

# Lien Priority Between Motor Vehicle and Floor Plan Lenders In Texas

## Why the Fifth Circuit is Wrong.

By Lawrence Young\* and Simon Mayer\*\*

Copyright © 2009 by HughesWattersAskanase.

### Introduction

In *Bank One v. Arcadia Financial*,<sup>1</sup> the Fifth Circuit Court of Appeals was required to apply Texas law concerning a priority dispute between a floor plan lender and a retail purchaser's secured lender. Because the Texas Supreme Court ("Court") had not ruled on the issue, the Fifth Circuit attempted to determine how the Court would rule based on the Texas statutes and relevant appellate case law. The Fifth Circuit, in an opinion that many viewed as standing Article 9 of the Uniform Commercial Code ("UCC") on its head, ruled that the Texas Certificate of Title Act ("COTA") trumped Article 9.<sup>2</sup>



### *Is Bank One - and was it ever - good law?*

The issue and the case are of more than passing importance. Revised Article 9 exists in all states. Certificate of Title acts also exist in all states. The express relationship between these two statutes, however, can, as we shall see, have marked differences in different states.

The issue in *Bank One* was whether the buyer's purchase of an automobile severed the security interest of the dealer's floor plan lender, thus, allowing the retail lender's lien to take first priority. The dispute arose because the floor plan lender refused to turn over possession of the certificate of title. When a certificate of title is not transferred to the buyer, the court in *Bank One* found that a buyer's purchase of a vehicle was not sufficient to eliminate the floor plan lender's lien.

Without an exchange of the certificate of title, the court reasoned, there was no completed "sale".<sup>3</sup>

The floor plan lender, Bank One, perfected its security interest in accordance with Texas law and also maintained physical possession of the certificates of title as assurance of its security interest.<sup>4</sup> Bank One argued that its security interest remained valid because the buyer did not receive the certificate of title as required under COTA.<sup>5</sup> Relying on the Code (as herein defined), Arcadia, the retail lender (i.e., buyer's financier) argued that the buyer was a "buyer in the ordinary course of business" and, therefore, took free and clear of Bank One's security interest.<sup>6</sup> Accordingly, under the Code, Arcadia's purchase money security interest (that was conveyed from the buyer) would then take priority.

The Fifth Circuit, citing the Code and decisions from the Dallas Court of Appeals, determined there was no conflict between COTA and the Code.<sup>7</sup> The court held COTA controlled the issue of whether or not a sale occurred.<sup>8</sup> Because the sale did not comport with COTA, i.e., the title certificate was not turned over at the time of sale, the sale as between the floor plan financier and the retail lender was void. The court held that "a third party's perfected security interest is not interrupted when a purported buyer attempts to purchase an automobile without receiving title as required to complete a sale under [COTA]."<sup>9</sup> Without the occurrence of a "sale" as defined under COTA, the buyer's retail lender could not use the "buyer in the ordinary course of business" defense, and the floor plan lender's lien remained in effect.<sup>10</sup>

*Bank One*, of course, is not binding on Texas courts—or on any other state courts—in interpreting state law. As stated by Judge Sim Lake in *In re Dota*, a federal court, "in making an *Erie* guess" as to what the Texas Supreme Court would do, "defers to intermediate state appellate court decisions 'unless convinced . . . that the highest court of the state would decide otherwise.'"<sup>11</sup>

The Texas Supreme Court has yet to decide this issue. However, statutory analysis and recent case law suggest that if a properly briefed, evidentially sufficient case were brought today, the outcome would be different.

The remainder of this article provides a detailed analysis of this issue. The first section is an analysis of COTA and the Code as they relate to this issue. The second section is a review of Texas appellate and federal case law involving similar factual scenarios and issues. The third section briefly reviews a few cases from courts in other jurisdictions to present a broader perspective on this issue.

## **I. Statutory Analysis**

### **1. COTA does not govern completion of a dealer's sale.**

Section 501.071(a) of the Texas Transportation Code (Texas's version of the Certificate of Title Act or COTA) states:

- (a) Except as provided in Section 503.039,

a motor vehicle may not be the subject of a subsequent sale<sup>12</sup> unless the *owner* designated in the certificate of title transfers the certificate of title at the time of the sale.

(b) The transfer of the certificate of title must be on a form prescribed by the department that includes a statement that:

- (1) the signer is the *owner* of the vehicle; and
- (2) there are no liens on the vehicle except as shown on the certificate of title or as fully described in the statement.<sup>13</sup>

Under § 501.071, a vehicle can be sold at a subsequent sale only when the *owner* designated in the certificate of title transfers the certificate of title. The floor plan lender in *Bank One* argued that the purchaser of the vehicle was not a valid purchaser because the certificate of title was not transferred at the time of sale.<sup>14</sup> However, the floor plan lender's argument ignored the dealer's specific, statutory exclusion from the certificate of title requirement.

### **A. COTA is applicable to a vehicle "owner," not a "dealer."**

The Texas Transportation Code defines a "dealer" as "a person who purchases motor vehicles for sale at retail."<sup>15</sup> "Owner" is defined by the Texas Transportation Code as "a person, *other than a* manufacturer, importer, distributor or *dealer*, claiming title to or having a right to operate under a lien a motor vehicle that has been subject to a first sale."<sup>16</sup> Thus a "dealer" is not subject to the requirement placed on an "owner" to transfer a certificate of title in order to complete the sale of a motor vehicle.

Furthermore, the term "dealer" is not limited to the sale of new vehicles. COTA indicates that a "dealer" may sell either new or used vehicles. Under § 501.0234(a) of COTA, a dealer is "a person who sells at the first or a subsequent sale a motor vehicle and who holds a general distinguishing number . . ."<sup>17</sup> Thus, a licensed "dealer," who is excluded from the definition of "owner," is a person who sells either new or used vehicles.<sup>18</sup> Texas courts have interpreted the statutory requirement in COTA to expressly exclude dealers of both new and used vehicles.<sup>19</sup>

Accordingly, the transfer of the certificate of title is not required to complete a sale from a dealer to its customer. Thus, a licensed automobile dealer's failure to "deliver" or "transfer" a certificate of title to the consumer purchaser does not affect the validity of the sale.<sup>20</sup>

### **B. If there is a conflict under COTA, the Code controls.**

COTA expressly defers to the Code when there is a conflict between the two. Section 501.005 of the Texas Transportation Code states that "Chapters 1–9, Business & Commerce Code, control over a conflicting provision of this chapter."<sup>21</sup>

However, as to this particular issue, there is arguably no conflict between COTA and the Code. COTA's requirement of delivery of a certificate of title to complete a sale does not apply to the sale of a vehicle by a licensed dealer.<sup>22</sup> Thus, a sale is complete when Article 2 of the Code so prescribes and the priority rules of Article 9 govern thereafter.

### **2. The Code Controls**

As demonstrated above, COTA does not apply to sale of a vehicle from a dealer to a buyer. Therefore, we turn to Article 2

of the Code to determine when the sale is complete and to Article 9 to determine the priority of any security interests in the vehicle.

### A. A dealer's sale of an automobile is governed by the Code.

"Goods" are defined as "all things . . . which are moveable at the time of identification to the contract for sale . . ." <sup>23</sup> Motor vehicles are goods under the Code. <sup>24</sup> A "sale" consists of the "passing of title from the seller to the buyer for a price." <sup>25</sup> Unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods. <sup>26</sup> Title passes despite any reservation of a security interest. <sup>27</sup> Therefore, unless there are explicit terms to the contrary, title passes to the buyer when the dealer delivers the vehicle to the buyer.

### B. A "buyer in the ordinary course of business"

The prior version of Article 9 defines a "buyer in the ordinary course of business" as "one who, in good faith and without knowledge that the sale is in violation of the ownership rights or security interest of a third party, buys from a person in the business of selling goods of that kind." <sup>28</sup> Revised Article 9 defines a "buyer in the ordinary course of business" as "a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind." <sup>29</sup> Under either of these definitions:

"[A] buyer in the ordinary course of business . . . takes free of a security interest created by the buyer's seller, even if the security interest is perfected and the buyer knows of its existence." <sup>30</sup>

Thus, a buyer in the ordinary course takes free of a security interest, even though perfected and even though the buyer knows the security interest exists. <sup>31</sup> However, the buyer may take subject to the security interest if he or she knows that the sale violates a term in an agreement with the secured party. <sup>32</sup>

Further analysis of the Comments to § 9.320 reveal that the limitations imposed under § 9.320 apply only to unauthorized sales by the debtor, in this scenario a dealer. <sup>33</sup> If the secured party authorized the sale in an express agreement or otherwise, then the buyer will take free under § 9.315(a) without regard to the limitations imposed in § 9.320. <sup>34</sup> Lastly, the buyer will also take free of the security interest if the secured party somehow waived or is otherwise precluded from asserting its security interest against the buyer. <sup>35</sup>

Is the dealer "authorized" by the floor plan lender to sell the vehicle? Section 2.403 of the Code concerns the power to transfer an interest in goods. Section 2.403(b) states that "[a]ny entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in the ordinary course of business." <sup>36</sup> "Entrusting" is defined to include "any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under criminal law." <sup>37</sup>

**A buyer in the ordinary course takes free of a security interest, even though perfected and even though the buyer knows the security interest exists.**

Therefore, by entrusting its collateral to an automobile dealer, the floor plan lender is authorizing the dealer to transfer all rights the floor plan lender has in the vehicle to a buyer in the ordinary course. Because a sale from a dealer to a purchaser is an authorized transfer of the floor plan lender's interest in the vehicle to the buyer, the floor plan lender's security interest in the vehicle is extinguished.

### C. Transfer of security interest from inventory to proceeds

The perfected security interest in inventory purchased in the ordinary course of business does not follow the collateral after it is sold. <sup>38</sup> The floor plan lender's security interest is transferred to the proceeds from the sale. Section 9.315 states that "[a] security interest . . . continues in collateral notwithstanding sale, lease, license, exchange, or other disposition thereof *unless* the secured party authorized the disposition free of the security interest . . . ; *and* a security interest attaches to any identifiable proceeds of the collateral." <sup>39</sup> Further, a security interest in proceeds is a perfected security interest if the interest in the original collateral was perfected. <sup>40</sup>

A security agreement between a floor plan lender and the dealer is intended to create a security interest in the financed inventory to ensure repayment of the loan. At the point of an authorized sale of inventory, the security interest in the motor vehicle is extinguished because the goods are no longer inventory. The security interest then becomes a security interest in the proceeds of the sale. <sup>41</sup> Lenders have no reason to complain since the very purpose of goods in inventory is to be turned into cash by sale. <sup>42</sup>

Therefore, when a buyer purchases a vehicle from the inventory of an automobile dealer, the buyer takes free and clear of the floor plan lender's security interest over that vehicle, even if the buyer is aware of the security interest. <sup>43</sup> The floor plan lender's security interest in the vehicle is then transferred to the proceeds from the sale of the vehicle. <sup>44</sup>

### D. The floor plan lender has no legal right to hold the certificates of title.

Neither COTA nor the Code allow a floor plan lender to perfect a security interest in inventory by retaining the certificates of title of the automobiles in inventory. <sup>45</sup> Section 501.027(b) of COTA allows lien-holders whose liens are perfected by recording on the certificates of title pursuant to § 501.111(a) the right to retain the original certificates of title in their possession until the lien is retired. <sup>46</sup> COTA does not provide lien-holders whose liens are in inventory and, therefore not recorded on the certificate of title, the same right. <sup>47</sup>

The Code provides that a security interest in inventory can only be perfected by filing a financing statement at the Secretary of State's office. <sup>48</sup> Thus, it is improper for a floor plan lender to withhold a certificate of title from a purchaser under the guise that it is perfecting its security interest in the inventory.

### 3. A retail lender's purchase money security interest in a vehicle trumps a floor plan lender's security interest in inventory.

As the applicable statutes, properly analyzed, make clear, a dealer's failure to transfer a certificate of title does not override a clear showing of a valid and complete transfer of ownership. COTA does not apply to a new or used vehicle sold by a licensed dealer in the State of Texas. Further,

where a perceived conflict may exist, COTA explicitly states that the Code shall control. Under the terms of the Code, so long as the buyer qualifies as a buyer in the ordinary course of business he will take free and clear of any pre-existing security interest in the vehicle.<sup>49</sup>

A security interest is a “property interest created by an agreement or by operation of law to secure performance of an obligation.”<sup>50</sup> Under the Code, the consumer lender’s security interest attaches and, therefore, becomes enforceable against the debtor and third parties with respect to the collateral when “(i) value has been given; (ii) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and (iii) . . . the debtor has authenticated a security agreement that provides a description of the property . . . .”<sup>51</sup> When all of these elements exist, a security interest becomes enforceable between the parties.<sup>52</sup>

Under the terms of the security agreement, the retail lender is granted rights in the collateral. The retail buyer conveys these rights to the retail lender but can only convey the rights that he or she has. As a buyer in the ordinary course of business, the buyer’s purchase severs the floor plan lender’s interest in the vehicle as inventory and enables the retail lender’s security interest to attach.<sup>53</sup>

Under current Texas case law and statutes, it is likely that a retail lender’s security interest will have first priority over a floor plan lender’s interest, because the buyer’s purchase of the automobile severs it from inventory whether or not the floor plan lender maintains possession of the certificate of title. Once the sale is complete the security interest of the floor plan lender continues in the proceeds of the sale, not in the motor vehicle itself.

## II. Texas Case Law Since *Bank One*

In cases involving a floor plan lender’s lien versus a purchaser or a purchaser’s lender, Texas courts focus on the interaction between the Code<sup>54</sup> and COTA.<sup>55</sup> A review of cases did not identify any substantive difference between cases analyzed under Article 9 and those analyzed under Revised Article 9. The distinctions between the cases involve which law, the Code or the Act, controls in the given factual scenario.

In 2003, the United States District Court for the Southern District of Texas addressed a suit involving a floor plan lender and the consumer purchaser.<sup>56</sup> The floor plan financing agreement covered the dealer’s inventory and the bank perfected its interest by filing financing statements at the Texas Secretary of State’s office. Further, the bank held the certificates of title to the vehicles in the inventory. The buyer subsequently purchased two vehicles, but only received title to one of them. The seller failed to apply the proceeds of the sale to the bank as required under the floor plan financing agreement. Shortly thereafter, the buyer filed bankruptcy and the bank demanded return of the one vehicle for which the buyer did not have title. The bank argued that the buyer was not a “buyer in the ordinary course of business” because he did not receive title as required under the Act. The court distinguished *Bank One* because the buyer there was not a necessary party.<sup>57</sup>

The court found that COTA did not apply to the transaction at issue. Based on stipulations by the parties, the court determined the used car dealer was not covered under the specific terms of COTA. Under the terms of COTA, the “transfer of the certificate of title must be on a form prescribed by the depart-

ment that includes a statement that the signer is the *owner* of the vehicle . . . .”<sup>58</sup> The definition of “owner” in COTA specifically excludes a “dealer.”<sup>59</sup> Because the parties stipulated that the seller was a “dealer . . . in the business of selling used cars to the public,” the court held that COTA did not apply to the transaction at issue.<sup>60</sup> Because the buyer was a “buyer in the ordinary course of business” under the Code, the buyer took free of any security interest created by the dealer, whether that interest was perfected or not.<sup>61</sup>

The court further stated that neither the Code nor COTA recognized the retention of certificates of title as a valid means for perfecting or protecting a security interest in inventory.<sup>62</sup> The bank had no statutory right to retain the certificate of title to the motor vehicle purchased by the buyer. Further, since the seller qualified as a “dealer,” it had a legal obligation to transfer the certificate of title to the buyer.

In *First National Bank of El Campo v. Buss*, a 2004 case, the Corpus Christi Court of Appeals held that the Code preempted COTA regarding relative rights of floor plan financiers and purchasers.<sup>63</sup> Similar to *In re Dota*, *First National* involved the purchasers bringing suit against the secured floor plan lender. The court held that, if the buyers could demonstrate they were “buyers in the ordinary course of business,” their purchases cut off the floor plan lender’s interest in the vehicles.<sup>64</sup>

Further, COTA expressly addresses which law should govern when the Code and COTA conflict: “Chapters 1–9, Business and Commerce Code, control over a conflicting provision of this chapter.”<sup>65</sup> Citing these provisions, the court held that because there was a conflict between the certificate of title provision of COTA and the “buyer in the ordinary course” provision of the Code, the Code controls.<sup>66</sup> Thus, where a buyer could demonstrate he was a “buyer in the ordinary course of business,” his purchase severed the floor plan lender’s security interests in the vehicle. The case was remanded for further findings of fact to determine if the buyer was a buyer in the ordinary course of business.<sup>67</sup>

In 2006, the El Paso Court of Appeals held that failure to transfer a certificate of title to a dealership as part of a trade-in did not void a sale.<sup>68</sup> In *Vibbert v. Par, Inc.*, the owner of the vehicle traded in a car toward the purchase of a new car.<sup>69</sup> Title, however, was never taken out of the owner’s name.<sup>70</sup> Because the original contract on the vehicle was never paid, the owner sued the subsequent retail lender for conversion of the automobile.<sup>71</sup>

The retail lender argued that there was no conversion. Under the UCC, title to the vehicle passed when the owner physically delivered the vehicle to the dealer. The owner argued that because the certificate of title was never transferred, the sale was void and she remained the owner.

In making its determination, the court in *Vibbert* examined the original purpose of COTA. It found that the act was originally intended to “lessen and prevent: (1) the theft of motor vehicles; (2) the importation into this State of and traffic in stolen vehicles; and (3) the sale of an encumbered vehicle without disclosure to the purchaser of a lien secured by the vehicle.”<sup>72</sup> The court found that the purpose of COTA was not to prevent sales and transfers of interests in motor vehicles.<sup>73</sup>

Noting the conflict provision of COTA, the court examined the sale of goods under the UCC. Under § 2.401, a “sale” consists of the “passing of title from the seller to the buyer for a price.” “Unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes her perfor-

## **A review of cases did not identify any substantive difference between cases analyzed under Article 9 and those analyzed under Revised Article 9.**

mance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place.<sup>74</sup> Further, under the Code, title to a motor vehicle passes to the buyer upon delivery of possession, regardless of whether a certificate of title is passed.<sup>75</sup> Thus, the court held that the sale of a vehicle without the transfer of a certificate of title is valid as between the parties when the purposes of COTA are not defeated, even through COTA declares that the non-transfer of the title renders the sale void.<sup>76</sup>

### III. Inter-Jurisdictional Analysis

To determine how this same issue is handled elsewhere, a brief survey of cases in other states was conducted. Below is a review of some of those cases.<sup>77</sup>

#### 1. Ohio

In *First Merit Bank v. Angelini*, the Ohio Court of Appeals found that the certificate of title act governed when there was a conflict between the act and the Ohio version of the UCC.<sup>78</sup> The court specifically relied on a recent Ohio Supreme Court holding that where there was conflict between the Ohio Certificate of Title Act and the UCC, the Ohio Certificate of Title Act governed.<sup>79</sup> However, unlike Texas, the Ohio Certificate of Title Act by its own terms specifically prevails over the Ohio UCC. The court therefore found that without a transfer of the certificate of title to the purchaser, the security interest of the dealer's secured creditor took priority and remained valid against any subsequent purchasers.<sup>80</sup> The court refused to find the retail lender's interest superior to the dealer's lender's interest where there had been no transfer of title as required under the certificate of title act.<sup>81</sup>

The dealer's creditor in *First Merit* was not a floor plan lender; instead it maintained its security interest in particular vehicles on the dealer's lot. However, in *dicta*, the court said that the outcome would likely have been the same with a floor plan lender.<sup>82</sup>

#### 2. California

In *Brasher's Cascade Auto Auction v. Valley Auto*, the California court determined that the California Certificate of Title Act could not be used to void a sale between a middleman and a dealer.<sup>83</sup> This case also did not involve a floor plan lender. Instead, the middleman financed the purchase of 32 vehicles from an auction house and then sold them to a vehicle dealer. The auction house possessed a secured interest in the middleman's 32 vehicles and held the certificates of title to the vehicles.<sup>84</sup> The auction house would maintain a lien against the vehicles until the middleman sold the vehicles and paid the auctioneer.<sup>85</sup> After the middleman absconded with the money, the auction house sued the dealer who purchased the vehicles from the middleman.<sup>86</sup> The auction house argued that no sale had occurred because the dealer never received the certificates of title.<sup>87</sup>

The court sought to determine which party, the auction house or the dealer, should bear the loss. The court determined that if the dealer could show it adhered to reasonable commercial standards sufficient to qualify as a "buyer in the ordinary course," the dealer's purchase would then sever the auction house's liens on the vehicles.<sup>88</sup> Under California law the "transfer of [a] property interest in a motor vehicle is effective as between the immediate parties even though they have not complied with the [Certificate of Title] statute."<sup>89</sup>

#### 3. Colorado

In *Valley Bank & Trust Company v. Holyoke Community Federal Credit Union*, the floor plan lender, with a security inter-

est in the dealer's inventory, sued the consumer's lender when the proceeds of the sale were not passed on to the floor plan lender.<sup>90</sup> The floor plan lender maintained control over the certificates of title.<sup>91</sup> The Colorado Court of Appeals held that the consumer lender was a "buyer in the ordinary course of business" and, therefore, the floor plan lender's security interest over the vehicles was terminated.<sup>92</sup>

The court held that the floor plan financing agreement provided the lender with a security interest in the dealer's inventory.<sup>93</sup> When the inventory was sold, the lender's security interest on that vehicle was extinguished, leaving it with a security interest in the proceeds only. Further, because the floor plan lender authorized the dealer to sell the vehicles without informing the buyers that it reserved its right in the collateral, the floor plan lender did not maintain a security interest in the sold vehicles. Thus, in this case, the Code's "buyer in the ordinary course" defense worked against a floor plan lender where the suit involved the vehicle purchasers' lender. It did not appear from the case that the purchasers were actual parties to the case.<sup>94</sup>

### IV. Evidence

Courts decide cases on evidence. The priority of the retail lender's security interest in the vehicle and the extinguishment of the floor plan lender's security interest depend upon proof of a buyer in the course of business. In cases where the buyer is not a party, retail lenders should not neglect the necessity of so proving.

### Conclusion

While *Bank One* has not been expressly overruled, the development of Texas case law since *Bank One* indicates a probable different outcome today. Ideally, the results would be as clear and logical as the Colorado court's in *Valley Bank* and the analysis as clear as Judge Lake's in *In Re Dota*. Both of these cases came after *Bank One*.

The Texas Certificate of Title Act does not control on the issue of priority between a floor plan lender's and a retail lender's security interest. COTA specifically does not apply to dealers. The purpose of COTA was not to impede the transfer of interests in motor vehicles. *Bank One's* interpretation of COTA would likely impede the purchase of vehicles because retail lenders would be less apt to provide financing unless they knew their interests had priority. Lastly, COTA specifically defers in any potential conflict to the Code.

Under the Code, buyers in the ordinary course of business take free and clear of all liens created by the seller. Because the buyer purchases from a dealer authorized to sell the vehicles, his purchase likely will sever the floor plan lender's security interest in the vehicle, leaving the floor plan lender with a security interest in proceeds. Once this interest is severed, the retail lender's purchase money security interest attaches to the vehicle in a first priority position.

This result comes from the interplay between Articles 2 and 9 of the Code. Under §§ 2.403(b) and 9.315(a), the floor plan lender's security interest is extinguished when the vehicle is sold from inventory to a buyer in the ordinary course of business. Under § 9.315(a), this same security interest attaches to the proceeds of the sale. Under § 9.320(a), the buyer in the ordinary course of business takes free and clear of the floor plan lenders security interest in the vehicle. The security interest of the retail lender is then left alone in first position.

Thus, the retail lender wins and Article 9 remains up-right when a particular state's Certificate of Title Act expressly says that Article 9 trumps it. *Bank One*, like its namesake bank, is defunct, and, once again, all is right with the world.

\* Lawrence Young is a partner in the law firm of HughesWatters Askanase in Houston, Texas and is Chairman *Ex Officio* of the Governing Committee of the Conference on Consumer Finance Law. He is a fellow of both the American College of Consumer Financial Services Lawyers and the American College of Commercial Finance Lawyers. Larry is the Texas State Editor for both *CarLaw* and *HouseLaw* and is on the Advisory Board of the *Consumer Financial Services Law Report*. He is the former Editor of the *Consumer Finance Law* QUARTERLY REPORT, authored several provisions of the Bankruptcy Code and has authored or co-authored over 100 articles and seminar papers, a book, two plays and a screenplay on a variety of legal subjects in consumer finance, commercial finance and bankruptcy. Larry is a graduate of the University of Michigan Law School and a former Marine officer.

\*\* Simon Mayer is an associate with HughesWattersAskanase. His practice focuses mainly on reorganizations and workouts for corporations and individuals, and the representation of secured creditors in and out of bankruptcy. He also routinely represents Chapter 7 and Chapter 11 trustees. He is a member of the Houston Bar Association, Houston Young Lawyers Association, American Bar Association, and State Bar of Texas. He is also a founding member of the Houston Association of Young Bankruptcy Lawyers. He graduated from South Texas College of Law in 2007 and obtained a bachelor's degree from the Trinity University at San Antonio.

1 *Bank One v. Arcadia Fin., Ltd*, 219 F.3d 494 (5th Cir. 2000).  
2 There should be no difference in how this issue is decided under Revised Article 9.  
3 *Bank One*, 219 F.3d at 496–98.  
4 *Id.* at 496.  
5 TEX. TRANSP. CODE ANN. § 501.071(a).  
6 *Bank One*, 219 F.3d at 497.  
7 *Id.* at 497 n.3 (citing *Pflugger v. Colquitt*, 620 S.W.2d 793 (Tex. App.—Dallas 1981, writ ref'd n.r.e.)).  
8 *Id.*  
9 *Id.* at 498.  
10 *Id.*  
11 *In re Dota*, 288 B.R. 448 (S.D. Tex. 2003).  
12 Section 501.002(20) of the Texas Transportation Code defines a “subsequent sale” as “the bargain, sale, transfer, or delivery of a motor vehicle that has been previously registered or licensed in this state or elsewhere, with intent to pass an interest in the vehicle, other than a lien, regardless of where the bargain, sale, transfer, or delivery occurs . . . .” TEX. TRANSP. CODE ANN. § 501.002(20).  
13 TEX. TRANSP. CODE ANN. § 501.071 (emphasis added). The Texas Legislature enacted COTA to replace the transfer of vehicles by bill of sale with the transfer by certificate of title administered by a central state-wide agency. *Vibbert v. Par, Inc.*, 224 S.W.3d 317, 321(Tex. App.—El Paso 2006, no pet.). The provisions of COTA must be construed in light of COTA's stated purpose to lessen and prevent: “(1) the theft of motor vehicles; (2) the importation into this State of and traffic in stolen vehicles; and (3) the sale of an encumbered vehicle without disclosure to the purchaser of a lien secured by the vehicle.” TEX. TRANSP. CODE ANN. § 501.003. The purpose of COTA is “not to prevent sales and transfers of interests in motor vehicles.” *Vibbert*, 224 S.W.3d at 321; *Gramercy Ins. Co. v. Arcadia Fin., Ltd.*, 32 S.W.3d 402, 408 (Tex. App.—Houston [14th Dist.] 2000, no pet.). COTA is not intended to hinder the transfer of ownership from the seller to the buyer.

14 *Bank One*, 219 F.3d at 496.  
15 TEX. TRANSP. CODE ANN. § 501.002(2).  
16 *Id.* § 501.002(16) (emphasis added); *see also In re Dota*, 288 B.R. at 456.  
17 TEX. TRANSP. CODE ANN. § 501.0234(a) (emphasis added).  
18 *In re Dota*, 288 B.R. at 457.  
19 *Fin. Servs., Inc. v. Republic Nat'l Bank*, 2005 WL 90958, at \* 3 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (mem. op.); *Motor Investment Co. v. Knox City* 141 Tex. 530, 174 S.W.2d 482,485 (Tex. 1943); *Radcliffe Fin. v. City Motor Sales, Inc.*, 159 Tex 493, 323 S.W.2d. 591,594 (Tex. 1959).  
20 *In re Dota*, 288 B.R. at 457.  
21 TEX. TRANSP. CODE ANN. § 501.005; *see also Vibbert*, 224 S.W.3d at 322.  
22 TEX. TRANSP. CODE ANN. § 501.002(2); *see also In re Dota*, 288 B.R. at 456.  
23 TEX. BUS. & COM. CODE ANN. § 2.105(a).  
24 *Id.*; *Associates Discount Corp. v. Rattan Chevrolet*, 462 S.W.2d 546, 549 (Tex. 1970) (“[T]he broad definition of ‘goods’ contained in § 2.105 clearly includes motor vehicles.”)  
25 TEX. BUS. & COM. CODE ANN. § 2.401; *Vibbert*, 224 S.W.3d at 322.  
26 *Vibbert*, 224 S.W.3d at 322 (citing TEX. BUS. & COMM. CODE ANN. § 2.401(b)); *First Nat'l Bank of El Campo v. Buss*, 143 S.W.3d 915, 920 (Tex. App.—Corpus Christi 2004, pet. denied).  
27 TEX. BUS. & COM. CODE ANN. § 2.401(b).  
28 *Id.* § 1.201(9) (Vernon 1991).  
29 *Id.* § 1.201(9) (Vernon 2002).  
30 *See Id.* § 9.307(a) (Vernon 1994) & *Id.* § 9.320(a) (Vernon 2002).  
31 *Id.* § 9.320, cmt. 3.  
32 *Id.*  
33 *Id.* at § 9.320, cmt. 6.  
34 *Id.*  
35 *Id.*  
36 *Id.* § 2.403(b).  
37 *Id.* § 2.403(c).  
38 *Valley Bank & Trust Co. v. Holyoke Cmty. Fed. Credit Union*, 121 P.3d 358, 361 (Colo. App. 2005).  
39 TEX. BUS. & COM. CODE ANN. § 9.315(a)(1)-(2) (emphasis added).  
40 *Id.* § 9.315(c).  
41 *Id.*  
42 *Id.* § 2.403, cmt. 2.  
43 This reasoning is in line with case law in other jurisdictions: *see e.g., Valley Bank & Trust Co.*, 121 P.3d 358; *Hampton Bank v. River City Yachts, Inc.*, 528 N.W.2d 880, 890 (Minn. Ct. App. 1995); *North Carolina Nat'l Bank v. Robinson*, 336 S.E.666, 670 (1985); *Cunningham v. Camelot Motors, Inc.*, 351 A.2d 402 (Ch. 1975); *Stroman v. Orlando Bank & Trust Co.*, 239 So.2d 621, 623 (Fl. Dist. Ct. App. 1970). Comment 2 to § 9.315 states, “the general rule that a security interest survives disposition does not apply if the secured party entrusts goods collateral to a merchant who deals in goods of that kind and the merchant sells the collateral to a buyer in ordinary course of business. Section 2-403(2) gives the merchant the power to transfer all the secured party's rights to the buyer, even if the sale is wrongful as against the secured party. Thus, under subsection (a)(1), an entrusting secured party runs the same risk as any other entruster.” TEX. BUS. & COM. CODE ANN. § 9.315, cmt. 2.  
44 “Under subsection (a)(2), . . . a security interest attaches to any identifiable ‘proceeds,’ as defined in Section 9–102.” TEX. BUS. & COM. CODE ANN. § 9.315, cmt. 3.  
45 *In re Dota*, 288 B.R. at 460.  
46 *See* TEX. TRANSP. CODE ANN. § 501.027(b); *In re Dota*, 288

B.R. at 460.

47 See e. g. TRANSP. CODE ANN. § 501.027(b); *In re Dota*, 288 B.R. at 460.

48 TEX. BUS. & COM. CODE ANN. § 9.320(a) & (c) (1999 Cumulative Annual Pocket Part) (now § 9.320(a)(4)); *In re Dota*, 288 B.R. at 460; see also *Gulf Coast State Bank v. Nelms*, 525 S.W.2d 866, 868 (Tex. 1975) (“With its effective date in 1966, the Texas Business and Commerce Code preserved the certificate of title system for perfecting security interests in motor vehicles except for vehicles held as inventory.”).

49 See TEX. BUS. & COM. CODE ANN. § 9.320(a).

50 BLACK’S LAW DICTIONARY 630 (2d pocket ed. 2001).

51 TEX. BUS. & COM. CODE ANN. § 9.203(b)(1)-(3)(a).

52 *Id.* § 9.203, cmt. 2.

53 See *Valley Bank & Trust Co.*, 121 P.3d at 361.

54 Section 9.320(a) of the Texas Business and Commerce Code states:

“[A] buyer in the ordinary course of business . . . takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence.” TEX. BUS. & COM. CODE ANN. § 9.320(a) (West 2010).

55 Section 501.071(a) of the Texas Certificate of Title Act states:

(a) Except as provided in Section 503.039, a motor vehicle may not be the subject of a subsequent sale unless the owner designated in the certificate of title transfers the certificate of title at the time of the sale.

(b) The transfer of the certificate of title must be on a form prescribed by the department that includes a statement that:

- (1) the signer is the owner of the vehicle; and
- (2) there are no liens on the vehicle except as shown on the certificate of title or as fully described in the statement

TEX. TRANSP. CODE ANN. § 501.071(a) (West 1999).

56 *In re Dota*, 288 B.R. 448.

57 *Id.* at 454–55. Given Judge Lake’s statutory analysis, it is difficult to see how his decision would have been different if the purchaser’s secured lender had been the party. As such, his distinction appears to be one without a difference, made to avoid going against the Fifth Circuit directly. Instead, he chose, by superior analysis, research and reasoning, to undercut *Bank One* indirectly. The real distinction may be evidentiary. If the buyer is not a party to the litigation, it may be more difficult to prove the buyer in the ordinary course of business status from which the priority of the retail lender’s lien derives.

58 *Id.* at 455 (quoting TEX. TRANSP. CODE § 501.071 (emphasis added)).

59 *Id.* at 456 (citing TEX. TRANSP. CODE § 501.002(2) & (16)).

60 *Id.* at 458.

61 *Id.* 288 B.R. at 461.

62 *Id.* at 460.

63 *First Nat’l Bank of El Campo v. Buss*, 143 S.W.3d 915 (Tex. App.-Corpus Christi 2004, no pet.).

64 *Id.* at 918.

65 TEX. TRANSP. CODE ANN. § 501.005.

66 *First Nat’l Bank*, 143 S.W.3d at 923–24.

67 *Id.* at 924.

68 *Vibbert*, 224 S.W.3d 317.

69 *Id.* at 319

70 *Id.*

71 *Id.*

72 *Id.* at 321.

73 *Id.*

74 *Id.* 224 S.W.3d. at 322 (citing TEX. BUS. & COM. ANN. § 2.401(b)).

75 *Id.*

76 *Id.*

77 These cases represent a random sampling of cases with similar fact patterns. This is in no way a representation that these opinions represent a consensus of the law throughout the country. Nor is this a representation that the law reflected in these cases is the majority opinion in those jurisdictions. These cases were randomly selected based on a given set of facts. A much more thorough and extensive analysis is required to determine the law regarding security interest priority between a floor plan lender and a purchaser’s lender in these states and across the United States.

78 *First Merit Bank v. Angelini*, 823 N.E.2d 485 (Ohio Ct. App. 2004).

79 *Id.* (citing *Saturn of Kings Automall v. Mike Albert Leasing*, 751 N.E.2d 1019 (Ohio 2001)).

80 *Id.*

81 *Id.*

82 *Id.*

83 *Brasher’s Cascade Auto Auction v. Valley Auto*, 15 Cal. Rptr. 3d 70 (Ca. Ct. App. 2004).

84 *Id.*

85 *Id.*

86 *Id.*

87 *Id.* at 90

88 *Id.* at 72

89 *Id.* at 88.

90 *Valley Bank & Trust Co. v. Holyoke Cmty. Fed. Credit Union*, 121 P.3d 358 (Colo. Ct. App. 2005).

91 *Id.*

92 *Id.* at 362.

93 *Id.*

94 *Id.*