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CREDITORS' RIGHTS

by

William V. Dorsaneo, III*

IN addition to coverage of recent developments in the subject areas dealt with in the 1977 *Survey* article on creditors' rights, developments in the consumer law area and the Deceptive Trade Practices Act¹ have been added this year. Major changes in the Texas Rules of Civil Procedure concerning attachment, garnishment, and sequestration are treated separately in the last section of this survey article.

I. EXTRAORDINARY REMEDIES AND EXECUTION

Only three important garnishment cases were decided during the survey period. In *Kirso v. Heard*² the garnishor attempted to mandamus a district court judge to enter a judgment against a garnishee. The court of civil appeals denied the motion for leave to file a petition for writ of mandamus because the application for garnishment was defective. The garnishor failed to state under oath that the action was not brought to injure *either* of the defendants and that *neither* of them had property, within the affiant's knowledge, subject to execution which would satisfy the judgment.³

In *United States v. Stelter*⁴ the court held that an ex-wife who had been awarded a portion of her ex-husband's military retirement pay as her share of the community estate could enforce the award by garnishing the United States. The court rejected on public policy grounds⁵ the ex-husband's argument that the federal statute permitting garnishment⁶ was inapplicable by its express terms.

The third garnishment case involved an attempt to garnish funds held by a district clerk. In *Celanese Coating Co. v. Soliz*⁷ funds had been deposited into the registry of the court in satisfaction of a judgment obtained by the defendants against a third party. That judgment provided that the balance of

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1. TEX. BUS. & COMM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1978).

2. 547 S.W.2d 322 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).

3. *Id.* at 324. The court's holding is based upon *Buerger v. Wells*, 110 Tex. 577, 222 S.W. 151 (1920), which held only that the application should contain sworn allegations that "the defendants" do not have property, within the knowledge of the affiant, subject to execution which would satisfy the judgment. *See also Mackey v. Lucey Prods. Corp.*, 150 Tex. 188, 239 S.W.2d 607 (1951). The court's suggestion that it is also necessary for the application to state that the garnishment applied for is not sued out to injure the defendant or garnishee is, however, incorrect since it is necessary only when the writ is sued out before judgment. TEX. REV. CIV. STAT. ANN. art. 4076(2)(3) (Vernon 1971).

4. 553 S.W.2d 227 (Tex. Civ. App.—El Paso 1977, writ granted).

5. *Id.* at 229: "Otherwise, the beneficial spirit of the law would be sacrificed to its letter."

6. 42 U.S.C. § 659 (Supp. IV 1974) provides that the United States "shall be subject, in like manner and to the same extent as if the United States were a private person, to legal process brought for the enforcement, against [an] individual [entitled to remuneration for employment] of his legal obligations to provide child support or make alimony payments."

7. 541 S.W.2d 243 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.).

the funds remaining after certain deductions would be paid to the defendants "and Bank of North Texas, Hurst, Texas."⁸ Hence, the funds held were jointly owned by the defendants and the bank. The garnishor sought to garnish the funds by instituting a post-judgment garnishment proceeding. The bank promptly intervened and set up a claim to the funds. After a jury trial, the funds were awarded to the bank.⁹ The garnishor argued that the bank had failed to show that it was entitled to receive all of the funds. The court held that since the judgment evidenced the fact that the funds in the clerk's possession were jointly owned by the defendants and the bank, the garnishor had the burden of proving what portion, if any, was severally owing to the judgment debtors. The garnishor failed to satisfy this burden.

One case decided during the survey period dealt with the issue of encumbrances upon a homestead. In *Means v. United Fidelity Life Insurance Co.*¹⁰ the plaintiffs sought to recover title to and possession of an alleged 200-acre rural homestead which was part of a larger tract. At the time of the purchase of the tract in 1969 the grantor retained a vendor's lien and obtained a deed of trust from the plaintiffs to secure the balance of the purchase price. Subsequently, the note evidencing the balance of the purchase price, the vendor's lien, and the deed of trust were assigned to a savings and loan association. Thereafter, the plaintiffs executed deeds of trust in connection with loans made to finance the construction of permanent improvements on the tract. The loans were extended, renewed, and consolidated. By March 1972 the loans totaled \$25,000 payable to the First Savings and Loan Association of Odessa. A \$75,000 loan, secured by a deed of trust lien on the homestead tract and on two other tracts, was then obtained from the First City Mortgage Company of Dallas, which thereafter transferred both the note and the lien to the United Fidelity Life Insurance Company. Approximately one-third of the \$75,000 loan was used to pay the balance of the principal and interest owed to the First Savings and Loan Association of Odessa. The plaintiffs defaulted on the loan, and defendant United Fidelity Life Insurance Company at a trustee's sale purchased the homestead tract and one other tract for \$56,250.

Against this factual background the plaintiffs contended that the foreclosure sale of their homestead was invalid because the deed of trust lien was invalid. In rejecting this contention, the court of civil appeals held that the United Fidelity Life Insurance Company was subrogated to the rights of the savings and loan association because the Odessa association had a valid lien on the homestead tract and a portion of the \$75,000 loan proceeds had been used to pay the valid encumbrance.¹¹

The plaintiffs' next contended that the foreclosure, made without consideration of the equities existing in plaintiffs' favor, was unauthorized. The

8. *Id.* at 246.

9. *Id.* at 248.

10. 550 S.W.2d 302 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.).

11. Despite the fact that the court of civil appeals concluded that the subrogation was contractual and agreed to by the plaintiffs, the court went on to say "it makes no difference whether the party, on the payment of the money, took an assignment of the mortgage or a release, or whether a discharge was made and the evidence of the debt cancelled." *Id.* at 309.

court rejected this argument for three reasons. Initially, the court held that by failing properly to demand that the *non-exempt acreage* be sold first, the plaintiffs waived any right to require segregation. Secondly, the plaintiffs failed to tender that portion of the debt, totaling approximately \$27,000, chargeable against the homestead by virtue of the defendant's subrogation rights. Finally, the plaintiffs had not obtained a jury determination of the 200-acre homestead's proportionate value in relation to the whole acreage upon which foreclosure was ordered. Consequently, the plaintiffs failed to substantiate their claim that the unsegregated homestead property brought more than the legal debt against it.

II. SWORN ACCOUNTS AND ATTORNEYS' FEES

Procedural errors made in connection with sworn account practice under rule 185¹² continued during the survey period. In *Dixon v. Mayfield Building Supply Co.*¹³ the defendant's pleading did not contain a properly verified denial. His answer, although containing an effective assertion that each and every item in the account made the basis of the suit was "wholly not just and true," was not supported by a proper oath or affidavit; a modified form of an acknowledgment was used rather than a jurat.¹⁴ The defendant, however, contended that he was a stranger to the transaction and accordingly was not required to make a verified denial.¹⁵ In rejecting this contention, the court held that the exception is not available when the plaintiff's pleadings or the invoices or other evidence exhibited as the basis for the obligation reflect that the defendant was a party to the transaction.¹⁶

The recovery of attorneys' fees in connection with suits on sworn accounts was considered in *T.J. Service Co. v. Major Energy Co.*¹⁷ The court there held that the plaintiff could not rely upon the sworn account provision of article 2226¹⁸ because the appellate record did not evidence a transaction whereby title to personal property passed from plaintiff to defendant.¹⁹ Similarly, in *Barcheers v. Braswell*²⁰ the plaintiff was not permitted to base his claim for attorneys' fees under the sworn account provision of article

12. TEX. R. CIV. P. 185.

13. 543 S.W.2d 5 (Tex. Civ. App.—Fort Worth 1976, no writ).

14. The form used was:

Before me, the undersigned authority, on this day personally appeared CHARLES DIXON, known to me to be the person who executed the foregoing instrument and acknowledged to me that he executed the same for the purposes therein expressed and the facts contained therein are true and correct.

GIVEN UNDER MY HAND AND SEAL OF OFFICE on this the 26 day of October, 1975.

Id. at 7.

15. *Id.* at 8.

16. See *Boysen v. Security Lumber Co.*, 531 S.W.2d 454 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ, *discussed in* Dorsaneo, *Creditors' Rights, Annual Survey of Texas Law*, 31 Sw. L.J. 213, 227-28 (1977).

17. 552 S.W.2d 598 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).

18. TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1978). The amendment to the statute, effective Sept. 1, 1977, appears to eliminate this problem because attorneys' fees are now recoverable in connection with "suits founded on oral or written contracts." See 1977 Tex. Gen. Laws ch. 76, § 1, at 153.

19. See *Van Zandt v. Fort Worth Press*, 359 S.W.2d 893 (Tex. 1962); *Meaders v. Biskamp*, 159 Tex. 79, 82-83, 316 S.W.2d 75, 78 (1958).

20. 548 S.W.2d 76 (Tex. Civ. App.—El Paso 1977, no writ).

2226 because "the words 'suits founded upon a sworn account or accounts' as used in article 2226 mean a suit for goods, wares and merchandise."²¹ The plaintiff was, however, permitted to recover attorneys' fees under the statutory provision authorizing their recovery for the prosecution of claims for services rendered. In this connection, the court held that the services need no longer be personally rendered by the claimant.²²

In *Johnson-Walker Moving & Storage, Inc. v. Lane Container Co.*²³ the defendant appeared for trial and announced that a cashier's check in the principal amount of the action had been mailed to the plaintiff. The cashier's check was received but no additional amount in payment of attorneys' fees, interest, and court costs was tendered. Subsequently, the trial court rendered judgment against the defendant for court costs, interest, and attorneys' fees. The court of civil appeals reversed the trial court judgment because the receipt of the principal amount of the debt was a bar to any claim for interest where no express contract or obligation to pay interest existed. Since article 2226 requires the plaintiff to "finally obtain judgment" for some part of his claim, once the principal was paid, no part of the claim remained unpaid because the interest award, which was itself based upon statute,²⁴ was unauthorized. Interest provided for by article 5069—1.03²⁵ is not recoverable once the principal is paid, even if the principal is received under protest.²⁶

The most significant development in the area of recovery of attorneys' fees was the substantial revision of article 2226 by the Texas Legislature.²⁷ Three major changes were made in the statute. First, "suits founded on oral or written contracts" will support a recovery of a reasonable amount as attorneys' fees, if at the expiration of thirty days after a *valid claim* for payment is made to the defendant or an authorized agent, "payment for the just amount owing has not been tendered."²⁸ It is important to note, however, that contracts of insurers have been specifically exempted from the application of the new statutory language.²⁹ Secondly, the statutory

21. *Id.* at 79.

22. See *Caston v. Texas Power & Light Co.*, 501 S.W.2d 472 (Tex. Civ. App.—Texarkana 1973, no writ). See also *Howard v. French-Brown Floors Co.*, 542 S.W.2d 709 (Tex. Civ. App.—Dallas 1976, no writ); *Alpert v. Jarrell Carpentry Co.*, 510 S.W.2d 136 (Tex. Civ. App.—Dallas 1974, no writ).

23. 548 S.W.2d 500 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.).

24. TEX. REV. CIV. STAT. ANN. art. 5069—1.03 (Vernon 1971) provides:

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.

25. *Id.*

26. 548 S.W.2d at 502.

27. TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1978).

28. *Id.* The amendment probably eliminates the "special contract" limitation on the recovery of attorneys' fees in the sworn account context. See *Langdeau v. Bouknight*, 162 Tex. 42, 50, 344 S.W.2d 435, 441 (1961); *Meders v. Biskamp*, 159 Tex. 79, 83, 316 S.W.2d 75, 78 (1958); *Jackson v. Paulsel Lumber Co.*, 461 S.W.2d 161, 170 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.).

29. TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1978) states:

The provisions hereof shall not apply to contracts of insurers subject to the provisions of the Unfair Claim Settlement Practices Act (Article 21.21-2 Insurance Code), nor shall it apply to contracts of any insurer subject to the provisions of Article 3.62, Insurance Code, or to Chapter 387, Acts of the 55th Legislature,

reference to the minimum fee schedule has been deleted. The State Bar Minimum Fee Schedule no longer constitutes prima facie evidence of reasonable attorneys' fees.³⁰ Apparently, the amount of reasonable attorneys' fees will now be determined in the same manner as any other question of fact.³¹ Finally, the statutory language requiring the claimant to obtain a final judgment for some part of his claim has been excised. Thus, the question is raised whether the claimant must still fulfill the previous final-judgment requirement. Since, however, the attorneys' fees are still recoverable "in addition to his claim and costs," the alteration of the statutory language has probably not modified the prior case law in this respect.³²

III. USURY

A. Guaranty/Suretyship Obligations

Two cases decided during the survey period dealt with the question of a surety's entitlement to assert a claim or defense of usury in connection with certain loans made to corporations. In *V.I.P. Commercial Contractors v. Alkas*³³ the noteholder instituted suit against two corporations and a corporate president who had signed the note in his individual capacity.³⁴ The corporate officer contended that he was no more than "an accommodation maker,"³⁵ and not a guarantor of a corporate obligation who would consequently be precluded from raising a claim or defense of usury under article 1302—2.09.³⁶

Citing *Universal Metals & Machinery, Inc. v. Bohart*,³⁷ the court concluded that the corporate officer had no basis for a valid usury defense or claim.

In holding that accommodation makers may not assert that the underlying loan transaction is usurious when the corporate party accommodated cannot do so, the court characterized an accommodation maker's contract as one of

Regular Session, 1957, as amended (Article 3.62-1 Vernon's Texas Insurance Code), or to Article 21.21, Insurance Code or to Article 21.21, Insurance Code, as amended or to Chapter 9, Insurance Code, as amended, and each such article or chapter shall remain in full force and effect.

30. The practice of setting minimum fee schedules by a state bar association has been held to violate the price fixing prohibitions of the Sherman Act. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). The Texas Supreme Court had also held that the "prima facie" evidence provision was inapplicable to summary judgment practice. *Coward v. Gateway Nat'l Bank*, 525 S.W.2d 857, 859-60 (Tex. 1975).

31. See *Rice v. Nu-Ray Elec. Co.*, 514 S.W.2d 86, 89 (Tex. Civ. App.—Fort Worth 1974, no writ); *Braswell v. Braswell*, 476 S.W.2d 444, 446 (Tex. Civ. App.—Waco 1972, writ dismissed). But see TEX. R. CIV. P. 166a, amended effective Jan. 1, 1978, which permits use of affidavits by experts. See also *Coward v. Gateway Nat'l Bank*, 525 S.W.2d 857 (Tex. 1975).

32. See *Askso Eng'r Corp. v. Mobil Chem. Corp.*, 535 S.W.2d 893, 897 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

33. 553 S.W.2d 656 (Tex. Civ. App.—San Antonio, 1977, no writ).

34. *Id.* at 657.

35. An accommodation maker is one who signs the instrument in any capacity for the purpose of lending his name to another party to the instrument. TEX. BUS. & COMM. CODE ANN. § 3.415(a) (Vernon 1968). Furthermore, an accommodation maker is a surety with a right of recourse on the instrument against the party accommodated if he, the accommodation maker, pays. *Id.* § 3.415(e).

36. TEX. REV. CIV. STAT. ANN. art. 1302—2.09 (Vernon Supp. 1978) provides that "the claim or defense of usury by such corporation, its successors, guarantors, assigns or anyone on its behalf is prohibited"

37. 539 S.W.2d 874 (Tex. 1976), discussed in *Dorsaneo*, *supra* note 16, at 232-34.

suretyship rather than of joint obligation.³⁸ Like an accommodation maker, a guarantor of payment is a surety³⁹ who agrees to pay the instrument according to its tenor without resort by the holder to any other party.⁴⁰ Therefore, the court concluded that both guarantors and accommodation makers should stand on the same footing with respect to the claim or defense of usury.⁴¹ This conclusion is sensible because it recognizes that the distinction between an accommodation maker and a guarantor of payment is one of form and not of substance. Therefore, since a guarantor of payment of a corporate obligation is precluded from effectively maintaining a claim or defense of usury under article 1302—2.09⁴² in connection with corporate obligations of \$5,000 or more under the supreme court's holding in *Bohart*, accommodation makers should likewise be barred from so doing.⁴³

In the second case dealing with article 1302—2.09, *Hutchison v. Commercial Trading Co.*,⁴⁴ a guarantor of payment of a corporate obligation sought to assert a claim of usury on the theory that the lender utilized a corporate structure as a scheme to evade the interest limits set by article 5069—1.02.⁴⁵ Confronted with the rule in *Skeen v. Glenn Justice Mortgage Co.*,⁴⁶ that "[t]he mere fact that the corporation was formed in order to obtain the loan . . . does not render the transaction void or illegal"⁴⁷ so long as the corporate rate is not exceeded, plaintiff argued that his assignor was the alter ego of the corporation and that the *Skeen* precedent was, therefore, not controlling.⁴⁸ The district court stated that the essence of the *Skeen* holding was estoppel.⁴⁹ The court then concluded that because an ongoing corporate entity constituted the corporate vehicle, because the guarantor was not inexperienced in the business world or at borrowing money, and because no facts concerning fraud or other illegality were alleged, the plaintiff had not stated a claim upon which relief could be granted.

38. 553 S.W.2d at 658. It had previously been held that when an individual and a corporation execute a "joint and several" note as comakers, the individual has a cause of action for usury if the individual rate is exceeded. *Sud v. Morris*, 492 S.W.2d 335 (Tex. Civ. App.—Beaumont 1973, no writ).

39. TEX. BUS. & COMM. CODE ANN. § 1.201(40) (Vernon 1968) provides that the term "surety" shall include "guarantor."

40. *Id.* § 3.416(a).

41. *See id.* § 3.416(b).

42. *See* note 36 *supra* and accompanying text.

43. It could be argued that the article does not explicitly preclude "accommodation makers" from successfully making a claim or defense of usury because the statutory language barring the contention is restricted to "such corporation, its successors, guarantors, assigns or anyone in its behalf."

44. 427 F. Supp. 662 (N.D. Tex. 1977).

45. TEX. REV. CIV. STAT. ANN. art. 5069—1.02 (Vernon 1971) provides:

Except as otherwise fixed by law, the maximum rate of interest shall be ten percent per annum. A greater rate of interest than ten percent per annum unless otherwise authorized by law shall be deemed usurious. All contracts for usury are contrary to public policy and shall be subject to the appropriate penalties prescribed in Article 1.06 of this Subtitle.

46. 526 S.W.2d 252 (Tex. Civ. App.—Dallas 1975, no writ), *noted in* 29 Sw. L.J. 959 (1975).

47. *Id.* at 256.

48. The *Skeen* opinion also contained the following language: "While it is true that the corporate entity may be disregarded where it is used as a cloak or cover for fraud or some other transaction tainted with illegality, such is not the situation in this instance." *Id.*

49. 427 F. Supp. at 666.

B. Definition of Interest

In *Boyd v. Life Insurance Co.*⁵⁰ a borrower made the contention that a prepayment penalty constituted interest.⁵¹ The court of civil appeals held the charging of a prepayment penalty was not for the use of money "but for the privilege of repaying the loan before maturity."⁵²

*Delta Enterprises v. Gage*⁵³ presents a somewhat more interesting fact picture. Certain payments made to defendant Gage were denominated "interest" in option contracts for the purchase of real estate. Upon the exercise of the options, the purchaser of the land, in addition to the purchase price of the real estate, paid the full amount of the "interest," which was computed from the date of the purchase of the options to the date set for the closing of the sale. The purchaser later instituted suit, contending that by computing the "interest" from the date of the purchase of the option the defendant received interest in excess of double the amount allowed by law.

Defendant, on the other hand, argued that the option contracts were ambiguous, and introduced parol evidence to the effect that the disputed payments were really "a variable component of the consideration for the options in question, or as part of an escalating purchase price at which the option could be exercised."⁵⁴ The jury found that disputed payments were not interest, and judgment was accordingly rendered for the defendant. In affirming this judgment, the court of civil appeals held that the substance of the transaction, and not its form, should control;⁵⁵ since the plaintiff admitted in its pleadings that the disputed sum was not for the use, forbearance, or detention of money, the payments could not possibly fall under the statutory definition of interest.⁵⁶

C. Settlement of a Usury Claim

One of the most interesting usury cases decided during the survey period is *Skeen v. Slavik*.⁵⁷ In defense of an action for the payment of promissory notes defendant Skeen made the contention that the notes sued upon were usurious to such an extent that they were unenforceable because the interest rates were twice the rates of interest allowed by law.⁵⁸

Plaintiff initially advanced \$325,000 to a corporate borrower who executed promissory notes aggregating \$425,000 in principal amount which

50. 546 S.W.2d 132 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd).

51. Interest is defined by statute as "the compensation allowed by law for the use or forbearance or detention of money . . ." TEX. REV. CIV. STAT. ANN. art. 5069—1.01(a) (Vernon 1971).

52. 546 S.W.2d at 133. See also *Gulf Coast Inv. Corp. v. Prichard*, 438 S.W.2d 658, 661 (Tex. Civ. App.—Dallas), writ ref'd n.r.e. per curiam, 447 S.W.2d 676 (Tex. 1969).

53. 555 S.W.2d 555 (Tex. App.—Fort Worth 1977, no writ).

54. *Id.* at 557.

55. See *Gonzales County Sav. & Loan Ass'n v. Freeman*, 534 S.W.2d 903, 906 (Tex. 1976).

56. See note 51 *supra* and accompanying text.

57. 555 S.W.2d 516 (Tex. Civ. App.—Dallas 1977, writ granted).

58. TEX. REV. CIV. STAT. ANN. art. 5069—1.06(2) (Vernon 1971) provides: "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 . . ."

Skeen guaranteed.⁵⁹ Subsequently, the first set of notes was cancelled and new notes aggregating \$425,000 were executed, although no new money was advanced to the corporate borrower.⁶⁰ Skeen also guaranteed payment of these notes. Thereafter, the corporate borrower repaid all but \$200,000 of the face amount of the notes. After the payments, the corporate borrower signed two new notes aggregating in the principal amount of \$220,000.⁶¹ Once again, both notes were guaranteed by Skeen. Approximately five months later, Skeen entered into a "put and call" agreement with plaintiffs under which Skeen was paid \$300,000 for stock in the corporate borrower and in a second corporation, subject to plaintiff's right to demand repurchase by Skeen of the same stock for \$360,000. A new agreement was made one year later. Skeen paid \$50,000 to plaintiffs and \$5,000 to their attorney, executed two promissory notes in the separate amounts of \$310,000 and \$235,950, and executed a release of all liability "for any causes of action which may have accrued up to that date, including usury claims growing out of the loan transactions and 'put and call' agreement"⁶²

Skeen contended that the original loan agreement and the "put and call" arrangement were all usurious loan transactions because the amount of money "advanced" by plaintiffs was substantially reduced by so-called "loan fees." Moreover, he maintained that the settlement and release agreement were ineffective because the two notes he executed in connection with the release carried forward the usurious obligations. The court of civil appeals agreed.

Plaintiffs sought to uphold the validity of the loan fees on the ground that they constituted bona fide loan fees. Their argument was premised upon the holding in *Gonzales County Savings & Loan Association v. Freeman*⁶³ that a fee which commits a lender to make a loan at some future date is not interest but merely the purchase of an option. In rejecting this argument, the court of civil appeals noted that, regardless of the label, a charge which is admittedly for the use, forbearance, or detention of money constitutes interest. Thus, the court followed the requirement enunciated in *Gonzales County* that a court must look beyond superficial appearances in determining the existence or nonexistence of usury.⁶⁴

The fact that the court of civil appeals accepted the defendant's argument that the signed release was ineffective because the usurious charges were "carried forward" also raises the question of whether, and by what means, a lender can compromise a cause of action based upon usurious transactions. It has long been established that a usury claim can be compromised

59. Plaintiff testified that the additional \$100,000 obligation was in exchange for using plaintiff's credit in obtaining the money and for undertaking the risk in lending the money. 555 S.W.2d at 520.

60. Twenty-thousand dollars of the initial \$325,000 cash advance had been paid by the corporate borrower before the execution of the second series of notes. *Id.* at 519.

61. The principal increase of \$20,000 represented a loan fee, according to testimony of plaintiff. *Id.*

62. *Id.*

63. 534 S.W.2d 903 (Tex. 1976), discussed in Dorsaneo, *supra* note 16, at 228.

64. "[W]hether or not a charge labeled a 'commitment fee' is merely a cloak to conceal usury may depend upon whether or not the fee is unreasonable in light of the risk to be borne by the lender." 534 S.W.2d at 906.

under Texas law.⁶⁵ The removal of the taint of usury, however, cannot be accomplished merely by a renewal, or successive renewals, of an originally usurious contract.⁶⁶ The usurious character of the original transaction must be purged. For example, if the releases are integral parts of prior loan transactions that are tainted by usury, the releases will not be effective.⁶⁷ Furthermore, when a lender who is faced with an action for usury reduces the final payment to a sum that also diminishes the amount of interest paid over the loan term, he does not thereby avoid statutory penalties.⁶⁸ On the other hand, when a bona fide dispute exists with regard to whether usurious interest has been exacted, the parties may settle the dispute and compromise their differences.⁶⁹

D. Frozen Funds—Spreading

In *Miller v. First State Bank*⁷⁰ a husband and wife signed a note for \$70,000 bearing interest at the rate of ten percent per annum. The term of the note was three years, with accrued interest payable annually on the anniversary date of the note. Pursuant to an agreement with the lender, \$14,000 of the original advance of \$70,000 was frozen by the bank to prevent the borrowers from withdrawing this amount and to guarantee payment of interest during the first two years of the loan term. The borrowers also gave the bank two post-dated checks of \$7,000 each which the bank was authorized to cash on the first and second anniversary dates respectively. Hence, the cash advance represented by the loan available to the borrowers was \$56,000. On the first anniversary date of the note, the first post-dated check was cashed, and one-half of the frozen funds was applied to the payment of accrued interest. Before the second anniversary date, the husband died, and as a result the bank did not cash the check.⁷¹ The remaining \$7,000 had, however, been commingled by the bank with its own funds and all or part of the \$7,000 had been loaned to other customers. In effect, although the bank was unable to make a bookkeeping entry with respect to the second post-dated check, it had full use of the retained funds from the date that the \$14,000 was frozen. Thereafter, the wife paid the \$70,000 face amount of the note, and deposited \$7,000, representing interest accrued during the third loan year, into the registry of the court. Individually and in

65. See *Stout v. Ennis Nat'l Bank*, 69 Tex. 384, 8 S.W. 808 (1887); *Cotton v. Thompson*, 159 S.W. 455, 460 (Tex. Civ. App.—Galveston 1913, no writ). See also *Smith v. Brewer*, 149 S.W.2d 262 (Tex. Civ. App.—El Paso 1941, writ dismissed).

66. *Commerce Trust Co. v. Ramp*, 135 Tex. 84, 87, 138 S.W.2d 531, 534 (1940). See also *Hurley v. National Bank of Commerce*, 529 S.W.2d 788 (Tex. Civ. App.—Dallas 1975, writ refused n.r.e.), discussed in *Dorsaneo*, *supra* note 16, at 234.

67. *Finn v. Alexander*, 139 Tex. 461, 163 S.W.2d 714 (1942). In both *El Paso Bldg. & Loan Ass'n. v. Lane*, 81 Tex. 369, 17 S.W. 77 (1891), and *International Bldg. & Loan Ass'n v. Biering*, 86 Tex. 476, 25 S.W. 622 (1894), the court held, however, that payment upon a usurious contract should be applied to the principal even if it was received as interest.

68. *Southwestern Inv. Co. v. Hockley County Seed & Delinting, Inc.*, 516 S.W.2d 136 (Tex. 1974).

69. *Gibson v. Hicks*, 47 S.W.2d 691, 693 (Tex. Civ. App.—El Paso 1932, writ refused). See also *Cotton v. Thompson*, 159 S.W.455, 460 (Tex. Civ. App.—Galveston 1913, no writ).

70. 551 S.W.2d 89 (Tex. Civ. App.—Fort Worth 1977, writ granted).

71. *Id.* at 94. See TEX. BUS. & COMM. CODE ANN. § 4.405 (Vernon 1968).

her capacity as executrix of her husband's estate, she then sued the bank to recover twice the usurious interest.⁷²

The bank counterclaimed for \$14,000, an amount representing interest for the last two years of the loan. The bank denied that the loan transaction was usurious because: (1) the husband and wife had use of the \$70,000 which had been deposited in their account; (2) the checks had been post-dated for interest to be paid only on the anniversary date; (3) the \$14,000 had been placed in a "special account," title to which remained in the borrowers; (4) the husband and wife were estopped to claim usury since the freezing of the funds had been proposed by their authorized representatives, and the idea had not originated with the bank; (5) after the freeze agreement had been made, the bank had never refused to allow the borrowers to withdraw the frozen funds; and (6) Texas usury law provides for a penalty only for twice the amount of interest that has actually been paid. The plaintiff argued that the \$14,000 was not owed because the sum represented a charge for usurious interest.

On appeal from a judgment in favor of defendant bank the court of civil appeals reversed and rendered judgment for the plaintiff in her individual capacity; plaintiff was awarded \$70,000, representing double the amount of interest (\$42,000) plus recovery of \$7,000 frozen in her account, the \$7,000 deposited in the registry of the court, and the \$14,000 representing the difference between the \$70,000 paid and the amount of the cash advance. In rejecting the bank's first argument, the court of civil appeals concluded that despite the fact the \$14,000 was not formally frozen until approximately five days after the \$70,000 was deposited in the borrowers' account, all parties understood that they would never control the fund at any time. Since the husband and wife had orally agreed not to withdraw the \$14,000, "[t]he possibility . . . [that they] could have avoided their oral contract . . . by withdrawing funds from their account between the date of the funding and the date the freeze order appeared on the Bank records, a matter of a few days, [did] not alter the substance of the transaction."⁷³

The bank's second contention was that a prepayment of interest does not violate the usury statutes. Relying upon *Bothwell v. Farmers' & Merchants' State Bank & Trust Co.*,⁷⁴ the bank contended that, since interest may be retained in advance at the maximum legal rate for one year, such interest may also be retained in advance for two years. This argument was dismissed as fallacious.⁷⁵ The bank's third argument, premised upon the "special account" theory, was unacceptable because the bank's only purpose in treating the \$14,000 as a special account for a special purpose was to pay

72. 551 S.W.2d at 94. See TEX. REV. CIV. STAT. ANN. art. 5069—1.06(1) (Vernon 1971) which provides:

Any person who contracts for, charges or receives interest which is greater than the amount authorized by this Subtitle, shall forfeit to the obligor twice the amount of interest contracted for, charged or received, and reasonable attorney's fees fixed by the court provided that there shall be no penalty for a violation which results from an accidental or bona fide error.

73. 551 S.W.2d at 96.

74. 120 Tex. 1, 30 S.W.2d 289 (1930).

75. "In Texas the rule sanctioning the reservation of interest in advance at the highest conventional rate for a year or less is too firmly established to be departed from . . ." *Id.* at 6, 30 S.W.2d at 291 (emphasis added).

itself. In rejecting the bank's fourth argument, the court of civil appeals concluded that it was immaterial that the form of the loan was suggested by the borrowers or their agents since as a lender it was presumed to recognize usury on sight.⁷⁶ The bank's fifth argument, that its liability should be limited to twice the amount of interest actually paid, was also rejected. Citing *Windhorst v. Adcock Pipe & Supply Co.*,⁷⁷ the court of civil appeals concluded that since the bank charged the borrowers the interest, the penalties were triggered.⁷⁸

The bank also contended that if the \$14,000 interest payment had been spread over the life of the loan, then no interest in excess of ten percent per annum would have been contracted for or charged; thus, even if the frozen funds were considered as interest payments made at the time the funds were frozen, if payment had been spread over the life of the loan, no usury would have resulted. Nevertheless, since no savings clause requiring the interest to be spread had been included in the note, the court held that the prepayment of interest in excess of ten percent per annum in any one year resulted in a violation of the usury statute.⁷⁹

Two other aspects of the opinion are worthy of note. First, despite the fact that the trial court held that the husband's cause of action terminated on his death, the wife was awarded full recovery in her individual capacity as a joint obligor. Although the court of civil appeals cited *Pinemont Bank v. DuCroz*,⁸⁰ which held that an amount twice the total interest contracted for, charged, or received represents the maximum forfeiture recoverable under article 5069—1.06 regardless of how many makers are individually liable on the note, the court interpreted *Pinemont* to hold that "the total amount of usurious interest will be awarded to the successful plaintiffs—whether one or several."⁸¹ While this holding creates no procedural problems under the present fact situation, it leaves unanswered the question of the potential double liability of the bank and the res judicata effect of a judgment in favor of one maker upon a subsequent suit by another maker.⁸² Secondly, the wife was permitted to recover an amount in excess of twice the amount of interest for which the parties had contracted. The court of civil appeals reasoned that "[t]o effectuate the intent of the usury statute, the [\$14,000]

76. 551 S.W.2d at 98. See, e.g., *Moore v. Sabine Nat'l Bank*, 527 S.W.2d 209 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.); *Townsend v. Adler*, 510 S.W.2d 175 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ).

77. 542 S.W.2d 222 (Tex. Civ. App.—Waco 1976), *rev'd per curiam*, 547 S.W.2d 260 (Tex. 1977). The court of civil appeals held that the charging of interest in excess of the amount authorized by statute is not actionable unless charged pursuant to an agreement. The supreme court found the holding to be contrary to the plain meaning of the statute. For further discussion of this case see text accompanying notes 85-87 *infra*.

78. 551 S.W.2d at 101.

79. *Id.* at 98. The court of civil appeals stated that "if there is a savings clause in the loan agreement which requires any otherwise usurious interest to be spread, then, of course, usury has not resulted." See *Imperial Corp. of America v. Frenchman's Creek Corp.*, 453 F.2d 1338 (5th Cir. 1972). But see *Tanner Dev. Co. v. Ferguson*, 21 Tex. Sup. Ct. J. 25 (Oct. 22, 1977).

80. 528 S.W.2d 877 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.), *discussed in Dorsaneo*, *supra* note 16, at 230.

81. 551 S.W.2d at 100.

82. Must the other makers obtain their "share" from the original plaintiff, or may they sue the bank while at the same time asserting that it is estopped by the prior judgment to deny liability?

interest payment should be returned to Mrs. Miller before she recovers twice the interest charged, so that the net effect is a forfeiture of twice the interest charged."⁸³ Under this analysis the penalty provided in article 5069—1.06(1) is not only twice the amount contracted for or charged but also the amount of "interest" paid. This analysis was, however, ultimately rejected by the supreme court which held that usurious interest paid could not be recovered under article 5069—1.06.⁸⁴

In *Windhorst v. Adcock Pipe & Supply Co.*⁸⁵ the Texas Supreme Court reversed the holding of the Waco court of civil appeals that "the charging of interest in excess of the amount authorized is not actionable unless charged pursuant to an agreement of the parties, or actually collected."⁸⁶ The supreme court held that "[b]y describing the conditions . . . in the disjunctive, the Legislature made it clear that only one such condition need occur to trigger penalties; either a contract for, a charge of *or* receipt of usurious interest."⁸⁷

The troublesome question of how front-end charges should be treated was addressed squarely in *Tanner Development Co. v. Ferguson*.⁸⁸ In the latter part of 1973 Tanner conveyed unimproved land to Ferguson in consideration of a cash payment and the execution and delivery of a promissory note in the principal sum of \$226,388.77, with interest at nine and one-half percent per annum. The note called for payment of the first year's interest in advance. Additionally, the note provided for quarterly payments of interest in advance on the twentieth day of January, April, July, and October of each calendar year, from January 20, 1974, until January 20, 1977, with principal payments to be made thereafter. Ferguson paid the first year's interest on November 12, 1973. He also made six quarterly interest payments and a partial payment of the quarterly payment due on July 20, 1975. Subsequently, Tanner declared the unpaid balance of the note immediately due and payable and gave notice of acceleration.

Ferguson instituted suit to recover statutory penalties and alleged that the contract was usurious. The trial court held that the note was not usurious, but the court of civil appeals reversed and rendered judgment for Ferguson.⁸⁹ Although Ferguson argued on appeal that under *Commerce Trust Co. v. Ramp*⁹⁰ the "squeezed" interest in the first year made the note usurious on its face, the court of civil appeals rejected this contention, apparently because the note contained a savings clause.⁹¹ Instead, the court held that

83. 551 S.W.2d at 103.

84. 21 Tex. Sup. Ct. J. 236 (1977). See *Wall v. East Tex. Teachers Credit Union*, 533 S.W.2d 918 (Tex. 1976); *Johns v. Jaeb*, 518 S.W.2d 857 (Tex. Civ. App.—Dallas 1974, no writ), discussed in Henderson, *Commercial Transactions, Annual Survey of Texas Law*, 30 Sw. L.J. 118, 137-38 (1976).

85. 547 S.W.2d 260 (Tex. 1977).

86. 542 S.W.2d 222, 224 (Tex. Civ. App.—Waco 1976).

87. 547 S.W.2d at 261.

88. 21 Tex. Sup. Ct. J. 25 (Oct. 22, 1977), *motion for rehearing denied*, 21 Tex. Sup. Ct. J. 103 (Dec. 10, 1977).

89. 541 S.W.2d 483 (Tex. Civ. App.—Houston [1st Dist.] 1976).

90. 135 Tex. 84, 138 S.W.2d 531 (1940). See also *Southwestern Inv. Co. v. Hockley County Seed & Delinting, Inc.*, 511 S.W.2d 724 (Tex. Civ. App.—Amarillo), *writ ref'd n.r.e. per curiam*, 516 S.W.2d 136 (Tex. 1974).

91. 541 S.W.2d at 490. For a related discussion of *Miller v. First State Bank*, 551 S.W.2d 89 (Tex. Civ. App.—Fort Worth 1977, writ granted), see text accompanying notes 70, 73, 78, & 79 *supra*.

because the first year's "interest" was paid in advance the actual principal of the note was \$204,888.84, *i.e.*, the face amount of the note minus the pre-paid interest for the first year. The maximum interest permitted by law at the rate of ten percent per annum on the actual principal is, however, \$101,422.67. Consequently, since interest required by the note "on its face amount calculated a 9 1/2% per annum as called for in the note is \$106,520.42 . . . [t]he note requires a payment of interest in the amount of \$5,087.75 more than maximum allowed by law."⁹² Although the defendant contended that the first year's interest should not have been deducted because the transaction in question was not a loan of money but rather was a sale of real estate,⁹³ the court failed to see any distinction.

The supreme court reversed the judgment of the court of civil appeals.⁹⁴ In the course of its opinion, the court made three significant holdings. First, the court noted that even though negotiations of the parties may have some relevance in ascertaining the dominant purpose and intent, "once the agreed terms have been reduced to writing in the form of a compulsory contract, the test of alleged usury is not concerned with which party might have originated the alleged usurious provisions."⁹⁵ Secondly, the supreme court held that the first year advance payment of interest should not have been deducted in ascertaining the true principal since:

[t]he transaction was not a loan of money from which any fee, commission or interest was withheld from the payor. Rather it was a sale of real estate in which Ferguson received a deed to ten acres of land in exchange for his cash down payment and the delivery of the . . . note. . . . None of the consideration for [the] note was reserved by Tanner or returned . . . to Tanner. Ferguson had at all times the full use and benefit of the ten acres⁹⁶

Moreover, the note was a no personal liability note.⁹⁷ Finally, the court ruled that:

[s]ince the contract in question provided Ferguson, the payor, with the full use of the consideration represented by the actual face amount of the note (the ten acres of land) for the entire term of the contract, . . . we are compelled to hold that the advance interest payment under the present note should be spread over the entire term of the contract⁹⁸

92. 541 S.W.2d at 491. But see the method of computation applied in *Nevels v. Harris*, 129 Tex. 190, 102 S.W.2d 1046 (1937).

93. 541 S.W.2d at 491.

94. 21 Tex. Sup. Ct. J. 25 (Oct. 22, 1977), *motion for rehearing denied*, 21 Tex. Sup. Ct. J. 103 (Dec. 10, 1977).

95. *Id.* at 26-27.

96. *Id.* at 28. It should be noted that on rehearing, when the respondent pointed out the artificiality of the distinction, the court stated:

[W]e reiterate that in cash loan transactions from which the lender deducts interest, fees, commissions or other front-end charges, the amount of dollars actually received or retained by the borrower is held to be the 'true' principal. In such cases the amount of the stated principal is reduced accordingly in testing for usury. See *Nevels v. Harris*, 129 Tex. 190, 102 S.W.2d 1046 (1937)

21 Tex. Sup. Ct. J. at 104.

97. *Id.* This is the soundest basis for the distinction. A "no personal liability note" requires the payee to look only to the liens on the property for satisfaction of the "debt." *Id.*

98. 21 Tex. Sup. Ct. J. at 31.

IV. CONSUMER LOAN PROBLEMS

A. Case Development

In *Thornhill v. Sharpstown Dodge Sales, Inc.*⁹⁹ the lender miscalculated the amount of the finance charge and charged the borrower a time price differential forty-two cents in excess of the amount permissible under the statute regulating the financing of motor vehicles.¹⁰⁰ The court of civil appeals upheld the trial court's instructed verdict for the defendant with respect to plaintiff's claim for statutory penalties¹⁰¹ by applying the rule of *de minimis non curat lex*, the law will not concern itself with insignificant matters.¹⁰² Because the insurance was not procured from the seller¹⁰³ the court also overruled plaintiff's contention that the seller was required to state in the contract the kind, coverage, term, and amount of premium for the required physical-damage insurance on the motor vehicle.¹⁰⁴

In *Chavez v. Aetna Finance Co.*¹⁰⁵ a noteholder instituted suit to recover the entire unpaid balance of a note, including an amount representing unearned interest. The defendant counterclaimed, alleging that the lender's failure to rebate unearned interest increased the amount of interest beyond that permitted by law. The defendant further alleged a violation of the federal Truth in Lending Act¹⁰⁶ because the lender failed to "clearly and conspicuously"¹⁰⁷ disclose to the borrower "[t]he amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments."¹⁰⁸

The court of civil appeals concluded that the suit for the entire unpaid balance, including earned and unearned interest, would have constituted an acceleration exceeding the permissible interest rate only if the plaintiff had also sought default charges. Since the plaintiff made no demand for the default charges to which it was entitled, it "in effect rebated more than it was required to refund under the statute."¹⁰⁹ The court, however, agreed with defendant's second contention that the required disclosure was not clearly and conspicuously made because the default charge could only be ascertained by referring to two separate instruments, neither of which

99. 546 S.W.2d 151 (Tex. Civ. App.—Beaumont 1976, no writ).

100. *Id.* at 152. TEX. REV. CIV. STAT. ANN. arts. 5069—7.03(1)-(2) (Vernon 1971).

101. TEX. REV. CIV. STAT. ANN. art. 5069—8.01 (Vernon 1971).

102. 546 S.W.2d at 152. *See also* Hight v. Jim Bass Ford, Inc., 552 S.W.2d 490 (Tex. Civ. App.—Austin 1977, writ granted).

103. 546 S.W.2d at 153. *But see* Southwestern Inv. Co. v. Mannix, 557 S.W.2d 755 (Tex. 1977), where the court defined "seller-procured insurance" as including:

any insurance coverage whereby the seller becomes involved in the insurance acquisition process or directly or indirectly benefits from such insurance coverage. This involvement may be accomplished by actual sales of insurance policies, . . . receipts of direct or hidden commissions, financing of insurance purchases from other sources, or by other similar devices. Only that insurance obtained totally independent of the seller and from which the seller will obtain no direct or indirect benefit from the procuring of the required insurance shall be considered 'buyer provided.'

Id. at 768-69.

104. 546 S.W.2d at 153; *See* TEX. REV. CIV. STAT. ANN. arts. 5069—7.06(1)-(2), (6) (Vernon 1971).

105. 553 S.W.2d 174 (Tex. Civ. App.—San Antonio 1977, writ *dism'd*).

106. 15 U.S.C. §§ 1601-1665 (1970). *See also* 12 C.F.R. § 226 (1977).

107. 553 S.W.2d at 177. *See also* 12 C.F.R. § 226.6(a) (1977).

108. *Id.* § 226.8(b)(4) (1977).

109. 553 S.W.2d at 177; *see id.* at 178-80 (Cadena, J., dissenting).

referred to the other.¹¹⁰ Hence, the defendant was held to be entitled to recover twice the amount of the finance charge in addition to court costs and attorneys' fees.¹¹¹

In *Page v. Central Bank & Trust Co.*¹¹² a bank charged interest on installment loans in excess of the statutory maximum under article 5069—4.01.¹¹³ The bank contended that the charge was the result of "an accidental and bona fide" error.¹¹⁴ The court of civil appeals agreed with the bank's contention since the transcript contained at least some evidence to support the trial court's finding of fact that the excess charge was the result of a mathematical error,¹¹⁵ and accordingly held for the plaintiff-bank.

In *Southwestern Investment Co. v. Mannix*¹¹⁶ the supreme court determined that the investment company, both the drafter and the assignee of a retail installment contract used by the seller of the goods, was liable to the borrower for statutory damages under both federal¹¹⁷ and state law.¹¹⁸ Disagreeing with the Waco court of civil appeals¹¹⁹ concerning the violations which the lower appellate court found, the supreme court nevertheless affirmed because although the retail installment contract provided that the buyer should insure the goods, it insufficiently specified the kind, coverage, term, and amount of premium for that insurance.¹²⁰ Moreover, the supreme court found that the installment contract, which provided that the assignee had the right to remove the goods from the buyer's property even if such removal would require a forcible entry on the buyer's property, violated article 5069—6.05.¹²¹ Holding that such action by the assignee would constitute a "breach of the peace,"¹²² the court further concluded that the contrac-

110. *Id.* at 178 (Cadena, J., dissenting).

111. *Id.* See also 15 U.S.C. § 1640(a) (1970 & Supp. IV 1974), (provides that as a penalty for failing to comply with regulation Z, 12 C.F.R. § 226.8(b)(4) (1977), a lender will be liable for twice the total of the finance charge, court costs and attorneys' fees).

112. 548 S.W.2d 802 (Tex. Civ. App.—Eastland 1977, no writ).

113. TEX. REV. CIV. STAT. ANN. art. 5069—4.01(1)-(2) (Vernon 1971).

114. The prescribed penalty is found in TEX. REV. CIV. STAT. ANN. art. 5069—8.01 (Vernon Supp. 1978).

115. Both *Guetersloh v. CIT Corp.*, 451 S.W.2d 759, 761 (Tex. Civ. App.—Amarillo 1970, writ ref'd n.r.e.), and *Western Bank & Trust Co. v. Ogden*, 93 S.W. 1102, 1104 (Tex. Civ. App. 1906, no writ), suggest that the defense applies only to computational or clerical errors and perhaps only small ones. See text accompanying notes 133, 188 *infra*.

116. 557 S.W.2d 755 (Tex. 1977).

117. *Id.* at 755-56. See also 15 U.S.C. § 1640 (1970 & Supp. IV 1974).

118. 557 S.W.2d at 761-65. See also TEX. REV. CIV. STAT. ANN. art. 5069—8.01 (Vernon Supp. 1978). The statute is discussed in the text accompanying notes 127-37 *infra*.

119. 540 S.W.2d 747 (Tex. Civ. App.—Waco 1976).

120. 557 S.W.2d at 762. See also TEX. REV. CIV. STAT. ANN. art. 5069—6.04 (Vernon 1971).

121. 557 S.W.2d at 763-64. TEX. REV. CIV. STAT. ANN. art. 5069—6.05(4) (Vernon Supp. 1978) provides:

No retail installment contract or retail charge agreement shall:

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

122. See TEX. BUS. & COMM. CODE ANN. § 9.503 (Vernon Supp. 1978) (emphasis added):

Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process *if this can be done without breach of the peace* or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Section 9.504.

tual provision¹²³ resulted in a waiver of a legal right of action in violation of article 5069—6.05.

The supreme court agreed with the conclusion below that the contract did not comply with regulation Z¹²⁴ because both a contractual provision for the acquisition of a security interest in after-acquired property and a provision that the property also serve as security for future advances appeared on the back of the document rather than on the front or first page.¹²⁵ It may be noteworthy that the doctrine of *de minimis non curat lex* applied by the Beaumont court of civil appeals in the *Thornhill* case was not mentioned by the supreme court in the *Mannix* opinion.¹²⁶

B. Statutory Amendments

Several significant statutory provisions in the area of consumer credit were enacted by the Texas Legislature during this survey period. Article 5069—8.01¹²⁷ was amended to provide that the liability of any person who violates subtitle 2 of the Texas Consumer Credit Act¹²⁸ or chapter 14 of this title¹²⁹ by:

- (i) failing to perform any duty or requirement specifically imposed on him by any provision of this Subtitle or Chapter 14 of this Title, or by
- (ii) committing any act or practice prohibited by this Subtitle or Chapter 14 of this Title, shall be liable to the obligor for a penalty in an amount equal to twice the time price differential or interest contracted for, charged, or received but not to exceed \$2,000 in a transaction in which the amount financed is \$5,000 or less, and not to exceed \$4,000 in a transaction in which the amount financed is in excess of \$5,000 and reasonable attorneys' fees fixed by the court.¹³⁰

The statute was also amended by the addition of three defenses. Under new article 5069—8.01(f),¹³¹ a person may not be held liable in any action brought under article 8.01 involving a contract for or receipt of interest, time price differential, or other charges greater than the amount authorized by

123. As set out in the opinion, the contract provided:

Nothing shall prevent the Secured Party from removing [the property] from any premises to which same may be attached, upon default or breach of this Retail Installment Contract and Security Agreement or any part thereof, and the Debtor agrees to sustain the cost of repairs, if any, of any physical injury to the real estate caused by such removal.

557 S.W.2d at 763.

124. 12 C.F.R. § 226.8 (1977) (emphasis added) provides:

(a) . . . All of the disclosures shall be made together on either:

(1) The note or other instrument evidencing the obligation on the *same side of the page and above the place for the customer's signature*; . . .

(b) . . . In any transaction subject to this section, the following items, as applicable, shall be disclosed:

(5) A description or identification of the type of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, . . . *If after-acquired property will be subject to the security interest, or if other or future indebtedness is or may be secured by any such property, this fact shall be clearly set forth in conjunction with the description or identification of the type of security interest held, retained or acquired.*

125. 557 S.W.2d at 765-66.

126. See Recent Developments, 4 CAVEAT VENDOR 10-12 (1977).

127. TEX. REV. CIV. STAT. ANN. art. 5069—8.01 (Vernon Supp. 1978).

128. *Id.* arts. 5069—2.01 to —8.05.

129. *Id.* arts. 5069—14.01 to .28.

130. *Id.* art. 5069—8.01(b).

131. *Id.* art. 5069—8.01(f).

subtitle 2,¹³² provided he can show, by a preponderance of the evidence, one of two exonerating circumstances. First, if the violation was not intentional, but was the result of a bona fide error, notwithstanding the maintenance of procedures reasonably adopted to avoid such violation, no liability will attach. Secondly, if an act or omission which would otherwise be violative of article 8.01 is made in good faith and is in conformity with any existing rule, regulation, or interpretation of the Texas Consumer Credit Act or of the federal Consumer Credit Protection Act,¹³³ an absolute defense arises, "notwithstanding that after such act or omission has occurred, such rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason."¹³⁴

New subsection (h) of article 8.01¹³⁵ provides three partial defenses. First, liability under article 8.01 is "in lieu of and not in addition to . . . liability under the federal Consumer Credit Protection Act." Secondly, a final judgment under the federal statute bars any action under article 8.01 for the same violation. Finally, a lender may recover from a borrower who obtains a judgment under article 8.01 and who thereafter brings an action under the federal act for the same violation the amount recovered by the borrower in his action under article 8.01 and the lender's reasonable attorneys' fees.

Subsection (c) of article 8.01,¹³⁶ as recently adopted, provides that a lender may avoid liability for any violation of subtitle 2 or chapter 14 if, prior to receiving written notice of the violation from the borrower or prior to the institution of a suit by the borrower alleging the violation, the lender corrects the violation. The lender perfects his shield from liability by performing the required duty or act or by refunding any amount in excess of that authorized by law within sixty days after he actually discovers the violation.¹³⁷ If the lender does not take corrective action within sixty days after actual discovery of the violation, but does correct before he is sued or given written notice of the violation, he is liable only "in an amount equal to the time price differential or interest contracted for, charged, or received but not to exceed \$2,000 plus reasonable attorneys' fees fixed by the court."¹³⁸

Changes were also effected in other sections of the Texas Consumer Credit Act. The criminal penalty for violation of article 5069—8.02¹³⁹ was reduced to a maximum fine of \$100;¹⁴⁰ otherwise the article is unaltered. Article 5069—14.19¹⁴¹ was amended to limit the liability of a lender who fails to make the required disclosures in transactions entered into after July 1,

132. *Id.* art. 5069—8.01(a).

133. 15 U.S.C. §§ 1601-1665 (1970).

134. TEX. REV. CIV. STAT. ANN. art. 5069—8.01(f) (Vernon Supp. 1978).

135. *Id.* art. 5069—8.01(h).

136. *Id.* art. 5069—8.01(c).

137. *Id.* art. 5069—8.01(c)(1).

138. *Id.* arts. 5069—8.01(c)(3)-(4).

139. *Id.* art. 5069—8.02.

140. A potential conflict exists between new subsections (b) and (c) of art. 5069—8.01 and amended art. 5069—8.02 because the latter speaks in terms of avoiding or limiting liability for violating subtitle 2, which includes art. 5069—8.02. Further, in this context consideration should be given to new subsections (f) and (h) of art. 5069—8.01 which focus on penalties to be imposed for violations arising under art. 5069—8.01.

141. TEX. REV. CIV. STAT. ANN. art. 5069—14.19 (Vernon Supp. 1978).

1975, to the penalties prescribed by chapter 8.¹⁴² Under the revised article 5069—6.05(7),¹⁴³ retail installment contracts or retail charge agreements may now provide for a first lien on real estate. Before the lien on the real estate will serve as security for the obligation, however, two conditions must be met: (1) the contractual lien must arise from agreements for the sale, or the construction and sale, of a structure to be used as a residence; and (2) the time price differential may not exceed an annual rate of ten percent. The definition of "goods" in article 5069—6.01(a) was changed to include structures other than mobile homes, used as residences.¹⁴⁴ Finally, article 5069—7.06 was amended to permit a buyer and seller to agree to include a separate charge in their vehicle sales contract covering motor vehicle liability insurance, mechanical breakdown insurance, or warranty and service provisions.¹⁴⁵

V. RECEIVERSHIP

In *Whisenhunt v. Park Lane Corp.*¹⁴⁶ a real estate investor attempted to place a corporation in receivership. Having guaranteed the payment of a loan made to the corporation, the investor paid the deficiency after the corporation's default and received an assignment of the note evidencing the corporation's obligation. Hence, the investor was not a secured or lien creditor of the corporation.

The district court first considered whether the remedy of receivership was available to the real estate investor as an unsecured creditor. The court concluded that although as a general rule unsecured creditors are denied the remedy,¹⁴⁷ general creditors of corporations may be entitled to sue for receivership under the "trust fund doctrine."¹⁴⁸ This doctrine permits a court to exercise its equitable powers to require that a corporation's officers, directors, or majority shareholders hold corporate assets which have been improperly appropriated by such parties in trust for the corporation's creditors.¹⁴⁹ Reasoning that the doctrine exists to prevent fraud, the court refused to grant the remedy since no evidence of fraud had been provided. The court also concluded that because the probability of plaintiff's success on the merits in a suit to recover on the loan guarantees was unclear, temporary receivership should not be ordered.¹⁵⁰

In *Neel v. Fuller*¹⁵¹ the Texas Supreme Court held that the conveyance, without court approval, of a royalty interest in property in receivership

142. *Id.* art. 5069—14.19(i).

143. *Id.* art. 5069—6.05(7).

144. *Id.* art. 5069—6.01(a) (Vernon Supp. 1978).

145. *Id.* art. 5069—7.06(8) provides: "If a charge is added to a contract . . . the contract shall clearly and conspicuously disclose that fact."

146. 418 F. Supp. 1096 (N.D. Tex. 1976).

147. *Id.* at 1098; *see, e.g.,* *Carter v. Hightower*, 79 Tex. 135, 137, 15 S.W. 223, 224 (1890) (construing Tex. Rev. Civ. Stat. Ann. art. 2293 (Vernon 1971)); *Parr v. First State Bank*, 507 S.W.2d 579 (Tex. Civ. App.—San Antonio 1974, no writ).

148. 418 F. Supp. at 1098.

149. *See* *Texas Consol. Oils v. Hartwell*, 240 S.W.2d 324 (Tex. Civ. App.—Dallas 1951, and *overr.*). *See also* TEX. BUS. CORP. ACT ANN. art. 7.05(A)(2)(a)(b) (Vernon 1956).

150. 418 F. Supp. at 1098.

151. 557 S.W.2d 73 (Tex. 1977).

could have no force or effect upon the receivership. In so holding, the court applied the doctrine of *custodia legis* which was created in order to prevent interference with the receivership proceedings, including the possession, control, and distribution of assets. Nevertheless, the court held that to the extent that the transfer of property in *custodia legis* does not interfere with the receivership or unduly complicate the proceedings, the transferee should be entitled to "step into the shoes" of the transferor.¹⁵² Under such circumstances the transfer would not necessarily be a nullity.¹⁵³

VI. DECEPTIVE TRADE PRACTICES ACT

Since its passage in 1973 the Deceptive Trade Practices Act (DTPA)¹⁵⁴ has provided consumers¹⁵⁵ relief¹⁵⁶ from false, misleading, or deceptive acts or practices in the conduct of any trade or commerce.¹⁵⁷ Several significant cases decided during the survey period involve a construction of the provisions of the DTPA. Moreover, the Sixty-fifth Legislature enacted amendments to the DTPA and related statutes which may have a substantial impact upon the effectiveness of the Act.

A. Case Development

*Vargas v. Allied Finance Co.*¹⁵⁸ involved the issue of whether, in seeking to collect on written consumer contracts, the institution of suits in forums distant from the consumer's residence or from the place of execution constituted a deceptive trade practice.¹⁵⁹ Vargas, a resident of Starr County, had purchased a stereo from a retailer in Hidalgo County. Vargas executed a promissory note and a retail installment contract in connection with the purchase. The retailer assigned the note and the contract to Allied Finance Company. The promissory note was payable in Dallas, Dallas County, Texas, and the installment contract provided that it was performable in Dallas, Dallas County, Texas. When Vargas became delinquent in his pay-

152. *Id.* at 76.

153. See *First S. Properties, Inc. v. Vallone*, 533 S.W.2d 339 (Tex. 1976) (holding sale void).

154. TEX. BUS. & COMM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1978). The original Act became effective for transactions entered into after May 21, 1973. The 1975 amendments to the Act became effective Sept. 1, 1975, for subsequent transactions. The 1977 amendments are discussed in notes 157-67 *infra* and accompanying text. See Lynn, *A Remedy for Undermade and Oversold Products—The Texas Deceptive Trade Practices Act*, 7 ST. MARY'S L.J. 698 (1976); Lynn, *Anatomy of a Deceptive Trade Practices Case*, 31 SW. L.J. 867 (1977); Maxwell, *Public and Private Remedies Under the Deceptive Trade Practices—Consumer Protection Act*, 8 ST. MARY'S L.J. 617 (1977).

155. "'Consumer' means an individual, partnership, or corporation who seeks or acquires by purchase or lease any goods or services." TEX. BUS. & COMM. CODE ANN. § 17.45(4) (Vernon Supp. 1978).

156. *Id.* § 17.50.

157. *Id.* § 17.46.

158. 545 S.W.2d 231 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.).

159. In apparent response to an article written by Professor Jack Sampson, the venue statute regulating suits filed in district and county courts was amended in 1976. See Sampson, *Distant Forum Abuse in Consumer Transactions: Proposed Solution*, 51 TEXAS L. REV. 269 (1973); TEX. REV. CIV. STAT. ANN. art. 1995(5b) (Vernon Supp. 1978). The effectiveness of the 1976 amendment in eliminating "distant forum abuse" was seriously limited for at least two reasons: (1) art. 1995 does not apply to actions instituted in the justice courts (*but see* TEX. REV. CIV. STAT. ANN. art. 2390(4) (Vernon Supp. 1978)), and (2) Texas venue practice requires the

ments, Allied sued him in a Dallas County justice court. Vargas' plea of privilege was overruled.

Thereafter Vargas instituted the present action as a class action, seeking to enjoin Allied from filing consumer collection suits in a county other than that of the consumer's residence or of the contract's execution. The trial court granted summary judgment for the finance company. The court of civil appeals affirmed on the ground that no provision of the DTPA specifically provided that the filing of suits against consumers in a distant forum is an unfair trade practice. Moreover, the court pointed out that the venue statutes applicable to justice courts specifically authorized suits to be maintained in a distant forum.¹⁶⁰ The court then suggested that the question of whether the venue statutes should be revised is a matter for the legislature and not for the courts.¹⁶¹

In apparent response to the holding in *Vargas* the Sixty-fifth Legislature amended the DTPA to provide specifically that in a consumer context a creditor's filing of a suit based on a written contract in a county other than the county of the consumer's residence at the time of the filing of suit, or in the county in which the consumer in fact signed the contract, is a deceptive trade practice.¹⁶² The legislative amendment may, however, reach far beyond remedying the kind of practice employed in the *Vargas* fact situation. Given the possibility that the interpretation of the term "consumer" will be expanded to include "merchants,"¹⁶³ the amendment may create as much injustice as it was designed to eliminate.¹⁶⁴

From the standpoint of both coverage and available remedies, the supreme court decision in *Woods v. Littleton*¹⁶⁵ is of prime importance. Plaintiffs in that case had purchased a new home in late 1972. In connection with the sale the defendants warranted to repair any defect which materialized within the first year after the date of purchase. When plaintiffs complained that the sewer system and septic tank had begun to operate in an unsatisfactory manner, defendants undertook on several occasions to correct the

defendant to file a plea of privilege which may be controverted by the plaintiff (*see* TEX. R. CIV. P. 86-87). If the plea of privilege is controverted, a venue hearing is held in the county of suit. Although the burden is upon the plaintiff to demonstrate by a preponderance of the evidence that venue is proper, the issue is still determined in the distant forum. Moreover, failure to contest the plaintiff's choice of forum by the filing of a plea of privilege in accordance with the rules of civil procedure would result in a waiver of the venue rights.

160. *But see* TEX. REV. CIV. STAT. ANN. art. 2390(4) (Vernon 1978) (amended to remedy apparent oversight).

161. 545 S.W.2d at 234.

162. *See* TEX. BUS. & COMM. CODE ANN. § 17.46(b)(21) (Vernon Supp. 1978). Although two subdivisions are numbered "(21)," the latter is the one discussed here.

163. In *Trial v. McCoy*, 553 S.W.2d 199 (Tex. Civ. App.—El Paso 1977, no writ), the court of civil appeals concluded that a "merchant" could not be a consumer because the DTPA defined a "merchant" as a party to a consumer transaction other than a consumer. (*See* 1973 Tex. Gen. Laws, ch. 143 § 1, at 323). The Sixty-fifth Legislature has, however, deleted the term "merchant" from the definitional section of the Act and has replaced it with a definition of "unconscionable action or course of action." TEX. BUS. & COMM. CODE ANN. § 17.45(5) (Vernon Supp. 1978).

164. *See* Bragg, *Now We're All Consumers! The 1975 Amendments to the Consumer Protection Act*, 28 BAYLOR L. REV. 1 (1976).

165. 554 S.W.2d 662 (Tex. 1977). *See also* Lynn, *Anatomy of a Deceptive Trade Practices Case*, 31 Sw. L.J. 867, 877-81 (1977).

plumbing problems. After May 21, 1973, the effective date of the DTPA,¹⁶⁶ defendants informed plaintiffs that the system was in good working order.

Plaintiffs based their DTPA claim on the theory that defendants' false information that the system was in satisfactory condition constituted a deceptive trade practice. The jury awarded plaintiffs actual damages for mental anguish and for the diminished value of their home. The trial court rendered judgment for the plaintiffs but declined to award them treble damages. The court of civil appeals reversed and remanded on the grounds that the evidence was insufficient on the question of diminished value and that the special issue on mental anguish was defective. The court of civil appeals also commented that the DTPA did not apply to this transaction because the house was purchased before the effective date of the DTPA.¹⁶⁷

Although the supreme court agreed that the case should be reversed and remanded, it nevertheless found the DTPA to be applicable to the transaction. Despite the fact that the house was purchased before the effective date of the DTPA, the court held that since the deceptive trade practice occurred after May 21, 1973, the date of purchase did not control.¹⁶⁸ The supreme court further restricted plaintiffs to damages for mental anguish occurring after the date of the deceptive practice.¹⁶⁹ In the second significant holding of *Woods v. Littleton* the court concluded that "the consumer who proves all the elements required to recover actual monetary damages shall recover three times the actual monetary damages and, supported by adequate proof, reasonable attorneys' fees and court costs."¹⁷⁰ Hence, the award of treble damages was held to be mandatory.¹⁷¹

The defendants in *Woods* contended, however, that the plaintiffs were not "consumers" because they were not individuals who had sought or acquired "goods or services"; not until 1975 was real property included in the definition of "goods."¹⁷² The supreme court was not persuaded, concluding that the deceptive trade practice arose from the plaintiffs' separate contract for "services."¹⁷³ Under this analysis, the plaintiffs were "consumers." This difficulty would, of course, not have arisen had the sale of the house occurred on or after September 1, 1975, the date upon which the 1975 amendments took effect.¹⁷⁴

166. See TEX. BUS. & COMM. CODE ANN. § 17.63 (Vernon Supp. 1978).

167. 538 S.W.2d 800, 803 (Tex. Civ. App.—Texarkana 1976).

168. 554 S.W.2d at 665. See also *Town & Country Mobile Homes v. Stiles*, 543 S.W.2d 664 (Tex. Civ. App.—El Paso 1976, no writ); *Crawford-Chevrolet, Inc. v. McLarty*, 519 S.W.2d 656 (Tex. Civ. App.—Amarillo 1975, no writ).

169. 554 S.W.2d at 671-72.

170. *Id.* at 669.

171. See also *McDaniel v. Dulworth*, 550 S.W.2d 395 (Tex. Civ. App.—Dallas 1977, no writ), which held treble damages to be mandatory.

172. See TEX. BUS. & COMM. CODE ANN. § 17.45(1), (4) (Vernon Supp. 1978). See also *Bragg*, *supra* note 164.

173. 554 S.W.2d at 666-67. "Services" means "work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods." TEX. BUS. & COMM. CODE ANN. § 17.45(2) (Vernon Supp. 1978).

174. See *Recent Developments*, 4 CAVEAT VENDOR 6 (1977). While the court has not decided whether a pre-May 21, 1973, sale of real estate alone can give rise to a cause of action under the DTPA, *Woods v. Littleton*, 554 S.W.2d 662 (Tex. 1977), suggests that the court is likely to

In *Doyle v. Grady*¹⁷⁵ the Texarkana court of civil appeals held that under section 17.56 of the DTPA the plaintiff must *plead and prove* a cause of action at the venue hearing in order to maintain venue in the county where the defendant is "doing business."¹⁷⁶ In apparent response to *Doyle*, the Sixty-fifth Legislature amended section 17.56 to provide: "An action brought which alleges a claim to relief under Section 17.50 of this subchapter 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 done business."¹⁷⁷ This amendment apparently removes the requirement that the cause of action be proved at the venue hearing. Significantly, the phrase "has done business" replaces the requirement of present business activity. Moreover, the phrase is not modified by the specification of any particular time period; nor has any express requirement that the cause of action arise from the business done been included.¹⁷⁸

Several interesting cases decided during the survey period deal with the recovery of attorneys' fees in connection with a DTPA action. In *Cordrey v. Armstrong*¹⁷⁹ the question presented to the court of civil appeals was whether, in the absence of any other recovery, plaintiffs may recover attorneys' fees. In construing section 17.50(b) of the DTPA,¹⁸⁰ the court held that a plaintiff who has relied on a false representation concerning the amount of mileage on an automobile may not recover attorneys' fees or court costs where, despite the false representation, the jury finds no actual damages. The court of civil appeals reasoned that since plaintiffs only sought money damages, which were denied, the trial court's award of

approach these issues if and when they arise with the notion that the DTPA "shall be liberally construed and applied to promote its underlying purposes." TEX. BUS. & COMM. CODE ANN. § 17.44 (Vernon Supp. 1978).

175. 543 S.W.2d 893 (Tex. Civ. App.—Texarkana 1976, no writ).

176. "An action brought under Section 17.50 or 17.51 of this subchapter may be commenced in the county in which the person against whom the suit is brought resides, has his principal place of business, or is doing business." 1973 Tex. Gen. Laws, ch. 143, § 1, at 322.

177. TEX. BUS. & COMM. CODE ANN. § 17.56 (Vernon Supp. 1978).

178. Section 17.47(b) was also amended to provide:

An action brought under Subsection (a) of this section [public enforcement of DTPA by Attorney General] which alleges a claim to relief under this section may be commenced in the district court of the county in which the person against whom it is brought resides, has his principal place of business, has done business, or in the district court of the county where the transaction occurred or, on the consent of the parties, in a district court of Travis County.

Id. § 17.47(b).

179. 553 S.W.2d 798 (Tex. Civ. App.—Beaumont 1977, no writ).

180. Section 17.50 was amended to provide:

- (b) In a suit filed under this section, each consumer who prevails may obtain:
- (1) three times the amount of actual damages plus court costs and attorneys' fees reasonable in relation to the amount of work expended;
 - (2) an order enjoining such acts or failure to act;
 - (3) orders necessary to restore to any party to the suit any money or property, real or personal, which may have been acquired in violation of this subchapter; and
 - (4) any other relief which the court deems proper; including the appointment of a receiver or the restoration of a license or certificate authorizing a person to engage in business in this state if the judgment has not been satisfied within three months of the date of judgment.

TEX. BUS. & COMM. CODE ANN. § 17.50(b) (Vernon Supp. 1978).

attorneys' fees and costs was erroneous. The court's characterization of its holding is significant, however, in light of the wording of the DTPA.

We hold that consumers-plaintiffs must obtain some . . . relief [other than attorneys' fees and court costs] in order to be considered as prevailing. If plaintiffs had recovered judgment for actual damages, restoration, or an injunction, then they would have *prevailed* in the trial court and could have obtained their attorneys' fees and court cost. A plaintiff may not recover only attorneys' fees and court cost.¹⁸¹

A literal reading of section 17.50(b), however, indicates that recovery of attorneys' fees and court costs is available only in connection with a treble damage award.¹⁸²

In *Volkswagen of America, Inc. v. Licht*¹⁸³ recovery of attorneys' fees on appeal under section 17.50(b) was considered. Citing the landmark case of *International Security Life Insurance Co. v. Spray*,¹⁸⁴ the court of civil appeals held that the recovery of attorneys' fees on appeal was authorized.¹⁸⁵ On the other hand, in *Bray v. Curtis*¹⁸⁶ a defendant attempted to recover attorneys' fees incurred in connection with the successful defense of a DTPA action.¹⁸⁷ Since, however, the jury found that the suit was not groundless or brought for the purpose of harassment, the defendant was not entitled to recover attorneys' fees for the defense of the DTPA claim.

B. Statutory Amendments

The Sixty-fifth Legislature made a significant change in the DTPA in connection with defenses to private treble damages actions. Under section 17.50A¹⁸⁸ recovery will be limited to actual damages, reasonable attorneys' fees, and court costs where the defendant proves that: (1) the action complained of resulted from a bona fide error notwithstanding the use of reasonable procedures adopted to avoid the error; or (2) he had no written notice of the consumer's complaint before the institution of suit; or (3) he tendered to the consumer, within thirty days after receipt of notice, the greater of the cash value of the consideration received from the consumer or of the benefit promised and expenses, including reasonable attorneys' fees incurred by the consumer; or (4) in connection with a DTPA claim based on the breach of an express or implied warranty, he was not given a reasonable opportunity to correct the problem before suit.

Other amendments to the DTPA include the following: (1) the addition of

181. 553 S.W.2d 798 at 799.

182. See also *Woods v. Littleton*, 554 S.W.2d 662, 669 (Tex. 1977), for the suggestion that attorneys' fees and court costs would be recoverable by a consumer who obtains only injunctive relief.

183. 544 S.W.2d 442 (Tex. Civ. App.—El Paso 1976, no writ).

184. 468 S.W.2d 347 (Tex. 1971).

185. 544 S.W.2d at 446.

186. 544 S.W.2d 816 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.).

187. TEX. BUS. & COMM. CODE ANN. § 17.50(c) (Vernon Supp. 1978) provides: "On a finding by the court that an action under this section was groundless and brought in bad faith or for the purpose of harassment, the court may award to the defendant reasonable attorneys' fees in relation to the amount of work expended, and court costs."

188. *Id.* § 17.50A.

a section concerning contribution and indemnity;¹⁸⁹ (2) revision of section 17.59 concerning post judgment relief;¹⁹⁰ (3) the addition of "governmental entity" to the definition of consumer;¹⁹¹ (4) removal of the term "merchant" from the definitional section of the DTPA;¹⁹² (5) the addition of a definition of "unconscionable action or cause of action" to the definitional section of the DTPA;¹⁹³ (6) deletion of the commercial or business use "exemption" from the definition of "services";¹⁹⁴ (7) the addition of subsections making both false representations of completion of work or services, including the replacement of parts,¹⁹⁵ and distant forum provisions in consumer contracts deceptive trade practices;¹⁹⁶ (8) revision of the public enforcement provisions of the DTPA;¹⁹⁷ (9) repeal of the class action provision of the DTPA;¹⁹⁸ and (10) removal of the requirement that Federal Trade Commission interpretations of the Federal Trade Commission Act¹⁹⁹ be followed in private consumer actions.²⁰⁰

VII. MISCELLANEOUS MATTERS

In *Allied Chemical Corp. v. Koonce*²⁰¹ the defendant specially excepted to the plaintiff's original petition on the ground that the petition showed on its face that the claim on the promissory note was barred by limitations. Plaintiff filed a supplemental petition, alleging that in certain letters the defendant had admitted the existence of the debt and promised to pay it; therefore plaintiff argued that the defendant had waived the limitation defense in writing or, alternatively, was estopped from asserting the defense.²⁰² The trial court sustained the defendant's special exception. The court of civil appeals affirmed the trial court's decision on the ground that a creditor must *declare* in the new promise to pay the revived debt because such promise, and not the original debt, constitutes the creditor's cause of

189. *Id.* § 17.55A.

190. *Id.* § 17.59.

191. *Id.* § 17.45(4).

192. *Id.* § 17.45.

193. *Id.* § 17.45(5) defines such an act as one which, to a person's detriment: "(A) takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree or, (B) results in a gross disparity between the value received and consideration paid, in a transaction involving transfer of consideration."

194. *Id.* § 17.45(2).

195. *Id.* § 17.46(b)(21) (the first subdivision (21)) defines as a deceptive trade practice "representing that work or services have been performed on, or parts replaced in, goods when the work or services were not performed or the parts replaced."

196. *Id.* § 17.46(b)(21) (the second subdivision (21)); see notes 162-64 *supra* and accompanying text.

197. *Id.* §§ 17.47(a)-(d).

198. *Id.* § 17.51. TEX. R. CIV. P. 42 was amended effective Jan. 1, 1978. The general provisions of the rule rendered the special class action provisions of the DTPA unnecessary. See Figari, *Texas Civil Procedure, infra*, p. 415.

199. 15 U.S.C. § 45(a)(1) (1970).

200. TEX. BUS. & COMM. CODE ANN. § 17.46(c) (Vernon Supp. 1978).

201. 548 S.W.2d 80 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).

202. TEX. REV. CIV. STAT. ANN. art. 5539 (Vernon 1958) provides:

When an action may appear to be barred by a law of limitation, no acknowledgment of the justness of the claim made subsequent to the time it became due shall be admitted in evidence to take the case out of the operation of the law, unless such acknowledgement be in writing and signed by the party to be charged thereby.

action. In other words, by failing to amend the original petition to state a cause of action on the new promise, plaintiff committed a fatal procedural error.²⁰³

In *McLendon v. Todd-Ao-Corp.*²⁰⁴ a judgment creditor brought suit upon a California judgment. The court of civil appeals stated the familiar rule that when a party is sued upon a foreign judgment in Texas and introduces a properly authenticated copy of the judgment he has established a prima facie case. The burden is then placed upon the defendant to establish reasons, such as the foreign court's lack of in personam jurisdiction, why the judgment is not entitled to full faith and credit.²⁰⁵ The court of civil appeals held that since the defendant had voluntarily paid the greater part of the foreign judgment he could not challenge the judgment of the sister state. Moreover, since the judgment had been paid voluntarily, defendant had waived his right to appeal.²⁰⁶

VIII. AMENDMENTS TO RULES OF PROCEDURE: SEQUESTRATION

A. Background

The constitutional mandate that no state may deprive a person of property without due process of law²⁰⁷ has presented significant problems in the context of extraordinary remedies. In 1977, in an attempt to conform extraordinary remedies to due process requirements outlined by the United States Supreme Court, the Texas Supreme Court amended the Texas Rules of Civil Procedure governing sequestration, attachment, and garnishment.²⁰⁸ The Texas Legislature had previously amended article 6840,²⁰⁹ which governs sequestration, in an effort to avoid due process problems. The statutes concerning the remedies of garnishment²¹⁰ and attachment,²¹¹ however, have not been amended.

Due Process Considerations. In *Sniadach v. Family Finance Corp.*²¹² the United States Supreme Court held that prejudgment garnishment of wages without affording the wage-earner notice and a prior hearing constitutes a deprivation of property without due process of law.²¹³ Since Texas law prohibits wage garnishment²¹⁴ the decision had no direct impact on the state. The landmark case of *Fuentes v. Shevin*,²¹⁵ however, appeared to expand the

203. 548 S.W.2d at 82. Although the record did not reflect whether plaintiff was afforded the opportunity to amend prior to dismissal of his action, the court of civil appeals nonetheless held that a motion for new trial was required to preserve the error where the party is denied the right to amend. *Id.* See also *Ainsworth v. Homes of St. Mark*, 530 S.W.2d 877 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ).

204. 546 S.W.2d 653 (Tex. Civ. App.—Beaumont 1977, no writ).

205. See 28 U.S.C. § 1738 (1970). See also *Williams v. North Carolina*, 325 U.S. 226 (1945).

206. 546 S.W.2d at 654; see *Elkins v. Vincik*, 437 S.W.2d 49, 51-52 (Tex. Civ. App.—Austin 1969, no writ).

207. U.S. CONST. amend. XIV, § 1.

208. *Civil Procedure Rules Amended*, 40 TEX. B.J. 709 (1977).

209. TEX. REV. CIV. STAT. ANN. art. 6840 (Vernon Supp. 1978) (amended in 1975).

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

211. TEX. REV. CIV. STAT. ANN. art. 275 (Vernon 1973).

212. 395 U.S. 337 (1969).

213. *Id.* at 339-42.

214. TEX. CONST. art. XVI, § 28.

215. 407 U.S. 67 (1972).

Court's holding in *Sniadach* by prohibiting all seizures of property prior to notice and hearing unless the seizure could be justified by an "extraordinary situation." In discussing the meaning of the phrase "extraordinary situation," the *Fuentes* majority focused upon fact situations involving important governmental or public interests.²¹⁶ The opinion also suggested that, under some circumstances, a creditor could make a showing of immediate danger that the debtor would destroy or conceal the property to be seized and this showing would satisfy the "extraordinary situation" requirement.²¹⁷

Thereafter, in *Mitchell v. W.T. Grant Co.*²¹⁸ the Court upheld the validity of the Louisiana sequestration procedure which provides that property may be seized before notice to the debtor and before an adversary hearing is conducted. The opinion, in contrast to *Fuentes*, emphasized the interest of the creditor in the goods seized. Since the creditor had a security interest in the goods, the Court reasoned that a failure of the debtor to make retail installment payments would result in the steady diminution of the creditor's property interest so long as the defaulting debtor remained in possession;²¹⁹ the continued possession would give the debtor the "power . . . to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action."²²⁰ The Court concluded that it would be impossible to protect the property from concealment, waste, or transfer if the debtor was provided with notice and a hearing before the seizure.²²¹

Perhaps more significantly, the *Mitchell* majority provides guidance regarding the procedural safeguards which must accompany the issuance of the extraordinary writ:

- (a) a "judicial" officer must determine whether the property may be seized prior to notice and an adversary hearing.
- (b) the officer must be informed of specific facts which justify the prehearing seizure. Conclusory "boilerplate" allegations will not suffice.
- (c) the person from whom the property has been seized must be afforded an opportunity to obtain a judicial hearing at which the creditor had the burden of proving that the deprivation of the property pending final determination of the controversy is appropriate.²²²

Commentators have attempted to reconcile the seemingly contradictory holdings of *Fuentes* and *Mitchell*.²²³ Arguably, the creditor's preexisting property interest, which the Court did not discuss in *Fuentes*, explains the difference. On the other hand, the *Mitchell* Court's emphasis on the procedural safeguards which accompanied the seizure may be the decisive

216. *Id.* at 90-91.

217. *Id.* at 93.

218. 416 U.S. 600 (1974).

219. *Id.* at 608.

220. *Id.* at 605 (quoting L.A. CODE CIV. PRO. ANN. art. 3571 (West 1961)).

221. 416 U.S. at 608-09.

222. *Id.* at 616-18.

223. See, e.g., Comment, *Constitutional Dimensions of the Amended Texas Sequestration Statute*, 29 Sw. L.J. 884 (1975).

aspect of the opinion, suggesting the elimination of the "extraordinary situation" exception in *Fuentes*.

Two subsequent United States Supreme Court opinions provide little assistance in resolving this interpretive dilemma. In *North Georgia Finishing, Inc. v. Di-Chem, Inc.*²²⁴ a Georgia prejudgment garnishment procedure was held unconstitutional because it did not incorporate any of the procedural safeguards discussed in *Mitchell*. The opinion differs only slightly from *Mitchell*, referring to an opportunity for an "early," rather than an "immediate," hearing.

In *Carey v. Sugar*²²⁵ the Supreme Court was asked to consider the constitutionality of the post-seizure hearing provided for by the New York attachment statute. Although the statute provided for an early post-seizure hearing, it did not specifically require an inquiry into the merits of a plaintiff's underlying claim. The Court directed the lower federal court to abstain from a decision concerning the constitutionality of the New York procedure until a state court construction of this aspect of the statute had been made. The Court concluded that the state courts may construe the statute to require the plaintiff to litigate the merits of his underlying claim, despite the fact that the statute does not expressly require it.

Assuming the "extraordinary situation" concept still exists, it is unclear whether due process requires an examination of the statutory grounds upon which each of the extraordinary remedies rests in determining whether the ground employed constitutes an "extraordinary situation." If a statutory ground is not "extraordinary," does the Constitution abolish the ground regardless of the use of procedural safeguards? Is the major consideration the adequate employment of procedural safeguards, and not the sufficiency of the legislatively created ground? Although the amendments to the Texas Rules of Civil Procedure are designed to provide adequate procedural safeguards, they do not affect the constitutional sufficiency of the statutory grounds.

B. Sequestration²²⁶

Sequestration is a purely ancillary statutory procedure. The purpose of the procedure is to take specified property, in which the claimant asserts a preexisting property interest, out of the possession of a party to a suit and place it in the custody of the court pending final judgment on the issue of who is entitled to the property.²²⁷ The procedure is designed to preserve the property until a final determination on this issue has been made.²²⁸

224. 419 U.S. 601 (1975), noted in 29 Sw. L.J. 660 (1975).

225. 425 U.S. 73 (1976) (per curiam).

226. For further background and forms, see 2 W. DORSANEO, TEXAS LITIGATION GUIDE §§ 40.01-.203 (1978).

227. *Harding v. Jesse Dennett, Inc.*, 17 S.W.2d 862, 864 (Tex. Civ. App.—San Antonio 1929, writ ref'd).

228. See *Radcliff Fin. Corp. v. Industrial State Bank*, 289 S.W.2d 645, 649 (Tex. Civ. App.—Beaumont 1956, no writ). Sequestration is available only when provided for by statute, and strict compliance with the statute and applicable rules of procedure is required. See *American Mortgage Corp. v. Samuell*, 130 Tex. 107, 111-12, 108 S.W.2d 193, 196 (1937); *Hunt v. Merchandise Mart, Inc.*, 391 S.W.2d 141, 144-45 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.).

Sequestration is not proper unless the subject matter of the underlying action is related to the property sought to be sequestered.²²⁹ Article 6840²³⁰ provides that sequestration is available in actions for title, possession, or partition of the property involved, or in suits where the claimant is seeking to enforce or foreclose a security interest, lien, or mortgage on the property. Thus, the claimant must assert a pre-existing property interest in the property which is sought to be sequestered. In addition to listing the type of actions required for sequestration, article 6840 lists the grounds which will support sequestration:

1. There is an immediate danger that the defendant will conceal, remove or otherwise dispose of an item of personal property.
2. There is an immediate danger that the defendant will damage the property which is sought to be sequestered or that he will convert the property or its revenues to his own use.
3. The plaintiff has been forcefully or violently ejected from possession of the disputed property.
4. A defendant in the suit is a non-Texas resident and the suit is to try title to, foreclose a lien on, or partition real property.

The first two grounds for sequestration appear to be extraordinary situations under *Fuentes*. To the extent that the extraordinary situation requirement of *Fuentes* still exists, however, there may remain constitutional problems with the third and the fourth grounds.²³¹

Issuance of the Writ of Sequestration. Judges of the district and county courts and justices of the peace have the power to issue writs of sequestration at the commencement or during the progress of any civil suit.²³² Although due process requires that a "judicial" or "neutral" officer order the issuance of the writ,²³³ there should be no objection to the clerk's performing the ministerial task of actually issuing the writ so long as it is issued pursuant to a judicial order.²³⁴

The application for the issuance of the writ must be made under oath and must set forth specific facts stating the nature of the plaintiff's claim, the amount in controversy, the statutory grounds relied upon, and specific facts relied upon by the plaintiff to justify findings of fact that support the statutory ground or grounds relied upon.²³⁵ Under rule 696, the application must comply with all statutory requirements²³⁶ and must be supported by

229. TEX. REV. CIV. STAT. ANN. art. 6840, § 1 (Vernon Supp. 1978).

230. *Id.*

231. See notes 215-17 *supra* and accompanying text; *Shaffer v. Heitner*, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977).

232. TEX. REV. CIV. STAT. ANN. art. 6840, § 1 (Vernon Supp. 1978).

233. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 616 (1974). See also *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (Powell, J., concurring), noted in 29 Sw. L.J. 660 (1975).

234. See TEX. R. CIV. P. 696. Compare *id.* with TEX. R. CIV. P. 592 (attachment) and TEX. R. CIV. P. 658 (garnishment).

235. TEX. R. CIV. P. 696. Compare *id.* with TEX. R. CIV. P. 592 (attachment) and TEX. R. CIV. P. 658 (garnishment). See also TEX. REV. CIV. STAT. ANN. art. 6840 § 2 (Vernon Supp. 1978).

236. There are four statutory grounds upon which the issuance of the writ may be based. TEX. REV. CIV. STAT. ANN. art. 6840, §§ 1(b)-(e) (Vernon Supp. 1978). See text accompanying note 231 *supra*. A statute provides that a writ of sequestration may be issued before default if the reasonable conclusion may be drawn that a person's collateral will be injured, ill-treated, wasted, or converted. TEX. REV. CIV. STAT. ANN. art. 6844 (Vernon 1960).

affidavits. The supporting affidavits may be based on information and belief only if the grounds for such belief are specifically stated, and they may state grounds either disjunctively or conjunctively. The application for the writ must also include a sufficient description of the property to be sequestered to identify it and to distinguish it from similar property. The application must state the value of each article of property and the county in which it is located.²³⁷ Finally, in ruling on the application, due process requires that the judicial officer reject conclusory statements concerning the fulfillment of the statutory grounds for issuance of the writ.²³⁸

The clerk may issue the writ only upon a written order following a hearing, which may be *ex parte*. The court's written order granting the application must contain specific findings of fact to support the statutory grounds which support the application and the writ. Property to be sequestered must be described in the court order with sufficient certainty to distinguish it from other similar property; in addition to this identification, the order must state the value of each item to be sequestered and the county in which it is located.²³⁹

Before the writ of sequestration can issue, the plaintiff must file a sufficient bond with the court.²⁴⁰ The court must specify the amount of bond required of the plaintiff in the court order granting the writ. The bond must, in the opinion of the court, be sufficient to "adequately compensate defendant in the event plaintiff fails to prosecute his suit to effect and pay all damages and costs as shall be adjudged against him for wrongfully suing out the writ."²⁴¹ Either party may challenge the amount of the bond or the sufficiency of the sureties.²⁴² The court must also indicate in its order the amount of bond required of the defendant to replevy.²⁴³ Rule 696 establishes the amount of the bond at the value of the property sequestered or the amount of the plaintiff's claim plus interest if allowed by law on the claim, whichever is less, plus court costs.

Contents of the Writ and Service on the Defendant. The Court in *Mitchell v. W.T. Grant Co.* held that due process does not necessarily require a pre-seizure hearing when the person from whom property is taken has available means to obtain a judicial hearing promptly after the seizure.²⁴⁴ Rule 700a requires that the copy of the writ served on the defendant prominently

237. TEX. R. CIV. P. 696. Compare *id.* with TEX. R. CIV. P. 592 (attachment) and TEX. R. CIV. P. 658 (garnishment).

238. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 605-07 (1974); *Garcia v. Krausse*, 380 F. Supp. 1254, 1258-59 (S.D. Tex. 1974), *vacated on other grounds*, 534 F.2d 609 (5th Cir. 1976).

239. TEX. R. CIV. P. 696. Compare *id.* with TEX. R. CIV. P. 592 (attachment) and TEX. R. CIV. P. 658 (garnishment).

240. TEX. R. CIV. P. 698. Compare *id.* with TEX. R. CIV. P. 658a (attachment) and TEX. R. CIV. P. 592a (garnishment).

241. TEX. R. CIV. P. 696. Compare *id.* with TEX. R. CIV. P. 592 (attachment) and TEX. R. CIV. P. 658 (garnishment).

242. TEX. R. CIV. P. 698. Compare *id.* with TEX. R. CIV. P. 592a (attachment) and TEX. R. CIV. P. 658a (garnishment).

243. TEX. R. CIV. P. 696. Compare *id.* with TEX. R. CIV. P. 592 (attachment) and TEX. R. CIV. P. 658 (garnishment).

244. 416 U.S. 600, 610 (1974). See notes 218-22 *supra* and accompanying text.

display in ten-point type, in a manner calculated to advise a reasonably attentive person, the following message:

YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT.²⁴⁵

This language, and the rights of dissolution and modification granted under rule 712a,²⁴⁶ help protect the Texas sequestration procedure from constitutional attack.

The writ of sequestration must be directed to a sheriff or any constable within the State of Texas and must command him to take possession of the property, subject to the right of replevy and further order of the court.²⁴⁷ The defendant must be served with a copy of the writ, the application of the plaintiff, accompanying affidavits, and orders of the court. Service may be made in any manner prescribed for service of citation or as provided in rule 21a of the Texas Rules of Civil Procedure. Service must occur as soon as practicable following the levy of the writ.²⁴⁸ On the face of the writ, prior to the required ten-point language quoted above,²⁴⁹ the writ must state:

To _____, Defendant:

You are hereby notified that certain properties alleged to be claimed by you have been sequestered. If you claim any right in such property, you are advised.²⁵⁰ [The language in ten-point type must be placed here].

Dissolution or Modification of the Writ of Sequestration. Under rule 712a the defendant may, for any extrinsic or intrinsic ground or cause, seek by sworn written motion to vacate, dissolve, or modify the writ and the order directing the issuance of the writ. The motion to dissolve, modify, or vacate must admit or deny each finding in the court order authorizing the issuance of the writ; if, however, the moving party is unable to admit or deny a finding contained in the order, he must state the reasons why he is unable to admit or deny it. The motion must then be heard promptly, after reasonable notice to the plaintiff (which may be less than three days) and the issue shall be determined not later than ten days after the motion is filed.²⁵¹ Since rule 696 permits ex parte hearings on the issue of seizure, the prompt post-seizure hearing requirements set forth in rule 712a constitute the heart of the new procedure in terms of the satisfaction of due process requirements. Rule 712a further provides for alteration of the ten-day requirement by agreement of the parties.

245. TEX. R. CIV. P. 700a. Compare TEX. R. CIV. P. 700a with TEX. R. CIV. P. 598a (attachment) and TEX. R. CIV. P. 663a (garnishment).

246. TEX. R. CIV. P. 712a. See notes 251-54 *infra* and accompanying text.

247. TEX. R. CIV. P. 699. Compare TEX. R. CIV. P. 699 with TEX. R. CIV. P. 593 (attachment) and TEX. R. CIV. P. 662 (garnishment).

248. TEX. R. CIV. P. 700a. Compare TEX. R. CIV. P. 700a with TEX. R. CIV. P. 598a (attachment) and TEX. R. CIV. P. 663a (garnishment).

249. See text accompanying note 245 *supra*.

250. TEX. R. CIV. P. 700a. Compare TEX. R. CIV. P. 700a with TEX. R. CIV. P. 598a (attachment) and TEX. R. CIV. P. 663a (garnishment).

251. TEX. R. CIV. P. 712a. Compare TEX. R. CIV. P. 712a with TEX. R. CIV. P. 608 (attachment) and TEX. R. CIV. P. 664a (garnishment).

Once a rule 712a motion has been filed, all other proceedings under the writ are stayed except for orders relating to the care and preservation of the property. This stay remains in effect until a hearing is had on the motion and the issue is decided.²⁵²

Generally, the writ of sequestration is to be dissolved if the plaintiff fails to prove the grounds relied upon for issuance of the writ. The movant, however, has the burden of proving, if he so contends, that the reasonable value of the property sequestered exceeds the amount necessary to secure the sum total of the debt, interest for one year, and probable costs.²⁵³

In ruling on a motion, the court may make its determination on the basis of uncontroverted affidavits which set forth facts that would be admissible in evidence. If the affidavits are controverted the court must make its determination on the basis of evidence submitted by the parties in the normal manner. In addition to dissolving the writ, the new rules give the court great latitude in modifying its previous order on the writ if dissolution is not appropriate. In this connection, if the court determines that the order of the writ should not be vacated or dissolved, but only modified, it may make further orders with respect to a replevy bond filed by the defendant which are consistent with the modification.²⁵⁴

Replevy. The defendant may replevy the property at any time prior to judgment.²⁵⁵ "If the movant has given a replevy bond an order to vacate or dissolve the writ shall vacate the replevy bond and" discharge the sureties.²⁵⁶ Replevin requires that the defendant give bond with sufficient sureties; the surety or sureties must be approved by the officer who levied the writ and must be payable to the plaintiff. The amount of the bond is the amount fixed by the original court order; that is, an amount equivalent to the value of the property or the amount of the plaintiff's claim and one year's interest, which ever is the lesser amount, and the probable costs of the court.²⁵⁷

If the bond is objectionable to either party, that party, on motion and notice to the opposing party, has the right to a prompt judicial review of the amount of the bond required, denial of bond, sufficiency of sureties, or as to the estimated value of the property in question. Judicial review of these issues is to be made by the court which authorized the issuance of the writ on the basis of evidence submitted, or uncontroverted affidavits setting forth facts which would be admissible.²⁵⁸

252. TEX. R. CIV. P. 712a. *Compare* TEX. R. CIV. P. 712a with TEX. R. CIV. P. 608 (attachment) and TEX. R. CIV. P. 664a (garnishment).

253. TEX. R. CIV. P. 712a. *Compare* TEX. R. CIV. P. 712a with TEX. R. CIV. P. 608 (attachment) and TEX. R. CIV. P. 664a (garnishment).

254. TEX. R. CIV. P. 712a. *Compare* TEX. R. CIV. P. 712a with TEX. R. CIV. P. 608 (attachment) and TEX. R. CIV. P. 664a (garnishment).

255. TEX. R. CIV. P. 701. *Compare* TEX. R. CIV. P. 701 with TEX. R. CIV. P. 599 (attachment) and TEX. R. CIV. P. 664 (garnishment).

256. TEX. R. CIV. P. 712a.

257. TEX. R. CIV. P. 701. *See* TEX. R. CIV. P. 702, 703 (condition of bond for personal property and real estate).

258. TEX. R. CIV. P. 701. *Compare* TEX. R. CIV. P. 701 with TEX. R. CIV. P. 599 (attachment) and TEX. R. CIV. P. 664 (garnishment).

If the defendant fails to replevy the property within ten days after levy of the writ and the service of notice, the plaintiff may replevy by giving bond payable to the defendant in the amount of not less than double the value of the property replevied, with sufficient sureties to be approved by the levying officer.²⁵⁹ Under rule 708, if the property to be replevied is personalty, the condition of the bond shall be either that the plaintiff will preserve the property in the same condition as when it is replevied, together with the value of the fruits or revenue thereof, to abide the decision of the court, or that he will pay the value thereof, or the difference between its value at the time of replevy and the time of judgment. If the property is realty, the condition of the bond shall be that the plaintiff will not injure the property and that he will pay the value of the rents if he is required to do so. On proper notice by either party, the complaining party can obtain judicial review of the plaintiff's replevy, just as in the case of defendant's replevy.

C. Attachment²⁶⁰

The purpose of attachment is to impound and fix a lien upon the nonexempt property of a debtor prior to judgment.²⁶¹ The remedy is structured primarily to prevent a debtor from making himself judgment proof during the pendency of litigation.²⁶² Ordinarily the type of suit which will support the issuance of the writ is a suit for a debt,²⁶³ which is defined as an obligation to pay a liquidated sum upon an express or implied contract.²⁶⁴ The grounds which will support the issuance of the writ in a suit on a debt are set forth in article 275.²⁶⁵ The statute requires the plaintiff to make an affidavit stating that one or more of the statutory grounds exist. An additional statutory provision requires the plaintiff to swear that the attachment is not for the purpose of injuring or harassing the defendant and that the plaintiff will probably lose his debt unless the attachment is issued.²⁶⁶ A writ of attachment may also be issued in suits based on tort or unliquidated demands if personal service on the defendant cannot be obtained within the state.²⁶⁷

Most of the amended rules of civil procedure relating to attachment and garnishment are substantially the same as the amended rules for sequestration. Hence, the amended attachment and garnishment rules will be discussed largely by reference to the corresponding rules for sequestration.

259. TEX. R. CIV. P. 708.

260. For further background and forms, see 2 W. DORSANEO, TEXAS LITIGATION GUIDE §§ 41.01-.203 (1978).

261. Property of a debtor which is exempt from attachment, execution, or other seizure for the satisfaction of liabilities is set forth in TEX. REV. CIV. STAT. ANN. arts. 3833-3836 (Vernon Supp. 1978).

262. *Midway Nat'l Bank v. West Tex. Wholesale Co.*, 447 S.W.2d 709, 710-11 (Tex. Civ. App.—Fort Worth 1969), *writ ref'd n.r.e. per curiam*, 453 S.W.2d 460 (Tex. 1970).

263. TEX. REV. CIV. STAT. ANN. art. 275 (Vernon 1973).

264. *El Paso Nat'l Bank v. Fuchs*, 89 Tex. 197, 201, 34 S.W. 206, 207 (1896).

265. TEX. REV. CIV. STAT. ANN. art. 275 (Vernon 1973).

266. *Id.* art. 276.

267. *Id.* art. 281.

Issuance of the Writ of Attachment. Rule 592²⁶⁸ has established new procedures governing the plaintiff's application for, and the court's issuance of, a writ of attachment. These new procedures are similar to those instituted in rule 696, which governs the issuance of writs of sequestration.²⁶⁹ Rule 592, like its sequestration counterpart, was designed to meet the constitutional demands of due process.

Rule 592a requires that the plaintiff file an attachment bond before the writ will be issued and provides for judicial review, if requested by either party, of the amount of the bond or the sufficiency of the sureties.²⁷⁰ The bond required of the plaintiff is designed to compensate the defendant adequately in the event the plaintiff fails to prosecute his suit to effect and to compensate the defendant sufficiently for all damages and costs which may be adjudged against the plaintiff for wrongfully suing out the writ of attachment.²⁷¹ The attachment bond requirement is almost identical to the bond required by the rules for sequestration.²⁷²

Contents of the Writ and Service on the Defendant. The writ of attachment must be directed to a sheriff or any constable within the state.²⁷³ The instructions to the sheriff or constable are the same as those given in a writ of sequestration except that, rather than identifying the specific property to be sequestered, the sheriff is directed to attach property "of a reasonable value in approximately the amount fixed by the court."²⁷⁴ As in the case of sequestration, the writ of attachment must inform the defendant of his right to replevy and regain possession by filing a motion to dissolve the writ.²⁷⁵ Service on the defendant is attained by the same method as is used for service of a writ of sequestration.²⁷⁶

Dissolution or Modification of the Writ of Attachment. Rule 608²⁷⁷ governs dissolution and modification of the writ of attachment. This rule was rewritten to provide for a prompt hearing. The procedure is substantially the same as the procedure for dissolving or modifying a writ of sequestration discussed earlier.²⁷⁸ It is, therefore, unnecessary to discuss the procedure here.

268. TEX. R. CIV. P. 592.

269. See notes 232-39 *supra* and accompanying text. The court's order must also contain a specification of the maximum value of the property that may be attached.

270. TEX. R. CIV. P. 592a.

271. TEX. R. CIV. P. 592. If the attachment is wrongful there are remedies open to the defendant. If none of the grounds stated in the plaintiff's affidavit for the issuance of the writ are true, then the attachment is wrongful. See, e.g., *Petty v. Lang*, 81 Tex. 238, 242, 16 S.W. 999, 1000 (1891). This is true notwithstanding the plaintiff's good faith. See, e.g., *Christian v. H. Seeligson & Co.*, 63 Tex. 405, 406 (Tex. Comm'n App. 1885, opinion adopted). The party whose property was wrongfully attached must prove interference with his property rights to be entitled to more than nominal damages. *Bartley v. J.M. Radford Grocery Co.*, 15 S.W.2d 46 (Tex. Civ. App.—Amarillo 1929, writ ref'd). When, however, the attachment creditor has acted maliciously and without probable cause, exemplary damages may be in order. See, e.g., *Craddock v. Goodwin*, 54 Tex. 578, 586-89 (1881).

272. See notes 240-43 *supra* and accompanying text.

273. TEX. R. CIV. P. 593.

274. *Id.* See note 247 *supra* and accompanying text.

275. TEX. R. CIV. P. 598a. See note 245 *supra* and accompanying text.

276. See note 247 *supra* and accompanying text.

277. TEX. R. CIV. P. 608.

278. See notes 251-54 *supra* and accompanying text.

Replevy. Rule 599 provides that the defendant may replevy upon the filing of the required bond. The amount of the bond required of the defendant is the amount of the plaintiff's claim, one year's accrued interest if allowed by law, and the estimated costs of court. At the election of the defendant, however, the bond may be set at the value of the property the defendant seeks to replevy. Either party is entitled to judicial review of the amount of the bond, denial of bond, sufficiency of the sureties, and the estimated value of the property attached.²⁷⁹ In these regards rule 599 is extremely similar to the corresponding rule covering sequestration.²⁸⁰ The attachment rule, however, further provides that the defendant may move to have property of equal value substituted for the property attached.

D. Garnishment²⁸¹

Post-judgment garnishment is a procedure which is available to a judgment-creditor to satisfy his money judgment from the judgment-debtor's nonexempt personal property in the possession of a third person.²⁸² Only personal property subject to execution can be reached by garnishment.²⁸³ Post-judgment garnishment is only available where the plaintiff has a valid, subsisting judgment and the judgment-debtor does not have property in his possession within the state subject to execution to satisfy the judgment.²⁸⁴ The Texas statute governing post-judgment garnishment has been found constitutional²⁸⁵ notwithstanding that post-judgment garnishment does not require that a writ of execution be issued, or issued and returned unsatisfied.

Pre-judgment garnishment is also provided for by statute and is available: (1) when an original attachment has issued; or, (2) when suit is brought for a debt owed and an affidavit is made by the plaintiff to the effect that the defendant does not possess property in Texas subject to execution sufficient to satisfy the debt and the plaintiff is not seeking to injure or harass the defendant with the writ.²⁸⁶ The statutory provision for pre-judgment garnishment, however, has been held unconstitutional on the grounds that it freezes property, prior to judgment in the main suit, in the hands of the third-party

279. TEX. R. CIV. P. 599.

280. See notes 255-58 *supra* and accompanying text.

281. For further background and forms, see 2 W. DORSANEO, TEXAS LITIGATION GUIDE §§ 42.01-.203 (1978).

282. *Beggs v. Fite*, 130 Tex. 46, 52, 106 S.W.2d 1039, 1042 (1937).

283. *Mobil Oil Corp. v. Commercial Nat'l Bank*, 460 S.W.2d 249, 250-51 (Tex. Civ. App.—Dallas 1970, no writ).

284. TEX. REV. CIV. STAT. ANN. art. 4076 (Vernon 1966). See also *Reese v. Piperi*, 534 S.W.2d 329, 330 (Tex. 1976). TEX. R. CIV. P. 658 states that an application for a writ of garnishment may be brought "[e]ither at the commencement of a suit or at any time during its progress." This appears to imply that a post-judgment application for a writ of garnishment cannot be made. This conclusion is incorrect. Apparently the rule was written with an eye toward the problematic area, and, consequently, reference to this non-problematic area was inadvertently omitted. Additional support for this conclusion is found in TEX. REV. CIV. STAT. ANN. art. 1731a, § 2 (Vernon 1962), which provides that the rules enacted by the Supreme Court of Texas "shall not abridge, enlarge or modify the substantive rights of any litigant." Statutory post-judgment garnishment is still permitted, and could not be repealed by the supreme court's adoption of a rule of procedure.

285. *Ranchers & Farmers Livestock Auction Co. v. First State Bank*, 531 S.W.2d 167, 171 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.).

286. TEX. REV. CIV. STAT. ANN. art. 4076 (Vernon 1966). The debt must be liquidated. See *Cleveland v. San Antonio Bldg. & Loan Ass'n*, 148 Tex. 211, 215, 223 S.W.2d 226, 228 (1949).

garnishee, without notice, hearing, or restriction on the pre-hearing seizure to an extraordinary situation.²⁸⁷ The present constitutionality of pre-judgment garnishment is unclear, even under the new rules, because the second ground for the issuance of the writ is difficult to characterize as an extraordinary situation.

Issuance of the Writ of Garnishment. The application for and issuance of the writ of garnishment are essentially the same as in the sequestration situation.²⁸⁸ The requirements for a plaintiff's pre-judgment garnishment bond are the same as a sequestration bond.²⁸⁹ When the garnishee's uncontroverted answer reflects that he is indebted to the defendant or has possession of property of the defendant, after due notice to the defendant, the court in which such garnishment is pending may, upon hearing, reduce the required amount of the bond to double the sum of the garnishee's indebtedness to the defendant, plus the value of the property in his possession which belongs to the defendant.²⁹⁰

When the necessary rules have been complied with, the judge must docket the case in the name of the plaintiff as plaintiff and of the garnishee as defendant²⁹¹ and must immediately issue a writ of garnishment.²⁹² Under rule 659, the writ, directed to the garnishee, should command him to appear and answer under oath what, if anything, he owes to the defendant-debtor, and what was his debt to the defendant-debtor at the time the writ was served. The garnishee must also reveal what property of the defendant-debtor he has in his possession presently, and what property he possessed when the writ was served. Finally, the garnishee must reveal what other persons, within his knowledge, are indebted to the defendant-debtor or have property belonging to him in their possession.²⁹³

Contents of the Writ and Service on the Defendant. After the court orders issuance of the writ, which may be in the form prescribed by rule 661,²⁹⁴ the defendant-debtor is required to be served with a copy of the writ, the

287. *Southwestern Warehouse Corp. v. Wee Tote, Inc.*, 504 S.W.2d 592 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ).

288. See notes 232-39 *supra* and accompanying text.

289. TEX. R. CIV. P. 658a. See notes 240-44 *supra* and accompanying text. The bond must be sufficient to cover any potential damages for wrongful garnishment. TEX. R. CIV. P. 658. The remedies for wrongful garnishment remain. Garnishment is wrongful if the prescribed allegations set forth in the garnishor's affidavit are untrue. See *Peerless Oil & Gas Co. v. Teas*, 138 S.W.2d 637, 640 (Tex. Civ. App.—San Antonio 1940), *aff'd*, 138 Tex. 301, 158 S.W.2d 758 (1942). As in attachment, good faith is no defense. *Massachusetts v. Davis*, 160 S.W.2d 543, 554 (Tex. Civ. App.—Austin), *aff'd in part and rev'd in part on other grounds*, 140 Tex. 398, 168 S.W.2d 216, *cert. denied*, 320 U.S. 210 (1942). Although good faith is not a defense, the garnishee cannot recover exemplary damages unless he can prove that the garnishment was obtained maliciously and without probable cause. See, e.g., *Biering v. First Nat'l Bank*, 69 Tex. 599, 7 S.W. 90 (1888); *Pegues Mercantile Co. v. Brown*, 145 S.W. 280, 281 (Tex. Civ. App.—El Paso 1912, no writ). Third parties, whose property interests are wrongfully garnished as belonging to the garnishment debtor, may also maintain an action against the erring creditor. See *Stevens v. Simmons*, 61 S.W.2d 122 (Tex. Civ. App.—El Paso 1933, no writ).

290. TEX. R. CIV. P. 658a.

291. TEX. R. CIV. P. 659.

292. *Id.*

293. *Id.*

294. TEX. R. CIV. P. 661.

application, accompanying affidavits, and orders of the court as soon as practicable following the service of the writ upon the garnishee.²⁹⁵ As in the case of sequestration, the writ must inform the defendant of his right to replevy and to regain possession by filing a motion to dissolve the writ.²⁹⁶ The procedure governing dissolution or modification of the writ is substantially the same as the procedure discussed in the sequestration context.²⁹⁷

Replevy. The defendant-debtor may replevy at any time before judgment if the garnished property has not been previously claimed or sold.²⁹⁸ The defendant-debtor may replevy the property, any part thereof, or the proceeds from the sale of the property if it has been sold under an order of the court.²⁹⁹ The procedure necessary to entitle the defendant-debtor to replevy in garnishment are the same as those in sequestration.³⁰⁰ Also, just as in attachment, the defendant-debtor may move to have property substituted for the garnished property.³⁰¹

295. TEX. R. CIV. P. 663a. The necessary contents of the writ and service on the defendant are similar to those set forth in the rules for sequestration. *See* notes 244-50 *supra* and accompanying text.

296. TEX. R. CIV. P. 663a.

297. *See* notes 251-54 *supra* and accompanying text.

298. TEX. R. CIV. P. 664.

299. *Id.*

300. *See* notes 255-58 *supra* and accompanying text.

301. TEX. R. CIV. P. 664.