UNIFORM COMMERICAL CODE

BY EXPRESS LANGUAGE IN THE ACT THE UCC TRUMPS TEXAS CERTIFICATE OF TITLE ACT

Vibbert v. Par, Inc., ____S.W.3d ____ (Tex.App.—El Paso 2006).

FACTS: In June 2001, Sandra Vibbert and her husband traded in their Nissan Altima for a used Mercedes Benz from G.S. Motor Sports ("G.S."). G.S. agreed to pay the balance owed on the Nissan to Wells Fargo Bank, the original lien holder. G.S. sold the Nissan a few days after the trade to new buyers. This subsequent sale of the Nissan was financed by a division of Cygnet Finance ("Cygnet"). Wells Fargo notified the Vibberts that payment was due on the Nissan. G.S.' payoff check to Wells Fargo had bounced, and Wells Fargo decided to pursue the Vibberts. The Vibberts then sued G.S. for DTPA violations, fraud, and breach of contract. Cygnet, the lien holder of the second sale of the Nissan, contracted with Par, Inc. to obtain a duplicate title on the Nissan. Par. and its agents allegedly signed Sandra Vibbert's name and the name of an officer at Wells Fargo, the original lien holder, to the certificate of title in order to transfer title from the Vibberts and Wells Fargo to Cygnet and the new owners of the Nissan. The Vibberts filed suit against Par for conversion by fraudulently transferring title. The trial court granted summary judgment in favor of Par and the Vibberts appealed.
HOLDING: Affirmed.
REASONING: The court concluded that under the UCC, title to the Nissan passed to the car dealer when the former owner physically delivered the vehicle. Sandra no longer owned or had a right to possession of the Nissan. The Vibberts argued that the Texas Certificate of Title Act (the "Act") made the sale void because Sandra failed to transfer the certificate of title at the time she gave possession of the Nissan to G.S. The Vibberts also argued that the certificate of title showing Sandra Vibbert as owner created a presumption of ownership and a right to possession. However, the court, relying on *Tyler Car & Truck Ctr. v. Empire Fire & Marine Ins. Co.,* 2 S.W.3d 482, 485 (Tex. App – Tyler 1999), found that the Vibberts failed to show evidence to support a presumption of ownership or Sandra's right to possession and summary judgment was appropriate.

At the time of the sale, chapter 501.071(a) of the Texas Transportation Code prohibited the sale of motor vehicles without a transfer of the certificate of title by the named owner at the time of the sale. The code further provided that any sale made in violation of this provision was void and title could not pass until the parties to the transaction complied with all requirements. Tex. Transp. Code Chapter 501.073 (Vernon 1999). The court then looked to the legislative intent of the Act, which was: 1) to prevent auto theft; 2) to lessen the importation into the state of stolen vehicles; and 3) to prevent the sale of encumbered vehicles without disclosure to the purchaser of a lien secured by a vehicle. Tex. Transp. Code Ann. §501.003 (Vernon 1999); *First Nat'l Bank v. Buss*, 143 S.W.3d 915, 919 (Tex. App – Corpus Christi 2004). Since enforcing the sale would not interfere with the purpose of the Certificate of Title Act, the court upheld summary judgment for Par.

Lastly, the court noted a conflict existed between the Act and the UCC provision, Tex. Bus. & Com. Code Ann. §2.401(b). However, the Act expressly stated that "Chapters 1 through 9 of the [UCC] control[led] over a conflicting provision of Chapter 501." Tex. Transp. Code Ann. § 501.005. Thus, the court concluded the UCC provision trumped the Texas Act by its express language.

MISCELLANEOUS

FOR DIVERSITY JURISDICTION PURPOSES, NATIONAL BANK IS A CITIZEN OF STATE IN WHICH ITS MAIN OFFICE IS LOCATED

Wachovia Bank v. Schmidt, 126 S. Ct. 941 (2006).

FACTS: Wachovia Bank ("Wachovia") is a national banking association with a designated main office in Charlotte, North Carolina, and branch offices in several other states, including South Carolina. A group of South Carolina citizens sued the bank in a South Carolina state court claiming that the bank fraudulently induced them to participate in an illegitimate tax shelter. Relying on a claim of diversity of citizenship, Wachovia filed a petition to compel arbitration of the dispute in federal district court. The district court denied the petition on the merits and Wachovia appealed the decision.

To determine the bank's citizenship, the Fourth Circuit looked to the language in 28 U.S.C.S. § 1348, which reads, in part: "All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located." 28 U.S.C.S. § 1348. The appellate court determined the meaning of the term "located" implied that a bank is a citizen in every state in which it maintains a branch office. Because Wachovia operated a branch in South Carolina, the bank was considered to be a citizen of that state. As a result, diversity of citizenship did not exist between the parties to the fraudulent inducement claim and the claim could not be adjudicated in federal court. The Supreme Court granted certiorari to resolve the disagreements over the meaning of § 1348.
HOLDING: Reversed and remanded.
REASONING: The Fourth Circuit cited three reasons for the decision to give inclusive meaning to the term "located" as used in § 1348. First, the court relied upon the term's dictionary definition to include physical presence. Second, the court looked to the use of the terms "established" and "located" in the code and determined that each term was used independently of the other. Finally, the court cited the language used by the Supreme

Court to determine that the term "located" as it is used in the statute, includes any location where a bank operates a branch office. *Citizens & Southern Nat. Bank v. Bougas*, 434 U.S. 35 (1977). The Supreme Court, however, rejected this reasoning and noted distinctions between the cases cited by the appellate court and the case at hand. For example, the *Bougas* case dealt with a statute designating venue while the language in question in the present case falls under a statute related to subject-matter jurisdiction. The court determined that there are important differences between these two ideas and stated that venue has more to do with "litigational convenience" while subject-matter jurisdiction is a far "weightier" issue that deals with the court's actual authority to rule on certain types of cases. Additionally, objections to venue are considered to be waived unless they are timely made as opposed to subject-matter jurisdiction issues, which can be raised *sua sponte* and must be considered by the court. Because of these distinctions, the *Bougas* case was found to be inapplicable to the present facts.

The Court found the meaning of the term "located" depends on the purpose and context in which it is used.

In summary, the Court found the meaning of the term "located" depends on the purpose and context in which it is used. When used in a context related to venue, it may indeed refer to multiple locations. However, when the term is used to govern federal-court subject-matter jurisdiction, citizenship is proper in only one state. Therefore, the word "located" as it is used in 28 U.S.C.S. § 1348 indicates that the state citizenship of a national bank is determined by the bank's articles of association, not by where branch offices are located. As a result, Wachovia Bank was deemed a citizen of North Carolina and could properly remove the state court action for federal court adjudication.

HOUSEHOLDER COULD SUE U.S. POSTAL SERVICE IN TORT FOR DAMAGES SHE SUFFERED WHEN SHE TRIPPED AND FELL OVER MAIL LEFT ON HER PORCH

Dolan v. United States Postal Serv., 126 S.Ct. 1252 (2006).

FACTS: Dolan ("Householder") tripped and sustained injuries over mail negligently left on her porch by a United States Postal Service mail carrier. Householder brought suit against the United States Postal Service ("USPS") under the Federal Tort Claims Act ("FTCA"), seeking to recover for the injuries she suffered. The United States District Court for the Eastern District of Pennsylvania dismissed the case for lack of subject matter jurisdiction and found that an exception to the FTCA barred her claims for damages. The Third Circuit affirmed.
HOLDING: Reversed and remanded.
REASONING: The Court reasoned that under the Postal Reorganization Act, the Postal Service is an independent establishment of the executive branch of the government of the United States. Consistent with that status, the Postal Service enjoys federal sovereign immunity absent a waiver. Although the Postal Reorganization Act generally waives the immunity of the Postal Service from suit by giving it the power to sue and be sued in its official name, the statute also provides the FTCA shall apply to tort claims arising out of the Postal Service's activities.

Prior courts concluded that although the FTCA generally waives sovereign immunity as to a federal employee's torts, Dolan's claims were barred by an exception to that waiver. The FTCA exception to sovereign immunity pertaining to postal operations is located in 28 U.S.C § 2680(b), which states, "the provisions of this chapter and section 1346(b) of this title shall not apply to… any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matters." The Supreme Court had to determine if the exception to the FTCA regarding claims arising out of negligent transmission of mail by USPS employees applied to claims of personal injuries or if it was limited in scope and applied only to claims of damaged mail. The Court ultimately thought it more likely that Congress intended to retain immunity only for injuries arising directly or consequently when mail either fails to arrive at all or arrives late, in damaged condition, or at the wrong address. The Court felt that Congress did not intend to immunize all postal activities. Had Congress intended to preserve immunity for all torts related to postal delivery, including hazardous mail placement at customer homes, it could have used sweeping language. Instead, by carefully delineating just three types of harm (loss, miscarriage, and negligent transmission), Congress expressed the intent to immunize only a subset of postal wrongdoing, not all torts committed in the course of mail delivery. The postal exception was found inapplicable and Dolan's claim fell within the FTCA's general waiver of federal sovereign immunity.

STATE "DO-NOT-CALL" LAW AS APPLIED TO NON-PROFITS DOES NOT VIOLATE FREE SPEECH

Fraternal Order of Police, N.D. State Lodge v. Stenehjem, 431 F.3d 591 (8th Cir. 2005).

FACTS: A nonprofit organization brought an action challenging North Dakota "Do-No-Call" statute (the "Act") as a violation of its First Amendment free speech rights. North Dakota Century Code Chapter 51-28 prohibited certain telephone solicitations of North Dakota residents who register with the state's "do-not-call" list. Plaintiff was a nonprofit organizations that relied on professional charitable solicitors for fundraising. The Act exempted telephone solicitations made by charitable organizations if "the telephone call was made by a volunteer or employee of the charitable organization" and the caller made specified disclosures. A charity could hire an outside agency to call registrants to advocate but could not solicit the registrant to donate funds. The Act distinguished between "in-house" charitable solicitors and professional charitable solicitors. The district court invalidated a portion of the Act as a content-based regulation that failed strict scrutiny. North Dakota appealed from the invalidation of the Act.
HOLDING: Reversed and remanded.
REASONING: To determine whether professional charitable solicitation was fully protected speech, the court first questioned whether the North Dakota regulation was content neutral or content based. The Act was considered content neutral because North Dakota had not distinguished between professional and in-house charitable solicitors to avoid any disagreement with

the message that would be conveyed; the message would be identical regardless of who conveyed it. In addition, the regulation can be justified without reference to the content of the regulated speech because North Dakota's interest is in protecting residential privacy.

The court next considered whether the State had a sufficient or "legitimate" interest; whether the interest identified was "significantly furthered" by a narrowly tailored regulation; and whether the regulation substantially limited charitable solicitations. The court reasoned that North Dakota's narrowly tailored do-not-call statute significantly furthered the state's interest in residential privacy. The Act did not substantially limit charitable solicitations and was not unconstitutionally broad. North Dakota's goal of ensuring residential privacy would be achieved less effectively if the legislature exempted professional charitable solicitors from the Act. Seeking to balance the interest of callers against the privacy rights of subscribers, the legislature distinguished between in-house and professional charitable solicitors.

North Dakota's narrowly tailored do-not-call statute significantly furthered the state's interest in residential privacy.

North Dakota contended that the distinction was based upon the sheer volume of calls because "[a] charity using paid professional telemarketers was typically able to dial substantially more residential telephone numbers than if the charity used its own volunteers and employees." The Act did not substantially limit charitable solicitations but prohibited calls to residents who have chosen not to receive calls from professional charitable solicitors. The Act did not foreclose all means of charitable solicitation directed at these residents. Employees or volunteers could solicit funds from all North Dakota residents, and professionals could solicit funds from residents who have not registered with the state's do-not-call list. Thus, the Act as applied did not violate free speech.