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William V. Dorsaneo III

Southern Methodist University, Dedman School of Law, wdorsane@mail.smu.edu

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CREDITOR AND CONSUMER RIGHTS

by

William V. Dorsaneo, III*

THE careful reader will note a change in the title of this year's *Survey* Article. The change reflects an increased emphasis on consumer law begun last year when the Article was expanded to include developments under the Deceptive Trade Practices—Consumer Protection Act¹ and the Texas Consumer Credit Code.² This approach has been continued this year. Expanded treatment has also been given to the subject of sworn account practice because of significant case law development during the survey period concerning the proper method of interpreting the scope of sworn account practice under rule 185 of the Texas Rules of Civil Procedure.

I. EXTRAORDINARY REMEDIES AND EXECUTION

A. Garnishment

A variety of garnishment cases were decided during the survey period. In *Curry Motor Freight, Inc. v. Ralston Purina Co.*³ a garnishee sought to set aside a default judgment by writ of error. The court of civil appeals reversed the default judgment because the officer's return did not state the manner of service.⁴ The court held that it was immaterial that the defendant may have had actual knowledge of the existence of the suit and the issuance of the writ of garnishment.⁵

The propriety of a default judgment against a garnishee whose answer is not in strict compliance with the rules governing answers in garnishment cases was considered in *Healy v. Wick Building Systems, Inc.*⁶ Although the procedural posture of the case was somewhat complicated, the central question presented pertaining to garnishment was whether the garnishee's answer was rendered insufficient as a matter of law by his failure to respond to the inquiry of whether he knew of other persons who were indebted to the debtor.⁷ The Dallas court of civil appeals concluded that

* B.A., University of Pennsylvania; J.D., University of Texas. Associate Professor of Law, Southern Methodist University.

1. TEX. BUS. & COM. CODE ANN. §§ 17.41-63 (Vernon Supp. 1978-79).

2. TEX. REV. CIV. STAT. ANN. art. 5069 (Vernon 1971).

3. 565 S.W.2d 105 (Tex. Civ. App.—Amarillo 1978, no writ).

4. TEX. R. CIV. P. 107, 663. *See also* Jacksboro Nat'l Bank v. Signal Oil & Gas Co., 482 S.W.2d 339 (Tex. Civ. App.—Tyler 1972, no writ).

5. 565 S.W.2d at 107.

6. 560 S.W.2d 713 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.).

7. *See* TEX. R. CIV. P. 659, 666, 667.

when a garnishee answers with respect to the merits of the writ, but fails to answer as to his knowledge of other persons who may be indebted to the debtor, no judgment by default is authorized.⁸

In *Hardy v. Construction Systems, Inc.*⁹ the court stated the general rule that property in custodia legis is not subject to garnishment, but held that such exemption ceases when a court has entered a judgment ordering the distribution of the property and nothing remains for the custodian to do but make delivery or payment to the distributees.¹⁰ In *Hardy* the judgment ordering distribution had become final prior to the time garnishment was sought;¹¹ thus, garnishment in this instance was found to be proper.

The propriety of garnishing an agency or instrumentality of the United States was also dealt with in several cases during the survey period. In *United States v. Stelter*¹² the Texas Supreme Court construed a federal statute that removed the government's sovereign immunity from suits to enforce "legal obligations to provide child support or make alimony payments."¹³ The supreme court held that an award to a woman of a portion of her ex-husband's military retirement pay as her share of the community estate could not be enforced by garnishment because it was awarded as a community property division and not as "alimony" as defined in the statute.¹⁴ In *United States v. Fleming*¹⁵ the wife had a claim for unpaid child support and sought to garnish the military retirement pay of her ex-spouse to satisfy the claim. The garnishee, however, contended that military retirement pay was exempt from garnishment under Texas law as current wages for personal services.¹⁶ The court of civil appeals disagreed and held that the military retirement pay constituted "property" and was subject to garnishment.¹⁷ The court of civil appeals, however, reversed the trial court judgment as an unconstitutional taking of property under the fourteenth amendment.¹⁸ Before a judgment against the garnishee is authorized, the claim against the debtor must be reduced to a money judg-

8. 560 S.W.2d at 721; see *American Express Co. v. Monfort Food Dist. Co.*, 545 S.W.2d 49, 52-53 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ).

9. 556 S.W.2d 843 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ).

10. *Id.* at 844. In its opinion the court noted two early Texas Supreme Court decisions, *Curtis v. Ford*, 78 Tex. 262, 14 S.W. 614 (1890), and *Pace v. Smith*, 55 Tex. 555 (1882), which held that a writ of garnishment is never appropriate as to funds in the custody of a court. The court of civil appeals stated that while the above mentioned cases had *never* been specifically overruled, it was convinced "that they no longer correctly express the law of this state" and that the applicable rule in Texas was the one followed in the case. 556 S.W.2d at 844.

11. See TEX. R. CIV. P. 329b, para. 5.

12. 567 S.W.2d 797 (Tex. 1978).

13. 42 U.S.C. § 659 (1976). Prior to this statute, the government was immune from garnishment proceedings authorized by state law. See *Marin v. Hatfield*, 546 F.2d 1230 (5th Cir. 1977); *Wilhelm v. United States Dep't of Air Force, Accounting & Fin. Center*, 418 F. Supp. 162 (S.D. Tex. 1976).

14. 567 S.W.2d at 798.

15. 565 S.W.2d 87 (Tex. Civ. App.—El Paso 1978, no writ).

16. *Id.* at 88. See TEX. CONST. art. XVI, § 23 ("No current wages for personal service shall ever be subject to garnishment"); TEX. REV. CIV. STAT. ANN. art. 4099 (Vernon 1966).

17. 565 S.W.2d at 88-89.

18. *Id.* at 89.

ment.¹⁹ The findings in the trial court to the effect that the husband was in arrears did not amount to a judicial determination of the debt since "the absence of [the husband] from the case because of lack of notice result[ed] in the absence of an indispensable party," necessary to a valid judgment.²⁰ In other words, to allow the husband's property to be garnished here would violate his due process rights, as it would constitute a prejudgment garnishment without necessary procedural safeguards.²¹

A somewhat similar procedural fact situation was presented in *Tom Benson Chevrolet Co. v. Beall*.²² The plaintiff obtained a default judgment against the debtor on August 30, 1976, and instituted garnishment proceedings against the garnishee. Instead of paying the plaintiff, on September 9 the garnishee paid the primary defendant all sums owed. On September 29 the default judgment was set aside and a new trial granted, which resulted in another judgment being rendered against the primary defendant on October 14. In May of the following year judgment was entered for plaintiff against the garnishee for the amount of the first judgment. On appeal, the court of civil appeals held that since the first judgment had been set aside, and since the second judgment was rendered after the writ of garnishment had been served and the property disposed of, there was no judgment to support a writ of garnishment.²³ The judgment against the garnishee was therefore reversed and remanded. Apparently, the only ground asserted to support the issuance of the writ was the existence of a "valid and subsisting judgment."²⁴

B. Sequestration

Two cases involving sequestration were decided during the survey term.

19. See TEX. FAM. CODE ANN. § 14.09(c) (Vernon 1975), which enables the claimant to reduce the claim to judgment. See note 21 *infra*.

20. 565 S.W.2d at 89.

21. For development of the fourteenth amendment in this context, see *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), noted in 29 Sw. L.J. 660 (1975); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969); *Southwestern Warehouse Corp. v. Wee Tote, Inc.*, 504 S.W.2d 592 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ). TEX. R. CIV. P. 663a was recently promulgated to require notice to or joinder of the debtor. See generally Soules, *Attachment, Sequestration, and Garnishment: The 1977 Rules*, 32 Sw. L.J. 753 (1978). See also Dorsaneo, *Creditors' Rights, Annual Survey of Texas Law*, 32 Sw. L.J. 245, 279-80 (1978). It should also be noted, however, that under Texas law, before judgment against the garnishee is authorized, the main claim must be reduced to judgment. See, e.g., TEX. R. CIV. P. 667, 668, 669. For a similar case, see *Breedlove v. United States*, 569 S.W.2d 582 (Tex. Civ. App.—Tyler 1978, no writ), discussed in Figari, *Texas Civil Procedure*, p.466 *infra*. It should also be observed that if military retirement pay is subject to garnishment in Texas, certain federal restrictions on the amounts that can be garnished would be applicable. 15 U.S.C. § 1673(b)(2) (1976) provides that the maximum amount of an individual's aggregate disposable earnings per work week that can be garnished to enforce an order for the support of another person is limited to 50% of the individual's disposable earnings of that week when that individual is supporting a spouse or dependent child other than one to whom the support order pertains. When an individual is not supporting such a spouse or child, the amount to be garnished cannot exceed 60% of weekly disposable earnings.

22. 567 S.W.2d 857 (Tex. Civ. App.—San Antonio 1978, writ *ref'd n.r.e.*).

23. *Id.* at 859.

24. TEX. REV. CIV. STAT. ANN. art. 4076(3) (Vernon 1966).

In *Monroe v. General Motors Acceptance Corp.*²⁵ an interlocutory appeal from an order overruling a motion to dissolve a writ of sequestration was dismissed for the reason that in the absence of statutory authority, an appeal lies only from a final judgment.²⁶ In *Barfield v. Brogdon*²⁷ the question was considered as to what constitutes the proper standard to be employed in determining whether an award of exemplary damages should be made in a wrongful sequestration action. In this case the court stated that the key issue was a determination of legal malice. An issue submission inquiring whether the wrongdoer "knew or should have known that he had no right to title or possession" of the sequestered property, however, did not properly submit to the jury the question of malice.²⁸ The majority held, however, that since the wrongdoer did not object to the jury charge for failing to submit an issue "expressly inquiring if he acted with malice," the right to complain had been waived.²⁹ Consequently, the court awarded exemplary damages based on the presence of reasonable evidence of legal malice, but found the trial court's award of \$3000 exemplary damages excessive and reduced the award by \$2000.³⁰

C. Homestead

The effect of the 1973 amendment to the Texas Constitution allowing a single adult person a homestead³¹ was construed in *First Realty Bank & Trust v. Youngkin*.³² The realty involved had been conveyed to the appellee on July 3, 1972; thus, the conveyance was made prior to the time the amendment had taken effect. The appellant bank had recovered a judgment against the appellee in 1965. Moreover, the bank had obtained and recorded its abstract of judgment in 1965 and again in 1974.³³ The court of civil appeals properly held that the judgment lien, which antedated the homestead character of the subject realty, was not defeated by the after-acquired homestead right.³⁴

A similar question was presented in *Shepler v. Kubena*.³⁵ Dan Shepler purchased eighty acres of land in 1961. In that same year, he conveyed the realty to a private corporation that he and his first wife operated. The private corporation executed a deed of trust in favor of a savings and loan association to secure a note of \$25,000. Approximately six months later, the appellant married Shepler, moved onto the subject property, and

25. 561 S.W.2d 12 (Tex. Civ. App.—Waco 1978, no writ).

26. TEX. REV. CIV. STAT. ANN. art. 2249 (Vernon 1971).

27. 560 S.W.2d 787 (Tex. Civ. App.—Amarillo 1978, writ ref'd n.r.e.).

28. *Id.* at 791.

29. *Id.*; see TEX. R. CIV. P. 274, 279. See also *Allen v. American Nat'l Ins. Co.*, 380 S.W.2d 604 (Tex. 1964). But see the dissent of Justice Reynolds in *Barfield* for a sound argument that the claimant waived the ground of recovery on exemplary damages. 560 S.W.2d at 792-94.

30. 560 S.W.2d at 792.

31. TEX. CONST. art. XVI, § 50.

32. 568 S.W.2d 428 (Tex. Civ. App.—Eastland 1978, no writ).

33. *Id.* at 429.

34. *Id.* at 430.

35. 563 S.W.2d 382 (Tex. Civ. App.—Austin 1978, no writ).

treated that property as her homestead. Two years later, the private corporation, which still had title to the land, executed a second deed of trust to secure payment of a note for \$38,000, which carried forward the prior \$25,000 note and lien. The corporation then transferred the land to Shepler, who later conveyed it to appellant. Thereafter, the savings and loan association assigned the note to appellee, who then sought to foreclose upon the deed of trust lien. The appellant asserted that the property constituted her homestead and that the lien was invalid. The court of civil appeals held that encumbrances placed on the property were not affected by a later acquired homestead interest. At the time the lien arose the appellant was not the owner of the property, but had a mere possessory interest as a tenant at will. With the interest of a mere tenant at will, the appellant could not restrict the title owner, the private corporation, from "encumbering the property which was not used by [the corporation] as its homestead."³⁶

In *Minnehoma Financial Co. v. Ditto*³⁷ the appellant, who was the owner and holder of a retail installment contract and security agreement, sought a money judgment and a foreclosure of its security interest in a mobile home. The mobile home was initially purchased on ninety-day credit by the appellee from Interstate Housing Corporation (IHC), which had the mobile home on consignment from the appellant. The home was delivered to the appellee who removed its wheels and placed the home on concrete blocks on his land. Thereafter, the appellee failed to pay the balance of the purchase price prior to the expiration of the ninety-day period. As a result, IHC and the appellee entered into the retail installment contract and security agreement on November 1, 1973. This agreement was then assigned to the appellant. Neither the original sales contract, nor the subsequent installment contract and security agreement, were signed by the appellee's wife. The trial court denied foreclosure of the security interest, apparently on the appellee's theory that the purchase money security interest was for an improvement to a homestead, which would require the signature of both spouses to be valid.³⁸ The court of civil appeals rejected appellee's argument for several reasons. First, under the terms of the contracts, the mobile home did not become part of the homestead until the purchase price was paid. Second, the court held that the requirement of both signatures "extends only to the creation of a lien on what was already homestead at the time of the transaction."³⁹ In rejecting the appellee's ar-

36. *Id.* at 386.

37. 566 S.W.2d 354 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.).

38. TEX. CONST. art. XVI, § 50; TEX. REV. CIV. STAT. ANN. art. 5460 (Vernon Supp. 1978-79).

39. 566 S.W.2d at 357. The court noted:

There is a crucial distinction between an improvement lien on the homestead requiring two signatures and a purchase money lien which does not: In the case of a purchase money lien, the lien *for* purchase money is *on* the property purchased, and both signatures are not required. An improvement lien requiring both signatures is one which is *for* an improvement but is *on* the existing homestead.

Id. at 358. (Emphasis in original).

gument that at the time of the November 1, 1973 "readjustment" of credit terms the mobile home was part of the homestead, the court of civil appeals appears to rely upon *Machicek v. Barcak*⁴⁰ for the proposition that the head of the family has the right to renew, rearrange, and readjust encumbrances on a homestead.⁴¹ The court of civil appeals also concluded that it was immaterial that the original seller, IHC, may have had notice that the mobile home was to be attached to the appellee's land.⁴²

A case involving a fact situation somewhat similar to the *Ditto* case was *McGahey v. Ford*.⁴³ In *McGahey* the appellant sought to foreclose a deed of trust lien on certain real estate that appellee claimed as homestead. The deed of trust had been executed by the appellee's predecessor in interest in the property, individually and on behalf of the predecessor's corporation. On the date that the deed of trust was executed, record title to the realty was vested, as shown by the deed records, in the corporation. The court of civil appeals found that the transfer to the corporation by the appellee's predecessor had been a "pretended sale" of the homestead property, and was therefore void.⁴⁴ Consequently, since the corporation had no title to the property, its attempt to execute the deed of trust was also void. As a result, the court ruled that the property retained its homestead character and could not be mortgaged for any purpose other than purchase money or improvements.⁴⁵ In response, the appellant argued that it was a bona fide mortgagee for value because it had no notice that the deed to the corporation was a pretended sale. The court of civil appeals concluded, however, that since appellant had advanced no new consideration for the deed of trust, it did not qualify as a bona fide purchaser for value without notice that the property conveyed was homestead.⁴⁶ It should be observed that the homestead argument was made by the party who had bought the real estate from the individual who made the "pretended sale" to the corporation. The purchaser, though not a party to the transfer to the corporation, was held to be entitled to raise the homestead issue because "[a] void instrument has no effect, even as to persons not parties to it, and its invalidity may be asserted by anyone whose rights are affected."⁴⁷

In *Bank of Texas v. Laguarda*⁴⁸ the appellant had obtained a judgment for the amount of \$186,993.36 against the appellee in early 1977. After obtaining a judgment lien on all of the appellee's nonexempt realty in Harris County, the appellant convinced a constable to levy a writ of execution on property that the appellee claimed as homestead. Appellant contended that at the time of designation of the "homestead" in 1969, the value of the

40. 141 Tex. 165, 170 S.W.2d 715 (1943).

41. *Id.* at 169, 170 S.W.2d at 717.

42. 566 S.W.2d at 358.

43. 563 S.W.2d 857 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.).

44. See TEX. CONST. art. XVI, § 50, which provides that "all pretended sales of homestead involving any condition of defeasance shall be void."

45. 563 S.W.2d at 862.

46. *Id.* at 863.

47. *Id.* at 861.

48. 565 S.W.2d 363 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ).

lot exceeded the \$5,000 maximum homestead exemption then in effect, and that the nonexempt portion exceeded the outstanding balance of any purchase money mortgage.⁴⁹ The appellee obtained a temporary injunction restraining the constable's sale. The court of civil appeals upheld the injunction, concluding that despite the trial court's determination that the value of the property was in excess of the applicable homestead exemption, the question as to value should not be decided at a temporary injunction hearing.⁵⁰ The court's clear suggestion that this type of question should be resolved at either a permanent injunction hearing or a full trial makes it highly doubtful that proof that property was homestead can ever be successfully rebutted at a temporary injunction hearing.

In *North Texas Production Credit Association v. Lee*⁵¹ the question of the entitlement of a bankrupt to a rural as opposed to an urban homestead was considered. The bankrupt owned two tracts of land in Oak Grove, one consisting of 193.99 acres and the other of 1.125 acres. The district court, in reversing the bankruptcy judge, held that Oak Grove, which consisted of thirteen houses, a convenience store, an abandoned church, and two sawmills within a radius of six-tenths of a mile, was not a "village." Consequently, the two-hundred-acre rural homestead exemption⁵² was applicable in this instance. The district court reached its holding despite the 1934 decision in *Buttram v. Harris*⁵³ in which it was determined that Oak Grove was a village. The court stated that "the facts and circumstances which gave life to the village [Oak Grove] in that year [1934] do not presently exist and are not binding upon the Court in deciding this case."⁵⁴ On appeal, the Court of Appeals for the Fifth Circuit affirmed.

D. Execution

In *Rio Delta Land Co. v. Johnson*⁵⁵ the appellant brought suit to set aside a sheriff's sale, arguing that proper notice of the sale had not been given and that the land had been sold at a grossly inadequate price. He further alleged that a subsequent purchaser who had acquired the land from the purchaser at the sheriff's sale was charged with knowledge of the irregularities concerning the notice and that the sale to him was therefore voidable.⁵⁶ The court of civil appeals agreed that since the sale was held on a day less than twenty days from the date of the publication of the first

49. See *Valley Bank v. Skeen*, 401 F. Supp. 139, 140 (N.D. Tex. 1975), *aff'd mem.*, 532 F.2d 185 (5th Cir. 1976), *cert. denied*, 429 U.S. 834 (1977); *In re Bobbitt*, No. BK-3-74-373-F (N.D. Tex. Mar. 29, 1976), *discussed in* Dorsaneo, *Creditors' Rights, Annual Survey of Texas Law*, 31 Sw. L.J. 213, 225 (1977); *Hoffman v. Love*, 494 S.W.2d 591, 596-97 (Tex. Civ. App.—Dallas), *writ ref'd n.r.e. per curiam*, 499 S.W.2d 295 (Tex. 1973).

50. 565 S.W.2d at 365.

51. 570 F.2d 1301 (5th Cir. 1978).

52. TEX. CONST. art. XVI, § 51.

53. 73 F.2d 679 (5th Cir. 1934).

54. 570 F.2d at 1303.

55. 566 S.W.2d 710 (Tex. Civ. App.—Corpus Christi 1978, *writ ref'd n.r.e.*).

56. *Id.* at 712.

notice of sale,⁵⁷ the sale was improper. There was a substantial conflict in the testimony in the trial court, however, concerning whether the land in question was sold for a grossly inadequate price. The trial court did not find the price grossly inadequate, and held that the irregularity as to the notice of sale did not affect the amount bid at the sheriff's sale. The court of appeals affirmed, holding that the improper notice was insufficient to set aside the sale absent a showing of gross inadequacy in the sale price.⁵⁸ In addition, testimony in the trial court indicated that the purchaser at the sheriff's sale offered to sell the land to appellant for the amount paid at the sale plus expenses, but the offer was rejected by the appellant.⁵⁹ This revelation undoubtedly influenced the trial and appellate courts' conclusions.

E. Receivership

Due process limitations on the ability of a receiver to take property into actual custody when that property is in the possession of third parties were considered in *First National Bank v. State*.⁶⁰ Pursuant to the Deceptive Trade Practices Act,⁶¹ the state instituted a receivership proceeding against defendants who had funds deposited with the appellant bank. Shortly after the petition was filed, the state filed an ex parte motion alleging that the receiver had attempted to take possession of the funds, but that the appellant had refused to surrender them. The motion was granted requiring the bank to turn the funds over to the receiver, and the appellant complied with the ex parte order. Immediately thereafter, the appellant intervened in the receivership proceedings, moving to vacate the ex parte order on the theory that it was obtained in a prohibited summary proceeding without notice and that, in any event, the appellant was entitled to the funds under a previously exercised right to offset these funds against another debt. The trial court denied the appellant's motion to vacate. The court of civil appeals, however, reversed and held that the ex parte order should have been vacated. In so ruling the court stated:

[A] receiver cannot through summary proceedings take into custody property found in the possession of persons claiming adversely. The receiver has no greater right than the person whose property he has been appointed to receive, and if he desires to obtain possession of property in the hands of a stranger to the suit, he must either make that person a party or file a separate action against him.⁶²

57. See TEX. R. CIV. P. 647.

58. 566 S.W.2d at 714. For a general discussion of legal principles governing the relationship between the adequacy of price and regularity of sales, see *McKennon v. McGown*, 11 S.W. 532, 533 (Tex. 1889); *Prudential Corp. v. Bazaman*, 512 S.W.2d 85, 89-91 (Tex. Civ. App.—Corpus Christi 1974, no writ).

59. 566 S.W.2d at 713.

60. 555 S.W.2d 200 (Tex. Civ. App.—Dallas 1977, no writ).

61. TEX. BUS. & COM. CODE ANN. § 17.47 (Vernon Supp. 1978-79).

62. 555 S.W.2d at 203. The case is complicated by the fact that all but \$4,500 of the funds that the bank turned over appear to have been delivered to a receiver in bankruptcy appointed in a chapter XI proceeding involving one of the defendants in the state court proceeding. The trial court had awarded the remaining \$4,500 to the receiver appointed in the state court receivership proceeding.

In *Bergeron v. Session*⁶³ the court of civil appeals determined that an order awarding final compensation to a receiver and his accountant up to the date of hearing was not interlocutory, but was an appealable final order. In a subsequent opinion, the court held that the trial court erred in making a *final* award of the fees prior to the final accounting.⁶⁴ The latter opinion indicated that the appropriate procedure in cases of this type is to allow a receiver a partial, nonfinal advance prior to a final accounting;⁶⁵ such an order will be considered interlocutory and, therefore, not appealable. Theoretically, this approach solves two problems. First, it avoids the possibility of intermediate appeals. Secondly, it motivates the receiver to terminate the receivership proceeding as early as possible. To further add to this motivation, the court of civil appeals suggested that the partial advances should be materially less than the value of the services rendered by the receiver prior to the allowance.⁶⁶ In summary, the court held that a final award of partial fees is appealable and constitutes an abuse of discretion.

The court also considered in *Bergeron* the standards that a trial court should apply in determining the amount of awards and advances to be made. The court stated that compensation earned while acting in the capacity of a receiver must be determined separately from compensation for legal work performed, if any, because a receiver is not entitled to be paid at a legal rate for work that does not require legal skills.⁶⁷ In addition, the following were mentioned as controlling factors in ascertaining the value of the services of a receiver: (1) the nature, extent, and value of the administered estate; (2) the complexity and difficulty of the work; (3) the time spent; (4) the knowledge, experience, labor, and skill required of, or devoted by, the receiver; (5) the diligence and thoroughness displayed; and (6) the results accomplished.⁶⁸ Similar standards are also to be applied in determining the reasonable value of the services of the attorney for the receiver.⁶⁹ Finally, the court held that there is no right to trial by jury on the issue of the award of fees to the receiver.⁷⁰

The procedure for the appointment of a receiver was addressed in *Rubin v. Gilmore*.⁷¹ A trial court had appointed a receiver to take charge of a partnership business on the basis of findings that the partnership assets were in danger of being appropriated by one of the partners for his personal use. The appellant contended that the order appointing the receiver was unreasonably vague and was therefore invalid. The appellant also ar-

63. 554 S.W.2d 771 (Tex. Civ. App.—Dallas 1977, no writ).

64. *Bergeron v. Sessions*, 561 S.W.2d 551 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.) (appellee's name was misspelled in the first opinion).

65. *Id.* at 553.

66. *Id.* at 553 n.1.

67. *Id.* at 554.

68. *Id.* at 554-55.

69. *Id.* See also State Bar of Texas, Rules and Code of Professional Responsibility DR 2-106 (1971).

70. 561 S.W.2d at 554.

71. 561 S.W.2d 231 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).

gued that the trial court lacked authority to appoint the receiver because the applicant had not filed a bond as required by rule 695a.⁷² The court of civil appeals concluded that the order involved was not so vague as to be invalid; nevertheless, because the requirement of an applicant's bond is mandatory, the court ruled that noncompliance with rule 695a required reversal of the order of appointment.⁷³

*Parness v. Parness*⁷⁴ dealt with what constitutes appropriate conditions for the appointment of a receiver. In *Parness* the court of civil appeals reversed a trial court's order appointing a temporary receiver to take charge of and sell the parties' homestead pending a divorce action. The basis for the reversal was that a receiver should be appointed only in those instances where the property involved is in present danger of being lost, removed, or materially injured. Since there was no evidence of any such imminent danger or urgency, the court ruled that it was error for the trial court to appoint a receiver to sell the house.

In *Hubbard v. Lagow*⁷⁵ the Texas Supreme Court answered affirmatively the question whether a receiver appointed by a bankruptcy court in a chapter XI proceeding had standing to seek a writ of error appeal from a default judgment rendered against the debtor prior to the receiver's appointment. The rationale underlying the court's conclusion was that the chapter XI receiver constitutes the legal representative of the debtor under the terms of the Bankruptcy Act.⁷⁶ The court also held, citing to rule 610 of the Rules of Bankruptcy Procedure, that the petitioner, as a chapter XI receiver, was not required to obtain bankruptcy court approval as a prerequisite to the prosecution of the writ of error appeal.⁷⁷

II. SWORN ACCOUNTS AND ATTORNEYS' FEES

Several cases of major significance were decided during the survey period with respect to sworn account practice pursuant to rule 185.⁷⁸ In *Juarez v. Dunn*⁷⁹ the issue of the scope of rule 185 was considered in the context of a claim for personal services rendered by an architect under the terms of an express contract. The El Paso court of civil appeals held that the literal language of the rule extending the procedural benefits of sworn account practice beyond open accounts⁸⁰ involving sales of personalty

72. TEX. R. CIV. P. 695a.

73. See *Continental Homes Co. v. Hilltown Property Owners Ass'n, Inc.*, 529 S.W.2d 293 (Tex. Civ. App.—Fort Worth 1975, no writ).

74. 560 S.W.2d 181 (Tex. Civ. App.—Dallas 1977, no writ).

75. 567 S.W.2d 489 (Tex. 1978).

76. *Id.* at 492; see *Smith v. Gerlach*, 2 Tex. 424, 426 (1847), which states that a writ of error "can only issue at the instance of a party to the suit, or of one whose privity of estate, title, or interest appears from the record . . . or who may be the legal representative of such party."

77. 567 S.W.2d at 493; see FED. BANKR. R. 610.

78. TEX. R. CIV. P. 185.

79. 567 S.W.2d 223 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.).

80. An "open account" actually constitutes an implied in fact contract that arises from the business dealings of the parties. For example, the price term is usually an "open" term. See *Tomasic & Kieval, Sworn Accounts and Summary Judgment Proceedings in Texas: A*

should be given effect. Thus, pursuant to the holding in *Juarez*, sworn account practice is *not* limited to "transactions between persons in which there is a sale upon one side and a purchase upon the other, whereby title to personal property passes from one to the other, and the relation of debtor and creditor is thereby created by general course of dealing."⁸¹ With regard to the above, the statutory predecessor to rule 185⁸² was amended in 1931 to extend the procedural benefits of sworn account practice to claims based upon accounts stated⁸³ and to claims for personal services rendered.⁸⁴ Subsequently, the rule was amended to add claims for "labor done or labor or materials furnished."⁸⁵ Despite these amendments, the language quoted above from *Meaders v. Biskamp*⁸⁶ has been relied upon for the proposition that sworn account practice encompasses only sales of personalty on open account.⁸⁷ Furthermore, *Meaders* fostered another restriction on the scope of sworn account practice that is usually described as the "special contract" doctrine, which is that a suit on a sworn account is not based on "transactions between parties resting upon special contract."⁸⁸ A special contract has been defined as "one with peculiar provisions or stipulations not found in the ordinary contract relating to the same subject matter and such provisions are such as, if omitted from the ordinary contract, the law will never supply."⁸⁹ Claims for liquidated money demands based upon written contracts that would be considered special contracts are now clearly within the purview of rule 185.⁹⁰ It is therefore submitted that this obscure limitation should not be applied when the transaction made the basis of the action is otherwise within the literal purview of rule 185.⁹¹ With regard to the scope of a permissible claim for a liquidated money demand, it would appear that only those types of claims actually enumerated in rule 185 are within its coverage.

Proposed Change, 17 So. Tex. L.J. 147, 151 (1976). A stated account arises when there is an express agreement that the prices charged were usual, customary, and reasonable. See *Eastern Dev. & Inv. Corp. v. City of San Antonio*, 557 S.W.2d 823, 824 (Tex. Civ. App.—San Antonio 1977, writ ref'd n.r.e.).

81. *Meaders v. Biskamp*, 159 Tex. 79, 82-83, 316 S.W.2d 75, 78 (1958).

82. 1883 Tex. Gen. Laws, ch. 107, § 1, at 110.

83. See *Tomasic & Kieval*, *supra* note 80, at 153. But see *Unit, Inc. v. Ten Eyck-Shaw, Inc.*, 524 S.W.2d 330, 334 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.).

84. 567 S.W.2d at 226.

85. See *Tomasic & Kieval*, *supra* note 80, at 150.

86. 159 Tex. 79, 316 S.W.2d 75 (1958).

87. See *DeWees v. Alsip*, 546 S.W.2d 692, 694 (Tex. Civ. App.—El Paso 1977, no writ); *Robinson v. Faulkner*, 422 S.W.2d 209, 212-13 (Tex. Civ. App.—Dallas 1967, writ ref'd n.r.e.).

88. *Meaders v. Biskamp*, 159 Tex. 79, 83, 316 S.W.2d 75, 78 (1958). Although the origin of the special contract limitation is somewhat obscure, under the system of common law pleading the term "special contract" was used to denote an express or explicit contract as contrasted with a promise implied in law. H. BALLANTINE, *SHIPMAN ON COMMON-LAW PLEADING* 148-52 (3d ed. 1923).

89. *Eisenbeck v. Buttgen*, 450 S.W.2d 696, 702 (Tex. Civ. App.—Dallas 1970, no writ).

90. See *TEX. R. CIV. P.* 185.

91. See *Hollingsworth v. Northwestern Nat'l Ins. Co.*, 522 S.W.2d 242, 244 (Tex. Civ. App.—Texarkana 1975, no writ) (rule 185 "does not apply to transactions between parties resting upon special contracts other than those giving rise to the transactions mentioned in the rule").

Thus, the rule is probably unavailable except where the claim is for goods, wares and merchandise, personal services rendered, labor done, or labor or materials furnished.⁹² In *Juarez* the court also stated in the context of a suit for personal services that in order to be entitled to the procedural benefits of rule 185, the claimant

should swear to a systematic record of all charges and payments, entered in regular sequence . . . that is, that a statement or invoice [should] be set forth in the pleadings or by an attached and incorporated exhibit which clearly identifies the nature of the items constituting the sworn account, particularly where it is a suit for personal services.⁹³

In short, itemization is required in order to compel the opposing party to plead more than a general denial.

Several other cases decided during the survey period, however, perpetuate the notion that sworn account practice extends only to sales of personalty on open account. Suit was brought in *Ferguson v. Yorfino*⁹⁴ to recover overpayments allegedly made to a builder in connection with a written construction contract. The court held that a suit to recover money advanced under a contract is not a suit on a sworn account. While the court's holding is sensible insofar as this type of claim is not specifically set forth in rule 185, the court's reliance upon *Meaders v. Biskamp*⁹⁵ for a definition of the scope of the rule is misleading. Similarly, in *Dallas Eight, Ltd. v. Aaron Rents, Inc.*⁹⁶ a lessor brought suit based upon provisions contained in the lease in the form of a sworn account for rental monies allegedly due and for the value of some missing rented furniture. Because the supporting affidavits contained only conclusory statements, the court of civil appeals reversed the trial court's summary judgment in favor of the lessor.⁹⁷ In a statement unnecessary to the result reached, the court stated that a suit on a sworn account must be based upon a transaction involving a sale on one side and a purchase on the other whereby title to personalty passes from one party to the other.⁹⁸

The technical requirements imposed upon a party seeking to recover on an account were considered in *Minyard v. Southern Pipe & Supply Co.*⁹⁹ The defendant, who had failed to answer, attacked the default judgment entered against him by writ of error. Since the affiant's name did not ap-

92. See *Hollingsworth v. Northwestern Nat'l Ins. Co.*, 522 S.W.2d 242, 244 (Tex. Civ. App.—Texarkana 1975, no writ).

93. 567 S.W.2d at 226.

94. 570 S.W.2d 422 (Tex. Civ. App.—San Antonio 1978, no writ).

95. 159 Tex. 79, 316 S.W.2d 75 (1958). A careful reading of *Meaders* will indicate that the definition of sworn account set forth in the opinion was in connection with a construction of the words "sworn account" contained in TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1978-79).

96. 560 S.W.2d 778, 779 (Tex. Civ. App.—Tyler 1977, no writ).

97. *Id.* at 780.

98. *Id.* at 779. See also *Morgan v. Morgan*, 406 S.W.2d 347, 351 (Tex. Civ. App.—San Antonio 1966, no writ).

99. 563 S.W.2d 332 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.). Rule 185 requires that the claim be supported by an affidavit. See TEX. R. CIV. P. 185.

pear in the appropriate blank in the body of the affidavit, the defendant contended that the affidavit supporting the account was fatally defective in that it did not identify the signer of the affidavit as the person who appeared before the notary public. The court held that since the affidavit had been signed before a notary and contained a proper jurat, the omission was a mere clerical error which did not invalidate the affidavit.¹⁰⁰ The defendant also argued that the terminology in the invoices did not sufficiently describe the goods sold to him, upon which the plaintiff's claim was based. The court ruled, however, that the use of the terms "meter box," "gate valve," and "closet flange" in the invoices was sufficient because the items were described "in terms with recognized meanings in the English language."¹⁰¹

Defendants continued to be plagued by technical pleading problems during the survey period. In *Airborne Freight Corp. v. CRB Marketing, Inc.*¹⁰² the supreme court summarized the effect of a sworn account petition in proper form as follows:

It is settled that if the defendant fails to file a written denial under oath and in the form provided, he will not be permitted to dispute receipt of the items *or services* or the correctness of the stated charges The defendant may, however, assert defenses in the nature of confession and avoidance without filing a sworn denial if they are properly pleaded. . . . Of course, a sworn account is not prima facie evidence of the debt as against a stranger to the transaction.¹⁰³

Because the defendant in *Airborne* had neither filed a sworn denial nor pleaded an affirmative defense, the trial court's judgment for the plaintiff was affirmed.¹⁰⁴ Moreover, the supreme court held that it was not necessary to introduce the account formally into evidence when the defendant failed to plead a proper answer.¹⁰⁵

In *Aztec Pipe & Supply Co. v. Sundance Oil Co.*¹⁰⁶ the defendant's answer contained the following allegations: (1) an assertion that "[t]he claim on which plaintiff's claim is founded is wholly not just or true"; (2) a specific denial that the defendant requested the items involved; (3) a specific denial that the defendant requested the items at the prices charged; and (4) a specific denial that the defendant promised to pay for the materials. Each of the specific denials contained the statement that "said allegation is not just or true."¹⁰⁷ The court of civil appeals held that the denials did not meet the strict requirements of rule 185.¹⁰⁸ Fortunately for the defendant,

100. 563 S.W.2d at 333.

101. *Id.*

102. 566 S.W.2d 573 (Tex. 1978).

103. *Id.* at 574 (emphasis added; footnotes omitted).

104. *Id.* at 574-75.

105. *Id.* at 575.

106. 568 S.W.2d 401 (Tex. Civ. App.—Houston [1st Dist.] 1978), *writ ref'd n.r.e. per curiam*, 22 Tex. Sup. Ct. J. 91 (Nov. 18, 1978).

107. 568 S.W.2d at 402.

108. "[B]efore an announcement of ready for trial in said cause, [the defendant must] file a written denial, under oath, stating that each and every item is not just or true, or that some specified item or items are not just or true" TEX. R. CIV. P. 185; *see* Cal-Tex Beef

however, the court concluded that an affidavit filed by the defendant's president raised an issue of fact with respect to whether the defendant was a stranger to the account and was therefore not required to file a proper answer.¹⁰⁹ In refusing the application for writ of error, the Supreme Court of Texas wrote that the judgment of the lower court was correct because the invoice, or "joint interest statement," included not only the name of the defendant, but also the name of another company, thus raising a fact question as to whether the defendant was a party to the transaction.¹¹⁰

The stranger to the account exception was also considered in *Juarez v. Dunn*.¹¹¹ While it is apparent that a stranger need not file a sworn denial under rule 185, it is somewhat unclear who qualifies as a stranger and how the matter should be raised. In *Juarez* the plaintiff alleged that one of the defendants was a partner of the other defendant who had contracted with the plaintiff, and by definition could not be a stranger to the transaction in question. The noncontracting party filed a written denial of partnership under oath.¹¹² The court of civil appeals held that this denial was sufficient. In so doing, the court observed that prior case law seems to limit the stranger to the account exception to those situations in which the plaintiff's own pleadings or the exhibits reflected that the defendant was not a party to the original transaction.¹¹³ It now appears that it is possible to raise the "defense" by either a sworn denial under Rule 93 or perhaps as an "affirmative defense" to the special pleading requirements. If the latter characterization of the "defense" is accepted, summary judgment proof must be produced by the nonmovant.¹¹⁴

Several cases decided during the survey period addressed the recovery of attorneys' fees in the context of sworn account practice. In *Harvey v. Pedigo Oil Co.*¹¹⁵ the presentment requirement of article 2226,¹¹⁶ the pro-

Processors, Inc. v. Frozen Food Express, Inc., 530 S.W.2d 143, 144 (Tex. Civ. App.—Waco 1975, no writ) (the defendant's answer, accompanied by the proper affidavit, stated that "[t]he claim alleged in Plaintiff's petition which is the foundation of Plaintiff's action is wholly not just or true" and was considered sufficient).

109. 568 S.W.2d at 403-04.

110. 22 Tex. Sup. Ct. J. 91 (Nov. 18, 1978).

111. 567 S.W.2d 223 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.). For an additional discussion of this case, see notes 79-93 *supra*.

112. TEX. R. CIV. P. 93(f). See also *Booher v. Criswell*, 531 S.W.2d 844 (Tex. Civ. App.—Dallas 1975, no writ).

113. 567 S.W.2d at 227; see *Boysen v. Security Lumber Co.*, 531 S.W.2d 454 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ).

114. See *Brown v. Clark*, 557 S.W.2d 558, 560 (Tex. Civ. App.—Texarkana 1977, no writ). See also *Airborne Freight v. CRB Marketing, Inc.*, 566 S.W.2d 573 (Tex. 1978), wherein the defendant alleged that it had no record of contracting for the services and this was considered insufficient. See also *Aztec Pipe & Supply Co. v. Sundance Oil Co.*, 568 S.W.2d 401, 404 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.); *Brown v. Clark*, 557 S.W.2d 558, 561 (Tex. Civ. App.—Texarkana 1977, no writ).

115. 557 S.W.2d 167 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.).

116. TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1978-79) provides in part as follows:

Any person, corporation, partnership, or other legal entity having a valid claim against a person or corporation for services rendered, labor done, material furnished, overcharges on freight or express, lost or damaged freight or express, or stock killed or injured or suits founded upon a sworn account or

vision governing the award of attorneys' fees, was considered. The requirement was held to be satisfied when the claimant's lawyer went to see the defendant to talk to her about the account involved in the action, but was threatened with a whipping and told to contact the defendant's attorney before suit was filed. *Enriquez v. K&D Development & Construction, Inc.*¹¹⁷ is of more significance for its statement that it is no longer necessary for the claimant to "finally obtain judgment" in order to recover attorney's fees pursuant to article 2226.¹¹⁸ Prior to its amendment, the statute contained language to the effect that a judgment for all or part of the claim as presented was necessary.¹¹⁹ This language was excised, however, by the Sixty-fifth Legislature. The court of civil appeals noted that attorneys' fees are now recoverable "if at the expiration of thirty days after presentment of the claim 'payment for the just amount owing has not been tendered.'"¹²⁰ The El Paso court also indicated that there was no requirement that the plaintiff accept a tender of payment before judgment, which had been true even prior to the amendment.¹²¹

By its decision in *Welborn v. Woolfolk*,¹²² the Fort Worth court of civil appeals appears to have eliminated the "special contract" limitation on the recoverability of attorney's fees.¹²³ Plaintiff had provided labor and materials to the defendant at the defendant's request. When the defendant failed to pay, suit was instituted on an implied in fact contract theory. In addition, attorney's fees were sought pursuant to article 2226. The trial court denied the plaintiff recovery of attorney's fees on the theory of "special contract." In ruling otherwise, the court of civil appeals concluded that the special contract doctrine is at variance with the liberal construction provision of the civil statutes.¹²⁴ The court also concluded that the 1977 amendment to article 2226, which permits "suits founded on oral or written contracts," demonstrates that the special contract doctrine is not valid.¹²⁵

Several courts of civil appeals have held that the "special contract" doc-

accounts, or suits founded on oral or written contracts, may present the same to such persons or corporation or to any duly authorized agent thereof; and if, at the expiration of 30 days thereafter, payment for the just amount owing has not been tendered, the claimant may, if represented by an attorney, also recover, in addition to his claim and costs, a reasonable amount as attorney's fees.

117. 567 S.W.2d 40 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.).

118. *Id.* at 42.

119. See TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon 1971).

120. 567 S.W.2d at 42.

121. *Id.*

122. 560 S.W.2d 189 (Tex. Civ. App.—Fort Worth 1977, no writ).

123. See note 89 *supra* and accompanying text for definition of "special contract."

124. See TEX. REV. CIV. STAT. ANN. art. 10, § 8 (Vernon 1969), which provides:

The rule of the common law that statutes in derogation thereof shall be strictly construed shall have no application to the Revised Statutes; but the said statutes shall constitute the law of this State respecting the subjects to which they relate; and the provisions thereof shall be liberally construed with a view to effect their objects and to promote justice.

125. 560 S.W.2d at 191.

trine serves only as a limitation on the language of article 2226, which allows the recovery of attorney's fees in connection with suits founded upon a sworn account or accounts.¹²⁶ The supreme court has held that the term "sworn account" in article 2226 is restricted to transactions involving sales of personalty on open account.¹²⁷ While the "special contract" limitation can be justified as a limitation on the recovery of attorneys' fees when the only basis for recovery is the sworn account category in article 2226, there is no compelling precedential basis for extending the limitation to other categories in the section, such as claims for services rendered, labor done, or material furnished. A policy argument can be made that when parties make an express contract having no open terms, it is inappropriate to imply a provision for the recovery of attorneys' fees upon non-payment. This argument rests on the notion that the expectation of the breaching party is that a breach will result in liability on the contract and nothing more. On the other hand, article 2226 evidences a policy that attorneys' fees of a reasonable amount should be awarded to compensate a creditor who has presented a valid claim within the statute to the alleged debtor. This policy has little or nothing to do with the original expectations of the contracting parties. Hence, the "special contracts" limitation should be abandoned.

III. USURY

A. Guaranty/Suretyship Obligations

Two cases decided during the survey period clarified the application of the Texas usury laws to corporations. In *Houston Furniture Distributors, Inc. v. Bank of Woodlake, N.A.*¹²⁸ an individual serving as guarantor of a corporate obligation that was not usurious as to the corporation¹²⁹ attempted to assert usury as a defense to a suit on a note on the theory that the use of the corporate form was merely a subterfuge to evade the usury laws, and that he was the "true" borrower.¹³⁰ As support for this theory, the guarantor relied upon general language in *Micrea, Inc. v. Eureka Life Insurance Co. of America*,¹³¹ which suggests that if the loan was actually made to the guarantor, and that if the language of the loan documents is in

126. See, e.g., *Jackson v. Paulsel Lumber Co.*, 461 S.W.2d 161, 170 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.).

127. *Meaders v. Biskamp*, 159 Tex. 79, 82-83, 316 S.W.2d 75, 78 (1958); see note 81 *supra* and accompanying text.

128. 562 S.W.2d 880 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ).

129. TEX. REV. CIV. STAT. ANN. art. 1302—2.09 (Vernon Pam. Supp. 1963-78).

130. The claim or defense of usury is not available to a corporate guarantor unless the corporate rate is exceeded. *Universal Metals & Mach., Inc. v. Bohart*, 539 S.W.2d 874, 879 (Tex. 1976); *Skeen v. Glenn Justice Mortgage Co.*, 526 S.W.2d 252, 256 (Tex. Civ. App.—Dallas 1975, no writ).

131. 534 S.W.2d 348, 354 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.). See also *Skeen v. Glenn Justice Mortgage Co.*, 526 S.W.2d 252, 256 (Tex. Civ. App.—Dallas 1975, no writ) ("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").

fact fictional, the lower individual rate should apply.¹³² The court of civil appeals held that since the guarantor had demonstrated only that the lender had suggested the use of a corporation, the evidence was not sufficient to show that the loan transaction was a subterfuge to avoid the application of the usury statute.¹³³ In *Gulf Atlantic Life Insurance Co. v. Price*¹³⁴ a lender contended that a guarantor of a corporate obligation had no cause of action for usury even if the statutory corporate rate of interest was exceeded.¹³⁵ The court of civil appeals disagreed, and held that if interest is charged in excess of the maximum allowable corporate rate, a guarantor does have a cause of action.¹³⁶

B. "Charging" Cases

In *Killebrew v. Bartlett*¹³⁷ the plaintiff instituted a suit based on a sworn account. At the bottom of the invoices that supported the account was the following notice: "1 1/2% Charged Each Month on Your Unpaid Balance 30 Days After Purchase, 50¢ Minimum Charge."¹³⁸ In his original petition, the plaintiff claimed interest at one and one half percent each month on the balance of the account, although this claim was subsequently omitted from his amended petition. The evidence at trial reflected that "no amount for interest was ever added to the bills sent to the defendants and that no interest was charged to the defendants' account on the books of the company."¹³⁹ The jury found that plaintiff had not charged interest in excess of ten percent per annum. On appeal the legal and factual sufficiency of the evidence to support the jury's answer was challenged by the appellant. In straining to distinguish the Texas Supreme Court's holding in *Windhorst v. Adcock Pipe & Supply Co.*, that a "contract for, a charge of or receipt of usurious interest" triggers the usury penalties,¹⁴⁰ the Amarillo

132. 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."

133. 562 S.W.2d at 883. As a condition to making a loan, a lender can lawfully require that the loan be made to a corporate as opposed to an individual borrower; here, however, "the burden was on the defendants to offer competent summary judgment proof of some agreement, device or subterfuge to charge interest at a usurious rate." *Id.*

134. 566 S.W.2d 381 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.).

135. *Id.* at 384. The lender relied upon *Micrea v. Eureka Life Ins. Co.*, 534 S.W.2d 348, 354 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.), which contains the suggestion that "[r]ights of redress . . . are . . . restricted to those who are original parties to the usurious contract."

136. 566 S.W.2d at 384.

137. 568 S.W.2d 915 (Tex. Civ. App.—Amarillo 1978, no writ).

138. *Id.* at 917.

139. *Id.*

140. 547 S.W.2d 260, 261 (Tex. 1977). In *Windhorst* the court of civil appeals had held that the charging of interest in excess of the amount authorized by statute would not support the claim or defense of usury unless the interest was charged pursuant to an agreement. The supreme court concluded that the holding of the court of civil appeals was contrary to the plain meaning of TEX. REV. CIV. STAT. ANN. art. 5069—1.06(1) (Vernon 1971), which provides that "[a]ny person who contracts for, charges or receives interest which is greater than the amount authorized by this Subtitle, shall forfeit to the obligor twice the amount of interest contracted for, charged or received and reasonable attorney's fees." 547 S.W.2d at 261.

court held that since no amount of interest was actually added to the account, and since the evidence did not show any demand for payment,¹⁴¹ *Windhorst* was inapplicable.¹⁴²

The claimant seeking to recover on a sworn account did not fare as well in *Heaner v. Houston Sash & Door Co.*¹⁴³ The appellee provided goods and services to a corporation on an open account that was guaranteed by the appellant's husband prior to his death. Upon nonpayment, the appellee brought suit against both the corporation and the appellant in the capacity of executrix of the guarantor's estate. The appellant filed a sworn denial and counterclaimed for the penalties provided by article 5069—1.06 on the basis that the appellee had "charged" interest on the unpaid account balance at the rate of twelve percent beginning thirty days after the delivery of the merchandise.¹⁴⁴ Because no agreement was pleaded or proved concerning the interest charged, the court of civil appeals concluded that the Consumer Credit Code mandated a six percent interest rate applicable from the first day of January after the making of the account.¹⁴⁵ The "charge" of twelve percent therefore constituted a charge of double the amount of interest allowable under Texas law. This subjected the lender to a forfeiture of an amount equal to twice the amount of interest charged,¹⁴⁶ a forfeiture of all principal,¹⁴⁷ and liability for attorneys' fees.

The portion of the court of civil appeals judgment pertaining to Heaner's estate was reversed by the supreme court.¹⁴⁸ Mr. Heaner, chairman of the board of the corporation, had executed a separate letter agreement guaranteeing the corporation's account. The letter agreement further provided that Heaner would pay "interest from the due date of any [corporation] account to the date of payment at the rate of 12% per annum."¹⁴⁹ The supreme court concluded that since Heaner was an obligor only under his written guaranty, "not a co-obligor on the open account,"¹⁵⁰ his estate was not entitled to interpose the corporation's usury defense. The supreme

141. The original petition was never introduced at trial.

142. 568 S.W.2d at 917; *accord*, *Thomas Conveyor Co. v. Portec, Inc.*, 572 S.W.2d 361 (Tex. Civ. App.—Waco 1978, no writ).

143. 560 S.W.2d 525 (Tex. Civ. App.—Waco 1977, no writ), *aff'd in part, rev'd in part*, 22 Tex. Sup. Ct. J. 206 (Jan. 31, 1979).

144. 560 S.W.2d at 526. Compare the method of computation of interest used by the majority and dissenting judges in *Watson v. Cargill, Inc., Nutrena Div.*, 573 S.W.2d 35 (Tex. Civ. App.—Waco 1978, no writ).

145. 560 S.W.2d at 527. 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 open accounts, from the first day of January after the same are made."

146. *See* note 140 *supra*.

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

148. *Houston Sash & Door Co. v. Heaner*, 22 Tex. Sup. Ct. J. 206 (Jan. 31, 1979).

149. *Id.* at 207.

150. *Id.* at 209.

court further held that the interest rate specified in article 5069—1.04,¹⁵¹ which provides that the parties to a written contract may agree to a maximum rate of interest of ten percent per annum, applied to the guaranty agreement, rather than the six percent per annum rate, which constitutes the rate of interest that may be charged to an obligor on an open account. Since the guaranty provided for interest at a rate of twelve percent per annum, however, the ten percent rate was exceeded and Houston Sash & Door was subject to a forfeiture of an amount equal to twice the amount of interest contracted for and reasonable attorneys' fees pursuant to article 5069—1.06(1).¹⁵² Heaner's estate is theoretically entitled to recover any amounts that it is required to pay Houston Sash & Door from the corporation accommodated by the guaranty.

The supreme court's opinion in *Heaner* is also noteworthy because of the method seemingly employed to determine whether an amount in excess of double the amount allowed by article 5069—1.03¹⁵³ has been charged by the account creditor. For example, the opinion contains the following paragraph:

It is undisputed that Houston Sash charged interest on Bedford's account during the calendar year in which it was made. It is also apparent that the interest charged (twelve percent) is in excess of double the amount allowed by Article 5069-1.03; *i.e.*, in excess of twice zero. Houston Sash is, therefore, subject to the penalty forfeiture prescribed by Article 5069-1.06(2).¹⁵⁴

Under this method of analysis, it appears that anytime an account creditor charges any amount of interest attributable to the calendar year in which the account was made, the penalty provisions of article 5069—1.06(2) are applicable.¹⁵⁵

In *Miles v. W.C. Roberts Lumber Co.*,¹⁵⁶ a case decided prior to the supreme court's opinion in *Heaner*, an intermediate result was reached involving an action by the appellee on an open account. Since the appellant failed to prove that *no* agreement had been made with respect to a specified rate of interest on the account, the six percent rate implied by law in the absence of such agreement was inapplicable.¹⁵⁷ Thus, proof that the seller-appellee had assessed "service charges" of one percent per month on

151. TEX. REV. CIV. STAT. ANN. art. 5069—1.04 (Vernon 1971).

152. *Id.* art. 5069—1.06(1).

153. *Id.* art. 5069—1.03.

154. 22 Tex. Sup. Ct. J. at 209.

155. Assume that XYZ, Inc. purchases goods or services from ABC, Inc. such that the account between the purchaser and the seller is made on December 30, 1979. Assume that the first invoice sent by the seller to the purchaser "charges" interest on the unpaid balance at the rate of one percent per annum. Under the supreme court's reasoning has the seller forfeited the entire principal by charging interest on the account during the calendar year in which it was made? It is submitted that it will be more sensible to treat both the portion of the calendar year in which the account was made and during which interest was charged and the subsequent or successive calendar year as the period during which the per annum interest rate would be computed.

156. 561 S.W.2d 256 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.).

157. TEX. REV. CIV. STAT. ANN. art. 5069—1.03 (Vernon 1971).

the past due balance¹⁵⁸ was insufficient to show that the interest was in excess of double the allowable amount, as the appellant had failed to prove that six percent was the allowable amount. It should be observed that if the charge had exceeded twice the allowable amount, the lender would have been required to forfeit all principal, as was the case in *Heaner*. The court reasoned that because interest not in excess of ten percent per annum is authorized if agreed upon,¹⁵⁹ the borrower must prove that the interest was not charged pursuant to an agreement. The supreme court's opinion in *Heaner* casts doubt upon this conclusion.¹⁶⁰ Nevertheless, since the twelve percent per annum charge exceeded the ten percent maximum rate, the court imposed a penalty of double the amount of interest charged.¹⁶¹

C. Miscellaneous

Venue. Article 5069—1.06(3) of the Texas Consumer Credit Act provides the following with regard to actions brought for statutory penalties pursuant to article 5069—1.06(1) and (2):

[Such actions] shall be brought . . . in the county of the defendant's residence, or in the county where the interest in excess of the amount authorized by this Subtitle has been received or collected, or where such transaction had been entered into or where the parties who paid the interest in excess of the amount authorized by this Subtitle resided when such transaction occurred, or where he resides.¹⁶²

In *Allied Finance Co. v. Miro*¹⁶³ the cryptic words "or where he resides" were construed to mean where the plaintiff resides at the time of suit. Moreover, the court of civil appeals held that proof of usury is not required to establish proper venue when plaintiff relies for venue on the words "or where he resides."¹⁶⁴

Required Balances with Third Parties. In *Texas International Mortgage Co. v. M.P. Crum Co.*¹⁶⁵ a lender required the borrower to deposit a portion of the loan proceeds with a third party. Apparently, the deposit with the third party resulted in the issuance of a certificate of deposit that was given to the lender as collateral. The Dallas court of civil appeals concluded that this circuitous operation was not of the type in which "the lender required the borrower to keep part of the loan proceeds on deposit with the lender, thus permitting the lender to use it in making loans to others. Here the only benefit to the lender from the \$100,000 deposit was as security for the

158. 561 S.W.2d at 258.

159. See TEX. REV. CIV. STAT. ANN. art. 5069—1.02 (Vernon 1971).

160. The supreme court's opinion quotes a portion of the Waco civil appeals decision that indicates that the burden of producing evidence of an "agreement" is on the creditor: "The court of civil appeals stated: 'There was no agreement plead or proved by plaintiff whereby Bedford would pay a rate of interest on its open account with Houston Sash in excess of 6%.' 560 S.W.2d 525 at 526." 22 Tex. Sup. Ct. J. at 207 n.6.

161. 561 S.W.2d at 259; see note 140 *supra*.

162. TEX. REV. CIV. STAT. ANN. art. 5069—1.06(3) (Vernon 1971).

163. 568 S.W.2d 910 (Tex. Civ. App.—Waco 1978, no writ).

164. *Id.* at 911.

165. 564 S.W.2d 421 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.).

loan"¹⁶⁶ Hence, the court held that the true principal was not reduced by the amount deposited with the third party in testing for usury.¹⁶⁷

IV. CONSUMER CREDIT

The provisions of the Texas Consumer Credit Code were again the subject of litigation during the survey period. Chapter 7 of the Texas Consumer Credit Code, which relates to motor vehicle installment sales, regulates retail installment transactions between "retail buyers" and "retail sellers" of "motor vehicles." The statute defines the term "retail buyer" as "a person who agrees to buy or buys a motor vehicle other than principally for the purpose of resale, from a retail seller in a retail installment transaction."¹⁶⁸ Thus, the fact that the motor vehicle is not purchased primarily for personal, family, or household use is not determinative.¹⁶⁹ Despite this broad language, the court in *Hensley v. Lubbock National Bank*¹⁷⁰ concluded that the appellant's purchase of a motor vehicle from the appellee's assignor, for the purpose of helping out a third party and business associate, constituted a purchase that was principally for resale and the appellant was therefore not a "retail buyer." The court also overruled the appellant's contention that he was protected by the Federal Consumer Credit Protection Act.¹⁷¹ Because the appellant had purchased the motor vehicle for the purpose of "helping a friend," he was held not to be a "consumer" as defined in the federal act.¹⁷² Hence, the transaction did not qualify as a federal consumer credit transaction.¹⁷³

In *Mobile America Sales Corp. v. Rivers*¹⁷⁴ the trial court concluded that the defendants improperly failed to disclose that the physical damage insurance required by a retail installment contract executed in connection

166. *Id.* at 422. For an example of the kind of case distinguished by the court, see *First State Bank v. Miller*, 563 S.W.2d 572 (Tex. 1977).

167. 564 S.W.2d at 422; see *First State Bank v. Miller*, 563 S.W.2d 572 (Tex. 1978); *Tanner Dev. Co. v. Ferguson*, 561 S.W.2d 777 (Tex. 1977); *Nevels v. Harris*, 129 Tex. 190, 102 S.W.2d 1046 (1937).

168. TEX. REV. CIV. STAT. ANN. art. 5069—7.01(b) (Vernon 1971); see *Ford Motor Credit Co. v. Blocker*, 558 S.W.2d 493 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.).

169. See generally TEX. REV. CIV. STAT. ANN. art. 5069—6.01(a) (Vernon Supp. 1978-79) (retail installment sales). See also *id.* art. 5069—14.01(8).

170. 561 S.W.2d 885 (Tex. Civ. App.—Amarillo 1978, no writ).

171. 15 U.S.C. §§ 1601-1691 (1976).

172. 561 S.W.2d at 890. The federal act provides as follows:

The adjective "consumer," used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, household or agricultural purposes.

15 U.S.C. § 1602(h) (1976).

173. See also TEX. REV. CIV. STAT. ANN. art. 5069—14.01(a)(8) (Vernon Supp. 1978-79), defining "consumer" as

a person as defined by [art. 5069—1.01(e)], and the money, property, or services which are the subject of the transaction are primarily for personal, family, household, or agricultural purposes or are business or commercial transactions subject to the provisions of [arts. 5069—3.01 to —5.05, —7.01 to 7.10, —12.02 to —12.20].

174. 556 S.W.2d 378 (Tex. Civ. App.—San Antonio 1977, writ ref'd n.r.e.).

with the purchase of a mobile home was at a rate or premium not fixed or approved by the State Board of Insurance.¹⁷⁵ As a result, the court awarded penal damages in an amount of twice the time price differential,¹⁷⁶ default and deferment charges in the sum of \$27,218.52, and reasonable attorneys' fees.¹⁷⁷ Appellees contended that the statutory requirement of disclosure when the rate is not "fixed or approved" is unenforceable because of its uncertain meaning. They also argued that since the insurer's by-laws had been filed with the State Board of Insurance and had contained the rates or charges of the insurer, the rates had in fact been "fixed or approved." The court of civil appeals disagreed with both contentions and affirmed the award by the trial court of a partial summary judgment.¹⁷⁸

In *Smail v. Sequoya Mobile Homes, Inc.*¹⁷⁹ the appellants contended that the seller of a mobile home and its assignee violated both chapter 7 of the Texas Consumer Credit Code and regulation Z,¹⁸⁰ promulgated under section 128(b) of the Federal Truth in Lending Act.¹⁸¹ With regard to the state law allegations, the appellants argued that the retail installment contract entered into by them violated articles 5069—7.02(6)(b),¹⁸² 5069—7.02(3),¹⁸³ and 5069—7.06(3).¹⁸⁴ Although the retail installment contract recited a cash down payment in excess of the actual down payment, the court concluded there was no violation of article 5069—7.02(6)(b) because the purpose of the incorrect disclosure in this instance was to facilitate financing for the transaction. The court noted that the buyers had participated in the making of the incorrect recital for their own benefit and were

175. TEX. REV. CIV. STAT. ANN. art. 5069—7.06(3) (Vernon 1971) provides:

[W]hen any requested or required insurance is sold or procured by the seller or holder at a premium or rate of charge not fixed or approved by the State Board of Insurance, the seller or holder shall include such fact [in a disclosure statement] . . . Such statement or statements may be made in conjunction with or as a part of the retail installment contract . . .

176. The penalty provision relied upon by the court was *id.* art. 5069—8.01(b) (Vernon Supp. 1978-79).

177. 556 S.W.2d at 380. Article 5069—8.01(b) was amended by the 65th Legislature to limit the penalties for violations of the disclosure requirements of subtitle two for transactions entered into after June 30, 1976, to an amount not to exceed \$4,000 in a transaction in which the amount financed is in excess of \$5,000. The transaction in question occurred in 1974.

178. 556 S.W.2d at 381-82.

179. 568 S.W.2d 385 (Tex. Civ. App.—Amarillo 1978), *rev'd*, 22 Tex. Sup. Ct. J. 319 (Apr. 25, 1979).

180. 12 C.F.R. § 226.801(b) (1978).

181. 15 U.S.C. § 1638(b) (1976).

182. TEX. REV. CIV. STAT. ANN. art. 5069—7.02(6) (Vernon 1971) provides: "The retail installment contract shall specifically set out the following items: . . . (b) The amount of the buyer's down payment, if any, specifying the amounts paid in money and in goods traded in . . ."

183. *Id.* art. 5069—7.02(3) provides: "A retail installment contract shall also contain, in a size equal to at least ten-point bold type, a specific statement that liability insurance coverage for bodily injury and property damage caused to others is not included, if that is the case."

184. *Id.* art. 5069—7.06(3) provides that when insurance is required in connection with a contract or agreement, that requirement must be disclosed "clearly and conspicuously."

not harmed by the transaction.¹⁸⁵ In addition, the court held that the contract's disclosure that liability insurance coverage was not included was sufficient on its face,¹⁸⁶ as was the disclosure pertaining to required insurance.¹⁸⁷ The appellants contended that the retail installment contract violated federal law¹⁸⁸ since the buyer's signature was not below the full content of the document, and the agreement did not state on both sides thereof the wording: "NOTICE: See other side for important information."¹⁸⁹ The court of civil appeals held that the contract violated section 226.801.¹⁹⁰ Hence, recovery of \$1,000 plus interest was held appropriate.¹⁹¹ The supreme court reversed the holding of the court of civil appeals because the section applies only to documents processed by mechanical and electronic equipment. Moreover, the court pointed out that section 226.801 is not a "regulation," but only a Federal Reserve Board interpretation of regulation Z.

In *Garza v. Allied Finance Co.*¹⁹² the appellee finance company instituted suit on an installment note secured by the appellants' household goods. The appellants claimed that the appellee had violated the regulation Z requirement that provides for the identification of the property to which a security interest relates:

[Regulation Z requires] a clear identification of the property to which the security interest relates or, if . . . not identifiable, an explanation of the manner in which the creditor retains or may acquire a security interest in such property which the creditor is unable to identify. . . . If after-acquired property will be subject to the security interest . . . this fact shall be clearly set forth in conjunction with the description or identification of the type of security interest held, retained or ac-

185. 568 S.W.2d at 389.

186. With regard to this point, the court stated:

The contract states in bold type that "liability insurance for bodily injury and property damage to others is not included unless such coverage is a part of a mobile homeowners policy purchased hereunder." The contract conclusively shows on its face that a "mobile homeowners policy" was not purchased under the agreement.

Id. at 390.

187. *Id.* at 389.

188. 12 C.F.R. § 226.801(b) (1978) provides in part:

[T]he disclosures required under § 226.8 shall . . . be made on the face of that document, on its reverse side, or on both sides: *Provided*, that the amount of the finance charge and the annual percentage rate shall appear on the face of the document, and, if the reverse side is used, the printing on both sides of the document shall be equally clear and conspicuous, both sides shall contain the statement, "NOTICE: See other side for important information," and the place for the customer's signature shall be provided following the full content of the document.

189. 568 S.W.2d at 388. *See also* McDonald v. Savoy, 501 S.W.2d 400, 406 (Tex. Civ. App.—San Antonio 1973, no writ).

190. 568 S.W.2d at 391.

191. *Id.* at 390; *see* 15 U.S.C. § 1640(a) (1976). Similarly, in *Ford Motor Credit Co. v. Blocker*, 558 S.W.2d 493 (Tex. Civ. App.—El Paso 1977, no writ), a creditor's failure to use the required term "total of payments" in connection with the disclosure of the sum of payments was held to be in violation of § 226.8(b)(3). *See* 12 C.F.R. §§ 226.8(b)(3), .807(b)(1) (1978).

192. 566 S.W.2d 57 (Tex. Civ. App.—Corpus Christi 1978, no writ).

quired.¹⁹³

The disclosure statement provided to the appellants identified the collateral as "household goods" and indicated that after-acquired household goods were included. The statement did not disclose, however, that the security interest under an after-acquired property clause did not attach to consumer goods "unless the debtor acquires rights in them within ten days after the secured party gives value."¹⁹⁴ The Corpus Christi court of civil appeals held that the failure to make this disclosure constituted a truth-in-lending violation. Moreover, the disclosures were held not to be "in conjunction with" each other since the after-acquired property disclosure was located at the bottom of the disclosure statement, while the description of the collateral was at the top.¹⁹⁵

Perhaps of more significance in *Garza* is the court's holding that the appellants' claim was not barred by the one year statute of limitations contained in the federal act.¹⁹⁶ The claim was asserted defensively after the time had passed for bringing an original action.¹⁹⁷ Relying upon cases from other jurisdictions and an early Texas case that appears to hold just the opposite,¹⁹⁸ the court of civil appeals held that since the defendants' claim involved the same transaction that resulted in the note sued upon, the claim could be asserted defensively as recoupment.¹⁹⁹

In *Crowder v. First Federal Savings & Loan Association*²⁰⁰ the secondary mortgage provisions of the Texas Consumer Credit Code were construed to authorize a provision in a note and secondary mortgage contract for a fifteen percent attorneys' fee in the event of default, despite specific statutory language prohibiting "all charges whatsoever" in connection with the collecting or enforcing of a loan, except those few which are expressly permitted.²⁰¹ The appellants had executed two notes secured by secondary mortgages on their homestead to finance the construction of a swimming

193. 12 C.F.R. § 226.8(b)(5) (1978).

194. TEX. BUS. & COM. CODE ANN. § 9.204(d)(2) (Vernon 1968).

195. 566 S.W.2d at 65.

196. 15 U.S.C. § 1640(e) (1976) provides: "Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation."

197. 566 S.W.2d at 62.

198. *United States v. Western Pac. Ry.*, 352 U.S. 59 (1956); *Bull v. United States*, 295 U.S. 247 (1935); *Moriss-Buick Co. v. Davis*, 127 Tex. 41, 91 S.W.2d 313 (1936).

199. 566 S.W.2d at 63. The court further stated that "[t]he defense of recoupment may be asserted even though the same claim asserted as an independent cause of action would be barred by limitations." *Id.* See also TEX. REV. CIV. STAT. ANN. art. 5539c (Vernon Supp. 1978-79), which provides:

In the event a pleading asserting a cause of action is filed under circumstances where at the date when answer thereto is required by law a counterclaim or cross claim would otherwise be barred by the applicable statute of limitation, then the party so answering may, within 30 days following such answer date file a counterclaim or cross claim in such cause and the period of limitation is hereby extended for such period of time provided that the counterclaim or cross claim arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim.

200. 567 S.W.2d 550 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.).

201. *Id.* at 552.

pool and a tennis court. Although not in default, the appellants instituted a suit against the appellee for statutory penalties alleging that the "attorney's fees upon default" provisions contained in the instruments were violative of article 5069—5.02(5).²⁰² The court interpreted the statutory section as not specifically prohibiting contractual provisions pertaining to attorneys' fees in the event of default.²⁰³ The court of civil appeals concluded that "[i]t is inconceivable that . . . the contracting for attorney's fees in the event of default amounted to a deceptive or abusive practice, when such practice has never been considered deceptive or abusive or potentially usurious by the courts."²⁰⁴

In *Anguiano v. Jim Walter Homes, Inc.*²⁰⁵ the appellants entered into a contract with a builder for the construction of a new house on a lot owned by appellants. The builder agreed to construct the dwelling for a cash price of \$13,910 plus a "time price differential"²⁰⁶ of \$15,124, for a total of \$29,034. The question presented was whether chapter 6 of the Texas Consumer Credit Code, by its terms applicable to retail installment transactions, also applies to installment credit contracts for the construction of a new home. The definition in Texas of a retail installment transaction is as follows:

[A]ny transaction in which a retail buyer purchases *goods or services* from a retail seller pursuant to a retail installment contract or a retail charge agreement . . . which provides for a time price differential . . . and under which the buyer agrees to pay the unpaid balance in one or more installments, together with a time price differential.²⁰⁷

Thus, whether a new house constituted a good or not was determinative. According to chapter 6, the word "goods" includes

all tangible personal property when purchased primarily for personal, family or household use and not for commercial or business use, including such property which is furnished or used at the time of sale or subsequently, in the modernization, rehabilitation, repair, alteration, improvement or construction of real property so as to become a part

202. TEX. REV. CIV. STAT. ANN. art. 5069—5.02(5) (Vernon 1971) provides:

In addition to the authorized charges provided in this Chapter no further or other charge[s] or amount whatsoever shall be directly, or indirectly, charged, contracted for, or received. This includes (but is not limited by) all charges such as fees, compensation, bonuses, commissions, brokerage, discounts, expenses and every other charge of any nature whatsoever, whether of the types listed herein or not. Without limitation of the foregoing, such charges may be any form of costs or compensation whether contracted for or not, received by the lender, or any other person, in connection with (a) the investigating, arranging, negotiation, procuring, guaranteeing, making, servicing, collecting or enforcing of a loan

203. 567 S.W.2d at 552.

204. *Id.* at 554.

205. 561 S.W.2d 249 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.).

206. Under the time price differential doctrine, Texas courts have not treated the difference between a cash price and a credit price as "interest," even when the credit price is or exceeds the cash price plus lawful interest. *See* *Lamb v. Ed Maker, Inc.*, 368 S.W.2d 255 (Tex. Civ. App.—Dallas 1963, no writ).

207. TEX. REV. CIV. STAT. ANN. art. 5069—6.01(e) (Vernon Supp. 1978-79) (emphasis added).

thereof whether or not severable therefrom.²⁰⁸

The court of civil appeals held that chapter 6 applies "to the initial erection of structures as well as [work done on] pre-existing structures."²⁰⁹ Hence, the contract was required to be in conformity with the remaining statutory provisions of chapter 6 in order for the builder to avoid the statutory penalties.²¹⁰

Prior to its amendment by the Sixty-fifth Legislature, article 5069—6.05²¹¹ contained a prohibition upon the granting of a first lien upon real estate to secure a contractual monetary obligation, except when such a lien was created by the recording of an abstract of judgment. Since the contract under consideration in *Anguiano* granted appellee a first lien, appellee was held subject to the statutory penalty of twice the amount of time price differential contracted for, or \$30,248. The Sixty-fifth Legislature amended article 5069—6.05 to permit the acquisition of a first lien so long as the time price differential does not exceed an annual percentage rate of ten percent.²¹²

The venue provision contained in subtitle two of the Texas Consumer Credit Code, in effect prior to its amendment by the Sixty-fifth Legislature, was construed in *Velasquez v. Schuehle*.²¹³ Analyzing the language of article 5069—8.04²¹⁴ as it read prior to its amendment by the Sixty-fifth Legislature, the court of civil appeals concluded that venue was proper in the county where the action was filed because the plaintiff resided in Bexar County, the county of suit,²¹⁵ and because the transaction was entered into

208. *Id.* art. 5069—6.01(a) (emphasis added).

209. 561 S.W.2d at 253.

210. *See* TEX. REV. CIV. STAT. ANN. arts. 5069—8.01-.02 (Vernon Supp. 1978-79).

211. 1967 Tex. Gen. Laws ch. 274, § 2, at 646.

212. TEX. REV. CIV. STAT. ANN. art. 5069—6.05 (Vernon Supp. 1978-79) states:
No retail installment contract or retail charge agreement shall:

(7) Provide for or grant a first lien upon real estate to secure such obligation, except, . . .

(b) such lien as is provided for or granted by a contract or series of contracts for the sale or construction and sale of a structure to be used as a residence so long as the time price differential does not exceed an annual percentage rate of 10 percent.

213. 562 S.W.2d 1 (Tex. Civ. App.—San Antonio 1977, no writ).

214. TEX. REV. CIV. STAT. ANN. art. 5069—8.04 (Vernon Supp. 1978-79) provides: "Actions under this Chapter may be brought in the county where the transaction was entered into or where the Defendant resides at the time the action was filed . . ." Prior to its amendment by the 65th Legislature the section provided:

All such actions . . . shall be brought . . . in the county of defendant's residence, or in the county where the interest, time price differential or other charge in excess of the amount authorized by this Subtitle shall have been received or collected, or where such transaction has been entered into or where the parties who paid the interest, time price differential or other charge in excess of the amount authorized in this Subtitle resided when such transaction occurred, or where he resides.

Id. art. 5069—8.04 (Vernon 1971). Compare TEX. REV. CIV. STAT. ANN. art. 5069—1.06(3) (Vernon 1971).

215. 562 S.W.2d at 3; *cf.* *Donald v. Agricultural Livestock Fin. Corp.*, 495 S.W.2d 592 (Tex. Civ. App.—Fort Worth 1973, no writ) (proof of party's residence in county at time of suit established venue).

in that county.²¹⁶ It is currently uncertain whether proof of a cause of action will be required under the amended statute to sustain venue "where the transaction was entered into" under amended article 5069—8.04.

V. DECEPTIVE TRADE PRACTICES ACT

In *Spradling v. Williams*²¹⁷ the Texas Supreme Court considered the method of special issue submission in an action brought under the Deceptive Trade Practices—Consumer Protection Act (DTPA).²¹⁸ The plaintiff-appellee alleged that the appellant had made deceptive representations about a pleasure boat that he sold the appellee. The issues submitted in the trial court were: (1) whether a particular representation had been made; (2) whether the representation constituted a deceptive trade practice; and (3) whether the representation was relied upon. The court defined a deceptive trade practice as one "which has the capacity to deceive an average or ordinary person, even though that person may have been ignorant, unthinking or credulous."²¹⁹ Appellant contended that this instruction was erroneous insofar as it reduced the plaintiff's burden of proof. The supreme court, however, held that the definition was proper. Subsection 17.46(c)²²⁰ provides that Texas courts are to be guided by the interpretations given by the federal courts to section 5(a)(1) of the Federal Trade Commission Act.²²¹ The supreme court concluded that the definition given by the trial court had been approved by the federal courts.²²²

The appellant also complained that the trial court erred in instructing the jury "that the term 'false, misleading, or deceptive' acts or practices includes, but is not limited to the following acts,"²²³ and then listing the five acts allegedly committed by the defendant. The supreme court held that the instruction was erroneous because if subsection 17.46(b), which contains a non-exclusive "laundry list" of specific legislatively defined deceptive trade practices, declares a practice to be unlawful, "there is no need

216. 562 S.W.2d at 3. Apparently, the court of civil appeals held that since the nature of plaintiff's cause of action was noncompliance with the disclosure requirements, proof that the retail installment contract was not completed so as to make the disclosures constituted proof of a cause of action. There is, however, a suggestion in the opinion that proof of a cause of action is not necessary when the venue exception relied upon is "where such transaction was entered into." Cf. *National Mortgage Corp. of America v. Maxwell*, 541 S.W.2d 626 (Tex. Civ. App.—Beaumont 1976, no writ) (plaintiffs were not residents of the county in which suit was filed; the court held that proof that the transaction was usurious was necessary to maintain venue).

217. 566 S.W.2d 561 (Tex. 1978).

218. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1978-79). Originally passed in 1973, the DTPA was amended in 1976 and 1977.

219. 566 S.W.2d at 562.

220. TEX. BUS. & COM. CODE ANN. § 17.46(c) (Vernon Supp. 1978-79).

221. 15 U.S.C. § 45(a)(1) (1976). The 65th Legislature amended § 17.46(c) in 1977 to provide that in private damage actions, the courts should look to interpretations of only the federal courts; prior to the amendment courts were directed to be guided by the interpretations of the Federal Trade Commission as well.

222. 566 S.W.2d at 563. See *Florence Mfg. Co. v. J.C. Dowd & Co.*, 178 F.73, 75 (2d Cir. 1910). But see *Lynn, Anatomy of a Deceptive Trade Practices Case*, 31 Sw. L.J. 867, 869-74 (1977).

223. 566 S.W.2d at 563.

for an issue which asks if it is deceptive. If subsection 17.46(b) does not list the act, the court should not instruct the jury that the act is deceptive, but should leave that to an inquiry to the jury."²²⁴ Nevertheless, the supreme court concluded that the error about the unlisted acts was harmless because there was evidence of at least one act or practice included in subsection 17.46(b).²²⁵

In *Singleton v. Pennington*²²⁶ the precise question addressed in the court's original opinion was whether the DTPA imposes liability for an innocent misrepresentation by a seller of secondhand goods who is not in the business of selling such goods. The defendant had represented that a boat sold to the plaintiff was in "excellent condition," "perfect condition," and "just like new."²²⁷ The statements were false, but the trial court found that the defendant did not make the false statements knowingly or recklessly. The trial court rendered judgment for the plaintiff for actual damages and, pursuant to a pretrial stipulation, exemplary damages of \$500. On appeal, the defendant contended that the DTPA, which declares unlawful "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce,"²²⁸ did not apply to him since he was not a seller "in the business of selling."²²⁹ The court of civil appeals, however, concluded that the terms "trade" and "commerce" as defined in section 17.46(b)(6) apply to any sale of goods whether or not made in the course of the seller's business.²³⁰ Hence, had there been no stipulation, treble damages would have been mandatory.²³¹ In a strong dissent, Justice Akin concluded that the DTPA "applies only to an individual or business organization which, in the ordinary course of business, sells or leases goods or services to consumers."²³² Section 17.46(c) directs the courts to be guided by the section 17.46(b)²³³ laundry list and the federal court interpretations of section 5(a)(1) of the Federal Trade Commission Act (FTCA)²³⁴ in determining what constitutes a deceptive trade practice under the DTPA. According to Justice Akin's opinion, the fact situation in *Singleton* "does not fall within the ambit" of a specific subdivision of sec-

224. *Id.* at 564.

225. *Id.* In a concurring opinion, Chief Justice Greenhill indicated that he had "grave doubts" about the constitutionality of a treble damage award for deceptive acts or practices not included in the laundry list of § 17.46(b). In this regard he stated:

It is one thing for the Legislature to create a cause of action in tort or contract for actual damages caused by reliance on unfair and deceptive trade practices; but it is another thing for it to create a penalty of triple damages for the violation of unwritten, unlisted and unspecified unlawful acts.

Id. at 565.

226. 568 S.W.2d 367 (Tex. Civ. App.—Dallas 1977, writ granted).

227. 568 S.W.2d at 369.

228. TEX. BUS. & COM. CODE ANN. § 17.46(a) (Vernon Supp. 1978-79).

229. 568 S.W.2d at 370.

230. *Id.*

231. *See* Woods v. Littleton, 554 S.W.2d 662 (Tex. 1977), in which the court held that treble damages are mandatory rather than permissive for a violation of the DTPA.

232. 568 S.W.2d at 372.

233. *See* TEX. BUS. & COM. CODE ANN. § 17.46(c) (Vernon Supp. 1978-79).

234. 15 U.S.C. § 45(a)(1) (1976).

tion 17.46(b); therefore, the court's interpretation of deceptive trade practice should be guided by the federal court interpretations of the FTCA. Federal courts have held section 5(a)(1) of the FTCA applicable only to "unfair acts of traders."²³⁵ Justice Akin therefore concluded that liability under the general language of section 17.46(a) applies only to sellers in the business of selling, not to isolated transactions between individuals.²³⁶ Ultimately, Justice Akin's opinion was based on his view that a one-time seller should not be subjected to treble damages and attorneys' fees for an innocent misrepresentation since the purpose of the DTPA is "to protect the public generally rather than to address private wrongs."²³⁷

On rehearing the court of civil appeals addressed the defendant's argument that section 17.46(a) of the DTPA is unconstitutionally vague because it has no definition of "[f]alse, misleading, or deceptive acts or practices."²³⁸ The court's opinion was limited to the transaction in question, and focused on the issue of whether section 17.46(a) put the defendant on notice that an unintentional misrepresentation would make him subject to the treble damages provision of the Act.²³⁹ In determining that the DTPA was not unconstitutionally vague insofar as the specific fact situation in *Singleton* was concerned, the court set forth several interpretative principles.

If an alleged deceptive trade practice is of the type included in the section 17.46(b) laundry list of deceptive acts, the language of the subsection is controlling since the courts are to be guided by section 17.46(b) "to the extent possible."²⁴⁰ Thus, if the subsection requires an intent to deceive, "the alleged deceptive act is not in violation of the Act unless the specified intent to deceive is shown."²⁴¹ According to the court, subsection 17.46(b)(13), which refers to "statements of fact concerning the need for parts, replacement, or repair service" was applicable to the defendant's statement that the boat was "just like new." Since subsection 17.46(b)(13) requires that the statement be made "knowingly,"²⁴² and since the defendant's misrepresentation was not made knowingly, the court set aside the trial court's award of damages to the plaintiff.

The court of civil appeals also clarified the relationship between section

235. 568 S.W.2d at 373; see text at notes 241-44 *infra*.

236. Federal Trade Comm'n v. Klesner, 280 U.S. 19, 25-26 (1929).

237. 568 S.W.2d at 373. In this regard, Justice Akin stated:

[N]o public interest of the people of this state will be served by making a person who sells secondhand goods previously purchased for his own use liable for treble damages for an innocent misrepresentation. I see no logical reason to treat a one-time seller the same as those who are in the business of selling goods or services to the public, particularly with respect to treble damages and attorney's fees.

Id.

238. TEX. BUS. & COM. CODE ANN. § 17.46(a) (Vernon Supp. 1978-79).

239. See *id.* § 17.50(b)(1).

240. *Id.* § 17.46(c).

241. 568 S.W.2d at 380.

242. TEX. BUS. & COM. CODE ANN. § 17.46(b)(13) (Vernon Supp. 1978-79) provides that "knowingly making false or misleading statements of fact concerning the need for parts, replacement, or repair service" is a deceptive trade practice.

17.46(a) and section 17.46(b), explaining that an act "of a sort not referred to" in the section 17.46(b) laundry list may nonetheless be a deceptive trade practice within the meaning of section 17.46(a).²⁴³ It is perhaps significant that the court did not hold that a showing of intent is always required under section 17.46(a). Rather, it merely held that the section would not be subject to a vagueness challenge if a showing of intent were required.²⁴⁴ Since section 17.46(b)(13), the relevant section in *Singleton*, supplies an intent requirement, the court did not reach the question whether section 17.46(a) would be unconstitutionally vague when not construed in conjunction with a subsection of 17.46(b) that supplies an intent requirement. The court did hold, however, that "a wrongful intent to take advantage of the buyer" is necessary to prove an "unconscionable action" under section 17.50(a)(3) of the DTPA.²⁴⁵

The Waco court of civil appeals further construed section 17.50 of the DTPA in *Woo v. Great Southwestern Acceptance Corp.*²⁴⁶ Woo asserted a counterclaim in the trial court for alleged violations under subsections 17.50(a)(1), (3), and (b)(1) of the DTPA in connection with the purchase of a franchise from defendants. The opinion considered the term "adversely affected"²⁴⁷ and determined the meaning of "actual damages"²⁴⁸ as used in the DTPA. The defendants on the counterclaim argued that the proper measure of actual damages was the difference between the consideration paid and the value of the franchise. Woo, on the other hand, contended that she was entitled to receive her actual pecuniary outlay without regard to the value of the franchise. The court held that the term "actual damages" should be construed liberally, and permitted Woo the consideration paid by her for the distributorship as actual damages.²⁴⁹

The measure of damages under the DTPA was also a key issue in *Reiger v. DeWylf*.²⁵⁰ In *Reiger* a defendant filed a counterclaim to a plumber's suit in quantum meruit and sought damages under the DTPA. The jury found, however, that the counterclaimant had suffered no actual damages. Following *Cordrey v. Armstrong*,²⁵¹ the court of civil appeals held that in a case seeking damages a claimant must sustain actual damages before a

243. *Id.* § 17.50(a)(3) allows a consumer to maintain a cause of action if he has been adversely affected by "any unconscionable action or course of action by any person."

244. For a scathing criticism of the court's opinion on rehearing, see Maxwell, *Court Questions Whether § 17.46(a) is Unconstitutionally Vague in Certain Situations*, 4 CAVEAT VENDOR 63 (1978).

245. 568 S.W.2d at 382.

246. 565 S.W.2d 290 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.).

247. TEX. BUS. & COM. CODE ANN. § 17.50(a) (Vernon Supp. 1978-79) (a consumer may maintain an action if he has been adversely affected by certain deceptive acts or practices).

248. *Id.* § 17.50(b) provides that "[i]n 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."

249. Because the counterclaimant had sold portions of her franchise rights, amounts she had received on the sale were deducted from the original consideration before damages were trebled. 565 S.W.2d at 298. See also *Cantrell v. First Nat'l Bank*, 560 S.W.2d 721 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.).

250. 566 S.W.2d 47 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.).

251. 553 S.W.2d 798, 799 (Tex. Civ. App.—Beaumont 1977, no writ).

recovery of attorneys' fees or other recovery can be obtained under the DTPA.

The Houston court of civil appeals further clarified the damages provision of the DTPA²⁵² in *Riverside National Bank v. Lewis*.²⁵³ The court held that a plaintiff may not recover both exemplary damages and treble damages for the same act "as that would amount, at least in part, to a double recovery of exemplary damages."²⁵⁴ The appellee in *Riverside* sought to transfer a car loan from the original lender to the appellant. Initially, the appellant-bank agreed to refinance the car, but later refused to do so. The appellee's car was consequently repossessed and sold by the first lender. The jury found that appellant's action violated the DTPA.²⁵⁵ The court of appeals held that appellee was a consumer,²⁵⁶ that an extension of credit is a service,²⁵⁷ and that the DTPA therefore applies to a bank agreement to extend credit.

In *Burnett v. James*²⁵⁸ the appellant brought suit to recover under a retail installment contract governing the sale and installation of a central air conditioning unit in appellee's home. The appellee counterclaimed alleging that the capacity of the unit had been misrepresented. The trial court granted rescission of the retail installment contract pursuant to subsection 17.50(b)(4)²⁵⁹ and awarded attorneys' fees. The counterclaim, however, did not contain a prayer for rescission. As a result, the court of civil appeals reversed, holding that rescission must be prayed for specifically.²⁶⁰ The fact that subsection 17.50(b)(4) provides for the recovery of "any other relief which the court deems proper" did not excuse the special pleading requirement.²⁶¹ As a result of the court's conclusion that rescission should not have been granted absent a proper pleading, the court also held that the award of attorneys' fees was improper.²⁶² Nevertheless, in the interest

252. TEX. BUS. & COM. CODE ANN. § 17.50(b) (Vernon Supp. 1978-79).

253. 572 S.W.2d 553 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ granted). The supreme court granted *Riverside's* application for writ of error on two points: (1) that the court of civil appeals erred in holding that there had been a waiver of the defense of illegality, and (2) that the lower court's award of treble damages and attorneys' fees was unconstitutional insofar as it constituted the imposition of penal damages on unspecified acts prohibited by the DTPA. *Riverside Nat'l Bank v. Lewis*, 22 Tex. Sup. Ct. J. 215 (Feb. 10, 1979).

254. 572 S.W.2d at 561. Compare the court's language with TEX. BUS. & COM. CODE ANN. § 17.43 (Vernon Supp. 1978-79).

255. 572 S.W.2d at 561.

256. TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon Supp. 1978-79) defines "consumer" as one "who seeks or acquires by purchase or lease, any goods or services."

257. *Id.* § 17.45(2) defines "services" as "work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods." See also *Woods v. Littleton*, 554 S.W.2d 662, 667 (Tex. 1977), which defines services as an "action or use that furthers some end or purpose; conduct or performance that assists or benefits someone or something; deeds useful or instrumental toward some object."

258. 564 S.W.2d 407 (Tex. Civ. App.—Dallas 1978, writ dismissed).

259. TEX. BUS. & COM. CODE ANN. § 17.50(b)(4) (Vernon Supp. 1978-79) provides in part that in a suit filed pursuant to the DTPA, a consumer who prevails may obtain "any other relief which the court deems proper."

260. 564 S.W.2d at 409.

261. See note 259 *supra*.

262. 564 S.W.2d at 409.

of justice, the court remanded the case for retrial.²⁶³

In *MacDonald v. Mobley*²⁶⁴ the plaintiffs based their claim for recovery of damages in part upon a breach of an implied warranty "of fitness, general condition and habitability" in connection with their purchase of a home from the defendant.²⁶⁵ The escrow sales contract contained a provision that the lot was conveyed to the plaintiffs with all improvements "in the same condition as it is on this date, reasonable wear and tear excepted."²⁶⁶ The defendant argued that the contract language constituted a disclaimer of the implied warranty. The court of civil appeals, however, held that the language was not conspicuous because it was not printed in large or contrasting type, and was therefore ineffective.²⁶⁷ A significant aspect of the opinion is that it does not mention section 17.42 of the DTPA, which provides that a waiver of the provisions of the DTPA is ineffective.²⁶⁸

In *Howze v. Surety Corp. of America*²⁶⁹ the appellee filed a declaratory judgment action seeking a determination of whether it was bound to pay a default judgment that the appellants had obtained against R.L. Greer, who was doing business as Mobile Market Homes. The appellants had obtained the judgment against Greer in a separate action based on Greer's false representation that he would assume the outstanding indebtedness on a mobile home that the appellants had traded in. At the time of the misrepresentation Greer had a Mobile Home Dealer Bond²⁷⁰ upon which the appellee was the surety. Under the terms of the bond, appellee was obligated to pay " 'for damages, penalties or expenses, including reasonable attorneys' fees, resulting from a cause of action connected with the sale or lease of a mobile home,' " if the principal violated the Texas Mobile Homes Standards Act.²⁷¹ The appellee's claim that it was not liable for this particular judgment rested on two theories. First, since appellee was not a party to the suit against Greer, and had no notice of the action, it was not bound by Greer's default judgment. The court of civil appeals agreed, stressing that the appellee had undertaken only a general liability for violations of the Mobile Homes Standards Act, and had not agreed to be

263. *Id.* at 410; see TEX. R. CIV. P. 434.

264. 555 S.W.2d 916 (Tex. Civ. App.—Austin 1977, no writ).

265. *Id.* at 917.

266. *Id.* at 919 (emphasis in original).

267. *Id.* See TEX. BUS. & COM. CODE ANN. § 2.316(b) (Vernon 1968) which requires disclaimers of the implied warranty of fitness to be in writing and "conspicuous." *Id.* § 1.201(10) indicates that a term is conspicuous when it is written so that a reasonable person against whom it would operate should notice it.

268. TEX. BUS. & COM. CODE ANN. § 17.42 (Vernon Supp. 1978-79) provides: "Any waiver by a consumer of the provisions of this subchapter is contrary to public policy and is unenforceable and void." See also Note, *Implied Warranties: Can They Still Be Waived in Texas?*, 26 BAYLOR L. REV. 440 (1974).

269. 564 S.W.2d 834 (Tex. Civ. App.—Austin 1978), *rev'd*, 22 Tex. Sup. Ct. J. 319 (Feb. 21, 1979).

270. See TEX. REV. CIV. STAT. ANN. art. 5221f (Vernon Supp. 1978-79) (Mobile Homes Standards Act).

271. 564 S.W.2d at 836.

bound by a particular judgment.²⁷² Unless the bond provides an undertaking that the surety is or agrees to be bound by a particular judgment, a determination that the principal is liable does not bind the surety having no notice of the action.²⁷³ The supreme court reversed, holding that the bond actually was a judgment bond. Second, the appellee argued that Greer had not violated the Mobile Homes Standards Act. Since the appellants did not plead or prove that Greer had violated a mobile home warranty, the court of civil appeals concluded that there was no violation of the Mobile Homes Standards Act upon which to base a recovery. Again, the supreme court disagreed. Recovery on a statutory surety bond, therefore, is for any "cause of action connected with the sale or lease of a mobile home" when there is a violation of the DTPA.

As in *Howze*, the courts often deal with a DTPA case that also involves other statutes. In several cases during the survey period the plaintiffs based their claims alternatively on violations of the DTPA and the Texas Insurance Code. In *Mobile County Insurance Co. v. Jewell*²⁷⁴ the appellees brought suit against a county mutual insurance company on a fire insurance policy, and under the provisions of the DTPA and article 21.21, section 16 of the Insurance Code.²⁷⁵ The court of civil appeals concluded that the company was controlled by chapter 17 of the Insurance Code.²⁷⁶ Since county mutual insurance companies are exempt from the operation of all insurance laws except ones specifically enumerated in chapter 17,²⁷⁷ however, and since the chapter makes no reference to section 16 of article 21.21,²⁷⁸ the court held that the provisions of section 16 were not applicable to the defendant. Therefore, article 21.21 did not constitute a statutory basis for an award of treble damages and attorneys' fees.²⁷⁹ The court held alternatively that since section 16 of article 21.21 refers to deceptive acts or practices as defined by section 17.46 of the DTPA, it incorporates only those deceptive acts or practices contained in the section 17.46(b) laundry list, none of which were applicable. In a per curiam opinion the supreme court stated that the court of civil appeals was correct in concluding that county mutual insurance companies are exempt from the provi-

272. *Id.* at 837.

273. *Browne v. French*, 22 S.W. 581, 583 (Tex. Civ. App. 1893, no writ). The Act now requires that the surety be given notice. TEX. REV. CIV. STAT. ANN. art. 5221f, § 13(g) (Vernon Supp. 1978-79).

274. 555 S.W.2d 903 (Tex. Civ. App.—El Paso 1977), writ *ref'd n.r.e. per curiam*, 566 S.W.2d 295 (Tex. 1978).

275. TEX. INS. CODE ANN. art. 21.21, § 16 (Vernon Pam. Supp. 1963-78) provides that an action may be maintained by any person who has been injured by the practices declared in Section 4 of this Article or in rules or regulations lawfully adopted by the Board under this Article to be unfair methods of competition and unfair and deceptive acts or practices in the business of insurance or in any practice defined by Section 17.46 of the Business & Commerce Code, as amended.

276. TEX. INS. CODE ANN. arts. 17.01-25 (Vernon 1963).

277. *Id.* art. 17.22 (Vernon Pam. Supp. 1963-78).

278. See note 275 *supra*.

279. See TEX. INS. CODE ANN. art. 21.21, § 16(b)(1) (Vernon Pam. Supp. 1963-78).

sions of article 21.21 of the Texas Insurance Code.²⁸⁰

In *Ceshker v. Bankers Commercial Life Insurance Co.*²⁸¹ the plaintiff brought suit under the DTPA and article 21.21 of the Insurance Code, seeking treble damages, court costs, and attorneys' fees pursuant to section 16(b)(1) of article 21.21, as well as a permanent injunction preventing further advertisements pursuant to section 16(b)(2).²⁸² The court of civil appeals held that article 21.21, which confers rights on "any person who has been injured,"²⁸³ does not grant rights to individuals since a "person" is defined as one "engaged in the business of insurance."²⁸⁴ Hence, the plaintiff had no standing to assert a claim. The court also considered whether the plaintiff had a cause of action under the DTPA. The court concluded that since the plaintiff had not purchased an insurance policy from the defendant, and consequently was not "adversely affected" within the meaning of section 17.50 of the DTPA, he had no cause of action.²⁸⁵ In a per curiam opinion, the supreme court expressly disapproved of the holding of the court of civil appeals that limited the term "person" to one engaged in the business of insurance.²⁸⁶ The supreme court agreed, however, with the conclusion that a showing of injury is required.

In *Royal Globe Insurance Co. v. Bar Consultants, Inc.*²⁸⁷ the plaintiff brought suit on an insurance policy and, in the alternative, asserted that the company had committed a violation of the DTPA and article 21.21 of the Insurance Code. The basis of the appellee's DTPA and Insurance Code claims was that if the loss in question was not covered by the policy, then the representations of appellant's agent that the loss was covered constituted false, deceptive, and misleading statements in violation of article 21.21²⁸⁸ and section 17.46(12)²⁸⁹ of the DTPA. At trial, plaintiff's claims under the DTPA and the Insurance Code were sustained, and the plaintiff was awarded treble damages, court costs, and attorneys' fees. On appeal, the defendant argued that the plaintiff was not a "person" within the meaning of article 21.21 or a "consumer" within the meaning of the DTPA and that the plaintiff was, therefore, not entitled to bring a cause of action under either statute. In reliance upon the supreme court's per curiam opinion in *Ceshker*, the court of civil appeals held that the term "person" was not restricted to one who is engaged in the business of insurance. It was therefore unnecessary for the court to consider whether the insured

280. 566 S.W.2d at 295.

281. 558 S.W.2d 102 (Tex. Civ. App.—Tyler 1977), writ *ref'd n.r.e. per curiam*, 568 S.W.2d 128 (Tex. 1978).

282. TEX. INS. CODE ANN. art. 21.21, § 16(b)(2) (Vernon Pam. Supp. 1963-78).

283. See note 275 *supra*.

284. TEX. INS. CODE ANN. art. 21.21, § 2 (Vernon 1963).

285. TEX. BUS. & COM. CODE ANN. § 17.50 (Vernon Supp. 1978-79) provides a cause of action for a consumer who has been "adversely affected" by a violation of the Act.

286. 568 S.W.2d at 129.

287. 566 S.W.2d 724 (Tex. Civ. App.—Austin 1978, writ granted).

288. TEX. INS. CODE ANN. art. 21.21, § 4(1) (Vernon 1963) defines misrepresentations and false advertising of policy contracts as unfair methods of competition and unfair and deceptive acts.

289. TEX. BUS. & COM. CODE ANN. § 17.46(12) (Vernon Supp. 1978-79).

was a "consumer" entitled to bring an action against the insurance company pursuant to section 17.50(a) of the DTPA.²⁹⁰

The defendant-appellant also questioned whether the plaintiff suffered any injury as a result of the misrepresentations concerning coverage. The court of civil appeals concluded that the showing of injury was sufficient since the misrepresentations, which were made both before and after the insurance policy was issued, had the capacity to deceive, and since the plaintiff had relied on them.²⁹¹ There is, however, nothing in the opinion to suggest that other insurance would or could have been obtained by the plaintiff had the misrepresentations about coverage not been made. The supreme court has granted a writ of error on this question.²⁹²

In *Hanssard v. Ledbetter*²⁹³ suit was filed before the Sixty-fifth Legislature amended the special venue provision of the DTPA,²⁹⁴ so the pre-amendment provision was controlling. Following *Doyle v. Grady*,²⁹⁵ the court of civil appeals held that prior to the statute's amendment, proof of a cause of action was required to sustain venue in the county where the defendant was doing business.²⁹⁶

VI. MISCELLANEOUS

A. Bulk Sales

In *Petereit v. Mid-West Marks, Inc.*²⁹⁷ a creditor sued a transferee in a bulk transfer transaction, claiming that the transferee was personally liable for damages in accordance with section 6.106 of the Texas Business and

290. 566 S.W.2d at 726. It seems clear that the Austin court did not mean to suggest that the remedial provisions of the DTPA do not apply to insurance companies. Since the policy in question was purchased in 1976 for business purposes, arguably the plaintiff was not a "consumer" within the meaning of the DTPA prior to its amendment by the 65th Legislature. This is the apparent reason that there was some question about the applicability of DTPA § 17.50.

291. 566 S.W.2d at 727.

292. On February 14, 1979, after the close of the survey period, the supreme court affirmed the court of civil appeals decision. *Royal Globe Ins. Co. v. Bar Consultants, Inc.*, 577 S.W.2d 688 (Tex. 1979). In so doing the court held that the plaintiff had been "adversely affected" and "injured" by its reliance on the pre-loss representations of coverage made by the appellant's agent. *Id.* at 694. Furthermore, the court noted that the plaintiff's reliance on the representation was made even more logical and reasonable by its knowledge that the insurer had paid a similar claim in the past. *Id.* Thus, the pre-loss representations constituted a deceptive trade practice.

The court, however, disagreed with the court of civil appeals that the post-loss misrepresentation constituted a deceptive trade practice. First, the post-loss representation of coverage was not within the agent's actual or apparent scope of authority. Secondly, the plaintiff took no action based on this representation in that it would have repaired the damage regardless, and therefore was not "injured" or "adversely affected." *Id.* at 694-95.

293. 561 S.W.2d 34 (Tex. Civ. App.—Waco 1978, no writ).

294. 1973 Tex. Gen. Laws ch. 143, § 1, at 322.

295. 543 S.W.2d 893 (Tex. Civ. App.—Texarkana 1976, no writ).

296. The statute as amended provides that "[a]n 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." TEX. BUS. & COM. CODE ANN. § 17.56 (Vernon Supp. 1978-79).

297. 564 S.W.2d 442 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ).

Commerce Code.²⁹⁸ According to the creditor, the transferee did not fulfill its statutory duty to assure that new consideration paid to the transferor was applied "to pay those debts of the transferor which are either shown on the list furnished by the transferor (Section 6.104) or filed in writing in the place stated in the notice (Section 6.107) within thirty days after the mailing of such notice."²⁹⁹ Since the creditor did not establish that its claim was included in the list of creditors furnished by the transferor, and since the creditor did not file a claim within thirty days after receiving notice of the transfer, the court of civil appeals concluded that the trial court erred in holding the transferee liable to the creditor.

B. *Offset*

In *Sears v. Continental Bank & Trust Co.*³⁰⁰ the bank withdrew funds from an account in the name of "H.A. Sears, d/b/a Sears Enterprises" to offset Sears' alleged indebtedness to the bank. As a result, Sears brought suit to recover the amount withdrawn. Despite the fact that the bank did not prove Sears' indebtedness, the trial court directed a verdict for the bank and the court of civil appeals affirmed.³⁰¹ The supreme court reversed and remanded, holding that the bank was required to justify the offset by proving the indebtedness that supported its deduction from a depositor's account balance.³⁰²

C. *Interest After Judgment*

In the companion cases of *Coastal Industrial Water Authority v. Trinity Portland Cement Division, General Portland Cement Co.*³⁰³ and *Manley v. Sammons Enterprises, Inc.*³⁰⁴ the supreme court held that the 1975 statutory amendment to article 5069—1.05,³⁰⁵ which increased the interest rates that judgments bear from six percent to nine percent per annum, would not be applied retroactively. Rather, the new rate applies "only to judg-

298. TEX. BUS. & COM. CODE ANN. § 6.106 (Vernon 1968).

299. *Id.*

300. 562 S.W.2d 843 (Tex. 1977).

301. 553 S.W.2d 394 (Tex. Civ. App.—Houston [1st Dist.]), *rev'd*, 562 S.W.2d 843 (Tex. 1977).

302. 562 S.W.2d at 844.

303. 563 S.W.2d 916 (Tex. 1978).

304. 563 S.W.2d 919 (Tex. 1978).

305. TEX. REV. CIV. STAT. ANN. art. 5069—1.05 (Vernon Supp. 1978-79) provides:

All judgments of the courts of this State shall bear interest at the rate of nine percent per annum from and after the date of the judgment, except where the contract upon which the judgment is founded bears a specified interest greater than nine percent per annum, in which case the judgment shall bear the same rate of interest specified in such contract, but shall not exceed ten percent per annum, from and after the date of such judgment.

The amendment became effective on Sept. 1, 1975.

ments rendered after the effective date of the statute.”³⁰⁶ It is immaterial whether the judgment is on appeal or whether the mandate is issued after the effective date of the statutory change.³⁰⁷

306. 563 S.W.2d at 919.

307. *Id.* at 920.

