No. 14-15-00215-CV

IN THE FOURTEENTH COURT OF APPEALS
HOUSTON, TEXAS

TEX STAR MOTORS, Inc.,
Appellant/ Cross-Appellee,

v.

REGAL FINANCE COMPANY, LTD, AND
REGAL FINANCE COMPANY II, LTD
Appellees/Cross-Appellants,

Appeal from the 61st District Court, Harris County, Texas,
Trial Court Cause No. 2002-41615

AMICUS BRIEF IN SUPPORT OF APPELLEE'S PETITION FOR EN BANC RECONSIDERATION

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Amicus Curiae sponsoring this brief is the American Financial Services Association (AFSA). AFSA is the national trade association for the consumer credit industry. AFSA is dedicated to protecting access to credit and consumer choice. The Association encourages and maintains ethical business practices and supports financial education for consumers of all ages.

AFSA has provided services to its members for over ninety years. Among the members who have a direct interest in the application and meaning of Part 6 of Article 9 of the Uniform Commercial Code are GMAC, Ford Credit, Chrysler Financial, Toyota Financial, and CitiFinancial.

The fee for preparation of this brief has been paid by the amicus; no fee has been paid by any party to this litigation. *See* TEX. R. APP. P. 11(c).

INTRODUCTION

Tex Star made thousands of loans to consumers to finance consumers' purchases of used cars from Tex Star. Regal financed Tex Star by buying the "chattel paper" so generated. Here chattel paper was the security agreements and other contracts that consumers signed and obligations arising from those agreements that consumers owed to Tex Star.

The transaction between Tex Star and Regal was unusual, for it was not merely a sale of the chattel paper, but a sale "with recourse." This recourse right gave Regal the right to recover from Tex Star any loss that it suffered when the consumer buyers defaulted on their car loans. So here the court was faced not with the routine repossession deficiency judgment case, but with the granddaddy of deficiency judgment cases; the case involved 906 separate repossessions and sales. Apparently the parties originally contemplated that Tex Star would buy back defaulted loans and would, itself, repossess and seek any deficiency from the consumer buyer. For reasons not material here, Regal had to undertake all of the 906 repossessions and sales itself when the relationship soured and Tex Star refused to take over the defaulted loans. In all, Regal claims approximately $8 million as the deficiency between the amount that it was owed by defaulting consumers and the amount that it collected on the resale of repossessed cars. This appeal arises out of the lawsuit by Regal to recover that $8 million from Tex Star under their recourse agreement.

Trial Results

The trial court instructed the jury that Regal could recover only deficiencies that had arisen out of repossession sales that had been conducted in compliance with Article 9 of the Uniform Commercial Code ("UCC"). Following those instructions, the jury concluded that Regal was entitled to approximately $4 million in damages.

For reasons that are sufficiently obvious, Regal did not offer testimony (and the trial judge did not demand testimony) about each of the 906 sales. Instead Regal introduced the loan file for each of the sales and the testimony of several persons who had been involved in the disposition of the 906 vehicles. These witnesses described their general practices and procedures for disposing of the repossessed vehicles.

The court instructed the jury as follows:

> Every aspect of the disposition, including the method, manner, time, place and other terms must be commercially reasonable. A sale is commercially reasonable if it conforms to reasonable commercial practices among dealers in the type of property that was the subject of the sale.
>
> The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by [Regal] is not itself sufficient to preclude [Regal] from establishing that a collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner.

With Regal's description of the process and with the judge's instructions, the jury was given the 906 files and asked to determine which sales complied and which sales did not comply. The jury awarded Regal approximately $4 million of the $8 million it had requested.

Appellate Proceedings

Tex Star appealed and Justice Edelman, joined by Justices Anderson and Hudson, reversed the $4 million award. Justice Edelman concluded that Regal had not shown that its sales of the repossessed cars complied with the UCC.

ARGUMENT

POINT OF ERROR NUMBER ONE

1. Justice Edelman misinterpreted the Uniform Commercial Code

This case is unusual only because it involves 906 repossessions in a single lawsuit, not because it presents novel legal issues. In fact the basic issue – whether the repossessing secured

creditor sold the collateral for an appropriate amount – is as old as time. Not only the Uniform Commercial Code, but also the law of mortgages and every other law dealing with secured credit must find a process that is fair to the debtor, fair to the secured creditor and reasonably inexpensive. Invariably the debtor (here in the shoes of Tex Star) claims that the sale price is too low and that a much larger amount would have been realized if the creditor had only followed proper procedures. The creditor, on the other hand, notes that the collateral was tattered, down at the heel and often damaged.

The UCC's resolution of this recurring conflict is found in Section 9-610(b):

> Every aspect of the disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as the unit or in parcels, and at any time and place and on any terms.

Seventeen Sections removed from 9-610 one finds additional information on what is commercially reasonable in Section 9-627, specifically Section 9-627(b), which reads as follows:

> A disposition of collateral is made in a commercially reasonable manner if the disposition is made:
>
> (1) in the usual manner on any recognized market;
>
> (2) at the price current in any recognized market at the time of the disposition; or
>
> (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

Prior to the 1999 revision of Article 9 of the UCC, much of the current 9-627 was in 9-507(2) and the basic rule was in Section 9-504. By focusing on Section 9-627, it appears that Justice Edelman overlooked the basic rule that is now stated in 9-610 (every aspect ... must be

commercially reasonable) and compounded his error by failing to see that subsections (b) and (c) of Section 9-627 are merely safe harbors, not legal requirements.

That Subsection (b) (3) is only a safe harbor is made clear both by the language of the Code and by the last sentence in comment 3 to Section 9-627. Where the drafters intend to require a certain act they use verbs such as "**shall,**" see, e.g., Section 9-621. Where the drafters intend merely that a certain act have a certain consequence they use language such as that in 9-627(b): "[a sale of repossessed goods] **is** made in a commercially reasonable manner **if** the disposition is made [according to any of the three following methods]...." The sentence is an affirmative statement of the consequence of a particular action. The use of the verb "is made" together with the conjunction "if" is not ambiguous.

To make this more than plain, the comment to 9-627 says it again in different words: "**none** of the specific methods of disposition specified in subsection (b) is **required or exclusive**." So a disposition "in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition" is neither mandatory nor exclusive; it is one of the ways that is blessed by the drafters. To the extent that Justice Edelman believes otherwise, he misreads the statute.

Appellate Opinion

Justice Edelman does not say in so many words that the only way one can comply with Section 9-610(b) is by fulfilling 9-627(b)(3), but his language leaves no doubt of this conclusion. Justice Edelman's discussion of commercial reasonableness is composed of six paragraphs. The sixth and last paragraph, which contains his holding, is composed of five sentences. Each of the first four of those sentences quotes the language verbatim or, in one case, in summary – "reasonable commercial practices among dealers." This is the language of 9-627(b) (3).

Ignoring the general rule in Section 9-610, Justice Edelman focuses on one option, **reasonable commercial practices among dealers**. In the first sentence he says there is no "evidence" of reasonable commercial practices among "**dealers**." In the second sentence he says the jury would have no way to assess whether Regal had complied with reasonable commercial practices among "**dealers**." In the third sentence he notes that the jury could not compare the circumstances described by Regal's witnesses with those that would fit as commercially reasonable among "**dealers**." And finally he sums up that there is no evidence to show that Regal "conformed to reasonable commercial practices among **dealers**…" In the face of this repeated recitation of the language of (b) (3), of his complaint about the failure of Regal to prove its compliance with reasonable commercial practices among dealers, and in the absence of any reference to any other provision of 9-627 or 9-610, the only fair reading of the opinion is that Justice Edelman incorrectly interpreted Section 9-627(b) (3) to be the only way for Regal to comply with Article 9.

POINT OF ERROR NUMBER TWO

2. The misinterpretation will cause uncertainty not only in Texas, but also throughout the United States.

Every day courts adopt unusual and conflicting interpretations of countless state and federal statutes, but the world goes on. Why is this different?

First it is different because the Uniform Commercial Code is designed to be the same in every state. To the extent that states differ in their interpretations and applications of the Code – even a little – there is a degradation of national uniformity. So interpreting the UCC is different from interpreting a statute that has been enacted only by the state legislature in Michigan or Texas or California.

Second many of the terms in Part 6 of Article 9 were chosen by the drafters of Article 9 in response to comments and proposals from debtor and creditor representatives. Much of the language of Part 6 reflects compromises to resolve the competing interests of debtors and creditors. Both Sections 9-610 and 9-627 were the subject of such compromises during the 1999 revision. When a court misinterprets a Section that resulted from one of those compromises, it frustrates the legitimate expectation of the drafters, and of the creditors and debtors.

Most important, repossession and resale of cars after default is a nationwide business that demands certainty and uniformity. Vehicle repossessions are averaging about one and one half million per year (see Manheim News coxenterprises.com/corp/presscenter/viewPressRelease.asp, showing 1.6 million repossessions in 2003 and 1.34 million in 2005). Cars repossessed in one state are often sold in another where the market is better. To stimulate that market – and so favor the debtor by getting the best price – we need consistent rules. In a large number of these cases, the creditors seek deficiency judgments and in virtually every one of the deficiency cases, the creditor's behavior will be in issue.

In the close community of consumer lawyers and consumer creditor lawyers, word of a case like Tex Star will spread quickly. So the Court cannot satisfy itself by passing the case off as a bit of Texas lore that affects only Houston; the case will be cited from California to New Jersey.

CONCLUSION

Justice Edelman erred. The error will cause trouble from one end of Texas to another and from one end of the United States to the other. The Court should hear the case *en banc* and reverse.

Respectfully Submitted

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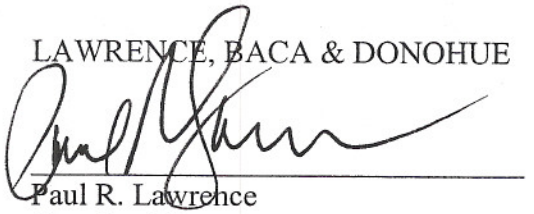

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CERTIFICATE OF SERVICE

I, Paul R. Lawrence hereby certify that a true and correct copy of the Amicus Brief in Support of Appellee's Petition for En Banc Reconsideration has been sent to the following parties by U.S. Certified Mail on this 8th day of January, 2008.

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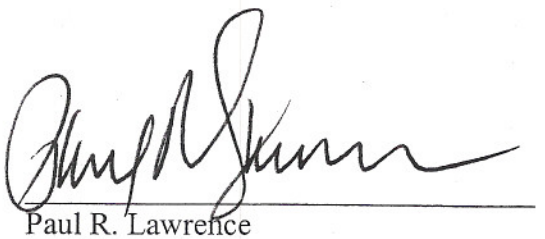

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STATUTES AND RULES