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# CREDITOR AND CONSUMER RIGHTS

by

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**R** EPORTED Texas court decisions revealed only limited substantive changes in the area of creditor and consumer rights in 1984. The reported decisions primarily concerned the application of existing law to new factual situations, with the greatest amount of litigation occurring in the area of borrowers' rights under the Consumer Credit Code and in the area of creditors' ancillary remedies in enforcing their claims.

## I. THE CONSUMER CREDIT CODE

During the 1984 survey period, one reported decision by the Texas Supreme Court and several reported decisions by courts of appeals addressed issues arising under the Texas Consumer Credit Code<sup>1</sup> (Credit Code) concerning the construction of contracts, the application of the doctrine of *de minimis non curat lex*, and the liability of holders and assignees of retail installment contracts to the original consumers.

### A. Construction of Contracts

In *Jim Walter Homes, Inc. v. Schuenemann*<sup>2</sup> the Texas Supreme Court held in a divided opinion that a creditor had contracted to collect an unearned time price differential<sup>3</sup> of more than twice that article 6.02 of the Credit Code allows,<sup>4</sup> and imposed statutory penalties on the creditor pursu-

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1. TEX. REV. CIV. STAT. ANN. arts. 5069—1.01 to —51.19 (Vernon 1971 & Pam. Supp. 1971-1985) is commonly referred to as the Texas Consumer Credit Code, and all references herein, unless otherwise noted, are made thereto.

2. 668 S.W.2d 324 (Tex. 1984).

3. Time price differential is defined in article 5069—6.01(h) of the Credit Code as the amount "paid or payable for the privilege of purchasing goods or services to be paid for by the buyer in installments over a period of time." TEX. REV. CIV. STAT. ANN. art. 5069—6.01(h) (Vernon 1971).

4. *Id.* art. 5069—6.02(9)(a) provides that a seller or holder may

ant to sections 8.01<sup>5</sup> and 8.02<sup>6</sup> of the Credit Code.<sup>7</sup> *Schuenemann* is noteworthy because it required the court to construe an agreement between the parties to a home construction contract consisting of three separate documents: a "Building Contract", an "Installment Mechanic's Note," and a "Mechanic's Lien Contract With Power Of Sale"; at least one of the instruments arguably characterized the transaction as not requiring payment of unearned time price differential on default.<sup>8</sup> The majority noted, however, that when "the default maturity clauses in the installment note and lien contract unambiguously call for the collection of unearned time price differential,"<sup>9</sup> the offending documents were not saved by language in the Building Contract that arguably described a contrary intent.<sup>10</sup>

The court acknowledged that the creditor made no attempt to accelerate the indebtedness and no intent was shown actually to charge the forbidden rate, but noted that merely contracting for the usurious time price differential triggered the Credit Code penalties.<sup>11</sup> The court recognized that instruments "executed at the same time, for the same purpose, and in the course of the same transaction are to be construed together" as an entire agreement,<sup>12</sup>

charge, collect and receive a time price differential which shall not exceed an amount determined in accordance with the following schedule:

(i) On so much of the principal balance as does not exceed Five Hundred Dollars, Twelve Dollars per One Hundred Dollars per annum;

(ii) On so much of the principal balance as exceeds Five Hundred Dollars, but is not in excess of One Thousand Dollars, Ten Dollars per One Hundred Dollars per annum;

(iii) On so much of the principal balance as exceeds One Thousand Dollars, Eight Dollars per One Hundred Dollars per annum.

5. *Id.* art. 5069—8.01(a) (Vernon Pam. Supp. 1971-1985) states that violation of the Consumer Credit subtitle by "contracting for, charging or receiving interest, time price differential or other charges" greater than the amount authorized shall subject the violator to forfeiture of "twice the amount of interest or time price differential and default and deferment charges contracted for, charged or received, and reasonable attorneys' fees fixed by the court."

6. Article 5069—8.02 of the Credit Code provides that any violation arising under article 5069—8.01(a) that involves interest, time price differential, and other charges that aggregate to more than double the total amount authorized by the Credit Code shall cause the violator to forfeit "as an additional penalty all principal or principal balance, as well as all interest or time price differential, and all other charges, and shall pay reasonable attorneys' fees actually incurred by the obligor in enforcing the provisions of this Article." *Id.* art. 5069—8.02.

7. 668 S.W.2d at 329.

8. The building contract contained the following language:

The promissory note and (MORTGAGE), (DEED TO SECURE DEBT), (DEED OF TRUST), shall have customary covenants and conditions included therein and shall bear interest from maturity at the rate of 6% per annum until paid and shall provide that in event of default in payment of any installment provided for hereunder for a period of thirty (30) days, the holder thereof may at its option declare all of the remainder of said debt immediately due and collectible and any failure to exercise said option shall not constitute a waiver of the right to exercise the same at any other time.

*Id.* at 327 (emphasis by court).

9. *Id.* at 329.

10. *Id.* at 330. The court noted that the parties had not intended the building contract to determine their rights and duties upon acceleration of the obligation; rather, the "provision merely states what shall be provided in other instruments in the event the Schuenemanns default in payment . . ." *Id.* (emphasis in original).

11. *Id.* at 328.

12. *Id.* at 327.

and also acknowledged the rule requiring that an allegedly usurious contract be construed as complying with the law if reasonably possible.<sup>13</sup> The court held, however, that because the default maturity clauses of the note and the lien contract provided for acceleration of the note rather than the debt<sup>14</sup> and only the building contract disclosed the fact that part of the payments represented in the note reflected time price differential, applying the severe statutory penalties in this instance was consistent with the legislative intent to protect consumers from being deceived into believing that creditors lawfully could collect unearned time price differentials upon acceleration of their obligations.<sup>15</sup>

In a case involving another multi-instrument contract, *Carbajal v. Ford Motor Credit Co.*,<sup>16</sup> the court deemed an alleged defect in an automobile sales contract cured by the language of a separate instrument executed as part of the same transaction. In *Carbajal* the automobile purchaser sued the defendant creditor for violations of the Credit Code, alleging that the sales contract failed to disclose clearly and conspicuously, as required by section 7.06 of the Credit Code, a requirement that the purchaser maintain physical damage insurance.<sup>17</sup> The *Carbajal* court ruled that the second instrument,

13. *Id.* at 332.

14. The note provided:

*[I]n the event of default in payment of any installment for a period of thirty days, the holder of this note may, at its option, declare all the remainder of said installments due and said note will mature and it shall at once become due and payable and the Mechanic's Lien or the Deed of Trust Lien herein mentioned, either or both, shall become subject to foreclosure proceedings, as the holder may elect.*

*Id.* at 327-28 (emphasis by court). Similar language in the lien contract provided that: Should owners make default in the punctual payment of said note, or any part thereof, as the same becomes due and payable . . . the holder of said note may, at his option, declare the entire remaining unpaid balance of said note immediately due, and, if not immediately paid then in that event the Trustee or his successor is hereby authorized and empowered to sell said property.

*Id.* at 328 (emphasis by court).

15. *Id.* at 332-33. Three justices dissented in the *Schuenemann* decision. The dissenting justices indicated that, in light of the rule requiring that the court construe documents together and the presumption that the parties intended to obey the law and to enter into a non-usurious contract, the court should have interpreted the transaction in question as not providing for the acceleration of unearned time price differential, particularly between the original parties to the agreement. *Id.* at 334-36.

16. 658 S.W.2d 281 (Tex. App.—Corpus Christi 1983, writ dismissed w.o.j.).

17. TEX. REV. CIV. STAT. ANN. art. 5069—7.06(3) (Vernon Pam. Supp. 1971-1985) provides that:

When insurance is required in connection with such a contract or agreement made under this Chapter, the seller or holder shall furnish the borrower a statement which shall clearly and conspicuously state that insurance is required in connection with the contract, and that the buyer shall have the option of furnishing the required insurance either through existing policies of insurance owned or controlled by him or of procuring and furnishing equivalent insurance coverages through any insurance company authorized to transact business in Texas. . . . Such statement or statements may be made in conjunction with or as part of the retail installment contract required by Article 7.02 or may be made in a separate written statement or statements.

Mr. Carbajal alleged that the retail installment contract did not comply with the requirements of article 7.06(3) because it contained a paragraph entitled "OPTIONAL INSURANCE" that created confusion regarding the buyer's obligation to insure the vehicle purchased, as previously held in *Portland Tradewinds Ford v. Lugo*, 613 S.W.2d 26, 29 (Tex. Civ. App.—Corpus

which clearly set forth the insurance requirement, cured any confusion over insurance requirements created by the retail installment contract itself.<sup>18</sup> The debtor in *Carbajal* also alleged that the creditor violated the Credit Code by failing to notify the debtor of certain defective language in the retail installment contract within sixty days after actually discovering the statutory violation as required by section 8.01(c)(1) of the Credit Code.<sup>19</sup> In deciding that Ford timely gave appropriate corrective notice, the court noted that Ford previously had been a party to lawsuits wherein appellate court decisions had split regarding the legality of the clause in question.<sup>20</sup> Accordingly, the court ruled that Ford did not actually discover that the language in question violated the Credit Code until the Texas Supreme Court resolved the issue and that Ford mailed the appropriate corrective notice within sixty days thereafter.<sup>21</sup>

In *Tradewinds Ford Sales, Inc. v. Paiz*<sup>22</sup> a creditor automobile seller unsuccessfully appealed a decision that language in a retail installment sales contract that prohibited a buyer from transferring his interest in the property violated section 7.03(5) of the Credit Code, which entitles retail purchasers to transfer their rights upon written consent of the seller.<sup>23</sup> The seller argued that a separate contractual clause providing for subsequent modification of the contract in writing furnished the buyer with protection equivalent to that provided by the statute.<sup>24</sup> The court noted that "a seller

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Christi 1981, no writ). The *Carbajal* court distinguished the case at bar from *Lugo*, however, because in *Carbajal* a second form that expressly stated that the installment contract required the vehicle to be continuously covered by property damage insurance was provided to and executed by the buyer. 658 S.W.2d at 285.

18. 658 S.W.2d at 285.

19. TEX. REV. CIV. STAT. ANN. art. 5069—8.01(c)(1) (Vernon Pam. Supp. 1971-1985) provides that:

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

20. 658 S.W.2d at 283. The clause, the waiver portion of which ultimately was found to violate public policy and the Credit Code, provided that "[a]ny personalty in or attached to the Property when repossessed may be held by Seller without liability and Buyer shall be deemed to have waived any claim thereto unless written demand by certified mail is made upon Seller within 24 hours after repossession." *Id.*

Prior appellate court decisions regarding the legality of the waiver provision included *Ford Motor Credit Co. v. McDaniel*, 613 S.W.2d 513, 515-17 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.) (finding a violation), and *Ford Motor Credit Co. v. Zapata*, 605 S.W.2d 362, 365 (Tex. Civ. App.—Beaumont 1980) (finding no violation in the clause), *rev'd*, 615 S.W.2d 198 (Tex.), *cert. denied*, 454 U.S. 1024 (1981).

21. 658 S.W.2d at 284.

22. 662 S.W.2d 164 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.).

23. TEX. REV. CIV. STAT. ANN. art. 5069—7.03(5) (Vernon Pam. Supp. 1971-1985) states that "[a] buyer under a retail installment contract may, upon written consent of the holder, transfer his equity in a motor vehicle at any time to another person . . ." The offending language of the contract in question provided that the "[b]uyer shall not transfer or otherwise dispose of any interest in this contract or the Property." 662 S.W.2d at 165.

24. Paragraph 20 of the contract provided that "[t]his contract constitutes the entire agreement between the parties and no modification hereof shall be valid in any event, and

has a duty to prepare a contract in accordance with the standards established by the Texas Consumer Credit Code" and may not prohibit what the Credit Code expressly allows.<sup>25</sup>

The factual situation in the *Tradewinds Ford Sales* decision, however, is difficult to distinguish from the same court's decision in *Lundquist Buick-Opel, Inc. v. Wikoff*.<sup>26</sup> In *Lundquist* a clause in the contract expressly prohibited the debtor from asserting claims and defenses he might have against the secured party's assignee except as granted in the security agreement.<sup>27</sup> The court held that the clause did not violate the Credit Code because a reasonable construction of the security agreement granted the buyer the right to assert against the seller and any assignee all the claims and defenses available to the buyer under Texas law despite the express limiting language.<sup>28</sup>

### B. Application of the De Minimis Doctrine

Another issue raised in the *Lundquist* decision concerned whether defendant automobile dealer's failure to disclose a two dollar state inspection fee in the retail installment contract so violated the requirements of article 7.02(6)(c) of the Credit Code as to justify imposition of statutory penalties.<sup>29</sup>

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Buyer expressly waives the right to rely thereon, unless made in writing signed by Seller." 662 S.W.2d at 165.

25. *Id.*

26. 659 S.W.2d 466 (Tex. App.—Corpus Christi 1983, no writ).

27. The clause appears to violate TEX. REV. CIV. STAT. ANN. art. 5069—7.07 (Vernon Pam. Supp. 1971-1985), which provides:

No retail installment contract or retail charge agreement shall:

(4) Provide for a waiver of the buyer's rights of action against the seller or holder or other person acting therefor for any illegal act committed in the collection of payments under the contract or agreement or in the repossession of a motor vehicle;

(6) Provide that the buyer agrees not to assert against the seller or holder of [sic] any claim or defense arising out of the sale.

28. The court determined that the following provision in the contract was sufficient to cure any violation of the Credit Code caused by the apparent waiver of defenses. 659 S.W.2d at 468-69. The contract provided that: "ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF." *Id.* at 468. The provision is required by the FTC. See *infra* note 38.

29. 659 S.W.2d at 468. Article 5069—7.02(6)(c) provides that "[t]he retail installment contract shall specifically set out . . . [a]ny itemized charges, as defined in Article 7.01." TEX. REV. CIV. STAT. ANN. art. 5069—7.02(6)(c) (Vernon Pam. Supp. 1971-1985). Article 5069—7.01(g) provides that for purposes of the Motor Vehicle Installment Sales chapter, itemized charges means those amounts included in the cash price for charges related to:

(i) any registration, certificate of title, and license fees;

(ii) any taxes;

(iii) any other fees or charges that are set or prescribed by law, that are not more than the amounts allowed by law, and that are connected with the sale or inspection of a motor vehicle; and

(iv) any charges permitted by Article 7.06 for insurance, service contracts, or warranties permitted by Article 7.06.

*Id.* art. 5069—7.01(g).

The lower court imposed the statutory penalties on the seller, and the Corpus Christi court of appeals reversed, holding that although nondisclosure of the two dollar inspection fee technically violated the statute, recovery under the statute was not authorized under the doctrine of *de minimis non curat lex*.<sup>30</sup>

The San Antonio court of appeals adopted a contrary position on the applicability of the *de minimis* doctrine in *Vela v. Yates Ford, Inc.*<sup>31</sup> In *Vela* the creditor had overcharged the debtor \$2.83 in financing charges because it calculated the number of "odd days"<sup>32</sup> on the contract by a procedure authorized by Regulation Z of the Code of Federal Regulations<sup>33</sup> rather than by the procedures set forth in the Credit Code.<sup>34</sup> In refusing to apply the *de minimis* doctrine, the San Antonio court noted that the *de minimis* doctrine applies only when the gist of the action is damages, and not when the purpose of the action is to penalize statutorily proscribed conduct.<sup>35</sup> Recognizing that the *Lundquist* court, among others, had applied the *de minimis* doctrine to deny recovery under the Credit Code, the *Vela* court observed that "such holdings frustrate the express intent of the statute and leave the consumer without the remedy contemplated by the legislature."<sup>36</sup>

### C. Liability of Subsequent Holders and Assignees

The penalties set forth in the Credit Code apply to subsequent holders and assignees of contracts prescribed by the Credit Code as well as to the original parties thereto. In *De La Fuente v. Homes Savings Association*<sup>37</sup> the holder

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30. 659 S.W.2d at 468 (citing *Wayne Strand Pontiac-GMC v. Molina*, 653 S.W.2d 45, 47 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.) ("The doctrine stands for the proposition that '[t]he law does not care for, or take notice of, very small or trifling matters.'")).

31. 675 S.W.2d 232 (Tex. App.—San Antonio 1984, writ granted).

32. "Odd days" are days in addition to one month's time for which a creditor is allowed to charge a finance charge on a retail installment contract when the first payment does not fall due exactly one month from the date of the contract. Thus, if the first installment payment on a contract is due more than one month beyond the contract date, the additional days beyond one month are considered "odd days." See *id.* at 234.

33. See 12 C.F.R. § 226, app. J(b)(5)(ii) (1984). The procedure for determining the number of odd days set forth in Appendix J of Federal Reserve Board Regulation Z requires subtracting a calendar month from the installment payment date; the odd days are those days remaining prior to the first monthly interval. Thus, for a contract executed on February 28, 1983, with a first installment due on April 2, 1983, there would be two odd days using the procedure authorized by Regulation Z. This figure is derived by first subtracting one calendar month from the payment due date, providing the date March 2, 1983, for calculating the odd days. The odd days are those between February 28, 1983, and March 2, 1983, thus producing an odd days figure of two in this example. (Note that March 2 is included as an odd day).

34. TEX. REV. CIV. STAT. ANN. art. 5069—2.01(j) (Vernon 1971) provides that "[m]onth" means that period of time from one date in a calendar month to the corresponding date in the following calendar month . . . ." In the example set forth in the preceding note, a contract executed on February 28, 1983, with a first payment due on April 2, 1983, would have five odd days if odd days were computed as the number of days beyond one month from the contract date to the first scheduled installment date, under the method derived from Texas statutes. See 675 S.W.2d at 236; TEX. REV. CIV. STAT. ANN. art. 5069—7.03(4) (Vernon 1971). Similar variations in the number of odd days computed by the two methods result for periods overlapping the ends of other calendar months.

35. 675 S.W.2d at 237.

36. *Id.* at 237-38.

37. 669 S.W.2d 137 (Tex. App.—Corpus Christi 1984, no writ).

of a promissory note for the sale and installation of aluminum siding, who had purchased the note in good faith and for value, sued for collection upon default. The consumer counterclaimed alleging violations of the Credit Code in the underlying contract. The creditor defended the counterclaim in part by asserting that even if the contract violated the Credit Code, the creditor was not liable because of its status as a holder in due course. In reversing the lower court's judgment for the creditor, the appellate court stated that when the subject note contained the notice to holders required by federal law, the holder in due course doctrine was abolished in consumer credit transactions.<sup>38</sup> The court reasoned that by promulgating this notice requirement, the Federal Trade Commission clearly had intended to place the burden for losses occasioned by sellers' misconduct on the holder of the paper.<sup>39</sup>

In *Ford Motor Credit Co. v. Soto*<sup>40</sup> the court held the holder of an automobile retail installment contract liable for violations of its continuing obligation to disclose changes in physical damage insurance coverage.<sup>41</sup> In *Soto* an automobile dealer sold a new car to Mr. Soto and, at Mr. Soto's request, arranged for physical damage insurance on the vehicle to be provided at rates approved by the State Board of Insurance. The seller subsequently assigned the contract to Ford, and the seller had no further involvement with the contract. Upon later review of the buyer's driving record, a third-party insurance broker learned that the buyer did not qualify for insurance coverage at the rates fixed or approved by the State Board of Insurance. The broker, retroactively and without notifying the buyer, changed the insurance policy to a company handling higher risk policies whose rates were not fixed or approved by the State Board of Insurance.

The buyer subsequently sued the seller and Ford for failure to provide him with notice of the higher insurance rate and with a ten-day option to procure

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38. *Id.* at 141. The note in question contained the following notice set forth in bold face type:

NOTICE  
 ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF

*Id.* This language is prescribed by the FTC at 16 C.F.R. § 433.2 (1984), which provides that:

In connection with any sale or lease of goods or services to consumers, in or affecting commerce as 'commerce' is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice within the meaning of Section 5 of that Act for a Seller directly or indirectly, to: (a) Take or receive a consumer credit contract which fails to contain the [above quoted] provision in at least ten point, bold face type . . . .

39. 669 S.W.2d at 142. The Seller's misconduct in this instance consisted of contracting to receive a first lien trust deed on the consumer's residence to secure the value of home improvements in violation of article 5069—6.05(7) of the Credit Code. The *De La Fuente* court noted that language in the *Lundquist* opinion, *supra* notes 26-28, indicates that the assignee of a seller is entitled to holder in due course status. 669 S.W.2d at 141 n.2. The *De La Fuente* court distinguished the language used in *Lundquist*, however, and stated that "the holder of a note subject to the Credit Code has an independent duty to ensure that the retail installment contract conforms to the statutory requirements of the Credit Code." *Id.* at 142.

40. 671 S.W.2d 620 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).

41. *Id.* at 624.



alternative insurance as required by section 7.06(3) of the Credit Code.<sup>42</sup> The seller and Ford argued that they met the statutory notice requirement when the approved insurance policy was placed in effect at the time the contract was executed and that the statute did not require them to provide notice to the buyer several months later when the insurance coverage was changed unilaterally without their knowledge. The court held that Ford, as holder of the contract, was the only party liable to the buyer, noting that in this case the holder, and not the seller, was the party directly responsible for maintenance of the ongoing transaction.<sup>43</sup> Ford, therefore, had a continuing duty under section 7.06(3) to disclose any changes in insurance to nonfixed or nonapproved rates to the buyer and to provide him with the opportunity to acquire insurance at better terms.<sup>44</sup>

## II. USURY

With one exception, the Texas courts did not chart new ground in interpreting the state's usury laws. That exception, *Alamo Lumber Co. v. Gold*,<sup>45</sup> requires Texas courts to construe strictly the usury laws whenever refinancing is conditioned upon the assumption of third-party debt by the borrower.<sup>46</sup> The holding, which evoked strong dissent in the court,<sup>47</sup> effectively banishes such a refinancing tool as an alternative to which lenders may turn.

*Alamo Lumber* involved a promissory note executed by Gold payable to a financial institution in the amount of \$75,000, against which interest of over \$7,000 had accrued. The transaction upon which this note was based and the note itself were not usurious. Gold secured repayment of the note by pledging certain realty. Upon Gold's default, the bank instituted foreclosure proceedings in a collection effort. At a time when the foreclosure was imminent, Gold's son was indebted to Alamo Lumber on an unsecured open account in an amount exceeding \$23,000. To thwart the impending foreclosure, Gold convinced Alamo Lumber to purchase the noteholder's position. In exchange Gold assumed her son's obligations to Alamo Lumber by the execution of a promissory note, roughly equaling the open account indebtedness. The realty that secured the original \$75,000 promissory note also secured the repayment of this second notes. Alamo extended the due

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42. TEX. REV. CIV. STAT. ANN. art. 5069—7.06(3) (Vernon Pam. Supp. 1971-1985) provides that if any insurance that is sold or procured by the seller or holder is obtained at a premium or rate of charge not approved by the State Board of Insurance, the seller must notify the buyer in writing. The buyer then has a 10-day option to procure alternate insurance.

43. 671 S.W.2d at 624.

44. *Id.* at 625. The court limited imposition of the continuing duty of disclosure to Ford Motor Credit Company in this case because, after initially placing the purchaser on binder coverage at the time the retail installment contract was executed, the seller was totally removed from maintenance of the ongoing, continuing retail installment contract transaction. Furthermore, the holder, not the seller, was the only party involved at the time of the subsequent policy change.

45. 661 S.W.2d 926 (Tex. 1983).

46. *Id.* at 928.

47. *See id.* at 928 (Barrow, J., dissenting).

dates of the obligations evidenced by the two notes. Neither note was usurious on its face.

Gold, the maker of the two notes, commenced an action against Alamo Lumber and argued that by conditioning the refinancing of the \$75,000 note on the assumption of her son's indebtedness to Alamo, Alamo had charged additional interest in an amount equal to the assumed indebtedness. That indebtedness, when factored as interest on the \$75,000 debt extended, far exceeded the maximum amount allowed by law, constituted interest double the maximum amount permitted, and resulted in Alamo suffering the maximum penalties under article 5069-1.06 of the Credit Code.<sup>48</sup> The court distinguished the *Alamo Lumber* transaction from those instances in which a borrower is required to pay one of its own debts as a condition to making a loan, which the Court impliedly approved.<sup>49</sup>

In a vigorous dissent, Justice Barrow disputed the court's reliance on *Laid Rite, Inc. v. Texas Industries, Inc.*,<sup>50</sup> which the dissent found to have misapplied fundamental usury principles.<sup>51</sup> Specifically, the dissent noted that neither note was usurious on its face, which under the authority of *Walker v. Temple Trust Co.*<sup>52</sup> required the trial court to inquire as to the intent of the parties.<sup>53</sup> The majority's holding totally eviscerated without explanation the issue of intent and therefore abandoned a long line of Texas jurisprudence.<sup>54</sup>

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48. The penalties imposed upon Alamo Lumber were severe. Specifically Alamo forfeited \$82,925.34 due it on the first note, forfeited \$30,893.10 represented by the second note, suffered a cancellation of the liens securing the two notes in question, and suffered a judgment for double the amount of interest (which, because it included the \$30,893.10 deemed interest, constituted \$45,177.90 at the time of trial) plus \$25,000 in attorneys' fees. Although the decision of the court is not abundantly clear in all respects, apparently by its effort to secure the original \$23,522.80, Alamo suffered an out of pocket loss of \$229,174.24.

TEX. REV. CIV. STAT. ANN. art. 5069—1.06(1) (Vernon Pam. Supp. 1971-1985) provides that "[a]ny person who contracts for, charges or receives interest which is greater than the amount authorized by this Subtitle, shall forfeit to the obligor three times the amount of usurious interest . . . ." No penalty is assessed for any "usurious interest which results from an accidental and bona fide error." *Id.*

*Id.* art. 5069—1.06(2) (Vernon 1971) provides for forfeiture of the principal if the usurious interest exceeds double the legal rate.

49. 661 S.W.2d at 928. The court's holding, in which it impliedly condones requiring a borrower to pay off indebtedness as a condition to making a loan, does not address the situation in which a lender requires a payoff even though the borrower is current on all its obligations. Clearly, a lender can expect a borrower in default to pay its obligation as a precondition to making a loan. The nondefaulting borrower situation, however, is much closer to the *Alamo Lumber* fact situation and should be pursued with utmost care and caution.

50. 512 S.W.2d 384 (Tex. Civ. App.—Fort Worth 1974, no writ).

51. 661 S.W.2d at 928 (Barrow, J., dissenting).

52. 124 Tex. 575, 578, 80 S.W.2d 935, 936 (1935).

53. 661 S.W.2d at 929.

54. *See, e.g.,* Carbajal v. Ford Motor Credit Co., 658 S.W.2d 281, 284 (Tex. App.—Corpus Christi 1983, writ dismissed w.o.j.) (court required contract terms to expressly and positively evidence intent); Rotello v. International Harvester Co., 624 S.W.2d 249, 251-52 (Tex. App.—Dallas 1981, writ ref'd n.r.e.) (buyer must show that exaction of usurious interest is seller's dominant purpose and intention); Prestonview Co. v. State Mutual Investors, 581 S.W.2d 701, 703 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) (court required showing of intent to assess usurious interest); American Century Mortgage Investors v. Regional Center, Ltd., 529 S.W.2d 578, 583 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.) (transaction not usurious unless the lender supposed and intended it so); Hernandez v. United States Fin. Co., 441 S.W.2d 859, 862 (Tex. Civ. App.—Waco 1969, writ dismissed w.o.j.) (contract not usurious

A second criticism addressed the majority's failure to acknowledge the new consideration given by Alamo. The dissent's review of *Laid Rite* concluded that the court in *Laid Rite* incorrectly paraphrased *Vee Bee Service Co. v. Household Finance Corp.*<sup>55</sup> and other cases<sup>56</sup> to hold that any assumption of third-party debt must be included in computing interest.<sup>57</sup> Justice Barrow noted the exact language of *Vee Bee*, which stated:

[W]here a borrower is required, as a condition of the loan, to assume or pay, in whole or part, the debt of another, in addition to legal interest, the transaction is usurious, *unless the borrower receives something of benefit for the additional assumption or payment, aside from the use of the money loaned.*<sup>58</sup>

The dissent concluded that additional consideration was present in the facts of *Alamo Lumber* and, therefore, a finding of usury was not supportable.<sup>59</sup> The majority never reached the issue of consideration, as its holding construed all third-party debt assumptions as questionable subject only to the mathematical calculations necessary to determine whether the interest ceiling had been exceeded.<sup>60</sup>

Two cases addressed the recurring question of whether judicially related action specifying that an amount is owed constitutes "charging." In *Austin Elcon Corp. v. Avco Corp.*<sup>61</sup> a federal district court construed Texas law to hold that submitting documents to a court during litigation to show money owed on the claim does not amount to "unilaterally placing on an account an amount due as interest"<sup>62</sup> and, therefore, does not constitute charging of interest.<sup>63</sup> Undaunted, however, the court went on to add that because in the facts of the case all prelitigation billings were devoid of interest charges, any claim in litigation that could be construed as interest should be construed as a request for prejudgment interest.<sup>64</sup> Persuasive in the court's additional reasoning was the oft cited rule that a federal court may look to

on its face will not be held usurious absent intention); *Sinclair v. Mack Trucks, Inc.*, 355 S.W.2d 563, 564-65 (Tex. Civ. App.—Fort Worth 1962, writ ref'd n.r.e.) (court required showing of intent).

55. 51 N.Y.S.2d 590 (Sup. Ct. 1944), *aff'd*, 269 A.D. 772, 55 N.Y.S.2d 570 (1945).

56. *See* *Darden v. Schuessler*, 154 Ala. 372, 377-78, 45 So. 130, 131 (1907) (court found usury when the borrower received nothing of benefit other than money loaned); *Winder Nat'l Bank v. Graham*, 38 Ga. App. 552, 144 S.E. 357, 358 (1928) (same); *Canal-Commercial Trust & Sav. Bank v. Brewer*, 143 Miss. 146, 108 So. 424, 429 (1926) (lack of any consideration renders contract usurious); *Ferdon v. Zarriello Bros.*, 87 N.J. Super. 124, 208 A.2d 186, 189 (Law Div. 1965) (transaction is usurious unless supported by consideration other than money newly loaned); *Janes v. Felton*, 99 W. Va. 407, 129 S.E. 482, 484 (1925) (same).

57. 661 S.W.2d at 931.

58. *Id.* (emphasis by court) (quoting *Vee Bee*, 51 N.Y.S.2d at 602).

59. 661 S.W.2d at 932. Although the holding in *Alamo Lumber* does not go so far as specifically to include third-party guarantees within the ambit of forbidden transactions, the court's decision does not rule out the proposition that requiring a guaranty of a third party's debt could constitute charging.

60. *Id.* at 928.

61. 590 F. Supp. 507 (W.D. Tex. 1984).

62. *Id.* at 517 (quoting *Rheiner v. Varner*, 627 S.W.2d 459, 465 (Tex. App.—Tyler 1981, no writ)).

63. 590 F. Supp. at 517.

64. *Id.*

state law "as a matter of convenience and practicality" to determine the appropriate remedy.<sup>65</sup> The court noted that the cause of action involved the federal Miller Act<sup>66</sup> and as a federal action the state's penalty laws were not mandatory.<sup>67</sup> The decision in *Austin Elcon* cited with approval<sup>68</sup> the case of *Tyra v. Bob Carroll Construction Co.*,<sup>69</sup> which held that a pleading seeking interest does not in and of itself constitute charging.<sup>70</sup> *Austin Elcon's* embrace of *Tyra* should be viewed with some temperance due to its posture as an action under the federal Miller Act.<sup>71</sup> The holding in *Austin Elcon* is contrary to the decision of *Nationwide Financial Corp. v. English*,<sup>72</sup> but, due to its Miller Act connections, does not overrule *English*.

*Dryden v. City National Bank*<sup>73</sup> illustrates the limitations of the *Tyra* immunity. In *Dryden* a bank made demand on the debtor for an amount that did not credit the debtor for payments previously made. Later when the bank filed suit to follow up on the demand, it gave credit to the debtor for all previous payments. The court refused to characterize the demand as less than a unilateral act to collect an amount due as interest and found such to be charging, notwithstanding the correction ultimately made in the pleadings.<sup>74</sup> The court's holding focused on the unilateral act of the creditor's demand for the entire debt involved, not just the debt due, and concluded that the excess demanded was interest.<sup>75</sup> In so holding, the court reaffirmed a long line of Texas cases that leave little room for the erring creditor to correct its mistake.<sup>76</sup> *Dryden* is distinguishable from *Tyra* due to the nature of the unilateral act involved, but intellectually the two cases are not so easily distinguished.

The Corpus Christi court of appeals discussed the difficulty in proving a mistake in charging in *Perez v. Hernandez*.<sup>77</sup> In that case a promissory note

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65. *Id.* The court cited the case of *United States ex rel. Georgia Elec. Supply Co., Inc. v. United States Fidelity and Guar. Co.*, 656 F.2d 993, 997 (5th Cir. 1981) as authority.

66. See 40 U.S.C. §§ 270a-270d (1982). The Miller Act concerns the bonds required of contractors of public buildings or works.

67. 590 F. Supp. at 517.

68. *Id.*

69. 618 S.W.2d 853 (Tex. Civ. App.—El Paso 1981), *aff'd*, 639 S.W.2d 690 (1982) (a pleading seeking interest did not constitute charging of usurious interest when plaintiff had not sought to charge interest prior to litigation).

70. 618 S.W.2d at 856.

71. 40 U.S.C. §§ 270a-270d (1982).

72. 604 S.W.2d 458 (Tex. Civ. App.—Tyler 1980, cause dismissed as moot) (original counterclaim seeking to recover unearned interest amounted to usury).

73. 666 S.W.2d 213 (Tex. App.—San Antonio 1984, writ refused n.r.e.).

74. *Id.* at 220-21.

75. *Id.* at 221.

76. See *Tanner Dev. Co. v. Ferguson*, 561 S.W.2d 777, 781 (Tex. 1977) (test of alleged usury is not concerned with which party to transaction originated the allegedly usurious provisions); *Southwestern Inv. Co. v. Hockley County Seed & Delinting, Inc.*, 516 S.W.2d 136, 137 (Tex. 1974) (per curiam) (reduction of final sum paid does not render a contract usurious on its face non-usurious); *Rick Furniture Distrib. Co. v. Kirlin*, 634 S.W.2d 738, 740 (Tex. App.—Dallas 1982, writ refused n.r.e.) (filing petition demanding payment of unearned time price differential is charging); *Nationwide Fin. Corp. v. English*, 604 S.W.2d 458, 461 (Tex. Civ. App.—Tyler 1980, writ dismissed) (original counterclaim seeking to recover unearned interest amounted to usury).

77. 658 S.W.2d 697 (Tex. App.—Corpus Christi 1983, no writ).

called for an interest rate of seven percent per annum. Contrary to the rate in the note, a payment by the maker resulted in an interest rate of 21.29% being paid to the payee. The payment was based upon a calculation made by a legal secretary. At trial the payee attempted to show that the legal secretary's law firm actually represented the maker and, therefore, any improper calculation was not attributable to the payee. On appeal the payee abandoned this argument and adopted accidental and bona fide error as his defense.<sup>78</sup> The court of appeals noted that in order to avoid liability for usury because of a mistake, the lender must plead, prove, and obtain a finding from the trial court that an accidental and bona fide error occurred.<sup>79</sup> The payee did not satisfy any of these requirements and, consequently, the court overruled the payee's point of error.<sup>80</sup> The court further concluded that even if the legal secretary's law firm represented the maker of the note, the penalty provisions of Texas usury statutes are applicable to any party who receives interest greater than the lawful amount.<sup>81</sup> The strict liability standard, applicable whenever excessive interest is actually received, is stern warning to lenders to exercise caution in delegating responsibility for calculating interest.

In *Robinson v. Rudy*<sup>82</sup> the court addressed the question of whether litigation settled by the defendant's execution of a promissory note could subject the plaintiff to a claim of usury. In that case Robinson had executed a promissory note in the amount of \$20,000 in settlement of litigation initiated for alleged damage to the plaintiff in an amount exceeding \$38,000. The alleged damages arose out of a business transaction in which Robinson received \$15,000 from Rudy as a contribution to a joint venture. After Robinson defaulted on the \$20,000 note, Rudy sued Robinson again and obtained a summary judgment. In defense against Rudy's motion for summary judgment Robinson alleged that the promissory note was usurious because it provided for a charge of \$5,000 on the \$15,000 originally advanced by Rudy. The note was not usurious on its face. The trial court and appellate court rejected Robinson's argument and concluded that the transaction by which the original advance was made was not a loan and involved a business venture pursuant to which, absent Robinson's wrongdoing, no absolute obligation to repay arose.<sup>83</sup> The court noted that as a business transaction both Rudy and Robinson assumed the risk of business failure.<sup>84</sup> Because the note was not usurious on its face and because a usurious contract is one for "(1) a loan of money (2) where the borrower has an absolute obligation to repay the principal and (3) the lender exacts a greater compensation than allowed

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78. *Id.* at 701.

79. *Id.*; see *Cochran v. American Sav. & Loan Ass'n*, 586 S.W.2d 849, 850 (Tex. 1979) (per curiam).

80. 658 S.W.2d at 702.

81. *Id.*

82. 666 S.W.2d 507 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).

83. *Id.* at 510.

84. *Id.*

by law for the use of the money,"<sup>85</sup> the facts in *Robinson v. Rudy* were deficient in two respects. The validity of the note caused the trial court to look beyond the note to determine if the transaction was usurious, and the court found the transaction to pass muster.<sup>86</sup> Although the court found no usury in *Robinson v. Rudy*, a settlement of litigation clearly can result in usury if the note executed is usurious on its face.

### III. EXEMPT PROPERTY

In 1984 the Fifth Circuit clarified the domains of the state and federal regulations governing exemptions in bankruptcy. The federal court stated in *Allen v. Hale County State Bank*<sup>87</sup> that section 522 of the Bankruptcy Code<sup>88</sup> allowed states the option to "remain silent and allow federal law to be the sole remedy, [to] draft an exemption schedule which partially or wholly precludes the [Bankruptcy Code] remedy, [or to] allow election between state and federal exemption provisions."<sup>89</sup> Texas law allows an election and also allows spouses to elect separate exemptions.<sup>90</sup> In *Allen* a married couple filed a joint bankruptcy petition and elected separate exemptions. The wife chose the state exemptions but sought also to employ section 522(f) of the Bankruptcy Code<sup>91</sup> to avoid a lien on her property. The Fifth Circuit held that subsection (f) "merely gives the debtor the power to avoid a lien on property to the extent that the lien impairs an exemption to which the debtor would have been entitled under [section] 522(b)."<sup>92</sup> The Texas statute does not exempt property subject to a secured lien, and the court held that the federal exemption provision does not preempt the Texas statute.<sup>93</sup>

The debtors in *Reagan v. Austin Municipal Federal Credit Union*<sup>94</sup> also chose state law exemptions and then tried to use section 522 of the Bankruptcy Code to prevent property from becoming part of the bankruptcy estate as defined in section 541.<sup>95</sup> The property concerned was the wife's retirement fund account that secured a credit plan at the credit union. The Fifth Circuit concluded that because Texas law does not exempt retirement funds and because the debtor did not choose the federal exemptions afforded,

85. *Id.* at 509; see *Redman Indus. v. Couch*, 613 S.W.2d 787, 789 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.).

86. 666 S.W.2d at 510.

87. 725 F.2d 290 (5th Cir.), *reh'g denied en banc*, 729 F.2d 1459 (5th Cir. 1984).

88. 11 U.S.C. § 522 (1982).

89. 725 F.2d at 292.

90. Act of June 15, 1973, ch. 588, § 3, 1973 Tex. Gen. Laws 1627, 1628, *repealed by* Act of June 19, 1983, ch. 576, § 6, 1983 Tex. Gen. Laws 3475, 3729 (enacting the Property Code). Repealed article 3836 is now codified as TEX. PROP. CODE ANN. § 42.001 (Vernon 1984).

91. 11 U.S.C. § 522(f) (1982) provides that "[n]otwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section . . . ."

92. 725 F.2d at 292.

93. *Id.* at 291.

94. 741 F.2d 95 (5th Cir. 1984).

95. See 11 U.S.C. § 541 (1982).

section 522 did not apply to her case.<sup>96</sup>

The *Reagan* court also resolved the question of whether the retirement fund qualified as a spendthrift trust that would not pass into the debtor's estate. Citing its opinion in *Goff v. Taylor*<sup>97</sup> the court held that Texas law does not protect trusts created by a settlor for his own benefit, while trusts created for a beneficiary that contain a spendthrift clause are protected, since the former is specifically assignable under Texas law and the latter is not.<sup>98</sup> The court held that the assignable nature of the debtor's trust prevented it from being excluded from the debtor's estate in bankruptcy.<sup>99</sup>

A third issue presented in *Reagan* was whether the fact that the debtor had no right to possession of the fund until after retirement rendered the credit union's claim unenforceable. The court determined that the security agreement could become enforceable without the employee first becoming entitled to the funds.<sup>100</sup> Although section 502(b) of the Bankruptcy Code<sup>101</sup> states that a court shall not allow a claim that is unenforceable, contingent, or unmatured against the debtor or his property, the court nevertheless decided that the credit union's claim was currently enforceable in that the debtor possessed a legal right of assignment and vested future rights in the fund.<sup>102</sup> The court admitted that the credit union could not convert its security interest into cash before the debtor's retirement, but stated that the credit union was "entitled above all other claimants to assert in bankruptcy its security interest in the assigned fund".<sup>103</sup>

During the survey period, the Fifth Circuit also considered the issue of whether a debtor in bankruptcy could retain a life insurance annuity pursuant to section 541(c)(2) of the Bankruptcy Code.<sup>104</sup> In *Johnson v. Fenslage*<sup>105</sup> the Fifth Circuit held that such a fund did not constitute a spendthrift trust because it was voluntary and terminable at will.<sup>106</sup> The debtor in *Johnson* also attempted to use the Texas State College and University Employees Uniform Insurance Benefits Act<sup>107</sup> to obtain exemption of the annuity. The court found, however, that the annuity was not exempt under the Act unless the educational institution contributed to the annuity.<sup>108</sup> The debtor also failed to obtain an exemption under article 21.22 of the Texas Insurance Code, which provides that insurance benefits or annuities paid on a periodic basis are not attachable.<sup>109</sup> The terms of the debtor's

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96. 741 F.2d at 97.

97. (*In re Goff*), 706 F.2d 574 (5th Cir. 1983).

98. 741 F.2d at 97; see 11 U.S.C. § 541(c)(2) (1982).

99. 741 F.2d at 97.

100. *Id.* at 98.

101. 11 U.S.C. § 502(b) (1982).

102. 741 F.2d at 98.

103. *Id.*

104. 11 U.S.C. § 541(c)(2) (1982).

105. 724 F.2d 1138 (5th Cir. 1984).

106. *Id.* at 1140.

107. See TEX. INS. CODE ANN. art. 3.50-3, § 9(a) (Vernon 1981). The Act provides exemption for insurance payments, benefits, and other transactions made pursuant to the act.

108. 724 F.2d at 1141.

109. See TEX. INS. CODE ANN. art. 21.22 (Vernon 1981).

annuity allowed payments in a lump sum, however, and for this reason the court refused to exempt the insurance annuity.<sup>110</sup>

In *Davidson Texas, Inc. v. Garcia*<sup>111</sup> a judgment creditor attempted to garnish property that allegedly constituted exempt current wages for personal services.<sup>112</sup> The creditor, after losing at the trial court level, argued on appeal that the funds constituted payment for work performed in an independent contractor relationship.<sup>113</sup> The court, however, noted language from a previous decision that stated that the test is whether the employer controlled not only what shall be done but how it shall be done, and found under the facts that the appellee was an employee and thus entitled to exemption of the funds as his current wages.<sup>114</sup>

In *Dallas Power & Light Co. v. Loomis*<sup>115</sup> a judgment creditor sought to subject the appellee's homestead to satisfaction of the judgment. The creditor sought the value in the exempt homestead that was in excess of the constitutionally protected amount as of the date the property was purchased.<sup>116</sup> A constitutional amendment increased the exemption from \$5,000 to \$10,000 in 1970,<sup>117</sup> after the defendant acquired the property but before the appellant's judgment. The jury found the value to be less than the amended limit but in excess of the original amount protected. The court ruled that the increased exemption amount was to be applied retroactively and denied the relief sought.<sup>118</sup>

In *Hennigan v. Hennigan*<sup>119</sup> an attorney, against whom another attorney had obtained a judgment for unpaid fees, claimed that fees owed to him for legal services rendered constituted exempt wages for personal services. The court noted that the term "current wages" implies an employer-employee or master-servant relationship and excludes compensation due to an independent contractor.<sup>120</sup> The court of appeals ruled that retainer fees and bills for services performed at hourly rates were amounts owed for work performed as an independent contractor and thus were not exempted current wages.<sup>121</sup>

110. 724 F.2d at 1142.

111. 664 S.W.2d 791 (Tex. App.—Austin 1984, writ *dism'd w.o.j.*).

112. *See* TEX. REV. CIV. STAT. ANN. art. 4099 (Vernon 1966). The statute exempts current wages for personal services from garnishment.

113. 664 S.W.2d at 792.

114. *Id.* at 794. The court had previously set forth the relationship test in *Brasher v. Carnation Co.*, 92 S.W.2d 573, 575 (Tex. Civ. App.—Austin 1936, writ *dism'd*).

115. 672 S.W.2d 309 (Tex. App.—Dallas 1984, writ *ref'd n.r.e.*).

116. The provision in effect at the time of purchase, TEX. CONST. art. XVI, § 51 (1876, amended 1970), exempted \$5000.

117. *See id.*

118. 672 S.W.2d at 310-11.

119. 666 S.W.2d 322 (Tex. App.—Houston [14th Dist.] 1984, writ *ref'd n.r.e.*) (per *curiam*).

120. *Id.* at 324.

121. *Id.* at 324-25; *see* TEX. CONST. art. XVI, § 28 (current wages not subject to garnishment); *see also* *First Nat'l Bank v. Graham*, 22 S.W. 1101, 1102 (Tex. Civ. App. 1889, no writ) (fees due an attorney for services rendered are not exempt from garnishment).



## IV. CREDITORS' RIGHTS UNDER BANKRUPTCY CODE

During the survey period several opinions underscored the effect of the Bankruptcy Code on creditors' rights in Texas. In *Henke Grain Co. v. Keenan*<sup>122</sup> the appellant filed a motion for new trial in state district court after the cause had been removed to federal bankruptcy court, but before the bankruptcy court's remand. The state appellate court faced the question of whether the appellant's bankruptcy filing and subsequent removal meant that the district court had no authority to receive the motion for new trial, resulting in a failure to perfect the appeal. In resolving the issue, the court asserted that although the removal suspended the district court's authority to rule on the motion for new trial, it did not impair an appellant's ability to file such a motion.<sup>123</sup> The court ruled that the motion remained pending until remand.<sup>124</sup> If thereafter the moving party failed to act on the motion, the motion would be overruled by operation of law.<sup>125</sup>

The effect of the automatic stay provisions of the Bankruptcy Code<sup>126</sup> was at issue in *Wallen v. State*,<sup>127</sup> in which the state brought suit for unpaid gross receipts taxes against a debtor and the insurance company that executed bonds to secure payment of the debtor's taxes. The district court entered a judgment in favor of the state, and the debtor, on appeal, contended that he had received service of citation during the pendency of the automatic stay in bankruptcy. The appellate court held that the citation was the type of action that was subject to the automatic stay provision and was, therefore, void and without any legal effect.<sup>128</sup>

In *McDonald v. Burrows*<sup>129</sup> the Fifth Circuit affirmed a bankruptcy court's decision denying the petitioners' habeas corpus relief, in which the petitioners faced criminal charges for violation of Minnesota securities laws. The court stated that the All Writs Act<sup>130</sup> afforded the debtor no protection, citing the Eleventh Circuit's decision in *Barnette v. Evans*,<sup>131</sup> in which the court explained that "[t]he purpose of bankruptcy is to protect those in financial, not moral, difficulty."<sup>132</sup> The *McDonald* court also relied upon the Younger Doctrine,<sup>133</sup> which provides that federal courts may not enjoin state criminal proceedings unless the proceedings present a great and immediate danger to the plaintiff's federally protected rights.<sup>134</sup> The court noted

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122. 658 S.W.2d 343 (Tex. App.—Corpus Christi 1983, no writ).

123. *Id.* at 346.

124. *Id.*

125. *Id.*

126. See 11 U.S.C. § 362 (1982). Section 362 acts to stay certain actions during the pendency of bankruptcy proceedings. *Id.*

127. 667 S.W.2d 621 (Tex. App.—Austin 1984, no writ).

128. *Id.* at 623; see 11 U.S.C. 362(1), (6) (1982) (staying acts to collect, assess, or recover claims from debtor).

129. 731 F.2d 294 (5th Cir.), cert. denied, 105 S. Ct. 173, 83 L. Ed. 2d 108 (1984).

130. 28 U.S.C. §§ 1651-1656 (1982). Section 1651 authorizes federal courts to issue all writs necessary or appropriate in aid of their respective jurisdictions. *Id.* § 1651.

131. 673 F.2d 1250 (11th Cir. 1982).

132. *Id.* at 1251.

133. *Younger v. Harris*, 401 U.S. 37, 46 (1971).

134. 731 F.2d at 298.

that the debtor had no federal right to have his debts administered through a bankruptcy court.<sup>135</sup>

In *Howard v. Howard*<sup>136</sup> the court granted a default judgment on a bill of review filed by appellee and four days thereafter appellee filed bankruptcy. The bankruptcy court lifted automatic stay,<sup>137</sup> and the question raised was whether the default judgment had become a final order because of appellants' failure to file a motion for new trial until after the bankruptcy court lifted automatic stay, long after the deadline for filing such motion absent a bankruptcy intervention.<sup>138</sup> The trial court granted the motion for new trial, and the appellate court agreed that the motion, filed nine days after the expiration of the automatic stay, was timely filed due to the operation of section 108(c) of the Code, which allows thirty days after the termination of the automatic stay to commence or continue civil actions.<sup>139</sup>

The ability of a bankruptcy court to estimate the value of a creditor's contingent and unliquidated claim was reaffirmed in *Addison v. Langston*,<sup>140</sup> in which the court dealt with over 1,200 on-call contracts held by creditors. Texas law allows the nondefaulting party to such a contract to fix a reasonable price for damages when the other party defaults.<sup>141</sup> The Fifth Circuit, however, believed that the bankruptcy court had clearly not abused its discretion by estimating the value of these contracts as of the date of bankruptcy, rather than some later date that would have provided the creditors with a higher market value for their contracts.<sup>142</sup>

The Internal Revenue Service successfully challenged the ability of a debtor to settle a claim with a non-priority creditor outside of a plan of reorganization in *United States v. AWECO, Inc.*<sup>143</sup> The debtor proposed a settlement of a pending unsecured claim. The proposed settlement called for transfer of certain of the debtor's assets that secured a tax claim of the Internal Revenue Service, as well as that of another secured creditor. Over the objection of the IRS and the secured party, the bankruptcy court approved the settlement, and the district court affirmed the bankruptcy court's decision. The Fifth Circuit, in remanding the case for additional factual evidence on the issues of the fairness and equity of the proposed settlement, determined that the "fair and equitable" standard is a term of art meaning

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135. *Id.* at 298-99; see *United States v. Carson*, 669 F.2d 216, 217 (5th Cir. 1982) (federal court may require offender to make restitution to victim, though debt is discharged in bankruptcy).

136. 670 S.W.2d 737 (Tex. App.—San Antonio 1984, no writ).

137. The bankruptcy filing automatically invokes the stay provisions of the code. See 11 U.S.C. § 362 (1982); see *supra* note 126. Section 362(d) grants creditors the right to request that the stay be lifted. *Id.* § 362(d).

138. TEX. R. CIV. P. 329b. The rule sets a 30-day time limit for filing a motion for new trial. *Id.*

139. 11 U.S.C. § 108(c) (1982).

140. 737 F.2d 1338 (5th Cir. 1984).

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

142. 737 F.2d at 1340-41; see 11 U.S.C. § 502(c)(1) (1982) (allowing estimation of contingent or unliquidated claims that hinder closing the case).

143. (*In re AWECO, Inc.*), 725 F.2d 293 (5th Cir.), *cert. denied*, 105 S. Ct. 244, 83 L. Ed. 2d 182 (1984).

that senior interests are to be given priority over junior interests.<sup>144</sup> The court ruled that a bankruptcy court abuses its discretion in approving settlements with a junior creditor unless the court concludes that priority of payment will be respected as to objecting senior creditors.<sup>145</sup> The decision has been hotly debated among bankruptcy experts who are concerned with the possible ramifications that the *AWECO* decision might have on a debtor's flexibility in arriving at a successful rehabilitation of its financial problems.

## V. ESTABLISHING AND COLLECTING CLAIMS

### A. Foreclosure

In *Longview Savings & Loan Association v. Nabours*<sup>146</sup> homeowners sought to enjoin a foreclosure sale conducted pursuant to a deed of trust lien and to recover damages for violation of the Deceptive Trade Practices Act.<sup>147</sup> The borrowers had attempted to obtain lender approval of the transfer of their property to a third party who had arranged "wrap-around" financing. The lender advised that any transfer must result in an assumption by the purchaser of the existing loan, or such transfer would be without the lender's consent and would, therefore, constitute a default.<sup>148</sup> The lender's attorney recommended against closing the sale but did not indicate to the borrower that the lender would enforce the consent clause. After closing the lender accepted payments from the borrower for five months with no objection. The appellate court agreed with the jury's findings that the lender had waived its rights to declare and to enforce a default pursuant to the consent clause on the basis of the borrower's failure to obtain the lender's acceptance of the transfer.<sup>149</sup>

The Corpus Christi court of appeals in *Cortez v. Brownsville National Bank*<sup>150</sup> dealt with the type and sufficiency of prior notice of an intended foreclosure. In an action brought by the borrower to set aside a trustee's deed given at a foreclosure sale, the court ruled that for a foreclosure sale under a deed of trust to be valid, absent a contrary agreement, waiver, or exceptional circumstance, the lender must have given two types of notice: first, notice of intent to accelerate prior to exercising the option to accelerate; and second, actual notice of acceleration.<sup>151</sup> The court found that in the instant case the note had the necessary language waiving the requirement of notice of intent to accelerate, thus validating the lender's action of only send-

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144. 725 F.2d at 298; see *SEC v. American Trailer Rentals Co.*, 379 U.S. 594, 611 (1965).

145. 725 F.2d at 298.

146. 673 S.W.2d 357 (Tex. App.—Texarkana 1984, writ granted).

147. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1985).

148. The pertinent provision in the mortgage read: "The Grantors further agree that they will not make any voluntary inter vivos transfer of the premises . . . without first obtaining the written consent of the mortgagee. Any such transfer, if the mortgagee shall not so consent, shall constitute a default . . ." 673 S.W.2d at 359.

149. *Id.* at 361.

150. 664 S.W.2d 805 (Tex. App.—Corpus Christi 1984, no writ).

151. *Id.* at 809; see *Ogden v. Gibraltar Sav. Ass'n*, 640 S.W.2d 232, 233-34 (Tex. 1982); *Allen Sales & Servicenter, Inc. v. Ryan*, 525 S.W.2d 863, 865-66 (Tex. 1975).

ing notice of acceleration.<sup>152</sup>

### B. Garnishment and Setoff

The Tyler court of appeals dealt with the issue of the validity of a judgment in a garnishment action based upon the finality of the judgment on the underlying debt in *Taylor v. Trans-Continental Properties, Ltd.*<sup>153</sup> The judgment creditors in *Taylor* had obtained a judgment in a garnishment action and sought to execute on this garnishment award during the pendency of an appeal of the main judgment, out of which the garnishment proceeding arose. The appellate court held that the trial court lost its jurisdiction in the main lawsuit by reason of the appeal; therefore, the trial court necessarily lost jurisdiction to render a judgment in the ancillary garnishment action pending the appeal.<sup>154</sup> The court of appeals also stated, however, that if the judgment is affirmed on appeal, the court retains its jurisdiction over the ancillary proceeding.<sup>155</sup> The court distinguished the rule that permits the issuance of a writ of garnishment on the date of the signing of a debt judgment when a supersedeas bond is not procured.<sup>156</sup> The court concluded that this rule only allows the creditor to seize, impound, and have first priority to the judgment debtor's funds pending final disposition of the appeal of the main cause.<sup>157</sup>

In *Dallas/Fort Worth Airport Bank v. Dallas Bank & Trust Co.*<sup>158</sup> the assignee of a certificate of deposit, as endorsee and holder in due course, sought payment of the certificate from the issuing bank that claimed a right of setoff against the certificate to the extent of the purchase money debt the certificate purchaser owed to the issuing bank. The appellate court, in affirming summary judgment granted in favor of the assignee, held that the issuing bank's security interest in the purchaser's deposit accounts failed to give a security interest in the funds allocable to the certificate.<sup>159</sup> The court did not permit the setoff because the demand that the bank held against the debtor (purchaser) was not matched at the time of the attempted setoff by any demand the debtor had against the bank, thus failing the test applied to attempted setoffs that the demands must mutually exist between the same parties.<sup>160</sup>

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152. 664 S.W.2d at 810.

153. 670 S.W.2d 417 (Tex. App.—Tyler 1984, no writ).

154. *Id.* at 419; see TEX. REV. CIV. STAT. ANN. art. 4076 (Vernon 1966) (providing who may issue writs of garnishment and when).

155. 670 S.W.2d at 419.

156. *Id.* at 420; see TEX. R. CIV. P. 657.

157. 670 S.W.2d at 420. *But see* Northshore Bank v. Commercial Credit Corp., 668 S.W.2d 787, 788 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (dates of issuance of writs cannot be used to prioritize multiple claims to a fund when such writs were issued prior to finality of judgment).

158. 667 S.W.2d 572 (Tex. App.—Dallas 1984, no writ).

159. *Id.* at 574-75; see TEX. BUS. & COM. CODE ANN. § 9.105(5) (Vernon Supp. 1985) (specifically excluding certificates of deposit from the definition of "deposit account").

160. 667 S.W.2d at 575; see *Western Shoe Co. v. Amarillo Nat'l Bank*, 127 Tex. 369, 373, 94 S.W.2d 125, 128 (Tex. 1936) (mutuality is essential to a setoff).

### C. Levy-Turnover

*Renger Memorial Hospital v. State*<sup>161</sup> presented the court with the issue of whether a cause of action held by a judgment debtor was a property right assignable in a turnover proceeding.<sup>162</sup> The court rendered judgment in favor of the state against the defendant, and the state commenced an ancillary action for turnover of a cause of action possessed by the defendant against its former directors. The appellate court ruled that all property, including present or future rights to property, not exempt from seizure for satisfaction of liabilities is subject to turnover and found the cause of action to be such a property right capable of turnover.<sup>163</sup>

In a complicated fact situation, conflicting claims of ownership of allegedly converted oil field equipment were resolved in *3-C Oil Co. v. Modesta Partnership*.<sup>164</sup> Various parties asserted rights to the equipment by virtue of: (a) the purchase of the underlying oil and gas leases at a sheriff's sale, therefore claiming the equipment as fixtures; (b) the issuance of a writ of execution, levy of the writ on the equipment, and purchase at the subsequent sale of the property by the United States Marshal; (c) the issuance of a writ of execution, levy of the writ on the equipment, but no subsequent sale; and (d) an assignment from the owner (judgment debtor) prior to any levy and/or sale by any of the other claimants.<sup>165</sup> The *3-C Oil* court ruled that no title passed to the purchaser of the oil and gas leases because the equipment was not a fixture; no title passed to the purchaser of the equipment at the marshal's sale because the judgment debtor did not have title to the equipment at the time the writ of execution was levied; the other creditor who levied upon the property held no title to the equipment because no execution sale had taken place, making this creditor merely a legal custodian of whatever interest the judgment debtor possessed; and the assignee, whose assignment from the judgment debtor occurred prior to any levy of a writ of execution, held title to the equipment.<sup>166</sup>

In *Ortiz v. M & M Sales Co.*<sup>167</sup> a judgment creditor sued a sheriff and his surety for damages caused by the sheriff's delay in issuing a writ of execution on real property of the debtor. The judgment debtor filed for bankruptcy two days after the creditor gave notice to the sheriff of the existence of real property to be levied upon. The trial court held the sheriff liable for his failure to levy the writ of execution. The sheriff avoided liability on appeal, however, because of the automatic stay provisions of the Bankruptcy Code

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161. 674 S.W.2d 828 (Tex. App.—Austin 1984, no writ).

162. See TEX. REV. CIV. STAT. ANN. art. 3827a(b) (Vernon Supp. 1985) (court may order judgment debtor to turn over property to satisfy the judgment).

163. 674 S.W.2d at 830; see also *Duke v. Brookshire Grocery Co.*, 568 S.W.2d 470, 472 (Tex. Civ. App.—Texarkana 1978, no writ) (cause of action for damages is assignable unless expressly forbidden by statute).

164. 668 S.W.2d 741 (Tex. App.—Austin 1984, writ ref'd n.r.e.).

165. *Id.* at 744-46.

166. *Id.* at 748-50.

167. 656 S.W.2d 554 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.); see TEX. REV. CIV. STAT. ANN. art. 3825 (Vernon 1966) (sheriffs held liable for failure to levy immediately on property after notice).

that would have prevented the sheriff's ultimate sale pursuant to a levy of the writ of execution.<sup>168</sup>

#### D. Tax Sales-Redemption

The issue of a taxpayer's right to redeem property lost for nonpayment of taxes assessed under the Limited Sales, Excise and Use Tax Act<sup>169</sup> was raised in *Wells v. Fenley*.<sup>170</sup> In *Wells* the purchaser of the property sold at a sheriff's sale brought suit to quiet title against the taxpayer. The taxpayer asserted a right of redemption under section 34.21 of the Texas Property Tax Code,<sup>171</sup> which became effective on January 1, 1982. All of the taxpayer's acts of redemption, however, occurred in 1981. At the time in question, therefore, only property lost for nonpayment of ad valorem taxes could be redeemed.<sup>172</sup> Hence, the Property Code provision was inapplicable, and the court quieted title in favor of the sheriff's sale purchaser.<sup>173</sup>

#### E. Reclamation

In *United States v. Westside Bank*<sup>174</sup> a statutory interpleader was brought to determine the proper distribution of proceeds of a foreclosure sale. The district court denied the priority status claim of a credit seller. The seller based its claim on a right of reclamation. The Fifth Circuit reversed the district court's order, finding that a seller of goods does retain a priority status to the extent of traceable proceeds from the sale of those goods if all requirements of section 2.702 of the Texas Business and Commerce Code<sup>175</sup> have been met. The court also noted that the seller must have diligently pursued the right of reclamation created under that section.<sup>176</sup>

#### F. Abstract of Judgment

The court in *Reynolds v. Kessler*<sup>177</sup> reviewed a suit to remove a cloud on title resulting from a purported federal judgment lien based on an allegedly defective abstract of judgment.<sup>178</sup> The judgment creditor challenged the trial court's judgment in favor of the property owner on the basis that the Texas

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168. 656 S.W.2d at 556. See TEX. R. CIV. P. 647, which requires a sheriff to post a notice of a sale of real property pursuant to the levy of a writ of execution for three weeks in a newspaper in the county where the property is located.

169. Ch. 24, 1961 Tex. Gen. & Spec. Laws, 1st Spec. Sess. 71, repealed by Act of June 13, 1979, ch. 841, § 6, 1979 Tex. Gen. Laws 2217, 2329-30.

170. 668 S.W.2d 924 (Tex. App.—Amarillo 1984, writ dismissed w.o.j.).

171. TEX. TAX CODE ANN. § 34.21 (Vernon 1982).

172. See 668 S.W.2d at 926.

173. *Id.*; see also *Alamo Land & Sugar Co. v. Hidalgo County Water Improvement Dist. No. 2*, 276 S.W. 949, 950 (Tex. Civ. App.—San Antonio 1925, no writ) (right of redemption does not exist unless specifically granted).

174. 732 F.2d 1258 (5th Cir. 1984).

175. TEX. BUS. & COM. CODE ANN. § 2.702 (Tex. UCC) (Vernon 1968).

176. 732 F.2d at 1265.

177. 669 S.W.2d 801 (Tex. App.—El Paso 1984, no writ).

178. See 28 U.S.C. §§ 1962-1963 (1982) (regarding the creation and registration of federal judgment liens); see also TEX. PROP. CODE ANN. §§ 52.003-.004 (Vernon 1984) (requirements for a valid Texas abstract of judgment and proper recordation).

law on requirements for abstracting a judgment did not pertain to a federal court judgment lien. The court, however, ruled that the statute providing that an abstract of judgment rendered in Texas by any United States court may be recorded and indexed in the same manner as provided for judgments of courts of Texas,<sup>179</sup> when read in conjunction with the federal statute providing for registration of judgments of other districts, results in uniform treatment of state and federal judgments.<sup>180</sup> The federal abstract in question failed to state the date of judgment and the rate of interest specified in the judgment. The court concluded that the failure to state the date of the judgment was alone fatal to the creation of the judgment lien, despite actual notice of the defective record.<sup>181</sup> The court, therefore, held that the abstract was so improperly recorded that it created no lien.<sup>182</sup>

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179. 669 S.W.2d at 805; see TEX. PROP. CODE ANN. § 52.007 (Vernon 1984).

180. 669 S.W.2d at 805.

181. *Id.* at 804-06.

182. *Id.*