The Court compared the reasoning in *Shiner v. Moriarty*, 706 A.2d 1228 (Pa. Super. 1998) and *Werner v. Plater-Zyberk*, 799 A.2d 776 (Pa. Super. 2002) with *U.S. Express Lines, Ltd. v. Higgins,* 281 F.3d 383 (3d Cir. 2002). In *Shiner* and *Werner*, the courts said that the complexity of the Bankruptcy Code shows Congress has intent to control the entire field. However, a line of cases shows that abuse of process claims are beyond the scope of the Bankruptcy Code. In *U.S. Express Lines*, the court held that Rule 11 of the Federal Rules of Civl Procedure was more expansive than the provision in the Bankruptcy Code, but the case was not on point here because it involved a maritime action. Additionally, other jurisdictions have allowed state law claims to preempt the Bankruptcy Code and the Federal Rules of Civil Procedure. After reviewing the case law, the court decided that Congress intended the remedies in the Bankruptcy Code to govern sanctions as they relate to Bankruptcy Court, and that deciding the matter this way can prevent forum-shopping among litigants.

BANKRUPTCY DISCHARGE INJUNCTION VIOLATED BY REFUSAL TO RELEASE LIEN ON CAR

In re Pratt, 462 F.3d 14 (1st Cir. 2006).

FACTS: Carlton and Christine Pratt bought a new car in 1994, and financed the purchase through GMAC (General Motors Acceptance Corporation). Four years later, the Pratts filed for Chapter 13 bankruptcy. In 1999, the Pratts converted the case to Chapter 7 and gave notice of "surrender" to GMAC. GMAC decided that the expense of repossession was greater than value of secured claim and wrote off the remaining loan balance. The bankruptcy court then granted the Pratts a Chapter 7 discharge, releasing them from the balance due on the car loan.

In late 1999, the Pratts realized the car was inoperable and it was "junk." Under Maine law, the salvage dealer needed a release of the GMAC lien to proceed. The Pratts spent several months trying to get GMAC to either repossess the car or release the lien. GMAC refused unless they first repaid the outstanding balance in full. The Pratts then reopened the bankruptcy case, but the court entered judgment for GMAC. The Pratts' intermediate appeal to the district court was unsuccessful.

HOLDING: Reversed and remanded.

REASONING: The Pratts contended that GMAC violated the Chapter 7 discharge injunction by demanding that they repay the loan prior to releasing the lien. Court noted that "although the unsecured portion of a secured creditor's claim may be discharged in a chapter 7…case, its lien in the collateral normally survives the bankruptcy proceeding and the discharge." The court stated that Section 521(a)(2) of the Bankruptcy Code allows lien avoidance or modification by reaffirmation, redemption or surrender of the collateral. The court then noted that the term "surrender" is not defined in Section 521(a)(2) but "[s]ince Congress did not use the term 'deliver,' however, one reasonably may assume that 'surrender' does not necessarily contemplate that the debtor physically have transferred the collateral to the secured creditor." Thus, the court interpreted "surrender" to mean that "the debtor agreed to make the collateral *available* to the secured creditor." Therefore, surrender did not require actual repossession.

"Federal bankruptcy-law interest in according debtors a fresh start, free from objectively coercive reaffirmation demands, must be accorded supremacy."

The court then turned to the issue of whether the surrender required GMAC to release the lien by taking note of these facts: (1) the Pratts filed notice of intention to surrender in timely manner; (2) the Pratts did not prevent GMAC from repossessing the car; (3) the car was worthless junk; (4) GMAC decided not to repossess; (5) state law prevented the car from being junked until GMAC released the lien. The court then concluded based on these facts that GMAC was objectively coercive but not acting in bad faith. Specifically, it found that "even legitimate state-law rights exercised in a coercive manner might impinge upon the important federal interest served by the discharge injunction." The court noted that GMAC's refusal to release the lien unless the Pratts repaid the loan amounted to "reaffirmation" of the loan. This refusal would force the Pratts to keep a worthless vehicle in addition to repaying the loan, effectively eliminating surrender as an option under §521(a)(2). Furthermore, "GMAC identifies no compelling reason for doing so in this instance." Therefore, "federal bankruptcy-law interest in according debtors a fresh start, free from objectively coercive reaffirmation demands, must be accorded supremacy."

MISCELLANEOUS

ANNUAL STATEMENT IN CONTRACT FOR DEED THAT DID NOT COMPLY WITH THE PROPERTY CODE IS STILL SUFFICIENT IF IT CONSTITUTES A GOOD-FAITH EFFORT TO COMPLY WITH THE STATUTE

Flores v. Millennium Interests, Ltd., 464 F.3d 521 (5th Cir. 2006).

FACTS: Plaintiffs purchased houses from Millennium Interests, Ltd. under contracts for deeds. Millennium hired Concord Servicing Corp. to perform accounting and reporting services for the contracts. Texas Property Code §5.077 requires a seller of a contract for deed to provide annual statements to its purchaser, and lists seven items which must be included in the statement. The annual statements provided to plaintiffs omitted two of the required items: the "amount paid under the contract," and "the number of payments remaining under the contract." A seller who fails to comply with §5.077 becomes liable to the purchaser for liquidated damages and reasonable attorney's fees. Plaintiffs sued, alleging that Millennium and Concord violated federal and state law by sending notices and annual statements without information required by statute. The district court entered summary judgment for Millennium and Concord on all claims. Plaintiffs appealed only the adverse ruling on the §5.077 claims.

HOLDING: Affirmed.
REASONING: Because the case involved determinative but unanswered questions of Texas law, the court certified questions regarding the liquidated damages provision to the Texas Supreme Court. In *Flores v. Millennium Interests, Ltd.*, 185 S.W.3d 427, 429 (Tex. 2005), the Supreme Court of Texas held that "an annual statement under §5.077 that omits some required information does not invoke the 'liquidated damages' provision unless the statement is so deficient as to be something other than a good faith attempt by the seller to inform the purchaser of the current status of their contractual relationship." The court further held that the annual statements mailed to plaintiffs in this case were timely and that the omission of some information required by §5.077 did not render them deficient or otherwise invoke the liquidated damages provision. The annual statements provided to plaintiffs contained two of the four items required by statute: the "remaining amount owed on the contract" and the "amounts paid to taxing authorities." One of the omitted items, the "total amount paid under the contract," could be calculated from the contracts themselves. The statements also included information not required by statute. The court held that although the statements omit two items required by statute, they plainly constitute a good-faith effort by Millennium to inform plaintiffs of the current status of their contractual relationship. Accordingly, the annual statements provided to plaintiffs did not invoke the liquidated damages provision of §5.077(c).

MENTAL ANGUISH AS A RESULT OF THE USE OF AN AIRCRAFT ARE NOT LIMITED BY THE $100,000 "EACH PERSON" LIMITATION

Global Aerospace v. Pinson, ____ S.W.3d ____ (Tex. App.—Corpus Christi 2006).

FACTS: In 2003, Harold and Maria Grassley, husband and wife, were killed in an airplane accident. At the time of the accident, Harold was piloting the airplane, and Maria was the only passenger. Appellants, Federal Insurance Company and the Continental Insurance Company, had provided liability insurance to Harold, the plane's owner. Appellant Global Aerospace signed the policy on behalf of the two insurers. Maria's children ("Appellees") filed suit to recover damages regarding the fatal accident and sought a declaratory judgment that the liability insurance policy set a limit of $1,000,000 for mental anguish damages claimed by appellees rather than $100,000 as asserted by appellants. According to the policy, the coverage limit of liability for all damages was $1,000,000 for each occurrence or accident. The policy also included an "each passenger" limitation which stated that all damages, including damages for care and loss of services, because of bodily injury sustained by any passenger as the result of any one occurrence, shall not exceed $100,000. Appellants argued that the policy was not ambiguous and that the damages sought for wrongful death and survival were "because of" the death of Maria, a passenger, and thus were covered by the "each passenger" limitation. In their counter-motion for summary judgment, appellees argued that they sustained bodily injury in the form of mental anguish, an injury included in the policy's definition of "bodily injury" that was separate from Maria's bodily injury claims; thus, the "each occurrence" limit of $1,000,000 governed. Competing motions for summary judgment were filed. The trial court denied appellants' motion and granted appellees' counter-motion.
HOLDING: Affirmed.
REASONING: The court held that the appellees claims were subject to $1,000,000 per occurrence limitation in the liability policy, and not $100,000 per passenger limitation because appellees' claims were claims of non-passengers and thus were separate from passenger's bodily injury claims. Under the liability coverage section, the policy clearly stated that appellants will pay damages because of bodily injury sustained by any person caused by an occurrence arising out of the use of the aircraft. In the definition section "bodily injury" is defined to include mental anguish. The court reasoned that when terms are defined in an insurance policy, those definitions control. *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 823 (Tex. 1997). The policy clearly stated that appellants will pay all damages arising out of one occurrence up to $1,000,000. Furthermore, nowhere in the policy did appellants state that their liability for bodily injury sustained by any person other than a passenger is limited to $100,000. The court reasoned that if appellants had intended for the $100,000 liability limit to apply to bodily injury, such as mental anguish, sustained by non-passengers, then appellants had the duty to make such an intention in its policy clear and unambiguous. Where an insurance policy's provisions are ambiguous or inconsistent, and the policy is subject to two or more reasonable interpretations, then that construction which affords coverage will be the one adopted. *Gonzalez v. Mission Am. Ins. Co.*, 795 S.W.2d 734, 737 (Tex. 1990). The court concluded that under the policy's language, the bodily injury damages claimed by appellees are claims of non-passengers, separate from the bodily injury claims of their mother, and, as such, the $1,000,000 occurrence limitation, not the per passenger limitation, applied.

COVENANT NOT TO COMPETE ENFORCEABLE IF EXECUTORY PROMISE IS PERFORMED BY EMPLOYER

Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson, ____ S.W.3d. ____ (Tex. 2006).

FACTS: Kenneth Johnson began working for Alex Sheshunoff Management Services, L.P. ("ASM") as an at-will employee. ASM promoted Johnson to director of its "Affiliation Program." After the promotion, ASM asked Johnson to sign an employment agreement ("the Agreement") that included a covenant not to compete. Johnson signed the Agreement. The Agreement provided that ASM would give Johnson special training and access to certain confidential and proprietary information and materials. The covenant not to compete stated that for one year after termination Johnson would not provide consulting services to any ASM clients that Johnson had provided services within the last year of his employment nor would he solicit or aid any other party in soliciting an ASM client or member.

In 2001, Johnson participated in confidential meetings regarding ASM's plans to introduce a bank overdraft protection program. The market leader for such a product was Strunk & Associates, L.P. ("Strunk"). In early 2002, Strunk contacted Johnson about possible employment. After Strunk contacted Johnson, Johnson continued to receive confidential information

from ASM regarding the proposed overdraft program. In March 2002, Johnson left ASM to work for Strunk. ASM sued Johnson alleging breach of the covenant not to compete and seeking injunctive relief and damages. The trial court granted the temporary injunction. Strunk and Johnson moved for summary judgment arguing that under *Light v. Centel Cellular Co*. 883 S.W.2d 642 (Tex. 1994), the covenant was unenforceable as a matter of law. The district court granted the summary judgment motion and denied Strunk's request for final judgment. The court of appeals affirmed holding the covenant unenforceable because the promises to provide specialized training and confidential information were illusory when the agreement was made and thus did not comport with the Texas Business and Commerce Code §15.50(a) requirement that the agreement be enforceable when made. ASM appealed.

HOLDING: Affirmed in part, reversed in part and remanded.

REASONING: The court held that "an at-will employee's non-compete covenant becomes enforceable when the employer performs the promises it made in exchange for the covenant." Under *Light*, this court held that section 15.50(a) requires a covenant not to compete to be "ancillary to or part of" the otherwise enforceable agreement. To meet this requirement, the covenant must meet two conditions: "(1) the consideration given by the employer in the otherwise enforceable agreement must give rise to the employer's interest in restraining the employee from competing; and (2) the covenant must be designed to enforce the employee's consideration or return promise in the otherwise enforceable agreement." ASM promised to disclose confidential information and provide specialized training under the Agreement and Johnson promised not to disclose confidential information. The covenant was ancillary to or part of the agreement under the two requirements of *Light*. However, under footnote six of *Light*, the Agreement was not enforceable at the time it was made. Footnote six stated that, "if only one promise is illusory, a unilateral contract can still be formed; the non-illusory promise can serve as an offer, which the promisor who made the illusory promise can accept by performance… But this unilateral contract, since it could be accepted only by future performance, could not support a covenant not to compete inasmuch as it was not an 'otherwise enforceable agreement at the time the agreement is made' as required by §15.50(a)." Contrary to footnote six of *Light*, the court held that the covenant not to compete need only be ancillary to or part of the agreement at the time the agreement is made. Thus, a unilateral contract formed when the employer performs a promise that was illusory when made can satisfy the requirements of §15.50(a).

The court stated that there is no sound reason why a unilateral contract made enforceable by performance should fail under §15.50(a).

The court stated that there is no sound reason why a unilateral contract made enforceable by performance should fail under §15.50(a). An agreement not to compete, like any other contract, must be supported by consideration. Section 15.50(a) addresses this concern because the covenant cannot be a stand-alone promise from the employee lacking any new consideration from the employer. But if the employer's consideration is provided by performance and becomes non-illusory at that point, and the agreement in issue is otherwise enforceable under §15.50(a), there is no reason to hold that the covenant fails. A covenant not to compete is not unenforceable under §15.50(a) solely because the employer's promise is executory when made. If the agreement becomes enforceable after the agreement is made because the employer performs his promise under the agreement and a unilateral contract is formed, the covenant is enforceable if all other requirements under §15.50(a) are met. In this case, the covenant not to compete was enforceable because ASM performed by providing Johnson with specialized training and confidential information forming a unilateral contract and meeting the other requirements under §15.50(a).

The court concluded that Johnson's covenant with ASM was reasonable under §15.50(a). The court held that summary judgment was improper since the covenant was enforceable and affirmed the judgment that Johnson and Strunk were not entitled to attorneys' fees. The court reversed the judgment that ASM take nothing and remanded to the trial court to determine ASM's claim for damages for breach of the covenant.

PROPORTIONATE RESPONSIBILITY STATUTE INCLUDES CLAIMS UNDER THE DRAM SHOP ACT

F.F.P. Operating Partners, L.P. v. Duenez, ____S.W.3d____ (Tex. 2006).

FACTS: After consuming a case and a half of beer, Roberto Ruiz drove his truck to a "Mr. Cut Rate" convenience store owned by defendants F.F.P. Operating Partners, L.P. ("FFP"). The store's assistant manager sold a twelve-pack of beer to Ruiz, who, upon leaving the store, climbed into the cab of his truck, opened a can of beer, put the can between his legs and drove away. There was a dispute about whether Ruiz actually drank any of the beer before driving away.

Ruiz then drove onto a nearby highway where, after swerving into oncoming traffic several times, hit the car driven by plaintiff Duenez. All five family members in the car were injured, and Ruiz was arrested at the accident scene. He was incarcerated upon pleading guilty. The Duenezes brought suit against FFP and other defendants. FFP filed a cross-action against Ruiz, naming him as a responsible third-party and a contribution defendant. The Duenezes then non-suited all defendants except FFP. At the pre-trial conference, the Duenezes won a partial summary judgment that the proportionate statute (Chapter 33 of the Texas Civil Practices and Remedies Code) did not apply to this case. The trial court then severed the FFP's cross-action against Ruiz, leaving FFP as the sole defendant in the case. At trial, the jury found that when FFP sold the alcohol to Ruiz, it was "apparent to the seller that he was obviously intoxicated to the extent that he presented a clear danger to himself and others," and that Ruiz's intoxication was a proximate cause of the collision. The jury awarded the Duenezes a $35 million dollar verdict.

The appeals court affirmed, holding that in third party actions under the Dram Shop Act in which there are no allegations of negligence on the part of the plaintiffs, a provider is vicariously liable for the damages caused by an intoxicated person, and such a provider is not entitled to offset its liability by that of the intoxicated person. The appeals court further held that the

trial court did not abuse its discretion by severing FFP's claim against Ruiz. The Supreme Court of Texas granted FFP's petition for review and issued an opinion on September 3, 2004. FFP then filed a motion for a rehearing that was subsequently granted. While the rehearing was pending, three of the Duenez plaintiffs settled with FFP. The case was re-argued on November 5, 2005, and the Supreme Court withdrew its earlier opinion in favor of a new one.

HOLDING: Reversed and remanded.

REASONING: The legislature enacted the Dram Shop Act to deter providers of alcoholic beverages from serving alcoholic beverages to obviously intoxicated individuals who may potentially inflict serious injury on themselves and on innocent members of the general public." *Smith v. Sewell*, 858 S.W.2d 350, 356 (Tex. 1993). The act states that [p]roviding selling, or serving an alcoholic beverage may be made the basis of a statutory cause of action under this chapter and may be made the basis of a revocation proceeding under section 6.01(b) of this code upon proof that: (1) at the time the provision occurred it was apparent to the provider that the individual being sold, served, or provided with an alcoholic beverage was *obviously intoxicated* to the extent that he presented a *clear danger* to himself and others; and (2) the intoxication of the recipient of the alcoholic beverage was a proximate cause of the damages suffered. Tex. Alco. Bev. Code §2.02. If a plaintiff meets the onerous burden of proof, the provider is liable for damages proximately caused by its employees or patrons. *El Chico Corp. v. Poole*, 732 S.W. 2d 306, 314 (Tex. 1987).

The majority rejected the approach of dissenters who argued that under theories of imputed liability or vicarious liability, the dram shop becomes liable for all damages subsequently caused by the intoxicated patron. The court concluded instead that this approach, which would hold the dram shop liable regardless of whether the patron had actually consumed any of the alcohol purchased, would serve to nullify the expansive effect of the proportionate responsibility statute. The majority also disagreed with the dissent's contention that the failure to read one of these theories of liability into the statute undermines the act's legislative purpose, because the act accomplishes its objectives in several ways. The statute provides a remedy once foreclosed, and expands common law doctrine by imposing upon dram shops a duty to patrons and injured third parties under specified circumstances while subjecting them to civil liability for damages they proximately cause. The contention that liability may be imputed to the dram shop for the action of its patron is taken from the Restatement (Third) of Torts. Restatement (Third) of Torts: Apportionment of Liability §7 cmt. j (2000). However, the common law has been supplanted with respect to this issue and §7 is not the law in Texas. The Proportionate Responsibility Act and the Dram Shop Act govern this issue. Contrary to the assertions of the dissent, the court did not read the statute to say a provider of alcohol is responsible, without regard to fault, for one hundred percent of the damages caused by an intoxicated patron. The attempt to fault the dram shop under the theory of vicarious liability fell short as well. In the dissent's argument comparing the issue at bar with the reasoning in negligent entrustment cases, the dissent was deficient because the basis for imposing liability on the owner of the thing entrusted to another is that ownership of the thing gives the right of control over its use. Because there is no ownership by the dram shop of the object used by a patron to cause the accident, the vicarious liability doctrine does not support--and the Dram Shop Act does not create--the proposed vicarious liability scheme or a proposed indemnification scheme. These positions expand the theory of vicarious liability beyond its traditional boundaries.

Because the collision occurred in July 1997, the 1995 version of the Proportionate Responsibility Act governed. The statute provided, with certain exceptions, that a defendant was liable only for the percentage of responsibility found by the trier of fact, unless the percentage of responsibility exceeded fifty percent. Tex. Civ. Prac. & Rem. Code §33.013. If a defendant's percentage of responsibility exceeded fifty percent, that defendant was jointly and severally liable for all of the claimant's recoverable damages. *Id*. The statute required the trier of fact to apportion responsibility with respect to each person's causing or contributing to cause in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these.

The trial court addressed the applicability of the proportionate responsibility act to the Dram Shop Act in 1993. *Sewell*, 858 S.W.2d 350. The appeals court distinguished this case, reasoning that *Sewell* limited an intoxicated patron's recovery against a provider according to the intoxicated person's percentage of responsibility but not imposing similar limitations when a third party seeks recovery against a provider for damages caused by an intoxicated patron's actions. This is, however, contrary to the supreme court's opinion in Sewell and rebutted by the deterrent effects of the act. Refusing to apply *Sewell's* rule of law to cases in which a third party is injured as a result of an intoxicated person's actions is contrary to the language of the Dram Shop Act, to the premise of *Sewell,* and to the purpose of the Dram Shop Act: the provider's liability stems from its own conduct. The trial court abused its discretion by, among other things, refusing to submit jury questions for determining Ruiz's negligence and proportion of responsibility.