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Commercial Law

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by Robert A. Weber, Jr.*

I. SALES

Most issues arising under Article 2 of the Uniform Commercial Code during the survey period concerned warranties and the proper form and procedure for their exclusion. A precondition to consideration of Article 2 warranty rules, however, is the existence of a contract for the sale of goods within the scope of Article 2. In *Willis Mining, Inc. v. Noggle*,[1] plaintiff purchased granite blocks from defendant. Plaintiff cut monuments from the granite and sold the monuments to dealers for eventual sale to the public. The monuments began to show signs of discoloration within eighteen months of sale, and when defendant refused to reimburse plaintiff for its cost in replacing the monuments, plaintiff sued for breach of the implied warranty of merchantability.[2]

Defendant argued that Article 2 rules governing warranty did not apply. In particular, defendant claimed the granite blocks sold to plaintiff were not "goods." To constitute goods within the meaning of Article 2, defendant's argument proceeded, the goods must be "manufactured."[3]

The court rejected defendant's argument that goods covered by Article 2 must possess the characteristic of having been manufactured.[4] First, the test for determining the existence of goods within the meaning of Article 2 is "whether the goods are 'movable at the time of identification

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As with last year's article, many thanks to my wife, Laurie, for all her support.

1. 235 Ga. App. 747, 509 S.E.2d 731 (1998).
2. *Id.* at 748, 509 S.E.2d at 732.
3. *Id.* at 749, 509 S.E.2d at 733.
4. *Id.* at 749-50, 509 S.E.2d at 733.

to the contract.'"[5] Second, commercial code provisions addressing goods severed from real estate explicitly cover minerals.[6] Lastly, cases cited by defendant[7] in support of its argument were inapposite and merely stood for the proposition that a defendant is not liable for warranty claims as to drugs that it neither manufactures nor prescribes.[8]

The court in *Noggle*, having determined Article 2 rules applied, also addressed the more common Article 2 issue of the survey period: implied warranties and disclaimer thereof.[9] Defendant first argued that plaintiff's conduct—inspecting the blocks and using his own judgment to select the granite blocks—precluded implication of the warranty of merchantability.[10] Although such a contention might have been relevant if plaintiff had claimed a breach of implied warranty of fitness for a particular purpose, it was irrelevant in the context of disclaiming the warranty of merchantability, which can be disclaimed only by written, conspicuous language.[11]

Defendant also argued that the warranty of merchantability did not apply because the defects in this case were latent, not discoverable by buyer or seller.[12] The court summarily rejected this argument, stating that "[u]ndisclosed latent defects . . . are the very evil that the implied warranty of merchantability was designed to remedy."[13] Only latent defects discoverable by the exercise of caution on the buyer's behalf are excluded from the warranty of merchantability, and because the evidence at trial showed the defect in the granite blocks was not discoverable by such efforts, the warranty still applied.[14]

The court in *North Georgia Ready Mix Concrete Co. v. L & L Construction, Inc.*[15] explored the nature of express warranties under Article 2 in a fact-intensive opinion. Buyer and seller entered a contract for the sale of concrete, and the parties agreed to a particular mixture of ingredients for the concrete. Seller convinced buyer to allow it to alter the mix, and buyer agreed, but only upon seller's agreement to revert to the previous mix if buyer was dissatisfied. Buyer did, in fact, become

5. *Id.*
6. *Id.* at 750, 509 S.E.2d at 733.
7. Presto v. Sandoz Pharm. Corp., 226 Ga. App. 547, 487 S.E.2d 70 (1997); Presto v. Charter Peachford Behavioral Health Sys., Inc., 229 Ga. App. 576, 494 S.E.2d 377 (1997).
8. 235 Ga. App. at 750, 509 S.E.2d at 733-34.
9. *Id.* at 748, 509 S.E.2d at 732.
10. *Id.*
11. *Id.*
12. *Id.* at 749, 509 S.E.2d at 733.
13. *Id.*
14. *Id.*
15. 235 Ga. App. 68, 508 S.E.2d 722 (1998).

dissatisfied and instructed seller to revert to the originally agreed upon specifications. Seller did so, but only briefly, and thereafter continued using the altered mix without notifying buyer.[16]

The originally agreed upon mixture constituted an express warranty as a "'description of the goods which is made a part of the basis of the bargain.'"[17] In further support of its conclusion, the court stated:

> "A warranty is a statement or representation made by the seller of goods, contemporaneously with and as part of the contract of sale, though collateral to the express object of it, having reference to the character, quality, or title of the goods, and by which he promises or undertakes to ensure that certain facts are or shall be as he then represents them. The warranty may be express or implied. It is the former when created by the apt and explicit statements of the seller; the latter, when the law derives it by implication or inference from the nature of the transaction, or the relative situation or circumstances of the parties."[18]

Although the agreement at issue in *Bailey v. Tucker Equipment Sales, Inc.*[19] was a lease governed by Article 2A, the ruling therein on warranty disclaimers is equally applicable in the context of Article 2.[20] The lease contract in *Bailey* included the following pertinent language:

> "Lessee acknowledges that he has examined the Equipment and that it is in good condition and repair. Lessee accepts the Equipment *as is* and agrees to use reasonable care in the operation of the Equipment. Upon termination of the rental, Lessee shall return the Equipment to the place of business of the Lessor in as good condition as when received by the Lessee, ordinary wear and tear excepted."[21]

The court stressed that the emphasized language in this quote "was not highlighted, bolded, in larger print, or otherwise set off."[22]

To be effective, a disclaimer of a warranty implied by Article 2A must be "'in writing and conspicuous.'"[23] Conspicuous means that the clause or term "'is in larger or other contrasting type or color.'"[24] As drafted, the "as is" language was not conspicuous, nor was the phrase such that

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16. *Id.* at 68-69, 508 S.E.2d at 723-24.
17. *Id.* at 72, 508 S.E.2d at 726 (quoting O.C.G.A. § 11-2-313(1)(b) (1994)).
18. *Id.* (quoting Elgin Jewelry Co. v. Estes & Dozier, 122 Ga. 807, 810, 50 S.E. 939, 940 (1905)).
19. 236 Ga. App. 289, 510 S.E.2d 904 (1999).
20. *Id.* at 290, 510 S.E.2d at 906.
21. *Id.* at 289, 510 S.E.2d at 905 (emphasis supplied).
22. *Id.*
23. *Id.* at 290, 510 S.E.2d at 905 (quoting O.C.G.A. § 11-2A-214(3)(a) (1994)).
24. *Id.*, 510 S.E.2d at 906 (quoting O.C.G.A. § 11-1-201(10) (1994)).

a "reasonable person ought to have noticed and understood" that its usage operated to preclude warranty rights.[25]

II. NOTES AND GUARANTEES

Survey cases involving notes and guarantees provided practical guidance on several issues affecting daily practice, including representative capacity of a guarantor,[26] the consideration necessary to support a note,[27] and the import of "holder in due course" status for a client in commercial transactions.[28]

In *Dewberry Painting Centers, Inc. v. Duron, Inc.*,[29] a corporate account debtor opened two accounts with plaintiff. The individual defendant, owner of the corporate account debtor, signed documents purporting to be individual guarantees on such accounts.[30] As to the first account, the guaranty stated, in relevant part: "[W]e . . . do hereby jointly and severally guarantee the payment by said firm . . . . I/WE jointly and severally personally guarantee the performance of the applicant herein agreeing to the terms hereinabove stated."[31] Beneath this language the name of a corporate account debtor was typed, with the individual defendant's signature, followed by the typed word "president."[32] The second account guaranty contained the following similar, although not identical, language: "[W]e the undersigned do hereby jointly and severally guarantee the payment by said firm . . . . I/WE jointly and severally ________________ the performance of the applicant herein agreeing to the terms hereinabove stated."[33] Immediately beneath this language was the signature of the individual defendant, followed by the handwritten title "president." However, the name of the corporate account debtor appeared nowhere in the signature area.[34]

Because these documents had been executed prior to the revision of Article 3, the court found the pre-revision version of the statute

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25. *Id.* at 291, 510 S.E.2d at 906.
26. Dewberry Painting Ctrs., Inc. v. Duron, Inc., 235 Ga. App. 40, 508 S.E.2d 438 (1998).
27. Ochs v. Hoerner, 235 Ga. App. 735, 510 S.E.2d 107 (1998).
28. Fedeli v. UAP/GA AG CHEM, Inc., 237 Ga. App. 337, 514 S.E.2d 684 (1999).
29. 235 Ga. App. 40, 508 S.E.2d 438 (1998).
30. *Id.* at 40, 508 S.E.2d at 439.
31. *Id.* at 41-42, 508 S.E.2d at 440.
32. *Id.* at 42, 508 S.E.2d at 440.
33. *Id.* at 43, 508 S.E.2d at 440. The words "personal guarantee" had been struck through on the contract as indicated by the blank line. *Id.*, 508 S.E.2d at 441.
34. *Id.*, 508 S.E.2d at 440.

governing signatures in a representative capacity[35] controlled.[36] According to the pre-revision version of O.C.G.A. section 11-3-403, a signature is made in a representative capacity if "'the name of an organization [is] preceded or followed by the name of an authorized individual.'"[37] Unless the parties establish otherwise, "the representative is personally obligated 'if the instrument names the person represented but does not show that the representative signed in a representative capacity.'"[38]

Applying these rules to the foregoing facts, the court found that the first guarantee was not made individually but rather in a representative capacity.[39] The second account guarantee, however, created a question of fact as to the parties' intent because the organization name was omitted.[40]

The court in *Ochs v. Hoerner*[41] explored the consideration necessary to support a note. The result reached in *Ochs*, combined with the court's holding in *Tyson v. McPhail Properties*,[42] should convince counsel that a recital of at least nominal consideration, in addition to the standard reference "for value received," should be included when drafting promissory notes. In *Ochs* maker and payee entered a contract whereby maker would purchase real property from a closely held corporation controlled by payee. Maker, apparently simultaneously with execution of the agreement, executed a $100,000 demand note to payee. Payee testified that he never paid any funds to maker and that the note was given as compensation for deferring closing on the referenced real property. Neither the note nor the real property sales contract referred to the other, and the sales contract contained a standard merger clause. When maker did not close on the real property, payee sued on the demand note.[43]

The court first ruled that, due to the merger clause, the note was to be viewed separately from the sales contract for purposes of determining the existence of consideration sufficient to support the note.[44] Viewing the note in isolation, the court found that defendant had rebutted the

35. O.C.G.A. § 11-3-403 (1994).
36. 235 Ga. App. at 42, 508 S.E.2d at 440. *See also* Robert A. Weber, Jr., *Commercial Law*, 50 MERCER L. REV. 193, 211 (1998).
37. 235 Ga. App. at 42, 508 S.E.2d at 440 (quoting O.C.G.A. § 11-3-403(3)).
38. *Id.* (quoting O.C.G.A. § 11-3-403(2)(b)).
39. *Id.*
40. *Id.* at 43, 508 S.E.2d at 441.
41. 235 Ga. App. 735, 510 S.E.2d 107 (1998).
42. 223 Ga. App. 683, 478 S.E.2d 467 (1996).
43. 235 Ga. App. at 735-36, 510 S.E.2d at 108.
44. *Id.* at 736, 510 S.E.2d at 108.

presumption that the note was supported by consideration.[45] Because the note merely stated it was given for "value received," parol evidence was admissible on the issue of the existence of consideration.[46] Because the maker received no funds and deferral of the closing on the real property was something to which maker was entitled by reason of the sales contract, no consideration existed, and the note was invalid.[47]

The court in *Fedeli v. UAP/GA AG CHEM, Inc.*[48] addressed the prerequisites to status as a holder in due course of a check as well as the breadth of legal protection accorded such status. Defendant extended credit to cotton farmer's corporation, NPI, to finance operations, and in exchange received a security interest in crops grown by NPI. Defendant notified the gins where farmer sold cotton for NPI. Farmer also custom-farmed cotton for plaintiff, who paid farmer by the acre. When defendant became concerned about farmer's debt, it sent notices to the gins requesting that checks be issued payable jointly to defendant and NPI, which the gins did. Plaintiff filed an action against defendant for restitution, alleging defendant improperly received money from cotton sales to which plaintiff was entitled.[49]

Defendant claimed it was a holder in due course as to checks issued by the gins.[50] To qualify as a holder in due course, defendant had to show the checks were taken "for value, in good faith, and without notice that [they were] overdue or ha[d] been dishonored or of any defense against or claim[s] to [them] on the part of any person."[51] Concluding that defendant satisfied this definition, the court considered plaintiff's contention that holder in due course status did not insulate defendant from plaintiff's claims for restitution because he sought recovery of the proceeds, not the checks themselves.[52] The court ruled that holder in due course status, which insulates the holder of an instrument from all claims, bars a "claim" of restitution that seeks recovery of a check's proceeds.[53]

The court in *Workman v. Sysco Food Services of Atlanta*[54] addressed the question of whether a guarantor was a "compensated surety" and

45. *Id.*, 510 S.E.2d at 108-09.

46. *Id. See also* Robert A. Weber, Jr., *Commercial Law*, 50 MERCER L. REV. 193, 212 (1998).

47. 235 Ga. App. at 736-37, 510 S.E.2d at 108-09.

48. 237 Ga. App. 337, 514 S.E.2d 684 (1999).

49. *Id.* at 337-39, 514 S.E.2d at 686-87.

50. *Id.* at 342-44, 514 S.E.2d at 689-91.

51. *Id.* at 342-43, 514 S.E.2d at 690 (citing O.C.G.A. § 11-3-302(1) (1994)).

52. *Id.* at 344, 514 S.E.2d at 691.

53. *Id.* at 345, 514 S.E.2d at 691.

54. 236 Ga. App. 784, 513 S.E.2d 523 (1999).

thus beyond the protection of the rule *strictissimi juris*, which states that a contract of suretyship is one of strict law, "and the surety's liability will not be extended by implication or interpretation."[55] Defendant had signed a personal guaranty on behalf of the principal debtor, an entity in which guarantor had an ownership interest.[56] The court found that merely because the consideration for defendant's execution of a guaranty flowed to an entity in which she had an ownership interest, this did not result in her being a compensated surety, so that she was entitled to protection of *strictissimi juris*.[57]

Perhaps the most significant decision of the survey period addressed the statute of limitations applicable to demand notes. In *McNeal Construction Co. v. Wilson*,[58] maker executed note A to payee on December 1, 1986. Maker executed note B to payee on December 1, 1989. Both notes provided they would not be due and payable unless a written demand was made. Payee made written demand on November 17, 1995 and instituted suit for recovery on the notes on July 31, 1996.[59]

The sole legal question was whether the suit was barred by the statute of limitations.[60] Maker contended that the statute in effect when the notes were executed, O.C.G.A. section 11-3-122(1)(b),[61] should govern.[62] Under that code section, a cause of action on a demand note accrued "'upon its date or, if no date is stated, on the date of issue.'"[63] Because the "statute of limitations on an instrument not under seal is six years after the instrument becomes due and payable,"[64] the statute of limitations would have barred payee's claim if former O.C.G.A. section 11-3-122 controlled.[65]

However, effective July 1, 1996, the legislature amended O.C.G.A section 11-3-122. The relevant code section as of that date was O.C.G.A. section 11-3-118(b), which provided that "if demand for payment is made to the maker of a note payable on demand, an action to enforce the obligation of a party to pay the note must be commenced within six

55. O.C.G.A. § 10-7-3 (1994).
56. 236 Ga. App. 784, 786, 513 S.E.2d 523, 525 (1999).
57. *Id.*
58. 235 Ga. App. 759, 509 S.E.2d 742 (1998).
59. *Id.* at 759, 509 S.E.2d at 743.
60. *Id.*
61. O.C.G.A. § 11-3-122 (1994).
62. 235 Ga. App. at 759-60, 509 S.E.2d at 743.
63. *Id.* at 759, 509 S.E.2d at 743 (quoting O.C.G.A. § 11-3-122(1)(b)).
64. 235 Ga. App. at 759, 509 S.E.2d at 743 (citing O.C.G.A. § 9-3-24 (Supp. 1999)).
65. *Id.*

years after the demand."[66] Payee argued that this provision controlled her lawsuit, which was filed thirty days after the effective date of the statute.[67] The court agreed with payee and, in effect, found that O.C.G.A. section 11-3-118(b) revived payee's time-barred action against maker.[68]

The Supreme Court of Georgia has granted review of this case.[69] An angle not considered in the court of appeals decision is a construction of the new code section's plain language. The court of appeals stated "no question of retroactivity is presented."[70] With due respect, the entire question is retroactivity. The new code section provides that the statute of limitations on demand notes begins to run "if demand for payment *is* made."[71] The ruling in *McNeal* thus turns on what the legislature intended by its use of the word "is." At the risk of political satire, "It depends on what the meaning of the word 'is' is." Here, the demand notice was given well before the effective date of the new statute.[72] The question thus becomes whether the statute will be interpreted as referring to a demand notice that is *or has been* sent or one that is sent, *now or after the effective date hereof.* Does the statute, when it refers to a demand notice that is sent, include notices that "have been" sent? If not, the former code section would apply.

III. SECURED TRANSACTIONS

The court in *Citizens Bank of Americus v. Federal Financial Services, Inc.*[73] considered the priority of a prior secured lender vis-a-vis a subsequent purchase money lender in a specific piece of equipment. The subsequent purchase money lender's priority in the specific collateral turned on when the debtor acquired "possession" of the collateral, thus triggering the running of the time period (fifteen days) in which the purchase money lender was required to file its financing statement.[74]

Debtor, a logging company, proposed to acquire a "skidder" and for that purpose borrowed money from defendant-bank on December 5,

66. O.C.G.A. § 11-3-118 (1994 & Supp. 1999).
67. 235 Ga. App. at 759, 509 S.E.2d at 743.
68. *Id.* at 761, 509 S.E.2d at 744.
69. Certiorari granted April 12, 1999. The supreme court reversed the appellate court on October 18, 1999, finding that the new statute did not apply retroactively. McNeal Construction Co. v. Wilson, No. S99G0517, 1999 WL 824103, at *3 (Ga. Oct. 18, 1999).
70. 235 Ga. App. at 760, 509 S.E.2d at 743.
71. O.C.G.A. § 11-3-118 (1994 & Supp. 1999) (emphasis supplied).
72. 235 Ga. App. at 759, 509 S.E.2d at 743.
73. 235 Ga. App. 482, 509 S.E.2d 339 (1998).
74. *Id.* at 482, 509 S.E.2d at 339.

1996. However, debtor used the loan proceeds to pay off other debts and did not acquire the skidder. Bank, unaware of this, filed its financing statement listing the skidder as collateral the following day. On December 18, seller delivered the skidder to debtor for demonstration purposes only. On December 30, debtor signed a sales contract with seller for the skidder; however, the contract was subject to debtor obtaining insurance listing seller and plaintiff-finance company as loss payees. Plaintiff-finance company was to provide the purchase money financing for the skidder. On February 6, 1997, after obtaining insurance, debtor acquired ownership of the skidder, executed a note to plaintiff, and signed a financing statement listing the skidder as collateral. Plaintiff sent the loan proceeds to seller and filed the financing statement on February 10.[75]

A security interest is entitled to priority as a purchase money security interest to the extent that it is a security interest:

> "(a) taken or retained by the seller of the collateral to secure all or part of its price; or (b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used."[76]

A purchase money security interest is entitled to priority over a previously perfected security interest in the same collateral if the purchase money security interest is perfected within fifteen days after debtor "'receives *possession* of the collateral.'"[77] As noted, the question in these circumstances was at what point debtor received possession of the skidder for purposes of triggering the fifteen-day period in which the purchase money lender's financing statement had to be filed.[78]

The court discussed two standards for determining when a debtor receives possession.[79] Under the "obligation" standard, the court stated:

> a purchase money security interest has priority over a previously perfected security interest, where the buyer obtains physical possession of the property before becoming obligated to make the purchase, and the purchase money lender's perfection of its security interest is timely

75. *Id.* at 483, 509 S.E.2d at 339-40.
76. *Id.* at 485-86, 509 S.E.2d at 341 (quoting U.C.C. § 9-107).
77. *Id.* at 482, 509 S.E.2d at 339 (quoting O.C.G.A. § 11-9-312(4) (1994)) (emphasis supplied).
78. *Id.*
79. *Id.* at 484-85, 509 S.E.2d at 340-41.

> when measured from the point when the purchaser incurs the purchase money obligation which the property secures.[80]

Under the "physical control" standard, possession is determined by reference to an easily applied objective standard suggested by the name given to this line of cases: When did the debtor acquire physical control of the collateral? The court noted that the former standard is typically employed in cases involving sales on approval; the latter usually involves "situations in which the buyer or lessee owed performance of an obligation secured by the property at the time physical possession was acquired."[81] The common thread in cases applying these standards, moreover, was that none "held that the running of the grace period was triggered before the debtor owed performance of the secured obligation."[82] The court thus held that, "[u]nder these circumstances, [plaintiff] has priority."[83]

The court's opinion does not openly endorse either of the quoted standards and suggests (implicitly) that courts should employ a case-by-case evaluation.[84] In deciding which standard to apply, the court suggested (implicitly) that the physical possession standard is the general rule, with the obligation standard being appropriate in sale-on-approval cases.[85] Although impossible to determine from the court's opinion, it appears that the court applied the obligation standard because this was a sale-on-approval case. The court attempted to marginalize the significance of debtor's physical possession of the skidder by characterizing the debtor as a bailee until it became a purchaser.[86] The court's effort to minimize the legal significance of physical possession further supports the conclusion that the court applied the obligation standard here. In any event, the court reached a good conclusion. Had the time lapse between debtor's acquisition of physical possession and perfection by the purchase money lender been greater, the opposite result may have been more appropriate. However, the relatively brief lapse of less than sixty days, which here seems to have been a trial period for the equipment, between debtor's gaining physical control of the skidder and perfection by the purchase money lender is commercially reasonable and, thus, should be entitled to protection as a true purchase

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80. *Id.* at 485, 509 S.E.2d at 341.
81. *Id.* at 486, 509 S.E.2d at 342.
82. *Id.* at 487, 509 S.E.2d at 342.
83. *Id.*
84. *Id.* at 484, 509 S.E.2d 340 ("in analyzing when the time–triggering event occurred, several variables must be considered"). *See also id.* at 487, 509 S.E.2d at 342 ("under these circumstances").
85. *Id.* at 486 n.16, 509 S.E.2d at 342 n.16.
86. *Id.* at 483, 509 S.E.2d at 340.

money security interest. A longer delay, however, would have weakened the causal link between the purchase money lender's provision of financing and the debtor's ability to acquire the collateral, i.e., it would have seemed less like a trial period.

A survey period without a case distinguishing a lease from a security interest would be incomplete. In *Lewis v. Lease Atlanta, Inc.*,[87] the court found that because lessee "was not bound to renew the lease or become the owner of the vehicle and the residual purchase option price was not nominal or even unreasonably low," the agreement was a true lease and not a security interest.[88]

IV. DRAFTING CONSIDERATIONS

Survey decisions interpreting standard contract provisions provide valuable guidance to practitioners who may, in the wake of such decisions, revise standard clauses they use in drafting commercial agreements.

In *Akintobi v. Phoenix Fire Restoration Co.*,[89] parties to litigation involving a breach of contract agreed to binding arbitration. Both sides requested that attorney fees be awarded in arbitration, even though neither the contract nor the arbitration agreement provided for such fees. Over objection of the losing party, the trial court subsequently affirmed the arbitrator's award, which included attorney fees.[90] The court of appeals affirmed the fee award, notwithstanding absence of a contractual authorization of such fees, because it found that the parties implicitly agreed to arbitrate the fee issue.[91] For those instances where the adversary is unwilling to arbitrate fees, implicitly or otherwise, *Akintobi* serves as a reminder to include in any contract clause regarding arbitration a statement regarding the authority (or lack thereof) of an arbitrator to enter a fee award.

The court in *Gibson v. Decatur Federal Savings & Loan Ass'n*[92] also addressed attorney fee clauses, albeit in the context of a deed to secure debt. In *Gibson* lender-grantee of a deed to secure debt erroneously marked as paid the note evidencing the debt for which the deed to secure debt was given. After debtor-grantor refused to voluntarily reform the note, lender filed an action seeking reformation of the note. Eventually successful, lender sought recovery of attorney fees against debtor under

87. 234 Ga. App. 812, 508 S.E.2d 188 (1998).
88. *Id.* at 814, 508 S.E.2d at 190.
89. 236 Ga. App. 760, 513 S.E.2d 507 (1999).
90. *Id.* at 761, 513 S.E.2d at 508.
91. *Id.*
92. 235 Ga. App. 160, 508 S.E.2d 788 (1998).

the terms of the deed to secure debt, which contained the following language:

> If borrower fails to perform the covenants and agreements contained in this security instrument, or there is a legal proceeding that may significantly affect lender's rights in the property (such as proceeding in bankruptcy, probate, for condemnation or to enforce laws or regulations), the lender may do and pay for whatever is necessary to protect the value of the property and lender's rights in the property. Lender's actions may include paying any sum secured by a lien which has priority over this security instrument, appearing in court, paying reasonable attorney's fees and entering on the property to make repairs.[93]

The court found that this language only entitled lender:

> to a reimbursement of expenditures that it may make to protect itself from actions over which the lender has no control, i.e., if the borrower, through no fault of the lender, fails to perform the covenants and agreements contained in the deed to secure debt or if a proceeding is initiated by the borrower or by a third party against the borrower that affects the lender's rights in the property.[94]

Because this proceeding was one to correct the lender's fault, it was not within the scope of the contract provision authorizing attorney fees.[95] Counsel would be well advised to include in their standard forms phraseology to cover such events.

The court in *Sage Technology, Inc. v. NationsBank N.A. South*[96] construed as consistent two clauses in a contract dealing with the disposition of earnest money. Plaintiff–buyer and defendant–seller entered a contract for the sale of realty. The contract was organized by section headings. One section, entitled "Conditions to Closing," contained the following clause: "'If this Agreement is terminated pursuant to the right of either party to terminate this Agreement, the Earnest Money will be promptly refunded to [buyer] and neither party shall have any further obligations under this Agreement.'"[97] Another section, entitled "Default," contained the following clause: "'If [buyer] breaches this Agreement, [seller], as [its] sole remedy and relief hereunder, may terminate this Agreement and thereupon receive the

93. *Id.* at 162-63, 508 S.E.2d at 791.
94. *Id.* at 163, 508 S.E.2d at 791.
95. *Id.*, 508 S.E.2d at 791-92.
96. 235 Ga. App. 405, 509 S.E.2d 694 (1998).
97. *Id.* at 406 n.1, 509 S.E.2d at 696 n.1.

Earnest Money as liquidated damages.'"[98] When buyer failed to make an additional earnest money payment required by an amendment extending the closing date, seller terminated the agreement and claimed the earnest money then on deposit as liquidated damages under the latter clause. Buyer sued for return of its earnest money.[99]

Buyer contended that a conflict existed between the foregoing provisions.[100] The court disagreed and relied upon the sections of the agreement in which the respective clauses were located to explain any ambiguity.[101] The former provision, providing for a return of the earnest money, was within the section giving "the parties options for terminating the deal for reasons other than default during the Agreement's executory period."[102] By contrast, the other provision was found in the section dealing with "respective remedies in case of default."[103] The court thus found the provisions consistent, with one directing "disposition of the earnest money in case of termination by either party as a matter of right, [and the other directing] disposition of the earnest money in case of termination by reason of default."[104]

The court's holding highlights the need for including (or, contrariwise, the rationale for excluding) a provision negating the interpretive effect to be accorded section headings within an agreement.[105] Many practitioners surely view such a clause as meaningless boilerplate. The buyer in *Sage Technology* undoubtedly does not subscribe to that belief after the opinion from the court of appeals.

The survey period emphasized the significance of other provisions usually considered to be boilerplate and otherwise not worthy of consideration. The decision in *Zampatti v. Tradebank International Franchising Corp.*[106] demonstrated the significance of a survivability clause, which provides for the survival of covenants as obligations independent of the agreement in which they are contained in the event the agreement is breached or terminated.

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98. *Id.* at 406, 509 S.E.2d at 696.
99. *Id.*
100. *Id.*
101. *Id.* at 406-07, 509 S.E.2d at 696-97.
102. *Id.* at 407, 509 S.E.2d at 696.
103. *Id.*
104. *Id.*
105. The court does not mention the existence of such a clause in this case. The absence of such a clause is curious, as it is practically a boilerplate provision in most sophisticated agreements.
106. 235 Ga. App. 333, 508 S.E.2d 750 (1998).

V. COLLECTION ISSUES

In *Morgan v. Wachovia Bank, N.A.*,[107] creditor sued debtor for amounts due and owing under the terms of a motor vehicle installment sales contract. Although the contract was attached to the complaint, the complaint was unverified, did not recite the manner in which the amount sought (principal, interest, attorney fees, and costs) had been calculated, and did not recite debtor's account payment history.[108] Thus, even though creditor was entitled to judgment on the pleadings,[109] it was nevertheless incumbent upon creditor to substantiate its claim with evidence. Had the complaint contained more thorough information and been verified in the first instance, many headaches would have been avoided.

The decision in *Zampatti* is instructive on the proper cause of action to pursue in a collection matter. The court distinguished between action on open account and a claim in quantum meruit:

> An open account is one in which some item of contract is not settled by the parties. Black defines an open account as one which has not been finally settled or closed, but is still running or open to future adjustment or liquidation. Georgia law agrees with this definition. Absent a contractual relationship an action on open account is not the proper theory of recovery and procedure to use. A suit on an open account may be maintained for the price of goods sold under a contract where the price has been agreed upon by the seller and purchaser and where the seller has performed his part of the agreement and nothing remains to be done except for the purchaser to make payment. A suit on an open account may be based on either an express or implied promise to pay.[110]

A claim in quantum meruit is, by contrast, appropriate where the value of the goods and services provided is in dispute.[111]

The court's decision in *Speir v. Krieger*[112] demonstrates that a corporate officer is not completely shielded from liability because of the corporate form. Plaintiff in *Speir* had sued defendant corporation for purposes of piercing the corporate veil. Even though the corporate secretary was not a party to the action, the trial court's judgment, which

107. 237 Ga. App. 257, 514 S.E.2d 239 (1999).
108. *Id.* at 258, 514 S.E.2d at 241.
109. *Id.* Plaintiff did not seek default judgment, but rather judgment on the pleadings, as defendant had filed an answer. *Id.*
110. 235 Ga. App. at 343-44, 508 S.E.2d at 760 (internal quotes and citations omitted).
111. *Id.* at 344, 508 S.E.2d at 760.
112. 235 Ga. App 392, 509 S.E.2d 684 (1998).

disregarded the corporate entity, was binding upon him.[113] More significantly, the court found that in the subsequent action against the corporate secretary in his individual capacity, the trial court had properly entered summary judgment for plaintiff against the secretary.[114] In particular, the summary judgment ruling rendered the secretary personally liable for the corporation's debt to plaintiff notwithstanding the secretary's testimony that he had resigned from the corporation prior to the conduct giving rise to plaintiff's injury.[115] The court discounted the secretary's testimony as self-serving and conclusory and relied principally upon the corporation's registry on file with the Secretary of State, required to be updated annually, showing the secretary was still listed as corporate officer and as registered agent.[116] In light of this evidence, and considering that the secretary "did not tender a copy of his alleged notice of resignation; . . . did not submit an affidavit from any other corporate officer stating [his] name was inadvertently left on the corporate registry; [and, in fact] submitt[ed] nothing," the court held that the corporate officer was personally liable.[117]

VI. MISCELLANEOUS

The decision in *White v. Cauthen*[118] did not fall within any of the foregoing headings. However, failure to include it would have been a waste. Succinctly stated, the court in *White* reiterated the rule that, in the context of a contractor's waiver of lien rights,

> "[A]n affidavit regular on its face, but challenged on the ground it was not properly sworn to or notarized, is as a matter of law sufficient *if* there is an absence of any evidence indicating that the owner was aware of the irregularity, or allegations and proof of fraud and/or collusion."[119]

In light of the above, the court found that a contractor's affidavit, notwithstanding the absence of a jurat, was sufficient to preclude the contractor's subsequent action against the homeowners for additional sums due.[120]

113. *Id.* at 399-400, 509 S.E.2d at 690-91.
114. *Id.* at 398-99, 509 S.E.2d at 689-90.
115. *Id.*
116. *Id.* at 397-98, 509 S.E.2d at 689.
117. *Id.* at 398, 509 S.E.2d at 690.
118. 235 Ga. App. 245, 509 S.E.2d 140 (1998).
119. *Id.* at 246, 509 S.E.2d at 141-42 (quoting Walk Softly v. Hyzer, 188 Ga. App. 230, 233, 372 S.E.2d 500, 502-03 (1988) (emphasis supplied)).
120. *Id.* at 247, 509 S.E.2d at 142.