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Creditor and Consumer Rights

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THE 1982 survey period saw reduced judicial activity in the area of creditor and consumer rights. The survey period likewise passed without any legislative activity in these areas. The greatest amount of judicial activity during the survey period occurred in connection with the scope and applicability of the Deceptive Trade Practices—Consumer Protection Act (DTPA) and the Texas Consumer Credit Code.

I. DECEPTIVE TRADE PRACTICES—CONSUMER PROTECTION ACT

No legislative amendments to the Texas Deceptive Trade Practices—Consumer Protection Act occurred during the survey period. A significant degree of judicial activity took place, however, involving interpretations of various DTPA provisions as outlined below.

A. A Deceptive Act

A number of cases examined the various items on the "laundry list" of deceptive acts, the requirement that such act be a producing cause of the damage, and the requirement that the damaged party establish the pres-
ence of an act on the statutory list before liability ensues. In *Fortner v. Fannin Bank* a loan customer brought an action under the DTPA for the alleged failure of the defendant lender to file title papers on the plaintiff's automobile. In reversing a summary judgment in favor of the lender, the appellate court determined that an act not listed on the statutory deceptive laundry list may still violate the DTPA. To overcome the omission, the plaintiff must prove that the act or practice in fact occurred and that the act or practice was in fact deceptive. The Austin court of appeals held that an act is deceptive if it has the capacity to deceive an ignorant, unthinking, or credulous person.

The Dallas court of appeals ruled in *Trenholm v. Ratcliff* that to be actionable a representation must be relied upon by the aggrieved party. The plaintiff, a home builder, continued to purchase and construct houses on subdivision lots after learning that the representations of the defendant developer's representative were false. The court found such conduct to be conclusive proof that the plaintiff had not relied on the defendant's statements and therefore had not been harmed by the false statements. The Texas Supreme Court agreed that reliance is a necessary element, but reversed the finding at the trial level that reliance had been proven as a matter of law.

In *Bormaster v. Henderson* the plaintiff brought suit under the DTPA for breach of express and implied warranties arising from the purchase of a pet cockatoo that died three weeks after the purchase. The Houston [14th District] court of appeals affirmed the lower court's decision denying relief to the plaintiff because his evidence failed to establish sufficiently that the cause of the disease and subsequent death of his pet cockatoo was the fault of the defendant pet shop owner. The plaintiff claimed that the defendant misrepresented the quality of the cockatoo at the time of purchase by certifying that the bird was healthy when in fact it was diseased. To be actionable under the DTPA, the act complained of must be

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Article 21.21, Texas Insurance Code, as amended, or rules or regulations issued by the State Board of Insurance under Article 21.21, Texas Insurance Code, as amended.

*See also* Butler v. Joseph's Wine Shop, Inc., 633 S.W.2d 926, 931 (Tex. Ct. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.) (discussion of special issue submission on § 17.50(a) of DTPA).

5. TEX. BUS. & COM. CODE ANN. § 17.46(b) (Vernon Supp. 1982-1983).
6. 634 S.W.2d 74 (Tex. Ct. App.—Austin 1982, no writ).
7. *Id.* at 77.
8. *Id.; see also* Spradling v. Williams, 566 S.W.2d 561, 564 (Tex. 1978) (source of two-pronged test to find an act not on laundry list violative of DTPA); Cravens v. Skinner, 626 S.W.2d 173, 176 (Tex. Civ. App.—Fort Worth 1981, no writ) (confirming test).
9. 634 S.W.2d at 78; *see* Chrysler-Plymouth City, Inc. v. Guerrero, 620 S.W.2d 700, 705 (Tex. Civ. App.—San Antonio 1981, no writ).
11. 636 S.W.2d at 720.
12. *Id.*
15. *Id.* at 658-59.
the producing cause of the damage.\textsuperscript{16} Because the plaintiff failed to show the cause of the bird’s death by a preponderance of the evidence, he did not establish the existence of a defective condition at the time of sale that was a producing cause of the disease and death.\textsuperscript{17}

A disturbing case decided by a Houston [1st District] court of civil appeals found DTPA liability to arise from facts more properly depicting a wrongful foreclosure. In \textit{Dickinson State Bank v. Ogden}\textsuperscript{18} the defendant bank had been assigned a mechanic’s lien contract that obligated the landowners to pay the contractor within 120 days from the date of execution, subject to the contractor’s completion of the contract. The contract provided that if the project was not completed, the bank would have a lien for the contract price less the cost necessary to complete the project. The bank foreclosed on this lien when the landowners failed to pay within 120 days, but before the project was completed. The court of appeals found that the bank’s attempt to foreclose was a representation that the contract conferred rights and remedies not actually granted.\textsuperscript{19} Such action was held by the court to be a false, misleading, or deceptive act under the DTPA.\textsuperscript{20}

In \textit{Sam Montgomery Oldsmobile Co. v. Johnson}\textsuperscript{21} the Houston [1st District] court of appeals ruled that the practice of “cannibalization” is a deceptive act that is actionable under the DTPA.\textsuperscript{22} When the defendant auto dealer failed to replace cannibalized parts with factory replacements matching original specifications, it violated section 17.46(a) of the DTPA.\textsuperscript{23} The court indicated that temporarily borrowing parts from one vehicle, if they are later replaced with identical factory parts, would probably not be actionable under the DTPA.\textsuperscript{24}

The Supreme Court of Texas reversed and remanded the decision of the Dallas court of civil appeals in \textit{Robinson v. Preston Chrysler-Plymouth, Inc.}\textsuperscript{25} The supreme court stated that the DTPA does not impose liability for the failure to disclose facts the speaker does not know.\textsuperscript{26} The plaintiff contended that a seller commits a deceptive act by the failure to disclose material facts to a buyer even if the seller has no knowledge of those facts. The case arose prior to the 1979 amendments to the DTPA making “fail-

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\textsuperscript{16}TEX. BUS. & COM. CODE ANN. § 17.50(a) (Vernon Supp. 1982-1983). \\
\textsuperscript{17}624 S.W.2d at 660; see also Riojas v. Lone Star Gas Co., 637 S.W.2d 956, 959 (Tex. Ct. App.—Fort Worth 1982, writ ref’d n.r.e.) (producing cause, defined as efficient, exciting or contributing cause, is equally applicable under pre- and post-1979 versions of the DTPA). \\
\textsuperscript{18}624 S.W.2d 214 (Tex. Civ. App.—Houston [1st Dist.] 1981), rev’d on other grounds, 624 S.W.2d 220 (Tex. Sup. Ct. J. 1983). The supreme court specifically acknowledged that the bank’s statement was a deceptive act under DTPA section 17.46(b)(12). \\
\textsuperscript{19}624 S.W.2d at 220. \\
\textsuperscript{20}Id. at 219-20. \\
\textsuperscript{21}624 S.W.2d 237 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ). \\
\textsuperscript{22}Id. at 240. Cannibalization is automobile dealers’ practice of switching parts from one car to another on the lot. Id. \\
\textsuperscript{23}Id.; TEX. BUS. & COM. CODE ANN. § 17.46(a) (Vernon Supp. 1982-1983) prohibits “false, misleading, or deceptive acts or practices.” \\
\textsuperscript{24}624 S.W.2d at 240. \\
\textsuperscript{25}633 S.W.2d 500 (Tex. 1982). \\
\textsuperscript{26}Id. at 502. 
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ure to disclose material facts” a laundry list violation. Consequently, the actions complained of had to be shown to be “[false, misleading or deceptive acts or practices in the conduct of any trade or commerce” to be actionable. The supreme court held that a failure to disclose material facts not known is not a false, misleading, or deceptive act.

B. Definition of Consumer

In order to be entitled to the rights and protections the DTPA affords, a plaintiff must be a consumer. The DTPA defines a consumer as “an individual who seeks or acquires by purchase or lease, any goods or services.” During the survey period Texas courts grappled with the task of determining whether a defendant’s activities constituted the provision of goods or services.

In Dowling v. NADW Marketing, Inc., the defendant sold distributorships in certain geographical territories in Texas granting the buyer the right to solicit and sell new and used car dealers a program designed to improve customer relations. The defendant advertised a “Firm Buy Back Agreement” and that the buyer’s investment was “Completely Secured.” The plaintiff claimed the advertisements violated section 17.46(b)(12) of the laundry list. Because this case arose prior to the 1979 amendments, the services provided had to be “for other than business or commercial use” before the user of such service could be a consumer. The Tyler court of appeals held, therefore, that the plaintiff was not a consumer as to the services the defendant provided. In a hybrid situation, involving the purchase of both goods and services, the court determined that the plaintiff has the burden to differentiate between the goods and services for which he can recover as a consumer.

The purchaser in Guerra v. Brumlow claimed he was wronged by the misrepresentation of the seller-defendant that a bull purchased was a good breeder. The seller-defendant was an officer in an association sponsoring the sale, but owned no interest in the bull. The seller did, however, work closely with the owner and was a joint payee on the promissory note payable by the purchaser. Despite the fact the seller-defendant never had an ownership interest in the bull, the San Antonio court of appeals found the

28. 633 S.W.2d at 502.
29. Id.
30. TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon Supp. 1982-1983) (“representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law”).
31. 625 S.W.2d 392 (Tex. Ct. App.—Tyler 1981), rev’d and rendered, 631 S.W.2d 726 (Tex. 1982). The supreme court reversed and rendered the appellate court’s decision on plaintiff’s alternative pleading for fraud.
34. 625 S.W.2d at 396-97.
35. Id. at 397.
plaintiff to be a consumer and held the defendant liable.\textsuperscript{37}

In \textit{Tom Benson Chevrolet, Inc. v. Alvarado}\textsuperscript{38} the San Antonio court of appeals decided that the plaintiff was a consumer because part of the plaintiff's inducement in purchasing the car was the repair services warranty the defendants provided.\textsuperscript{39} The defendant argued that the plaintiff failed to prove she was a consumer of services or service warranties furnished by the defendant. The evidence, however, showed that the plaintiff obtained her warranty from General Motors Corporation (GMC) and received the warranty work from the defendant pursuant to its dealership agreement with GMC, whereupon GMC paid the defendant for its work.

The Austin court of appeals in \textit{Fortner v. Fannin Bank}\textsuperscript{40} discussed the issue of whether a bank's financial services constitute services under the DTPA so as to qualify a borrower as a consumer. While recognizing that the Texas Supreme Court has held that the borrowing of money is not an acquisition of services under the DTPA,\textsuperscript{41} the court of appeals properly noted that the supreme court expressly refused to determine whether activities collateral to a loan transaction are subject to the DTPA.\textsuperscript{42} The collateral activity examined by the court in \textit{Fortner} was the bank's alleged agreement to process the title papers on the plaintiff's car. Using the definition of services promulgated by the Texas Supreme Court in \textit{Van Zandt v. Fort Worth Press},\textsuperscript{43} the court determined that the bank's alleged agreement with Fortner "assisted or benefited" Fortner or "was an activity on his behalf," and thus was a service enabling Fortner to be treated as a consumer with rights to bring an action under the DTPA.\textsuperscript{44}

\section*{C. Damages}

Many cases were decided during the survey period in which courts dealt with the proper measure and method of assessing damages in DTPA cases.

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\item \textsuperscript{38} 636 S.W.2d 815 (Tex. Ct. App.—San Antonio 1982, writ ref'd n.r.e.).
\item \textsuperscript{39} Id. at 821.
\item \textsuperscript{40} 634 S.W.2d 74 (Tex. Ct. App.—Austin 1982, no writ); see supra note 6-9 and accompanying text.
\item \textsuperscript{41} Riverside Nat'l Bank v. Lewis, 603 S.W.2d 169, 174-75 (Tex. 1980).
\item \textsuperscript{42} 634 S.W.2d at 75; see also First State Bank v. Cheshir, 634 S.W.2d 742, 747 (Tex. Ct. App.—Amarillo 1982, writ ref'd n.r.e.) (holding that holders of certificate of deposit were not consumers who could bring action on certificate of deposit transactions under DTPA). \textit{But see} Knight v. International Harvester Credit Corp., 627 S.W.2d 382, 388 (Tex. 1982) (holding that extension of credit in installment sales contract simultaneously with purchase of vehicle is service under DTPA).
\item \textsuperscript{43} 359 S.W.2d 893, 895 (Tex. 1962) (defined services as "any act performed for the benefit of another under some agreement").
\item \textsuperscript{44} 634 S.W.2d at 76-77.
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In *Simmons v. Simpson*\(^4^5\) the plaintiff asserted a cause of action for breach of warranty in connection with the sale of a used automobile. Finding the breach of warranty to be a producing cause of plaintiff’s injury, the trial court determined the cost of repairing the car to the condition it was represented to be in at the time of sale would have been $328.00. The difference between the amount paid and its value at the time of sale was $75.00. The trial court trebled the $328.00 cost of repair figure and awarded attorney’s fees and court costs to the plaintiff.\(^4^6\) Recognizing that the DTPA does not extend the measure of damages beyond the well-settled common law rules,\(^4^7\) the El Paso court of appeals found that since the plaintiff had pleaded breach of warranty as the basis of her cause of action, the proper measure of damages was the difference between the market value of what was received and the value of what was contracted for.\(^4^8\)

Damages for mental pain and anguish under the DTPA were the court’s concern in *Ybarra v. Saldana*.\(^4^9\) Three property owners filed suit under the DTPA against a builder, and the trial court awarded treble their actual damages of $11,098.74 plus attorney’s fees and court costs.\(^5^0\) The trial court also found that the plaintiff suffered mental pain and anguish to the extent of $6,000.00, but denied recovery of this sum. The San Antonio court of appeals determined that the proper measure of damages was treble the total loss the plaintiff sustained as a result of the deceptive trade practice.\(^5^1\) Noting that actual damages have been defined to mean common law damages, the court upheld the trial court’s award of treble the excess of the reasonable and necessary cost of completion over the contract price plus the reasonable value of plaintiff’s services in supervising the completion.\(^5^2\) The court also affirmed the denial of damages for mental pain and anguish.\(^5^3\) In *Rodriguez v. Holmstrom*\(^5^4\) the Austin court of appeals upheld a judgment trebling the estimated cost to repair a vehicle and then subtracting the actual repair price.\(^5^5\) Finding actual damages suffi-

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46. Id. at 316.
47. Id.; see also American Transfer & Storage Co. v. Brown, 584 S.W.2d 284 (Tex. Civ. App.—Dallas 1979), rev’d on other grounds, 601 S.W.2d 931 (Tex. 1980), cert. denied, 449 U.S. 1015 (DTPA does not extend measure of damages beyond the common law).
48. 626 S.W.2d at 317; see also Mercer v. Long Mfg. N.C., Inc., 671 F.2d 946 (5th Cir. 1982) (denial of rehearing for reversal of award of damages confusing warranty damages and strict liability damages); St. John v. Barker, 638 S.W.2d 239 (Tex. Ct. App.—Amarillo 1982, no writ) (damages are total loss sustained as result of deceptive trade practices).
49. 624 S.W.2d 948 (Tex. Ct. App.—San Antonio 1981, no writ).
50. Actual damages consisted of $6,098.74 for reasonable and necessary expense in excess of the contract price needed to complete construction per the original plans, plus $5,000.00 as the true value of appellee’s services in supervising the construction work. Id. at 950.
51. Id. at 952.
52. Id. at 953; see also Smith v. Kinslow, 598 S.W.2d 910, 915-16 (Tex. Civ. App.—Dallas 1980, no writ) (limiting recovery to three times amount of actual damages).
53. 624 S.W.2d at 953.
55. Id. at 201. The Texas Supreme Court, however, reduced actual damages in Smith v. Baldwin, 611 S.W.2d 611, 617 (Tex. 1980), by the applicable setoff prior to trebling. The inconsistency is not addressed in *Rodriguez*. See Providence Hosp., Inc. v. Truly, 611
ciently established, the court also upheld an award of attorney's fees.\textsuperscript{56}

The defendant in \textit{Tom Benson Chevrolet, Inc. v. Alvarado}\textsuperscript{57} appealed a judgment awarding plaintiff prejudgment interest on an unliquidated claim. The trial court awarded the plaintiff damages in the amount of $2,155.96, representing double the time price differential charged by the defendant,\textsuperscript{58} plus $23,115.00, which was treble the actual damages the plaintiff suffered under the DTPA. The trial court also awarded prejudgment interest from the date the cause of action arose plus attorney's fees. The San Antonio court of appeals, citing \textit{Black Lake Pipe Line Co. v. Union Construction Co.},\textsuperscript{59} determined that when damages are conclusively established as of a specific time and in a definite amount, interest is recoverable as a matter of right from the date of injury.\textsuperscript{60} The court therefore amended the trial court judgment to permit prejudgment interest only on the amount of damages "definitely determinable."\textsuperscript{61}

\textbf{D. Venue}

The subject of proper venue in DTPA actions\textsuperscript{62} was the focus of several courts during the survey period. In \textit{First Title Co. v. Cook}\textsuperscript{63} the Fort Worth court of appeals determined that a plaintiff who: (1) had alleged to be a consumer seeking services from the defendant; (2) had alleged that the defendant's breach of warranty was a producing cause of action damages; and (3) had proved that the defendant had done business in the county where the action was filed, properly established venue.\textsuperscript{64} The court held that to prove a cause of action under the venue statute,\textsuperscript{65} the plaintiff must establish that the defendant breached the plaintiff's right and that some part of the transaction creating the primary right occurred in the county where the plaintiff brought the suit.\textsuperscript{66}

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  \item 627 S.W.2d at 201.
  \item 636 S.W.2d 815 (Tex. Ct. App.—San Antonio 1982, writ ref'd n.r.e.); see supra note 38-39 and accompanying text.
  \item 59. 538 S.W.2d 80, 95-96 (Tex. 1976).
  \item 60. 636 S.W.2d at 824.
  \item 61. \textit{Id.}
  \item 62. \textsc{Tex. Bus. & Comm. Code Ann. § 17.56} (Vernon Supp. 1982-1983) provides that an action may be: commenced in the county in which the person against whom the suit is brought resides, has his principal place of business, or has a fixed and established place of business at the time the suit is brought or in the county in which the alleged act or practice occurred or in a county in which the defendant or an authorized agent of the defendant . . . solicited the transaction made the subject of the action at bar.
  \item 63. 625 S.W.2d 814 (Tex. Ct. App.—Fort Worth 1981, writ dism'd).
  \item 64. \textit{Id.} at 818-19.
  \item 66. 625 S.W.2d at 816-17; \textit{see also} Allen Constr. Co. v. Parker Bros. & Co., 535 S.W.2d 751 (Tex. Civ. App.—Beaumont 1976, no writ) (venue in suit against construction company for breach of oral supply contract in county where contract made or breached); Inwood
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The plaintiff in *Balas v. First Bank*[^67] sued a contractor and a nonresident bank for removal of a cloud on the title of his residence. Sustaining the bank's plea of privilege, the trial court transferred the cause to the county of the bank's residence and principal place of business. The Houston [1st District] court of civil appeals, in affirming the trial court's ruling, determined that at the time of the venue hearing the bank had disclaimed all interest in the mechanic's lien contract and thus was not a necessary party to the plaintiff's cause of action.[^68]

### E. Miscellaneous

Numerous other decisions were reported during the survey period that interpreted other important aspects and ramifications of the DTPA. The plaintiff in *Termeer v. Interstate Motors, Inc.*[^69] sued a partnership for violations of the DTPA. The trial court rendered a default judgment against the partnership after the defendant partnership failed to answer. On appeal by only one partner, the Beaumont court of appeals held that the appealing partner was bound by his partner's actions that were found to be in violation of the DTPA and affirmed the judgment.[^70]

The trial court in *Mahoney v. Cupp*[^71] ordered class certification and the issuance of a temporary injunction enjoining the defendants from canceling or threatening to cancel any land sales contracts entered into with the plaintiff and the other members of the class. On appeal the defendant claimed that as a matter of law a DTPA suit cannot be maintained as a class action, because in 1977 the Texas Legislature amended the DTPA to repeal sections 17.51, 17.52, 17.53 and 17.54, which provided for class actions.[^72] Denying appellant's argument that such repeal evidenced a clear legislative intent to preclude class actions under the DTPA, the Waco court of appeals concluded that the better reasoning was that the legislature determined such special class action provisions were unnecessary in light of the Texas Supreme Court's approval, on May 9, 1977, of rule 42 of the Texas Rules of Civil Procedure.[^73]

Through its Consumer Protection Division of the Office of Attorney General, the State of Texas in *Franklin v. State*[^74] sued an individual car dealer for violation of the DTPA. The state sought a permanent injunction and civil penalties for the alleged sale of automobiles without certificates of title. The actions complained of occurred prior to the 1979

[^68]: Id. at 666 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ).
[^69]: Id. at 668.
[^70]: Id. at 14. The court reformed the judgment on other grounds. *Id.*
[^71]: Id. at 14. The court reformed the judgment on other grounds. *Id.*
[^72]: Id. at 257 (Tex. Ct. App.—Waco 1982, no writ).
[^73]: Id. at 261; see 1977 Tex. Gen. Laws, ch. 216, §§ 11-13, at 605.
amendments to the DTPA, and therefore the case was examined on the basis of whether the acts complained of were false, misleading, or deceptive under prior section 17.46. Since violation of the Certificate of Title Act was not a laundry list violation, the El Paso court of appeals ruled that the jury should first determine if the act occurred, and if so the court should then determine if the act was a deceptive trade practice. After the jury found in the affirmative, the court held that the act of selling automobiles without certificates of title was a deceptive trade practice.

In McKnight v. Ideal Mutual Insurance Co. the plaintiff alleged that the defendant's actions of encouraging the plaintiff-insured to file a claim and then denying coverage violated section 17.50(a)(4) of the DTPA and various provisions of the Texas Insurance Code. In dismissing this portion of plaintiff's complaint, a federal district court agreed with the defendant that the Texas Insurance Code provisions the plaintiff relied upon do not confer a private cause of action for the type of misconduct the plaintiff alleged. Furthermore, the court rejected the plaintiff's contention that section 17.50(a)(4)'s referral to article 21.21 of the Texas Insurance Code conferred a private cause of action.

Finally, in King v. Ladd the El Paso court of civil appeals reviewed a trial court's award of treble damages and attorney's fees to a purchaser of real estate. The sales contract provided that a swimming pool would be completed by January 1, 1978. In June 1978 the buyer sued for $8,500.00 he alleged had to be expended to complete the pool. The buyer also filed suit against an escrow agent for return of funds the purchaser had deposited as part of the sales price. The suit was governed by the DTPA as it existed after the 1977 amendments and prior to the 1979 amendments. The operable portion of the DTPA at that time provided that no treble damages could be awarded if the defendant proved he did not have reasonable notice of the consumer's complaint before the suit was filed. Letters from the plaintiff's attorney to the escrow agent prior to the coin-
mencement of the suit demanding return of the escrowed funds were held not to constitute adequate notice to trigger the right to treble damages.

II. USURY

No Texas legislative changes occurred this year in the area of usury law, although several cases of note were decided by the courts. Generally, the judicial decisions refined usury principles already in place and did not forge new ground for Texas lawyers.

Of particular importance to secured lenders was the decision in Starness v. Guaranty Bank. In Starness the lender required its borrowers to purchase a certificate of deposit and pledge the certificate as security for a loan. The borrowers asserted that, in order to compute whether the lender had charged usurious interest, the trial court should have reduced the principal amount by the face amount of the certificate pledged. In rejecting the borrower's argument, the Dallas court of appeals distinguished the instant facts from those in First State Bank v. Miller, wherein the Texas Supreme Court established that the test for usury should be applied to the net amount of money the borrower has available for his use notwithstanding the failure to disburse the entire principal. In Miller the supreme court determined the effective interest rate by reducing the face value of the note by an amount required to be deposited in a nominal interest bearing account. In contrast, the borrower in Starness received the full principal of the negotiated loan. Furthermore, the funds for the certificates ultimately securing the obligation were not related to the loan. In holding that the true principal of a loan, fully disbursed, is not reduced by the value of the debtor's property pledged to secure the loan, regardless of the nature of the pledged property, the Starness court confirmed an accepted principle of law and avoided potential liability for lenders throughout Texas.

Two other cases decided in the past year affirmed long standing protections the usury laws have afforded creditors. First, the Houston
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strict] court of appeals in Arndt v. National Supply Co. affirmed the general rule that usury is a defense personal to the obligor and a guarantor’s allegations of usury will not be heard. In Smart v. Crawford Building Material Co. the Tyler court of appeals adopted the corollary to the rule in Arndt that the defense of usury is not assignable. The assignment of the usury claim in Smart arose out of a property settlement wherein the wife received from her ex-husband an assignment of his usury claim against a vendor. In exchange, the wife agreed to indemnify him for any indebtedness to the vendor. Critical to the court’s holding was its implied finding that the wife’s indemnification to her ex-husband did not alter or change the husband’s obligation to the vendor. Inasmuch as the wife did not become liable to the vendor, she did not qualify as an obligor entitled to assert the penalty provisions of article 5069—1.06.

During the survey period two cases addressed the elusive issue of what constitutes “accidental and bona fide error” under Texas usury penalty provisions. The decision of the Texas Supreme Court in Tyra v. Bob Carroll Construction Co. considered the issue of whether a mistaken prayer for a usurious amount of interest in a petition can, given the circumstances, constitute accidental and bona fide error sufficient to spare the creditor from the penalties in article 5069—1.06(1). In holding that the accidental and bona fide error defense is available, the supreme court

92. 633 S.W.2d 919 (Tex. Ct. App.—Houston [14th Dist.] 1982, writ ref’d n.r.e.).
93. Id. at 925.
94. 638 S.W.2d 228 (Tex. Ct. App.—Tyler 1982, no writ).
95. Id. at 230.
96. Also of critical importance to the trial court and the court of appeals was the finding that the debt involved was not a community obligation of the Smarts but was only an obligation of Mr. Smart. It is interesting to note that the plaintiff sued both Smarts thereby indicating its conclusion that Mrs. Smart was obligated, yet Mrs. Smart entered a general denial and counterclaimed solely on the assignment of the usury cause of action from the property settlement. Id.
97. Id. The applicable provision reads: “(1) Any person who contracts for, charges or receives interest which is greater than the amount authorized by this Subtitle, shall forfeit to the obligor . . . .” TEX. REV. CIV. STAT. ANN. art. 5069—1.06(1) (Vernon Pam. Supp. 1971-1982) (emphasis added).
98. The penalty provision provides:

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

99. 639 S.W.2d 690 (Tex. 1982).
100. Although the court of civil appeals held that interest was not “charged” because the petitioner amended its pleading to conform to the fact that it had not up to the time of pleading charged interest, the supreme court assumed for the purposes of its opinion that interest had been charged and such usurious charging by pleading was defensible as the result of accidental and bona fide error. Id. at 691.
adopted the rationale and interpretation espoused in *PJM, Inc. v. Walter Clark Advertising, Inc.*\(^{101}\) and by implication disapproved the appellate court's dictum in *Tyra* that the bona fide error exception is inapplicable whenever interest in excess of double the allowable amount has been charged.\(^ {102}\) As reasoned by the Dallas court of appeals in *PJM*, the penalty of forfeiture of principal\(^ {103}\) is in addition to and not independent of the lesser penalty contained in subsection (1) of section 5069-1.06, and the availability of the bona fide error exception is not precluded by the size of the charge.\(^ {104}\) The San Antonio court of appeals came to a similar conclusion in *Bendele v. Tri-County Farmer's Co-Op*\(^ {105}\) but as the Texas Supreme Court stated on appeal of that case, the defense of accidental and bona fide error must be pled for the lesser penalty in order to be similarly pled against the more onerous provisions in article 5069-1.06(2).\(^ {106}\) In addition to endorsing the applicability of bona fide error to subsection (2) of section 5069-1.06, the court in *PJM* held that a clerical error resulting in the charging of interest can be sufficient, given other circumstances in the creditor's favor, to invoke the bona fide error defense.\(^ {107}\) In the course of considering the issue, the court in *PJM* noted the penal nature of the penalty under article 5069-1.06 and emphasized the need for courts to construe the statute strictly before finding the penalty provisions warranted.\(^ {108}\)

Finally, two decisions during the survey period added to the already substantial case authority for the principle that parties to an open account can, by their course of conduct, agree to an interest rate higher than the statutory maximum. In *Preston Farm & Ranch Supply Inc. v. Bio-Zyme Enterprises*\(^ {109}\) the Texas Supreme Court concluded that parties to an open account can, by course of conduct, evidence an agreement to pay a spec-

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101. 624 S.W.2d 282 (Tex. Ct. App.—Dallas 1981, writ ref'd n.r.e.).
103. The forfeiture of principal is authorized by subsection 2, which provides:

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

TEX. REV. CIV. STAT. ANN. art. 5069—1.06(2) (Vernon 1971).
104. 624 S.W.2d at 284-85.
105. 635 S.W.2d 459 (Tex. Ct. App.—San Antonio 1982), rev'd in part, aff'd in part, 641 S.W.2d 208 (Tex. 1982). The court of appeals in *Bendele* noted agreement with the holding in *PJM* that the penalty under paragraph two is excused in the absence of a paragraph one penalty. 635 S.W.2d at 469.
106. 641 S.W.2d at 210.
107. 624 S.W.2d at 285.
108. *Id.*; see *Agey v. American Liberty Pipe Line Co.*, 172 S.W.2d 972 (Tex. 1943); *Hight v. Jim Bass Ford, Inc.*, 552 S.W.2d 490 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.).
fied and nonstatutorily imposed interest rate.\textsuperscript{110} Of significance was the court's refusal to base its conclusion on section 2.207 of the Texas Business and Commerce Code,\textsuperscript{111} and its reliance instead upon the common law principle of contracts implied in fact.\textsuperscript{112} Further, the supreme court rejected the interpretation of the holding in \textit{Houston Sash & Door Co. v. Heaner}\textsuperscript{113} as precluding a court from finding the existence of a contract based upon invoices and course of dealing between the parties.\textsuperscript{114} The parties in \textit{Bio-Zyme} engaged in at least twenty transactions, each evidenced by a monthly statement indicating a charge of interest, albeit excessive. The court noted the obligor's acquiescence by payment of the interest charges and his continued ordering of goods knowing the same interest terms would apply, and concluded that an agreement to charge and pay interest could be found from such action.\textsuperscript{115}

The San Antonio court of appeals in \textit{Bendele} faced an easier fact situation and concluded that an agreement to pay interest can be found from the existence of invoices signed by the obligor.\textsuperscript{116} In so holding, the court adopted the rule espoused in \textit{Dean Vivian Homes, Inc. v. Sebera's Plumbing & Appliances, Inc.},\textsuperscript{117} although it noted that prior to \textit{Dean Vivian Homes}

\begin{footnotesize}
\begin{enumerate}
\item \emph{Id.} at 298. At the time the parties engaged in the transactions giving rise to the dispute, the rate of interest legally chargeable on an open account was governed by the version which read:

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

\begin{footnotesize}
\end{footnotesize}

\item \textit{TEX. BUS. & COM. CODE ANN.} § 2.207 (Tex. UCC) (Vernon 1968) provides:

\begin{enumerate}
\item A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
\item The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
\begin{enumerate}
\item the offer expressly limits acceptance to the terms of the offer;
\item they materially alter it; or
\item notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
\end{enumerate}
\item Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this title.
\end{enumerate}
\item \emph{Id.} at 299-300.
\item 577 S.W.2d 217 (Tex. 1979); \emph{see} Bendele v. Tri-County Farmer's Co-op, 635 S.W.2d 459 (Tex. Ct. App.—San Antonio), \textit{rev'd in part, aff'd in part}, 641 S.W.2d 208 (Tex. 1982).
\item \emph{Id.} at 300.
\item \emph{Id.} at 298.
\item 635 S.W. at 466.
\item 615 S.W.2d 921 (Tex. Civ. App.—Waco 1981, no writ).
\end{enumerate}
\end{footnotesize}

\end{footnotesize}
little authority existed for such a conclusion. Thus, in the wake of Bio-Zyme and Bendele, substantial authority is developing to enable the courts to find a meeting of the minds to pay interest even absent a formal signed document.

III. Consumer Credit

In the area of consumer credit, recent cases primarily restated or refined firmly entrenched legal principles. The one exception to that statement effectively ended the availability of one cause of action for consumers.

During the survey period the Texas Supreme Court considered in Knight v. International Harvester Credit Corp. whether the absence of a savings clause provision in the statute repealing chapter 14 of the credit code precluded the survivability of a pending cause of action alleging chapter 14 violations. Despite the consumer's argument that the Code Construction Act preserved the cause of action, the court concluded that absent a savings clause in the repealing statute, the right of recovery based on chapter 14 was extinguished. In rejecting Knight's argument, the court noted that the Code Construction Act was enacted to aid in the construction of codes in the state's continuing statutory revision program and that chapter 14 was not enacted pursuant to that program.

In Ciminelli v. Ford Motor Credit Co. the Texas Supreme Court considered whether a co-signor of a conditional sales contract is, for purposes of chapter 7, an obligor entitled to allege violations of that chapter. Ciminelli had agreed to assist an employee in the purchase of an automobile by signing the conditional sales contract as co-buyer. Although the contract in question contained a section for a guarantor's signature, Ciminelli did not sign in that section nor did he intend to act as a guarantor of his employee's debt. Noting that Ciminelli had all the obligations of an obligor under the contract, the supreme court concluded that his pri-

118. 635 S.W.2d at 466.
119. 627 S.W.2d 382 (Tex. 1982).
123. 627 S.W.2d at 385.
125. 624 S.W.2d 903 (Tex. 1981).
mary liability enabled him to assert against Ford any violations of chapter 7.\textsuperscript{126} The court commented that the decision of the Amarillo court of appeals in \textit{Hensley v. Lubbock National Bank}\textsuperscript{127} does not stand for the proposition that a co-buyer cannot be a retail buyer, and therefore an obligor, under chapter 7; rather, \textit{Hensley} merely restricts from the class of retail buyers those persons who buy motor vehicles principally for the purpose of resale.\textsuperscript{128}

The decisions of \textit{Vela v. Ebert's Mobile Homes, Inc.}\textsuperscript{129} and \textit{Rick Furniture Distributing Co. v. Kirlin}\textsuperscript{130} added to substantial case law demonstrating the severe consequences of violating the consumer credit code. In \textit{Vela} the seller transformed a conditional sales contract to purchase a mobile home into a lease due to the purchaser's inability to raise a sufficient down payment. The terms of the lease were nearly identical to the terms of the original sales contract, and the lessee had the option to become the owner of the mobile home for no additional consideration. The lease's lack of a conforming notice\textsuperscript{131} and its obvious character as a conditional sales contract caused the Corpus Christi court of appeals to find a chapter 6 violation; thus the court subjected the seller-lessee to the penalties imposed under chapter 8.\textsuperscript{132}

In \textit{Rick} the Dallas court of appeals concluded that the creditor's petition, which prayed for recovery of unearned time-price differential, constituted a charging under articles 5069--8.01 and 5069--8.02 and that amendments to the petition did not absolve the creditor from the consequences of having violated chapter 8.\textsuperscript{133} The severe rule imposed by \textit{Rick}, however, may be tempered by the arguably conflicting decision of the El Paso court of appeals in \textit{Tyra v. Bob Carroll Construction Co.}\textsuperscript{134} The court in \textit{Rick} also upheld the constitutionality of the chapter 8 penalty provisions,\textsuperscript{135} which were challenged as imposing an excessive fine or penalty

\begin{flushleft}
\textsuperscript{126} \textit{Id.} at 906.
\textsuperscript{127} 561 S.W.2d 885 (Tex. Civ. App.—Amarillo 1978, no writ).
\textsuperscript{128} 624 S.W.2d at 905-06.
\textsuperscript{129} 630 S.W.2d 434 (Tex. Ct. App.—Corpus Christi 1982, writ ref'd n.r.e.).
\textsuperscript{130} 634 S.W.2d 738 (Tex. Ct. App.—Dallas 1982, writ ref'd n.r.e.).
\textsuperscript{131} The notice that should have been included in the contract/lease states:
NOTICE TO THE BUYER. DO NOT SIGN THIS CONTRACT BEFORE YOU READ IT OR IF IT CONTAINS BLANK SPACES. YOU ARE ENTITLED TO A COPY OF THE CONTRACT YOU SIGN. UNDER THE LAW YOU HAVE THE RIGHT TO PAY OFF IN ADVANCE THE FULL AMOUNT DUE AND UNDER CERTAIN CONDITIONS MAY OBTAIN A PARTIAL REFUND OF THE TIME PRICE DIFFERENTIAL. KEEP THIS CONTRACT TO PROTECT YOUR LEGAL RIGHTS.
\textsuperscript{132} 630 S.W.2d at 438.
\textsuperscript{133} 634 S.W.2d at 740.
\textsuperscript{134} 618 S.W.2d 853 (Tex. Ct. App.—El Paso 1981), aff'd, 639 S.W.2d 690 (Tex. 1982). In \textit{Tyra} the plaintiff sought the amount owed on an account plus interest of one and one-half percent. The court of appeals held that this did not constitute a usurious charging under chapter 8. 618 S.W.2d at 856.
\textsuperscript{135} 634 S.W.2d at 741-42; see also \textit{St. Louis, I.M. & S. Ry. v. Williams}, 251 U.S. 63
\end{flushleft}
and as denying due process of law.\textsuperscript{136} Drawing on the decision of the Texas Supreme Court in \textit{Pennington v. Singleton},\textsuperscript{137} the court noted that a fine "is not unconstitutionally excessive and the court will not overrule the legislature's discretion, 'except in extraordinary cases, where it becomes so manifestly violative of the constitutional inhibition as to shock the sense of mankind,'" and that a fine constitutes a denial of due process only if its severity is wholly disproportionate to the offense and clearly unreasonable.\textsuperscript{138}

In \textit{Charlie Hillard, Inc. v. Heath},\textsuperscript{139} the Forth Worth court of appeals approved a contract provision that granted the seller the "free right of entry" to effect a repossession.\textsuperscript{140} The buyer argued that the contract provision constituted an attempt to subvert article 5069—7.07(3)'s prohibition of nonpeaceful repossessions.\textsuperscript{141} The court rejected this argument and found that the provision merely restated the seller's rights to repossess its collateral peacefully and did not purport to grant the seller any rights contrary to law.\textsuperscript{142} Another contract provision, which entitled the seller to retain personalty found in the repossessed car after passage of a twenty-four-hour grace period for the debtor to replevy,\textsuperscript{143} was found to violate article 5069—7.07(4).\textsuperscript{144} The court reached this conclusion because the provision constituted a contractual waiver of the buyer's legal rights against the seller.\textsuperscript{145} The court's decision with respect to subsection 4 is consistent

\begin{itemize}
\item \textsuperscript{136} 634 S.W.2d at 741.
\item \textsuperscript{137} 606 S.W.2d 682 (Tex. 1980).
\item \textsuperscript{138} 634 S.W.2d at 741 (citing \textit{Pennington}, 606 S.W.2d at 690).
\item \textsuperscript{139} 624 S.W.2d 758 (Tex. Ct. App.—Fort Worth 1981, no writ).
\item \textsuperscript{140} \textit{Id.} at 760.
\item \textsuperscript{141} TEX. REV. CIV. STAT. ANN. art. 5069—7.07 (Vernon Pam. Supp. 1971-1982) states: "No retail installment contract or retail charge agreement shall: (3) Authorize the seller or holder or other person acting on his behalf to enter upon the buyer's premises unlawfully or to commit any breach of the peace in repossession of a motor vehicle."
\item \textsuperscript{142} 624 S.W.2d at 760; see Dub Shaw Ford, Inc. v. Jackson, 622 S.W.2d 664 (Tex. Ct. App.—Fort Worth 1981, no writ); Woolard v. Texas Motors Inc., 616 S.W.2d 706 (Tex. Civ. App.—Fort Worth 1981, no writ); see also Tradewinds Ford Sales, Inc. v. Caskey, \textit{rev'd in part on other grounds, aff'd in part, and remanded}, 616 S.W.2d 935 (Tex. 1981).
\item \textsuperscript{143} The contract provided:
\begin{quote}
[L]In the event Buyer defaults in any payment, . . . Seller shall have the rights and remedies of a Secured Party under the Uniform Commercial Code, including the right to repossess the Property whenever the same may be found with free right of entry, . . . Any personalty in or attached to the property when repossessed may be held by Seller without liability and Buyer shall be deemed to have waived any claim thereto unless written demand by certified mail is made upon Seller within 24 hours after repossession.
\end{quote}
\item \textsuperscript{144} Subsection 4 states that no contract shall: "Provide for a waiver of the buyer's rights of action against the seller or holder or other person acting therefor for any illegal act committed in the collection of payments under the contract or agreement or in the repossession of a motor vehicle." TEX. REV. CIV. STAT. ANN. art. 5069—7.07(4) (Vernon Pam. Supp. 1971-1982).
\item \textsuperscript{145} 624 S.W.2d at 761.
\end{itemize}
IV. ENFORCEMENT OF JUDGMENTS

A. Garnishment

In Commercial Mortgage Insurance, Inc. v. Citizens National Bank a federal district court considered whether the Employment Retirement Income Security Act (ERISA) bars a plan beneficiary's commercial creditor from garnishing benefits. The court found that those provisions of ERISA and the Internal Revenue Code that prohibit the assignment or alienation of pension benefits create a general federal exemption of pension benefits from commercial creditors' claims and that these provisions preempt otherwise relevant state law.

The Corpus Christi court of appeals examined the rights of an intervening creditor who claimed a lien on a garnished deposit account in Bullock v. Foster Cathead Co. A judgment creditor attempted to garnish a deposit account that the judgment debtor had previously assigned to the Texas Comptroller of Public Accounts as security for the issuance of a limited sales and use tax permit. The assignment stated that it was meant as security for tax liabilities "which may accrue." The appellate court found that this assignment met the requirements of a common law pledge, even though the debtor owed no debt to the assignee at the time of the assignment or at the time of trial. The court also found that the assignee had constructive possession of the pledged property by virtue of a recitation in the assignment that the account was to be held "for the sole use and subject to the exclusive control of the Comptroller" and by virtue of the fact that the garnishee had notice of the pledge.

The garnishing creditor fared no better in Appeal Contractors, Inc. v. Vantage Properties, Inc., in which the Dallas court of appeals held that a party claiming a security interest in a deposit account is entitled to intervene in the garnishment action in order to establish its claimed lien on the garnished funds. The trial court dismissed the intervention because it unnecessarily complicated the garnishment action, but ruled that the dismissal was without prejudice to the intervenor's right to pursue its claim to

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146. See Zapata v. Ford Motor Credit Co., 615 S.W.2d 198 (Tex. 1981), and cases cited therein.
149. Id. § 1056(d)(1) (1976).
151. 526 F. Supp. at 516.
152. 631 S.W.2d 208 (Tex. Ct. App.—Corpus Christi 1982, no writ).
153. Id. at 210.
154. Id. The court's ruling on this point was probably incorrect in light of First Nat'l Bank v. McCamey, 105 S.W.2d 879, 881-82 (Tex. Comm'n App. 1937), which held that an existing debt or obligation is a prerequisite to a valid pledge.
155. 631 S.W.2d at 210.
156. 620 S.W.2d 666 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.).
157. Id. at 667.
the funds in an independent action against the garnishor. The appellate court found that the intervenor's rights would necessarily be prejudiced if it were not allowed to establish its secured claim in the original garnishment action, because the intervenor may not have an independent right of action against the garnishor once the funds in the garnished account were released to the garnishor.158

In Commercial Credit Corp. v. United States Fire Insurance Co.,159 the Houston [1st District] court of appeals considered whether a party may garnish a judgment debt when the judgment is not final. The court held that until a judgment is final no property interest exists that is subject to garnishment; thus, a garnishment action filed before a judgment is final is a nullity.160

B. Postjudgment Discovery

The Texas Supreme Court discussed in Arndt v. Farris161 the procedures required by rule 621a to “initiate and maintain” discovery proceedings.162 The case came before the court on an original mandamus petition wherein the relator sought an order compelling the trial court to vacate its order imposing sanctions for the relator’s failure to appear at a postjudgment deposition. The relator had appealed the judgment under which postjudgment discovery was sought, but had not filed a supersedeas bond. The relator contended that postjudgment discovery can only be initiated by filing an original petition and by serving a new citation on the judgment debtor. In the absence of such a procedure, the relator argued that the trial court was without jurisdiction to issue any orders relating to postjudgment discovery. The Texas Supreme Court rejected this argument and ruled that postjudgment discovery under rule 621a can be initiated and maintained in the same cause in which the judgment was entered, pursuant to the rules governing pretrial discovery.163

Kantor v. Herald Publishing Co.164 dealt with another unusual attack on postjudgment discovery procedures. The judgment creditor, Herald Publishing Co., was pursuing postjudgment discovery on a default judgment against Kantor. While the postjudgment discovery was pending, Kantor filed a bill of review that the trial court denied. He also filed a supersedeas bond on the default judgment. Kantor then appealed the denial of the bill of review and moved the appellate court for leave to file a petition for writ of prohibition forbidding the trial court from continuing to exercise jurisdiction over postjudgment discovery in the case in which the default judgment was entered. Kantor contended that the supersedeas bond abated postjudgment discovery until such time as a final judgment was entered in

158. Id.
159. 630 S.W.2d 651 (Tex. Ct. App.—Houston [1st Dist.] 1981, no writ).
160. Id. at 652.
161. 633 S.W.2d 497 (Tex. 1982).
163. 633 S.W.2d at 499.
164. 632 S.W.2d 656 (Tex. Ct. App.—Tyler 1982, no writ).
the bill of review action. The Tyler court of appeals rejected this argument because it found that the default judgment was final. Thus, the supersedeas bond was ineffective to suspend either execution or postjudgment discovery on the default judgment.\footnote{165}{Id. at 658.}

\section*{V. EXEMPT PROPERTY}

\subsection*{A. Homestead Exemption}

Continuing the tradition of liberally interpreting the Texas exemption statutes, the Texas Supreme Court in \textit{Renaldo v. Bank of San Antonio}\footnote{166}{630 S.W.2d 638 (Tex. 1982).} held that a divorced parent can dedicate his separate property as a family homestead even though it was never occupied as a family homestead during marriage.\footnote{167}{Id. at 640.} The court noted that a parent's right to a family homestead "derives from the relationship to his or her children"; thus, it is unnecessary for the divorced parent to establish his homestead right prior to divorce.\footnote{168}{Id.}

The Corpus Christi court of appeals in \textit{Clark v. Salinas}\footnote{169}{626 S.W.2d 118 (Tex. Ct. App.-Corpus Christi 1981), \textit{writ ref’d n.r.e. per curiam}, 628 S.W.2d 51 (Tex. 1982).} also liberally construed the nature of proof required to establish that property is being held as a homestead in the absence of actual occupancy. The proof the homestead claimant offered was that he had purchased certain building materials and construction plans that had not been put to any use at the time of trial. The appellant argued that a trial court may only consider as evidence of the requisite intent those activities performed on the homestead property itself. The appellate court rejected this evidentiary limitation and held that the purchase of building materials and construction plans were sufficient evidence of intent to occupy the land as a homestead even though the materials had been purchased at least two years before the homestead claim was disputed.\footnote{170}{626 S.W.2d at 120.}

\subsection*{B. Personal Property Exemptions}

In \textit{In re Howerton}\footnote{171}{21 Bankr. 621 (N.D. Tex. 1982).} a federal bankruptcy court considered whether the benefits from an individual retirement annuity contract established pursuant to the Internal Revenue Code\footnote{172}{26 U.S.C. \textsection 408(b) (1976 & Supp. V 1981).} are exempt property under Texas law. The debtors argued that, under the terms of their annuity contract and the IRC provisions, their interest in the annuities was not transferable and that this transfer prohibition meant that the annuities were exempt under Texas law. As authority for this argument the debtors cited \textit{Moser v. Tucker},\footnote{173}{87 Tex. 94, 26 S.W. 1044 (1895).} which contains the rather general statement that no "interest in property is
subject to sale under execution or like process, unless the debtor . . . has power to pass title to such property or interest in property by his own act.”

The bankruptcy court found that the broad legal principle stated in Moser v. Tucker applied only to the nonassignability of remote and contingent property interests and not to annuities from which the debtors could so easily withdraw their cash value.

The debtor in England v. First National Bank argued that heavy machinery used in his business was exempt as “tools of the trade” under the Texas personal property exemption statute. The federal bankruptcy court initially noted that two lines of authority have developed in Texas on the breadth of the exemption permitted for tools of the trade: One line of authority limits the exemption to tools used by hand, and a more liberal view allows an exemption for all tools of the trade, regardless of their size or the power source for their use. The bankruptcy court reasoned that the liberal view was more consistent with the current $30,000 limitation for personal property exemptions and held that heavy machinery may be exempted under Texas law.

VI. Creditors’ Rights Under the Bankruptcy Code

A. Bankruptcy Courts’ Jurisdiction

In Northern Pipeline Construction Co. v. Marathon Pipeline Co., the Supreme Court invalidated at least a portion of section 241(a) of the Bankruptcy Reform Act of 1978. In a plurality opinion Justice Brennan concluded that section 241(a) of the Code “has impermissibly removed most,
if not all, of 'the essential attributes of the judicial power' from the Art. III district court, and has vested those attributes in a non-Art. III adjunct.”

Justice Rehnquist, in a concurring opinion joined by Justice O'Connor, stated that the precise jurisdictional issue before the Court was whether Marathon Pipeline Company could be forced to defend, in the bankruptcy court and over its objection, an action for breach of contract filed by a debtor in bankruptcy. Justice Rehnquist concurred with the plurality because he agreed that the portion of the jurisdictional grant in section 214(a), which he found to be unconstitutional, was not readily severable from the remaining jurisdictional grant to the bankruptcy courts under section 241(a).

Although Congress had an opportunity to enact remedial legislation in response to Marathon, it failed to do so, and the Court's judgment became effective on December 24, 1982. In response to the jurisdictional void left by Marathon, the judicial councils in each federal circuit entered orders directing the district courts in their respective circuits to adopt, by December 25, 1982, certain emergency rules drafted by the Administrative Office for the United States Courts and to provide for the administration of bankruptcy cases and proceedings. These emergency rules provide that "all cases under Title 11 and all civil proceedings arising under Title 11 or arising in or related to cases under Title 11 are to be referred to the bankruptcy judges of this district."

The emergency rules under which bankruptcy cases are presently being administered are also subject to constitutional attack. Thus, the Marathon jurisdictional quagmire will probably continue to impede the administration of bankruptcy cases and the bankruptcy courts' resolution of controversies until Congress enacts legislation curing the constitutional defects.

From the standpoint of creditors' rights, this jurisdictional uncer-

183. 102 S. Ct. at 2879-80, 73 L. Ed. 2d at 625. Section 241a of the Code amended title 28 of the United States Code by adding a new chapter 90 that conferred jurisdiction to the bankruptcy courts in "all civil proceedings arising under title 11 or arising in or related to cases under title 11." 28 U.S.C. § 1471 (1976 & Supp. V 1981). This section includes provisions pertaining to venue in bankruptcy cases, id. §§ 1472, 1473, 1475; the removal and remand of cases in bankruptcy, id. § 1478; jury trials in bankruptcy cases, id. § 1480; and the general judicial powers of the bankruptcy courts, id. § 1481.

184. 102 S. Ct. at 2881, 73 L. Ed. 2d at 626. (Rehnquist, J., concurring).

185. Id. at 2882, 73 L. Ed. 2d at 627.

186. The Court's judgment in Marathon was originally stayed until Oct. 4, 1982. Id. at 2880, 73 L. Ed. 2d at 626. On that date the stay was extended until Dec. 24, 1982, pursuant to a Motion to Extend Stay filed by the Solicitor General of the United States.

187. For a detailed discussion of the impact of Marathon on the administration of bankruptcy cases, see Bankruptcy Court Act of 1982: Hearings on H.R. 6109 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 97th Cong., 2d Sess. 60-73 (1982) (hereinafter Subcommittee Report) (Statement of the National Bankruptcy Conference) and id. at 87-93 (statement of the Honorable Dean M. Gandy).

188. See W. NORTON, BANKRUPTCY LAW AND PRACTICE 3-7 (Pamph. Supp. 1983).

189. Id. at 4.


191. There is a consensus among bankruptcy practitioners, commentators, and judges that Congress should respond to Marathon by granting to the bankruptcy courts all of the
tainty will undoubtedly mean increased delays and increased costs in pursuing and obtaining commercial remedies in the bankruptcy courts.

B. Avoidance of Liens on Consumer Goods

The issue raised on appeal to the United States Supreme Court in United States v. Security Industrial Bank was whether the retroactive application of the Code's lien avoidance provision violates the due process clause of the fifth amendment. The provision allows a debtor to avoid nonpossessory, nonpurchase-money security interests in certain types of exempt property if the lien impairs an exemption to which the debtor is otherwise entitled under the Code. The Supreme Court avoided the constitutional issue by finding that Congress did not intend section 522(f) to be applied retroactively. Thus, section 522(f) may now only be applied to security interests that were created by conveyances after October 1, 1979.

The Supreme Court's validation of the lien avoidance provision in Security Industrial Bank will probably not benefit Texas debtors who attempt to avoid liens that impair exemptions claimed under Texas law in light of the Texas personal property exemption statute and the Fifth Circuit's recent decision in McManus v. Avco Financial Services. The issue in McManus was whether a party claiming exemptions under Louisiana law could avoid a nonpossessory security interest pursuant to section 522(f). Louisiana law precludes exemptions for property on which the debtor has previously granted a chattel mortgage. The debtor argued that the granting of a chattel mortgage against his household goods was merely a waiver of his exemptions, and since section 522(f) is, by its terms, applicable "notwithstanding any waiver of exemptions," he was still entitled to avoid the subject lien. The Fifth Circuit disagreed with this construction of section 522(f) and held that the debtor could not avoid chattel mortgage.

A federal bankruptcy court recently applied the McManus rationale in In re Evans. The bankruptcy court considered whether a Texas debtor could invoke section 522(f) to avoid a security interest that encumbered property the debtor claimed to be exempt under the Texas personal property exemption statute. The court noted that the Texas statute contains a provision similar to the Louisiana statute analyzed in McManus in that it attributes of article III courts. See, e.g., Subcommittee Report, supra note 187, at 87-93, 189-207.

192. 103 S. Ct. 407, 74 L. Ed. 2d 235 (1982).
194. Id.
195. 103 S. Ct. at 414, 74 L. Ed. 2d at 245.
197. 681 F.2d 353 (5th Cir. 1982).
199. 681 F.2d at 357.
does not permit a debtor to claim an exemption as to encumbered personal property against the person who holds the lien or encumbrance. Given the similarity, the court concluded that the McManus holding was controlling and held that a person claiming exemptions under Texas law cannot utilize section 522(f) to avoid encumbrances.

C. Collateral Estoppel

Several state court cases considered whether the collateral estoppel doctrine is applicable in actions involving issues similar to those decided in prior bankruptcy cases. In Adams v. Wilhite the Texas Supreme Court considered whether a bankruptcy court’s prior ruling that a debtor did not intend to defraud his creditor constituted collateral estoppel in a subsequent state court action brought by the bankruptcy trustee under the Texas fraudulent conveyance laws. In the bankruptcy proceeding, the trustee had objected to the debtor’s discharge pursuant to section 727(a)(2). The supreme court held that the determination in the bankruptcy proceeding that the debtor did not intend to defraud his creditors when he conveyed his business property to his wife, collaterally estopped the bankruptcy trustee from raising the issue in a subsequent suit to set aside the transfer of the property.

In Edmundson Investment Co. v. Florida Treco Co. a creditor sued for a deficiency judgment following a foreclosure sale conducted pursuant to a deed of trust. The defendant argued that the plaintiff was judicially estopped from claiming a deficiency because he had stipulated in the debtor’s prior bankruptcy proceeding that the value of the property in question exceeded the amount of indebtedness. The Houston [14th District] court of appeals found that the bankruptcy court had made no specific finding of fact on the value of the property. The court therefore ruled that the plaintiff was not bound by the prior stipulation, particularly since it was made in connection with a settlement agreement that the debtor subsequently breached and that had been made two years before the foreclosure sale.

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202. Article 3836(a) provides in part: “Personal property . . . is exempt from attachment, execution and every type of seizure for the satisfaction of liabilities, except for encumbrances properly fixed thereon.” Id. (emphasis added).
203. 25 Bankr. at 110. Since the State of Texas has not yet exercised its option to preclude the use of the federal exemptions provided under § 522(d), see 11 U.S.C. § 522(b) (Supp. V 1981), the avoidance of liens under § 522(f) is still available to Texas debtors who claim exemptions under § 522(d).
204. 640 S.W.2d 875 (Tex. 1982).
206. 11 U.S.C. § 727(a)(2) (1976 & Supp. V 1982) provides: (a) The court shall grant the debtor a discharge, unless (2) the debtor, with intent to hinder, delay or defraud a creditor . . . has transferred . . . (A) property of the debtor, within one year of the filing of the petition.”
207. 640 S.W.2d at 877.
208. 633 S.W.2d 599 (Tex. Ct. App.—Houston [14th Dist.] 1982), writ ref’d per curiam, 640 S.W.2d 859 (Tex. 1982).
209. 633 S.W.2d at 603.
210. Id.
Another collateral estoppel issue arose in *Rohdie v. Washington*,\(^2\) in which a general partner of a limited partnership was sued on a debt that the partnership had incurred while it was a debtor in bankruptcy. The general partner argued that the plaintiff was asserting the same claim in the present action that the bankruptcy court had denied when the plaintiff had attempted to collect the debt from the bankruptcy trustee. The El Paso court of appeals rejected the argument and held that res judicata was not applicable because the general partner was not a party to, and did not participate in, the bankruptcy court case.\(^2\)

\(^2\) Id. at 320. The stated rationale for the court's ruling on the res judicata defense is questionable in light of such cases as *Hammonds v. Holmes*, 559 S.W.\(^2\)d 345 (Tex. 1977). In *Hammonds* the Texas Supreme Court held that res judicata is applicable in an action in which the parties or their privies are the same as in the prior action. *Id.* at 346.