *Dixon v. Brooks*,²⁴⁷ *Woolard v. Texas Motors, Inc.*,²⁴⁸ and *Smart v. Tower Land & Investment Co.*²⁴⁹ *Dixon* serves as a stern warning to the growing number of private obligees engendered by the creative financing wave. The obligee in *Dixon* assessed a "late charge" in excess of ten percent per annum against her defaulting obligor. The obligee argued that the "late charge" was in the nature of a service charge and not "interest." The court rejected this argument and noted that except for certain statutory provisions that permit savings and loan associations to charge penalties for late payments,²⁵⁰ late charges were always interest within the meaning of the usury statutes.²⁵¹

The court in *Woolard* addressed the recurring issue of whether or not a contract "hypothetically" charges interest.²⁵² The purchaser in *Woolard* contended that the contract was usurious on its face because it provided:

"Time is of the essence of this contract. In the event Buyer defaults in any payment, or fails to obtain or maintain the insurance required hereunder, or fails to comply with any other provision hereof, or Seller in good faith believes that the prospect of payment or performance hereunder is impaired, Seller shall have the right to declare all amounts due or to become due hereunder to be immediately due and payable"²⁵³

The purchaser argued that under hypothetical circumstances an acceleration early into the payoff period would, in view of the above provision, result in the holder having an immediate right to the entire amount of

246. 604 S.W.2d at 461.

247. 604 S.W.2d 330 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.).

248. 616 S.W.2d 706 (Tex. Civ. App.—Fort Worth 1981, no writ).

249. 597 S.W.2d 333 (Tex. 1980).

250. TEX. REV. CIV. STAT. ANN. art. 852a, § 507 (Vernon 1964).

251. 604 S.W.2d at 334.

252. See *Smart v. Tower Land & Inv. Co.*, 597 S.W.2d 333 (Tex. 1980); *Walker v. Temple Trust Co.*, 124 Tex. 575, 80 S.W.2d 935 (1935); *Triton Oil & Gas Corp. v. Marine Contractors & Supply, Inc.*, 618 S.W.2d 814 (Tex. Civ. App.—Corpus Christi 1981, no writ). *Triton Oil* was reported in the advance sheets but withdrawn from the bound volume of the reporter at the court's request.

253. 616 S.W.2d at 707 (emphasis by the court). The statutory basis for the plaintiff's action was TEX. REV. CIV. STAT. ANN. art. 5069—7.03 (Vernon Pam. Supp. 1971-1981).

interest due on the note, unearned as well as earned, and would result in an interest charge over twice the amount allowed by law. The court recognized the potential for such an abuse, but chose to interpret the contract as a whole and concluded that the parties never intended for the lender to retain unearned interest.²⁵⁴ The court noted that a claimant must not only prove that a hypothetical construction supports a claim of usury, but must also overcome the presumption that the collection of usurious interest was not intended.²⁵⁵

In *Smart v. Tower Land & Investment Co.*, a case similar to *Woolard*, the Texas Supreme Court held that prepaid interest can be usurious upon acceleration when there is an affirmative indication that the prepaid interest is to be retained by the lender.²⁵⁶ In contrast to the situation existing in *Woolard*, the contractual provision in *Smart* not only could be interpreted on the whole as providing for usurious rates, but it also provided for retention of all prepaid interest in the event of acceleration even though some of the retained interest would be unearned.²⁵⁷ Under these circumstances, the court logically found that the defendant had "contracted for" usurious interest.²⁵⁸ As in *Woolard*, however, no interest was actually received.²⁵⁹

Of note during the survey period were two cases which interpreted whether or not terms printed on an invoice constituted a written contract for purposes of article 5069—1.03. In *El Paso Environmental Systems, Inc. v. Filtronics, Inc.*²⁶⁰ the court rejected the plaintiff's attempt to utilize section 2.207 of the Texas Business and Commerce Code as a statutory basis for creating a "written contract." Section 2.207 provides that under certain

254. 616 S.W.2d at 708. The court cited with approval *Walker v. Temple Trust Co.*, 124 Tex. 575, 577, 80 S.W.2d 935, 936-37 (1935), which stated: "The determination of whether or not usury exists in a contract is a matter involving first and pre-eminently the principle which is the polestar of construction, to wit: the ascertainment of the dominant purpose and intention of the parties embodied in the contract, interpreted as a whole" 616 S.W.2d at 707.

255. 616 S.W.2d at 709. See also *Ware v. Traveler's Indem. Co.*, 604 S.W.2d 400 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.).

256. 597 S.W.2d 333, 340-41 (Tex. 1980).

257. Two provisions in the note proved to be the defendant's undoing. The first gave it the option upon default to accelerate the note by providing:

Default in the payment of any part of the principal or interest when due, or failure to comply with any of the agreements and conditions in the instrument given to secure this note shall, at the option of the holder hereof, mature this note and it shall at once become due and payable. . . however, holder shall give maker or endorsers thirty (30) days' notice of default before this note can be matured.

The note further stated that "[t]he maker hereof is not now nor shall he ever be personally liable on this note, but the payees or other holders of this note shall never be obligated to refund any payment of interest or principal after such payment has been made."

Id. at 339-40.

258. See *Tanner Dev. Co. v. Ferguson*, 561 S.W.2d 777 (Tex. 1977); *Shropshire v. Commerce Farm Credit Co.*, 120 Tex. 400, 30 S.W.2d 282 (1930), *on motion for rehearing*, 120 Tex. 400, 39 S.W.2d 11, *cert. denied*, 284 U.S. 675 (1931). See also *Walker v. Temple Trust Co.*, 124 Tex. 575, 80 S.W.2d 935 (1935).

259. See *Hagar v. Williams*, 593 S.W.2d 783 (Tex. Civ. App.—Amarillo 1979, no writ) (considered whether interest was actually received).

260. 609 S.W.2d 810 (Tex. Civ. App.—El Paso 1980, writ ref'd n.r.e.).

circumstances additions to an original contract between merchants become a part of the contract, unless within a reasonable time the recipient of the proposal objects.²⁶¹ The court in *El Paso* recognized the presence of conditions sufficient to find a written contract under section 2.207, but held that for purposes of article 5069—1.03, no “written contract ascertaining the sum payable” had been created.²⁶² Consequently, the defendant’s charging of interest from and after the time when the sum was due and payable constituted a violation of article 5069—1.03.²⁶³ A different conclusion, however, was reached in *Dean Vivian Homes, Inc. v. Sebera’s Plumbing & Appliances, Inc.*, in which the court held that invoices signed by the party to be charged created a written contract for purposes of article 5069—1.03.²⁶⁴

Four cases during the survey period dealt with the question of standing to plead the usury claim or defense. In *Vordenbaum v. Rubin* the court concluded that the usurer did not have standing to set up his own usury to avoid his obligation under an agreement that turned sour.²⁶⁵ The court in *Vordenbaum* noted that the usury law did not render a usurious contract fully void but rather prescribed penalties despite the contract’s enforceabil-

261. TEX. BUS. & COM. CODE ANN. § 2.207 (Vernon 1971).

262. 609 S.W.2d at 812.

263. At the time the events under which this cause of action arose, TEX. REV. CIV. STAT. ANN. art. 5069—1.03 provided:

When no specific rate of interest is agreed upon by the parties, interest at the rate of six percent per annum shall be allowed on all written contracts ascertaining the sum payable, from and after the time when the sum is due and payable; and on all open accounts, from the first day of January after the same are made.

Article 5069—1.03 has since been amended by 1979 Tex. Gen. Laws, ch. 707, § 1 at 1718, and now provides that “[w]hen no specified rate of interest is agreed upon by the parties, interest at the rate of six percent per annum shall be allowed on all accounts and contracts ascertaining the sum payable, commencing on the thirtieth (30th) day from and after the time when the sum is due and payable.” TEX. REV. CIV. STAT. ANN. art. 5069—1.03 (Vernon Pam. Supp. 1971-1981).

264. 615 S.W.2d 921, 925-26. (Tex. Civ. App.—Waco 1981, no writ). Clearly, because the debtor signed the invoices, the fact situation was substantially different from that posed in *El Paso*. Furthermore, a legend in bold face type on each invoice informed the buyer:

NOTICE TO THE BUYER: DO NOT SIGN THIS CONTRACT BEFORE YOU READ IT OR IF IT CONTAINS BLANK SPACES. YOU ARE ENTITLED TO A COPY OF THE CONTRACT YOU SIGN. UNDER THE LAW YOU HAVE THE RIGHT TO PAY OFF IN ADVANCE THE FULL AMOUNT DUE AND UNDER CERTAIN CONDITIONS MAY OBTAIN A PARTIAL REFUND OF THE FINANCE CHARGE. KEEP THIS CONTRACT TO PROTECT YOUR LEGAL RIGHTS.

BUYER ACKNOWLEDGES THAT THIS CONTRACT WAS COMPLETELY FILLED IN PRIOR TO ITS EXECUTION AND THAT HE RECEIVED A TRUE COPY THEREOF.

Id. at 925.

265. 611 S.W.2d 463 (Tex. Civ. App.—Dallas 1980, writ ref’d n.r.e.). An interesting point was raised when the court commented on the sellers’ stated desire to avoid a usurious transaction by having the court rule the agreement unenforceable. The court noted that the sellers sought to avoid their obligations under the contract because of usury, but made no effort to reform the note so that it would bear a lawful rate of interest. The question becomes, then, whether a buyer at a later date can sue a seller for collecting usury when ordered by the court to perform the contract. *Id.*

ity. Consequently, the court granted the buyer's request for specific performance despite the clearly usurious nature of the agreement.²⁶⁶ In *Patterson v. Neel* the court concluded that the usury statutes were written for the protection of obligors on notes and consequently guarantors were not allowed to raise the claim of usury even though liable for payment under the guaranty contract.²⁶⁷ The same court similarly concluded in *R.J. Carter Enterprises, Inc. v. Greenway Bank & Trust* that a guarantor could not raise the defense of usury with respect to a corporate debt even though various terms of the document referred to the guarantor, an individual, as the "borrower."²⁶⁸ The court noted that the parties intended the obligation to be that of the corporation and evidence of any other intention was inconclusive.²⁶⁹ Lastly, in *South Eastern Xpress, Inc. v. Bank of Crowley* the court rejected the attempt by an obligor's assignee to assert the obligor's claim of usury.²⁷⁰ The court stated that under article 5069—1.06 the claim of usury was not assignable and the article limited recovery to the obligor.²⁷¹

The Fifth Circuit rendered an important decision on the choice of law to be used in a usury case in *Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Development Co.*²⁷² wherein the court reversed its own prior decision.²⁷³ Prior to the court's first decision, out-of-state lenders could safely apply the law of their residence to loan transactions when the negotiations were at arms length, the borrower was sophisticated and represented by competent counsel, the loan was not a consumer loan, the express choice of foreign law was freely agreed upon, and the interest contracted for would not be held usurious under the chosen foreign law.²⁷⁴ In *Woods-Tucker* a Mississippi lender filed a claim in a chapter XI bankruptcy proceeding instituted by a Texas debtor. Woods-Tucker had entered into an equipment sale-leaseback transaction with the debtor and sought reclamation in the bankruptcy proceeding wherein the debtor filed a counterclaim for usury. The underlying documents expressly called for the application of Mississippi law. Although there were no findings of fact that the loan documents constituted an "adhesion contract," in its first decision the Fifth Circuit determined that Texas law should apply, placing strong emphasis on the fact that the debtor was in dire financial straits and that the lease was on a preprinted form.²⁷⁵

After being inundated with amicus curiae briefs, the Fifth Circuit reversed itself with respect to its prior conclusions on the usury choice of law

266. *Id.* at 465.

267. 610 S.W.2d 154, 156 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

268. 615 S.W.2d 826, 828-29 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ).

269. *Id.* at 829.

270. 612 S.W.2d 85 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.).

271. *Id.* at 88.

272. 642 F.2d 744 (5th Cir. 1981).

273. 626 F.2d 401 (5th Cir. 1980).

274. See generally Pederson & Cox, *Choice of Law and Usury Limits Under Texas Law and the National Bank Act*, 34 Sw. L.J. 755 (1980).

275. 626 F.2d at 405.

issue.²⁷⁶ The court recognized the rights of parties under the Texas Uniform Commercial Code to choose the governing law so long as the jurisdiction bore a "reasonable relation" to the transaction. Under the facts of *Woods-Tucker*, the court determined that Mississippi law bore a reasonable relation to the transaction and its laws on usury should be applied.²⁷⁷

IV. GUARANTY/SURETYSHIP

A dearth of significant decisions interpreting existing guaranty and surety principles marked the survey period. The decisions that were reported generally restated accepted principles and to comment on them, therefore, is unnecessary.²⁷⁸ One possible exception is the decision in *Gulf Insurance Co. v. J.W. Blair*,²⁷⁹ in which contrary provisions between a surety bond and a court order were reconciled against the surety. The surety issued a bond on an administrator for the full and proper performance of all duties required of him under law. The order appointing the administrator provided that his appointment would expire on March 31, 1975. Because the administrator's defalcation occurred sometime after March 31, 1975, the surety argued that it had no liability under the surety bond. The court disagreed and held that because the bond did not limit the period of the surety's liability, and because the administrator was liable under law for his defalcation notwithstanding the expiration of his appointment, the surety was liable for losses to the estate occurring after March 31, 1975.²⁸⁰

V. PREJUDGMENT INTEREST AND ATTORNEYS' FEES

Due to the breadth of this year's Article and the detailed treatment that the practice and procedure under rule 185²⁸¹ has received in past *Survey* articles,²⁸² the discussion of creditors' rights in the area of collection actions is limited this year to the topics of prejudgment interest and attorneys' fees. The rate of prejudgment interest recoverable in a collection action was considered recently by the Fifth Circuit in *Dallas—Fort Worth Regional Airport Board v. Combustion Equipment Associates, Inc.*²⁸³ The appellate court held that the trial court did not abuse its discretion in

276. 642 F.2d at 745-46.

277. *Id.* at 750.

278. See *Brazosport Bank v. Travis*, 617 S.W.2d 729 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.); *Ciminelli v. Ford Motor Credit Co.*, 612 S.W.2d 671 (Tex. Civ. App.—Corpus Christi 1981), *rev'd*, 25 Tex. Sup. Ct. J. 91 (Dec. 9, 1981); *Malone v. Federal Deposit Ins. Corp.*, 611 S.W.2d 855 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.); *Balboa Ins. Co. v. K & D & Assocs.*, 589 S.W.2d 752 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.); *Insta/Com, Inc. v. Aetna Cas. & Sur. Co.*, 589 S.W.2d 494 (Tex. Civ. App.—Dallas 1979, no writ).

279. 589 S.W.2d 786 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

280. *Id.* at 787-88.

281. TEX. R. CIV. P. 185.

282. See *Dorsaneo, Creditor and Consumer Rights: Annual Survey of Texas Law*, 34 Sw. L.J. 253, 261-64, (1980); *Dorsaneo, Creditor and Consumer Rights: Annual Survey of Texas Law*, 33 Sw. L.J. 265, 274-78 (1979).

283. 623 F.2d 1032 (5th Cir. 1980).

awarding prejudgment interest pursuant to article 5069—1.05²⁸⁴ rather than article 5069—1.03.²⁸⁵ The court reasoned that when a trial court chooses to award equitable²⁸⁶ prejudgment interest rather than statutory interest, the trial court has discretion under Texas law to award interest at a rate greater than six percent per annum.²⁸⁷ In this particular case the court approved the trial court's award of prejudgment interest at the rate of nine percent.²⁸⁸

The foregoing statement of Texas law is questionable, particularly in light of the Texas Supreme Court's holding in *Miner-Dederick Construction Corp. v. Mid-County Rental Service, Inc.*²⁸⁹ The supreme court held that prejudgment interest at the rate of six percent per annum was the correct rate of interest to award in a suit involving a subcontractor's action for recovery of extras.²⁹⁰ Also, the court in *Miner-Dederick* cited with approval the case of *Pecos County State Bank v. El Paso Livestock Auction Co.*,²⁹¹ in which the El Paso court of civil appeals stated that six percent was the maximum rate of prejudgment interest recoverable when sought at common law as an element of damages.²⁹²

An award of attorneys' fees was appealed in *Life Insurance Co. v. Murray Investment Co.*²⁹³ The Fifth Circuit considered whether article 2226,²⁹⁴ after amendment in 1977²⁹⁵ and 1979,²⁹⁶ could be applied to an action for breach of contract when the contract was entered into prior to the effective date of the 1977 amendments, but the breach occurred and action commenced subsequent to the 1977 amendments but prior to the

284. TEX. REV. CIV. STAT. ANN. art. 5069—1.05 (Vernon Pam. Supp. 1971-1981) provides for interest on judgment at the rate of nine percent per annum.

285. 623 F.2d at 1042. TEX. REV. CIV. STAT. ANN. art. 5069—1.03 (Vernon Pam. Supp. 1971-1981), provides that "[w]hen no specified rate of interest is agreed upon by the parties, interest at the rate of six percent per annum shall be allowed on all accounts and contracts ascertaining the sum payable"

286. Why the court was even considering equitable prejudgment interest in this action is unclear since statutory prejudgment interest was obviously recoverable pursuant to art. 5069—1.03. See *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480, 483-84 (Tex. 1978); *First City Nat'l Bank v. Haynes*, 614 S.W.2d 605, 610 (Tex. Civ. App.—Texarkana 1981, no writ).

287. 623 F.2d at 1041. See *Fisher v. Agios Nicolaos V*, 628 F.2d 308, 319 (5th Cir. 1980), cert. denied, 102 S. Ct. 92, 70 L.Ed.2d 84 (1981).

288. 623 F.2d at 1042.

289. 603 S.W.2d 193 (Tex. 1980).

290. *Id.* at 200.

291. 586 S.W.2d 183, 187 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.).

292. 603 S.W.2d at 200.

293. 646 F.2d 224 (5th Cir. 1981), cert. denied, 50 U.S.L.W. 3548 (Jan. 11, 1982); see *Villiers v. Republic Financial Services, Inc.*, 602 S.W.2d 566, 572 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.); *Brophy v. Brophy*, 599 S.W.2d 345, 347 (Tex. Civ. App.—Texarkana 1980, no writ).

294. TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1982). Article 2226 is the general statutory provision covering award of attorneys' fees.

295. 1977 Tex. Gen. Laws, ch. 76, § 1, at 153. This amendment provided for the recovery of attorneys' fees in "suits founded on oral or written contracts." *Id.*

296. 1979 Tex. Gen. Laws, ch. 314, § 1, at 718. Section 2 of the 1979 amendatory act provided that the Act "is remedial in character and is intended to apply to all pending and future actions, regardless of the time of institution thereof or of the accrual of any cause of action asserted." *Id.* § 2.

effective date of the 1979 amendments. The defendant argued that since the action was tried prior to the effective date of the 1979 amendments, awarding attorneys' fees would violate article I, § 16 of the Texas Constitution,²⁹⁷ which forbids retroactive laws.²⁹⁸ The court rejected this argument on the ground that the constitutional prohibition did not apply to remedial legislation.²⁹⁹

In *Findlay v. Cave*³⁰⁰ the Texas Supreme Court considered whether a party could recover attorneys' fees incurred in connection with an action to collect an amount owing under a contract found by a jury to be unfair and unreasonable. The case involved a suit brought by an attorney to collect \$48,000 in fees pursuant to a contingent fee contract and in quantum meruit. The jury found that the contingent fee contract was not just or reasonable, but awarded plaintiff \$5,624.23 in additional fees on his quantum meruit claim.³⁰¹ The jury also awarded the plaintiff \$17,250 in attorneys' fees incurred in prosecuting and appealing his action.³⁰² The defendant argued on appeal that the plaintiff was not entitled to recover attorneys' fees under article 2226³⁰³ because the plaintiff's demand was excessive as a matter of law in that the demand was based on an unjust contract, and the demand was appreciably greater than the amount ultimately awarded by the jury. The court rejected the defendant's argument, holding that a demand "based precisely on the written contract between the parties" cannot be excessive as a matter of law.³⁰⁴

In *Denta Rama, Inc. v. Lavastone Industries of Central Texas, Inc.*,³⁰⁵ a sworn account action, the court allowed the plaintiff to recover attorneys' fees and prejudgment interest even though the plaintiff mistakenly demanded payment in excess of the amount to which it was entitled under the parties' agreement.³⁰⁶ The defendant argued that the excessive demand excused it from tendering payment in order to avoid liability for attorneys' fees and expenses. The court agreed with the defendant that a tender would have been unnecessary if the defendant could have established that plaintiff would not have accepted it, but the court found that the defendant's evidence was insufficient to show that the plaintiff would have refused a tender of the amount actually owing under the contract.³⁰⁷

297. TEX. CONST. art. I, § 16 provides: "no bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made."

298. 646 F.2d at 230.

299. *Id.*

300. 611 S.W.2d 57 (Tex. 1981).

301. *Id.* at 58.

302. *Id.*

303. TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1982).

304. 611 S.W.2d at 58.

305. 597 S.W.2d 507 (Tex. Civ. App.—Dallas 1980, no writ).

306. *Id.* at 510.

307. *Id.* at 509.

VI. PREJUDGMENT AND POSTJUDGMENT REMEDIES

A. Garnishment

As a preliminary matter, the constitutionality of the prejudgment garnishment procedure pursuant to a Texas statute³⁰⁸ and the Texas Rules of Civil Procedure³⁰⁹ was upheld in *Southwest Metal Fabricators, Inc. v. International de Aceros, S.A.*³¹⁰

In *Metroplex Factors, Inc. v. First National Bank*³¹¹ the application for writ of garnishment contained a sworn statement that the affiant was "cognizant of the matters recited herein" and that the affiant "has reason to believe, and does believe" that the garnishee was indebted to the judgment debtor.³¹² The trial court held that the foregoing recitations were insufficient statements for an affidavit in support of an application for writ of garnishment. The appellate court agreed, holding that the affidavit required under rule 658 of the Texas Rules of Civil Procedure³¹³ must state "clearly, positively and unequivocally that the affiant was swearing to matters within his personal knowledge."³¹⁴

*Small Business Investment Co. v. Champion International Corp.*³¹⁵ involved the question of whether a garnishing creditor is entitled to the funds held by the garnishee if the writ is never issued nor served on either the garnishee or the judgment debtor, but both the garnishee and judgment debtor voluntarily answer the application for the writ. Small Business Investment Company of Houston (SBIC) initiated two postjudgment garnishment proceedings against Exxon before another garnishing creditor, Champion, applied for its own writ. In the first garnishment proceeding a writ was issued and served on the garnishee, Exxon, and on the judgment debtor, and judgment was entered for SBIC. In the second proceeding SBIC's application for the writ apparently was not served on Exxon and the judgment debtor, and the writ was never actually issued. Nevertheless, Exxon and the judgment debtor voluntarily answered the application for the writ. Exxon also filed a petition impleading Champion because Champion had also filed an application for a writ. The trial court thereafter granted summary judgment for Champion due to SBIC's failure to have its writ issued.

SBIC argued on appeal that it was not necessary for the writ to be issued and served on the garnishee and judgment debtor because they had voluntarily answered the application. The appellate court agreed with SBIC

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

309. See TEX. R. CIV. P. 658, 658a, 663a, 664, 664a.

310. 503 F. Supp. 76, 78 (S.D. Tex. 1980). This is the first reported decision upholding the Texas prejudgment garnishment procedure.

311. 610 S.W.2d 862 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.).

312. *Id.* at 865.

313. TEX. R. CIV. P. 658. Rule 658 provides that the application for writ of garnishment "shall be supported by affidavits of the plaintiff . . . or other person having knowledge of relevant facts." *Id.*

314. 610 S.W.2d at 865.

315. 619 S.W.2d 28 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ).

that the garnishee could waive its right to be served with the writ by voluntarily answering the application, but stated that the garnishee could not waive the judgment debtor's right to be served.³¹⁶ Also, the court stated that the judgment debtor, by voluntarily answering the application, only waived technical irregularities in the writ, not the necessity for issuance of the writ and service of it on the judgment debtor.³¹⁷

Two cases decided during the survey period considered the types of debts that could be subject to garnishment. In *Aetna Finance Co. v. First Federal Savings & Loan Association*³¹⁸ a judgment creditor attempted to garnish a reserve fund held by a mortgagee to pay the mortgagor's real estate taxes and insurance. The garnishor argued that the judgment debtor's payments to the mortgagee were not payments on the indebtedness, but rather were bailments held in trust by the mortgagee, and therefore the funds should be subject to garnishment.³¹⁹ The court disagreed, finding that the funds garnished were required to be paid into the reserve fund by the terms of the real estate lien and note, and that the debtor had no right to these funds once they were paid to the mortgagee.³²⁰ Thus, the fund was not subject to garnishment. The garnishing creditor did not fare any better in *Citizens Bank & Trust Co. v. Wy-Tex Livestock Co.*,³²¹ in which the court held that a garnishing creditor could not garnish rental payments due to the judgment debtor when the payments had been unconditionally assigned to a third party prior to service of the writ on the lessee.³²²

B. Sequestration

The only noteworthy sequestration case decided during the survey period was *Callaway v. East Texas Government Credit Union*,³²³ involving an action for wrongful sequestration. The Tyler court of civil appeals considered when a cause of action for wrongful sequestration arose under section 3(c) of article 6840,³²⁴ and what constituted "reasonable procedures" to avoid a bona fide error under section 3(d).³²⁵ Relying on *Hufstedler v. Harral*,³²⁶ an action involving a claim of wrongful garnishment, the court held that a cause of action under article 6840 for "wrongfully securing the issuance of the writ"³²⁷ arose when the writ was "'actually or constructively placed in the hands of an officer for execution.'"³²⁸ The credit

316. *Id.*

317. *Id.*

318. 607 S.W.2d 312 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.).

319. *Id.* at 313.

320. *Id.* at 314.

321. 611 S.W.2d 168 (Tex. Civ. App.—Amarillo 1981, writ ref'd n.r.e.).

322. *Id.* at 171; see *Adams v. Williams*, 112 Tex. 469, 248 S.W. 673 (1923).

323. 619 S.W.2d 411 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.).

324. TEX. REV. CIV. STAT. ANN. art. 6840, § 3(c) (Vernon Supp. 1982).

325. *Id.* § 3(d).

326. 54 S.W.2d 353, 355 (Tex. Civ. App.—Amarillo 1932, writ ref'd).

327. TEX. REV. CIV. STAT. ANN. art. 6840, § 3(c), (Vernon Supp. 1982).

328. 619 S.W.2d at 414. (quoting *Hufstedler v. Harral*, 54 S.W.2d 353, 355 (Tex. Civ. App.—Amarillo 1932, writ. ref'd)).

union argued that it was entitled to avail itself of the bona fide error defense as it had utilized "on a regular basis, reasonable procedures to prevent sequestering property in which it [had] no right to title and possession."³²⁹ The court held the credit union had failed to show that it had adopted reasonable procedures to avoid the particular error, and, therefore, the court dissolved the writ.³³⁰

C. Executions and Enforcement of Statutory Liens

The importance to judgment creditors of the recently enacted Texas statute providing for the collection of judgments by special court proceedings³³¹ was illustrated in *Pace v. McEwen*.³³² A judgment creditor initiated a proceeding under article 3827a³³³ to have the judgment debtor's homestead declared nonexempt under Texas law.³³⁴ The trial court found that the debtor's homestead was not exempt from execution and, pursuant to article 3827a, ordered that the homestead be turned over to the sheriff for sale under writ of execution. The judgment debtor argued on appeal that the trial court's order to turn over his homestead for sale was improper because the trial court had no jurisdiction under article 3827a to consider issues other than the exempt or nonexempt status of the homestead.³³⁵ The appellate court held that the trial court had jurisdiction under article 3827a not only to determine the exempt status of property, but also to order the sale of property found to be nonexempt.³³⁶

*Jensen v. Bryson*³³⁷ dealt with the issue of whether the holder of equitable title to realty should be given preference over a judgment lien creditor, whose rights were granted by the Texas recording statute,³³⁸ when the equitable title vested before the recordation of the judgment lien. The appellate court held that the purchaser's equitable title, which had vested by full performance of the real estate contract, was superior to the rights of the judgment lien creditor.³³⁹ The court also held that the purchaser's open, exclusive, and visible possessions of the realty constituted notice to the judgment lien creditor of the purchaser's equitable interest, so that the judgment lien could not operate as a lien against the realty.³⁴⁰

The Fifth Circuit recently decided a case of major importance involving

329. 619 S.W.2d at 415.

330. *Id.*; see notes 82-93 *supra* and accompanying text.

331. TEX. REV. CIV. STAT. ANN. art. 3827a(a) (Vernon Supp. 1982) allows a judgment creditor to bring a special proceeding, in which he is entitled to the court's assistance, to reach the debtor's property that is not exempt and that "cannot readily be attached or levied on by ordinary legal process"

332. 617 S.W.2d 816 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

333. TEX. REV. CIV. STAT. ANN. art. 3827a (Vernon Supp. 1982).

334. See *id.* arts. 3833-3836.

335. 617 S.W.2d at 819.

336. *Id.*

337. 614 S.W.2d 930 (Tex. Civ. App.—Amarillo 1981, no writ).

338. TEX. REV. CIV. STAT. ANN. art. 6627 (Vernon Supp. 1982).

339. 614 S.W.2d at 933.

340. *Id.*

the enforcement of federal tax liens. In *United States v. Rogers*³⁴¹ the court held that the federal government cannot enforce a federal tax lien against a taxpayer's family homestead in Texas if the taxpayer's spouse has no federal tax liability.³⁴² The court analyzed the enforcement issue in terms of the nature of the interest created in favor of the property owner by the particular state's homestead law, whether the homestead interest was an exemption or was a property right.³⁴³ The court based this distinction on the view that in the case of jointly owned property the attachment and levy of federal tax liens involved only the taxpayer's interest in the property and not the entire property.³⁴⁴ The court found that under Texas law the homestead right was an "estate in land"; thus, the court held that a federal tax lien could not be foreclosed against the homestead property so long as the nontaxpayer spouse maintained the property as a homestead under Texas law.³⁴⁵

VII. CREDITORS' RIGHTS UNDER THE BANKRUPTCY CODE

This year's *Survey* article expands the scope of topics discussed in the area of creditors' rights to include cases relating to federal bankruptcy law³⁴⁶ and Texas law on fraudulent transfers.³⁴⁷ The cases surveyed that deal with bankruptcy law are all decisions rendered by Texas courts, and all involve some interplay between Texas law and federal bankruptcy law.

The courts decided several bankruptcy cases dealing with the concept of fraudulent transfer under the Bankruptcy Act of 1898 (the Act)³⁴⁸ and the Bankruptcy Reform Act of 1978 (the Code).³⁴⁹ The most important of these decisions was *Durrett v. Washington National Insurance Co.*³⁵⁰ In this case the Fifth Circuit held that the foreclosure of a real estate lien pursuant to a power of sale in a deed of trust is a transfer³⁵¹ under the Act

341. 649 F.2d 1117 (5th Cir. 1981); see *Ingram v. City of Dallas Dep't of Housing and Urban Rehabilitation*, 649 F.2d 1128 (5th Cir. 1981), in which the Fifth Circuit applied the holding in *United States v. Rodgers* to a case involving the proceeds from the sale of a Texas homestead. *Id.* at 1131-32. Certiorari has been granted in both cases. 102 S. Ct. 1748, 72 L. Ed. 2d 160 (1982).

342. 649 F.2d at 1127-28.

343. *Id.* at 1123-24.

344. *Id.* at 1125.

345. *Id.* at 1127.

346. 11 U.S.C. §§ 101-151326 (Supp. IV 1980).

347. TEX. BUS. & COM. CODE ANN. §§ 24.01-.05 (Vernon 1968).

348. 11 U.S.C. § 107(d)(2)(1976) (repealed 1978).

349. 11 U.S.C. § 548 (Supp. IV 1980).

350. 621 F.2d 201 (5th Cir. 1980). See *Abramson v. Lakewood Bank & Trust Co.*, 647 F.2d 547 (5th Cir. 1981), cert. denied, 50 U.S.L.W. 3548 (U.S. Jan. 11, 1982), in which the Fifth Circuit followed the *Durrett* opinion on the transfer issue. There was, however, a strong dissenting opinion in which it was argued that a foreclosure sale, which is triggered by the debtor's default under the deed of trust, should not be deemed a transfer by the debtor under § 67(d)(2). 647 F.2d at 549. But see *Alsop v. Alaska*, 14 Bankr. 982, 987 (Bankr. D. Alaska 1981), in which the bankruptcy judge refused to follow *Durrett* and *Abramson*.

351. Transfer was defined under the Act to include "the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof." 11 U.S.C. § 1(30)(1976) (repealed 1978).

so that a sale of a bankruptcy debtor's property without fair consideration³⁵² within one year of the debtor's filing a bankruptcy petition could be set aside as a fraudulent transfer under section 67(d)(2) of the Act.³⁵³ The *Durrett* court acknowledged that the actual transfer of title occurred at the time the deed was delivered and the deed of trust was conveyed and filed, which was more than one year before the bankruptcy petition was filed.³⁵⁴ The court, however, held that the "transfer" within the contemplation of the Act, was not final until the day of the foreclosure sale," because until that time the debtor retained possession of the property.³⁵⁵ After determining that the foreclosure sale constituted a "transfer made by . . . a debtor"³⁵⁶ under the Act, the *Durrett* court then had to determine whether the transfer was fraudulent; that is, was it made "without fair consideration"?³⁵⁷ The court found that the \$115,400 sum paid by the purchaser at the foreclosure sale was not fair consideration for the property in light of the trial court's finding that the fair market value of the property at the time of the foreclosure sale was \$200,000.³⁵⁸

Neither *Durrett* nor the subsequent Fifth Circuit case of *Abramson v. Lakewood Bank & Trust Co.*,³⁵⁹ which involved essentially the same issues as *Durrett*, offers any helpful guidance on what constitutes fair consideration in the context of a foreclosure sale. The *Durrett* court did, however, imply that a foreclosure sale for 70% of the market value of the property would be a "fair equivalent."³⁶⁰ Although the *Durrett* court was dealing with the transfer issue under the Act, the court's holding on this issue should control subsequent cases decided under the Code, since the definition of transfer under the Code is as comprehensive as the definition under the Act.³⁶¹

In *Diversified World Investments, Ltd. v. Omni International, Ltd.*³⁶² a bankruptcy judge considered the transfer concept in the context of voidable preferences under section 547 of the Code.³⁶³ The debtor in bankruptcy had purchased an aircraft and, as security for payment, assigned to the seller the rental payments due to the debtor from the subsequent lease of the aircraft to a third party. The assignment of the rentals to the seller

352. *Id.* § 107(d)(1)(E)(1).

353. 621 F.2d at 204. See 11 U.S.C. § 101 (Supp. IV 1980).

354. *Id.*

355. *Id.*

356. 11 U.S.C. § 107(d)(2)(1976) (repealed 1978).

357. *Id.*

358. 621 F.2d at 203.

359. 647 F.2d 547 (5th Cir. 1981), cert. denied, 50 U.S.L.W. 3548 (U.S. Jan. 11, 1982).

360. 621 F.2d at 203.

361. In the Code, "transfer" is defined as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest." 11 U.S.C. § 101 (40) (Supp. IV 1980). Also, the legislative history to this section indicates that transfer is defined "as broad as possible." H.R. REP. NO. 95-595, 95th Cong., 1st Sess. 314 (1977), reprinted in 1978 U.S. CODE CONG. & AD. NEWS, 5787, 5963.

362. 12 Bankr. 517 (Bankr. S.D. Tex. 1981).

363. 11 U.S.C. § 547 (Supp. IV 1980).

was clearly made for an antecedent debt,³⁶⁴ but the assignment occurred outside the ninety-day preference period under section 547.³⁶⁵ Certain rental payments, however, were received by the seller within ninety days of filing. Therefore, the purchaser, as a debtor-in-possession,³⁶⁶ brought an action against the seller to recover the rental payments as voidable preferences under section 547(b) of the Code.³⁶⁷ The seller argued that the assignment of the rental payments to it was complete upon the execution of the assignment; there was therefore no transfer within the ninety-day period.³⁶⁸ In ruling for the debtor, the court initially noted that for the purposes of voidable preferences, "a transfer is not made until the debtor has acquired rights in the property transferred."³⁶⁹ Since the debtor did not acquire any rights to the rental payments until each payment became due, the court therefore concluded that the transfer of each rental payment was not made until each rental payment became due.³⁷⁰

Another important issue ruled upon by a bankruptcy judge during the survey period was whether the debtor's conversion of nonexempt property to exempt property prior to filing a bankruptcy petition might constitute a fraudulent transfer under the Code, thus disqualifying the debtor from obtaining a discharge in bankruptcy.³⁷¹ In *First Texas Savings Association v. Reed*³⁷² a debtor sold approximately \$68,500 in nonexempt personal property for \$34,500 during the year before filing a petition in bankruptcy and used these proceeds to pay a portion of the purchase money indebtedness owing on his homestead. In doing so, the debtor candidly admitted that he was converting nonexempt property to exempt property so as to put the property beyond the reach of his creditors.³⁷³ Consequently, the bankruptcy judge found that the debtor converted nonexempt property to exempt property "with the intent to defraud, delay or hinder a creditor or other interested person,"³⁷⁴ which is prohibited under Texas law.³⁷⁵ The court therefore concluded that the debtor was not entitled to a discharge in bankruptcy under section 727 of the Code,³⁷⁶ even though the legislative history to section 522 of the Code stated that the conversion of nonexempt property to exempt property before the filing of a petition in bankruptcy "is not fraudulent as to creditors."³⁷⁷ The bankruptcy court found that the

364. *Id.* § 547(b)(2).

365. *Id.* § 547(b)(4).

366. *See id.* § 1107.

367. *Id.* § 547(b).

368. 12 Bankr. at 518-19.

369. *Id.* at 519 (quoting 11 U.S.C. § 547(e)(3) (Supp. IV 1980)).

370. 12 Bankr. at 519.

371. *See* 11 U.S.C. § 727 (Supp. IV 1980).

372. 11 Bankr. 683 (Bankr. N.D. Tex. 1981).

373. *Id.* at 687.

374. *Id.*

375. TEX. REV. CIV. STAT. ANN. art. 3836(b) (Vernon Supp. 1982).

376. 11 U.S.C. § 727 (Supp. IV 1980).

377. H.R. REP. NO. 95-595, 95th Cong., 1st Sess. 314 (1977), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5787, 5963. The House Report, quoted at 11 Bankr. 687, states that "[a]s under current law, the debtor will be permitted to convert nonexempt property into exempt property before filing a bankruptcy petition . . . The practice is not fraudulent as to

comment to section 522 did not reflect the law in Texas because Texas law contains an express statutory proscription against the conversion of nonexempt property to exempt property "to defraud, delay or hinder a creditor."³⁷⁸ In *Driskill v. Reed*³⁷⁹ the trustee in bankruptcy sought to set aside the same debtor's homestead exemption due to the debtor's conversion of nonexempt property to pay real estate liens on the debtor's homestead. The bankruptcy court refused to set aside the homestead exemption on this ground because the court found that the Texas Constitution prohibited the forced sale of the homestead for any purpose except to satisfy purchase money liens, improvement liens, and tax liens.³⁸⁰

In *Cannady v. Wilson*,³⁸¹ the Fifth Circuit dealt with the important question of the exemptions allowable under Texas and federal law to a husband and wife who jointly file a petition in bankruptcy. The husband claimed the urban homestead exemption³⁸² and the full personal property exemptions allowable to a family under Texas law,³⁸³ and the wife claimed personal property exemptions allowable under the Code.³⁸⁴ The bankruptcy court held that the wife could not claim personal property exemptions under the Code because she had benefited from the Texas personal property exemptions allowable to a family that her husband had claimed.³⁸⁵ On direct appeal the Fifth Circuit reversed, holding that in a joint case a husband and wife could claim all exemptions allowable under both state law and the Code, and the exemptions claimed by one spouse did not diminish the exemptions available to the other spouse.³⁸⁶ The court based its decision on the fact that the exemption provisions of the Code "[applied] separately with respect to each debtor in a joint case,"³⁸⁷ and on the fact that Texas law did not require the husband and wife jointly to claim exemptions allowable to a family under Texas law.³⁸⁸

Two bankruptcy cases dealing with the rights of mechanic's lien creditors were also considered during the survey period. *Boots Builders, Inc. v. Hobson Air Conditioning, Inc.*³⁸⁹ involved a determination of a mechanic's lien creditor's rights vis-à-vis the rights of a trustee in bankruptcy. The trustee under section 544(a)(3) of the Code possessed the rights and powers

creditors, and permits the debtor to make full use of the exemptions to which he is entitled under the law." (emphasis added by the court).

378. 11 Bankr. at 687-88, quoting TEX. REV. CIV. STAT. ANN. art. 3836(b) (Vernon Supp. 1982).

379. 12 Bankr. 41 (Bankr. N.D. Tex. 1981).

380. *Id.* at 43-44 (citing TEX. CONST. art. 16, § 50).

381. 653 F.2d 210 (5th Cir. 1981).

382. TEX. REV. CIV. STAT. ANN. art. 3833(a)(3) (Vernon Supp. 1982).

383. *Id.* art. 3836(a).

384. 11 U.S.C. § 522(d) (Supp. IV 1980).

385. 653 F.2d at 213.

386. *Id.* at 213-14; see *In re Maitland*, 13 Bankr. 923 (Bankr. S.D. Tex. 1981), in which a bankruptcy court upheld one spouse's entitlement to a homestead exemption under Texas law and the other spouse's entitlement to a full wild card exemption under § 522(d)(5) of the Code.

387. 11 U.S.C. § 522(m) (Supp. IV 1980).

388. 653 F.2d at 214; see TEX. REV. CIV. STAT. ANN. art. 3859 (Vernon 1966).

389. 11 Bankr. 635 (Bankr. N.D. Tex. 1981).

of a hypothetical "bona fide purchaser of real property from the debtor, against whom applicable law permits [the] transfer [sought to be avoided] to be perfected."³⁹⁰ The trustee in *Boots Builders* challenged the rights of a creditor claiming a constitutional mechanics' lien under Texas law. The court first noted that under Texas law a bona fide purchaser of real property takes free of constitutional liens unless the lien has been perfected pursuant to statute.³⁹¹ Also, because Texas law permits a mechanic's lien creditor to perfect his lien against a bona fide purchaser, the court held that the lien was voidable by the trustee under section 544.³⁹²

In *Community Investors IX, Ltd. v. Phillips Plastering Co.*,³⁹³ a Houston court of civil appeals considered the effect of a mechanic's lien creditor's failure to seek relief from the automatic stay³⁹⁴ prior to foreclosing his mechanic's lien in a state court action. The appellate court held that the district court, from the time the bankruptcy petition was filed until an order modifying the automatic stay was entered, had no jurisdiction over the debtor's property in the foreclosure action pending before it.³⁹⁵ Consequently, the district court's judgment for foreclosure of the mechanic's lien was not merely voidable, as argued by the lienholder, but was void.³⁹⁶

VIII. FRAUDULENT TRANSFERS UNDER TEXAS LAW

In *Anderson & Clayton Co. v. Earnest*³⁹⁷ an appellate court considered whether a bulk transferee could be held personally liable to the bulk transferor's creditors for violation of the Texas statutes relating to bulk transfers.³⁹⁸ The court held that a bulk transferee could not be held personally liable to the bulk transferor's creditors unless the creditors established that the bulk transferee converted or disposed of the goods received from the bulk transferor so as to put the goods beyond the reach of the bulk transferor's creditors.³⁹⁹ Also, the court stated in a dictum that the transferee's liability would be limited to the value of the goods transferred.⁴⁰⁰

The application of the clean hands doctrine in a suit to enforce a promise to make a fraudulent conveyance was considered in *Leal v. Cortez*.⁴⁰¹ The trial court granted an instructed verdict based on the equitable rule in Texas prohibiting the enforcement of a promise by a fraudulent grantee to reconvey land to a fraudulent grantor.⁴⁰² The plaintiffs argued on appeal

390. 11 U.S.C. § 544(a)(3) (Supp. IV 1980).

391. 11 Bankr. at 639.

392. *Id.*

393. 593 S.W.2d 418 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).

394. FED. R. BANKR. 11-44.

395. 593 S.W.2d at 420.

396. *Id.*

397. 610 S.W.2d 846 (Tex. Civ. App.—Amarillo 1980, no writ).

398. TEX. BUS. & COM. CODE ANN. §§ 6.101-.111 (Vernon 1968).

399. 610 S.W.2d at 848; *see* *Southwestern Drug Corp. v. McKesson & Robbins, Inc.*, 141 Tex. 284, 172 S.W.2d 485 (1943).

400. 610 S.W.2d at 848.

401. 603 S.W.2d 262 (Tex. Civ. App.—Corpus Christi 1980, no writ).

402. *Id.* at 264; *see* *Bramlett v. Jenkins*, 231 S.W.2d 539, 545 (Tex. Civ. App.—Fort Worth 1950, writ ref'd n.r.e.).

that the defendants were not entitled to an instructed verdict because the defendants had invoked the clean hands doctrine, yet had not shown that they had suffered any injury, which plaintiffs contended was a prerequisite to the application of the doctrine.⁴⁰³ In rejecting this argument, the appellate court held that it was not necessary for the defendants to assert the clean hands doctrine to defend against an action to enforce a promise to make a fraudulent conveyance because of the specific rule in Texas against enforcing such promises.⁴⁰⁴

In *Rucker v. Steelman*⁴⁰⁵ the court considered the effect of a lis pendens notice that was filed in connection with an action unrelated to the land covered by the notice. The plaintiff in this case brought an action against the defendants to remove the lis pendens as a cloud on his title. The lis pendens notice was filed in connection with a tort action that defendants had brought against the alleged fraudulent transferor, Mr. Patton. Before a judgment was rendered in the tort action, Patton conveyed the property in question to his brother and sister-in-law. After the constable's levy of execution under the judgment against Patton in the tort action, but prior to the recording of the abstract of judgment, Patton's grantees then conveyed the property in question to the plaintiff, Steelman. The trial court found that the transfers by Patton and by Patton's grantees were both made for valuable consideration. The appellate court therefore held that "the defendants had the affirmative burden of proving not only that [Patton's grantees] but also the plaintiff had knowledge of facts or circumstances sufficient to put a reasonably prudent person upon inquiry that Patton entertained the intent to defraud his creditors at the time he executed the conveyance in question."⁴⁰⁶

Defendants argued that the lis pendens notice, which defendants had filed against the property prior to the conveyance to plaintiff, constituted constructive notice of defendants' claim and was sufficient to put plaintiff on inquiry of Patton's fraudulent intent. The appellate court rejected this argument, holding that a lis pendens notice filed in connection with an action that did not involve the land covered by the notice was ineffective to give notice.⁴⁰⁷ Consequently, the lis pendens notice filed by defendants in connection with defendants' tort action did not constitute constructive notice to plaintiff of the defendants' claim to the land.⁴⁰⁸

403. 603 S.W.2d at 264.

404. *Id.*

405. 619 S.W.2d 5 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.).

406. *Id.* at 7.

407. *Id.*

408. *Id.*