SMU | Dedman School of Law

SMU Law Review

Volume 38
Issue 1 *Annual Survey of Texas Law*

Article 12

January 1984

Corporations and Partnerships

Robert W. Hamilton

CREDITOR AND CONSUMER RIGHTS

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IN 1983 the Texas Legislature gave little substantive attention to the area of creditor and consumer rights. During the 1983 survey period the greatest amount of judicial activity in this area involved the applicability and scope of the Deceptive Trade Practices—Consumer Protection Act (DTPA).[1]

I. THE DECEPTIVE TRADE PRACTICES—CONSUMER PROTECTION ACT

Texas courts decided a number of cases during the survey period involving the definition of a consumer entitled to the protection afforded by the DTPA, the appropriate measure of damages in a DTPA action, the notice requirements of and defenses available to actions under the DTPA, and the requirement that the act complained of be the producing cause of the injury to be actionable under the DTPA.

A. Definition of Consumer

The DTPA defines a consumer as "an individual, partnership, corporation, this state, or a subdivision of this state who seeks or acquires by purchase or lease, any goods or services . . . ."[2] Texas courts decided a number of cases during the survey period involving a determination of whether the plaintiff was a consumer entitled to the rights and protections of the DTPA.

In *English v. Fischer*[3] a dispute arose between the mortgagors and the mortgagee over the proceeds of a fire insurance policy. The mortgagors purchased a home from the mortgagee and signed a promissory note, secured by a deed of trust on the home that required the mortgagors to

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1. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1984).

2. *Id.* § 17.45(4).

3. 649 S.W.2d 83 (Tex. App.—Corpus Christi 1982), *rev'd on other grounds*, 660 S.W.2d 521 (Tex. 1983).

purchase a fire insurance policy naming the mortgagee as beneficiary. After the house was damaged by fire, the insurer issued a check payable to both parties. The mortgagee, however, refused to endorse the check to the mortgagors to allow them to rebuild their home with the insurance proceeds. The insurance company tendered the proceeds of the policy into the registry of the court and the mortgagors filed an action for damages against the mortgagee alleging breach of contract, breach of warranty, and violation of the DTPA.[4]

The jury found that the mortgagee represented to the mortgagors that the deed of trust, promissory note, and/or the insurance policy conferred or involved rights or obligations that the mortgagee did not have or that were prohibited by law, and that such representation was a producing cause of the damage to the mortgagors.[5] The jury credited the damages awarded, however, with the unpaid balance due by the mortgagors on the note. On appeal, the Corpus Christi court of appeals stated that for one to be a consumer, two requirements must be met:

> One requirement is that the person must have sought or acquired goods or services by purchase or lease. . . . Another requirement . . . is that the goods or services purchased or leased must form the basis of the complaint. . . . If either requirement is lacking, the person aggrieved by a deceptive act or practice must look to the common law or some other statutory provision for redress.[6]

The court ruled that the mortgagors did not satisfy either of these two requirements. The house was purchased in 1967 and the mortgagors complained of an alleged misrepresentation made by the mortgagee in 1979. Noting that no complaints relating to the sale of the house in 1967 were made, the court ruled that the complaint therefore did not involve goods or services, and that the goods or services purchased did not form the basis of the mortgagors' complaint.[7]

In *Sam Bradley Realty Co. v. McNair*[8] a real estate broker and one of its agents sought recovery of a real estate commission from the sellers of a parcel of property. The sellers filed a cross action for actual and exemplary damages under the DTPA.[9] The district court entered a take-nothing judgment in favor of plaintiffs, but awarded actual and exemplary damages to the defendants on their cross action. The plaintiff-broker and agent appealed. In reversing in part the trial court's decision, the court of appeals determined that the vendors were required to prove that they were

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4. TEX. BUS. & COM. CODE ANN. § 17.46(b)(12) (Vernon Supp. 1984) prohibits a representation that a product confers or involves rights, remedies, or obligations that it does not have or involve or that are prohibited by law.

5. 649 S.W.2d at 85.

6. *Id.* at 92 (quoting Cameron v. Terrell Garrnett, Inc., 618 S.W.2d 535, 539 (Tex. 1981)).

7. 649 S.W.2d at 92.

8. 644 S.W.2d 533 (Tex. App—Corpus Christi 1982, no writ).

9. The basis of the vendor's claim under the DTPA was that the broker's action in filing a lis pendens notice, thereby encumbering the vendor's property, constituted an unconscionable action or course of action entitling it to relief under the Act. *See* TEX. BUS. & COM. CODE ANN. § 17.50(a)(3) (Vernon Supp. 1984).

consumers in order to recover on their cross action.[10] In the absence of evidence that the alleged loss suffered by the vendors was either related to or the result of the brokerage services that the broker provided, the vendors failed to establish an essential element of their action.[11] The court determined that the evidence conclusively showed that the alleged objectionable conduct of the realtor occurred after the realtor had ceased to perform services for the vendors. The court of appeals reversed the trial court's favorable judgment on the vendors' DTPA claim because nothing in the record indicated any cause and effect relationship between the occurrence of the actionable conduct and the purchase by the vendors of the realtor's services.[12]

The question of whether an insured under an automobile insurance policy was a consumer under the DTPA was considered in *Rosell v. Farmers Texas County Mutual Insurance Co.*[13] In *Rosell* an automobile driven by an individual insured by the defendants struck the plaintiffs' daughter. The plaintiffs commenced the action against the insured driver and the insurance company. Prior to the first trial the insurance company offered to settle for $10,000 on the daughter's cause of action for personal injury and for $5000 on the parents' cause of action for emotional distress. The policy provided coverage for bodily injury with limits of liability of $10,000 per person or $20,000 per occurrence. The plaintiffs refused to settle the lawsuit and the trial court granted judgment in favor of the parents for $5,625, representing recovery for emotional distress.

The driver in the first action subsequently assigned to the plaintiffs, in satisfaction of the judgment rendered against him, any and all claims he might have against the insurance company for the company's failure to settle the suit within the policy limits. The plaintiffs then filed a separate action against the insurance company under the DTPA. The trial court granted the insurance company's motion for summary judgment. On appeal, the court of appeals determined that no cause of action was available under the DTPA because the daughter and her parents were not consumers and therefore affirmed the trial court's summary judgment.[14] Recognizing that a consumer is an individual who seeks or acquires by purchase or lease any goods or services, the court determined that any right that the plaintiffs might have under the DTPA must derive from the assignment of the insured driver's cause of action against the insurance company. The driver, who assigned the cause of action to the plaintiffs, was an additional insured under his father's insurance policy. Since the person whose cause of action was assigned to the plaintiffs neither sought nor acquired by purchase or lease any goods or services from the defendant, the plaintiffs were not, in the court's opinion, consumers entitled to protection under the

10. 644 S.W.2d at 535.
11. *Id.*
12. *Id.*
13. 642 S.W.2d 278 (Tex. App.—Texarkana 1982, no writ).
14. *Id.* at 279.

DTPA.[15] Additionally, the court determined that the alleged deceptive practice of the insurance company in failing to settle the lawsuit within the coverage limits was not involved in the sale of the insurance policy and as such was not covered by the DTPA.[16]

In *Manufactured Housing Management Corp. v. Tubb*[17] the purchaser of a mobile home brought an action under the DTPA against the manufacturer and seller for damages resulting from defects in the construction of the home. The seller cross, claimed against the manufacturer of the mobile home under the DTPA for damages caused by the seller's reliance on representations made by the manufacturer. The purchaser subsequently accepted a cash settlement of its claims against the seller. The trial court entered judgment for the purchaser and for the seller on its cross-claim against the manufacturer. The seller's damages were trebled by the trial court, and the manufacturer appealed. The court of appeals reversed the award of treble damages to the seller on the theory that the seller was not a consumer under the DTPA.[18] The court relied on an earlier opinion of the Tyler court of appeals that held that "it is reasonable to infer [from section 17.45 of the DTPA] that the purchase of goods for commercial purposes, such as for resale or for use in the production of other goods, is not within the contemplation of the DTPA.[19]

Limitations on the applicability of the DTPA to oil and gas investments were discussed by the court in *Hamilton v. Texas Oil & Gas Corp*.[20] In *Hamilton* the operator of an oil and gas well brought an action against a nonoperating working interest owner to collect unpaid drilling costs. The working interest owner filed a counterclaim against the operator for breach of the joint operating agreement, negligence, and violations of the DTPA.

At trial the jury found that the operator was guilty of gross negligence and had failed to perform its duties in a good and workmanlike manner.[21] Furthermore, the jury found that the operator had pursued an unconscionable course of action against the working interest owner and committed other deceptive acts, and that the working interest owner was a consumer.[22] The jury granted the working interest owner $5000 in actual damages, $10,000 in exemplary damages, and $50,000 in attorneys' fees. The trial court disregarded the jury finding that the working interest owner

15. *Id.*, American Ins. Cos. v. Reed, 626 S.W.2d 898, 902 (Tex. App.—Eastland 1981, no writ).

16. 642 S.W.2d at 280; *see* G.A. Stowers Furniture Co. v. American Indem. Co., 15 S.W.2d 544, 547 (Tex. 1929) (court allowed insured to recover from insurer entire amount of judgment rendered against insured because insurer negligently failed to accept settlement offer within liability limits of the insurance policy).

17. 643 S.W.2d 483 (Tex. App.—Waco 1982, writ ref'd n.r.e.).

18. *Id.* at 487.

19. Ratcliff v. Trenholm, 596 S.W.2d 645, 649 (Tex. Civ. App.—Tyler 1980), *aff'd*, 636 S.W.2d 718 (Tex. 1982).

20. 648 S.W.2d 316 (Tex. App.—El Paso 1982, writ ref'd n.r.e.).

21. *Id.* at 319.

22. *Id.*; *see* TEX. BUS. & COM. CODE ANN. § 17.50(a)(3) (Vernon Supp. 1984).

was a consumer under the DTPA and reduced the award of attorneys' fees. The working interest owner appealed.

The court of appeals began its discussion of the working interest owner's DTPA claim by defining the purchase of a good or service to involve the " '[t]ransmission of property from one person to another by voluntary act and agreement, founded on a valuable consideration.' "[23] The court, however, found this definition of purchase to be inadequate in the context of services, which are defined as "work, labor, or service purchased or leased for use."[24] "For use" was further defined by the court to mean " ' to put or bring into action or service; to employ for or apply to a given purpose.' "[25] The working interest owner in *Hamilton* maintained that the operator was paid for services rendered to the working interest owner including directing and controlling all operations, paying costs, and providing management, bookkeeping, and supervision for the well. The court of appeals, however, determined that the operator, under the terms of the joint operating agreement, was simply incurring debts for the operating and nonoperating interests for which he was entitled to reimbursement.[26] The court was swayed by the fact that the operator did not intend to make a profit for the services it provided to the nonoperating working interest owner. Based on its finding that the operator did not render services, the court of appeals affirmed the trial court's determination that the working interest owners were not consumers as contemplated in the DTPA.[27]

The working interest owner, relying on *Cameron v. Terrell & Garrett, Inc.*,[28] also claimed that the operator would be liable even if it did not render services under the DTPA because the operator had purchased goods or services from its suppliers. The working interest owner contended that the operator's dealings with its suppliers provided the basis for the working interest owner's action against the operator. The court of appeals disagreed. Although the court recognized that *Cameron* eliminated the requirement of privity in actions under the DTPA, the court nevertheless found that the suppliers did not provide the services that formed the basis of this complaint. The court therefore found *Cameron* inapplicable and held that, as a matter of law, the working interest owner was not a consumer of services under the DTPA.[29]

The Texas Supreme Court further refined the defined scope of a con-

23. 648 S.W.2d at 322 (quoting Hall v. Bean, 582 S.W.2d 263, 265 (Tex. Civ. App.—Beaumont 1979, no writ)).

24. TEX. BUS. & COM. CODE ANN. § 17.45(2) (Vernon Supp. 1984).

25. 648 S.W.2d at 322 (quoting Otto, Inc. v. Cotton Salvage & Sales, Inc., 609 S.W.2d 590, 593 (Tex. Civ. App.—Corpus Christi 1980, writ dism'd)).

26. 648 S.W.2d at 322.

27. *Id.*

28. 618 S.W.2d 535 (Tex. 1981). In *Cameron* the supreme court examined the legislative history of the DTPA and determined that the Act was not restricted to deceptive trade practices committed by the persons who actually furnished the goods or services on which the complaint is based. *Id.* at 539-41.

29. 648 S.W.2d at 322.

sumer under the DTPA in *White v. Southwestern Bell Telephone Co.*[30] In *White* the owner of a floral shop brought suit against the telephone company for damages resulting from an incorrect listing of the shop owner's telephone numbers in a directory. The telephone company sought and received an instructed verdict in the trial court on its contention, among others, that the shop owner was not a consumer within the meaning of the DTPA. The court of appeals affirmed the judgment of the trial court on other grounds. The supreme court reversed, holding that since the shop owner sought and paid for additional phone lines and directory advertising, he was a consumer under the DTPA.[31]

The applicability of the DTPA to attorneys' services was considered in *First Municipal Leasing Corp. v. Blankenship, Potts, Aikman, Hagin & Stewart, P.C.*[32] In that case the plaintiff purchased from a lessor of computer software and hardware the right to receive payments under a computer lease, which the plaintiff later sold to a third party investor. The plaintiff subsequently had to repurchase the lease from the third party after the initial contract between the lessor and the lessee was found invalid. The plaintiff then brought an action against the law firm that had issued a legal opinion to the original lessor stating that the contract was valid. The district court dismissed the plaintiff's action, which was based on theories of negligence, violations of blue sky laws, and the DTPA. In affirming the lower court's decision, the Dallas court of appeals held that because the attorneys were hired by the original lessor of the computer to issue the opinion and because the opinion was issued after the plaintiff took the assignment, the plaintiff could not have relied on the opinion of the attorneys.[33] The court also determined that the plaintiff's purchase of the contract was not a consumer transaction for purposes of the DTPA.[34] The court found that the assignment purchased was an intangible rather than a tangible item. In determining the definition of a "good" to be a "tangible" item for the purposes of the DTPA, the court reasoned that an intangible such as this contract was similar to an account receivable, which Texas courts have previously held constitutes neither a good nor a service under the DTPA.[35]

B. Damages

A number of decisions reported during the 1983 survey period dealt with the proper measure and method of assessing damages in DTPA cases.

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30. 651 S.W.2d 260 (Tex. 1983).

31. *Id.* at 262.

32. 648 S.W.2d 410 (Tex. App.—Dallas 1983, writ ref'd n.r.e.).

33. *Id.* at 418. Since the plaintiff did not rely on the attorney's opinion, he was not adversely affected by the actions of the attorneys and was, therefore, not a consumer. *See* Guerra v. Brumlow, 630 S.W.2d 425 (Tex. App.—San Antonio 1982, no writ).

34. 648 S.W.2d at 417; *see also* South Tex. Irrigation Sys. v. Lockwood Corp., 489 F. Supp. 256 (W.D. Tex. 1980).

35. 648 S.W.2d at 417; *see also* Snyders Smart Shop, Inc. v. Santi, Inc., 590 S.W.2d 167 (Tex. Civ. App.—Corpus Christi 1971, no writ).

In *Pope v. Rollins Protective Services Co.*[36] a burglar alarm lessee brought an action under the DTPA against the lessor and the installer of the burglar alarm. The lessee sought recovery of damages for physical injury and mental anguish sustained when she entered her home while a burglary was in progress and none of the burglar alarm components had operated properly. The United States District Court for the Southern District of Texas entered a judgment on a jury verdict in favor of the lessee, and the lessor appealed. The jury found the lessor liable for misrepresentation of the characteristics of the alarm system in violation of section 17.46(b)(5) of the DTPA,[37] and for causing confusion regarding certain features of the system in violation of section 17.46(b)(3) of the DTPA.[38] The district court further found that the lessor was grossly negligent in the installation and design of the burglar alarm system and in its failure to warn that burglars could disarm the system. The jury awarded the plaintiff $15,250 for loss of property, $150,000 for past and future mental anguish, and $150,000 punitive damages for Rollins's gross negligence.[39]

On appeal, the lessor argued that the lessee presented no evidence or, at most, insufficient evidence that the lessor's representations were the producing causes of the lessee's mental anguish.[40] Nevertheless, the Fifth Circuit upheld the district court's decision allowing the lessee to recover under the DTPA.[41] The court stated that one of the primary reasons for the enactment of the DTPA was to provide consumers with a remedy for deceptive trade practices without the burdens of proof and numerous defenses encountered in a common law fraud or breach of warranty action.[42] The court nonetheless determined that a putative plaintiff still must show that the deceptive trade practice was the producing cause of the damage.[43] The court determined from the evidence that the natural results of the lessor's misrepresentations were the lessee's reliance on a deficient system and the exploitation of those deficiencies by burglars to her detriment. The court therefore concluded that the jury finding on the producing cause issue was supported by evidence in the record.[44]

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36. 703 F.2d 197 (5th Cir. 1983).

37. TEX. BUS. & COM. CODE ANN. § 17.46(b)(5) (Vernon Supp. 1984) states that "representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not . . ." is sufficient to constitute "false, misleading, or deceptive acts or practices" and are unlawful conduct under the DTPA.

38. *Id.* § 17.46(b)(3).

39. 703 F.2d at 200.

40. For a consumer to be entitled to relief under § 17.50 of the DTPA, the prohibited action must be the producing cause of actual damages. Producing cause is distinguished from the requirement of proximate cause in tort by the fact that foreseeability is not an element of the former, while the latter consists of two elements: (1) cause-in-fact; and (2) forseeability. *See id.* at 202 n.4.

41. *Id.* at 201.

42. *Id.*; *see* Smith v. Baldwin, 611 S.W.2d 611 (Tex. 1980); Woo v. Great Sw. Acceptance Corp., 565 S.W.2d 290 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.).

43. 703 F.2d at 202; *see* City of Marshall v. Bryant Air Conditioning, 650 F.2d 724 (5th Cir. 1981).

44. 703 F.2d at 203. The district court gave the following instruction on the definition

The lessor in *Pope* also contended that as a matter of law the lessee was not entitled to recover for mental anguish under the DTPA. In response, the court noted that the Texas Supreme Court has construed the actual damages that are provided for under section 17.50 of the DTPA to mean those damages that are recoverable at common law.[45] Under Texas common law, damages for mental anguish cannot be recovered absent a showing of an intentional tort, gross negligence, willful and wanton disregard, or accompanying physical injury.[46] The Fifth Circuit determined that since the appellee introduced sufficient evidence of physical injury to recover damages for mental anguish, the jury's finding with respect to damages for mental anguish should be sustained.[47]

In *Connecticut General Life Insurance Co. v. Stice*[48] suit was brought to recover proceeds of an accidental death and dismemberment policy on the life of the plaintiff's deceased husband. The policy was initially issued by the defendant insurance company to the wife's employer. The plaintiff also sought treble damages from her employer for engaging in deceptive and misleading practices in violation of the Texas Insurance Code[49] and the DTPA.[50] The district court entered judgment for the plaintiff, and the insurance company and the employer appealed. The appellate court reversed the lower court's decision in part and ruled that the plaintiff could not recover damages from the employer based on a misrepresentation in the employer's brochure dealing with accidental death and dismemberment benefits since plaintiff successfully recovered benefits under the policy.[51] Because the jury found the policy to be in full force and effect, the court reasoned that the plaintiff incurred no actual damages, thus precluding recovery of treble damages under the DTPA.[52]

In *Litton Industrial Products, Inc. v. Gammage*[53] the plaintiff brought suit for severe personal injuries and damages sustained when a ratchet manufactured by one of the defendants failed while being used by the plaintiff. The suit was brought on the bases of negligence, strict liability, and deceptive trade practices under the DTPA. The case was tried to a jury, and the court entered judgment in favor of the plaintiff for a sum in excess of $700,000 in actual damages,which was trebled by the trial court

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of producing cause: "The term producing cause means an efficient, exciting or contributing cause, which in a natural sequence, produces the injuries or damages complained of, if any, and without which the injury would not have occurred." *Id.* at 202.

45. *Id.* at 203; *see* Brown v. American Transfer & Storage Co., 601 S.W.2d 931, 939 (Tex.), *cert. denied*, 449 U.S. 1015 (1980).

46. Farmers & Merchants State Bank v. Ferguson, 617 S.W.2d 918, 921 (Tex. 1981).

47. 703 F.2d at 204.

48. 640 S.W.2d 955 (Tex. App.—Dallas 1982, writ ref'd n.r.e.).

49. *See* TEX. INS. CODE ANN. art. 21.21, § 4 (Vernon 1981).

50. *See* TEX. BUS. & COM. CODE ANN. § 17.46(b)(5) (Vernon Supp. 1984).

51. 640 S.W.2d at 960; *see* Royal Globe Ins. Co. v. Bar Consultants, Inc., 577 S.W.2d 688, 695 (Tex. 1979).

52. 640 S.W.2d at 960.

53. 644 S.W.2d 170 (Tex. App.—Houston [14th Dist.] 1982), *aff'd in part, rev'd in part*, 27 Tex. Sup. Ct. J. 166 (Jan. 11, 1984).

pursuant to the DTPA.[54] The defendant argued on appeal that the DTPA does not apply to personal injury damages and that the trial court therefore erred in trebling the damages. The appellate court, however, found that actual damages recoverable under the DTPA include damages for personal injury.[55] Citing the Texas Supreme Court's allowance of treble damages for mental anguish in *Woods v. Littleton*,[56] the court found no justifiable reason to treble mental anguish damages in a non-personal injury case and not to treble damages in a personal injury case.[57] The Texas Supreme Court nonetheless reversed the court of appeals holding with respect to treble damages. The DTPA only applies to acts or practices occurring after May 21, 1973, the effective date of the Act.[58] The supreme court held that because the plaintiff failed to produce evidence showing that the defendant manufactured the defective ratchet after the effective date, no violation of the DTPA was established.[59]

The Houston court of appeals also dealt with the question of the scope of damages recoverable under the DTPA in *Mahan Volkswagen, Inc. v. Hall*.[60] In *Mahan* the plaintiff's daughter was killed in an automobile accident, and the plaintiff brought suit against the manufacturer, dealer, and distributor of the car to recover for the fatal injuries on theories of products liability and violation of the DTPA. The jury returned a verdict in favor of the plaintiff in excess of $400,000 in actual damages, which the court trebled pursuant to the DTPA.[61] The jury found that the dealer failed to disclose to the decedent that the car's brakes were defective and that such failure was a deceptive act that was the producing cause of the injury. The dealer appealed.

Since its enactment in 1973, the DTPA has been amended in every legislative session. The legislative history of the DTPA indicates that during the 1979 session of the legislature several efforts were made to redefine the term "actual damages" so as to eliminate personal injury cases from its scope. The 1979 legislature rejected all of these proposed amendments. The court of appeals in *Mahan* determined that it was bound to consider the rejection of the amendments as reflective of the legislature's satisfaction with the broader applicability of the term "actual damages."[62] According to the court, the decedent occupied the status of a consumer, and a cause of action under the DTPA for personal injury and property damage passed under the wrongful death statute to her heirs and the legal repre-

54. 644 S.W.2d at 171.

55. *Id.* at 173. The statute is to be liberally construed and applied pursuant to § 17.44. Section 17.50 of the 1973 version clearly states that "each consumer who prevails may obtain: (1) three times the amount of actual damages." TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon 1973).

56. 544 S.W.2d 662, 671 (Tex. 1977).

57. 644 S.W.2d at 173-74.

58. TEX. BUS. & COM. CODE ANN. § 17.63 (Vernon Supp. 1984).

59. 27 Tex. Sup. Ct. J. 166, 168 (Jan. 11, 1984).

60. 648 S.W.2d 324 (Tex. App.—Houston [1st Dist.] 1982, no writ).

61. *See* TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon Supp. 1984).

62. 648 S.W.2d at 332; *see* Smith v. Baldwin, 611 S.W.2d 611 (Tex. 1981).

sentatives of her estate.[63] The court on rehearing, however, limited the amount of damages attributable to the decedent's cause of action to damages for physical pain and mental anguish, funeral expenses, and property damage. Since no evidence of physical pain and mental anguish was introduced at trial, the only damages that were properly trebled under the DTPA were the decedent's funeral expenses and automobile damages.[64]

In *Whirlpool Corp. v. Texical, Inc.*[65] a refrigerator manufacturer brought suit against one of its purchasers to recover on a sworn account, whereupon the buyer counterclaimed for damages under the DTPA. The jury found that the seller committed a false, misleading, or deceptive act or practice in connection with the sale of the refrigerators. The court trebled the actual damages incurred by the buyer and ordered the sale rescinded. On appeal the seller contended that the trial court erred in allowing both recovery of treble damages under the DTPA and a rescission of the sales contract. The seller challenged the trial court's award on the basis of the opinion in *Smith v. Kinslow*.[66] In *Smith* the trial court awarded the plaintiff actual damages *plus* three times actual damages under the DTPA for a breach of warranty regarding repairs. Concerned about the effect of quadrupling the damages, the court of appeals reversed the trial court's judgment and held that "in a suit for breach of warranty, the complaining party may recover three times his actual damages under subdivision (1) [of section 17.50(b)] *or* restoration of the consideration paid under subdivision (3), but not both."[67] Distinguishing the *Smith* opinion, the court in *Whirlpool* found that the trial court's award relied on two different theories and two events. Also, the court did not face the problem of excessive recovery that existed in *Smith*, since the trial court ordered the buyer to return the refrigerators to the seller, thereby granting the buyer rescission. The court therefore held that granting partial recission and awarding treble damages under the DTPA are not incompatible.[68]

In *North Star Dodge Sales, Inc. v. Luna*[69] the buyer purchased a car from a dealer with the understanding that the car was covered by a limited money-back guarantee. When the dealer refused to honor its warranty obligations, the buyer brought suit alleging various violations of the DTPA.[70] The buyer also sought treble damages against the dealer under the section of the DTPA that requires a plaintiff to establish that the conduct of the defendant was committed knowingly.[71] In an attempt to prove

63. 648 S.W.2d at 333; *see* TEX. REV. CIV. STAT. ANN. arts. 4671 (Vernon Pam. Supp. 1941-1983), 5525 (Vernon 1958); *see also* Rodriquez v. Texas Employers' Ins. Ass'n, 598 S.W.2d 677 (Tex. Civ. App.—Fort Worth 1980, no writ).

64. 648 S.W.2d at 334.

65. 649 S.W.2d 55 (Tex. App.—Corpus Christi 1982, no writ).

66. 598 S.W.2d 910 (Tex. Civ. App.—Dallas 1980, no writ).

67. *Id.* at 915 (emphasis added).

68. 649 S.W.2d at 57.

69. 653 S.W.2d 892 (Tex. App.—San Antonio 1983), *rev'd in part, aff'd in part*, 27 Tex. Sup. Ct. J. 271 (Mar. 14, 1984).

70. The buyer alleged violations of TEX. BUS. & COM. CODE ANN. §§ 17.46(b)(5), .46(b)(7), .46(b)(12), .50(a)(2), .50(a)(3) (Vernon Supp. 1984).

71. TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon Supp. 1984) provides:

that the dealer acted knowingly, the buyer's attorney questioned the dealer's finance manager about the dealer's financial solvency. The dealer objected and moved for a mistrial, contending that the issue of motive was irrelevant. The court denied the motion, which ruling was one of several points of error precipitating an appeal. Since the consumer sought treble damages under section 17.50(b)(1) of the DTPA, which requires knowing commission of an act by the defendant,[72] the court of appeals determined that an inquiry into the possibility of the dealer's impending bankruptcy was relevant to the motive of the dealer in refusing to refund a portion of the purchase price demanded by the consumer.[73]

In *Keller Industries, Inc. v. Reeves*[74] the plaintiff brought suit alleging causes of action under the doctrine of strict liability in tort and the DTPA against a retailer and manufacturer of an aluminum stepladder for injuries incurred when the stepladder failed while being used by the plaintiff. The defendants appealed from a trial court judgment in favor of the plaintiff. They argued that the trial court improperly applied the DTPA in trebling damages and awarding attorneys' fees, on the theory that a set of facts that gives rise to a cause of action in strict liability for a defective product cannot also be the subject of a claim for personal injuries under the DTPA. The appellants' argument relied upon extensive references to the legislative history of the DTPA and lengthy quotes from the testimony of non-legislator proponents of the original legislation. In affirming the judgment of the trial court,[75] the court quoted from the opinion in *Litton Industrial Products v. Gammage*:[76]

> "It is a fundamental principle of statutory construction that the courts only look behind the law as to legislative intent and public policy where the statute is unclear, uncertain or ambiguous . . . . If there is no ambiguity, the statute itself is the public policy. We are of the opinion that the DTPA is clear and unambiguous and, therefore, it is not necessary to consider legislative intent beyond that expressly stated in the statute itself . . . .
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> "The DTPA clearly states that all actual damages are to be trebled, regardless of whether they are personal injury or property damages. Upon our review of the applicable legislative history, we found that

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(b) In a suit filed under this section, each consumer who prevails may obtain:

(1) the amount of actual damages found by the trier of fact. In addition the court shall award two times that portion of the actual damages that does not exceed $1,000. If the trier of fact finds the conduct of the defendant was committed *knowingly*, the trier of fact may award not more than three times the amount of actual damages in excess of $1,000 . . . .

(Emphasis added).

72. *Id.*

73. 653 S.W.2d at 896. The court also considered and sustained the seller's assertion that the trial court improperly allowed recovery for mental anguish and loss of use of the vehicle. *Id.* at 897-901.

74. 656 S.W.2d 221 (Tex. App.—Austin 1983, writ ref'd n.r.e.).

75. *Id.* at 229.

76. 644 S.W.2d 170 (Tex. App.—Houston [14th Dist.] 1982), *aff'd in part, rev'd in part*, 27 Tex. Sup. Ct. J. 166 (Jan. 11, 1984); *see supra* notes 53-59 and accompanying text.

> the purpose of the DTPA was to deter that behavior expressly prohibited by the DTPA. It would be totally illogical to conclude that the prohibited practices are better deterred by trebling property damage awards than by trebling personal injury awards. We can only, in all reasonableness, conclude that it is in keeping with the deterrent function of the DTPA to treble personal injury damages when the proper circumstances warrant it . . . ."[77]

C. Defenses

During the 1983 survey period, Texas courts also were faced with various defenses to liability under the DTPA. In *Wayne Strand Pontiac-GMC v. Molina*[78] an appeal was taken from a judgment in favor of the plaintiff and against an automobile dealership in a suit under the DTPA, the Consumer Credit Code, and the Federal Truth in Lending Act resulting from interest charges incurred in the purchase of a vehicle. The trial court rendered judgment for twice the amount of the finance charge incurred by the plaintiff. The dealer contended that the irregularity in the contract was de minimis because the contract overcharged interest to the plaintiff in the amount of $5.53 and asserted an improper charge of only $2.50 for official fees. The court of appeals determined as a matter of law that the overcharges in these amounts were de minimis.[79] A dissenting judge argued that in applying the doctrine of de minimis non curat lex a distinction should be drawn between overcharges that result from miscalculations of proper charges and charges that were never authorized and that therefore constitute actionable misrepresentations.[80] The majority of the court, however, did not believe that such a distinction should control, finding that the name of the doctrine itself demonstrates that it is a doctrine of convenience, which has as its purpose the relief of the courts from trivial matters. As such, in the court's opinion, the defense should not be restricted to a limited class of transactions.[81]

In *Miro v. Allied Finance Co.*[82] the in-house counsel for a corporation executed several promissory notes in favor of the corporation. Payments on the notes were to be made by payroll deductions or by counsel's personal check. After counsel's employment with the corporation terminated, he brought an action against the corporation alleging that the loans made to him by the corporation violated the Consumer Credit Code and were

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77. 656 S.W.2d at 224 (quoting 644 S.W.2d at 175, 176).

78. 653 S.W.2d 45 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.).

79. *Id.* at 46-47; *see* Ford Motor Credit Co. v. Long, 608 S.W.2d 293, 296 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.); Ford Motor Credit Co. v. Zapata, 605 S.W.2d 362, 366 (Tex. Civ. App.—Beaumont 1980), *rev'd on other grounds*, 615 S.W.2d 198 (Tex. 1981); Thornhill v. Sharpstown Dodge Sales, Inc., 546 S.W.2d 151 (Tex. Civ. App.—Beaumont 1976, no writ).

80. 653 S.W.2d at 49 (Bissett, J. dissenting).

81. *Id.* at 47.

82. 650 S.W.2d 938 (Tex. App.—Houston [14th Dist.] 1983, no writ).

usurious.[83] The corporation counterclaimed, alleging that the lawyer had breached his fiduciary duty and demanding repayment of the unpaid loan balance. On appeal of the judgment rendered in favor of the corporation on its counterclaim, the court of appeals held that the trial court did not err in holding that the corporation's charging of usurious interest rates on notes payable by counsel through payroll deductions was bona fide error, and that counsel was not entitled to recover on his usury claim since counsel had drafted the loan agreements in question and had a fiduciary duty, which he breached, to bring a usury problem to the attention of the corporation.[84] After reviewing cases concerning the bona fide error defense, the appellate court found that Texas courts have interpreted statutory bona fide error clauses in the Consumer Credit Code to hold harmless those lenders who accidentally and inadvertently charge and collect usurious interest.[85] The record contained nothing suggesting that the lending practices of the appellee were even remotely abusive or deceptive. Since the legislative history clearly indicates that the Consumer Credit Code was passed to prevent abusive or deceptive practices, the court found it permissible to excuse the lender from liability under the bona fide error defense.[86]

In *Miller v. Soliz*[87] the defendant raised the defenses of good faith and bona fide error in an action against him for violation of the DTPA. In *Miller* the Solizes purchased an automobile from the defendant and tendered a $1500 cash down payment, for which they were given a receipt and credit, and a retail order for a motor vehicle. Immediately thereafter, the defendant agreed to exchange the automobile purchased for another automobile, and the Solizes made an additional $465 down payment. The parties subsequently executed a motor vehicle contract that included financing for the second vehicle and reflected the $1500 initial down payment, but gave no credit for the second $465 down payment.

The defendant did not deny the violation charged under the Consumer Credit Code, but relied instead upon the bona fide error defense.[88] To take advantage of this defense, the defendant must show by a preponderance of the evidence that the purported violation was not intentional and resulted from a bona fide error, and that such error occurred notwithstanding the maintenance of procedures reasonably adopted to avoid such violation.[89] The court determined that the second element of the bona fide error defense, adoption and maintenance of preventive procedures, was

83. *See* TEX. REV. CIV. STAT. ANN. arts. 5069—1.06, 5069—8.01 (Vernon 1971 & Supp. 1984).

84. 650 S.W.2d at 942.

85. *Id.*

86. *Id. see* PJM, Inc. v. Walter Clark Advertising, 624 S.W.2d 282 (Tex. App.—Dallas 1981, writ ref'd n.r.e.).

87. 648 S.W.2d 734 (Tex. App.—Corpus Christi 1983, no writ).

88. TEX. REV. CIV. STAT. ANN. art. 5069—8.01(f) (Vernon 1971 & Supp. 1984) makes violation of the usury law due solely to bona fide error a valid defense.

89. 648 S.W.2d at 737; *see* Ballard v. Hillcrest State Bank, 592 S.W.2d 373, 374 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

not expressly presented to the trial court and ruled therefore that a summary judgment in favor of the plaintiffs should be sustained.[90] The defendant also challenged the court's ruling that the defendant pursued an unconscionable course of action in violation of section 17.50(a)(3) of the DTPA.[91] The defendant's response to the Solizes' motion for summary judgment stated that the acts were unintentional, were committed in good faith, and resulted from bona fide error. The court, however, determined that intent was not an element of section 17.50(a)(3) and held that the defenses of good faith and bona fide error were not available.[92]

D. Notice

In *Foster v. Daon Corp.*[93] the Fifth Circuit heard an appeal from a judgment rendered in favor of a seller who was sued by a condominium purchaser for reduction of a contract purchase price and for relief under the DTPA. At trial the condominium purchaser's claim under the DTPA was held barred by the fact that the purchaser failed to make a demand on the seller for the claimed damages before filing the suit.[94] When the seller asserted this defense in its answer, the purchaser moved to amend the complaint by dismissing the DTPA claim without prejudice. Dismissal of the DTPA claim in this manner would have allowed the purchaser to give the required demand thirty days before reinstituting the claim in court. The district court, however, denied the purchaser's request to amend the complaint.[95] The district court noted that the purpose of the DTPA thirty-day demand requirement is to encourage voluntary settlement,[96] but denied the purchaser's motion to amend, stating:

> Normally, leave to file amended pleadings is to be freely given . . . However, notice is a prerequisite to bringing an action under § 17.50(b)(1) . . . and the Court has concluded that no notice was given in this case. Since the DTPA claims were brought improperly thereby frustrating the underlying purpose of § 17.50A, the Court is of the opinion that the motion to amend should be denied.[97]

The purchaser also filed a second motion to amend in the trial court concerning the claim under the DTPA. While the first complaint was pend-

90. 648 S.W.2d at 738.

91. *See* TEX. BUS. & COM. CODE ANN. § 17.50(a)(3) (Vernon Supp. 1984).

92. 648 S.W.2d at 738; *see* Pennington v. Singleton, 606 S.W.2d 682 (Tex. 1980); Sam Kane Beef Processors, Inc. v. Manning, 601 S.W.2d 93 (Tex. Civ. App.—Corpus Christi 1980, no writ).

93. 713 F.2d 148 (5th Cir. 1983).

94. *Id.* at 151. TEX. BUS. & COM. CODE ANN. § 17.50A(a) (Vernon 1984) requires that before a suit is filed seeking damages under § 17.50(b)(1) against any person, a consumer must give written notice to the person at least 30 days before filing advising the person of the specific complaint and the amount of actual damages and expenses, including attorneys' fees, if any, reasonably incurred by the consumer in asserting the claim.

95. 713 F.2d at 151.

96. *Id.* at 151; *see also* Barnado v. Mecom, 650 S.W.2d 123, 127 (Tex. App.—Dallas 1983, writ ref'd n.r.e.); Goodfriend & Lynn, *Of White Knights and Black Knights: An Analysis of the 1979 Amendments to the Texas Deceptive Trade Practices Act*, 33 SW. L.J. 941, 988-96 (1979).

97. 713 F.2d at 151-52.

ing, the purchaser sent the defendant a notice of demand based on a separate violation of the DTPA and, less than thirty days thereafter, moved to amend the complaint to add this second claim under the DTPA. Although the thirty days required by section 17.50A had not yet passed, the purchaser was concerned that the two-year statute of limitations would run on the second complaint before the thirty-day waiting period expired.[98] The district court nonetheless again denied leave to amend to include this complaint because the purchaser failed to give the required thirty-day notice.[99]

On appeal the Fifth Circuit determined that the district court acted incorrectly in denying the motions to amend. Citing its prior opinion in *Chitimacha Tribe v. Harry L. Laws Co.*,[100] the court stated that:

> In exercising its discretion, the trial court should consider whether permitting the amendment would cause undue delay in the proceedings or undue prejudice to the nonmoving party, whether the movant is acting in bad faith or with a dilatory motive, or whether the movant has previously failed to cure deficiencies in his pleadings by prior amendments. The court may weigh in the movant's favor any prejudice that might arise from the denial of leave to amend. In keeping with the purposes of the rule, the court should consider judicial economy and whether the amendments would lead to expeditious disposition of the merits of the litigation. Finally, the court should consider whether the amendment adds substance to the original allegations, and whether it is germane to the original cause of action.[101]

The Fifth Circuit concluded that the district court abused its discretion in denying both motions to amend, finding no indication in the record that the proposed amendments would cause delay or undue prejudice to the defendant because the case was still in the pretrial stage, no indication that the purchaser's motives to amend were brought in bad faith or for the purpose of delay, and, most significantly, finding that the purchaser suffered great prejudice through the district court's denial of leave to amend due to the running of the statute of limitations on the DTPA claims. The court therefore reversed and remanded the case for further proceedings.[102]

In *Cameo Construction Co. v. Campbell*[103] a dispute arose between homeowners and a construction company and its president over a written contract to construct a residence. The homeowners filed suit against the construction company and its president under the DTPA. The president subsequently filed a counterclaim on his own behalf under section 17.50(c)

98. Section 17.50A(b) provides that the 30-day notice requirement is waived if giving the notice "is rendered impracticable by reason of the necessity of filing suit in order to prevent the expiration of the statute of limitations." TEX. BUS. & COM. CODE ANN. § 17.50A(b) (Vernon Supp. 1984).

99. 713 F.2d at 152.

100. 690 F.2d 1157, 1163 (5th Cir. 1982), *cert. denied*, 104 S. Ct. 69, 73 L. Ed. 2d 83 (1983).

101. 713 F.2d at 152.

102. *Id.*

103. 642 S.W.2d 10 (Tex. App.—El Paso 1982, no writ).

of the DTPA, which allows an award of attorneys' fees when an action under the DTPA is groundless and brought in bad faith, or brought for the purpose of harassment.[104] The homeowners thereafter were granted a motion for nonsuit as to the president only, and the trial court dismissed the president's DTPA counterclaim. The trial court entered judgment for the homeowners, and the construction company and its president appealed.

The court of appeals ruled that the trial court erred in striking a counterclaim by the building contractor's president to recover attorneys' fees under the DTPA, even though the homeowners eliminated all claims against the president under the DTPA by amending their pleadings.[105] The court determined that a counterclaim asserting that a claim under the DTPA was groundless and brought in bad faith, or brought for the purpose of harassment, should not be dismissed simply because the original claim was not prosecuted to a conclusion.[106]

The building contractor also asserted that the homeowners were not entitled to recover under the DTPA because the homeowners failed to comply with the notice provisions of the controlling earlier version of the DTPA.[107] The claimed breach of the 1976 contract was controlled by the 1973 provisions of the DTPA, which required notice only of suits brought as class actions under section 17.51 of the 1973 version of the DTPA.[108] Under the 1973 version, no notice was required for suits brought under section 17.50 of the DTPA, which provided general relief for individual consumers.[109] The court therefore determined that the district court erred in dismissing the homeowner's claim under the DTPA based on failure to give notice under section 17.53(a).[110]

II. THE CONSUMER CREDIT CODE

The 1983 survey period saw reduced activity by Texas courts in the interpretation of the terms and provisions of the Texas Consumer Credit Code.[111] In *North Star Dodge Sales, Inc. v. Luna*[112] the defendant auto dealer claimed that the trial court erred in holding that a retail installment contract entered into between a buyer and an auto dealer violated article 5069—7.07(7) of the Consumer Credit Code.[113] Article 5069—7.07(7) prohibits an installment contract from including a provision allowing the seller to retain or dispose of tangible personal property that is not subject

104. TEX. BUS. & COM. CODE ANN. § 17.50(c) (Vernon 1984).
105. 642 S.W.2d at 12.
106. *Id.*
107. TEX. BUS. & COM. CODE ANN. § 17.53(a) (Vernon 1971), *repealed by* Act of May 23, 1977, ch. 216, § 12, 1977 Tex. Gen. Laws 600, 605 (effective May 23, 1977).
108. *Id.* § 17.53.
109. *Id.*; *see* King v. Ladd, 624 S.W.2d 195 (Tex. Civ. App.—El Paso 1981, no writ).
110. 642 S.W.2d at 12.
111. TEX. REV. CIV. STAT. ANN. art. 5069—2.01 to —51.17 (Vernon 1971 & Pam. Supp. 1971-1983).
112. 653 S.W.2d 892 (Tex. App.—San Antonio 1983), *rev'd in part, aff'd in part,* 27 Tex. Sup. Ct. J. 271 (Mar. 14, 1984).
113. TEX. REV. CIV. STAT. ANN. art. 5069—7.07(7) (Vernon Pam. Supp. 1971-1983).

to a security interest.[114] The installment agreement in question allowed the seller to take possession of any other items in the automobile at the time of repossession.[115] After interpreting this contract provision to be violative of the provisions and requirements of article 5069—7.07(7), the trial court levied the statutory penalty of $2000 against the defendant.[116] On appeal, the court determined that the contractual provision allowing the seller to take possession of any other items in the property at the time of possession and to hold them without liability until demand constituted the retention of unsecured tangible personal property as contemplated by article 5069—7.07(7).[117] Accordingly, the contract's failure to require the seller or holder to send the appropriate written notice supported the award of damages pursuant to article 5069—8.01(b).[118]

In *Miller v. Soliz*[119] the court ruled that the bona fide error defense under article 5069—8.01(f) of the Consumer Credit Code involves a two-prong test requiring proof of the bona fide error and procedures adopted to avoid such errors.[120] In affirming the summary judgment rendered against the seller, the court determined that the nonmovant in summary judgment proceedings, in answer or response, must expressly present those issues, and proof of them if necessary, that would defeat the movant's right to summary judgment.[121] In the summary judgment proceeding before the trial court the seller pled that the violation was not intentional and resulted from bona fide error, but failed to allege or prove that reasonable preventive procedures were adopted and maintained. The second part of the bona fide error defense therefore was not considered on appeal, and the

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114. Article 5069—7.07(7) provides:

> No retail installment contract or retail charge agreement shall:
>
> . . .
>
> (7) Contain an authorization for the seller or holder or any person acting on the seller's or holder's behalf to retain or dispose of other tangible personal property that is not subject to a security interest and that is acquired in the repossession of a motor vehicle, except property attached to the vehicle, unless the contract or a separate writing requires the seller or holder to send written notice of such an acquisition to the last known address of the buyer as shown by the records of the holder within fifteen days of the discovery of the personal property by the seller or holder.

Id.

115. The contract provided:

> Seller his agents or representatives, may enter the premises where the property may be and take immediate possession of the property including any equipment or accessories, and Seller may take possession of any other items in the property at the time of the repossession, and hold them without liability until demanded by the buyer.

653 S.W.2d at 900.

116. *Id.*; *see* TEX. REV. CIV. ANN. art. 5069—8.01(b) (Vernon Pam. Supp. 1971-1983).

117. 653 S.W.2d at 901.

118. *Id.*

119. 648 S.W.2d 734 (Tex. App.—Corpus Christi 1983, no writ); *see supra* notes 87-92 and accompanying text.

120. 648 S.W.2d at 737; *see* Ballard v. Hillcrest State Bank, 592 S.W.2d 373, 374 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

121. 648 S.W.2d at 738; *see* City of Houston v. Clear Creek Basin, 589 S.W.2d 671, 679 (Tex. 1979).

court affirmed the summary judgment granted in favor of the buyer for violation of the Consumer Credit Code.[122]

In Northwest Bank v. Couie[123] lender brought suit for an amount allegedly due on an unpaid promissory note, and the borrowers counterclaimed alleging violations of the Consumer Credit Code. The lender had purchased two credit life policies to secure the borrowers' promissory note. The total premiums charged by the two insurance companies, however, were identical to the premium that would have been charged if only one policy had been issued. Article 5069—4.02(1) of the Consumer Credit Code provides that:

> [o]n any loan made under the authority of [Chapter 4 "Installment Loans"], a lender may request or require a borrower to provide credit life insurance and credit health and accident insurance as additional protection for such a loan. Only one policy of life insurance and one policy of health and accident insurance on any one obligor may be in force with respect to any one loan contract at any one time.[124]

The trial court rendered judgment against the lender on the counterclaim and granted the plaintiffs twice the amount of interest contracted for in the note. On appeal, the lender, relying on a prior version of article 5069—8.01 of the Consumer Credit Code, argued that since article 5069—4.02(1) imposes no specific duty on the lender, the lender did not violate the Code.[125] The appellate court found the bank's reliance on old article 5069—8.01 to be misplaced. Although the older version required that a lender must fail to perform a duty specifically imposed on it, the amended version of article 5069—8.01(b) triggers the punitive sanctions whenever prohibited acts are proven.[126]

The lender in *Couie* also contended that it had not violated the Consumer Credit Code because the total of the premiums charged by the two insurance companies was identical to the premium that would have been charged if only one credit life insurance policy had been issued. The borrowers, therefore, could not prove that they had been injured by the acts of the lender in causing two policies to be issued. The appellate court determined that this equitable contention was without merit because the situation was controlled specifically by statute.[127] The court found that the legislature had directed the courts in Texas to impose the penalties provided by article 5069—8.01 when any act or practice prohibited by the statute was comitted. Specifically, the court determined that the legislature intended to deter lenders or creditors from taking out more than one policy of credit life or health and accident insurance with respect to any one obli-

122. 648 S.W.2d at 738.

123. 642 S.W.2d at 847 (Tex. App.—Fort Worth 1982, no writ).

124. TEX. REV. CIV. STAT. ANN. art. 5069—4.02(1) (Vernon 1968).

125. *Id.* art. 5069—8.01(b) (Vernon 1967).

126. 642 S.W.2d at 850; *see* TEX. REV. CIV. STAT. ANN. art. 5069—8.01(b) (Vernon Pam. Supp. 1971-1983).

127. 642 S.W.2d at 851.

gor at any one time.[128] Furthermore, the court reasoned that private enforcement of the Consumer Credit Code would be deterred and consumers would be forced to meet a defense that had not been provided by statute if courts accepted the lender's harmless violation argument.[129] Finding that the defenses available to lenders are limited specifically to those enumerated in the Consumer Credit Code, the court was powerless to expand such defenses by judicial fiat.[130]

Lastly, the bank contended that the borrowers were estopped from asserting liability under article 5069—4.02(1) because they were not injured. The lender noted that the borrowers permitted the insurance companies to effectively retire their obligations under the note with the proceeds of the policies. The court determined that both parties benefited from the two insurance policies; the bank was repaid monies lent to the borrowers, and the borrowers satisfied their financial obligation to the lender by opting for credit life and disability insurance. The lender, however, being the beneficiary of the credit policies, was in a superior position to discover any error or to avoid statutory liability. The court therefore determined that estoppel did not lie in this case.[131]

In *Machado v. Crestview Mobile Housing*[132] the court reviewed a clause in a retail installment contract. The subject clause provided that if a purchaser continued to make payments to a seller after the retail installment contract was assigned to a third party, the purchaser's right to assert the defense of payment to the primary obligee would be waived in a suit by the assignee for payment irrespective of whether notice of the assignment was provided to the purchaser. The trial court rendered judgment for the seller-assignor, and the purchaser brought an appeal. The purchaser asserted that the trial court erred in failing to hold that the retail installment contract violated article 5069—6.07 of the Consumer Credit Code, which provides that unless the buyer has notice of assignment or negotiation of his retail installment contract, any payment made to the last known holder is binding upon any subsequent holders.[133]

The purchasers also argued that the contract provision clearly violated article 5069—6.05(6) of the Consumer Credit Code, which prohibits contract provisions stating that a buyer agrees not to assert any claim or defense arising out of the sale against the seller. The court sustained the purchaser's contentions, finding the contract clause to be violative of articles 5069—6.07[134] and 5069—6.05(6).[135]

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128. *Id.*

129. *Id.*

130. *Id.*; *see also* Anguiano v. Jim Walter Homes, Inc., 561 S.W.2d 249, 254-55 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.).

131. 642 S.W.2d at 851; *see also* Barfield v. Howard M. Smith Co., 426 S.W.2d 834, 838-39 (Tex. 1968).

132. 650 S.W.2d 494 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.).

133. TEX. REV. CIV. STAT. ANN. art. 5069—6.07 (Vernon 1971).

134. 650 S.W.2d at 495; *see* Commercial Credit Corp. v. Nichols, 529 S.W.2d 588 (Tex. Civ. App.—Amarillo 1975, no writ).

In *Haley v. Pagan Lewis Motors, Inc.* [136] the purchaser of an automobile brought suit against the automobile dealer for violation of the Consumer Credit Code. The purchaser argued that certain terms of the form installment sales contract prevented the purchaser from asserting any defenses he might have against the seller against any subsequent assignee of the contract. The district court entered judgment for the dealer and the purchaser appealed.

The court of appeals examined the contract terms challenged by the purchaser and compared them with seemingly contradictory language in bold face print found on the reverse side of the contract. The appellate court determined that if a contract, by its terms and construed as a whole, is susceptible of more than one reasonable construction, courts are obligated to adopt a construction that comports with legality.[137] In the instant case the court held that under a reasonable construction of the entire contract the buyer had the right to assert against the seller and any subsequent holder all claims and defenses available under Texas law. The court therefore found no violation of the Consumer Credit Code.[138]

III. USURY

A. Statutory Provisions

The maximum lawful rates that creditors may charge debtors for the use, forbearance, or retention of money are governed by article 5069—1.01 of the Texas Revised Civil Statutes.[139] Under the usury statutes, any lender charging more than the highest lawful rate is subject to forfeiture of three times the amount of excess interest charged, with a minimum penalty of $2000 or twenty percent of the principal.[140] If the interest charged exceeds twice the lawful rate, the lender is subject to forfeiture of all principal plus twice the amount of interest charged.[141] If a lender has charged interest absent an agreement, or if charging interest is not statutorily permitted, courts interpret the interest so charged to exceed twice the legally permissible amount.[142] The lender, therefore, is subject to forfeiture of twice the interest charged and all debt principal. The usury statutes also provide that a lender who charges interest in excess of the lawful rate must

135. 650 S.W.2d at 495; *see* TEX. REV. CIV. STAT. ANN. art. 5069—6.05(6) (Vernon Pam. Supp. 1971-1983); *see also* Southwestern Inv. Co. v. Mannix, 557 S.W.2d 755 (Tex. 1977).

136. 647 S.W.2d 319 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.).

137. *Id.* at 320.

138. *Id.*; *see* Ford Motor Credit Co. v. McDaniel, 613 S.W.2d 513, 518 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.); Grant v. Friendly Chrysler-Plymouth, Inc., 612 S.W.2d 667, 669 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.).

139. TEX. REV. CIV. STAT. ANN. art. 5069—1.01(a) (Vernon 1971). The Texas usury statutes were substantially revised in 1981 to raise significantly the permissible interest ceilings on loans. Nonetheless, except for the numerical interest rate involved, all cases cited herein that involve decisions under the former law should continue to be valid legal precedent for contracts and actions undertaken prior to 1981 as well as for most future case decisions.

140. TEX. REV. CIV. STAT. ANN. art. 5069—1.06(1) (Vernon Pam. Supp. 1971-1983).

141. *Id.* art. 5096—1.06(2) (Vernon 1971).

142. *See* Biggs v. Garrett, 651 S.W.2d 342 (Tex. App.—El Paso 1983, no writ).

pay the borrower's attorneys' fees.[143] Otherwise, most borrowers could not afford to protest usurious charges.[144] Because the statute is penal in nature, a court cannot award the statutory penalty and also require that the creditor pay the borrower additional damages.[145]

B. Case Law

Definition of Interest. The threshold question in determining whether charges by a lender are usurious is whether the charge in question constitutes interest. Interest is statutorily defined as "the compensation allowed by law for the use or forbearance or detention of money."[146] During the past year, three cases have considered whether particular charges constituted interest. In *Couch v. Mallory*[147] the Corpus Christi court of appeals ruled that a mortgage company that charged brokerage or origination fees on notes in addition to charging interest at the highest lawful rate committed usury. The court noted that the essential elements of a usurious transaction are: (1) a loan of money; (2) an absolute obligation that the principal be repaid; and (3) the exaction of a greater compensation than allowed by law for the use of the money.[148] The court treated the loan origination fee as compensation for the use of money, which when added to the interest charged on the face of the notes made the transaction usurious.[149]

Similarly, in *Goldring v. Texas Commerce Bank-Arlington*[150] the Fort Worth court of appeals reversed a summary judgment in favor of the lender and held that where a borrower agreed to pay costs of collection up to ten percent of the principal and interest owing on the note in the event of default, and the lender charged the borrower with its actual attorneys' fees, which exceeded the agreed amount, the excess attorneys' fees charged might be construed as interest on the note.[151] The court held that the borrower was not required to prove the existence of a corrupt scheme or an agreement to circumvent the usury law, because the borrower was not complaining of usury on the basis of the note, but for charges in excess of the amount agreed to on the note.[152] Although the note was not usurious on its face, if the borrower shows usurious charges on the basis of the entire transaction, including excess attorneys' fees, a lack of intent by the lender to charge a usurious rate of interest is not a defense.[153] The court

143. TEX. REV. CIV. STAT. ANN. art. 5069—1.06(1) (Vernon Pam. Supp. 1971-1983).
144. *See* Esparza v. Nolan Wells Communications, Inc., 653 S.W.2d 532, 535 (Tex. App.—Austin 1983, no writ).
145. Tri-County Farmer's Co-op v. Bendele, 641 S.W.2d 208, 210 (Tex. 1982).
146. TEX. REV. CIV. STAT. ANN. art. 5069—1.01 (Vernon 1971).
147. 638 S.W.2d 179 (Tex. App—Corpus Christi 1982, writ dism'd).
148. *Id.* at 182 (citing Holly v. Watts, 629 S.W.2d 694, 696 (Tex. 1982)).
149. 638 S.W.2d at 182.
150. 651 S.W.2d 361 (Tex. App.—Fort Worth 1983), *rev'd,* 27 Tex. Sup. Ct. J. 203 (Feb. 8, 1984).
151. *Id.* at 364.
152. *Id.* at 363.
153. *Id.* at 363-64.

remanded the case for a factual determination of whether the excess attorneys' fees were contracted for or were payment for the use, forbearance, or detention of money.

In *Meyer v. Mack Sales, Inc.*[154] the Corpus Christi court of appeals determined that a charge designated as floor plan interest by a truck dealer was not a charge for the use, detention, or forbearance of money and therefore did not constitute true interest within the meaning of the usury statutes. In *Meyer* the plaintiff purchased several trucks from the dealer in May 1978, but due to special rigging ordered by the plaintiff the trucks were not delivered until September 1978. Upon delivery, the dealer presented an itemized invoice to the plaintiff that included a charge denominated floor plan interest. The charge was computed on a basis of ten percent of the total purchase price per annum prorated for the four months between purchase and delivery. The plaintiff subsequently brought suit contending that the ten percent charge was usurious. The trial court granted the dealer's motion for judgment notwithstanding the verdict, and the plaintiff appealed.

The court of appeals began its inquiry by determining what constitutes interest. The court stated that forbearance of the use of money occurs when a debt is due or is to become due and the parties agree to extend the time of its payment.[155] In Meyer the parties agreed that full payment for the vehicles, including floor plan interest, would be due upon delivery. The court reasoned that since no forbearance was present, no charging of interest within the meaning of the usury statute existed.[156]

Calculation of the Rate of Interest. During the past year three cases were decided involving the calculation of the actual rate of interest charged. In *Conte v. Greater Houston Bank*[157] a borrower on a real estate lien note sued the lender, alleging that the lender's deduction of $17,000 as a brokerage fee when the note was made constituted usury when combined with the lender's requirement that the borrower maintain compensating deposit balances and the lender's contractual right to demand payment of the entire balance at its discretion. The court of appeals ruled that the $17,000 deducted from the funds advanced could not be classified as brokerage fee if no third party was involved in the transaction, and that amount therefore constituted prepaid interest.[158] The court noted, however, that under the rule of *Nevels v. Harris*[159] prepaid interest could be spread over the entire term of the note to determine whether the interest charged was usu-

154. 645 S.W.2d 493 (Tex. App.—Corpus Christi 1982, no writ).

155. *Id.* at 495 (citing Parks v. Lubbock, 92 Tex. 635, 51 S.W. 322 (1899)).

156. 645 S.W.2d at 495.

157. 641 S.W.2d 411 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.).

158. *Id.* at 415.

159. 129 Tex. 190, 102 S.W.2d 1046 (1937). In *Nevels* the lender took the borrower's note for $6400, deducted $320, and loaned the borrower only $6080. The court treated the $320 as interest and added it to the stated interest of eight percent. Nevertheless, when the $320 was spread over the entire term of the note, the total interest charged was not usurious.

rious.[160] By spreading the $17,000 brokerage fee over the fifteen-year term of the note, the total interest charged including the stated interest rate was less than the statutory maximum. Although the note was callable at the lender's discretion, the court noted that the note contained a savings provision that stated: "[I]n no event shall any interest payable under this note, regardless of how said interest may be defined or computed, ever exceed the maximum rate permitted under the laws of the State of Texas."[161] The court held that this provision was sufficient to make the note nonusurious despite the lender's demand option.[162] The court further held that a requirement for maintaining compensating balances did not reduce the amount of loan principal for computing the rate of interest charged if the depositor received interest on the deposits and was allowed to and did cash in the certificates of deposit without restraint.[163]

The *Nevels* spreading doctrine can also be applied retrospectively. Although interest assessed on a past due debt may seem usurious, creditors are entitled to spread the interest charges backwards to include any previous period for which interest could have been assessed. During the past year, two decisions held that courts must consider the entire time period for which a creditor may lawfully charge interest on an amount past due, not just the time period during which the creditor has actually charged interest, to determine whether interest is usurious.[164]

Variation by Agreement. Article 5069—1.03 provides for a maximum allowable statutory rate of interest of six percent per year, although this rate may be varied by agreement.[165] During the past year three decisions considered the proof necessary to establish an agreement to pay interest at a rate higher than six percent. In *Triton Oil & Gas Corp. v. Marine Contractors & Supply, Inc.* [166] the Texas Supreme Court ruled that if a letter agreement to share the costs of drilling, completing, equipping, and maintaining an oil and gas well did not specify a rate of interest to be charged, the highest lawful rate allowed on the transaction is the statutory rate of six percent.[167] In *Triton* the well operator unilaterally assessed ten percent charges on the amounts owed by Marine for the costs of production and deducted this amount from Marine's share of well proceeds. The court disagreed with the operator's argument that Marine's silence on receipt of

160. 641 S.W.2d at 415.
161. *Id.* at 416.
162. *Id.* at 418.
163. *Id.*
164. Esparza v. Nolan Wells Communications, Inc., 653 S.W.2d 532 (Tex. App.—Austin 1983, no writ); Motor 9, Inc. v. World Tire Corp., 651 S.W.2d 296 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.).
165. TEX. REV. CIV. STAT. ANN. art. 5069—1.03 (Vernon Pam. Supp. 1971-1983).
166. 644 S.W.2d 443 (Tex. 1982).
167. *Id.* at 445. Because the letter agreement did not provide for interest and the defendant actually charged a 10% rate of interest, the court ruled that the plaintiff made out a prima facie case of usury. Upon the plaintiff's prima facie showing of usury, the defendant therefore had the burden of introducing sufficient evidence of an agreement to pay a higher rate. *Id.* at 445.

joint interest billings showing the interest charges evidenced Marine's acquiescence or agreement to pay the higher rate of interest, or that the operator's unilateral deduction of the charges from Marine's share of proceeds was tantamount to payment by Marine.[168] The court distinguished the case of *Preston Farm & Ranch Supply v. Bio-Zyme Enterprises*,[169] which held that continued payments and purchases made after receipt of interest-charging invoices constituted evidence of an agreement between the parties to pay interest. The court noted that in *Bio-Zyme* the mere failure to object within a reasonable time to the interest charges, without more, could not establish an agreement between the parties.[170] The court noted that although Marine never complained of the interest charges, it also never paid them, and the operator's unilateral act in deducting the interest charges from Marine's share of proceeds was not evidence of an agreement between the parties to pay more than the statutory rate.[171]

In *Amarillo Equity Investors, Inc. v. Craycroft Lacy Partners*[172] the Fort Worth court of appeals held that when the borrower shows that the parties agreed to the charging of interest on account balances, but did not agree to a specific rate, the burden is on the lender to show the existence of an agreement to pay interest above the statutory rate.[173] The lendor introduced testimony showing that the borrower actually made a substantial payment on the account balance after the interest charges appeared on the statements. The court held that mere payment of part of the amount due on the accounts was not evidence of accepting interest charges at a higher rate.[174] Although the borrower never complained of the interest charges, no evidence was introduced to show that the borrower made payments in a manner that would indicate agreement to the higher rate.

The Amarillo court of appeals reached a different result in *Motor 9, Inc. v. World Tire Corp.*[175] In *Motor 9* the court held that although the parties never executed an express agreement for the payment of interest in excess of the statutory rate, the buyer's conduct in continuing to order and receive goods from seller for several months after the first interest charges were imposed was sufficient to support the jury's finding that the buyer agreed to pay interest in excess of the statutory rate.[176]

Procedure—Standing. During the past year, three Texas decisions addressed the issue of who may bring a claim for usury. In *RepublicBank Dallas v. Shook*[177] the Texas Supreme Court held that an individual guarantor of corporate notes cannot claim usury, even though the guaranteed

168. *Id.*
169. 625 S.W.2d 295 (Tex. 1981).
170. 644 S.W.2d at 445.
171. *Id.* at 446.
172. 654 S.W.2d 28 (Tex. App.—Fort Worth 1983, no writ).
173. *Id.* at 30.
174. *Id.* at 31.
175. 651 S.W.2d 296 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.).
176. *Id.* at 302.
177. 653 S.W.2d 278 (Tex. 1983).

loan provided for interest at a rate in excess of the maximum statutory rate for individuals. In *RepublicBank* the lender required an individual to incorporate his business in order to charge interest to the business at the higher rates allowed for corporations. The court held that a lender's requirement that an individual incorporate so that the lender could loan funds to the individual at a higher rate of interest was not a violation of the usury laws, but demonstrated an intent to comply with the laws, and that the corporate entity will therefore be disregarded only when fraud or other illegality is involved.[178] The court further noted that the trend in Texas cases is in harmony with the majority of states and the New York Rule. The New York Rule provides that an individual guarantor of a corporate obligation may not assert a usury defense for a loan that charges interest at a rate permissible for corporations but exceeding the permissible rate for individuals, unless the loan is made to the guarantor to discharge his personal obligations and is not in furtherance of a corporate or general business enterprise.[179] If an individual borrows through a shell corporation to further his own business or commercial enterprises, the defense of usury is not available. Shell corporations may be used to avoid the usury laws provided that the true borrower has a business purpose and the corporation itself is a financing device used in furtherance of the profit-oriented enterprise. The court also noted that pursuant to the 1981 amendment to article 5069—1.04, the lender must determine the purposes of the loan and distinguish between business, commercial, investment, or other purposes and personal, family, household, or agricultural use.[180]

Similarly, the El Paso court of appeals in *Stanley v. Connor Construction Co.*[181] held that the president of a construction company, who was comaker on a note with his corporation, lacked standing to sue for usury when the corporation was the true borrower and the president signed as an accommodation party, although the rate charged exceeded the lawful maximum for individuals.[182] The court noted that although article 1302—2.09 does not explicitly state that accommodation makers cannot assert a claim or defense of usury, guarantors and accommodation makers stand on the same footing with respect to the claim or defense of usury.[183]

In *Orr v. International Bank of Commerce*[184] the court of appeals applied the rule that the usury defense does not survive the death of either the debtor or the creditor. In *Orr* the executrix of the deceased plaintiff's estate appealed from a judgment denying her claim of usury on a promissory note executed by the decedent to the defendant bank. The reviewing court held that the trial court lacked jurisdiction to enter judgment, and

178. *Id.* at 281.
179. *Id.*
180. *Id.* at 281-82; *see* TEX. REV. CIV. STAT. ANN. art. 5069—1.04 (Vernon Pam. Supp. 1971-1983).
181. 651 S.W.2d 34 (Tex. App.—El Paso 1983, no writ).
182. *Id.* at 38.
183. *Id.* at 39; *see* TEX. REV. CIV. STAT. ANN. art. 1302—2.09 (Vernon 1980).
184. 649 S.W.2d 769 (Tex. App.—San Antonio 1983, no writ).

that the absence of jurisdiction was fundamental error subject to review for the first time on appeal.[185] The court's lack of jurisdiction was neither a question of want of subject matter jurisdiction nor of jurisdiction over the parties, but resulted because the underlying cause of action was not one that survives the death of a party.

Procedure—Defenses. Article 5069—1.06 provides that when usurious interest is charged by a lender through accidental and bona fide error, no penalty is imposed.[186] During the past year three cases addressed the issue of what constitutes excusable error. In *Tyra v. Bob Carroll Construction Co.*[187] the Texas Supreme Court considered the case of a creditor who sued to collect on an open account and whose attorney included a prayer for usurious interest in its petition. The attorney used a pleading form as a guide in preparing the petition for the case. Although the creditor never sent a demand for interest to the debtor and never instructed the attorney to add a demand for interest, the attorney inadvertently failed to remove the paragraph from the form pleading. The supreme court affirmed the decision of the court of appeals[188] and held that the attorney's demand for interest was bona fide error, and that no penalty would be imposed against the appellant.[189]

The Austin court of appeals held in *Esparza v. Nolan Wells Communications, Inc.*[190] that if a creditor's agent charged a rate of interest on customers' past due accounts in excess of the statutory maximum, the fact that the agent was ignorant of the usury laws and that the agent's actions violated the creditor's practice and policy did not make the charging of usurious interest an excusable mistake if the agent intended to charge the rate assessed.[191] The court held that a creditor's intent to charge usurious interest is immaterial if, in fact, the lender contracted for, charged, or received interest on a loan in excess of the maximum amount permitted by law.[192] Furthermore, the court held that including the additional element of intent as part of the statutory cause of action, outside the areas of contractual provisions for interest and accidental and bona fide error, would circumvent the statute's regulatory purposes and the legislature's intent.[193] In *Esparza* the court found that although the creditor's agent acted unilaterally and in violation of company practice and policy, he intentionally prepared and mailed the items demanding usurious interest, even though he may have been unaware of the usury laws.[194] Similarly, in *Goldring v. Texas*

185. *Id.* at 772.
186. TEX. REV. CIV. STAT. ANN. art. 5069—1.06(1) (Vernon Pam. Supp. 1971-1983).
187. 639 S.W.2d 690 (Tex. 1982).
188. 618 S.W.2d 853 (Tex. Civ. App.—El Paso 1981), *aff'd*, 639 S.W.2d 690 (Tex. 1982).
189. 639 S.W.2d at 690.
190. 653 S.W.2d 532 (Tex. App.—Austin 1983, no writ).
191. *Id.* at 536.
192. *Id.* at 535 (citing Cochran v. American Sav. & Loan Ass'n, 586 S.W.2d 849, 850 (Tex. 1979)).
193. 653 S.W.2d at 535.
194. *Id.* at 536.

Commerce Bank-Arlington[195] the Fort Worth court of appeals ruled that a lack of intent by a bank to charge a usurious rate of interest was no defense to a claim of usury if the bank intended to make the charges assessed and those charges exceeded the statutory maximum.[196]

Generally, a lender may not raise the defense of estoppel against a borrower's charge of usury. In *Miro v. Allied Finance Co.*,[197] however, the Houston court of appeals held that a corporation was entitled to that defense if the corporation made a usurious loan to its own legal counsel, who prepared the loan agreements in question. The court held that in this instance the borrower had a fiduciary duty to bring any usury problems to the attention of the corporation.[198] The court further ruled that the counsel's deception of the corporation and his breach of fiduciary duty estopped him from raising the defense of usury and recovering damages therefor.[199]

Procedure—Appeals. Texas courts generally hold that usury cannot be raised for the first time on appeal. In *Pinnacle Homes, Inc. v. RCL Offshore Engineering Co.*[200] the court of appeals ruled that the debtors waived the usury defense by not filing a request for additional or amended findings of fact and conclusions of law where the debtors raised the affirmative defense of usury at trial, but the trial court failed to address the issue of whether or not the subject transaction was usurious. The court held that in order to properly preserve the point for appellate review the debtors must request a specific finding that the transaction was usurious and, if the trial court fails to issue such specific finding, the debtors must perfect a bill of exception showing the court's failure or refusal to comply.[201]

In *Tri County Farmer's Co-op v. Bendele*[202] the Texas Supreme Court held that a creditor who failed to make a threshold pleading of its defenses to a charge of usury, including the defense of accidental and bona fide error, was barred from subsequently asserting those defenses on appeal. The court held this to be true even though the trial court only assessed a penalty of double the rate of interest plus attorneys' fees under article 5069—1.06(1) and upon review the court of appeals assessed a penalty of two times the interest, attorneys' fees, and cancellation of principal under article 5069—1.06(2).[203] The supreme court noted that the fact that article 5069—1.06 contains varying degrees of penalties does not create separate causes of actions for which independent defenses may be raised. The court

195. 651 S.W.2d 361 (Tex. App.—Fort Worth 1983), *rev'd*, 27 Tex. Sup. Ct. J. 203 (Feb. 8, 1984).
196. *Id.* at 363-64.
197. 650 S.W.2d 938 (Tex. App.—Houston [14th Dist.] 1983, no writ); *see supra* notes 82-86 and accompanying text.
198. 650 S.W.2d at 944.
199. *Id.*
200. 640 S.W.2d 629 (Tex. App.—Houston [14th Dist.] 1982, no writ).
201. *Id.* at 631.
202. 641 S.W.2d 208 (Tex. 1982).
203. *Id.* at 210.

also affirmed the holding of the court of appeals that the doctrine of de minimis non curat lex is not applicable to excuse a creditor from the increased penalties of article 5069—1.06(2) when the interest charged only slightly exceeded twice the lawful rate.[204]

In *Biggs v. Garrett*[205] the *El Paso* court of appeals reversed a trial court decision that found that a contractor mistakenly charged a homeowner interest on retail materials during a statutory interest-free period, and assessed the maximum statutory penalty.[206] The court further held that because the record contained no evidence to support the trial court's finding of accident, honest error, or honest mistake in charging interest on the retail materials during the statutory interest-free period, the trial court's decision must be reversed due to insufficient evidence and could not be supplemented on appeal.[207]

Finally, in *Orr v. International Bank of Commerce*[208] the *San Antonio* court of appeals noted that lack of jurisdiction in the trial court was a fundamental error and could be raised for the first time on appeal.[209]

IV. EXEMPT PROPERTY

A. Constitutional Amendment

In late 1983 the Sixty-Eighth Texas Legislature proposed and the electorate adopted a constitutional amendment changing the constitutionally protected urban homestead from one based on lot value to one based on size.[210] Prior to the new amendment, homeowners were entitled to exempt

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204. *Id.*

205. 651 S.W.2d 342 (Tex. App.—El Paso 1983, no writ).

206. *Id.* at 345.

207. *Id.* at 344.

208. 649 S.W.2d 769 (Tex. App.—San Antonio 1983, no writ); *see supra* notes 184-85 and accompanying text.

209. 649 S.W.2d at 771.

210. The new amendment was approved on Nov. 8, 1983, and became law on Nov. 30, 1983. The text of the amendment provides:

> The homestead, not in a town or city, shall consist of not more than two hundred acres of land, which may be in one or more parcels, with the improvements thereon; the homestead in a city, town or village, shall consist of lot or lots amounting to not more than one acre of land, together with any improvements on the land; provided, that the same shall be used for the purposes of a home, or as a place to exercise the calling or business of the homestead claimant, whether a single adult person, or the head of a family; provided also, that any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired.

TEX. CONST. art. XVI, § 51. Concurrently, the legislature amended article 3833(a) of the Revised Statutes to provide:

> (a) If it is used for the purpose of a home, or as a place to exercise the calling or business to provide for a family or a single, adult person, not a constituent of a family, the homestead of a family or a single, adult person, not a constituent of a family, shall consist of:
>
> (1) for a family, not more than two hundred acres, which may be in one or more parcels, with the improvements thereon, if not in a city, town, or village; or
>
> (2) for a single, adult person, not a constituent of a family, not more than

up to $5000 in lot value together with improvements thereon as their urban homestead if the lot was acquired prior to 1971, and up to $10,000 in lot value together with any improvements if the lot was acquired after 1971.[211] Texas residents now may exempt from forced sale by creditors up to one acre in lot size as their urban homestead together with all improvements thereon regardless of when the homestead was acquired. The purpose behind the constitutional amendment apparently was to provide increased protection for the homesteads of urban dwellers. Due to the effects of inflation, many lots in urban areas are now worth substantially more than $10,000, which caused families to risk losing their homes in excess value sales by foreclosing creditors.[212] Other reasons for the constitutional amendment were that the change would harmonize the urban homestead provisions with the provisions for rural homesteads, which have always been defined in terms of acreage,[213] and would make unnecessary periodic amendment of the state constitution to reflect changes in the price of land or standard of living.[214]

The constitutional amendment applies retroactively to all existing urban homesteads irrespective of when they were first acquired. The disparate treatment of homesteads acquired prior to and after 1971 is therefore removed. The constitutional amendment also renders moot for precedential purposes much of the existing literature and case law on creditors' rights to foreclose on the excess lot value of urban homestead property.

Certain potential problems are readily apparent with regard to the new homestead amendment. First, the new amendment is arguably too generous because it fails to limit the value of improvements that may be placed on the acre of residential land eligible for exemption. Second, because the urban homestead exemption applies to both residential and business property, under the new constitutional provisions a family-owned business in an urban environment may exempt an acre of commercial real estate without regard to value or improvements thereon. Third, the new homestead exemption could unnecessarily and unreasonably inhibit the financing alternatives of families and businesses who may desire to pledge their urban property as security for a debt. Finally, the new constitutional provision affects residents whose current lots exceed one acre in size. Many of these lots, which were acquired at a time of lower land values, may have been protected from creditors by the old homestead provisions but are now pro-

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one hundred acres, which may be in one or more parcels, with the improvements thereon, if not in a city, town, or village; or

(3) for a family or a single, adult person, not a constituent of a family, a lot or lots amounting to not more than one acre of land, together with any improvements thereon, if in a city, town, or village.

Act of June 19, 1983, ch. 976, § 1, 1983 Tex. Gen. Laws 5309 (amending TEX. REV. CIV. STAT. ANN. art. 3833(a) (Vernon Supp. 1982-1983), now codified before amendment in TEX. PROP. CODE ANN. § 41.001 (Vernon Pam. 1983)).

211. TEX. CONST. art. XVI, § 51 (1970, amended 1983).

212. *Analysis of Proposed Constitutional Amendment as Appearing on November 8, 1983 Ballot* in TEXAS LEGISLATIVE COUNCIL, INFORMATION REPORT 83-4, Aug. 1983, at 13.

213. *See* TEX. CONST. art. XVI, § 51 (1970).

214. TEXAS LEGISLATIVE COUNCIL, *supra* note 212, at 13.

tected only to the extent of one acre. This presents the possibility of an unintended and inequitable result.

Under the new amendment one key issue for litigation will be the proper criteria for distinguishing rural from urban property and for defining the business homestead. Another key question is whether courts will allow urban homesteaders owning more than one acre of property to arbitrarily designate the boundary of their exempt property in order to render the excess acreage either undesirable or valueless to the attaching creditor, or whether the courts will permit urban residents to declare that their urban homestead consists of more than one separate parcel of land, as is permitted for the rural homestead exemption.[215] Finally, because of the lack of specific statutory guidance, courts will need to determine the procedures to govern creditors' foreclosure actions on excess urban acreage, although the foreclosure procedures for excess rural acreage may apply.[216]

B. Case Law

With the increasingly generous urban homestead exemption, Texas courts may have to reconsider whether an urban debtor may convert formerly nonexempt property into homestead property on the eve of bankruptcy, or whether such a transaction should be set aside as a fraud on creditors. In *In re Reed*[217] the Fifth Circuit affirmed a bankruptcy court ruling that a debtor who converted substantially all his nonexempt property into exempt homestead property on the eve of bankruptcy would be entitled to the homestead exemption, but would not receive a discharge in bankruptcy.[218] The court noted that although the debtor's intent to defraud his creditors does not limit the availability of the homestead exemption under the state law, the debtor's eligibility for discharge is determined by federal law and could be denied because of his fraudulent acts.[219] The court found that Reed liquidated substantial amounts of nonexempt property and used the proceeds to reduce the mortgage on his homestead, while fraudulently prevailing upon his creditors to forbear demanding payment on their claims. Although debtors generally are permitted to convert nonexempt property into exempt property on the eve of bankruptcy in order to take full advantage of the bankruptcy exemptions, the court in *Reed* held that if the conversion is fraudulently made, the court may deny the debtor's discharge in bankruptcy.[220]

The generous extent of homestead protection in Texas also was evi-

215. *See* Act of June 19, 1983, ch. 976, § 1, 1983 Tex. Gen. Laws 5309 (amending TEX. REV. CIV. STAT. ANN. art. 3833(a) (Vernon Supp. 1982-1983), now codified before amendment in TEX. PROP. CODE ANN. § 41.001 (Vernon Pam. 1983)) (200-acre rural homestead exemption remains unchanged from prior law).

216. *See* TEX. PROP. CODE ANN. §§ 41.021-.030, 42.003 (Vernon Pam. 1983) (formerly codified at TEX. REV. CIV. STAT. ANN. arts. 3841-3859 (Vernon 1966)).

217. 700 F.2d 986 (5th Cir. 1983).

218. *Id.* at 988.

219. *Id.* at 991.

220. *Id.* at 992.

denced in *Lifemark Corp. v. Merritt*,[221] in which the Houston court of appeals held that an employer's loan of money to an employee, secured by a deed of trust on the employee's former home, did not create a purchase money lien on the employee's new home merely because the loan proceeds were used to purchase the new home.[222] Under Texas law, the only permissible liens attaching to a homestead are those for purchase money, taxes, home improvements, and those ordered by decree of a court.[223] In *Lifemark* the employer argued that the employee who used the borrowed funds to acquire a new home held the home in resulting trust for the employer. The court noted that " 'No resulting trust exists in favor of one who pays the purchase money by way of mere loan to another; the conveyance being taken in the name of a borrower.' "[224] To create a resulting trust " '[t]here must be an actual payment from a man's own money, or what is equivalent to payment from his own money . . . .' "[225]

Further demonstrating the court's solicitous approach to homestead exemptions, the United States Bankruptcy Court for the Western District of Texas held in *In re Harlan*[226] that a chapter 7 debtor who filed for bankruptcy within six months after selling his homestead would be entitled to exempt all of the sales proceeds from his creditors regardless of the use the debtor eventually made of the money.[227] The court reasoned that the rights of all parties are fixed on the date of filing a petition in bankruptcy, and that because Texas statutes protect the proceeds from the sale of a homestead from creditors for six months following such sale,[228] any debtor who files a petition in bankruptcy within the six-month period may permanently exempt the proceeds from the claims of prepetition creditors.[229]

Finally, in *In re Evans*[230] the United States Bankruptcy Court for the Northern District of Texas held that a noncustodial father who contributed to the support of his children was head of a family within the broad meaning of the personal property exemption statutes and therefore was able to claim a $30,000 instead of a $15,000 personal property exemption.[231] The court also determined that partially encumbered furnishings were only partially exempt, and that creditors could foreclose on the debtor's per-

221. 655 S.W.2d 310 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.).

222. *Id.* at 313-14.

223. TEX. PROP. CODE ANN. § 41.002(c) (Vernon Pam. 1983) (formerly codified at TEX. REV. CIV. STAT. ANN. art. 3839 (Vernon 1966)). An example of lien attaching to a homestead through judicial decree would be a community property settlement pursuant to a divorce.

224. 655 S.W.2d at 317 (quoting Jordan v. Jordan, 154 S.W. 359, 361 (Tex. Civ. App.—Texarkana 1913, writ ref'd)).

225. 655 S.W.2d at 317 (quoting Aaron Frank Clothing Co. v. Deegan, 204 S.W. 471, 471 (Tex. Civ. App.—San Antonio 1918, writ ref'd)).

226. 32 Bankr. 91 (Bankr. W.D. Tex. 1983).

227. *Id.* at 93.

228. TEX. REV. CIV. STAT. ANN. art. 3834 (Vernon 1966) (current version at TEX. PROP. CODE ANN. § 41.002(b) (Vernon Pam. 1983)).

229. 32 Bankr. at 93.

230. 25 Bankr. 105 (Bankr. N.D. Tex. 1982).

231. *Id.* at 107-08; *see* TEX. REV. CIV. STAT. ANN. art. 3836(a) (Vernon Supp. 1982-1983) (current version at TEX. PROP. CODE ANN. § 42.001 (Vernon Pam. 1983)).

sonal property to the extent of their encumbrances.[232]

V. CREDITORS' RIGHTS UNDER THE BANKRUPTCY CODE

During the past year, six Texas cases were reported respecting creditors' rights under the United States Bankruptcy Code. Two of these decisions reflect the strong policy of the Bankruptcy Code toward assuring equality of distribution among creditors, and four cases indicate the strong influence of state law in determining creditors' claims against bankrupt debtors.

A. Preferences

In *Yellow House Machinery Co. v. Mack*[233] the Fifth Circuit affirmed the holding of a bankruptcy court that a debtor in possession may recover an eve-of-bankruptcy payment to a creditor as a voidable preference despite the fact that the debtor caused the creditor's position to be undersecured at the time of payment by selling collateral and using the proceeds to operate its business. The creditor attempted to defend the preference action by arguing on general equitable principles that the court should deny recovery to the debtor because the debtor's own misdeed caused the creditor to lose its secured position. The court, however, distinguished between a debtor and a debtor in possession and held that, notwithstanding the debtor's misconduct, the preferential payment may be avoided by the debtor in possession because the benefit would not accrue to the debtor, but to its creditors.[234] The court noted that because of the underlying policy of equality of distribution among creditors,[235] the debtor in possession has the powers of a trustee and can sue under section 547 to set aside a preferential transfer, even though nonbankruptcy cases would prevent any successful recovery from the creditor.[236]

In *Abramson v. St. Regis Paper Co.*[237] the Fifth Circuit held that a trustee may recover the prepetition transfer of an option to purchase certain equipment as a preference even though the bankrupt was financially incapable of exercising the option.[238] In *Abramson* the bankrupt assigned its option to purchase certain equipment to a general creditor in exchange for the forgiveness of an antecedent debt and, in turn, received certain additional consideration from a third party who ultimately purchased the equipment at an increased price from the general creditor. The creditor attempted to defend against the trustee's preference action by claiming that the court could not find a preferential transfer without also finding a diminution of the bankrupt's estate, and that because the bankrupt would have been unable to exercise the option, no diminution of the estate oc-

232. 25 Bankr. at 110-11.
233. 704 F.2d 820 (5th Cir. 1983).
234. *Id.* at 821.
235. 11 U.S.C. § 1107(a) (1982).
236. 704 F.2d at 822; *see* 11 U.S.C. § 547 (1982).
237. 715 F.2d 934 (5th Cir. 1983).
238. *Id.* at 940.

curred, and therefore no preference existed. The Fifth Circuit found the diminution requirement to be implicit in the statute and equally implicit in the decision of the trial court.[239] The court required the creditor to return the difference between the option price and the resale price of the equipment and noted that the trustee's burden of proof did not require the trustee to construct a hypothetical alternative transaction or to prove that such a transaction would have been approved by all the parties concerned.[240] The court considered the bankrupt's earlier fruitless efforts to transfer or use the option to be inconclusive regarding the value of the option to the bankrupt and therefore reasoned that when the consideration paid to the bankrupt by the third party is neither enforceable by the bankrupt nor essential to the transaction, the creditor may not claim the giving of new consideration as a defense to the preference action.[241]

B. State Law Remedies

In *L & N Consultants, Inc. v. Sikes*[242] the Dallas court of appeals was called upon to decide the priority of claims between a deed of trust lienholder and a mechanics' and materialmen's (M&M) lienholder on removable improvements on premises held by a defaulting real estate developer. The trial court held in favor of the M&M lienholder, and the deed of trust lienholder appealed on the grounds that the M&M lien attached only to removable improvements and that at the time of dispute the M&M lienholder's claim against the developer was for $19,728.57 in removables and $18,489.52 in nonremovables. The deed of trust lienholder argued that the trial court erred in permitting the M&M lienholder to satisfy the unpaid amount for nonremovables from removable property. The M&M lienholder argued that his lien extended to all removable improvements, regardless of previous payment, and that article 5459, section 1 allows a M&M lien claimant to recover the entire amount of its debt to the extent of the total value of removable improvements.[243] The court noted that this issue had been raised before the Texas Supreme Court in *First National Bank v. Whirlpool Corp.*,[244] although the supreme court disposed of the case without addressing the merits of that issue. Extrapolating from the supreme court decision in *Whirlpool*, however, the court noted the importance of liberally construing the mechanics' and materialmen's lien statutes in such a way as to protect laborers and materialmen.[245] The court did not go so far as to say that an M&M lienholder was not required to identify and segregate the materials that he actually furnished, but noted that in this case all of the removable materials were furnished by the M&M

239. *Id.* at 937.
240. *Id.* at 938.
241. *Id.* at 940.
242. 648 S.W.2d 368 (Tex. App.—Dallas 1983, writ ref'd n.r.e.).
243. *See* TEX. REV. CIV. STAT. ANN. art. 5459, § 1 (Vernon Supp. 1982-1983) (current version at TEX. PROP. CODE ANN. § 53.123 (Vernon Pam. 1983)).
244. 517 S.W.2d 262 (Tex. 1974).
245. 648 S.W.2d at 372.

lienholder as general contractor. The court concluded that the receipt of prior payment for most of the removables did not effect the M&M lienholder's right to recover his claim for nonremovable improvements from the removable property.[246]

In *Meyers v. Moody*[247] the Fifth Circuit held that under Texas law a director-majority shareholder of an insolvent insurance company who concealed material facts from the disinterested shareholders was individually liable to creditors for damages based on the breach of his fiduciary duty. In this case the director-majority shareholder was found to have been grossly negligent and to have breached his fiduciary duties by undertaking a massive acquisition program based on an artificially inflated surplus. The court held that punitive damages, which are not recoverable in a rule 10b-5 action, may be recovered under pendent state law claims.[248] The court noted that Texas courts historically permitted third party creditors to recover damages directly from corporate directors who fraudulently or even negligently misrepresent the financial condition of the company.[249] Third party creditors, to recover, must rely in part on false financial statements appearing in the annual report of a corporation by the director's authorization, and under Texas common law directors may be held liable for any loss resulting from negligent mismanagement of a corporation.[250] This decision raises new possibilities for recovery in bankruptcy court by trustees, creditors, and investors in failed Texas corporations who may seek to recover the corporation's losses against directors individually if the directors authorized financial statements that materially misstated the financial condition of the corporation.

In *Fan-Reed v. Upper Neches River Municipal Water Authority*[251] the Tyler court of appeals held that the state's action against a privately owned public sewage treatment facility to enjoin violation of state environmental protection laws fell within an exemption to the automatic stay provisions of the Bankruptcy Code. The bankruptcy stay did not prevent the state from closing down the plant, despite the fact that a trustee was operating the water treatment system subject to the control of the bankruptcy court. The court noted that under section 362(b)(4) and (5)[252] the filing of a petition under sections 301, 302, or 303[253] does not stay an action or proceeding by a governmental unit to enforce its police or regulatory power or the enforcement of a judgment, other than a money judgment, obtained in a proceeding to enforce the governmental unit's police or regulatory

246. *Id.* at 371.

247. 693 F.2d 1196 (5th Cir. 1982) (petition for cert. filed).

248. *Id.* at 1220.

249. *Id.* at 1213; *see, e.g.*, Cameron v. First Nat'l Bank, 194 S.W. 469, 476 (Tex. Civ. App.—Galveston 1917, writ ref'd) (director held liable for misrepresentations in corporate financial statements used to obtain loan).

250. 693 F.2d at 1215.

251. 651 S.W.2d 356 (Tex. App.—Tyler 1983, no writ).

252. 11 U.S.C. § 362(b)(4)-(5) (1982).

253. *Id.* §§ 301-303.

power.[254] Insofar as use of the state's police and regulatory powers is concerned, therefore, the filing of a bankruptcy petition and the appointment of a trustee or debtor in possession does not preempt state law from safeguarding the quality of its environment or the rights of its citizens.

Finally, in *Grubbs v. Houston First American Savings Association*[255] the Fifth Circuit held that when a debt secured by a valid lien on a debtor's homestead is in default and is accelerated before the debtor files for relief under chapter 13 of the Bankruptcy Code, the debtor is not permitted to cure his default under section 1322(b)(5), and the creditor is entitled to relief from the automatic stay to pursue its foreclosure action in state court.[256]

VI. ESTABLISHING AND COLLECTING CLAIMS

A. Summary Judgment

In reviewing the long line of Texas cases limiting a plaintiff's right to summary judgment when suing on a promissory note,[257] the court of appeals in *Bevan v. Zarges*[258] held that as a matter of law an owner of a lost promissory note is not entitled to summary judgment.[259] The court followed its previous holding in *Haupt v. Coldwell*,[260] in which it reversed a trial court decision that granted summary judgment even though the instrument in question was lost.[261] The decision of the court of appeals in *Bevan* was reversed on appeal by the Texas Supreme Court on the ground that although a lost note can create a fact issue, the plaintiff's careful drafting of the supporting affidavits can support the motion for summary judgment.[262] Similarly, in *Jackson T. Fulgham Co. v. Stewart Title Guaranty Co.*[263] the plaintiff specifically recited its possession of the note, thus rais-

254. 651 S.W.2d at 360.

255. 9 COLLIER BANKR. CAS. 2d (MB) 478 (5th Cir. 1983).

256. *Id.* at 483-85; *see* 11 U.S.C. § 1322(b)(5) (1982).

257. *See* Life Ins. Co. v. Gar-Dal Inc., 570 S.W.2d 378 (Tex. 1978); Texas Nat'l Corp. v. United Syss. Int'l, Inc., 493 S.W.2d 738 (Tex. 1973); Hidalgo v. Surety Sav. & Loan Ass'n, 462 S.W.2d 540 (Tex. 1970).

258. 645 S.W.2d 589 (Tex. App.—El Paso 1982), *rev'd*, 652 S.W.2d 368 (Tex. 1983).

259. 645 S.W.2d at 591.

260. 500 S.W.2d 563 (Tex. Civ. App.—El Paso 1973, no writ).

261. *Id.* at 565.

262. 652 S.W.2d 368, 369 (Tex. 1983). The El Paso court of appeals explained its rationale in the *Haupt* case by stating:

> It might be added that a person claiming to be the owner of a lost instrument is not a "holder" since he is not in possession of the paper. He has no right as a holder . . . . Because of this and the requirement that the summary judgment proof establish that a plaintiff be the owner and holder of the note, we doubt that this case can ever be disposed of by summary judgment. The Uniform Commercial Code does provide for recovery to the owner of a note who might be in the Plaintiff's position, but there the trial Court may require security indemnifying the defendant against loss by reason of further claims on the instrument.

500 S.W.2d at 565. The supreme court in *Bevan* did not disagree with this analysis but merely concluded that these problems were not a factor here. 652 S.W.2d at 369.

263. 649 S.W.2d 128 (Tex. App.—Dallas 1983, writ ref'd n.r.e.).

ing the presumption of his being a holder in due course.[264] The defense of failure of consideration, although good against the original payee and holder, did not preclude the entry of summary judgment because the plaintiff's status as a holder in due course was not destroyed and the plaintiff's knowledge of the defenses, therefore, was not established.[265] Both *Bevan* and *Stewart Title* illustrate the potential pitfalls for plaintiffs seeking summary judgment in suits on promissory notes.

B. Garnishment

A creditor's counsel can turn to three cases decided during the survey period for guidance when seeking to garnish debtors' funds. In *Canyon Lake Bank v. Townsend*[266] the garnishor bank appealed the decision of the trial court, which held the bank liable for wrongful garnishment. Canyon Lake Bank filed its application for writ of garnishment after obtaining a money judgment. Another bank, named as garnishee, refused to honor checks submitted for payment by the judgment debtor, including one check drawn against a trust checking account.[267] On these facts the trial court awarded a money judgment to Townsend for wrongful garnishment. On appeal, Canyon Lake Bank argued that on the basis of the allegations in its affidavit, which was filed with its application for writ of garnishment, the garnishment was not wrongful.[268] The court of appeals found that although Canyon Lake Bank's affidavit did not recite, as required by statute, that the judgment debtor to the bank's knowledge had no assets available for attachment, the statutory requirement was for the benefit of the garnishee and not the judgment debtor.[269] In this case the garnishee did not object to the affidavit although it would have been within its rights to have the writ quashed.[270] Notwithstanding the judgment debtor's apparent lack of standing to attack the affidavit, the court noted that even if the judgment debtor had standing, in order to attack the affidavit for falsely stating

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264. TEX. BUS. & COM. CODE ANN. § 3.302 (Vernon 1968) defines a holder in due course as a "holder who takes the instrument (1) for value; and (2) in good faith; and (3) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person."

265. 649 S.W.2d at 131. Courts have long held that a note holder is presumed to be a holder in due course. Bryan v. Citizens Nat'l Bank, 628 S.W.2d 761, 763 (Tex. 1982); Favors v. Yaffe, 605 S.W.2d 342, 344 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.). Thus, defenses good against the original holder and payee are invalid against the holder in due course unless the presumption is rebutted.

266. 649 S.W.2d 809 (Tex. App.—Austin 1983, writ ref'd n.r.e.).

267. Townsend's trust account was found to be comprised solely of funds belonging to third parties. The trust account was utilized by Townsend in his profession as an attorney. The jury found that Townsend's inability to use the account caused $20,000 in damages to his reputation and $12,464.45 in damages for loss of future earnings. *Id.* at 810.

268. The application for writ of garnishment must be supported by affidavit that the judgment defendant, within the knowledge of the affiant, does not have property in his possession within the state that is subject to execution sufficient to satisfy the judgment. TEX. REV. CIV. STAT. ANN. art. 4076 (Vernon 1966).

269. 649 S.W.2d at 811.

270. *Id.*; *see* Bowers v. Continental Ins. Co., 65 Tex. 51, 52 (1885); Gottesman v. Toubin, 353 S.W.2d 294, 299 (Tex. Civ. App.—Houston [1st Dist.] 1962, no writ).

nonawareness of property actually in existence, the judgment debtor must plead and prove to the contrary, which he did not do in the instant case.[271] Finally, the court of appeals rejected the judgment debtor's argument that he was injured by the garnishee's freezing of the trust account. Despite the undisputed damage to the judgment debtor, the act of the garnishee could not be imputed to the garnishor.[272]

The case of *Black Coral Investments v. Bank of the Southwest*[273] further defines the garnishor's burden in obtaining a writ. In *Black Coral* the judgment debtor intervened in a garnishment action and, at the hearing on its motion to quash, introduced evidence that it owned personal property located in a warehouse within the state. The trial court ruled in the judgment debtor's favor, finding that (1) the garnishor did not have a good faith belief that the judgment debtor was without assets within the state sufficient to satisfy the judgment; (2) the judgment debtor had sufficient assets within the state to satisfy the judgment; and (3) the garnishor could not show, as a matter of fact, that the judgment debtor did not have assets sufficient to satisfy the judgment.[274] On appeal, the court of appeals held that the trial court misread article 4076 regarding the content of the garnishor's affidavit as requiring too great a burden on the garnishor and as requiring the garnishor to prove a negative.[275]

The most significant case regarding garnishments during the survey period emanates from the Texas Supreme Court and should be heeded by all garnishees whose debt arises pursuant to an unmatured promissory note. In *Williams v. Stansbury*[276] Williams, a holder in due course, notified the garnishee, an obligee under a promissory note to the obligor-judgment debtor, that Williams had purchased and that payment was due to him.[277]

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271. 649 S.W.2d at 811; *see* Industrial State Bank v. Wylie, 493 S.W.2d 293, 296-97 (Tex. Civ. App.—Beaumont 1973, no writ); King v. Tim, 352 S.W.2d 910, 913 (Tex. Civ. App.—El Paso 1961, no writ); Peerless Oil & Gas Co. v. Teas, 138 S.W.2d 637, 640 (Tex. Civ. App.—San Antonio 1940), *aff'd*, 158 S.W.2d 758 (Tex. 1942); Griffin v. Cawthon, 77 S.W.2d 700, 702 (Tex. Civ. App.—Fort Worth 1934, writ ref'd).

272. 649 S.W.2d at 811.

273. 650 S.W.2d 135 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.).

274. *Id.* at 136.

275. *Id.* TEX. REV. CIV. STAT. ANN. art. 4076, § 3 (Vernon 1966) states that writs of garnishment may issue "[w]here the plaintiff has a valid subsisting judgment and makes affidavit that the defendant has not, within his knowledge, property in his possession within this State, subject to execution, sufficient to satisfy such judgment."

276. 649 S.W.2d 293 (Tex. 1983).

277. Generally, a judgment debtor may not circumvent the garnishee's debtor-creditor relationship with the judgment debtor by assignment. Gause v. Cone, 73 Tex. 239, 241, 11 S.W. 162, 163 (1889); Intercontinental Terminals Co. v. Hollywood Marine, Inc., 630 S.W.2d 861, 863 (Tex. Civ. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.). The supreme court in *Stansbury* noted:

> An exception to this rule arises when the underlying debt in the hands of the garnishee has been suspended by the issuance of a negotiable instrument that has not fully matured. The reasons for this exception are explained in 1 E. Cook, Creditors' Rights in Texas § 3.37(a) (2d ed. 1981) at 133:
>
> > Such favored treatment is given to the holder in due course not simply to protect good-faith purchase but also, and even more importantly, to serve the greater need of certainty in commercial dealings. Granting the right to cut off various defenses to a holder in due course gives the

Some years passed after Williams's demand for payment, and Stansbury settled with the garnishor but ignored Williams's claim to payment under the note. The supreme court, noting Williams's status as a holder in due course, concluded that despite Williams's knowledge of the garnishment action, he was under no obligation to intervene in that action to preserve his claim against Stansbury. The court concluded that it was Stansbury's responsibility to bring all claimants to the note into the litigation in order to protect himself.[278] Stansbury's failure to do so unfortunately left him open to double liability.

C. Attorneys' Fees

The decision by the Fifth Circuit in *Atlantic Richfield Co. v. Manges*[279] provides an excellent source for determining the standards for reasonable attorneys' fees in state or federal courts. In the course of finding that Atlantic Richfield was entitled to the fees pled because its fees were not, as contended by Manges, incurred in asserting an excessive claim, the court reviewed the state and federal standards for attorneys' fees. In response to Manges's claim that Atlantic Richfield should be denied recovery of attorneys' fees for pursuing an excessive claim, the Fifth Circuit stated that a party's claim is excessive if (1) the claim wrongfully demands an amount in excess of what is due and (2) the creditor either refuses or clearly indicates that he will refuse the amount actually due.[280] The court found, however, that the elements of an excessive claim were not present and that although the trial court properly analyzed the issue of the propriety of attorneys' fees according to state law, the award of attorneys' fees was also supported by the federal standards announced in *Johnson v. Georgia Highway Express, Inc.*[281] The court reaffirmed that in diversity cases state rules regarding attorneys' fees apply.[282]

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purchaser of commercial paper confidence that it will be enforceable and, therefore, worth the amount that it purports to be worth.

649 S.W.2d at 296 n.2.

278. *Id.* at 296.

279. 702 F.2d 85 (5th Cir. 1983).

280. *Id.* at 87; *see* Tuthill v. Southwestern Pub. Servs. Co., 614 S.W.2d 205, 212 (Tex. Civ. App.—Amarillo 1981, writ ref'd n.r.e.).

281. 488 F.2d 714 (5th Cir. 1974). The twelve-part test required by *Johnson* considers:

(1) the time and labor required;
(2) the novelty and difficulty of the questions;
(3) the skill requisite to perform the legal service properly;
(4) the preclusion of other employment by the attorney due to acceptance of the case;
(5) the customary fee;
(6) whether the fee is fixed or contingent;
(7) time limitations imposed by the client or the circumstances;
(8) the amount involved and the results obtained;
(9) the experience, reputation, and ability of the attorneys;
(10) the undesirability of the case;
(11) the nature and length of the professional relationship with the client; and
(12) awards in similar cases.

282. 702 F.2d at 87. The Texas courts consider:

The recoverability of attorneys' fees in suits founded on oral or written contracts was reviewed during the survey period in *Pan American Bank v. Nowland*.[283] The court of appeals interpreted the 1979 amendment to article 2226, which now permits the recovery of attorneys' fees in a suit founded on oral as well as written contracts.[284] Despite the fact that the plaintiff's original petition was filed in 1977 and amended to include a prayer for attorneys' fees in 1980 after the amendment to article 2226 took effect, the court concluded that the intent of the legislature permitted the plaintiff to recover his attorneys' fees.[285] The court cited section 2 of the amendatory act to article 2226 and concluded that all pending actions would benefit from the provisions in article 2226.[286]

The recoverability of attorneys' fees for defending against counterclaims such as usury, duress, and lack of good faith when pursuing a suit on a promissory note was considered in *RepublicBank Dallas v. Shook*.[287] The court of appeals held that the value of the efforts of the bank's attorneys to collect on the promissory note, absent a response to the defendant's claims of usury, duress, and lack of good faith, was substantially less than the amount of attorneys' fees prayed for and that defending against those defenses was not contemplated by the contract.[288] The supreme court disagreed with the court of appeals, citing the case of *Williamson v. Tucker*[289] and noting that had the bank's attorneys not defended against the allegations of the defendant, it probably would not have recovered on the note.[290]

D. Foreclosures

Texas courts of appeals rendered two decisions during the survey period

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(1) the nature of the case: its difficulties, complexities, importance, and the nature of the services required to be rendered by counsel;
(2) the amount of money involved, the client's interest at stake, the amount of time devoted by the attorney, and the benefit derived by the client; and
(3) the time necessarily spent by the attorney, the responsibility imposed upon counsel, and the skill and experience reasonably needed to perform the services.

Tuthill v. Southwestern Pub. Servs. Co., 614 S.W.2d 205, 212-13 (Tex. Civ. App.—Amarillo 1981, writ ref'd n.r.e.).

283. 650 S.W.2d 879 (Tex. App.—San Antonio 1983, no writ).

284. TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1984).

285. 650 S.W.2d at 883.

286. *Id.*

287. 653 S.W.2d 278 (Tex. 1983).

288. 627 S.W.2d 741 (Tex. App.—Tyler 1981).

289. 615 S.W.2d 881, 892 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.). The facts in *Williamson* are less favorable to the party seeking to recover attorneys' fees. In *Williamson* the plaintiff sought recovery on the note in state court and had to defend an action by the debtor to rescind the obligation evidenced by the note in federal court. Yet, the court of appeals found that if the creditor had not defended the action in federal court, it would not have recovered on the note. *Id.* at 892.

290. 653 S.W.2d at 282. For other reported decisions concerning collection of attorneys' fees when suing on a promissory note, see Buffalo Sav. & Loan Ass'n v. Trumix Concrete Co., 641 S.W.2d 650 (Tex. App.—Corpus Christi 1982, no writ); Boulevare v. Security State Bank, 640 S.W.2d 735 (Tex. App.—Houston [14th Dist.] 1982, no writ).

dealing with a creditor's right to foreclose without notice of acceleration pursuant to the terms of the deed of trust, but the decisions reached opposite results. In *Bodiford v. Parker*[291] the Fort Worth court of appeals affirmed the trial court's decision to equitably restrict and enjoin the enforcement of a deed of trust that purportedly allowed the trustee to foreclose without providing the debtor with notice of acceleration. The deed of trust contained language that permitted the trustee to foreclose without sending the debtor notice of acceleration and demand for payment of past due installments.[292] After receiving notice of foreclosure without prior notice of intent to accelerate, the debtor obtained an injunction preventing foreclosure. The court of appeals reviewed the decision of *Ogden v. Gibraltar Savings Association*[293] and determined that notice, in the absence of waiver of such notice, is a prerequisite to foreclosure.[294] Although such a waiver could arguably have been found in the deed of trust, the promissory note contained no such waiver language, and the court concluded that the exception to notice allowed by *Odgen* was not present here.[295]

A contrary result was reached in *Chapa v. Herbster*[296] although the facts were similar to those contained in *Bodiford*. In *Chapa* the debtor at-

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291. 651 S.W.2d 338 (Tex. App.—Fort Worth 1983, no writ).

292. The deed of trust contained the following language:

> But should Grantors make default in the punctual payment of said indebtedness or any part thereof, principal or interest, as the same shall become due and payable, . . . then . . . the entire indebtedness hereby secured . . . may, at the option of the Beneficiary, . . . be immediately matured and become due and payable without demand or notice of any character, and it shall thereupon, or at any time thereafter, be the duty of the Trustee . . . to enforce this Trust and make sale of said real property as provided in Article 3810 . . . after notice as provided in said article (but without any other notice than is required by said Article 3810, as amended) . . . .

Id. at 339.

293. 640 S.W.2d 232 (Tex. 1982).

294. 651 S.W.2d at 339. The court in *Bodiford* summarized the general rule regarding notices set forth in *Ogden*:

> 1. Notice of intent to accelerate is necessary in order to provide the debtor an opportunity to cure his default prior to the harsh consequences of acceleration and foreclosure.
> 2. Proper notice that the debt has been accelerated, in the absence of a contrary agreement or waiver, cuts off the debtor's right to cure his default and gives notice that the entire debt is due and payable.

Id. at 339 (quoting *Ogden*, 640 S.W.2d at 234).

295. *Id.* A vigorous dissent was lodged by two of the justices on the court. The dissent cited the waiver language in the deed of trust as sufficiently clear to enable the trustee to have met the standard contained in *Ogden*. 651 S.W.2d at 340 (Jordan, J., dissenting). The *Ogden* standard requires notice of intent to accelerate "in the absence of a contrary agreement or waiver." *Ogden*, 640 S.W.2d at 234. Further, the dissent rejected the apparent conclusion of the majority that a waiver, to be enforceable, must be contained both in the promissory note and the deed of trust. Justice Jordan, speaking for the dissent, stated, "I believe that proposition is untenable for the reason that where a note and deed of trust are executed contemporaneously as security instruments in the course of a single transaction, as in this case, they are to be considered as though they are in fact a single instrument." 651 S.W.2d at 341 (citing Bennett v. State Nat'l Bank, 623 S.W.2d 719 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ); B & B Pharmacy & Drug, Inc. v. Lake Air Nat'l Bank, 449 S.W.2d 340 (Tex. Civ. App.—Waco 1969, writ dism'd)).

296. 653 S.W.2d 594 (Tex. App.—Tyler 1983, no writ).

tempted to set aside a foreclosure on the grounds that the trustee did not provide notice of demand, presentment, and acceleration of maturity. Both the promissory note and the deed of trust contained express provisions as to waiver of notice of demand and acceleration.[297] The court of appeals affirmed that trial court's judgment for the trustee and stated that when "a *waiver of notice* exists such notice of acceleration is dispensed with and all that is required is statutory compliance . . . ."[298] The two cases can be distinguished, although poorly, on the basis that unlike the note in *Chapa*, the promissory note in *Bodiford* did not contain unequivocal waiver language.

E. Suretyship

As usual, there was a dearth of suretyship cases reported during the survey period. One case of some note is *City of San Antonio v. Argonaut Insurance Co.*[299] In *Argonaut* the trial court granted a summary judgment in favor of the surety against the city of San Antonio, which attempted to collect on a performance bond relating to alleged improper construction of a waste water treatment plant. The trial court found that the performance bond in question, although not specifically referring to a limitation period for making a claim, incorporated as a matter of law article 5160, which

297. The promissory note contained the following language regarding waiver of notice:

> This note shall become immediately due and payable at the *option* of the Payee or other holder hereof, *without presentment or demand or any notice to the Maker* or any other person obligated or to become obligated hereon, upon default in the payment of any installment hereon when due, *upon default under the terms of any security instrument, or if any event occurs or condition exists which authorizes the acceleration of maturity hereof under any agreement made by the Maker.*
>
> . . . .
>
> The Maker, and all sureties, endorsers, and guarantors of this Note (i) *waive demand*, presentment for payment, notice of nonpayment, protest, notice of protest and *all other notice*, filing of suit and diligence in collecting this Note or enforcing any of the security herefor.

Id. at 601 (emphasis added by court). The language in the deed of trust regarding waiver of notice stated:

> *That in the event of default* in the payment of any installment, principal or interest, of the note hereby secured, in accordance with the terms hereof, *or of a breach of any of the covenants herein contained to be performed by Grantors, then and in any of such events Beneficiary may elect, Grantors hereby expressly waiving presentment and demand for payment, to declare the entire principal indebtedness hereby secured with all interest accrued theron and all other sums hereby secured immediately due and payable*, and in the event of default in the payment of said indebtedness when due or declared due, it shall thereupon, or at any time thereafter, be the duty of the Trustee, or his successor or substitute as hereinafter provided, at the request of Beneficiary (which request is hereby conclusively presumed), to enforce this trust; . . . *and the recitals in the conveyance to the Purchaser or Purchasers [at trustee's sale] shall be full and conclusive evidence of the truth of the matters therein stated, and all prerequisites to said sale shall be presumed to have been performed*, and such sale and conveyance shall be conclusive against Grantors, their heirs and assigns.

Id. (emphasis and brackets added by court).

298. *Id.* (emphasis in original).

299. 644 S.W.2d 90 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.).

limits suits on performance bonds to one year after a certificate of acceptance is executed by the beneficiary.[300] In this case, since the city of San Antonio filed suit over three years after accepting the project, the court of appeals held that summary judgment was proper.[301]

VII. BANKRUPTCY

The rules governing consumer and creditor rights are radically altered whenever the veil of bankruptcy is invoked. The developments in and the nuances of bankruptcy practice are beyond the scope of this Article, but recent developments regarding jurisdiction merit mention.

The celebrated Braniff Airways bankruptcy led to a partial resolution of the jurisdictional morass left in the wake of *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*[302] Until the Fifth Circuit rendered its decision in *In re Braniff Airways, Inc.*,[303] speculation abounded regarding the operation and resolution of disputes before the bankruptcy court.[304] The administrative office of the United States courts drafted an emergency rule

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300. TEX. REV. CIV. STAT. ANN. art. 5160 (Vernon 1971) provides:

> A. Any person or persons, firm, or corporation . . . entering into a formal contract in excess of Two Thousand Dollars ($2,000) with this State, any department, board or agency thereof . . . or any other governmental or quasi-governmental authority, whether specifically named herein or not, authorized under any law of this State, general or local, to enter into contractual agreements for the construction, alteration . . . or the prosecution or completion of any public work, shall be required before commencing such work to execute to the aforementioned governmental authority . . . the statutory bonds as hereinafter prescribed. . . .
>
> (a) A Performance Bond in the amount of the contract. . . .
>
> (b) A Payment Bond, in the amount of the contract. . . .
>
> . . . .
>
> G. All suits instituted under the provisions of this Act shall be brought in a court of competent jurisdiction in the county in which the project or work, or any part thereof, is situated. No suit shall be instituted on the performance bond after the expiration of one (1) year after the date of final completion of such contract.

As noted by the court:

> "The terms of said Article 5160 are by law incorporated in and become part of all bonds executed by a general contractor and furnished by him in connection with the construction of public work or public buildings for the state, county, school district or municipalities, whether or not such article is mentioned, referred to or incorporated in such bond."

644 S.W.2d at 91 (quoting United Title Co., Inc. v. Kermit Indep. School Dist., 273 S.W.2d 434, 437 (Tex. Civ. App.—El Paso 1954, writ ref'd n.r.e.)).

301. 644 S.W.2d at 92.

302. 458 U.S. 50 (1982).

303. 700 F.2d 214 (5th Cir. 1983), *aff'g* 27 Bankr. 231 (N.D. Tex.), *cert. denied*, 103 S. Ct. 2122 (1983).

304. The operative provision of the jurisdictional grant to the bankruptcy courts under the Bankruptcy Reform Act of 1978, is 28 U.S.C. § 1471 (1982) which provides:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.
>
> (c) The bankruptcy court for the district in which a case under title 11 is

to continue the operation of the bankruptcy courts, due to the clear implication in *Northern Pipeline* that the bankruptcy courts were without jurisdiction except in certain limited circumstances. That rule, adopted by the Fifth Circuit as well as other circuits, was intellectually indefensible according to some commentators because the courts were legislating jurisdiction in contravention of the United States Constitution. The per curiam decision by the Fifth Circuit affirming the rationale and holding of the district court in *In re Braniff Airways, Inc.*, emphasized the operability of the emergency rule. Consumers and creditors can now look to the bankruptcy forum to resolve disputes and claims with the knowledge that finality of decisions is at least possible.[305]

commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

(d) Subsection (b) or (c) of this section does not prevent a district court or a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.

(e) The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case.

305. *See In re* Basin Ref., Inc., 30 Bankr. 578 (Bankr. N.D. Tex. 1983). Other courts have had more trouble with the emergency rule. *See In re* Conley, 26 Bankr. 885 (Bankr. M.D. Tenn. 1983); *In re* Otero Mills, 10 BANKR. CT. DEC. (CRR) 899 (Bankr. D.N.M. 1983).