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Bankruptcy and Creditors' Rights

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INTRODUCTION

This Article will focus primarily on significant developments in Bankruptcy Law and Creditors Rights and Remedies from the perspective of the Texas practitioner. In somewhat of a departure from years past, it will feature an analysis of one case dealing with valuation of collateral in bankruptcy reorganization proceedings. Otherwise, the cases included in this Article will be reviewed much more concisely. In keeping with the Survey's focus on Texas law, this Article is limited to significant developments impacting upon the creditors' rights or debtor/creditor practitioner during the Survey period.1

II. BANKRUPTCY

A. SUPREME COURT

Early in the Survey period, the Supreme Court considered the level of a creditor's reliance on a fraudulent misrepresentation necessary to render a debt non-dischargeable. In Field v. Mans,2 the Court was faced with a situation involving the "actual fraud" provision of § 523 of the Bankruptcy Code, which deals with non-dischargeability of certain debts. Specifically, subsection (a)(2) deals with dischargeability of a debt incurred either by: (i) false pretenses, a false representation, or actual fraud, other than a statement regarding financial condition, or (ii) the use of a materially false written financial statement on which the creditor "reasonably relies" and which the debtor published with an intent to

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1. If a case or statutory amendment does not meet these criteria, chances are that it is not covered in this Article. The author has attempted to limit the focus of this Article to issues arising in the enforcement of the debtor/creditor relationship. The reader is urged to review the Survey Articles on Banking Law and Commercial Transactions, which address related topics such as usury, failed financial institutions, and Article 9 secured transactions. For more expansive coverage of bankruptcy developments during the Survey period, see E. Wartten & J. Westbrook, Recent Developments, in UNIVERSITY OF TEXAS SCHOOL OF LAW 15TH ANNUAL BANKRUPTCY CONFERENCE (1996); R. Littlefield & T. Murphy, New Case Update, in TEXAS TECH UNIVERSITY SCHOOL OF LAW 12TH ANNUAL FARM, RANCH AND AGRI-BUSINESS BANKRUPTCY INSTITUTE (1996). Similar updates are also provided at the State Bar of Texas Advanced Consumer Bankruptcy Course and Advanced Business Bankruptcy Course. Additionally, the Texas Tech Law Review's Fifth Circuit Symposium typically features an annual update of bankruptcy developments in the Fifth Circuit.

deceive. The provision dealing with false financial statements explicitly requires that a creditor "reasonably rely" on the false financial statement in order for the debt to be declared non-dischargeable. The statute dealing with actual fraud, however, is silent with respect to any level of reliance. The Court, faced with a conflict among the circuits, essentially had to decide whether and to what extent to impose a reliance requirement under the "actual fraud" provision of § 523.

The Court applied a concept of statutory construction known as "the apparent negative pregnant," which essentially provides that "[a]n express statutory requirement here, contrasted with statutory silence there, shows an intent to confine the requirement to the specified instance." In the instant case, the Court essentially had to decide the effect of Congress excluding a reliance standard in one section of the statute while imposing a specific reliance standard in another. Justice Souter found the apparent negative pregnant analysis helpful but found danger in a blind, all-encompassing application of such a maxim.

The Court noted a significant historical difference between the actual fraud provision and the false financial provision. The former referred to a long-standing common law tort, and the latter applied to a more specific bankruptcy related issue with an entirely different set of problems and policy considerations. The Court reviewed the Restatement (Second) of Torts, which in the context of common law fraud has long suggested the imposition of a "justifiable" reliance standard. The Court applied the same meaning to the actual fraud provision of the Bankruptcy Code.

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4. Id.
5. To find a debt non-dischargeable under the "actual fraud" provision, the creditor must prove certain elements that are not unlike common law fraud. Essentially, the creditor must prove the following: that the debtor made a material representation that he knew at the time to be false; that the debtor made the representation with the intention to deceive the creditor; that the creditor relied upon the representation; and that the creditor was damaged as a result. See generally In re Eashai, 87 F.3d 1082, 1086 (9th Cir. 1996) (credit card debt found non-dischargeable under "actual fraud" provision).
7. Id. In other words, "where Congress includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Gozlon-Perez v. United States, 498 U.S. 395, 404, (1991) (citing Russello v. United States, 464 U.S. 16, 23 (1983)).
8. "Without more, the inference might be a helpful one. But there is more here, showing why the negative pregnant argument should not be elevated to the level of interpretive trump card." Field, 116 S. Ct. at 442. The opinion goes on to point out what would be in Justice Souter's analysis a nonsensical application of such a standard when there are obvious reasons not to do so.
9. Id. at 443. Given the history of the actual fraud provision and its relation to common law fraud, the Court is to infer, unless a statute otherwise dictates, that Congress means to incorporate established meaning of common law terms.
11. As the Court stated: The Restatement expounds upon justifiable reliance by explaining that a person is justified in relying on a representation of fact "although he might have ascertained the falsity of the representation had he made an investigation." Significantly, for our purposes, the illustration is given of a seller of
In applying the "justifiable" reliance standard, the Court pointed out that this is a lower threshold than the more difficult and objective standard of "reasonable" reliance found in the false statement provision.\(^1\) Reasonable reliance imposes a reasonable person standard. Justifiable reliance merely requires the creditor to use common sense and not blindly rely upon a misrepresentation if the falsity is obvious or patent to the creditor, perhaps suggesting a cursory examination or investigation. The Court added that in addition to the statutory distinction, a historical discrepancy in bargaining power between large consumer lenders and unsophisticated borrowers provided a policy reason for imposing the reasonable reliance standard in the case of false financial statements.\(^3\)

During the Survey period, the Court also issued a number of other opinions; however, those opinions dealt with issues that were either beyond the scope of this Survey\(^1\) or had previously been reviewed in last year's Survey.\(^5\)

B. DEVELOPMENTS IN FIFTH CIRCUIT AND BELOW\(^16\)

1. Collateral Valuation—The Rash that Won't Go Away

   a. The En Banc Majority Opinion

In a case that by now should be familiar to regular readers of this Survey, the Fifth Circuit reversed itself and split with at least five other circuits who says it is free of encumbrances; according to the Restatement, a buyer's reliance on this factual representation is justifiable, even if he could have "walk[ed] across the street to the office of the register of deeds in the courthouse" and easily have learned of an unsatisfied mortgage. \(^2\)

\[Field, 116 S. Ct. at 444\] (citation omitted) (citing \textit{RESTATMENT (SECOND) OF TORTS, § 540 (1979)}). Similarly, the Court further notes that, Illustration 1 of \textit{PROSSER'S LAW OF TORTS} also suggested a justifiable reliance standard quoting "[i]t is only where, under the circumstances, the facts should be apparent to one of his knowledge and intelligence from a cursory glance, or he has discovered something which should serve as a warning that he is being deceived, that he is required to make an investigation of his own." \(^3\) \textit{Id.} (citing \textit{WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 108, 718 (4th ed. 1971)}).

\[^{12}\] \textit{Field}, 116 S. Ct. at 439.

\[^{13}\] \textit{Id.} at 447. It is worth noting that reasonableness is not rendered totally irrelevant: \[^{14}\] [As for the reasonableness of reliance, our reading of the Act does not leave reasonableness irrelevant, for the greater the distance between the reliance claimed and the limits of the reasonable, the greater the doubt about reliance in fact. Naifs may recover, at common law and in bankruptcy, but lots of creditors are not at all naive. The subjectiveness of justiciability cuts both ways, and reasonableness goes to the probability of actual reliance. \(^4\) \textit{Id.} at 446.


\[^{16}\] The Fifth Circuit has decided a number of cases dealing with bankruptcy and creditors' right since the Survey. For a preview of cases that may be reviewed in next...
cuits in In re Rash. The Fifth Circuit has now decided, en banc, that in a Chapter 13 bankruptcy case, courts should begin any analysis of collateral valuation (even when the debtor proposes to keep the collateral) with the wholesale value of the collateral. This is a departure from the prior Rash opinion and numerous other circuits, where a majority rule had developed that in reorganization proceedings, collateral should be valued at what amounts to replacement cost, or at least without deducting hypothetical foreclosure costs. Given the risk of oversimplification, split among the circuits, vigorous dissent, and the far reaching economic consequences of this decision, some analysis of this decision is in order.

In Rash, the debtor purchased a Kenworth truck tractor, the financing of which was ultimately provided by Associates Commercial Corporation (ACC). The debtor filed for Chapter 13 relief, and the debtor's plan provided for a "cram down" of ACC's secured claim under § 1325(a)(5)(B) of the Bankruptcy Code. ACC filed a proof of claim and a motion for relief from the automatic stay. The court heard ACC's motion, the debtor's objection to ACC's claim, and other matters, the disposition of which required the court to determine the value of the truck for purposes of ACC's secured claim.

The bankruptcy court denied ACC's motion for relief from stay and entered an order fixing the amount of ACC's secured claim at the truck's wholesale price. The court apparently reasoned that it had to value the truck from the "creditor's perspective" because § 506(a) of the Bankruptcy Code sets the amount of a secured claim at "the value of [the]
creditor's interest in the estate's interest in the property.”

In short, the bankruptcy court determined that the value of the truck “was equal to the amount that ACC could realize if it exercised its right under the Security Agreement to repossess and sell the truck.”

On rehearing en banc, the majority affirmed the bankruptcy court. The majority's analysis focused on its perception of Texas law regarding secured transactions and on its reading of § 506(a) of the Bankruptcy Code, which prescribes the method for determining valuation of secured claims. Section 506 provides that an allowed claim is secured “to the extent of the value of such creditor's interest in the estate's interest in such property . . . . Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property.”

The majority initially examined the first sentence of § 506 in an effort to determine the creditor's interest in the estate's interest in the property. The majority reasoned that under state law the creditor's interest is in the nature of a security interest, “giving the creditor the right to repossess and sell the collateral and nothing more.” The court also hypothesized that either of the two “cram down” alternatives found in § 1325 (specifically: (i) surrender of collateral, or (ii) retaining and paying the present value of the collateral over time) should effectively yield the same result for the secured creditor. The majority sought symmetry between the two “cram down” alternatives, expressing a concern that valuing a creditor's secured claim at replacement cost (in the retention and use context) would provide more protection than the secured creditor would realize under the collateral surrender scenario. For some reason, the court found this unacceptable.

The court then focused on the second sentence of § 506, which mandates that a court value collateral in light of the purposed disposition or use of that property. The court concluded that such mandatory language did not offer the “clear textual guidance” needed to justify departure from what the majority thought was established state law regarding realization upon security interests. Specifically, the majority viewed state law under the UCC as limiting a secured creditor's interest in collateral to what amounts to its remedies upon default. As the dissent points out, however, there really is no state law regarding treatment of

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22. Rash, 90 F.3d at 1040, (quoting In re Rash, 149 B.R. at 433).
24. Initially, the Fifth Circuit disagreed with the wholesale approach and found that the inquiry should begin at the replacement cost, which is in effect a retail valuation. See In re Rash, 62 F.3d 685 (5th Cir. 1995).
25. Rash, 90 F.3d at 1061.
27. Rash, 90 F.3d at 1044.
28. Id. at 1046.
29. Id. at 1047.
30. Id.
31. Id. at 1047-51.
32. Id. at 1050.
33. Id. at 1041-42.
secured claims in a reorganization context.\textsuperscript{34}

In conclusion, based upon the majority's reading of the statutory language, economic considerations, and legislative history, the valuation of a secured creditor's interest (at least according to the majority opinion) "should start with what the creditor could realize if it repossessed and sold the collateral pursuant to its security agreement, taking into account the purpose of the valuation and the proposed disposition or use of the collateral."\textsuperscript{35} Importantly, however, bankruptcy courts are allowed to make adjustments depending upon considerations arising from the facts of each particular case.\textsuperscript{36}

b. The Dissent (and Majority Rule in Other Circuits)

The en banc majority not only has the Fifth Circuit effectively reversing itself, but it now has placed itself clearly within the minority view. As of this writing, \textit{Rash} is inconsistent with holdings in at least five other circuits.\textsuperscript{37} There is perhaps no better critical analysis of the majority opinion than is found in Judge Smith's dissent.\textsuperscript{38} Although the dissent speaks for itself, the majority opinion warrants some analysis here, especially

\begin{itemize}
\item \textsuperscript{34} \textit{Id.} at 1069. (Smith, J., dissenting). This is further discussed \textit{infra} note 39.
\item \textsuperscript{35} \textit{Id.} at 1061. \textit{Rash} has been followed by at least one district court. \textit{See In re Maddox}, 200 B.R. 546 (N.J. 1996) (apparently decided before most recent opinion in \textit{Taffi} (see \textit{infra} note 37)).
\item \textsuperscript{36} \textit{Id.} at 1061. In the bankruptcy court opinion, however, Judge Sharp found "no justification" from varying from wholesale valuation of Mr. Rash's truck. \textit{In re Rash}, 149 B.R. at 433.
\item \textsuperscript{37} \textit{See In re Hoskins}, 102 F.3d 311, 313-16 (7th Cir. 1996) (average between wholesale and retail most suitable "middle ground"); \textit{Taffi} v. United States, 96 F.3d 1190 (9th Cir. 1995) (holding that in Chapter 11 context, confirmation value of secured claim is measured by fair market value with no deduction for hypothetical foreclosure and repossession costs); Metrobank v. Trimble (\textit{In re Trimble}), 50 F.3d 530 (8th Cir. 1995) (holding that in Chapter 13 case, confirmation value of secured claim is measured by retail value without hypothetical sale cost deduction); Winthrop Old Farm Nurseries v. New Bedford Institution for Savings (\textit{In re Winthrop Ole Farm Nurseries}), 50 F.3d 72 (1st Cir. 1995) (holding that in Chapter 11 confirmation value is measured by "fair market value" rather than liquidation value); Huntington Nat'l Bank v. Pees (\textit{In re McClurkin}), 31 F.3d 401 (6th Cir. 1994) (no deduction for hypothetical sale cost when debtor purposes to retain collateral in Chapter 13); Coker v. Sovran Equity Mortgage Corp. (\textit{In re Coker}), 973 F.2d 258 (4th Cir. 1992) (value of collateral measured without deduction for hypothetical sale cost when debtor retains collateral in Chapter 13). \textit{Compare Lomas Mortgage USA v. Wiese}, 980 F.2d 1279, 1286 (9th Cir. 1992), \textit{vacated on other grounds} 508 U.S. 958, (1993) with General Motors Acceptance Corp. v. Mitchell (\textit{In re Mitchell}), 954 F.2d 557, 560 (9th Cir.), \textit{cert. denied}, 506 U.S. 908, (1992). \textit{Mitchell}, however, has been overruled. \textit{See Taffi}, 96 F.3d at 1193.
\item \textsuperscript{38} For starters, the dissent notes:
\begin{itemize}
\item The majority dismantles 11 U.S.C. § 506(a) (1994) by combining a question-begging interpretation of the statute's first sentence with an unreasonably restrictive reading of the second. Having thereby obscured the section's plain meaning, the majority turns to an inappropriate presumption, an incorrect economic analysis, and the last resort of judicial redrafting-selective reading of the legislative history. Not surprisingly, this policy-driven reconstruction of the statute has been squarely rejected by every other circuit that has considered it.
\end{itemize}

\textit{Rash}, 90 F.3d at 1061 (Smith, J., dissenting).
given what may have been a misapplication of existing state law regarding security interests.

As mentioned above, § 506(a) contains two sentences. In effect, the first sentence relies upon existing state law. The bankruptcy court must first determine the nature and extent of the creditor's interest in the estate's interest in an item of property. Arguably, this is the secured creditor's "security interest." Once this determination is made, then the court looks to the second sentence of § 506(a), which mandates that the court make the valuation in light of the purpose for which the collateral will be disposed of or used. What follows is a brief analysis of how this author believes the Fifth Circuit first misunderstood substantive state law regarding security interests and second, how the court then applied that substantive law in an illogical fashion. Additionally, the court's analysis further goes askew when it essentially defers to a body of state law that simply does not exist.

First, an analysis of the state law regarding secured transactions reflects that the court's reading of the first sentence of § 506(c) may be flawed. In the context of personal property, the applicable state law is article 9 of the Texas Business and Commerce Code. Article 9 deals with the creation, perfection, and enforcement of security interests in personal property. Article 9, however, is silent with respect to any limitation on the extent of the creditor's security interest, other than to the extent the creditor has given value. In other words, under state law, the lien simply exists to the extent of the indebtedness, which remains an encumbrance against the property.

More specifically, section 9.504 provides the secured party's remedies upon default. Those remedies consist of disposing of the collateral in a "commercially reasonable" manner, applying the net proceeds to satisfaction of the debt, or retaining the collateral in total satisfaction of the debt. The rules regarding disposition of collateral, however, do not dictate that a creditor dispose of collateral in a wholesale fashion, nor do they purport to limit a creditor's interest in collateral to such a hypothetical result. Rather, in the spirit of attempting to obtain the highest value possible (which benefits both the debtor and the secured creditor), there is nothing to preclude the creditor from attempting to dispose of the collateral on a more "retail" basis. If and to the extent the creditor is successful in obtaining such a higher value, that value goes to the creditor (to

39. TEX. BUS. & COM. CODE ANN. §§ 9.101-9.507 (Tex. UCC) (Vernon 1991). Actually, the term "security interest" is defined in article 1. See id. at § 1.201(37)(A) ("'Security interest' means an interest in personal property or fixtures which secures payment or performance of an obligation . . . .").
40. Id. § 9.504.
41. Id.
42. Id. § 9.505.
43. As reviewed elsewhere in this Article, at least one Texas court has noted that § 9.504 "does not require but rather allows a secured party to sell the collateral." Schmid v. Texas Commerce Bank, 912 S.W.2d 845, 846 (Tex. Civ. App.—Fort Worth 1995, writ denied) (emphasis added).
the extent of the debt) because it constitutes part of the secured creditor's security interest. Alternatively, the creditor may retain the collateral in a "strict foreclosure" of its security interest.

Article 9, however, is absolutely devoid of even any mention of restructuring or reorganizing such secured debt, in a bankruptcy context or otherwise. This is because there simply is no state law regarding the rights of secured creditors in reorganizations. This field has been preempted by the Code, which is federal law. Additionally, in the context of day to day commercial expectations, there is likewise no such limitation in the absence of an intervening bankruptcy. These principles are equally applicable to transactions involving real and personal property.

Turning to the Code, the second sentence of § 506(a) unequivocally mandates that valuation "shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property." When the purpose is a "cram down" of property to be retained and utilized by a reorganizing debtor, the only logical conclusion is that the court "shall" look to the value of the property "in the hands of the debtor, not on the auction block." It is logically and factually incongruous to analyze an actual situation involving retention and use of an item of property by valuing it based upon the purely hypothetical cost of a foreclosure sale that (if a plan is successful) would never happen. As the Eighth Circuit has clearly stated (and as quoted in the Rash dissent):

[W]here a debtor intends to retain and use the collateral, the purpose of the valuation is to determine the amount an undersecured creditor will be paid for the debtor's continued possession and use of the collateral, not to determine the amount such creditor would receive if it hypothetically had to repossess and sell the collateral. Such an interpretation ignores the expressed dictates of § 506(a).

More recently, in In re Taffi, the Ninth Circuit, in concluding that fair market value is the appropriate measure, put the entire issue in perspective:

When a Chapter 11 debtor or a Chapter 13 debtor intends to retain property subject to a lien, the purpose of a valuation under § 506(a) is not to determine the amount the creditor would receive if it hypothetically had to foreclose and sell the collateral. Neither the foreclosure value nor the costs of repossession are to be considered

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44. Obviously, if the collateral was disposed of in a commercially reasonable manner, and the proceeds insufficient to satisfy the debt, then the creditor may have a claim for a deficiency. See Tanenbaum v. Economics Labs., 628 S.W.2d 769, 771-72 (Tex. 1982).
46. Imagine the nonsensical result if security interests and liens were so limited. For example, when real or personal property that secures a debt is sold in the ordinary course of business, the "payoff" is always the full amount of the debt or lien, and in the absence of an agreement between the parties, the secured creditor is not limited to the net proceeds of a hypothetical forced sale. This is not contemplated in the typical transaction, and there is no state law that would mandate such approach.
48. See Rash, 90 F.3d at 1061 (Smith, J., dissenting).
49. In re Trimble, 50 F.3d 530, 532 (8th Cir. 1995) (emphasis added).
because no foreclosure is intended. Instead, when the proposed use of the property is continued retention by the debtor, the purpose of the valuation is to determine how much the creditor will receive for the debtor's continued possession. Hypothetical sale costs are not to be considered because no sale is intended.

 valuation must be accomplished within the actual situation presented. Consequently, the value has to be the fair market value of what the debtors are using.\footnote{Tafti, 96 F.3d at 1192. As another circuit explained, by retaining the collateral, the reorganizing debtor is insuring that the very event that gives rise to the majority's starting point for valuation will not take place. See In re Winthrop Old Farm Nurseries, 50 F.3d at 74.}

In what amounts to a disregard of the second sentence of § 506(a) (which results in an overly narrow reading of the first sentence), the majority refers to a canon of construction that disfavors displacement of well established areas of state law. As mentioned above and in the dissent, however, that maxim does not apply to Rash because there simply is no state law that addresses reorganization of debts.

The majority's search for symmetry between the "cram down" alternatives of retention and surrender of the collateral to the secured creditor seems similarly incongruent. The majority seems concerned that valuation at a replacement or similar cost would give a creditor more protection and even more potential return than it would have under the surrender/foreclosure scenario. This concern is misplaced, however, because the two situations are in no way symmetrical. On the contrary, they arise out of two very different scenarios. First, surrender of collateral to a secured creditor truly is like the situation contemplated by section 9.504 of the UCC because the creditor in fact will be disposing of the collateral. The cost of repossession and disposition are not merely hypothetical, but they will in all likelihood be incurred. Thus, it makes sense to take a wholesale approach in a "surrender" situation.

On the other hand, retention and use of the collateral create an entirely different situation. Not only are there no repossession and sale costs to be taken into account, but the collateral truly is worth more to the debtor and the estate and, therefore, to the secured creditor. To the extent the debtor retains and uses collateral for a greater purpose (reorganization), the creditor's interest in the collateral is simply worth more. This is consistent with the majority's own statement and recognition of the fundamental concept that valuation for one purpose does not necessarily control for another, especially in light of the admonition of the second sentence of § 506(a).

Finally, although in a somewhat different context, the Supreme Court has stated on more than one occasion that the "creditor's interest in the estate's interest in such property" means "the value of the collateral."\footnote{See Nobleman v. American Savings Bank, 508 U.S. 324, 328-29, (1993) (Under § 506(a), a claim is secured "to the extent of the value of [the] property"); United Savings
The Fifth Circuit even alluded to this concept in an earlier case.\textsuperscript{52} Of course, the secured creditor's interest is limited to the estate's interest in the property. Not only is this common sense, but it is consistent with the fundamental concept of state law—the secured creditor's interest in an item of property can be no greater than the interest conveyed by the debtor. In effect, the debtor's interest that was pledged to the creditor is the interest that is being valued. This does not mean, however, that the creditor's interest is limited to the proceeds of a hypothetical, imaginary forced sale that may never occur.

c. Conclusion

It is not the place of this Survey issue to determine whether a decision is "right" or "wrong." It is important to note, however, that with the Rash decision, the en banc majority now puts the Fifth Circuit in the minority view. Although there may be no set answer to the issue of collateral valuation in the absence of new legislation, the Rash majority seems to have misapplied state law, which leads to logical inconsistencies in the majority opinion. These inconsistencies cannot be explained, especially coming from a circuit that has in the past been so consistent with its "plain meaning" approach to statutory construction.

A tempting "practical" approach is taken by the Ninth Circuit in Taffi, in which that court concluded that "the value has to be the fair market value of what the debtors are using."\textsuperscript{53} Although Taffi dealt with real property, the court made the following observation with respect to motor vehicles: "We make no judgment whether the fair market value of an automobile is high blue book or low blue book or some other value; that value is to be determined by the facts presented to the bankruptcy court."\textsuperscript{54}

Obviously, Taffi does not provide what may be a much needed hard and fast guideline for valuing motor vehicles, but neither does the Bankruptcy Code.\textsuperscript{55} Given the choice between the two extremes, however,

\begin{footnotes}
\item[53] In re Taffi, 96 F.3d at 1192.
\item[54] Id. at 1193.
\item[55] See, e.g., In re Johnson, 165 B.R. 524, 529-30 (S.D. Ga. 1994) where the Court stated:

[T]he legislative history of Section 506(a) makes clear that "value" does not necessarily contemplate forced sale or liquidation value of the collateral; nor does it always imply a full going concern value. Courts will have to determine value on a case by case basis, taking into account the facts of each case and the competing interest in the case. . . . A fixed "wholesale" or "retail" standard for Section 1325(a)(5)(B)(ii) valuations is inconsistent with Section 506(a)'s aversion to standardized procedure . . . [T]he Bankruptcy Code nowhere implies that NADA "wholesale" and "retail" values should operate
\end{footnotes}
state law, statutory construction, and logic all dictate that retained collateral used in a debtor's reorganization should be valued based upon its actual value, which is in effect its actual replacement cost.

Certiorari has been granted for Rash. The well-prepared practitioner should know, however, that the wholesale value approach suggested by Rash is only the starting point. Those who provide courts with well-reasoned, qualified expert testimony and fact evidence will be well served.

2. Consumer Case Administration

a. Statement of Intent

The Fifth Circuit decided another case that should have a direct impact on the administration of consumer bankruptcies. In In re Johnson, the court addressed what had been some uncertainty regarding the effect of the Statement of Intent required by § 521. Under § 521, an individual Chapter 7 debtor is required to file, within thirty days after the petition date, a statement of intent regarding consumer debts secured by property of the estate. Specifically, the debtor is required to state whether he intends to retain or surrender such property, and if such property is exempt, to specify the exemption and to state whether the debtor intends to redeem the property or reaffirm the debt secured by that property. The debtor is required to exercise that stated intention within forty-five days after the filing of the notice of intent. Whether the debtor is in fact limited to these three options (reaffirmation, redemption, or surrender) "has been hotly contested in recent jurisprudence."

The Fifth Circuit found that the specific language of § 521 mandates the filing of such a statement. Moreover, the court agreed with an earlier Eleventh Circuit case that decided that Chapter 7 debtors are limited to the three options set forth in the statute, and that compliance is

as any sort of a standard for measuring compliance with Section 1325(a)(5)(B)(i). . . . Fair market value is "[t]he amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts." . . . Ascertaining "fair market value" is an objective broad enough to permit use of NADA Guide Books and similar authoritative sources as evidence of value, but without implying that the valuation determination is limited to those sources.

Id. (citations omitted). For cases applying both wholesale and retail values, see for example, In re Madison, 186 B.R. 182 (Bankr. E.D. Pa. 1995); In re Myers, 178 B.R. 518 (Bankr. W.D. Ok. 1995); In re Carlan, 157 B.R. 324 (Bankr. S.D. Tex. 1993). For a thorough discussion of collateral valuation in Chapter 13, see, Keith M. Lundin, CHAPTER 13 BANKRUPTCY SECTION 5.46-5.48 (Wylie 1991 & Supp. 1996) (Author discusses most of above cases and comes to conclusions similar to that found in Rash).

56. 117 S. Ct. 758 (1997).
59. Id.
61. In re Johnson, 89 F.3d at 251.
62. Id. at 252.
mandatory. Therefore, it would appear that simply ignoring § 521 is no longer an option in the Fifth Circuit.

b. Case Administration—Chapter 13 Best Efforts

In In re Jobe, Judge Monroe denied confirmation of a Chapter 13 plan proposed by a debtor who apparently was intentionally underemployed and who did not devote “his best efforts” to funding the Chapter 13 plan. Under § 1325(b), a Chapter 13 plan may not be confirmed on objection, unless the plan provides that all of the debtor’s projected disposable income to be received during the three year period of the plan is applied to make payments under the plan. A crucial point in Jobe is that the Chapter 13 income test is more than just multiplying the debtor’s current income by the number of months in the plan. Rather, Chapter 13 requires that all of the debtor’s projected disposable income be dedicated to funding the plan. According to Jobe, “the capacity of the debtor to earn more money and, thereby, pay more in plan payments has been a factor that the Fifth Circuit and other courts have considered.”

In Jobe, the debtor was a relatively young able-bodied man with no apparent medical problems and with marketable skills gained while in the Army. The debtor apparently owned a small family farm; however, no crops were grown on that farm, and the debtor had no other work. The court found that “sitting idly by on a farm, the down payment for which was advanced by one’s second largest unsecured creditor, and collecting ‘early’ retirement pay from the Army while offering unsecured creditors four cents on the dollar hardly strikes the court as one’s ‘best efforts.’”

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63. Id.
64. Id. The court denied the creditor’s motion to dismiss; however, the creditor’s motion to compel in compliance with § 521 was granted. The debtors were allowed ten (10) days within which to notify the creditor of their intention, and, in the event of the debtor’s failure to do so, then the Bankruptcy Court was authorized to dismiss the case or deny the debtor’s discharge under 11 U.S.C. § 727(a)(6). Id. As mentioned above, the Court relied on the Eleventh Circuit in holding in Taylor v. AGE Federal Credit Union (In re Taylor), 3 F.3d 1512 (11th Cir. 1993).
66. Id. at 827.
68. 197 B.R. at 826-27.
69. Id. at 826.
70. Id. at 827; see also Commercial Credit Corp. v. Killough (In re Killough), 900 F.2d 61, 66 (5th Cir. 1990) (“[T]here may be instances where income obtained through working overtime can and should appropriately be included in a debtor’s projected and disposable income for the purposes of a Chapter 13 plan.”); In re Dunning, 157 B.R. 51, 53 (Bankr. W.D. N.Y. 1993).
71. In re Jobe, 197 B.R. at 827. For a discussion of non-exclusive factors applied in a case decided prior to the 1984 Amendments, see In re Estus, 695 F.2d 311, 315 (8th Cir. 1983). In In re Jobe, the Court seemed to indicate that the Estus factor and the “best efforts” or “ability to pay” test under Section 1325(b) to be equally applicable. Id. at 826.
3. Dischargeability\textsuperscript{72}—Willful and Malicious Injury

In what may become known as “The Shotgun Case,”\textsuperscript{73} the Fifth Circuit apparently narrowed somewhat the scope of willful and malicious injury necessary to render a debt non-dischargeable under § 523(a)(6). In \textit{In re Delaney},\textsuperscript{74} Delaney (the debtor), apparently in anticipation of a confrontation with Corley, loaded his double-barreled shotgun and took it with him to face Corley, who remained seated in the car that had stopped in Delaney’s driveway. Delaney aimed the loaded shotgun at Corley through the car’s windshield, and, with his finger on the trigger, tapped the shotgun twice on the windshield. The gun discharged, apparently by accident.

The court found that Corley’s damages were dischargeable, reasoning that for willfulness and malice to prevent discharge under § 523(a)(6), “the debtor must have intended the actual injury that resulted.”\textsuperscript{75} Quoting a Georgia bankruptcy court, the Fifth Circuit noted that § 523(a)(6) “excepts from discharge debts arising from ‘willful and malicious injury’ rather than ‘willful and malicious acts which cause an injury.’”\textsuperscript{76} In other words, had Delaney meant to pull the trigger, then the damages would have been non-dischargeable; however, under the Fifth Circuit’s logic, no matter how foreseeable the consequences of Delaney’s inexcusable acts, those consequences apparently do not give rise to non-dischargeability.\textsuperscript{77}

Similarly, in \textit{In re Greenway},\textsuperscript{78} the debtor apparently crashed a motor boat into another vessel, causing a fatality and various injuries. The debtor had apparently been drinking. The creditor sued in state court, and a jury, finding the debtor sixty percent responsible, awarded damages. The state court jury, however, did not find that the debtor was grossly negligent.\textsuperscript{79} Subsection (a)(9) excepts from discharge death or personal injuries caused by the operation of a “motor vehicle” if that op-

\textsuperscript{72} For an expansive update on dischargeability litigation, see Keith Lundin, \textit{Recent Developments in Discharge and Dischargeability Litigation}, in \textit{Twelfth Annual Texas Tech Farm, Ranch, and Agri-Business Bankruptcy Institute} (1996).

\textsuperscript{73} Judge Keith Lundin coined this phrase at the 1996 Texas Tech Farm, Ranch, and Agri-business Bankruptcy Institute.

\textsuperscript{74} Corley v. Delaney (\textit{In re Delaney}), 97 F. 3d 800 (5th Cir. 1996).

\textsuperscript{75} Id. at 802.

\textsuperscript{76} Id. (quoting \textit{In re Hampel}, 110 B.R. 88, 93 (Bankr. M.D. Ga. 1990)).

\textsuperscript{77} One could easily conclude that this inequitable result points out the need for a legislative amendment to what in hindsight appears to be a poorly drafted statute. Numerous courts have found claims nondischargeable when an intentional act has resulted in a foreseeable injury. \textit{See}, e.g., Perkins v. Scharfe, 817 F.2d 392 (6th Cir. 1987); \textit{In re Cecchini}, 780 F.3d 1440 (9th Cir. 1986); \textit{In re Quezada}, 718 F.2d 121 (5th Cir. 1983). This has even arisen in a medical malpractice context. \textit{See} Kelt v. Quezada (\textit{In re Cole}), 136 B.R. 453, 459 (Bankr. N.D. Tex. 1992) (doctor’s willful disregard of his duties and acceptable medical practices rendered malpractice claim nondischargeable); \textit{see also} First Nat’l Bank v. Franklin (\textit{In re Franklin}), 726 F.2d 606 (10th Cir. 1984); Kawaauhau v. Geiger (\textit{In re Geiger}), 172 B.R. 916 (Bankr. E.D. Mo. 1994).

\textsuperscript{78} Boyce v. Greenway, (\textit{In re Greenway}), 71 F.3d 1177 (5th Cir. 1996).

\textsuperscript{79} The Fifth Circuit faced two issues. First, the Fifth Circuit had to determine whether a motor boat was a “motor vehicle” as that term is used under section 523(a)(9).
eration was unlawful due to the debtor's intoxication. The court found that under its "plain meaning" statutory analysis, the term "motor vehicle" did not include a motor boat. Therefore, the court found subsection (a)(9) inapplicable to the operation of a motor boat.

The court also addressed a collateral estoppel issue arising out of the state court litigation regarding the accident. As mentioned above, the state court jury did not find that the debtor was grossly negligent. The court inferred that if the debtor was found not to be grossly negligent in an actually litigated state court proceeding between the same parties, then it necessarily followed that it had been preclusively decided that the debtor's actions did not come up to the "intentional" and lacking "just cause for excuse" standard required for a non-dischargeability finding under the "willful and malicious" provisions of subsection (a)(6).

4. Dischargeability—False Financial Statements

The Fifth Circuit revisited the issue of non-dischargeability of debts incurred as a result of a false financial statement in In re Norris. The false financial statement in Norris was made as part of an annual renewal process of what apparently was a series of year to year notes. Specifically, the debtors represented that they had a cash flow surplus of $45,000 at a time when their excess cash flow was almost non-existent. The debtor contended, however, that the debt was dischargeable because no "new" funds were disbursed in response to the false financial statement, and that they lacked the requisite intent to deceive the bank. The Fifth Circuit, however, noted that § 523(a)(2) expressly lists "renewal . . . of credit" as one of the classes of obligations excepted from discharge. The court also determined that regardless of the actual intent, the bankruptcy court found that at a minimum "there was a reckless disregard for the truth." The Fifth Circuit found no error in this reasoning.

81. 71 F.3d at 1180.
82. Id.
83. Greenway, 71 F.3d at 1180-81. This case was decided before the Delaney shotgun case. Under the Delaney rationale, it is even less likely that the debtor's operation of the motorboat would have resulted in a non-dischargeable claim.
84. Norris v. First Nat'l Bank (In re Norris), 70 F.3d 27 (5th Cir. 1995).
85. Id. at 29.
86. Id. Section 523(a)(2)(B) of the Bankruptcy Code provides that a debt is nondischargeable "for money . . . or an extension, renewal, or refinancing of credit" obtained by a written statement: "(i) that is materially false; (ii) respecting the debtor's . . . financial condition; (iii) on which the creditor . . . reasonably relied; and (iv) that the debtor caused to be made or published with intent to deceive." Each of these four elements must be proven by a preponderance of the evidence. See Grogan v. Garner, 498 U.S. 279 (1991).
87. 70 F.3d at 29 (citing 11 U.S.C. § 523(a)(2)). The Fifth Circuit noted that although the purpose of the Bankruptcy Act is to provide debtors a fresh start, the Supreme Court has concluded that with respect to the non-dischargeability provisions "Congress evidently concluded that the creditors' interest in recovering full payments of debts in these categories outweighed the debtors' interest in a complete fresh start." Id. at 30 (quoting Grogan, 498 U.S. at 287).
88. Id. at 29.
89. Id. at 30 n.12.
5. **Dischargeability—Unscheduled Creditors**

In *In re Faden*, the Fifth Circuit affirmed a finding of non-dischargeability of a claim of an unlisted, unsecured creditor, even in a no-asset case. The debtor apparently had full knowledge of the creditor's correct address; however, he failed to provide that information to counsel, whose secretary was left to resort to the telephone book. The secretary found an address for its parent company, and that is the address to which the notice was mailed. Apparently, the creditor never received the notice and filed an adversary proceeding after the debtor's discharge seeking a finding that the debts owed were non-dischargeable.

The court noted that the burden is on the debtor to complete schedules accurately and that the burden of proof rests upon the debtor to show that a creditor had notice or actual knowledge in order to avoid applicability of §523(a)(3)(A). The court identified what it had previously referred to as the three *Robinson factors* in evaluating whether an unlisted creditor's debt would be discharged: (1) the reasons the debtor failed to list the creditor; (2) the amount of disruption that would likely occur; and (3) the prejudice suffered by the listed creditors and the unlisted creditor in question.

In *Faden* there was arguably little or no prejudice to the unlisted creditor because *Faden* was a no asset case. No bar date had ever been set, so there was no deadline by which creditors had to file proofs of claim, and there were no assets for distribution to creditors. What is critical to note, however, is that the Fifth Circuit gave great deference to the bankruptcy court's apparent conclusion that the debtor was not credible and gave virtually no excuse for why the creditor's address was not provided to counsel. The court then alluded to other authority to the effect that notwithstanding factors like those found in *Robinson* (in particular prejudice to the creditor), the unscheduled debt should remain non-dischargeable if the debtor's failure to schedule the debt is due to any intentional design, fraud, or improper motive (in other words, more than "mere negligence or inadvertence"). Accordingly, the court found that the bankruptcy court did not abuse its discretion and held the debt non-dischargeable despite the fact that the creditor would have received no disbursement had a claim been filed.

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91. § 523(a)(3)(A) provides that an unlisted creditor's claim is not discharged "unless such creditor had notice or actual knowledge of the case in time for . . . timely filing" of a proof of claim. 11 U.S.C. § 523(a)(3)(A) (1996).
92. 96 F.3d at 796 (quoting Robinson v. Mann, 339 F.2d 547, 550 (5th Cir. 1964)).
93. *Id.* at 796.
94. *Id.* at 797 (citing *In re Stone*, 10 F.3d 285, 291 (5th Cir. 1994)); see also *In re Smith*, 21 F.3d 660, 665 (5th Cir. 1994)(unscheduled creditor's claim held non-dischargeable when debtor's scheduled creditor two and a half years after filing the case, but listed the wrong address, which could have been easily corrected by attempts to contact creditor).
95. 96 F.3d at 797. "The decision to reopen a bankruptcy case and allow amendment of schedules is committed to the sound discretion of the bankruptcy judge and will not be set aside absent abuse of discretion." *Id.* at 796.
6. Dischargeability—State Court Default Judgment

A federal district court revisited the issue of the preclusive effect of a state court default judgment in the context of dischargeability issues. In *In re Pancake*,96 the federal district court reversed a bankruptcy court summary judgment that held a state court default judgment preclusive on the issue of dischargeability of a debt arising out of fraud in a fiduciary capacity.

In the state court, the debtor’s pleadings were stricken for discovery abuse, and a summary judgment was entered. The district court noted that there was no summary judgment evidence regarding whether and to what extent the state court took evidence, conducted a “prove up” hearing, or otherwise took testimony from witnesses in support of the judgment.97 Rather, the only summary judgment evidence before the bankruptcy court was a reference in the judgment that it was entered “after hearing the evidence and arguments of counsel.”98

The district court distinguished its finding from *In re Garner*,99 a Fifth Circuit case reviewed in last year’s Survey, in which the Fifth Circuit applied collateral estoppel issue preclusion based upon a state court default judgment.100 The district court noted that in *Garner*, however, the summary judgment evidence presented to the bankruptcy court clearly indicated that an evidentiary hearing was conducted by the state court.101 The court recognized that preclusive effect of state court default judgments must be determined under state law;102 however, that same court cited federal case law to the effect that a default judgment does not meet the “actually litigated” test for application of collateral estoppel.103 The court stressed the “actually litigated” requirement for collateral estoppel effect, even in the face of Texas authority that a pre-answer default judgment is not subject to collateral attack under state law.104

7. Dischargeability—Credit Cards

The issue of non-dischargeability of credit card debt based on fraud has

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97. Id. at 354.
98. Id.
99. *In re Garner*, 56 F.3d 677 (5th Cir. 1995).
100. The Fifth Circuit reached a similar conclusion reflected in an opinion published after the survey period. See *In re Gober*, 100 F.3d 1195 (5th Cir. 1996) (state court default judgment following stricken pleadings given collateral estoppel effect).
102. Id.
104. See, e.g., Allen-West Comm’n Co. v. Gibson, 288 S.W. 342, 244 (Tex. App.—Dallas 1921, writ ref’d)(pre-answered default judgment establishes allegations in petition and cannot be collaterally attached).

The analysis in *Pancake* appears to differ slightly from that found in *Garner*; however, if *Pancake* is correct, then the cautious practitioner seeking a dischargeability finding based on collateral estoppel should at a minimum include some reference in summary judgment evidence to whatever evidentiary proceedings were conducted in the state court.
been the subject of substantial litigation in recent years. In addition to the cash advance and luxury goods provisions found in the Bankruptcy Code, many of the cases seem to deal with whether the debtor's use of the credit card constitutes an express or implied representation as to that person's ability to repay the debt.

In a recent case, Judge Akard of the Northern District weighed in on the issue. In In re McDaniel, the court was faced with a classic case of an unsolicited promotional campaign in which the credit card issuer unilaterally raised the debtor's credit limit and sent the debtor "Access Checks" to take advantage of a new low interest rate. According to the bankruptcy court, the debtor was having some financial difficulty at the time she took a cash advance to pay other debts; however, she testified that she did not make a final decision to file bankruptcy until approximately two and a half months later. In the ensuing adversary proceeding, the bankruptcy court held the bank to the new standard of "justifiable reliance" on any false pretenses, false representation, or actual fraud on the part of the debtor. The opinion states that the creditor offered no evidence of reliance but apparently relied upon the inference that "where hopeless insolvency at the time of the purchases make payment impossible, fraudulent intent may be inferred."

The court, recognizing that fraud is rarely proven by direct evidence, looked to a totality of the circumstances test supplied by another bankruptcy court. Specifically, the court listed the following factors: (i) the length of time between the loan and the bankruptcy; (ii) changes in the buying habits of the debtors; (iii) the debtor's financial sophistication; (iv) the debtor's employment status; (v) whether the debtor consulted an attorney regarding bankruptcy before incurring the charges; (vi) whether the purchases were for luxuries (as opposed to necessities); and (vii) whether the debtor was hopelessly insolvent.

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105. See, e.g., In re Eashai, 87 F.3d 1082 (9th Cir. 1996) (credit card debt found non-dischargeable based upon debtor's express or implied representations of intention to repay debt); In re Ladouceur, 95-CV-271, 1996 WL 596718 (N.D.N.Y. Oct. 15, 1996) (upheld summary judgment based upon debtor's admissions of the elements of fraud in credit card transaction); see also In re Haji, 201 B.R. 176 (E.D. Mich. 1996); In re Willis, 200 B.R. 868 (W.D. Mo. 1996); In re Bordgee, 198 B.R. 773 (9th Cir. App. 1996) (panel decision).

106. 11 U.S.C. § 523(a)(2)(C) (certain charges for luxury goods or cash advances within sixty days prior to bankruptcy presumed non-dischargeable).

107. See, e.g., In re Samoni, 192 B.R. 877 (Bankr. S.D. Tex. 1996). Courts have generally taken one of three approaches in determining dischargeability of credit card debt: the "implied representation" theory, the "assumption of the risk" theory, and the "totality of the circumstances" theory. See generally Citibank v. Eashai (In re Eashai), 87 F.3d 1082.


109. See Field, 116 S. Ct. 437. For a discussion of Fields, see supra note 2 and accompanying text.

110. 202 B.R. at 78 (quoting Sears Roebuck and Co. v. Boydston (In re Boydston), 520 F.2d 1098, 1101 (5th Cir. 1975)).

111. 202 B.R. at 79 (quoting In re Samani, 192 B.R. 877, 879-80 (Bankr. S.D. Tex. 1996)).

112. Id.; see also In re Eashai, 87 F.3d at 1087-88 for a listing of twelve factors reviewed in the Ninth Circuit.
In *McDaniel*, the court, obviously offended by what it perceived to be overreaching on the part of the creditor, concluded that the creditor could not now complain that the debtor committed fraud by doing the very thing the creditor induced it to do.\(^\text{113}\) The debtor obtained cash advances to pay other bills. Other bankruptcy courts have reached different conclusions on similar facts;\(^\text{114}\) however, the court gave notice that when the solicitation comes from the creditor unilaterally and is unsolicited by the debtor, the creditor will have a tough row to hoe in having that debt declared non-dischargeable.\(^\text{115}\)

8. Homesteads

a. Family Rural Homestead Applied to Widower

In *In re McDaniel*,\(^\text{116}\) the Fifth Circuit (somewhat reluctantly) allowed an adult widower with grown children to claim a full “family” rural homestead of up to 200 acres.\(^\text{117}\) The Court noted that although the debtor was a widower with no dependent children, he remained a “family” for the purpose of Texas Homestead Law given that under Texas law, the surviving spouse has the same homestead rights as both spouses had prior to the death of one.\(^\text{118}\)

The *McDaniel* court also addressed the effect of a written disclaimer signed by the debtor to induce a bank to make a loan.\(^\text{119}\) The court repeated the long-standing rule that in Texas “a homestead claimant is not estopped to assert his homestead rights in property on the basis of declarations made to the contrary if . . . the claimant was in actual use and possession of the property.”\(^\text{120}\) In *McDaniel*, the debtor’s execution of

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\(^{113}\) 202 B.R. at 79. “To allow the bank to prevail in this situation would result in converting dischargeable debts into non-dischargeable debts and would amount to this court condoning commercial entrapment.” *Id.*

\(^{114}\) For example, taking advances from one card to pay on another may constitute “credit card kiting,” which according to the Ninth Circuit, provides the fraudulent intent element of nondischargeability. *See In re Eashai*, 87 F.3d at 1088-89. (“[T]he kiting scheme enables a dishonest debtor to hide his fraudulent intentions and engage in a spending spree which results in increasing amounts of credit card debt.”). The Ninth Circuit has been a source of much of the development of credit card cases in chapter 7. *Compare In re Eashai*, 87 F.3d at 1088-89 with *In re Hashemi*, 104 F.3d 1122 (9th Cir. 1996) and *In re Anastas*, 94 F.3d 1280 (9th Cir. 1996). *See also In re Dougherty*, 84 B.R. 653 (9th Cir. 1988) (Panel decision).

\(^{115}\) 202 B.R. at 790.

\(^{116}\) Border v. McDaniel (*In re McDaniel*), 70 F.3d 841 (5th Cir. 1995).

\(^{117}\) *Id.* at 843.

\(^{118}\) *Id.* at 844.

\(^{119}\) *Id.* at 843; *see also* Kennard v. MBank Waco (*In re Kennard*), 970 F.2d 1455, 1458 (5th Cir. 1992); Truman v. Deason (*In re Niland*), 825 F.2d 801, 808 (5th Cir. 1987).
the disclaimer did not fit within two established exceptions, so the court was left with no choice but to conclude that the disclaimer was ineffective to preclude McDaniel from later asserting his homestead claim.

b. Temporary Abandonment

In In re Leonard, Judge Akard of the Northern District was provided with another opportunity to write on the homestead issue. In Leonard, the debtors temporarily vacated their 4,500 square foot home in Midland, Texas and moved to a smaller town to enroll their daughter in school. They testified that they intended to return to their home when their daughter was old enough for junior high school. The debtors rented out their Midland house from 1993 through and including their 1996 bankruptcy filing. They continued to receive mail at their Midland home, maintained a listing in the Midland telephone directory, had call-forwarding from their Midland home, continued to vote in Midland, and listed their Midland house as their address on their drivers' licenses. When they filed bankruptcy, however, they listed their temporary home as their residence address.

The creditor asserted that the debtors were judicially estopped from claiming their Midland house as their homestead because they had listed their other temporary home as their residence in their bankruptcy filing. As the court stated, however, "a residence and a homestead may be two different properties." The court determined that the debtors had not abandoned their homestead, notwithstanding the temporary renting of the home. This is consistent with two earlier Texas cases that allowed temporary abandonment of homesteads to enable families to educate

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121. "When, at the time of the disclaimer, (1) the debtor owned two or more noncontiguous pieces of property any of which—but not more than one—could constitute a homestead; or, (2) the property described in the disclaimer was not being used for homestead purposes." 70 F.3d at 843. The Court did not address it, but there may also be other exceptions, including (i) when an owner does not occupy the property or uses it in such a manner as to render its homestead status dubious; (ii) when owners create a lien by way of a disguised sale; or (iii) when an owner represents to an assignee of a note that a note is a secured by a valid mechanic's lien for improvements. See, e.g., Niland, 825 F.2d at 809; Lincoln v. Bennett, 156 S.W.2d 504, 505 (Tex. 1941).

122. 70 F.3d at 843-44.


124. Id. at 810. As Judge Akard stated:

Courts first look to see whether the property at issue has been the homestead. Next, the Court must determine if they have abandoned that homestead, either with or without acquiring another homestead. The bank has the burden of proof because "anyone asserting an abandonment has the burden of proving it by competent evidence." (Citations omitted) Whether the homestead has been abandoned is a question of intent. Temporary renting of the homestead does not change its homestead character if the homestead claimant has not acquired another homestead. "The ultimate question to be resolved is as to whether the claimant intended to resume the possession of the premises as homestead." (citations omitted).

Id. at 810 (citing El Paso v. Long, 209 S.W.2d 950, 954 (Tex. Civ. App.—El Paso 1947, writ ref'd n.r.e.)).
their children in other locations.\textsuperscript{125}

9. **Personal Property Exemptions—The Insurance Saga Continues**

At least two bankruptcy courts continued the struggle with the insurance exemptions found in the Texas Property Code and the Texas Insurance Code. In Chapter 42 of the Texas Property Code, which contains the general statutory scheme for exempting personal property, among the items listed is the "present value of any life insurance policy to the extent that a member of the family of the insured . . . is a beneficiary of the policy."\textsuperscript{126} This interest is listed among the categories of property that are subject to the limitation of $60,000 for a family and $30,000 for an individual.\textsuperscript{127}

The Texas Insurance Code, however, provides a broad unlimited exemption for a wide variety of insurance benefits including "all money or benefits of any kind, including policy proceeds and cash values . . ."\textsuperscript{128}

This exemption is unlimited in value, and as mentioned, it applies not only to cash values, but to virtually any money or benefit arising from qualifying policies.\textsuperscript{129}

This leaves a difficult issue on which there is yet no consensus: Whether a debtor may claim the unlimited insurance exemption under the Insurance Code and still enjoy the benefits of the $60,000/$30,000 personal property exemption under the Property Code. Prior to the survey period, at least three bankruptcy courts had struggled with this issue with differing results.\textsuperscript{130} During the Survey period, two more bankruptcy


\textsuperscript{126} TEX. PROP. CODE ANN. § 42.002 (Vernon Supp. 1996).

\textsuperscript{127} Id. § 42.002(a)(1) and (2).

\textsuperscript{128} Article 21.22 of the Texas Insurance Code provides as follows:


Sec. 1. Notwithstanding any provision of this Code other than this Article, all money or benefits of any kind, including policy proceeds and cash values, to be paid or rendered to the insured or any beneficiary under any policy of insurance . . . issued by a life, health or accident insurance company, including mutual and fraternal insurance, or under any plan or program of annuities and benefits in use by any employer, shall:

(a) inure exclusively to the benefit of the person for whose use and benefit the insurance is designated in the policy or contract;

(b) be fully exempt from execution, attachment, garnishment or other process;

(c) be fully exempt from being seized, taken or appropriated or applied by any legal or equitable process or operation of law to pay any debt or liability of the insured or of any beneficiary, either before or after said money or benefits is or are paid or rendered; and,

(d) be fully exempt from all demands in any bankruptcy proceeding of the insured or beneficiary.


\textsuperscript{129} Id.

courts also attempted to reconcile the statutes, again with diametrically differing results.

Judge Leif Clark first addressed the issue in *In re Borchers*. Judge Clark found the two statutes to be at odds with each other—recognizing, however, that the court should nevertheless construe statutes in a way to give each of them meaning and effect if possible. The court analyzed and disagreed with *In re Bowes*, in which Judge Akard had earlier allowed Chapter 7 debtors to exempt their full $77,000.00 cash surrender value, exhausting their $60,000.00 Texas Property Code cap in the process. In *Borchers*, Judge Clark disagreed based both on statutory construction and legislative history. Reasoning that the 1991 amendments to the Texas Insurance Code were a legislative reaction to another bankruptcy case, it was apparent to him that the legislature expressly intended to overrule that case, the net effect of which was “to enable debtors . . . to completely exempt the cash value of life insurance policies without regard to the monetary cap set out in section 42.001 of the Texas Property Code.” Accordingly, the *Borchers* court allowed the debtors to take full advantage of both exemption schemes without regard to the Property Code caps.

Shortly thereafter, Judge Felsenthal of the Northern District was faced with a similar issue in the context of an annuity contract and cash surrender values. In *In re Scott*, Judge Felsenthal, also relying in part on statutory construction principles, disagreed with *Borchers* and instead followed the approach taken by the *Bowes* court. Judge Felsenthal found that the legislature intended to maintain present value of life insurance policies within the Property Code.

As of this writing, the number of bankruptcy courts that have wrestled with this issue is now up to five, each with somewhat different results. Given the various tools of statutory construction of which the courts have availed themselves, it may simply be that there is no right answer to this issue. This author joins in Judge Clark’s appeal that the Legislature take

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132. Id. at 701.
135. See *In re Brothers*, 94 B.R. 82 (Bankr. N.D. Tex. 1988) (previously held that cash surrender values were limited by Texas Property Code cap because they were excluded from any mention in the Insurance Code).
137. Id.
139. Id. at 809.
140. Id. at 810-11. Judge Felsenthal found that because both amendments were enacted virtually simultaneously, and because the legislature did not manifest an intent for the general to prevail over the specific, the special limitation of $60,000 must apply over the general unlimited provision of the Insurance Code. Id. at 811.
141. *Bowes* could have resolved the issue; however, after the case had been on appeal in the district court for over two years, the parties settled. 160 B.R. at 290.
the steps necessary to fix this problem.142

10. Personal Property Exemptions—Tools of the Trade

At least two bankruptcy courts addressed the issues of tools of the trade, although in somewhat different contexts. Judge Akard applied what has become known as the “use test” to determine whether an item is a tool of the trade under the ever expanding definition of that term.143 In this context, Judge Akard found that a variety of items of restaurant equipment144 were all necessary to carry on the business of operating a restaurant. The court distinguished prior Texas cases that had in effect discriminated against restaurant operators in the “tool of the trade” analysis under earlier statutes and found that under the “more modern and inclusive approach” the exemption should be allowed for such restaurant equipment.145

A subsequent opinion from Judge Greendyke of the Southern District reminds us that there are limits to this expanding definition tools of the trade. In In re Erwin,146 Judge Greendyke denied an exemption claim to a county constable who used his Ford Crown Victoria to serve papers and carry out other constable duties.147 Recognizing Judge Akard’s prior rulings in In re Nash148 and Baldowski,149 the court found that this expansion is not unlimited, especially when the property in question has “only a remote, or even a moderate nexus with [a debtor’s] trade or profession.”150 Recognizing that the debtor used his vehicle for personal and family use, that any 4-door vehicle would suffice for the constable duties, and that the debtor was not self-employed, the court concluded that the debtor’s use of the vehicle was too tenuous in relation to his employment to justify avoidance of a non-purchase money non-possessory lien as a tool of the trade.151

11. BFP Extended To Post-Petition Tax Sale

In the 1994 case of BFP v. Resolution Trust Corp.,152 the Supreme
Court held that the price received at a regularly conducted non-collusive foreclosure sale establishes "a fair and proper price, or a 'reasonably equivalent value,' for foreclosed property" in the context of the reasonably equivalent value standard found in § 548 of the Bankruptcy Code (which deals with pre-petition fraudulent conveyances). In In re T.F. Stone Co., the Fifth Circuit applied similar reasoning in upholding a post-petition tax foreclosure sale. The debtor had sought to set aside the sale under § 549 of the Bankruptcy Code, which provides for avoidance of certain post-petition transfers.

One exception to the avoidance powers found under § 549 protects from avoidance "a transfer of real property to a good faith purchaser without knowledge of the commencement of the case and for present fair equivalent value." There is a subtle distinction, however, between this statutory language and the "reasonably equivalent value" provision found in § 548, which deals with pre-petition transfers. The T.F. Stone court compared the two statutes and concluded that Congress did not intend a meaningful difference between the term "reasonably" and the phrase "present fair" as applied in the context of the forced sale at issue. Moreover, the court also found that neither phrase was synonymous with "fair market value," which would have had a more profound effect upon the public policy interest in insuring "security of the titles to real estate" in the context of mortgage foreclosure sales and tax sales of real property.

III. FEDERAL STATUTES OF LIMITATIONS

During the Survey period, at least two cases arose in the federal courts dealing with applicability of the federal statutes of limitation in the context of failed financial institutions. These cases dealt with both the general federal statute of limitations and the more specific statute dealing...
The more significant of the two cases was *Cadle Co. v. 1007 Joint Venture*,\(^{161}\) which addressed the two year state statute of limitations for recovery of deficiency judgments following real property foreclosures *vis-à-vis* FIRREA’s six year statute.\(^{162}\) Courts have routinely allowed assignees of the FDIC to enjoy the full benefits of the applicable federal statute, both in a limitations context and otherwise;\(^{163}\) however, the distinguishing fact in *Cadle Co.* was that the loan in question was performing at the time of the receivership and the note remained current the entire time the FDIC had ownership of it. The Fifth Circuit held that an assignee of the FDIC can invoke FIRREA’s six year limitations period “only if the note at issue was in default either before the FDIC acquire[d] it or while the FDIC owned it.”\(^ {164}\) The court reasoned that FIRREA’s six year limitations period had no significance independent of a “claim” to which it applies; rather it applies only to an accrued claim and not to a performing note.\(^ {165}\) As the Fifth Circuit’s reasoning continued: “Until a note is in default, there is no claim and hence no need to ask whether FIRREA’s federal limitations rule supplants an otherwise applicable state statute of limitations.”\(^ {166}\)

In *Cadle Co.*, the surviving bank foreclosed in October of 1991, and suit was filed in September of 1994. With *Cadle Co.* left to rely only upon the two year state statute, the trial court entered a summary judgment that *Cadle Co.* take nothing, which the Fifth Circuit affirmed based upon the foregoing reasoning.\(^ {167}\)

As mentioned above, there are actually two federal statutes of limitations that appear to apply to suits on notes. In the context of failed financial institutions, however, one unresolved issue has been whether and to what extent the newer FIRREA statute completely supersedes the longstanding general federal statute of limitations. In what was apparently a case of first impression, a federal district court addressed this issue in

\(^{160}\) 12 U.S.C. § 1821(d)(14)(A). This statute, enacted as part of the Financial Institutions Reform, Recovery, and Enforcement Act, provides that the six year limitation period begins to run on the later of the date of the appointment of the FDIC as conservator or receiver or the date on which the cause of action accrues. *Id.*

\(^{161}\) 82 F.3d 102 (5th Cir. 1996).

\(^{162}\) Section 51.003 of the Texas Property Code provides a two (2) year statute of limitations for a deficiency following a foreclosure sale:

If the price at which real property is sold at a foreclosure sale under section 51.002 is less than the unpaid balance of the indebtedness secured by the real property, resulting in a deficiency, any action brought to recover the deficiency must be brought within two (2) years of the foreclosure sale and is governed by this section.

*TEX. PROP. CODE ANN.* § 51.003(a) (Vernon 1995) (emphasis added).

\(^{163}\) See, e.g., *Davidson v. FDIC*, 44 F.3d 246 (5th Cir. 1995); *FDIC v. Bledsoe*, 989 F.2d 805 (5th Cir. 1993).

\(^{164}\) *Cadle Co.*, 82 F.3d at 105.

\(^{165}\) *Id.*

\(^{166}\) *Id.*

\(^{167}\) *Id.* at 106. The court went on to discuss other public policy issues.
Midstates Resources Corp. v. Farmer’s Aerial Spraying Service, which was originally filed more than six years after the original maturity date. Less than six years prior to suit, however, the borrowers, through counsel, acknowledged the indebtedness in writing, which under § 2415 (the old federal statute) is effective for renewing limitations. The FIRREA statute, however, contains no such acknowledgment of indebtedness provision. The borrowers asserted that FIRREA’s limitation statute completely superseded § 2415, giving the written acknowledgment of the debt no effect.

The court addressed the issue as one of statutory construction—the application of an existing broad statute (§ 2415) following the enactment of a more recent narrow statute (FIRREA), each covering related subject matter. The court found that the more specific FIRREA statute controls only when one of its specific statutory rules conflicts with one of § 2415’s more general rules. The court therefore found that both statutes applied, and in the context of Midstates Resources, the acknowledgment of indebtedness provision of the old federal statute governed. Therefore, under Midstates Resources, the general federal statute of limitations still applies to notes payable to failed financial institutions subject only to more specific provisions found in FIRREA.

IV. DEVELOPMENTS IN THE STATE COURTS

A. ARTICLE 9—DISPOSITION OF COLLATERAL

By way of example, three cases are worthy of note with respect to disposition of personal property collateral upon default. In the first of those three cases, Havins v. First National Bank of Paducah, the Amarillo court, in what it determined to be a deficiency action, addressed both the commercially reasonable sale and notice of disposition provisions of section 9.504 of the Texas Business and Commerce Code.

169. Id. at 1426. One point of disclosure: this author’s firm represented the Plaintiff in this case. In Midstates Resources, all original limitations periods had apparently expired by the time Midstates filed suit.
170. Id. at 1426 (citing Resolution Trust Corp. v. Seale, 13 F.3d 850, 854 (5th Cir. 1994)).
171. 914 F. Supp. at 1427.
172. This is consistent with an earlier observation of the Texas Supreme Court in Jackson v. Thweat, 883 S.W.2d 171, 177 (Tex. 1994) (FIRREA “does not create an entirely new limitations scheme, but rather clarifies and amends existing law under 28 U.S.C. § 2415(a).”). This survey was cited by the Midstates Resources court in anticipating this issue. See Midstates Resources, 914 F. Supp. at 1426 n.3. (At least one commentator has anticipated this issue. See Cox, 1995 Annual Survey, supra note 18, at 908).
173. 919 S.W.2d 177 (Tex. App.—Amarillo 1996, no writ)
174. 914 F. Supp. at 1427.
175. Section 9.504 grants creditors the right, after default by the debtor, to sell, lease, or otherwise dispose of any collateral securing payment of the debt. TEX. BUS. & COM. CODE ANN. § 9.504(a) (Tex. UCC) (Vernon 1991). Should they opt to dispose of it, they must take care to assure that “every aspect of the disposition including the method, manner, time, place, and terms . . . [is] commercially reasonable.” Id. at 9.504(c).
In Havins, the creditor repossessed some cattle, and within approximately six weeks thereafter the cattle were sold by the bank at auction in a local sale barn. The Court of Appeals reversed a summary judgment in favor of the lender after having addressed "no evidence" points regarding the commercial reasonableness of the sale and whether and to what extent there was any notice provided thereof.\textsuperscript{175} As a practical matter, this case really turned upon whether the collateral was "perishable, threatening to decline speedily in value, or of a type customarily sold on a recognized market," in which event the creditor may have been excused from providing the debtor with notice of the sale.\textsuperscript{176} The court found that there was no evidence regarding the debtor having been provided with prior notice of the sale, nor was the trial court provided with any evidence to assist it in determining whether the cattle were of the type sold on a recognized market.\textsuperscript{177} Importantly, the court did not reject out of hand the possibility that cattle are collateral that may be sold on a recognized market at a cattle auction like that found in the instant case. To the contrary, the court found that in the context of cattle auctions, the "recognized market" issue is a fact intensive determination that should be determined by courts on a case to case basis.\textsuperscript{178} As mentioned, however, the court reversed and remanded the trial court's judgment due to the lack of evidence of notice and commercial reasonableness of the disposition.\textsuperscript{179}

In Acuff v. Lamesa National Bank,\textsuperscript{180} the lender had previously accepted certain collateral in partial satisfaction of a debt, also entering into a written agreement regarding the debt and the application of credits based upon the surrender of the collateral. The bank subsequently disposed of the collateral and then sought to reduce the remaining indebtedness to a judgment. The court held that the surrender of the collateral in partial and specific satisfaction of a portion of the debt was in essence a sale from the debtor to the lender.\textsuperscript{181} Therefore, at the time of the ultimate disposition of the collateral by the bank, the bank had already become the owner of that property and "there was no sale or disposition by the 'secured party' which would require notice under section 9.504."\textsuperscript{182}

\textsuperscript{175} 919 S.W.2d at 180-81.
\textsuperscript{176} Id. at 182-84.
\textsuperscript{177} "Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification [of a public or private sale] shall be sent by the secured party to the debtor ..." Id. at 182-83 (citing Tex. \textsc{Bus. \& Com. Code Ann.} \textquoteright § 9.504(c) (Tex. UCC) (Vernon 1991)).
\textsuperscript{178} The court provides an analysis of this "recognized market" issue. 919 S.W.2d at 183.
\textsuperscript{179} Id.
\textsuperscript{180} Id. at 184. The court listed numerous factors that should have been elicited at the trial would have assisted the court in making a determination on the "recognized market" issue. Id. The court also noted that the trial court's taking judicial notice that cattle are normally sold through livestock auction commission merchants did "nothing to fill the void." Id.
\textsuperscript{181} 919 S.W.2d 154 (Tex. App.—Eastland 1996, no writ).
\textsuperscript{182} Id. at 157.
In *Schmid v. Texas Commerce Bank*, the court of appeals upheld a summary judgment in favor of a lender who had retained some pledged stock certificates in its possession while ultimately seeking a judgment prior to disposition of that stock. The court of appeals found that the bank’s choosing to retain that stock while at the same time attempting to reduce its claim to judgment did not constitute an election of remedies. The court found that section 9.501(a) allows a secured party to reduce its claim to judgment, foreclose, or enforce its security interest by any available judicial procedure. The court noted further that section 9.504 “does not require but rather allows a secured party to sell the collateral.”

**B. REAL PROPERTY FORECLOSURES**

In *Provident National Assurance Company v. Stevens*, the Texas Supreme Court allowed a creditor who had foreclosed two notes secured by two tracts of property upon one blanket bid to allocate the foreclosure proceeds after the fact as it saw fit. The guarantor, in defense of a deficiency suit filed by the lender claimed that the creditor’s single bid for the two separate properties effectively precluded it from ever being able to prove deficiencies on either note or either property. The supreme court, however, disagreed and allowed the creditor to pursue a deficiency on this basis, even though the creditor’s allocation occurred after the sale.

In *Bonilla v. Roberson*, the court of appeals held that a holder of a deed of trust who discovered after foreclosure that the debtor had apparently committed substantial waste on the property could not in effect change its mind and rebid the property at a subsequent sale. The court held that the only remedy for the holder of the deed of trust would be to bring a judicial action seeking to set aside the sale and canceling the trustee’s deed. The lender could not simply enter into a private arrangement with the trustee to cancel the prior trustee’s deed and re-no-
tice a sale that had already been conducted and closed.\textsuperscript{194}

In \textit{In re Gayle},\textsuperscript{195} a Texas based bankruptcy court found that a creditor holding a claim secured by a deed of trust could seek to reduce the claim to judgment prior to seeking foreclosure of its deed of trust lien.\textsuperscript{196} The court determined that this was not an election of remedies as is the case when deciding between judicial foreclosure and non-judicial foreclosure.\textsuperscript{197}

The court found that the situation regarding reducing a debt to judgment prior to foreclosure was somewhat analogous to the previously well settled situation regarding debts secured by personal property.\textsuperscript{198} The court found that because the note and the lien are separate and severable rights held by a creditor, and further finding that doctrine of merger did not effect the lien, the court ruled that the creditor could reduce the debt to judgment and thereafter seek a non-judicial foreclosure.\textsuperscript{199} The court acknowledged, however, that if a judicial foreclosure had been sought in the prior case and not granted, that could have been a bar to future foreclosure relief.\textsuperscript{200}

\section*{C. Guarantor Notice and Liability}

In \textit{Bishop v. National Loan Investors},\textsuperscript{201} the court addressed two issues: whether a creditor was required to sue the maker of a note prior to suing the guarantor and whether the guarantor was entitled to notice of a foreclosure sale on deed of trust property securing the guaranteed debt. The court found that the guaranty in question was unconditional in nature, restating the long standing rule as follows: "The unconditional guarantor

\begin{itemize}
\item \textsuperscript{194} Id. at 21-23.
\item \textsuperscript{195} 189 B.R. 914 (Bankr. S.D. Tex. 1995).
\item \textsuperscript{196} Id. 916-19.
\item \textsuperscript{197} Id. at 916.
\item \textsuperscript{198} The law pertaining to the right to nonjudicially foreclose on personal property after a judgment on a promissory note has been rendered is well settled. After a debtor defaults on a secured personal property note, the creditor may exercise any right provided in the security agreement (with restrictions), reduce its claim to judgment, foreclose, or otherwise enforce the security interest by any available judicial procedure. \textsc{Tex. Bus. & Com. Code Ann.} \textsection 9.501(a) (Tex. UCC) (Vernon 1991). These rights and remedies are cumulative.
\item \textsuperscript{199} Id. at 916. Moreover, the judgment would be secured by the same property, relating back to the inception of the original security interest. See \textsc{Tex. Bus. & Com. Code Ann.} \textsection 9.501(e) (Tex. UCC) (Vernon 1991) which provides:
\begin{quote}
When a secured party has reduced his claim to judgment, the lien of any levy which may be made upon his collateral by virtue of any execution based upon the judgment shall relate back to the date of the perfection of the security interest in such collateral. A judicial sale, pursuant to such execution, is a foreclosure of the security interest by judicial procedure within the meaning of this section, and the secured party may purchase at the sale and thereafter hold the collateral free of any other requirements of this Chapter.
\end{quote}
\item \textsuperscript{199} In re Gayle, 189 B.R. at 921.
\item \textsuperscript{200} Id.
\item \textsuperscript{201} 915 S.W.2d 241 (Tex. App.—Fort Worth 1995, writ denied).
\end{itemize}
of a note is primarily liable, and waives any requirement that the holder of the note take action against the maker as a condition precedent to the guarantor's liability unless the guaranty specifically states otherwise.\textsuperscript{202}

The court determined that the guaranty in question was such an unconditional guaranty.\textsuperscript{203} The court further found that the guarantor was not entitled to notice of a deed of trust foreclosure sale affecting real property.\textsuperscript{204} The court noted the distinction between that rule regarding real property and a requirement to the contrary in Article 9 of the UCC as to personal property.\textsuperscript{205}

In \textit{In re El Paso Refining},\textsuperscript{206} a bankruptcy court dealt with a guaranty agreement that specifically authorized the creditor to release any obligor without impairing that creditor's ability to seek payment from a guarantor. Noting that "[a] guaranty of payment creates direct and primary liability for the guarantor[,]\textsuperscript{207} there is likewise no requirement that a creditor take action against the primary obligor as a condition precedent to the guarantor's liability. Therefore, in the situation facing that court, the release of the primary obligor in and of itself "had no effect on [the guarantor's] liability for the Guaranteed Obligations."\textsuperscript{208}

\section*{D. Tax Lien Subrogation}

In \textit{Benchmark Bank v. Crowder},\textsuperscript{209} the Texas Supreme Court found that a third party lender may be subrogated to a federal tax lien and thus entitled to enforce the tax lien against the taxpayers' homestead. In \textit{Crowder}, the borrowers obtained a loan from Benchmark Bank's predecessor, the proceeds of which were used to discharge a federal tax lien against the borrowers' homestead. The borrowers asserted that the lien was invalid because it impaired their homestead rights; however, the supreme court recognized that under the Supremacy Clause of the United States Constitution, the federal government may obtain a valid, enforceable tax lien against a Texas homestead.\textsuperscript{210} The court further found that when such a tax lien is refinanced, the new lender is subrogated to the tax lien much in the same way that a third party who refinances a debt se-

\begin{itemize}
  \item \textsuperscript{202} \textit{Id.} at 244 (citing Hopkins v. First Nat'l Bank, 551 S.W.2d 343, 345 (Tex. 1977)).
  \item \textsuperscript{203} 915 S.W.2d at 244.
  \item \textsuperscript{204} \textit{Id.} at 245.
  \item \textsuperscript{205} \textit{Id.} ("There is a definite distinction between guarantors of a loan secured by realty under the Property Code and a loan secured by consumer goods under the Business and Commerce Code.").
  \item \textsuperscript{206} 192 B.R. 144 (Bankr. W.D. Tex. 1996).
  \item \textsuperscript{207} \textit{Id.} at 148.
  \item \textsuperscript{208} \textit{Id.} at 148. The court relied on a Seventh Circuit case that reiterated that such a guarantee may stay in full force and effect until all indebtedness from the underlying obligation is paid in full, regardless of any settlement, compromise, release, or modification involving the primary obligor. \textit{Id.} at 149 (quoting Central Soya Co. v. Epstein Fisheries, 676 F.2d 939 (7th Cir. 1982)).
  \item \textsuperscript{209} 919 S.W.2d 657 (Tex. 1996).
  \item \textsuperscript{210} \textit{Id.} at 660.
\end{itemize}
cured by a valid mechanic's lien is also subrogated.\textsuperscript{211} The court reiter-
ated that once valid, a lien does not become invalid simply because it is
refinanced. Moreover, the court further found that not only could the
subrogated lien be refinanced, but that a future deed of trust renewing
and extending the old lien may also provide for new terms, including the
power of sale authorizing a non-judicial foreclosure.\textsuperscript{212} The court, how-
ever, found that because there was no federal tax lien against Crowder,
she was entitled to compensation for her interest in the homestead that
was foreclosed.\textsuperscript{213}

It should be noted that an amendment to the Texas Constitution has
been approved pursuant to which a homestead may be encumbered for
the refinancing of a lien, including a federal tax lien.\textsuperscript{214} That amendment,
however, had no bearing in Crowder because the tax lien and subrogation
rights were fixed before the amendment's adoption.\textsuperscript{215} Therefore,
although this issue has, to some extent, been addressed constitutionally,
Crowder remains instructive as to situations that predate the amendments
and also with respect to foreclosure rights and the enforceability of other
terms subsequently agreed to by the borrower and the lender.

On the other hand, a creditor attempting to equitably subrogate itself
to the position of an ad valorem taxing entity may be in a different situa-
tion. In \textit{Jackson v. Stonebriar Partnership},\textsuperscript{216} the Dallas Court of Appeals
found that a creditor could not subrogate itself to the position of an ad
valorem taxing entity in an effort to recover ad valorem taxes it paid on a
tract of property after foreclosure.\textsuperscript{217} This opinion does not necessarily
reflect a change in Texas law; however, it should be read and analyzed in
an effort to gain an understanding of how to deal with ad valorem taxes
with respect to real property that is in the process of being foreclosed.

\section*{E. Lender Liability}

There were no significant developments regarding lender liability.
There were a number of interesting cases, however, that addressed situa-
tions where debtors sought to impose liability based on wrongful foreclo-
sure or other collection action or otherwise as a result of a breach of an
alleged agreement. For example, in \textit{Bluebonnet Savings Bank, F.S.B. v.
Grayridge Apartment Homes, Inc.},\textsuperscript{218} the Houston Court of Appeals
found that statements to the effect that a loan restructuring proposal
“looked fine” and that “everything would be okay” did not rise to the

\begin{itemize}
\item \textsuperscript{211} \textit{Id.} at 661 ("We see no difference between the refinancing of debts secured by a
mechanic's lien and the refinancing of debt secured by a federal tax lien.") (citing \textit{Farm &
Home Savings Ass'n v. Martin}, 88 S.W.2d 459, 469-70 (Tex. 1935)).
\item \textsuperscript{212} \textit{Benchmark Bank}, 919 S.W.2d at 662.
\item \textsuperscript{213} \textit{Id.} at 659, 662.
\item \textsuperscript{214} \textit{Id.} at 660 (citing \textit{Tex. Const. art. xvi, § 50 (Vernon 1996)}).
\item \textsuperscript{215} 919 S.W.2d at 660.
\item \textsuperscript{216} 931 S.W.2d 635 (Tex. App.—Dallas 1996, writ requested).
\item \textsuperscript{217} \textit{Id.} at 640.
\item \textsuperscript{218} 907 S.W.2d 904 (Tex. App.—Houston [1st Dist.] 1995, writ denied).
\end{itemize}
level of negligent misrepresentation. The court further found that the debtor did not "justifiably rely" on such representations. This case was followed by the Fifth Circuit in *Clardy Manufacturing Co. v. Marine Midland Business Loans, Inc.* where the court found that a lender's statement that a loan commitment would be issued "in a few days" did not give rise to a promissory estoppel claim.

In *Maginn v. Norwest Mortgage, Inc.*, an unsuccessful mortgage loan applicant sued a bank for breach of contract (both written and oral), promissory estoppel, violations of the Deceptive Trade Practices Act (DTPA), negligence, gross negligence, fraud, and negligent misrepresentation. With the exception of certain of the tort claims, the court of appeals upheld a summary judgment against the unsuccessful applicant. Most importantly, the court found that the loan applicants were not consumers under the DTPA. Moreover, the court found that the borrower's contract claim failed to satisfy the statute of frauds. The court did, however, allow the tort claims to survive, remanding the case for further proceedings.

V. CONSUMER CREDIT COLLECTIONS

A. STATE COURT—TEXAS DEBT COLLECTION ACT

In *Waterfield Mortgage Co. v. Rodriguez*, the San Antonio court upheld a trial court finding that a mortgage company violated the Texas Debt Collection Act and, further upheld an award of exemplary damages to the debtors. According to the court of appeals, the borrowers had repeatedly attempted to bring the payments current, but those attempts were refused. Moreover, after refusing such attempts, the creditor continued to add late charges to the debt. The court of appeals recognized that the creditor telephoned the borrowers' bank and were told that one of the checks tendered for late payments would not clear because of insufficient funds; however, the debtors apparently made a subsequent tender by cashier's check of the full amount due. The lender rejected that cashier's check and raised the demand by an additional sum because of posting and reinstatement fees. The debtor testified he would have paid

219. Id. at 909-10.
220. Id. at 911-12.
221. 88 F.3d 347, 351 (5th Cir. 1996).
222. Id. at 351. The court also found that the borrower was not a consumer under the DTPA.
223. 919 S.W.2d 164 (Tex. App.—Austin 1996, no writ).
224. Id. at 166-69.
225. Id. at 167.
226. The court also addressed claims arising out of or pertaining to section 26.02(e) of the Texas Business and Commerce Code regarding "merger" clauses in loan agreements. *Id.* at 167-68.
227. *Id.* at 168-69.
228. 929 S.W.2d 641 (Tex. App.—San Antonio 1996, no writ).
229. A DTPA claim was dismissed, so there was no ruling on the borrowers' standing as "consumers" under the DTPA. One can only assume that under established cases law they would not have been considered consumers under that act.
that amount but was never given the chance because the foreclosure occurred before receiving that notification.

The court found that "the haste in pushing through foreclosure, then forcible entry and detainer, and selling the family home while the owner is offering the money that would essentially bring him current, is ample evidence to support [a finding of] actual damages and violation of the Texas Debt Collection Statute." The court further allowed the imposition of punitive damages, noting that although legislative amendments codified much of the law relating to exemplary damages, the Texas Debt Collection Statute was specifically excluded. The court of appeals upheld the punitive damage award even though there were no showings of personal abuse, phone calls, or other intimidating factors typically found in situations of that nature. The court simply found that "taking someone's home away from them when they are making good faith attempts to pay ever-escalating demands is worse than insulting or threatening them. Better harassed than homeless." The court further disregarded the bona fide error defense, finding that there was no pleading or evidence to support such a defense in the trial court. Although one might argue that the court may have gone a bit too far, especially in imposing exemplary damages, this case should be required reading for every consumer lender and counsel.

B. Federal Court—Fair Debt Collection Practices Act

While the Fair Debt Collection Practices Act (FDCPA) still proves somewhat of a mine field for the unwary practitioner in other jurisdictions, the Fifth Circuit took a step toward placing some reasonable parameters on the FDCPA in the context of violations where no actual damages result. In Johnson v. Eaton, a lawyer representing a furniture company attempting to collect a past due debt, along with his legal assistant, were sued based upon a demand letter and a second letter, which included a questionnaire and proposed consent judgment. The debtor stipulated before trial that she had suffered no actual damages as a result of the letters.

230. Id. at 645.
231. Id. (citing TEX. CIV. PRAC. & REM. CODE ANN. § 41.002(b)(6) (Vernon Supp. 1996)).
232. 929 S.W.2d at 649 (Duncan, J., concurring and dissenting).
233. Id. at 647.
234. Id.
235. See id. at 647 (Duncan, J., concurring and dissenting) (dissent disagrees with imposition of punitive damages).
238. 80 F.3d 148 (5th Cir. 1996).
of the initial demand letter, and the jury subsequently found that the lawyer’s conduct was likewise not a cause of any actual damage to the debtor. The trial court, however, awarded the debtor $500 in “additional damages” against the lawyer, and in excess of $10,000 in attorney’s fees against both defendants.

The Fifth Circuit reversed the award of attorney’s fees against the legal assistant, stating that the express language of the FDCPA expressly conditions an award of attorney’s fees, “which are available only where the Plaintiff has succeeded in establishing that the defendant is liable for actual and/or additional damages.”239 The court reasoned further that to allow an attorney’s fee recovery where the plaintiff has failed to prove damages, “rewards lawyers for bringing suits to stop behavior that, by definition, has caused legal injury to no one.”240

As to the lawyer against whom five hundred dollars in “additional damages” was awarded, the court remanded for reconsideration of the issue of attorney’s fees with instructions that the court reduce the award of fees against Eaton to the extent that the fees originally awarded were attributable to the preparation of the case against the legal assistant. Obviously, the implication here is that the court allowed the recovery of attorney’s fees from the lawyer because of the award of “additional” damages.

Unfortunately, this determination still left what would appear to be a somewhat nonsensical result—the award of attorney’s fees based on an award of additional damages when there were no actual damages incurred. This was unresolved by the Fifth Circuit because of a procedural point regarding the submission of the jury charge.241 This is pure speculation, but one would think that the same logical reasoning that the court applied in refusing to allow the award of attorney’s fees against the legal assistant would likewise apply to the inconsistency of allowing an award of “additional” damages in the absence of actual damages. Again, however, this issue appears to be unresolved.

On the subject of the FDCPA, a case from another circuit is worthy of note. In *Avila v. Rubin,*242 the Seventh Circuit found that mass produced collection letters issued under a facsimile signature on a law firm’s letterhead were misleading because they gave the appearance of having been written by a lawyer when in fact they were not.243 Although the Fifth Circuit had not addressed this specific situation as of the Survey period, this case appears to indicate that if a letter is coming from a lawyer seek-

239. *Id.* at 151. The court did not address whether the award of additional damages is appropriate in the absence of a finding of actual damages because neither party preserved the issue for appeal by objecting to the jury charge. *Id.* at 150.

240. *Id.* at 151. “Our interpretation of the statute will require attorneys to look for more than a technical violation of the FDCPA before bringing suit and will deter suits brought only as a means of generating attorney’s fees.” *Id.*

241. *Id.* at 150.

242. 84 F.3d 222 (7th Cir. 1996).

243. *Id.* at 228-29.
ing to recover a consumer debt, the lawyer should be careful about sign-
ing collection letters (or allowing use of a facsimile signature) unless the
lawyer has had some involvement in reviewing the file and actually gener-
ating or having some input into the content of the letter.

Additionally, the Avila court also took issue with the terms of the no-
tice used by that lawyer. In addition to attempting to comply with the
thirty day notice requirement, the notice also included a reference that to
the extent the FDCPA notice did not apply, then all actions required of
the debtor were to be undertaken within ten days. The Seventh Circuit
found this confusing and misleading to an unsophisticated consumer.
In effect, the court found the inconsistent messages in the notice to be too
confusing and potentially misleading.

The bottom line with respect to the FDCPA is that it is still alive and
well, and in most situations, it still applies to lawyers. One or more bills
have been offered in Congress in an effort to narrow the scope of the
FDCPA to truly intentional and misleading action by debt collectors.
Unfortunately, however, in addition to providing the consumer protec-
tion for which it originally intended, the FDCPA still serves as a danger-
ous trap for the unwary practitioner.

244. Id. at 226.
245. The court also analyzed the effect of its use of the unsophisticated consumer as
opposed to the least sophisticated consumer test used by other courts. Id.
246. Id. at 227.