CASE LAW UPDATE

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CHAPTER 1

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The case selection for this episode of Case Law Update, like all of them in the past, is very arbitrary. If a case is not mentioned, it is completely the author's fault. Cases are included through 296 S.W.3d 321.

In an effort to streamline the case discussions, various statutory and other references have been reduced to a more convenient shorthand. The following is an index of the more commonly used abbreviations.

"Bankruptcy Code" – The Federal Bankruptcy Code, 11 U.S.C.A. §§ 101 et seq.

"DTPA" – The Texas Deceptive Trade Practices Act, Texas Business and Commerce Code, Chapter 17.

"UCC" – The Texas Uniform Commercial Code, Texas Business and Commerce Code, Chapters 1 through 9.

"Prudential" – ***Prudential Insurance Co. of America* v. *Jefferson Associates***, 896 S.W.2d 156 (Tex.1995), the leading case regarding "as-is" provisions in Texas.

The Texas Property Code and the other various Texas Codes are referred to by their respective names. The references to various statutes and codes used throughout this presentation are based upon the cases in which they arise. You should refer to the case, rather than to my summary, and to the statute or code in question, to determine whether there have been any amendments that might affect the outcome of any issue.

This and past Case Law Updates are available at our website cwrwlaw.com.

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CASE LAW UPDATE

PART I
MORTGAGES AND FORECLOSURES

Myrad Properties, Inc.* v. *LaSalle Bank National Association, 300 S.W.3d 746, 2009 WL 4877733, 53 Tex. Sup. Ct. J. 208 (Tex. 2009). Myrad Properties, Inc. financed two separate properties in Killeen. Myrad executed a promissory note, which was secured by a deed of trust that covered both properties. After Myrad defaulted, LaSalle proceeded to foreclose.

The substitute trustees posted notice of sale. In various parts, the notice referred both to the note and the recorded deed of trust, including a statement that “Notice is hereby given of Holder's election to proceed against and sell both the real property and any personal property described in the Deed of Trust.” However, the notice's property description referred to Exhibit A, the only exhibit, which in turn described only one of the two properties. La Salle was the only bidder at the foreclosure sale. It bid its entire debt.

After the foreclosure sale, the substitute trustees issued a substitute trustees deed to LaSalle, which LaSalle immediately recorded. The substitute trustee’s deed conveyed the “Property” to LaSalle. “Property” was defined in the deed as the real property described in Exhibit A to the deed, which, again, described only one of the two tracts.

Myrad took the position that the sale covered only the one tract and, because LaSalle had bid its entire debt for the one tract, Myrad then owned the other tract free and clear. It sued LaSalle to enjoin it from filing a correction deed, but the trial court dissolved its initial restraining order and LaSalle filed a correction deed which described both tracts. Mryad then sought to quiet title and sought a declaration that LaSalle owns only the one tract described in the initial deed. LaSalle in turn sought a declaration that it now holds title to both properties, or in the alternative, LaSalle and the substitute trustees sought rescission of the conveyance from the substitute trustees to LaSalle.

Rather than requiring that erroneous deeds be reformed or rescinded by judicial proceedings, the courts have long allowed agreeable parties to use correction deeds in limited circumstances. For instance, a correction deed may be used to correct a defective description of a single property when a deed recites inaccurate metes and bounds. Similarly, a correction deed may be used to correct a defective description of a grantor's capacity.

However, using a correction deed to convey an additional, separate parcel of land is beyond the appropriate scope of a correction deed. Preserving the narrow circumstances for acceptable use of a correction deed is important because a proper correction deed may relate back to the date of the deed it corrects. To allow correction deeds to convey additional, separate properties not described in the original deed would introduce unwarranted and unnecessary confusion, distrust, and expense into the Texas real property records system. For example, it could require those who must rely on such records to look beyond the deed and research the circumstances of ownership to make sure that no conveyance mistake such as that before us in this case was made, undermining the entire purpose of record notice. Thus, the Supreme Court held that LaSalle's correction deed purporting to convey both properties was void as a matter of law.

Having not succeeded in confirming the correction deed, LaSalle then sought to rescind the conveyance from the substitute trustees because of mistake in the original deed. When mistake is alleged, the court may consider extrinsic evidence of intent in determining whether to enforce a deed. Rescission is an available equitable remedy if mutual mistake is shown.

The lower courts did not reach the rescission claim. However, the trial court granted, and the court of appeals affirmed, LaSalle's claim that the correction deed vested title to both parcels. The use of a correction deed to reform a mistaken deed necessarily implies a mutual mistake in the underlying instrument running contrary to the grantor's and grantee's intent. Thus, a fact-finding supporting a decision to enforce a correction deed would be identical to the finding required for equitable rescission. The correction deed at issue made a single change: the description of two properties instead of one. Thus, in entering and affirming judgment enforcing the correction deed, the trial court and court of appeals necessarily found that a mistake existed in the substitute trustees' deed, the intent of LaSalle and the substitute trustees being to convey both properties covered by the deed of trust. Because of the trial court's implied finding of mutual mistake, supported by all of the evidence, equitable rescission is an available remedy.

The court noted that it was “not blind” to the equities of the situation. LaSalle was entitled to be made whole as holder of the note from Myrad, and in trying to acquire two properties LaSalle received only one by mistake. Although the court cannot enforce the correction deed, it recognized that enforcement of the original substitute trustees' deed would result in one of two things happening. Should LaSalle remain able to foreclose on the omitted property under the note after accounting for its payment, requiring someone to pay a second time for that property will entitle Myrad to a

windfall from any surplus beyond what Myrad owes on the note. Likewise, if the terms of the note are satisfied, Myrad will stand as owner of the omitted property free from encumbrance despite its default. Myrad has never disputed this, and indeed argues for just such a result. We conclude that Myrad will be unjustly enriched if the mistaken deed to LaSalle is enforced.

The court did not need not reach the question of whether notice was adequate, then, or chilled potential bidding, because rescission of the deed is proper regardless. And, a fresh foreclosure sale would address Myrad's concerns about adequate notice to the public.

Terra XXI, Ltd.* v. *Harmon, 279 S.W.3d 781 (Tex.App.-Amarillo 2007, pet. denied). A trustee must conduct a foreclosure sale fairly and not discourage bidding by acts or statements made before or during the sale. However, the trustee has no duty to take affirmative actions beyond that required by statute or the deed of trust to ensure a fair sale. A trustee's duties are fulfilled by complying with the deed of trust. A foreclosure sale may be rendered void if there exists an irregularity, though slight, that caused or contributed to a sale for a grossly inadequate price.

The borrowers contend that the trustee, Harmon, inaccurately described the auctioned property and, thereby, affected the bidding process. Even if Harmon inaccurately described the property, no evidence was presented to demonstrate that an irregularity in the property description caused or contributed to lower bids, fewer bids, or a grossly inadequate price. Evidence must exist that the irregularity caused or contributed to the sale of property for a grossly inadequate price.

The Borrower's contention that the sales price was grossly inadequate is not supported by evidence considering that, in addition to the sales price of $20,000, the property was sold encumbered by superior liens of more than $3 million while the property had a fair market value of $5.7 million.

Long Beach Mortgage Company* v. *Evans, 284 S.W.3d 406 (Tex.App.-Dallas 2009, pet. denied). Evans was appointed receiver in a California suit brought by the SEC against TLC America. After his appointment in California, Evans brought suit in Texas federal court against various related defendants, included the Prices. During the course of that litigation, Evans discovered that the Prices had diverted funds to buy a house. Evans filed a notice of lis pendens describing the house on July 23 and the notice was recorded on July 24.

Also on July 24, 2002, the Prices borrowed $400,000 from Long Beach through a home equity loan. A deed of trust on the Marquette Property secured this loan. On August 2, 2002, Long Beach filed its deed of trust in Dallas County, Texas, creating a lien on the Marquette Property. The Prices ultimately defaulted on their loan with Long Beach.

After the California court found the Prices liable to Evans, it imposed a constructive trust on the house. Evans then asked for permission to sell the house free and clear of liens. Long Beach did not file a claim in that litigation. Evans registered the California judgment with the federal court in Texas, and that court divested the Prices of title to the house and vested title in Evans.

Evans filed this suit in state court to resolve the competing claims between the lis pendens and the deed of trust lien. The trial court held that the lis pendens was superior to the deed of trust.

Among many other arguments, Long Beach next contends the record does not reflect that the lis pendens was recorded prior to the effective date of Long Beach's lien. Thus, Long Beach argues the lis pendens did not provide the necessary constructive notice prior to the effective date of Long Beach's lien on the Marquette Property.

Although the record reflects the lis pendens was recorded on July 24, the same date Long Beach's deed of trust was executed, the record also reflects the lis pendens was filed on July 23. "An instrument filed with a county clerk for recording is considered recorded from the time that the instrument is filed." Property Code § 191.003. Also, a notice of lis pendens is effective from the time it is filed or, in this case, July 23. Thus, Evans's lis pendens was filed and deemed recorded prior to the date Long Beach executed its deed of trust on July 24 or filed the deed of trust on August 2. Thus, the record establishes that Evans's lis pendens was recorded prior to the effective date of Long Beach's security instrument. Long Beach's lien claim is, therefore, subordinate to Evans's lis pendens as a matter of law.

Still, Long Beach argues lis pendens provides constructive notice only upon recording and proper indexing. Long Beach asserts that "obviously, it was indexed sometime after it was recorded", so there was no constructive notice given prior to the time of execution of Long Beach's deed of trust. However, we have already concluded that the filing of the lis pendens was sufficient to place Long Beach on notice of Evans's interest in the property. There is no provision in Property Code § 13.004 which requires the index to be made as a condition precedent to the validity of the notice.

Statewide Bank* v. *Keith, 301 S.W.3d 776 (Tex.App.-Beaumont 2009, pet. pending). Keith's deed of trust required her to keep the property in good repair and to maintain insurance. Among the lender's rights under the deed of trust, it had the right to receive any insurance proceeds paid to the borrower that

resulted from damage to Keith's home. That provision, which is at issue, states: “[Mortgagee] may apply any proceeds received under the insurance policy either to reduce the note or to repair or replace damaged or destroyed improvements covered by the policy.”

Hurricane Rita severely damaged Keith's home. Keith filed a claim under her homeowners' insurance policy. Keith received an insurance draft for the damages the hurricane had caused to her home. The carrier made the draft payable to Keith, her attorney, and the lender.

After receiving the draft from the insurance company, Keith's attorney forwarded the draft to Statewide with instructions requesting that the lender endorse the check and return it so as to pay expenses and begin repairs. Instead, the funds were deposited into the account of the lender’s servicing agent. Although Keith sent the proceeds to the address the lender had instructed its mortgagors to send mortgage payments, the lender explained that payments received at that address were actually received by another bank with whom it had a relationship. Its deposit relationship with the other bank required that funds sent to the designated address be deposited into the servicer’s account for the lender. When the lender finally received a copy of the attorneys’ letter, it moved the funds to a suspense account, but did not try to contact Keith or her attorney regarding the funds.

When the endorsed check had not been returned, Keith's attorney called and spoke to a lender representative. Keith's attorney demanded that the lender return the draft. When the draft was not returned, Keith's attorney filed suit against the lender and servicer, alleging claims based on several theories, including breach of contract, theft, and breach of fiduciary duty.

Shortly after the suit was filed, the lender sent a letter saying it was prepared to disburse the proceeds to Keith and her contractor upon presentation of invoices. Keith rejected the lender’s requests.

Other than requesting that Keith provide the lender with contracts and invoices, and directing its servicer to make payments for invoices Keith had paid, the record does not contain any additional evidence that the lender or its agents did anything more to fulfill the lender's obligation under the deed of trust to either repair Keith's home or apply the proceeds to the loan's balance. At trial, the jury found that the lender had breached the deed of trust and rejected its claim that Keith breached the deed of trust.

The lender challenges the legal and factual sufficiency of the evidence to support the jury's finding that it breached the deed of trust. The lender argues that it acted reasonably in requiring Keith to provide it with invoices and contracts to protect its interest in making sure that the insurance proceeds were spent on the repair of Keith's home. It further asserts that none of the evidence indicates it acted unreasonably. However, the lender’s brief fails to address one of the questions implicitly resolved by the jury's verdict- whether the lender made a timely election of its option to either repair Keith's home or apply the proceeds to the principal of the mortgage. The lender argues that it still maintains a right under the deed of trust to elect to apply the insurance proceeds to the mortgage balance.

In contrast, Keith contends that the deed of trust did not require her to provide the lender with invoices or contracts for the repair of her home. While Keith recognizes that the lender could place some conditions on the release of the funds it held, she complains that instead of doing so, the lender chose to do nothing until Keith filed suit.

In analyzing whether the lender made a timely election, courts first consider the time period within which the lender was required to elect its option. The deed of trust provides no specific time. Nevertheless, where contracts do not specify the time within which a party must elect an option, the law presumes that the contracting parties intended the option be exercised within a reasonable period of time. Courts also consider the purpose of the option at issue when determining whether it was exercised in a timely manner.

An obvious purpose of a lender's option to repair is to allow it some control over how the insurance funds are used to protect the lender's damaged collateral. But, the lender's interest is not the only consideration, as the borrower also has an interest in making financial decisions that will impact the borrower's interests in the property. With respect to the length of time a lender may take in making its election, the question arises whether the lender could withhold its decision for such a length of time that the mortgagor could be forced to make a decision to repair the property without knowing if the lender had elected to repair the property. Or, stated another way, can the lender decide, after the borrower repaired the property, to apply the insurance proceeds to the mortgage balance instead of to the property's repair? With respect to that question, we think the answer is no.

Because both have an interest in knowing which option the lender has chosen, the interests of both the borrower and lender are protected by requiring the mortgagee, under an agreement that fails to specify otherwise, to exercise its option within a reasonable time. In this case, in light of the amount of Keith's outstanding mortgage compared to the insurance proceeds received, the court believed that the lender, acting in a reasonably prudent manner, was on notice that Keith's home had fairly extensive damage. Thus,

aware of significant damage to Keith's home, the lender needed to inform Keith of its election within a fairly short period after receiving the proceeds in order to allow Keith to then decide what to do about repairing her home.

PART II
HOME EQUITY LENDING

Texas Banks Association* v. *Association of Community Organizations for Reform Now (ACORN), 303 S.W.3d 404 (Tex.App.-Austin 2010, pet. pending). ACORN sued the Finance Commission and Credit Union Commission seeking to invalidate certain regulations adopted by the Commissions relating to home equity lending. ACORN claimed that the regulations either contradicted the plain meaning of the constitutional home equity lending provisions or represented new rules that the Commissions had no authority to enact. TBA intervened, arguing that the regulations were a proper exercise of the Commissions' authority. The trial court invalidated seven of the nine challenged regulations. TBA and the Commissions appealed as to the invalidated regulations and ACORN appealed as to the two that weren't invalidated.

Government Code § 2001.038 states that the validity or applicability of a rule may be determined in an action for declaratory judgment if it is alleged that the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of the plaintiff. Because that section does not prescribe a standard of review, the Texas Supreme Court has held that judicial review of rules is thus largely unlimited in scope.

The parties disagree on the level of deference to be afforded to the Commissions' interpretations of the home equity provisions of the constitution. Typically, construction of a statute by the administrative agency charged with its enforcement is entitled to serious consideration, so long as the construction is reasonable and does not contradict the plain language of the statute. The guidelines applicable to the construction of statutes are equally applicable to the construction of the Texas Constitution.

The first regulation challenged was the Commissions' interpretation of the constitution's cap on fees other than interest on a home equity loan. The constitution limits fees other than interest to 3% of the principal amount of the loan. In Rule 153.1(11), the Commissions defined "interest" for purposes of the fee cap as interest as defined in the Finance Code and as interpreted by the Courts. The Finance Code defines interest as "compensation for the use, forbearance, or detention of money." The Commissions further clarified their interpretations by stating that per diem interest and points are not fees subject to the 3% cap.

ACORN argues that the commonly understood meaning of "interest" is not the broad definition found in the usury statutes, but the amount of interest described in the promissory note and specified as a percentage rate to be applied to the remaining, unpaid principal. ACORN further contends that the Commissions' interpretation of "interest" encompasses all fees paid to the lender and therefore allows the "interest" exception to swallow the rule limiting fees to three percent of the principal. TBA and the Commissions argue that the usury definition of interest found in the finance code may reasonably be applied to the constitutional language capping fees "in addition to any interest" because the legislature is presumed to act with complete knowledge of the existing condition of the law and with reference to it. However, the court noted, there are inherent differences between the consumer protection mechanisms of the usury statutes, which require a broad definition of interest, and the protective purposes of the home equity fee cap, so the use of the usury definition of interest for purposes of the fee cap fails to preserve the legislative intent.

The Commissions further argue that the finance code's definition of interest represents a technical meaning of the word "interest," and that the court must construe the interest exception to the fee cap accordingly. The court disagreed. The finance code definition of interest represents the technical definition of interest only as it applies in the usury context, pursuant to the intent to protect borrowers from usurious lending practices. In the home equity lending context, incorporating the extremely broad usury definition of interest would defeat the purpose of the constitutional provision imposing a fee cap in the first place.

The plain language of the fee cap provision creates a 3% cap on fees other than interest in the context of a home equity loan. The Commissions' interpretation, which classifies fees charged by the lender as interest, essentially renders this cap meaningless. The court would not conclude that the legislature, in creating the cap on fees connected with a home equity loan, intended to exclude basically all fees charged by the lender from the cap.

The next challenged regulation was the Commissions' interpretation of the constitutional provision which states that a home equity loan may not be closed before the 12th day after the later of the date that the owner of the homestead submits an application to the lender for the extension of credit or the date that the lender provides the owner a copy of the notice prescribed by the section. The Commissions' regulation states that for purposes of triggering this 12-

day waiting period, a loan application may be given orally or electronically. The trial court invalidated that portion of the rule allowing oral applications to trigger the waiting period and preserved that portion of the rule allowing electronic applications.

ACORN argues that allowing an oral application to trigger the waiting period is inconsistent with the level of formality that the legislature intended to inject into the home equity lending system for the purpose of protecting consumers. TBA and the Commissions, on the other hand, assert that it is not uncommon for lenders to accept oral applications from prospective borrowers by taking information over the telephone, and further argue that the potential for abuse is minimal because the 12-day waiting period does not begin to run until the later of the date the application is submitted or the date the borrower receives the required disclosure statement.

The court noted that the statement of legislative intent said a homeowner could submit a written, electronic, or oral application. ACORN pointed out that the notice language defining the 12-day waiting period says "THE LOAN MAY NOT CLOSE BEFORE 12 DAYS AFTER YOU SUBMIT A WRITTEN APPLICATION TO THE LENDER OR BEFORE 12 DAYS AFTER YOU RECEIVE THIS NOTICE, WHICHEVER DATE IS LATER." The court noted, though, that this wording was later amended to change "written application" to "loan application." In light of the legislative statement of intent and the change in the notice, the court reversed the trial court's invalidation of the "oral application" portion of the rule.

The third rule in question was the rule interpreting the constitutional provision which states that a homeowner, in accessing a home equity line of credit, may not use a credit card, debit card, preprinted solicitation check, or similar device to obtain an advance. The Commissions' rule stated that devices which are not prohibited include prearranged drafts, convenience check, or written transfer instructions. ACORN argued that the rule did not provide a clearly defined distinction regarding permissible and impermissible devices, noting especially the difficulty in distinguishing between a convenience check and a preprinted solicitation check.

The constitutional provision was later amended changing "preprinted solicitation check" to "preprinted check unsolicited by the borrower." The Commissions then changed their regulation to say that preprinted checks requested by the borrower were permitted. The court held that the revised rule is now consistent with the constitutional provision.

The next rule challenged relates to the constitutional provision requiring the lender to provide the borrower documents at closing. In challenging this regulation, ACORN argued that the Commissions improperly limited the documents to be provided to those actually signed at closing. According to ACORN, the plain language of the constitution requires that the homeowner be provided with documents signed before closing that are related to the extension of credit, such as the loan application, employment verification, and certain disclosure notices. Again, while the case was pending, the constitutional provision was amended to state: "[A]t the time the extension of credit is made, the owner of the homestead shall receive a copy of the final loan application and all executed documents signed by the owner at closing related to the extension of credit." The Commissions then amended their rule. The court again concluded that the amended rule is consistent with the constitution and there is no obligation to give the owner copies of documents signed before the closing.

ACORN then sought to have the court invalidate the two rules that the trial court had not invalidated. The first rule was one related to the constitutional provision requiring closing to be only at the office of the lender, an attorney at law, or a title company. The rule in question states that a lender may accept a properly executed power of attorney allowing the attorney-in-fact to execute closing documents on behalf of the owner, and also states that a lender may receive consent required under the constitution by mail or other delivery of the party's signature to an authorized physical location and not the homestead.

ACORN claims that the power of attorney provision is not an interpretation of the constitution but an impermissible new rule that violates the intention to prohibit coercion in closing home equity loans. The Commissions claim that the power of attorney rule is not a new rule but merely a clarification that the constitution does not change the existing principle of Texas law that allows the use of a properly executed power of attorney in transactions. The court agreed with the Commissions. The use of powers of attorney to designate an attorney-in-fact to act on the designor's behalf is a recognized principle of Texas law. As a result, it is neither inconsistent with the constitution nor impermissible rulemaking for the Commissions to clarify that this principle continues to apply in the context of home equity loan closings, particularly where the drafters expressly prohibited the use of powers of attorney in other home equity lending contexts, but not with regard to closing the loan.

The mail-in rule is also not inconsistent with the literal text of the relevant constitutional provision. The Commissions' interpretation simply allows borrowers who are otherwise unable to appear in person at the closing to execute closing documents by mail, while

still preserving the constitution's requirement that closing take place at the offices of the lender, an attorney, or a title company. This interpretation is not unreasonable or contrary to the plain language of the constitution.

ACORN then sought to invalidate the rule interpreting the constitutional provision requiring the lender to provide the written notice. The rule in question said that, if the lender mails the notice, the lender must allow a reasonable time for delivery, and also said that 3 business days was a rebuttable presumption for sufficient mailing and delivery. The rule also says a lender may rely on an established system of verifiable procedures to evidence compliance with this section.

ACORN contends that the Commissions' interpretation contradicts the constitutional requirement to provide notice by presuming that the borrower has received notice three days after mailing. ACORN further argues that the rule creates a new, unauthorized rule by allowing lenders to rely on an established system of verifiable procedures rather than proving that the notice was actually provided to an individual borrower.

The court declined to invalidate the rule. The constitution requires the lender to provide notice, but does not define "provide" or clarify how a lender may establish that notice was provided when the required disclosure is mailed to the borrower. The Commissions interpreted the constitution by determining that in the event of mailing, the 12-day waiting period begins to run three days after the disclosure was mailed, absent any dispute by the borrower on the issue of whether notice was provided. The borrower is free to rebut this presumption of receipt. The constitution requires that a 12-day waiting period begin to run from the date of a certain event. The Commissions' regulations merely interpret the appropriate way to determine whether that event has occurred and to establish compliance with the notice requirement. It is for precisely that type of guidance that the Commissions were authorized to issue interpretations in the first place.

PART III
ASSIGNMENTS OF RENTS

In re *Amaravathi Limited Partnership*, 416 B.R. 618 (Bankr. S.D. Tex. 2009). The properties involved are high-end apartments that generate a lot of rents that are the primary source of the debtors' income. Acquisition of the properties were financed by the lender and secured by deeds of trust, assignments of rents and leases, and cash management agreements typical in securitized loan transactions. After borrowing the loan, the debtors collected the rents and deposited them into a lockbox pursuant to the cash management agreement. The lender would deduct the debt service and make the remainder available to the debtor. When the properties stopped generating enough cash to pay the operating expenses and debt service, the debtor stopped making deposits into the lockbox, which was a default under the various loan agreements.

The debtor filed this Chapter 11 bankruptcy and promptly moved to use the rents as cash collateral. The lender opposed the motion. The single issue litigated by the parties was whether the assignment of rents removed the post-petition rents from the property of the estate.

The lender argued that, since the assignment of rents was "absolute" under Texas law, the debtors had no further interest in the rents. Without an interest in the rents, the rents could not become property of the estate under Bankruptcy Code § 541(a)(1). The debtors argued, on the other hand, that the assignment was merely a "collateral" assignment and that the future rents remained property of the estate under § 541(a)(1).

The United States Supreme Court has held that bankruptcy courts should generally look to state law to determine property rights in the assets of a bankruptcy estate. There are two exceptions to this general rule. First, there is an exception if Congress modifies state law through legislation enacted under Congress's authority to establish uniform laws on the subject of bankruptcies throughout the United States. Second, state property law must relent if some federal interest requires a different result.

In an extensive discussion of bankruptcy law, the court concluded that under the unambiguous language of Bankruptcy Code § 541(a)(6), the rents that come from property of the estate are themselves property of the estate.

The court went further to say that the lender's state law arguments also fail. The lender claims that the parties agreed to an "absolute" assignment of rents that automatically transferred full title in the rents to the lender. Alternatively, the lender argues that, if the court finds the assignment was "collateral" and not "absolute," complete title to the rents transferred when the receiver took possession of the Properties. Regardless of whether the assignment was "absolute" from its initiation or "activated" by the appointment of a receiver, the thrust of the lender's argument is that debtors lack any interest in rents sufficient to bring the rents into the estate under Texas law.

Assignments of rents are interests in real property and are created and defined according to the law of the state where the property is located. The two leading cases involving assignments of rent in Texas are ***Taylor* v. *Brennan***, 621 S.W.2d 592 (Tex.1981) and

***FDIC* v. *International Property Management, Inc.*,** 929 F.2d 1033 (5th Cir.1991). Neither case directly addresses bankruptcy law or the issue presently before this court; nevertheless, their holdings and dicta provide the legal framework for resolving this case.

In ***Taylor***, the Texas Supreme Court discussed "absolute" and "collateral" assignments of rents. A "collateral" assignment of rents occurs when the debtor pledges the property's rents to the mortgage lender as additional security for a loan. In the event of default, the lender may assert rights not only to the property subject to the mortgage but also to the rents generated by the mortgage property. An important caveat with "collateral" assignments is that the lender must take some affirmative action to "activate" its rights to the rents. In dicta, the Texas Supreme Court explained how an "absolute" assignment of rents differs from a "collateral" assignment. The key difference is that "an absolute assignment operates to transfer the right to rentals automatically upon the happening of a specified condition, such as default.". Thus, unlike a "collateral" assignment-which forces the mortgagee to take additional steps to "activate" its "right" to collect rents-the "absolute" assignment permits the mortgagee to assert "rights" to all the rents immediately once a specified condition (usually default) occurs.

The law governing "absolute" assignments was later explained in greater detail by the Fifth Circuit-when interpreting and clarifying the dicta from ***Taylor***. In ***International Property***, the Fifth Circuit found that the mortgage documents demonstrated the parties' intent to create an "absolute" assignment and, therefore, the FDIC had the right to collect the rents immediately upon default. In ***International Property***, the Fifth Circuit recognized that, given the nature of these arrangements, the term "absolute" assignment is, essentially, a misnomer:

> "The concept of a present transfer of title to rents contingent upon default, as opposed to a security interest in the rents, is essentially a legal fiction.... Whatever terminology the court uses, ... mortgagees employ such assignments to secure the debt, and all such assignments would be considered security interests under the Uniform Commercial Code, which treats all transfers intended to secure a debt as security interests despite their form."

The bankruptcy court also quoted **In re *Foundry of Barrington Partnership***, 129 B.R. 550, 557 (Bankr.N.D.Ill.1991) ("[The lender] can call this arrangement an 'absolute assignment' or, more appropriately, 'Mickey Mouse.' It's still a lien ..."). The Fifth Circuit solidified this point by referring to "absolute" assignments as "contingent present assignments" on four different occasions in its opinion. The phrase "contingent present assignment" more accurately reflects the true substance of "absolute" assignments.

The finding that there is nothing "absolute" about "absolute" assignments directly influenced the Fifth Circuit's clarification of ***Taylor's*** statement, in dicta, that an "absolute" assignment "passes title to the rents" to the lender. Furthermore, any doubt concerning ***International Properties'*** legal conclusion that "absolute" assignments do not grant full title to the mortgagee is put to rest upon review of the general characteristics of an "absolute" assignment of rents transaction. Several characteristics of these transactions, which are also present in this case, indicate that complete title simply cannot transfer to the lender. The most obvious interest that a debtor retains following an "absolute" assignment is the debtor's ability to insist that the rents be properly applied to the debtor's obligation to the lender. The second characteristic demonstrating that equitable title remains with the debtor is that, although the borrower may be required to apply rents to pay for operation and maintenance of the property and to pay debt service, the borrower's use of excess rents is not restricted. Third, generally an absolute assignment of rents is given in connection with (and only because of) the related mortgage loan.

The bankruptcy court also noted that, as mentioned in ***Taylor***, a pro tanto payment must be made to create a "true" assignment. A pro tanto payment is a credit to the debt of the present value of the future rental stream. Thus, if the future rental stream was worth $10,000,000 at the time the loan documents were executed, the lender was required to reduce the debt by $10,000,000 in order to effect a "true" assignment of title. No pro tanto payment occurred in this case. The lender's failure to credit the present value of the rents is an indication that the parties did not treat the assignment as one of both a legal and an equitable interest.

Finally, the "absolute" assignment of rents does not transfer complete title because such assignments "terminate upon payment in full of the debt.

PART IV
PROMISSORY NOTES, LOAN COMMITMENTS, LOAN AGREEMENTS

New Wave Technologies, Inc.* v. *Legacy Bank of Texas, 281 S.W.3d 99, 66 UCC Rep.Serv.2d 113 (Tex.App.-El Paso 2008, pet. denied). Checks were

made payable to "Maxim Solutions Group/New Wave Techn" for $134,656.16 and $52,558.73 respectively. The back of each check stated "Each Payee Must Endorse Exactly As Drawn." The checks were received by Brett Autrey, president of Maxim, after Maxim had gone out of business, and were subsequently deposited in Maxim's bank account. The checks were accepted for deposit by a teller for Legacy, using a pre-printed deposit slip of Maxim's. The bank teller checked with her supervisor about whether or not to place a hold on the funds due to the size of the deposit. There was no hold placed on the funds. Each check had only Maxim's account number as an endorsement written on the back. The check was not endorsed by the other payee, "New Wave Techn."

New Wave contends that Legacy converted the checks, under Section 3.420 of the Texas Business and Commerce Code, by taking them by transfer from one payee, Maxim, without any endorsement by the other payee, New Wave. The bank argues that the checks were not made payable alternatively, as a matter of law, but rather were made payable jointly. The initial determination of whom an instrument is payable to is determined by the intent of the issuer of the instrument. UCC § 3.110(a). When there are multiple payees listed, the Code provides:

> "If an instrument is payable to two or more persons alternatively, it is payable to any of them and may be negotiated, discharged, or enforced by any or all of them in possession of the instrument. If an instrument is payable to two or more person not alternatively, it is payable to all of them and may be negotiated, discharged, or enforced only by all of them. If an instrument payable to two or more persons is ambiguous as to whether it is payable to the persons alternatively, the instrument is payable to the persons alternatively."

The checks in this case were made payable to "Maxim Solutions Group/New Wave Techn." The checks also had "Each Payee Must Endorse Exactly As Drawn" printed on the back. New Wave argues that the wording on the back of the check shows the maker's intent to make the checks jointly payable. However, the front of the check has the payees separated by a virgule, "/". While no Texas court has addressed the use of virgule in between payees on negotiable instruments, courts around the nation have been uniform in their holdings. The courts have used the common meaning of a virgule, looking at previously decided cases in other jurisdictions and dictionary definitions, and have held unanimously that it means "or," allowing for payment in the alternative. The court held that a virgule's common usage means "or" in alignment with the previous decisions of the courts of the many states. This does not resolve the issue, however, since the checks presented to Legacy include other language as well.

The statement on the back of the checks "Each Payee Must Endorse Exactly As Drawn" unequivocally states that each payee should endorse the check. New Wave argues that this shows that the checks are payable jointly. Obviously, the front and back of the checks are conflicting in their instructions. The use of the virgule indicates either payee can endorse while the backs of the checks require all payees to endorse. The printed instructions on the back of the check only increase the ambiguity of how the check is payable. The court found that the check, on its face, is ambiguous as to whether it is payable to persons alternatively or jointly, and as such, the instruments are payable alternatively. In the case of ambiguity, persons dealing with the instrument should be able to rely on the endorsement of a single payee. No endorsement by New Wave was required for Legacy to deposit the checks since the checks were properly payable to either payee individually.

Financial Freedom Senior Funding Corporation* v. *Horrocks, 294 S.W.3d 749 (Tex.App.-Houston [14th Dist.] 2009, no pet.). Mullane borrowed a reverse mortgage a few months before she died. The notes evidencing the mortgage provided that borrower was required to pay the balance upon receipt of a notice from lender requiring payment in full as provided in paragraph 7 of the notes. Paragraph 7 provided that the lender could require immediate payment in full upon the borrower's death or a disposition of the property.

Mullane died in March, 2003. In July, 2007, the lender sent a notice of loan maturity. The administrator of Mullane's estate claimed that the statute of limitations had run on the lender's right to foreclose.

The lender claimed that the notes were not demand notes and that the statute did not commence until it sent its notice of acceleration. Citing section 3.108(a)(2) of the Business & Commerce Code, the administrator argued that since the Notes state they are due upon receipt of a notice from appellant requiring payment in full and do not otherwise include a specific time for payment, they are demand notes and limitations began to run on the date they were signed. The court did not accept either interpretation of the notes.

While the notes do not list a specific maturity date, they do contain conditions which create a readily ascertainable time for payment – the borrower's death

or the disposition of the property. It thus held that the notes are payable at a definite time.

And while the court agreed that the notes were not demand notes, it did not agree that the cause of action accrued only when notice of acceleration was sent. The Notes at issue here do not provide for repayment through periodic installment payments with provision for acceleration of any outstanding payments in the event of default. Instead, the notes themselves provide that payment shall be made in full upon demand by appellant once specified conditions occurred. Because the entire debt would always be due upon demand, there was never any requirement that appellant accelerate the debt first. Because the notes are payable at a definite time, appellant's cause of action to enforce the liens accrued when one or more of the conditions listed in Paragraph 7 occurred.

Bank of Texas, N.A.* v. *Gaubert, 286 S.W.3d 546 (Tex.App.-Dallas 2009, pet. dism'd w.o.j.). Gaubert and Chami signed as co-borrowers on a loan from the Bank. The loan matured by its terms in January 2008 and contained no provisions for renewal. The note was secured by a deed of trust. The loan documents include a Notice of Final Agreement reciting Texas Business and Commerce Code § 26.02: "The written loan agreement represents the final agreement between the parties and may not be contradicted by evidence of prior, contemporaneous, or subsequent oral agreements of the parties. There are no unwritten oral agreements between the parties."

The parties anticipated that Gaubert would obtain permanent financing a repay the Bank when the loan matured. Gaubert said that he was told by the Bank officer there would be no problem in extending the loan when it matured. When it did mature, no permanent financing had been obtained. Gaubert said that the Bank told him several times by telephone, e-mail and letters that the loan was being extended. There were several letters from the Bank confirming that the loan was in the process of being extended. In late April, the Bank told Gaubert that it no longer intended to extend the loan. The Bank posted the property for foreclosure.

Gaubert sued and obtained a TRO. The Bank filed an answer raising the statute of frauds as a defense to Gaubert's claim that the bank had agreed to extend the loan. The trial court granted a temporary injunction finding that Gaubert had demonstrated a probably right to relief on one or more of his causes of action and had shown a probable, irreparable, and imminent injury in the interim. The temporary injunction enjoined foreclosures until final trial on the merits.

A temporary injunction is an extraordinary remedy and does not issue as a matter of right. Its purpose is to preserve the status quo of the subject matter of the litigation until trial on the merits. To obtain a temporary injunction, the applicant must plead and prove (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim.

The traditional statute of frauds in Texas provides that certain types of agreements, such as a promise to answer for the debt, default, or miscarriage of another, a contract for the sale of real estate, or an agreement which is not to be performed within one year of its making, are not enforceable unless the agreement, or a memorandum of it, is in writing and signed by the person to be charged or his authorized representative. However, equity will act to avoid the statute of frauds in circumstances where enforcing the statute would itself amount to a fraud.

In 1989, the legislature enacted section 26.02, a specific statute of frauds for loan agreements involving loans exceeding $50,000. Under this statute, a loan agreement is not enforceable unless the agreement is in writing and signed by the party to be bound or by that party's authorized representative. Unlike the traditional statute of frauds (section 26.01), section 26.02 requires the loan agreement itself to be in writing; a memorandum of the agreement does not satisfy section 26.02.

No case has expressly held that the equitable exceptions to the traditional statute of frauds also apply to section 26.02. Cases discussing promissory estoppel in the context of section 26.02 concluded that, assuming the exception applied, the evidence did not raise an issue of fact as to the existence of one or more of its elements. The court assumed that the same equitable exceptions apply.

Based on the record, it is undisputed that the loan involved in this case-as well as any relevant loan agreements-fall within the scope of section 26.02. Thus, if any such agreement is to be enforced, it must either be in writing and signed by the Bank, or an exception to the statute of frauds must apply. Viewing the record, including Gaubert's testimony that he was still discussing the extension with the Bank in early April, in the light most favorable to the trial court's ruling, the record does not contain evidence giving rise to the promissory estoppel exception. There is no evidence the Bank promised to sign an existing writing satisfying the statute of frauds. Gaubert never testified the Bank promised it would sign an existing writing extending the loan for four months; rather, his testimony was there was an oral agreement to extend the loan for four months from the time when new documents were signed.

Gaubert also argues his negligent misrepresentation claim alone is enough to support the temporary in-junction. The court disagreed. While equity will avoid the statute of frauds where application of the statute would itself work a fraud, there is no authority for avoiding the statute of frauds based on mere negligence. A negligent misrepresentation claim may not fall within the statute if the premise of the claim is that, although an agreement was never made, the defendant negligently misrepresented that an agreement had been made and the plaintiff reasonably relied on that misrepresentation to its detriment. But recovery under this theory is also limited to the pecuniary loss suffered in reasonable reliance on the misrepresentation; lost profits or the benefit of the bargain are not recoverable.

Here, based in part on his negligent misrepresentation claim and in addition to his out-of-pocket damages, Gaubert sought the relief of a temporary injunction. That relief has the effect of enforcing the alleged unwritten promise to extend the loan, giving Gaubert the benefit of his alleged oral agreement in violation of the statute of frauds. Regardless of any other remedies Gaubert may have for negligent misrepresentation, the relief at issue in this appeal-the temporary injunction-if countenanced, allows Gaubert to do indirectly what he cannot do directly, i.e. enforce an oral agreement within the ambit of section 26.02.

The court concluded that the statute of frauds serves a vital and important function and allegations of mere negligence are not sufficient to avoid its effect. If in the face of the Statute of Frauds it permitted Gaubert's negligent misrepresentation claim to the extent he seeks to recover the benefit of the unenforceable bargain (i.e., a four-month extension of the loan), it would deprive the Statute of any effect.

Burns* v. *Stanton, 286 S.W.3d 657 (Tex.App.-Texarkana 2009, pet. denied). ISC executed a note payable to Stanton, which Burns guaranteed. The note was secured by a security agreement that included a provision making a change in the borrower’s entity type a default. At one point, ISC and Burns decided they would save on taxes if ISC was converted from a corporation to a limited partnership, so, without getting permission from the lender, a conversion was done. This was, as confirmed by the court, an event of default under the terms of the loan documents.

Stanton accelerated the debt. Burns and ISC claimed Stanton had failed to adequately give notice of his intention to accelerate the indebtedness, and that, therefore, acceleration was improper. Even with an event of default, an acceleration of maturity is improper unless there was either a proper notice of intent to accelerate maturity or a waiver of such a notice.

A negotiable instrument that is payable at a definite time may provide for the right of acceleration of the debt on default. Because acceleration of a debt is viewed as a harsh remedy, however, any such clause will be strictly construed. Texas law requires clear notice of intent to exercise acceleration rights, followed (if the debtor continues in default) by notice of actual acceleration.

On December 7, 2006, Stanton's attorneys sent a letter to ISC and Burns advising that default had occurred and that “Stanton will take all applicable enforcement action” against ISC and Burns.

To encourage the Bank to finance ISC's operations, Stanton had entered into a Subordination Agreement with the Bank, and that Agreement had been acknowledged by ISC and Burns. That Agreement specifically contained a definition of “Enforcement Action” as meaning “to initiate or to participate with others in any suit, action or proceeding against Borrower or any Guarantor to enforce payment or to collect all or any part of the Subordinated Indebtedness ... or the Senior Indebtedness ... or to accelerate the Subordinated Indebtedness (in the case of Creditor) or the Senior Indebtedness (in the case of the Bank).” Therefore, when Stanton gave notice of default and that he intended to take “all applicable enforcement actions,” that notice necessarily included the required notice of intent to accelerate the maturity of the ISC and Burns obligations to Stanton.

Milton M. Cooke Co.* v. *First Bank and Trust, 290 S.W.3d 297 (Tex.App.-Houston [1st Dist.] 2009, no pet.). This lawsuit derives from two competing claims. First Bank's dispute derives from appellants' failure to pay obligations due to First Bank on two promissory notes for an equipment loan and a boat loan. Cooke’s dispute derives from First Bank's having honored checks that Cooke’s bookkeeper issued to herself from accounts with First Bank. The bookkeeper had been withdrawing funds to support a gambling habit for about 18 months when Cooke discovered the unauthorized checks. Estimates of the funds lost from her conduct ranged from $235,000 to $336,000. The bookkeeper was still working for Company, although with restricted responsibilities when this case went to trial.

The Bank refused to reimburse Cooke for the unauthorized checks, claiming the late notice violated the terms of its deposit agreement that required Cooke to notify the Bank within 60 days after the checks were issued. After a series of written communications ensued concerning whether First Bank would reimburse Cooke for the unauthorized checks, Cooke devised a plan to offset the losses related to the

unauthorized checks through the indebtedness to First Bank under the notes that secured the equipment and boat loans. Cooke warned First Bank then, both verbally, in speaking with a bank officer, and in writing, that he was considering withholding all payments on all notes currently held by First Bank as offsets to the money owed for the unauthorized checks unless First Bank deposited $235,000 in the Company account. An attorney for First Bank explained to Cooke in writing the legal reasons why it would not accept the offset, and First Bank continued to refuse Company's requests to deposit the $235,000 in appellants' accounts.

In keeping with his warnings and objections to First Bank's failure to reimburse for Riley's unauthorized withdrawals, Cooke then issued two checks to First Bank. Each check was in the customary amount of the monthly payments on its notes. The amounts of the checks were $3,471.38, against an unpaid balance of $122,218.53 for the equipment loan, and $2,888.91, against an unpaid balance of $193,156.51 for the boat loan. Cooke added "payment in full" notations to those checks. Cooke testified that he added the notation to indicate that the respective, monthly payment amounts would fully satisfy all further obligations under the notes. An additional purpose was to "offset" the losses from the unauthorized checks. Cooke instructed the teller to whom he gave the "full payment" checks to give the checks directly to the bank officer whom Cooke had warned that he would proffer this "offset."

Cooke described this strategy as "trying to have the bank enter into an accord and satisfaction" to compensate for losses arising from the unauthorized checks. After Cooke's proffer, it took the position that it had no further obligation to First Bank on the notes and did not make any additional installment payments on the notes. This prompted First Bank to declare both notes in default and to accelerate them, in accordance with their terms, and to file this lawsuit. The trial court's judgment awarded First Bank damages in accordance with Cooke's outstanding obligations under the notes, accrued interest, and attorney's fees, and denied appellants relief on their counterclaims.

Cooke contends it established the affirmative defense of accord and satisfaction as a matter of law, and they challenge the trial court's contrary conclusion.

Common-law principles define the defense of accord and satisfaction as premised on a contract, express or implied, in which the parties agree to discharge an existing obligation by means of a lesser payment that is tendered and accepted. To prevail under the common law on the affirmative defense that an accord and satisfaction barred First Bank's claims for the accelerated balances due on the loans, Cooke had to produce (1) evidence establishing a dispute between it and First Bank and (2) evidence establishing that it and First Bank specifically and intentionally agreed to discharge appellants' obligations.

UCC § 3.311 contains a detailed provision regarding accord and satisfaction. Pursuant to section 3.311(a)-(b), a claim is discharged if the "person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered in full satisfaction of the claim and (1) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim; (2) the amount of the claim was unliquidated or subject to a bona fide dispute; and (3) the claimant obtained payment of the instrument.

Cooke argued that the trial court disregarded UCC § 3.311 and erred by relying instead on common-law principles in rejecting Cooke's contentions. In other words, Cooke claimed that the UCC and the common law are inconsistent. But, held the court, § 3.311 does not conflict with the common-law doctrine of accord and satisfaction, rather, the statute is consistent with the doctrine as interpreted by Texas courts. As noted in the comments to the UCC, §3.311 is based on a belief that the common law rule produces a fair result and that informal dispute resolution by full satisfaction checks should be encouraged.

Furthermore, both the common law and the UCC recognize freedom of contract and allow the parties to vary the common law and the UCC rules regarding accord and satisfaction. Here, the loan agreements provided that Cooke agreed not to deliver full satisfaction checks to the Bank except in a specified manner that Cooke did not follow.

PART V
USURY

Kennon* v. *McGraw, 281 S.W.3d 648 (Tex.App.-Eastland 2009, no pet. history to date). McGraw and her husband bought a house with a mortgage from the seller. Until they were divorced, all went well, but after the divorce, McGraw fell behind in payments. The seller's lawyer sent McGraw a demand letter and received one in return from McGraw's lawyer stating that McGraw was not in default and claiming that the amounts were miscalculated. The seller sent another demand letter and McGraw's lawyer again responded with a denial of any default, this time asserting that McGraw was being charged usurious interest.

The seller sent a notice of trustee's sale. McGraw's lawyer faxed a response to it on the day before the sale, again contending that there were usurious charges being made. The seller foreclosed

and, when it tried to evict McGraw, she filed suit. The trial court found that she had been charged about $3,000 in usurious interest and awarded damages of around $9,000. The seller argued that the trial court erroneously failed to spread the interest over the entire term of the note and also erred by not giving effect to the savings clause contained in the note.

The trial court found that from March 1995 through December 1999 the seller charged McGraw interest of $17,845.29 and that this was usurious because the maximum amount of allowable interest was only $13,920. The December date may have been a typographical error because it appears that the court intended to use the time period running through the Trust's acceleration of the note, but the note was accelerated by letter dated March 10, 2000. Regardless, the seller argues that, because of the Spreading Doctrine, it was error to use any period of time shorter than the fifteen-year term of the note and that the trial court should have determined whether $17,845.29 could be legally charged over fifteen years. McGraw answers that the Spreading Doctrine only applies when analyzing a note to determine if it charges usurious interest and that it does not apply here because Kennon did not follow the note's terms when she charged past-due interest.

The Spreading Doctrine is codified in Texas Finance Code § 302.101: "To determine whether a loan secured in any part by an interest in real property, including a lien, mortgage, or security interest, is usurious, the interest rate is computed by amortizing or spreading, using the actuarial method during the stated term of the loan, all interest at any time contracted for, charged, or received in connection with the loan." Because of the statute's mandatory language and its broad reference to all interest contracted for, charged, or received, the court disagreed with McGraw that it only applies to the construction of a written agreement. The doctrine is applicable to this case as well.

The next question is what time period should be utilized. The trial court did not use the entire fifteen-year term because the note was accelerated; however, the Supreme Court has held that this is immaterial. In ***Tanner Dev. Co.* v. *Ferguson***, 561 S.W.2d 777, 779 (Tex.1977), the court considered a five-year note that required prepayment of interest at the beginning of the note and then provided for a subsequent period of principal-only payments. The debtor defaulted while still making prepaid interest payments, and the creditor accelerated the note. The court held that, even though the note was accelerated, usury should be determined by using the five-year term. Because the trial court did not utilize the entire term of the note when it performed its interest calculation, the court ruled in favor of the seller on the spreading issue. It did not agree with the seller as to the calculation of allowable interest, however.

The seller argued that the trial court erred as a matter of law by not giving effect to the note's savings clause. They contend that, unless a note is usurious on its face, a savings clause precludes a usury claim. The trial court found that, because the note was accelerated and the property foreclosed, McGraw's future payments could not be adjusted to compensate for overcharges and, thus, that the savings clause did not preclude a usury claim.

Savings clauses are favored by the law and will be given effect if reasonably possible. The effect of a savings clause hinges on the construction of the terms of the whole transaction in light of the surrounding circumstances. Usury is a matter of intention, and a savings clause is evidence of an intent not to charge usurious interest. A party may not, however, escape penalty by disclaiming the intention to do what was clearly done.

The seller's daily late interest charge was the amount of interest accruing each day on the total note. The seller testified that she calculated late interest charges using an amortization schedule the title company provided at closing. That schedule included an equivalent daily interest rate. She multiplied this rate by the number of days a payment was late. This initially resulted in a $7.872 daily late payment charge. As the note balance decreased, she recalculated the daily interest rate. The seller was, therefore, doubling the interest McGraw was charged each day her payment was late. One court has described this method as "patently erroneous." McGraw's lawyer had twice pointed this out to the seller. The court held that this meant the trial court had not erred in find that the savings clause did not preclude McGraw's usury claim issue.

At this point, the court had to determine how much, if any, usurious interest was being charged. Because McGraw's payments were late, the seller was entitled to late charges and to interest on unpaid charges. Finance Code § 302.001 allows the seller to charge the greater of 5% of the payment of $7.50 for any payment that is 10 days late. The seller was entitled to charge $16.23 for each late payment. The note also provided for interest on past due principal and interest at the maximum rate. Finance Code § 302.001(b) sets the maximum rate of interest at 10% a year. The seller was thus allowed to charge 8.8921 cents per day on all late payments. The court held that, while there was legally sufficient evidence to support the trial court's determination of the amount of interest charged, it was factually insufficient, so the case was remanded for a determination of how much interest had been charged and how usurious it was.

PART VI
DEEDS AND CONVEYANCE DOCUMENTS

Gaut* v. *Daniel, 293 S.W.3d 764 (Tex.App-San Antonio 2009, pet. denied). To be sufficient, a writing conveying title must provide within itself, or by reference to some other existing writing in existence at the time of the deed, the means or information by which the land being conveyed can be identified with reasonable certainty. This has been termed the "nucleus of description" theory. Under this theory, if the deed contains a "nucleus of description," parol evidence may be introduced to explain the descriptive words in order to locate the land.

Extrinsic evidence may be used only for the purpose of identifying the property with reasonable certainty from the data contained in the contract, not for the purpose of supplying the location or description of the property.

The deed in question first generally references the Duval County surveys out of which the 28 acres can be found. None of these surveys are part of the record. The deed also notes the 28 acres as being out of a called 399.5 acre tract designated as Share No. 6, as set aside to Alice L. Garcia. It then references several surveys of the partitioned land from which the 399.5 acre tract was taken. Following that was a metes and bounds description which, among other things, failed to identify the specific tract that was its point of commencement, contained no means within the deed to locate the tract, and included no reference within the deed to any existing extrinsic writing which might assist in determining the location. A surveyor was able to plot the boundaries, but only in reliance upon external evidence that was not part of the record. The court thus held that the property description was insufficient.

Enerlex, Inc. v. Amerada Hess, Inc., 302 S.W.3d 351 (Tex.App.-Eastland 2009, no pet.). A warranty deed to land conveys property. A quitclaim deed conveys the grantor's right in that property, if any. Enerlex's deed is labeled "MINERAL DEED." It conveyed to Enerlex "[A]ll right, title and interest in and to all of the Oil, Gas, and any other classification of valuable sub-stance, including any mineral leasehold and royalty interests, including any future or reversionary in-terest, in and under and that may be produced from the following described lands situated in Gaines County, State of Texas, to wit: WTTR Survey, Block G, Sections 160-230 inclusive." The deed also said that it was the grantor's intent to convey all interest of the grantor in the county, even if not specifically described. The deed also contained a general warranty.

Enerlex argues that the deed is not a quitclaim deed because it was not restricted to any interest that Grace may have had and, therefore, the deed conveyed an interest in property. Enerlex notes that Grace conveyed "all right, title and interest" in the seventy-one sections rather than "my right, title, and interest" or "all right, title, and interest that I may own."

Enerlex is correct that the deed does not contain this type of qualifying language, but it reads too much into this distinction. It is more significant that at no point in the deed did Grace warrant or represent that she actually owned any mineral interest. The court also recognized that the deed contains a general warranty and that it is absent any "as is" or "without warranty" language, but because the deed contains no specific representation concerning Grace's title, that language does not preclude it from being considered a quitclaim deed. The Fifth Circuit has noted that "what is important and controlling is not whether grantor actually owned the title to the land it conveyed, but whether, in the deed, it asserted that it did, and undertook to convey it." Am. Republics Corp. v. Houston Oil Co. of Texas, 173 F.2d 728, 734 (5th Cir.1949). Here, the grantor made no such assertion.

The mineral deed, when viewed in its entirety, is a quitclaim deed. It does not purport to convey any specific interest but instead broadly conveys all of the grantor's interest – not just in the seventy-one sections but in all of Gaines County. Because the mineral deed is a quitclaim deed, Enerlex cannot be a bona fide purchaser.

PART VII
LEASES

Garza* v. *CTX Mortgage Company, LLC, 285 S.W.3d 919 (Tex.App.-Dallas 2009, no pet.). In a lawsuit related to a mortgage loan transaction, the Garzas alleged claims for breach of oral and written contract, fraud, fraud in the inducement, fraud in a real estate transaction, breach of fiduciary duty, conversion, negligence, gross negligence, nine separate violations of the Texas DTPA, negligent misrepresentation, misapplication of trust funds, breach of a trust relationship, and breach of the common law duty of care.

CTX argued that it had no liability to Garza for misrepresentation claims because those claims were precluded by the terms of the contract and, CTX claimed, the entire relationship of the parties was established by the contract. The contract provision said: "Complete Agreement; Amendment. No party has made any promise or representation to any other that is not in the Loan Documents. The Loan Documents contain the complete agreement of the parties. This

Loan Agreement may not be amended and no provision of it may be waived except by a writing signed by Lender." CTX Mortgage contended that this clause "precludes and eliminates any prior or contemporaneous agreements which are inconsistent with the integrated agreement."

The court agreed that a party's disclaimer of reliance on representations, if the intent is clear and specific, can defeat claims for fraud, fraudulent inducement, and negligent misrepresentation, because reliance is a necessary element of each of those claims. However, the Texas Supreme Court in ***Forest Oil Corp.*** **v.** ***McAllen***, 268 S.W.3d 51, 56 (Tex.2008) and ***Schlumberger*** expressly declined to adopt a per se rule that a disclaimer of reliance automatically precludes a fraudulent-inducement claim. The court enunciated factors which it considered important in making that determination: whether the contract was negotiated or boilerplate, whether the complaining party was represented by counsel, whether the parties dealt with each other at arms length, whether the parties were knowledgeable in business matters, and whether the release language was clear.

Based on this record, the court could not conclude that the Garzas disclaimed reliance on CTX's alleged representations as a matter of law. Consequently, it concluded that summary judgment in favor of CTX Mortgage on the Garzas' claims for fraud, fraudulent inducement, and negligent misrepresentation was improper.

Luccia v. Ross, 274 S.W.3d 140 (Tex.App.—Houston [1st Dist.] 2008, pet. denied). Luccia leased an office building from Ross. The lease included an option to purchase at a set price "Anytime with credit on rents prorated."

Luccia excercised the option and the parties entered into a purchase contract; however, Luccia defaulted and failed to purchase the property. Ross kept the earnest money and Luccia continued as tenant of the property, paying rent.

Sometime later, Luccia again sought to purchase the property pursuant to the terms of the option. Ross declined to sell the property to Luccia, contending that a "new contract with new terms" would be necessary. Luccia responded to Ross's refusal to sell by filing this suit for breach of contract, seeking the remedy of specific performance or, alternatively, damages. Ross counterclaimed seeking a declaration that Luccia had no right to exercise the option and also seeking damages for Luccia's breach of contract for failing to meet the terms of the original Lease Agreement.

The parties dispute whether the option to purchase in the lease allowed Luccia more than one attempt to close the sale. In other words, the parties disagree whether the first Purchase Contract was the only time that the option to purchase could be exercised, or whether Luccia could again exercise the option to purchase during the period of time after the failed closing and the end of the lease.

Luccia contends that because the lease does not specify an exact time for the exercise of the option, it may be exercised at any time during the lease term, even though he defaulted on the first purchase contract. The court agreed because the plain terms of the agreement do not limit the number of times that Luccia can exercise the option to purchase the property, other than to require that the options be exercised during the term of the lease. The plain language of the lease agreement does not provide that the option offers a one-time-only chance to Luccia. The option expressly states "Anytime with credit on rents prorated." The reference to the rents indicates the option was tied to the lease term. Unless the option contains provisions to the contrary, all that is required of the optionee is that he notify the optionor, prior to the expiration of the option, of his decision to exercise the option. The Optionee thereafter has a reasonable time within which to complete the deal.

Moosavideen **v.** ***Garrett***, 300 S.W.3d 791 (Tex.App.-Houston [1st Dist.] 2008, pet. denied). A 1928 ground lease was freely assignable. One provision of the lease gave the Tenant the right to purchase the leased premises for $50,000, payable over a five year period. The option provision also stated that, when the Tenant exercised the option, the Landlord was bound to convey the property.

Moosavideen acquired the Tenant's interest under the lease. He sent notice to the four heirs of the original Landlord that he knew about, exercising the option. There were other heirs, as he later determined. He received no response to his initial notice, so he contacted them again, along with some additional heirs, this time sending a form of deed for the property. A few months later, with still no response, Moosavideen filed suit, seeking a declaratory judgment that he had validly exercised the option contained in the lease and was entitled to a deed transferring the lease property to him, and for specific performance of the option. During the course of discovery, Moosavideen determined the names of more heirs and provided notice to them of his intent to exercise the option.

Almost a year after Moosavideen gave notice of his exercise of the option, the heirs notified him that he was in default under the terms of the lease. The property had been used as a gas station and there was an environmental contamination that the heirs claimed violated the lawful use clause. The trial court found for the heirs and awarded them damages for breach of

the lease and found that, because of the breach, Moosavideen was not entitled to exercise the option.

Moosavideen contended that he had validly exercised the option when he first contacted the heirs. The lease stated that, if a notice address is to be changed, it is the duty of the party making the change to notify the other parties. The trial court had held that this provision didn't apply to the heirs, because they hadn't changed their addresses. This court disagreed. It is irrelevant that the heirs had not changed the addresses at which they resided. At issue is the lessors' duty in the event he or she wished to change the address for receiving notices under the lease from the address set out in the 1928 lease to some other address.

The undisputed evidence shows that, Moosavideen gave notice to all the heirs for whom he had an address, and that the remaining heirs had never changed their addresses for receiving notice as required by the lease. Because Moosavideen's failure to provide notice to the remaining heirs was brought about by the conduct of those heirs through their failure to comply with the lease, Moosavideen's failure to give notice to them separately is excused. Because some heirs did not comply with the notice change provisions of the lease, Moosavideen's notice of intent to exercise the purchase option was complete when he gave his first notice to the only four heirs for whom he had either received notice or had actual knowledge of their addresses. Thus, Moosavideen validly exercised the option to purchase almost one year before he was given notice of his default under the lease.

Even if the court were to hold that Moosavideen had not validly exercised the option before he was given notice of default, it nonetheless concluded that he was entitled to exercise the option any time before the contract was terminated because his compliance with the other terms of the lease was not a condition precedent to his right to exercise the lease purchase option.

Moosavideen claims that his right to exercise the purchase option was not conditioned on his compliance with the other clauses of the lease. He further argues that because the contract had not been terminated by the time he first attempted to exercise the option, the heirs should be required to specifically perform the option contract by transferring the property to him. The heirs respond that Moosavideen's right to exercise the option was conditioned on his compliance with the other terms of the lease, and that once they notified him that they intended to terminate the lease after a 180-day cure period, he no longer had the right to exercise the option to purchase.

The option clause in this lease agreement is not conditioned on the lessee's performance of the terms of the lease. The option provides that "[i]n consideration of the amount of the rental payments hereunder, paid and to be paid, and of the other valuable considerations inuring to the benefit of the LESSOR hereunder, the LESSOR hereby gives and grants to the LESSEE, and LESSEE shall have an optional right at any time within a period of the term of this lease, to purchase the interest of Lessor in and to the demised premises ..." While the option provision recites the rental payments as consideration, it does not condition the right to exercise the option on compliance with any of the other terms of the lease. Instead, the language clearly states that the option can be exercised "at any time within a period of the term of this lease." It is undisputed that, at the time Moosavideen was able to finally give notice to all of the heirs, rental payments were current, the lease had not yet terminated, and could not be terminated until the "cure" period expired. Had the parties wished to create a condition precedent to the lessee's right to exercise the option agreement conditioned on the lessee's compliance with the terms of the lease, they could have done so.

Taylor* v. *Carbajal, 304 S.W.3d 585 (Tex.App.-Beaumont 2010, pet pending). The lease provided for a term of five years,. The lease required payments of $800 per month, and provided that "amount paid on lease will go to purchase of property $125,000." The badly drafted option to purchase contained in the commercial lease read as follows:

> Option to Purchase. Provided that Lessee is not in default in the performance of this lease, Lessee shall have the option to purchase for an additional term of _____ months commencing at the expiration of the initial lease term. All of the terms and conditions of the lease shall apply during the renewal term except that the monthly rent shall be the sum of $ _____. The option shall be exercised by written notice given to Lessor not less than _____ days prior to the expiration of the initial lease term. If notice is not given in the manner provided herein within the time specified, this option shall expire.

The Tenants remained in possession of the property beyond the end of the initial term. The Landlord began demanding more money and refusing to agree to apply rents to the purchase price.

The Tenants gave written notice of their intent to exercise the option to purchase the property. The Landlord rejected the next rent payment and on a few weeks later, gave written notice to vacate the premises. The Tenants filed a petition for declaratory judgment

and deposited with the trial court he balance due on the purchase price of the property.

The Landlord claimed the option to purchase expired at the end of the initial lease term. The Tenants contended that the option to purchase remained in effect while they remained as tenants of the property paying rent and not otherwise in default.

The first question was whether the lease expired at the end of its stated term or remained in effect on the date the Tenants gave notice of exercise of the option. The general common law rule provides that a tenant who remains in possession of the premises after termination of the lease occupies 'wrongfully' and is said to have a tenancy at sufferance. Under the common law holdover rule, a landlord may elect to treat a tenant holding over as either a trespasser or as a tenant holding under the terms of the original lease. The court looked to the terms of the lease to determine whether the terms of the lease continue in the event of a holdover tenancy.

It is apparent that the Landlord converted a form lease renewal clause into an option clause, retaining some of the renewal language and leaving several terms blank. The option paragraph provides that "[a]ll of the terms and conditions of the lease shall apply during the renewal term except that the monthly rent shall be the sum of $ _____." It is undisputed that the Tenants continued to pay monthly rent in the amount of $800, and that the Landlord accepted each payment until after the Tenants gave written notice of the option to purchase. It follows that the parties did not understand this clause to mean that no rent was due. Thus, it appears the "monthly rent" exception did not apply, and all of the terms and conditions of the lease applied during the "renewal term."

"Renewal term" is not defined in the lease, but the previous sentence states that "[p]rovided that Lessee is not in default in the performance of this lease, Lessee shall have the option to purchase for an additional term of _____ months commencing at the expiration of the initial lease term." The second half of this sentence is somewhat ambiguous: do the Tenants have an unspecified number of months to exercise the option to purchase mentioned earlier in the sentence, or is the phrase merely an acknowledgment that the lease might be renewed for an unspecified period of time? The agreement of the parties did not provide the Tenants with the right to renew the lease; instead, they could exercise an option to purchase the property. However, by accepting the lease payments after the end of the initial term, the Landlord elected to treat the Tenants as holding under the terms of the original lease.

Under either possible construction of the clause, the express terms of the contract provided that all of the terms and conditions of the lease continued during the "renewal term." The contract does not provide for the length of the renewal term; however, at the very least, it would include the period during which the Tenants continued in possession of the property and the Landlord accepted monthly lease payments without giving notice of termination.

The next question was whether the option period expired. The contract provided that "[t]he option shall be exercised by written notice given to Lessor not less than _____ days prior to the expiration of the initial lease term." The Landlord construe the contract to require written notice "prior to the expiration of the lease term." Thus, they argue, the Tenants failed to meet the final sentence of the option paragraph, which required written notice to be given "within the time specified" by the option paragraph.

The Tenants argue that when the time for performance is omitted, the contract may be performed within a reasonable time.

Time is of the essence in an option contract because it is unilateral. In this case, however, the unilateral option was part of a bilateral contract. The Tenants had the exclusive right to exercise the option to purchase, but the Landlord had the exclusive right to renew the lease under the same terms and conditions as the original lease. Thus, under this contract both parties could control what occurred after the five-year lease term ended. The Tenants could purchase the property, or the Landlord could renew the lease. The option provision was not excluded from the renewal language. Because the provision was left blank, the contract failed to specify that the notice had to be given before the expiration of the initial lease term.

The contract in this case is distinguishable from a case in which the extension of the lease is contingent upon the exercise of the option. Here, a renewal clause is contained within the option paragraph, but it is not expressly contingent on the exercise of the option. That renewal clause expressly provides that all of the terms and conditions of the contract will continue during a renewal. The only potentially contrary provision appears in a clause that was left blank. Under these circumstances, a reason-able time for the exercise of the option includes the period of time during which the parties continued to perform the lease. The Tenants gave written notice before the Landlord gave notice of termination. Accordingly, the trial court did not err in declaring that the Tenants have a right to purchase the property for the amount agreed to in the lease.

In re *Wild Oats Markets, Inc.*, 286 S.W.3d 499 (Tex.App.-Beaumont 2009, mandamus dism'd). The lease between Wild Oats as the tenant and its landlord contained a waiver of jury trial in any court action. The landlord sued Wild Oats for breach of the lease and sued Whole Foods for tortious interference with

the lease agreement. The trial court struck the Landlord's jury demand as to the suit with the tenant, Wild Oats, but set the claims regarding Whole Foods for a jury trial.

The landlord argued that Whole Foods could not enforce the jury waiver because it was not a party to the lease.

The issue here is whether the waiver language in the lease necessarily includes the landlord's claims against Whole Foods. The provision covers any court action, any claim of injury, and any provisional remedy. While the contract places no express limitation on the parties affected by the provision, it does expressly refer only to the landlord and the tenant. Although the damages the landlord seeks in its petition for both its breach-of-contract claim and its tortious interference claim are both identical, a tortious interference claim against an unrelated third party is not a claim encompassed by the waiver-of-jury-trial clause contained in the lease.

Although direct benefits estoppel does not apply here, arguably the doctrine of concerted-misconduct equitable estoppel would apply if the doctrine were accepted in Texas. However, the Texas Supreme Court has declined to adopt concerted-misconduct equitable estoppel.

Cottman Transmission Systems, L.L.C.* v. *FVLR Enterprises, L.L.C., 295 S.W.3d 372 (Tex.App.-Dallas 2009, pet. denied). FVLR and LBR entered into a lease. LBR was a franchisee of Cottman and operated a transmission repair shop at the premises. The lease contained a rider that provided that Cottman had the option to assume the lease upon its termination or expiration. To exercise the option, Cottman was required to assume the lease and replace LBR as tenant.

LBR abandoned and moved out of the premises two years after execution. Cottman terminated its franchise with LBR and sent its manager to manage the repair shop at the premises. Cottman paid one month's rent. Cottman didn't pay any further rent and moved out in a few months. The landlord sued. At trial, the landlord was awarded damages for loss of rent, triple-net charges, and costs of finding a new tenant. Cottman complained that the evidence is legally and factually insufficient to support the jury's findings that Cottman was bound by the LBR lease agreement and the lease rider.

The lease agreement and lease rider are subject to the statute of frauds because they concern the lease of commercial real estate for a period greater than one year. Cottman did not sign the LBR lease agreement or the lease rider. At trial, FVLR relied upon the doctrine of partial performance to avoid the statute of frauds. Under the partial performance exception, an agreement that does not satisfy the traditional statute of frauds but that has been partially performed may be enforced if denying enforcement would itself amount to a fraud.

Cottman argues the evidence is insufficient to support the finding that it bound itself to the lease rider because it was not a party to it. However, Cottman's president testified that Cottman was a beneficiary of the lease rider. He readily acknowledged that the lease rider gave Cottman the option to assume the lease.

Cottman also contends the evidence is insufficient to support the finding that it assumed the lease. Cottman makes the following two arguments: (1) the lease rider required it to provide written notice to FVLR of its intent to assume the lease and it never provided such written notice; and (2) its actions did not constitute partial performance under the lease rider.

The court construed the wording of the option. The rider provided that the tenant conditionally assigned its interest in the lease to Cottman, effective upon the occurrence of two conditions: (1) the termination of the franchise with Cottman and (2) exercise by Cottman of the option to assume the obligations of and replace the tenant as provided in the franchise agreement. The court held that the rider did not explicitly state that Cottman had to provide written notice of its exercise of the option to assume.

Cottman also argued that the evidence was insufficient to show that it had partially performed under the lease rider. The court noted that Cottman had paid rent within the 30 day period it had to assume the lease. Payment of the rent was a good indication that Cottman was assuming the lease. But Cottman did a number of other things as well. It entered into a management agreement for the premises. It met with the landlord's property manager and told him that Cottman was taking over the operations at the premises. It secured utilities in its own name, purchased equipment, and entered into service contracts with vendors. Thus, the court concluded that an assumption had occurred and that Cottman was bound by the terms of the lease.

C.W. 100 Louis Henna, Ltd.* v. *El Chico Restaurants Of Texas, L.P., 295 S.W.3d 748 Tex.App.-Austin 2009, no pet.). The lease provided that, on termination, the improvements constructed by the tenant belonged to the landlord but that the tenant owned the trade fixtures. Just before the lease expired, the HVAC units on top of the restaurant were vandalized by copper thieves and damaged by hail. A dispute ensued as to whether the tenant was obligated to repair or replace the units.

The lease defined the Premises as the land and improvements. It also provided that the tenant has the right to install trade fixture and stated that trade

fixtures and other personal property remained the property of the tenant. The lease did not define "trade fixtures;" however that term has a well-established, commonly understood meaning in Texas. It is now well settled that, as between a landlord and his tenant, the term "trade fixtures" means such articlesas may be annexed to the realty by the tenant to enable him properly or efficiently to carry on the trade, profession, or enterprise contemplated by the tenancy contract or in which he is engaged while occupying the premises, and which can be removed without material or permanent injury to the freehold.

The court held that the tenant conclusively established that the HVAC units met the commonly understood definition of trade fixtures. The tenant presented uncontroverted summary-judgment evidence that the HVAC units were not attached to the building, but were designed to be and were placed on curbs on the roof so they could be removed and replaced without injury to the building, and that such units needed to be replaced periodically as they reached the end of their useful life cycles. The tenant likewise presented undisputed evidence that the HVAC units here were approaching the end of their useful lives, and that the units ultimately were replaced without injury to the building. Further, the tenant presented uncontroverted summary-judgment evidence that the 45 tons of air-conditioning capacity provided by the HVAC units facilitated the building's use as a restaurant, but was many times greater than that needed if the building were to be used for other retail or office use. Several Texas courts, addressing similar facts, have held that air-conditioning units are trade fixtures as a matter of law. There is no rule or presumption in Texas law that air-conditioning units are always trade fixtures. The issue, rather, turns on the parties' intent, which here we ascertain from the ground lease.

Harrell* v. *Citizens Bank & Trust Company of Vivian, Louisiana, 296 S.W.3d 321 (Tex.App.-Texarkana 2009, pet. dism'd w.o.j.). Harrell defaulted on his note, and the property was sold to the Bank at a nonjudicial foreclosure sale. The Bank demanded Harrell vacate the premises. When Harrell refused, the Bank filed a forcible detainer action in the justice court; the justice court granted the Bank a writ of possession.

Harrell contends that Charles A. Harrell, Jr., owned an undivided one-fourth interest in the real property described in plaintiff's sworn complaint for forcible detainer and that Harrell remains on the property with the consent of Harrell, Jr. Harrell contends that at the time he executed the deed of trust in favor of the Bank, Harrell, Jr. was a minor. Harrell testified that he was appointed guardian of Harrell, Jr. and that he failed to gain the approval of the county court in which Harrell, Jr.'s guardianship was pending before signing the deed of trust as guardian for his son.FN2 As a result of this omission, Harrell contends the trial court lacked subject-matter jurisdiction because these ownership issues are beyond the jurisdiction of the court sitting in a forcible detainer hearing.

Here, the issue of possession involves Harrell and the Bank; Harrell's only allegation is that the title issue involves Harrell, Jr. and the Bank. Harrell is not claiming any title in his own right. In fact, his attorney conceded as much at the hearing. Harrell's claimed right of possession is merely made through one he claims to have title to the property-Harrell, Jr. Harrell does not claim that his ownership interest in the property did not validly pass to the Bank via the deed of trust and substitute trustee's deed. As between Harrell and the Bank, there is no title dispute; the allegation involves a dispute in title between nonparties and the Bank. Harrell's claim of a title dispute based on the alleged property interests of nonparties with no supporting documentation is far too tenuous to permit us to conclude that the issue of possession cannot be determined. Specific evidence of a title dispute is required to raise an issue of jurisdiction.

Cammack the Cook, L.L.C. v. Eastburn, 296 S.W.3d 884 (Tex.App.-Texarkana 2009, pet. denied). The lease provided that, at the expiration of the lease, upon obtaining the Landlord's written consent, the Tenant would remove any alterations and improvements it made. It also provided that Tenant was required to fix up the premises after termination. When the lease was terminated by the Landlord, the Tenant left everything in place and didn't clean up or repair the premises, so the Landlord sued. When read as a whole, the court found the language in the lease to be unambiguous and that the Tenant had breached its obligations to remove alterations, trade fixtures, and improvements, and to clean up the premises.

PART VIII
VENDOR AND PURCHASER

McCarty* v. *Montgomery, 290 S.W.3d 525 (Tex.App.-Eastland 2009, pet. denied). McCarty agreed to sell an undivided interest in some land to Montgomery. Their contract was on a TREC form. The contract required McCarty to provide a title policy with certain enumerated exceptions. McCarty was also required to furnish a commitment for title insurance, legible copies of restrictive covenants, and documents evidencing exceptions in the commitment. While preparing a commitment, Palo Pinto County Abstract discovered that a federal tax lien burdened the property. The lien arose because McCarty's estranged

husband failed to pay income taxes after their separation in 1995. McCarty knew that the IRS had filed tax liens on their Brownwood home, but she did not know that it had filed a lien on her Palo Pinto County property.

McCarty's broker informed Montgomery about the lien and asked for some time to clear up the lien. Montgomery responded by filing an affidavit with a copy of the contract and stating his intention to seek specific performance. McCarty was firm in her belief that she didn't owe the taxes and said she wouldn't pay off the lien even if she got a million dollars for the property. Her broker then sent Montgomery a copy of a letter from McCarty saying that she would have to terminate the contract because of the situation with the lien. Montgomery kept insisting on buying the land free of the lien.

In the meantime, McCarty executed an oil and gas lease on part of the property, which Montgomery characterized as criminal misconduct.

Suit was filed and the trial court ordered specific performance, providing for payment of the tax lien out of the sales proceeds.

On appeal, McCarty argued that specific performance was not available because the contract terminated by its own terms. According to her, the contract provided that after Montgomery had objected to the lien, she had 15 days to cure. Because she didn't sure, Montgomery could then either close with the lien in place or terminate the contract.

However, the court pointed and Montgomery pointed out, the cure provision was in effect only after the purchaser received a commitment with exception documents. Montgomery never got a commitment. Furthermore, Montgomery was never put to an election. The court pointed out that the contract said that Schedule C requirements of the title commitment were not waived, so with or without any action by Montgomery, the commitment would have confirmed McCarty's obligation to clear the lien from title.

McCarty also argued that the provision of the contract dealing with representations limited Montgomery's rights to the termination of the contract. That provision said that if any of the seller's representations were untrue on the closing date, the buyer could terminate. However, the representation paragraph's language does not indicate that the parties intended termination to be Montgomery's exclusive remedy if McCarty failed to deliver clear title. For example, it does not contain language such as "exclusive" or "sole" remedy. Instead, termination is described permissively, "Buyer may terminate this contract."

Cate* v. *Woods, 299 S.W.3d 149 (Tex.App.-Texarkana 2009, no pet.). Tom and Patsy Cates signed a contract to sell their farm to Woods. The contract had a financing contingency that said the contract would terminate if Woods failed to obtain financing. Woods did not obtain financing for one of the two tracts comprising the farm. Nevertheless, the Cates provided partial seller financing and allowed Woods to purchase half of the farm. In order to do that, they entered into a separate contract for the one tract. Although they talked about it, no written contract was ever signed regarding the other half of the farm.

At one point, without letting Patsy know about it, Tom allowed Woods onto the other half of the farm. Woods moved cattle from the part he owned to this half, planted hay, and built some improvements. No money was ever paid for the tract.

When Patsy found out that Tom had let Woods onto the other half of the farm, she "had a heated discussion" with Tom. Tom and Woods continued to talk about Woods buying the property, but no contract was ever entered into. Patsy then wanted Woods off the land. After several attempts to remove Woods from the property, Tom moved Woods's cattle back to the other half of the farm, plowed up the grass, and put locks on the gates. Woods then sued for specific performance based on the original contract of sale. The trial court granted specific performance to Woods, requiring him to pay the purchase price. It also awarded him damages for the Cates trespassing on the property.

Specific performance is an equitable remedy that can be awarded upon showing a breach of contract. In pursuing an action for specific performance, the first question is whether there is an enforceable contract to be performed. To be enforceable and comply with the statute of frauds, a contract for the sale of real property must be in writing and signed by the person to be charged with the agreement. Before a court can order specific performance of a contract for the sale of land, there must be a written agreement expressing the essential terms of the contract with reasonable certainty.

In ordering specific performance, the trial court relied on the original contract for sale, which was clearly contingent upon Woods obtaining third-party financing for the value of both properties. Since financing was not obtained by the closing date, the contract terminated by its own terms. This termination and abandonment of the original contract was further evidenced by the parties' execution of a separate written contract for sale of the one half of the property at a later date.

Woods then tried to argue that he had an oral contract, but no evidence of an oral contract was presented at trial, so this argument was not available on appeal.

The court also found that there was no basis for Woods's fraud claim. When fraud claims arise out of an alleged contract which is unenforceable under the statute of frauds, the statute of frauds bars the fraud claims as well as the contract claims.

Elijah Ragira/VIP Lodging Group, Inc.* v. *VIP Lodging Group, Inc., 301 S.W.3d 747 (Tex.App.-El Paso 2009, pet. pending). VIP owned five tracts of land secured by a senior note held by PMC a subordinate note held by Sunburst. Having trouble paying off the matured notes on the property, which totaled approximately $2.7 million, VIP entered into negotiations with Ragira for the purchase of the property. The parties agreed to a purchase price of $3.5 million and executed three separate contracts.

The first contract provided for the purchase of tracts four and five at a price of $1 million and named the closing date as May 31, 2004. The second contract was for the purchase of tract one at a price of $1.5 million with a closing date of November 30, 2004. The third contract was for the purchase of tracts two and three at a price of $1 million and a closing date of February 28, 2005. Each contract required Ragira to deposit earnest money and a "$100 review fee," if Ragira failed to do so, the contracts were rendered null and void. Ragira deposited the earnest money for each contract, but didn't pay the "review fee."

The contracts were modified in various ways, but the earnest money and review fee provisions were not changed.

The contracts required VIP to provide surveys and phase one environmental reports. There was a dispute as to whether the surveys were to be new ones or existing ones and as to which party was responsible for getting the phase ones.

The first contract did not close on the extended closing date. Ragira blamed that on not having the survey or phase one; VIP claimed Ragira didn't have its financing. When Ragira tried to have VIP close later on, VIP refused.

Ragira found out that the property was part of the new Cowboy's stadium in Arlington and redoubled its efforts to close the properties. VIP, in the meantime, was negotiating with another buyer and the City of Arlington. VIP and the other parties were prevented from moving forward with the City because Ragira had filed memoranda of the contracts.

Ragira filed suit for specific performance. VIP filed counterclaims for removal of the memoranda as clouds on title. Ragira was denied specific performance because there was no evidence that it was ready, willing, and able to close on the contracts.

The equitable remedy of specific performance may be awarded upon a showing of breach of contract. However, to be entitled to specific enforcement of a contract, a party must show that the contract in question is valid and enforceable.

In this case, the express terms of the contracts provided that Ragira's failure to pay the review-period fees rendered the contracts "null and void." Further, Ragira admitted that he failed to pay those fees for any of the contracts. Accordingly, the three contracts were null and void, and Ragira was not entitled to specific performance. Ragira, citing 1464-Eight, Ltd. v. Joppich, 154 S.W.3d 101 (Tex.2004), argues that the nonpayment of the review-period fees did not preclude the enforcement of the contracts. However, unlike Joppich, the parties did not include a false recital of nominal consideration, that is, that the review-period fees had been paid. Rather, the contract required the payment of the review-period fees and expressly provided that Ragira's failure to do so rendered the contracts null and void. Because Ragira failed to satisfy the express requirements of the contract by failing to pay the review-period fees, the contracts were unenforceable as a matter of law, and therefore, Ragira was not entitled to specific performance on any of the contracts.

Assuming the contracts were enforceable, Ragira was still required to show his readiness, willingness, and ability to perform at relevant times to be entitled to specific performance.

Ragira contends that he proved his ability to tender performance on all the contracts by relying on the evidence showing that he contacted a third-party investor, who had been pre-approved for a loan, to aid in the purchase of the property. When a party alleges he is ready, willing, and able to perform under the terms of a contract, but is relying on third-party financing, the party must show that he had a firm commitment for financing, or he will not be entitled to specific performance.

The lender's commitment letter agreement falls short of the required firm commitment for financing. The letter agreement did not exist as of the original closing date of the first contract, and by the time Ishii's proposal was accepted by Ragira, Ragira already terminated the first contract. Moreover, funding for the purchase of all the properties was conditional on the formation of a LLC, which was never formed, and title insurance was to be obtained, which was never proven to have occurred. Additionally, although Ragira claims that VIP was responsible for obtaining the environmental reports under the terms of the contracts, the letter agreement placed that burden on Ragira, and Ragira did not obtain the environmental report until after the closing date passed on the first contract.

Having determined that Ragira did not have a firm commitment for financing from a third-party investor,

the court agreed with the trial court that Ragira was not ready, willing, and able to perform under the contracts, and therefore, Ragira was not entitled to specific perfor-mance on any of his contracts.

Nguyen* v. *Chapa, 305 S.W.3d 316 (Tex.App.-Houston [14th Dist.] 2009, pet. denied). Ruiz sold the 3-acre tract to Chapa. Chapa did not file the deed from Ruiz. Thirteen months later, Ruiz sold the same 3acres to Nguyen. Nguyen immediately filed a general warranty deed with the county reflecting his interest in the property. After learning of the Ruiz-Nguyen sale, Chapa sought to establish his title by filing suit. Challenging Chapa's unrecorded interest, Nguyen claimed he was a bona fide purchaser. The bank that financed Nguyen's loan on the property intervened and asserted status as a bona fide mortgagee. A jury found in favor of Chapa on his contract claims against Ruiz and found against Nguyen's and the bank's claims of bona fide purchaser and mortgagee, respectively.

Under Texas law, an unrecorded conveyance of an interest in real property is void as to a subsequent purchaser who purchases the property for valuable consideration and without notice. However, the unrecorded instrument is binding on a subsequent purchaser who does not pay a valuable consideration or who has notice of the instrument. Thus, to receive the bona fide purchaser protection, a party must acquire the property in good faith, for value, and without notice of any third-party claim or interest. A bona fide mortgagee takes a lien in good faith, for valuable consideration, and without notice of outstanding claims.

Notice of a third-party's claim or interest can be either actual or constructive, which has been broadly defined as information concerning a fact actually communicated to a person, derived by him from a proper source, or presumed by law to have been acquired. Generally, the question of whether a party has notice is a question of fact; it becomes a question of law only when there is no room for ordinary minds to differ as to the proper conclusion to be drawn from the evidence.

A subsequent purchaser has actual notice if he has personal information or express knowledge of an adverse right. The only evidence of actual knowledge at trial was Chapa's testimony that once he and Nguyen realized Ruiz had sold each of them the same property, Nguyen asked Chapa if he had filed his interest with Harris County. Chapa answered no, and Nguyen replied “bad luck for you.” Chapa contends that Nguyen's inquiry and response shows that he knew of Chapa's interest and knew Chapa did not file the interest with the county. Contrary to Chapa's argument, Nguyen's query is not evidence that he had personal or express knowledge that Chapa had a competing interest in the same property. Rather, Nguyen's statements merely reflect his knowledge of a party's duty to record interest in real estate. Nguyen's question and reply are not evidence of actual knowledge; at best, this evidence provides nothing more than basis for surmise, guess, or conjecture as to Nguyen's knowledge of Chapa's interest.

Constructive notice is notice the law imputes to a person not having personal information or knowledge. One form of constructive knowledge imputes notice where a subsequent purchaser has a duty to ascertain the rights of a party in possession. The duty to ascertain arises only if the possession is visible, open, exclusive, and unequivocal. This case, however, is not a constructive-knowledge-by-possession case.

Nevertheless, a subsequent purchaser is also charged with notice of the terms in deeds which form an essential link in his chain of ownership. Although a deed outside the chain of title does not impute constructive knowledge, a person may be charged with the duty to make a reasonable diligent inquiry using the facts at hand in the recorded deed. Thus, every purchaser of land is charged with knowledge of all facts appearing in the chain of title through which he claims that would place a reasonably prudent person on inquiry as to the rights of other parties in the property conveyed. Accordingly, if Nguyen or his bank had knowledge of any fact or circumstance sufficient to put a prudent man upon inquiry which, if prosecuted with ordinary diligence, would lead to actual notice of Chapa's claim to the 3 acres, Nguyen and the bank are charged with such knowledge. The court reviewed the evidence and found nothing that would have put Nguyen or the bank on inquiry.

FWT, Inc.* v. *Haskin Wallace Mason Property Management, L.L.P., 301 S.W.3d 787 (Tex.App.-Fort Worth 2009, pet. denied). Haskin, Wallace, and Mason are the owners of Haskin Wallace. In 1990, they formed Texas Galvanizing, Inc. Texas Galvanizing is located in Hurst and operates a “hot-dip” galvanizing plant. In 1997, FWT sold to Haskin Wallace approximately six acres of undeveloped real property located in Kennedale and adjacent to FWT's plant. The deed from FWT to Haskin Wallace contained a right of first refusal in favor of FWT that gave FWT the right to purchase the property on the same terms and conditions as Haskin Wallace intended to sell to a third party.

Haskin, Wallace, and Mason then formed U.S. Galvanization to operate a galvanizing business on the property. Haskin, Wallace, and Mason eventually decided to sell the two galvanizing businesses, Texas Galvanizing and U.S. Galvanization. They entered into a contract with Valmont Industries for the sale of the businesses and a lease or purchase of the property.

Pursuant to the right of first refusal in the deed, they sent notice to FWT. FWT responded by exercising its right of first refusal. Thereafter, confusion broke out among the parties. Haskin, Wallace, and Mason believed the right of first refusal required FWT to buy the businesses and the property on the Valmont terms; FWT took the position that the right of first refusal required only that FWT buy the property. No closing ever occurred, however.

A preferential right, also known as a right of first refusal or preemptive right, is a right granted to a party giving him or her the first opportunity to purchase property if the owner decides to sell it. A preferential right has been described as a dormant option. Once the property owner conveys the terms of the offer to the rightholder, the rightholder then has the power to accept or reject the offer. Thus, when the property owner gives notice of his intent to sell, the preferential right matures or "ripens" into an enforceable option. The terms of the option are formed by both the provisions granting the preferential right and the terms and conditions of the third-party offer presented to the rightholder. Once the property owner has given the rightholder notice of his intent to sell on the terms contained in the third-party offer, the terms of the option cannot be changed for as long as the option is binding on the property owner.

The rightholder's exercise of the option to purchase must be positive, unconditional, and unequivocal. With regard to an option, generally, a purported acceptance containing a new demand, proposal, condition, or modification of the terms of the offer is not an acceptance but a rejection.

As a general rule, the holder of a preferential right cannot be compelled to purchase assets beyond the scope of the agreement subject to the preferential right in order to exercise that right. An exception to this rule exists, however, when the preferential right is expressly made subject to the same terms and conditions offered by a prospective, bona fide, third-party purchaser, as is the case here. In such a case, the question of whether the holder of a preferential right must purchase the additional assets turns on whether the condition that requires the purchase of additional assets is commercially reasonable, imposed in good faith, and not specifically designed to defeat the preferential right. While this exception has been applied to cases involving the conveyance of a single asset, there doesn't appear to be any reason why it should not apply equally to cases involving multiple assets.

In this case, FWT elected to exercise its preferential right contained in the deed. The deed's preferential right provision clearly and unambiguously requires that FWT meet the same price and the "same terms and conditions offered by the prospective purchaser," Valmont. Valmont expressly conditioned its purchase or lease of the Property on its acquisition of the assets of the galvanizing businesses. Thus, FWT was required to meet the terms and conditions of Valmont's offer, including the conditions requiring acquisition of the business assets, unless those conditions were not commercially reasonable, were imposed in bad faith, or were specifically designed to defeat FWT's preferential right, which the court found them not to be.

Transcontinental Realty Investors, Inc.* v. *John T. Lupton Trust, 286 S.W.3d 635 (Tex.App.-Dallas 2009, no pet.). The original closing date under the contract between the Trust as seller and TCI as buyer was June 30, 2002. It was extended by written agreement several times. There was also an oral agreement to extend the closing date for two weeks. After the oral agreement to extend, the parties signed another written amendment to the contract, reinstating it and extending the closing yet again. This amendment required additional earnest money and if the additional earnest money was not deposited, the fourth amendment would be null and void. The earnest money got to the title company after the deadline and was rejected. The Trust sold the property to another buyer.

TCI claimed that, since the amendment was rendered void by its terms, the oral agreement was still in existence and should have allowed TCI to extend the closing date. The court disagreed. The oral agreement was the result of negotiations preceding the execution of the amendment and negotiations preceding a written contract should not displace the terms of the written contract. The parties' execution of a written agreement, i.e., the amendment in this case, presumes that all prior negotiations and agreements related to the transaction have been merged into it. The written agreement will not be added to, varied, or contradicted by parol evidence. Therefore, the oral extension agreement merged into the written amendment.

Lovett* v. *Lovett, 283 S.W.3d 391 (Tex.App.-Waco 2008, pet. denied). Louis and his wife moved to Navarro County from Arizona in 1993. Before moving to Texas, Louis and Peter reached an oral agreement concerning the property in dispute. Louis paid Peter $4,200 for the down payment, $500 for the appraisal, and began making monthly payments of $210 to Peter in March 1993. Louis and his wife moved into the house in June. They made these monthly payments through November 2001 and "paid taxes on the entire property for a period of at least three years." Louis states in his affidavit that the "total amount I have paid pursuant to our agreement for the shared purchase and

for maintenance and repair costs and taxes exceeds $25,000.00."

According to Peter, his wife Cheryl and he purchased the property at issue (the "first farm") in February 1993. Louis and he negotiated regarding the formation of a joint venture to purchase "another farm" but "never reached a formal agreement" and never purchased "the second farm." Peter allowed Louis to move into the house and pay "a portion of the note on the property and closing expenses" in lieu of rent.

Peter filed a forcible detainer action in July 2004, seeking to evict Louis from the property, but that proceeding was dismissed. Louis filed this suit in October 2004. Peter contends in his summary judgment motion that Louis's suit is barred by the statute of frauds. Louis responded that the oral agreement is enforceable under the partial performance exception to the statute of frauds.

To establish partial performance, a party must show: (1) payment of consideration; (2) possession of the property by the buyer; and (3) permanent and valuable improvements by the buyer with the consent of the seller or other facts demonstrating that the buyer would be defrauded if the agreement were not enforced. Peter does not dispute that Louis established the first two elements of partial performance. Therefore, the only issue to be determined is whether Louis presented some evidence that he made permanent and valuable improvements with Peter's consent or that he would be defrauded if the oral agreement is not enforced.

The court reviewed the case law and determined that the third required element of a claim of partial performance may be satisfied with evidence that the buyer made "a serious change of position in reliance upon the oral contract," which requires something more than the mere payment of consideration such that the buyer "will suffer an additional and substantial out-of-pocket loss" if the seller is permitted to avoid the contract. The court noted that the evidence showed that Louis did something more than the mere payment of consideration in reliance on the parties' oral contract. In particular, Louis presented summary-judgment evidence that his wife and he moved from Arizona to Texas in reliance on the agreement and that he paid ad valorem taxes for "at least three years" in reliance on the agreement.

Chief Justice Gray dissented, stating that "This proceeding involves the emasculation of the statute of frauds." He noted that the court's opinion allowed Louis to count payments he made to satisfy the first element to also satisfy the third element. The evidence the court now relies upon is nothing more than the evidence of the second element repeated. Everyone concedes money changed hands and that the alleged buyer moved onto the property. That is the evidence which satisfies the first and second elements of the test. The dissent did not believe more of that same evidence, payment of money and a move to the property from farther away, satisfies the third element.

PART IX
TITLE INSURANCE

GCI GP, LLC* v. *Stewart Title Guaranty Co., 290 S.W.3d 287 (Tex.App.-Houston [1st Dist.] 2009, no pet.). Frame bought a house and hired Aspen to do renovations on the home. Aspen worked on the house from 1997 to August 2003, when it stopped due to non-payment.

While the renovations were still ongoing, Frame executed a promissory note to the Bank FN2, secured by a deed of trust to the land "TOGETHER WITH all the improvements now or hereafter erected on the property, all easements, appurtenances, and fixtures now or hereafter a part of the property." The Bank purchased a mortgagee policy of title insurance from Stewart Title with a coverage amount equaling the original principal amount of the "promissory" [sic] note.

Aspen filed a lien affidavit claiming a statutory lien on the land, improvements, and removable, and a constitutional mechanic's and materialman's lien against the land and improvements.

Frame defaulted on the note and the Bank noticed the property for foreclosure sale. Aspen began negotiating with the Bank about their relative lien priorities and then filed suit against Frame and the Bank. The Bank sold its note and lien to Gulf Coast, who proceeded to foreclose. Aspen amended its lawsuit to include Gulf Coast.

Gulf Coast notified Stewart Title about the Aspen lawsuit and demanded that Stewart Title provide indemnification against Aspen's claims and a defense to the lawsuit.

Stewart Title claimed that losses or damage from Aspen's claims were not covered by the title policy because the claims involved items that could be removed without material damage to the land and improvements, i.e., "removables," and the that policy covered only claims against the land, not claims regarding personal property. Implicit is the argument that the policy only insures the priority of the lien of the insured mortgage against other liens that attach to the land that is subject to the mortgage lien. Stewart Title asserts that "removables" are personal property, not part of the land as that term is defined in the policy; therefore, Aspen's claims were not covered by the title policy and Stewart Title had no duty to indemnify Gulf Coast as to Aspen's claims.

The court disagreed with Stewart Title that the insuring clause limits coverage of loss or damage to risks and claims against the land only. Such a narrow interpretation is unsupported by the plain language of the policy. Neither the conditions and stipulations nor the insuring clause limits coverage exclusively to loss or damage by reason of risk and claims against the land that is insured. Rather, the paragraphs of the insuring clause provide eight specific circumstances against which Stewart Title would indemnify loss or damage. These involve claims against the title ("the land that is insured"), but also situations related to the exercise of various rights under the title or lien and disputes related to the priority of the lien of the insured mortgage over other liens or encumbrances. The salient question as to this last area of coverage is whether the other lien has priority over the lien of the insured mortgage. If the other lien has priority, the policy clearly provides indemnity for any losses or damages arising from it.

Paragraph 5 of the policy deals generally with claims made by holders of any liens, mechanic's or other types, which are superior to the lien of the insured mortgage, such as those that pre-date the recording of the mortgage lien. Paragraph 6, however, specifically addresses superior mechanic's liens that have an inception date on or prior to the date of the policy, not the date of the mortgage lien. This is significant because it provides for coverage for mechanic's liens whose inception date is subsequent to the date of the mortgage lien, but prior to the date of the policy.

In general, mechanic's liens whose inception is subsequent to the date of a deed of trust lien will be subordinate to the deed of trust lien. However, Texas statutes and case law provide that mechanic's liens whose inception date is subsequent to the recording of a deed of trust lien will, nevertheless, have priority over the prior recorded deed-of-trust lien in one narrow instance – that of removables.

A statutory mechanic's lien may only attach to land and items that have become annexed to land, such as improvements (including fixtures), not to chattel. However, chattels that have been incorporated into the realty become "fixtures" and are subject to a statutory mechanic's lien. A statutory mechanic's lien may therefore attach to items that have become fixtures and such lien will be superior to a prior deed-of-trust lien when the fixtures can be removed without material injury to the land and pre-existing improvements or to the fixtures themselves.

Paragraph 6 of the insuring clause covers loss or damage arising from "a statutory or constitutional mechanic's, contractor's, or materialman's lien for labor or material" having its inception (statutorily defined in Property Code § 53.124(a)) on or before the date of the policy, when such lien has priority over the lien of the insured mortgage (as provided for by the language of Property Code § 53.123 and its interpretation by Texas courts). Such a "mechanic's lien" will have priority over any prior lien, including a "lien of the insured mortgage," when the "mechanic's lien" is on improvements (including fixtures) that can be removed without material injury to the land and pre-existing improvements or to the improvements themselves, i.e., "removable improvements." Thus, paragraph 6 is specifically meant to provide indemnity for loss or damage arising from a "mechanic's lien" on "removable improvements" that had its inception on or before the date of the policy.

To interpret the insuring clause of the policy so as to exclude coverage when an asserted mechanic's lien is on removable improvements would render paragraph 6 superfluous and meaningless. The only circumstance under which a prior-in-time lien of the insured mortgage would lack priority over any mechanic's lien having its inception on or before the date of the title policy is when the mechanic's lien is on removable improvements.

PART X
BROKERS

Duncan* v. *F-Star Management, L.L.C., 281 S.W.3d 474 (Tex.App.-El Paso 2008, pet. denied). The broker's letters identified the property in question only as "Operation Campus View, Socorro, Texas." To comply with the Real Estate License Act's requirements, a written commission agreement must provide a description of the real estate that would satisfy the statute of frauds. In other words, the agreement must furnish, either within itself or by reference to some other existing document, the means or data by which the real estate may be identified. A commission agreement does not have to contain a metes-and-bounds property description to be enforceable, but it must furnish the data to identify the property with reasonable certainty.

Parol evidence may be used to clarify or explain the agreement, but not to supply the agreement's essential terms. For example, a contract for the sale of "my ranch of 2200 acres" satisfied the statute of frauds where extrinsic evidence showed that the grantor owned one ranch, which contained 2200 acres. However, a commission agreement for the sale or lease of an unidentified portion of a larger, identifiable tract is not sufficient.

The court held that the broker's letter was not an enforceable commission agreement because it doesn't sufficiently identify the property and doesn't refer to

another writing that does. The broker claimed that the description in the lease which resulted from the commission letter was sufficient, but the court noted that letter does not specifically refer to the lease.

The court also held that the description of property as Operation Campus View was not used to refer to a single tract of land; rather it was used to refer to a project of consolidating warehouse facilities. By itself, the term could not connote a specific tract of land with specific acreage.

Sellers* v. *Gomez, 281 S.W.3d 108 (Tex.App.-El Paso 2008, pet. denied). Sellers and Harvey Development Co., both licensed real estate brokers, demanded compensation from Gomez for their services in the sale of a theater in El Paso. Gomez refused because there was no signed commission agreement. Sellers and Harvey sued Gomez and his attorney for theft of services, fraud, breach of fiduciary duty, and conspiracy.

The Real Estate License Act provides:

> "A person may not maintain an action in this state to recover a commission for the sale or purchase of real estate unless the promise or agreement on which the action is based, or a memorandum, is in writing and signed by the party against whom the action is brought or by a person authorized by that party to sign the document." Texas Occupations Code § 1101.806(c).

In ***Trammell Crow Co. No. 60* v. *Harkinson***, 944 S.W.2d 631, 635 (Tex.1997), the Texas Supreme Court held that this section of the Real Estate License Act precluded a real estate broker's action for tortious interference to recover a commission. In this case, the brokers argue that the holding in ***Trammell Crow*** applies only to common law causes of action, rather than statutory causes of action. The court wouldn't buy the argument, holding that nowhere in the ***Trammell Crow*** opinion does the Supreme Court distinguish between statutory and common law causes of action. What is clear from that opinion, however, is that "a broker may not recover a commission unless the commission agreement is in writing and signed by the party to be charged."

The $120,000 that the brokers seek is nearly equal to the $114,000 it would have received if the property had been sold at $1,900,000 and Harvey Development had received a six-percent commission. When asked the basis for the amount of their claim, the brokers noted that the amount approximates what the brokerage commission would have been.

The purpose underlying the Real Estate License Act's requirement of a signed commission agreement is "to prevent fraud arising from parol testimony as to the terms and conditions of such contracts. In this case, the brokers rely strictly on the alleged statements of the principals indicating that the brokers would be compensated for their services. Allowing them to proceed would essentially allow them to construct an enforceable commission agreement out of an alleged oral agreement, directly contrary to the purpose underlying the requirement of a signed commission agreement.

Lathem* v. *Kruse, 290 S.W.3d 922 (Tex.App.-Dallas 2009, no pet.). Lathem was a broker who put a deal together for Kruse. Lathem told Kruse at the time the land was purchased that his broker fee was $50,000. Kruse asked Lathem if he wanted the cash or if he wanted to leave the fee "in the deal." Lathem left the money "in the deal;" however, there was no written agreement with Kruse or the acquiring partnership documenting the $50,000 commission or leaving the amount in the deal. Nor was there such a written agreement including Lathem as a partner in the joint venture.

When the project was sold, Lathem asked for his share of the profits. Kruse declined to pay, so Lathem sued asserting breach of contract and fiduciary duty.

Kruse denied liability, claiming that the amount Lathem was asking for was a real estate commission and that Lathem's claimed was barred by the Real Estate License Act, Occupations Code § 1101.806(c), which requires commission agreements to be in writing.

Lathem argues that the statute of frauds does not apply here because he is not suing for the $50,000 commission, but for an accounting, resulting trust, and damages as a participant in the joint venture. Lathem argues that this suit concerns a joint venture, not an oral listing agreement. He argues that the commission was paid when Kruse acknowledged his $50,000 commission in 2001 and agreed to Lathem's investing in the joint venture.

But, said the court, the test is whether Lathem is seeking recovery of compensation due for rendition of services governed by the Real Estate License Act, regardless of the form that compensation took. The court considers the substance, not the form, of the contract at issue.

Lathem entered into an oral agreement to be paid a commission measured as a percentage of the proceeds of the ultimate sale of property for which he provided broker services. It is undisputed Lathem did not provide any part of the purchase price of the original tract, and he does not claim to own an interest in the land.

The initial oral agreement for a $50,000 commission was modified when Lathem and Kruse

orally agreed Lathem's compensation due for rendition of broker services was a profits partnership interest in the joint venture. Thus, although Lathem is not seeking $50,000, the basis of his share of the profits of the joint venture is a commission arising from the sale of real property. Thus, Lathem's claim for breach of the oral joint venture agreement is “wholly derivative” of his unenforceable oral commission agreement and “translates only” into the loss of the expectancy of a commission agreed to as an interest in the profits of project’s sale. The court held that Lathem was not entitled to this commission.

PART XI
ADVERSE POSSESSION AND QUIET TITLE ACTIONS

Kazmir* v. *Benavides, 288 S.W.3d 557 (Tex.App.-Houston [14th Dist.] 2009, no pet.). The area of disputed ownership was a 4 foot strip between Lot 12 and Lot 13. Originally, the owner of Lot 13 built a chain link fence around his lot. It was 4 feet inside his property line on the Lot 14 side, reportedly to give the Lot 14 owner room to mow his yard between the houses. At the same time, the Lot 13 owner built the fence on the Lot 12 side 4 feet across the Lot 12 boundary.

Kazmir bought Lot 12, after having been shown that the fence encroached 4 feet into the lot. Over time, the Lot 13 owners built a concrete patio up to the fence. Kazmir knew the patio and the fence both encroached, but did nothing to compel the Lot 13 owners to remove them.

Lot 13 was sold to Benevides in 1973 under a contract for deed and he was given a deed to the property in 1997. Benevides began renting the property out in 1978. The entire time, the disputed area was used by the owners and tenants of Lot 13. During that time, Kazmir never told the Lot 13 owners or tenants that he owned the disputed area and never demanded they remove the fence or patio.

In 2004, Benevides tried to sell his lot to a developer, but the sale fell through when the developer had the lot surveyed and determined that the 4-foot strip was on Lot 12. Kazmir then ripped out the fence and removed the patio. Benevides then filed this lawsuit alleging ownership by adverse possession.

Kazmir claimed that possession before Benevides acquired Lot 13 was not adverse because it was consentual. And becauses Benevides acquired the lot by contract for deed, he was no more than a tenant of the property, did not have exclusive possession of the property, and therefore did not acquire an interest in Lot 13 sufficient to begin the ten-year statute of limitations running for their own adverse possession of the adjacent. Kazmir argued that the earliest Benevides’s adverse possession could begin was when he received a deed in 1997, so the 10-year statute had not run.

The court disagreed. There is a difference between a lease and a contract for deed. While a tenant under a lease occupies for the benefit of the landlord, the same is not true for a purchaser under a contract for deed. The court held the contract for deed passed sufficient interest in Lot 13 for Benevides to have exclusive possession of Lot 13 and the disputed area and commence adverse possession of the Disputed Area for his own benefit. Because Benevides obtained exclusive possession of Lot 13 through the 1973 contract for deed, the court concluded he did not need to rely on any alleged adverse possession by the the prior owner to meet the ten-year statute of limitations. Instead, Benevides’s adverse possession commenced in 1973 when he occupied Lot 13 and the disputed area and his claim under the ten-year statute of limitations matured in 1983.

PART XII
EASEMENTS

Allen* v. *Allen, 280 S.W.3d 366 (Tex.App.-Amarillo 2008, pet. denied). Barbara and Andrew acquired their interests in the Barker Hill Pasture in 1970 and have regularly used the Barker Hill Pasture Road to reach their property. There was also some evidence that their predecessor in title, Barbara's mother, used the Barker Hill Pasture Road. Barbara and Andrew never requested permission to use the road nor was their use expressly barred. Barbara never saw Tommy or his parents on the road. Andrew testified he did not know if Tommy used Barker Hill Pasture Road but could not contradict Tommy if he testified that he used the road. Tommy testified no one tried to exclude him from the Barker Hill Pasture Road, which he said was the only access to the east side of his pasture. He used the road when coming from the south and his deer hunt lessees used it to reach the east side of his property. Barker Hill Pasture Road also provided access to a communications tower. When asked about his exclusive use of the road Andrew agreed that he did not attempt to fence the road and that it was available for use by anyone on Tommy's property. Andrew could name no measures he undertook to prevent others from using the road.

Andrew claimed a right to use Barker Hill Pasture Road beginning when he was approximately age eight in the early 1950s because his father and grandfather used the road and they cut limbs along the way. Andrew did not notify anyone of this claim until his 1990 conversation with Tommy at the 1987 gate. At

that time, Barbara and Andrew complained of the locked gate, apparently precipitating Tommy's statement, "your way to go is down by [Millie Ward's]." It was then Andrew told Tommy he and Barbara had an easement over the Barker Hill Pasture Road.

Thereafter, on their trips from Austin to the Barker Hill Pasture during the 1990s, Barbara and Andrew continued using the Barker Hill Pasture Road. And problems with the locked gate persisted. At times, Barbara and Andrew found obstructions such as logs on the Barker Hill Pasture Road, which they removed. For a time, Tommy left the gate key in a mailbox but at other times the key could not be located. It was then necessary for Barbara and Andrew to call Tommy to come unlock the gate. At times, Tommy did not engage the lock but left it on the gate. On two such occasions, Andrew removed the lock and had a lock-smith make a duplicate key. According to Andrew, in 2002 he and Tommy had another conversation at the gate. This time Tommy said he might have to sell his property and if this occurred Barbara and Andrew could no longer use the Barker Hill Pasture Road. This led Barbara and Andrew to file suit.

As distinguished from establishment of a road by express or implied dedication, where the focus is on the intent or actions of the alleged easement's grantor, an easement by prescription rests on the claimant's adverse actions under color of right. An easement by prescription is established by the open, notorious, hostile, adverse, uninterrupted, exclusive and continuous use of the servient estate for a period of more than ten years, and the absence of any of these elements is fatal to the prescriptive claim. Use of property with the owner's express or implied permission or license will never ripen into a prescriptive easement no matter how long the use continues.

The use of the property must be exclusive, in that the claimant excluded or attempted to exclude all other persons, especially the property owner, from using the same land for the same purpose. It has long been the law in Texas that when a landowner and the claimant of an easement both use the same way, the use by the claimant is not exclusive of the owner's use and therefore will not be considered adverse. Moreover, the owner of the servient estate must have actual or constructive notice that there was an adverse and hostile claim against the property.

Barbara and Andrew contend the ten-year prescriptive limitation period began in 1990 when Andrew told Tommy he and Barbara possessed an easement. They argue this was a sufficient independent act establishing hostility and adversity and removing the case from the long-standing Texas rule that joint use of a way with the property owner is fatal to the claim of a prescriptive easement because it is consistent with permissive use in a non-adverse manner.

Assuming, without deciding, that Andrew's statement to Tommy on one occasion that he claimed an easement is the type of "distinct and positive assertion" required to establish adversity of use under the case law, here, after Andrew told Tommy he claimed an easement, it is undisputed Tommy kept the gate leading into the Allen property locked. Initially Tommy used a combination lock and provided Barbara the combination. But after the lock disappeared it was replaced with a keyed lock. At times Tommy provided keys to the lock for Andrew and Barbara, at other times it was necessary for them to call Tommy to unlock the gate, and on two or three occasions Andrew made a key without Tommy's knowledge. Even the broadest reading of the case law will not support the creation of a prescriptive easement in favor of Andrew and Barbara by virtue of their entry onto the Allen property through Tommy's locked gate. The evidence was legally insufficient to sustain the jury's finding of prescriptive easement.

Having failed to prove a prescriptive easement existed, Andrew and Barbara claimed an easement by estoppel. The statute of frauds generally requires a writing to establish an easement, but the doctrine of equitable estoppel provides an exception to prevent injustice and protect innocent parties from fraud. The essence of the doctrine of easement by estoppel is the owner of a servient estate may be estopped to deny the existence of an easement by making representations that are acted on by the owner of the dominant estate. Easement by estoppel requires proof of three elements: (1) a representation of the easement communicated, either by words or action, to the promisee; (2) the communication was believed; and (3) the promisee relied on the communication. An easement by estoppel is binding on the successors in title to the servient estate if reliance on the existing easement continues.

The gravity of a judicial means of acquiring an interest in the land of another solely by parol requires equitable estoppel be strictly applied. Thus, an estoppel should be certain, precise and clear. Authority for application of the doctrine is "rare and nebulous" outside a narrow band of cases consisting of those that concern: (1) the dedication of a street, alley, or square; (2) an owner selling land with reference to a map or plat; and (3) a seller of land who allows its purchaser to expend money on an alleged servient estate.

In 1970, Andrew and his now-deceased father constructed a cabin in the Barker Hill Pasture. They hauled the materials over CR-216A and the Barker Hill

Pasture Road. After construction began, Tom Allen asked Andrew and his father if they needed help "cutting some limbs over there on your road." Following the death of Tom Allen, Iva Allen telephoned Andrew on one or more occasions, asking that when he went to town he not "go out your way" but instead come to her house and pick up mail for delivery to the post office. Barbara and Andrew assert these two statements were representations of their ownership of an easement across the Barker Hill Pasture Road and in reliance on the statements they expended additional sums improving the cabin and out buildings on the Barker Hill Pasture.

Barbara and Andrew further argue Tommy is estopped to deny an easement because his predecessors in title silently watched Barbara and other members of her family use the Barker Hill Pasture Road since 1929 and make valuable improvements to the Barker Hill Pasture. Andrew and Barbara contend the silent acquiescence by Tommy and his family to their family's use of the Barker Hill Pasture Road combined with the "your road" and "your way" statements of Tom and Iva Allen provide factually sufficient evidence supporting the existence of an easement by estoppel. The court disagreed, finding the "your road" and "your way" statements insufficient as representations that an easement existed. Having considered and weighed all of the evidence, it found the evidence supporting the existence of an easement by estoppel, under the trial court's charge, to be so weak as to make the jury's finding clearly wrong and unjust.

Kothmann* v. *Rothwell, 280 S.W.3d 877 (Tex.App.-Amarillo 2009, no pet.). Rothwell owned undeveloped land where he wanted to develop a subdivision. The City required he obtain, in the City's name, drainage easements on adjacent property owned by Philpott before development. Philpott executed an instrument entitled "Drainage Easement" granting the City five drainage easements, each measuring fifty feet by two hundred feet. Kothmann subsequently acquired the property of Philpott.

At the time Kothmann acquired the property, the easements were not opened and a "fence-line berm" separated his land from that of Rothwell. After the easements were opened, Kothmann filed suit alleging damages from water flowing from the easements onto his land. He also sought a declaratory judgment that the instrument did not permit the flow of water off the easements onto the remainder of his property. Rothwell filed a counterclaim for declaratory relief seeking a declaration that water flowing through the easements could continue past the boundaries of the easements.

According to the easement document, the purpose of the grant from Philpott to the City was creation of a "perpetual and permanent drainage easement." For drainage, the instrument grants the City "liberty of passage ... over ... and across" each of the easements described by the instrument. As used here, "passage" means "to go past or across." The instrument expresses the parties' intention that water drain freely without restraint over and across the easements.

Kothmann argues the language of the instrument permits the City and Rothwell to drain only so much water as will naturally dissipate within the dimensions of the five easements. But this reading requires wringing from the text of the instrument a limitation that the City may do no more than impound water within each easement. This interpretation creates something other than a drainage easement and is not consistent with other language used in the instrument.

Kothmann further argues the trial court's ruling renders the stated boundaries of the easements meaningless, contrary to standards of contract construction. The court disagreed. Under the instrument language, the City's maintenance access and activities are limited to the described boundaries, as are its right to set and determine drainage grade and direction of water flow. Further, the restrictions on the erection of buildings or like structures exist only within the boundaries of the easements. But, consistent with the stated purpose and other terms of the easement, the court would not agree the flow of water is limited in the way Kothmann sees it. The trial court did not err in declaring that surface water could flow beyond the boundaries of the five easements.

PART XIII
CONDOMINIUMS AND OWNERS ASSOCIATIONS

Stanford Development Corporation* v. *Stanford Condominium Owners Association, 285 S.W.3d 45 (Tex.App-Houston [1st Dist.] 2009, no pet.). The Owners Association sued the developer, Stanford, for construction defects. Stanford moved to compel arbitration based on arbitration clauses contained in all of the deeds from the developer to the individual condo purchasers. The trial court held that the Owners Association was not subject to the arbitration provisions in the individual deeds, and refused to compel arbitration.

It is undisputed that there is an arbitration agreement between Stanford and 27 of the individual homeowners. The issue is whether the arbitration agreements can be enforced against the Association, a nonsignatory to the agreements. Courts have recognized six theories that may bind nonsignatories to arbitration agreements: (1) incorporation by reference,

(2) assumption, (3) agency, (4) alter ego, (5) equitable estoppel, and (6) third-party beneficiary.

Stanford argues that the fifth theory for binding non-signatories-equitable estoppel-applies in this case. Specifically, Stanford argues that because the Association has filed suit based, in part, on the contractual terms found in the homeowners' earnest money contracts, it is estopped from denying the applicability of the arbitration provision in the same contract. The court agreed.

A litigant who sues based on a contract subjects him or herself to the contract's terms. When the nonsignatory asserts claims identical to the signatories' contract claims, all must be arbitrated. Additionally, claims must be brought on the contract and arbitrated if liability arises solely from the contract or must be determined by reference to it. If a nonsignatory pursues a claim based on the contract of another, and the contract contains an arbitration clause, then the nonsignatory must pursue all claims-tort and contract-in arbitration.

In this case, the Association alleged in its petition that Stanford failed to comply with the express and implied contractual duties which they owed to owners. The only contracts giving rise to any express or implied contractual duties in this case are the earnest money contracts between Stanford and the individual homeowners. The Association also alleged that Stanford breached express and/or implied warranties. The only express warranties are contained in the individual homeowners' earnest money contracts. Because the Association has filed suit seeking the benefits of the earnest money contracts, it cannot deny the applicability of the arbitration agreements in the same contracts.

In addition to the claims based directly "on the contracts" of the individual homeowners, the Association also included DTPA claims, fraud, and intentional or negligent misrepresentation claims, and negligent design, construction, and supervision claims. However, because the Association chose to allege contract claims that are subject to arbitration clauses, and because the arbitration clauses in this case are broad enough to cover both contract and tort claims, the Association must also arbitrate the intertwined tort claims.

Duarte* v. *Disanti, 292 S.W.3d 733 (Tex.App.-Dallas 2009, no pet.). Duarte owned a condominium in the Skillman Bend Condominiums. The condominiums were created in 1980. Duarte failed to pay certain assessments, and the condominium association foreclosed on its lien, conducted a foreclosure sale, and sold the property to Disanti, a third party. Duarte attempted to "redeem" the property pursuant to the provisions of Section 209.011 of the Texas Residential Property Owners Protection Act. Disanti refused to allow Duarte to redeem the property, and Duarte filed suit. The sole basis for Duarte's claimed right of redemption is chapter 209 of the Texas Property Code. Disanti filed a motion for summary judgment asserting chapter 209 does not apply to condominiums.

Chapter 209 of the Texas Property Code, known as the Texas Residential Property Owners Protection Act, became effective in 2002. The Property Owners Protection Act contains various provisions concerning when a property owners' association of a "residential subdivision" may foreclose upon a lien. The Act also gives property owners certain rights of redemption when a property owners' association forecloses on such a lien. Section 209.003(d) makes clear that the Act does not apply to condominium developments governed by Chapter 82 of the Property Code.

Chapter 82, which applies only to condominiums, contains its own provisions that concern redemption after foreclosure by a property owners' association. Chapter 82 became effective in 1994. Condominiums created after that date are governed "exclusively" by chapter 82. Certain provisions of chapter 82, however, apply to all condominiums, regardless of when they were created. In particular, section 82.113 applies to all condominiums in the State of Texas. This section contains the provisions that permit a condominium's property owners' association to take a lien on a condominium, allow for nonjudicial foreclosure of such liens, and give a property owner a right of redemption when a unit is foreclosed on and purchased by the association.

The court concluded under the plain terms of the Property Owners Protection Act, that the Act does not apply to Duarte's condominium. This construction is in harmony with the legislature's clear intent to have different redemption rights for residential subdivisions than for condominiums.

PART XIV
HOMESTEAD

Fairfield Financial Group, Inc. v. Synnott, 300 S.W.3d 316 (Tex.App.-Austin 2009, no pet.). Glenn and Connie Synnott purchased the house in Travis County in 1984. Fairfield obtained a judgment against Glenn and filed an abstract of that judgment in 1992. The judgment debt is owed solely by Glenn. In the fall of 1997, Glenn moved out of the house to Hays County and filed for divorce. In January 1998, Glenn and Connie executed an Agreement Incident to Divorce, the court signed the decree, and then Glenn signed a special warranty deed conveying his interest in the property to Connie. By special warranty deed dated

September 15, 1999, Connie conveyed the house to the Connie L. Synnott Revocable Trust. She lives in the house and claims it as her homestead.

Connie filed this suit seeking a declaration that Fairfield has no interest in the property through a lien or otherwise. The trial court held that the house was Connie's homestead and not subject to the judgment lien. Fairfield appealed.

The core of Fairfield's appeal is its assertion that the summary judgment is erroneous because there is a genuine issue of material fact regarding whether Glenn abandoned the homestead, thereby allowing Fairfield's judgment lien to attach to his share of the community ownership of the house.

Under Texas law, judgment liens that have been properly abstracted cannot attach to a homestead while that property remains a homestead. The court noted that this statement differs from one of its earlier interpretations. In Exocet Inc. v. Cordes, 815 S.W.2d 350 (Tex.App.-Austin 1991, no writ), the Austin court held that a properly recorded and indexed abstract of judgment attached to the homestead but that the homestead remained exempt from the foreclosure while the homestead exemption existed.

On reviewing relevant statutory and case law, the Austin court changed its position. Constitutional homestead rights protect citizens from losing their homes, and statutes relating to homestead rights are liberally construed to protect the homestead. The property code states that a homestead is exempt from seizure for the claims of creditors except for encumbrances properly fixed on homestead property, and lists the limited ways a lien can be fixed. The implication is that types of encumbrances not listed may not be "properly fixed" on homestead property. This interpretation is consistent with the holdings of other courts of appeals regarding the effect of the homestead exemption on most liens and provides greater protection to the homestead. So Austin joined other Courts of Appeals in holding that judgment linens cannot attach to a homestead while that property while it remains a homestead.

A judgment lien may attach to the judgment debtor's interest, however, if he abandons the property as his homestead while he owns it and while there is a properly abstracted judgment lien against him. Fairfield contends that Glenn abandoned his homestead interest and that Fairfield's lien attached to his ownership interest in the home before he transferred his ownership interest to Connie. The court concluded, however, that the timing and effect of Glenn's actions are irrelevant because the property remained at all relevant times protected by Connie's undivided homestead interest in the property. Fairfield argues, correctly, that one spouse may abandon his homestead interest while his spouse retains her homestead interest. However, although a lien attaches to property when it loses its homestead character, Texas courts have held that the property is wholly exempt from the attachment of liens (other than those listed in property code section 41.001(b)) so long as the remaining spouse retains her homestead interest.

Denmon* v. *Atlas Leasing, L.L.C., 285 S.W.3d 591 (Tex.App.-Dallas 2009, no pet. history to date). Sarah and Carnell Denmon sold their home on Forest Green Drive in Dallas. After the sale of the home, Carnell gave his half of the sale proceeds to Sarah to put down on the Shennandoah property in Desoto, which is the property subject to this suit. Sarah bought the Shennandoah property in her name in July of 2003. She stated she was hoping to retire in the home, have a place for her son to live when he came home from college, and have a place for any future grandchildren. Although both spouses stated Carnell visited the Shennandoah property on several occasions, he bought a trailer home in his sole name in Giddings, Texas in July 2003. He did not, however, file a homestead exemption for his property until after he and Sarah divorced in 2004.

In November 2003, Sarah inquired into receiving a $10,000 loan for some home repair projects and to help her son with college. Atlas Mortgage Company worked out the details of the loan with Sarah, which included A-Advantage Company performing certain home repairs. On November 23, 2003 Sarah executed the documents, which included a mechanic's lien, a promissory note, and a deed of trust for the Shennandoah property.

Despite testimony that Sarah and Carnell had been separated since 2001, the undisputed evidence shows they were married until late 2004. Thus, when Sarah signed the loan documents, she and Carnell were still married.

Sarah testified she told Atlas prior to signing the loan documents that she was in fact married. The owner of Atlas, who testified at trial, stated he was never informed she was married. When Atlas conducted a property search on the Shennandoah property, it was listed only in Sarah's name and no homestead exemption was on file. Further, Carnell's name never appeared in the chain of title.

Sarah defaulted on the loan and Atlas eventually foreclosed and eventually evicted her. Sarah sued, arguing fraud and wrongful foreclosure. The trial court ruled against her.

Sarah relied on Texas Property Code § 53.254 which requires the signature of both spouses when fixing a lien on a homestead. Despite evidence of the two being separated since 2001, there is no evidence in

the record to contradict their marriage or these findings as a matter of law.

The language of section 53.254 is clear. To fix a lien on a homestead, the person who is to furnish material or perform labor and the owner must execute a written contract setting forth the terms of the agreement. Because it is undisputed they were married, section 53.254 applies if the Shennandoah property was in fact their family homestead.

The State of Texas famously recognizes one of the broadest homestead exemptions in the United States. Homestead rights have traditionally enjoyed great protection, and statutes that affect such rights are liberally construed to protect the homestead. The burden of proving homestead is on the party claiming such a homestead. To sustain a homestead claim, there must be proof of overt acts of homestead usage and intent on the part of the owner to claim the land as homestead. Nevertheless, exceptions to the homestead exemption do exist. Among them, the Texas Constitution provides that a marital homestead is "protected from forced sale for the payment of all debts except for ... work and material used in constructing new improvements thereon if ... the work and material are contracted for in writing, with the consent of both spouses."

Texas law recognizes that homestead protection can dissolve if the owners deliberately misrepresent their marital status in order to defeat the rights of an innocent third party who, in good faith, without notice, for valuable consideration, has acquired valid liens. However, Atlas never affirmatively asserted that Sarah misrepresented herself in order to defeat its rights. In fact, Sarah claimed at trial she told Atlas she was married; however, Atlas's owner stated at trial that information, if true, was never relayed to him. Rather, Atlas simply relied on its document review showing Sarah owned the Shennandoah property solely in her name, Carnell's name never appeared anywhere in the chain of title, and she did not file a homestead exemption on her property.

However, it is not necessary for a spouse to be listed on real property documents in order for homestead status to attach. Texas law is clear that possession of a homestead interest is not dependent upon ownership; a person is permitted to hold homestead rights in his or her spouse's separate property. Likewise, it has been held that no specific writing is needed to claim a homestead; therefore, the fact that Sarah did not file a homestead exemption is not proof that she did not intend it as such. To assert that the homestead protection of the Texas Constitution could be voided by mere failure to designate the property as a homestead for tax purposes would render the constitutional protection meaningless.

Also, once a property has been dedicated as a homestead, it can only lose such designation by abandonment, alienation, or death. Here, it is undisputed the Shennandoah property was Sarah's homestead, despite her failure to file an exemption. She specifically testified of her homestead intentions when buying the home and further stated she thought she had filed an exemption.

By reaching the conclusions that Sarah had the ability to place a valid lien on the home and the lien was not in violation of the homestead protections of the Texas Constitution, the trial court essentially determined that either (1) the property was her single person homestead, or (2) despite being married, the property was not Carnell's homestead. The court noted that either of these conclusions was incorrect.

First, it is undisputed Sarah was married at the time she entered into the transaction. As such, she could not qualify for a homestead exemption as a single person. Here, the community money from the sale of Sarah and Carnell's homestead on June 30, 2003 was applied for a down payment on the Shennandoah property, which became the family homestead.

The court acknowledged the trial court's finding that he purchased a trailer home in Giddings, Texas shortly after the sale of the first homestead and another woman, not his wife, sometimes stayed there. However, the trailer home could not be his single adult or family homestead. Carnell was not single and therefore could not claim his trailer as a single adult homestead. Further, the claim of a family homestead is not maintainable by a man and woman living together in an unmarried state.

Thus, under these facts, the court concluded because Sarah and Carnell were married at the time she purchased the Shennandoah property, she intended it to be the family homestead, and Atlas never pleaded and proved abandonment, the Shennandoah property was also Carnell's family homestead. Therefore, the trial court erred in concluding the lien did not violate the homestead protection of the Texas Constitution.

Atlas finally argued that Sarah does not have standing to challenge that the lien violated provisions of the homestead act because the purpose of requiring both parties to sign the legal documents creating a lien is to protect the non-signing spouse from possible loss of existing homestead rights without his consent. Thus, it contends that any homestead violation is Carnell's right to assert and not Sarah's right. The court disagreed. A void instrument has no effect, even as to persons not parties to it, and a contention that a document is void under homestead law may be asserted by anyone whose rights are affected by the instrument.

Grant* v. *Clouser, 287 S.W.3d 914 (Tex.App.-Houston [14th Dist.] 2009, no pet.). Earnest and Gwendolyn were married and bought a house together. Gwendolyn died intestate and her children, Shawna and Mark, inherited Gwendolyn's 50% community property interest in the house. Earnest and Shawna both lived in the house for a while, but later, Earnest remarried and moved out. Shawna remained in the house.

Grant obtained a judgment against Earnest and filed an abstract of judgment in Harris County. The constable executed on the judgment and grant bought Earnests' interest in the house at the execution sale. Grant then filed an application for partition of the house by sale.

Shawna answered the partition suit asserting that Grant did not acquire an interest in the property because it was her homestead. The trial court denied the partition by sale.

Grant contends that the trial court erred when it refused to compel partition of the property by sale because (1) the right to partition is absolute, and homestead laws do not preclude partition by sale of real property where a homestead-claiming cotenant asserts homestead as a defense to a non-homestead-claiming cotenant's attempt to partition the property by sale; (2) Texas homestead laws are intended to prevent forced sales of a homestead only when a creditor seeks a forced sale of a debtor's homestead; (3) Shawna is not Grant's judgment debtor; and, therefore, (4) article XVI, section 50(a) of the Texas Constitution and Texas Property Code section 41.001 do not preclude Grant's right to partition.

Shawna argued that her homestead interest and article XVI, section 50 of the Texas Constitution preclude partition by sale because Grant obtained his interest as Ernest's judgment creditor. Shawna also asserted that at the time actually where the judgment took place, she had a homestead interest in the property. That homestead interest could not be trumped by any lien that attaches thereafter.

Homestead rights historically have enjoyed strong protection in Texas. Because constitutional homestead rights protect citizens from losing their homes, statutes relating to homestead rights are liberally construed to protect the homestead.

Partition rights also are well established. Texas Property Code § 23.001 provides that "[a] joint owner or claimant of real property or an interest in real property ... may compel a partition of the interest or the property among the joint owners or claimants under this chapter and the Texas Rules of Civil Procedure." The right to partition has been characterized as absolute. If the property cannot be partitioned in kind, there must be a partition by sale.

A homestead right must accommodate the right to partition in some circumstances. For example, upon divorce, the trial court has broad power to order a "just and right" division of a divorcing couple's estate, including the power to order the sale of the homestead and partition of the proceeds. Under these circumstances, the homestead right attaches to the proceeds of the partition sale; a spouse generally enjoys continued homestead protection for the proceeds of the partition sale against creditors.

Section 52 of article XVI of the Texas Constitution also provides that heirs have a right to partition real property after the surviving spouse's death; accordingly, an heir may not defeat partition sought by another heir even if the property is the heir's homestead.

Since the court was not dealing with either the partition in a divorce or in an heirship situation, resolution of the case depends on principles governing rights of cotenants in circumstances other than those involving divorce or conflicts among heirs.

Homestead rights can attach to property interests held by tenancy in common; however, such homestead rights may not prejudice the rights of a cotenant. The general rule is that homestead rights attaching to property interests held by a cotenant are subordinate to another cotenant's right to partition. The court held that Shawna's homestead right is subordinate to Grant's right to compel partition.

PART XV CONSTRUCTION AND MECHANICS' LIENS

Ready Cable, Inc.* v. *RJP Southern Comfort Homes, Inc., 295 S.W.3d 763 (Tex.App.-Austin 2009, no pet.). Ready Cable sent its lien affidavit to the Williamson County Clerk for filing. Attached to the affidavit was a document entitled "EXHIBIT 'A' to Condominium Declaration: FIELD NOTES," which contained a legal description of the property sought to be charged with the lien. The phrase "Unofficial Document" appears across the face of the document.

A week later, Ready Cable got a written notice for the Williamson County Clerk stating that it could not accept an unofficial document as an attachment. A few weeks later, Ready Cable filed a modified affidavit.

RJP filed suit against Ready Cable seeking removal of the lien, claiming it was not timely filed. The district court granted a summary judgment and removed the lien.

To perfect its lien, Ready Cable was required to sign an affidavit with specified contents (Property Code § 53.054), timely file the affidavit with the

county clerk (Property Code § 53.052(a)), and provide notice of the filed affidavit to the property owner and the original contractor(Property Code § 53.055). Also, Ready Cable was required to have provided prior notice of the unpaid balance to the property owner and the original contractor(Property Code § 53.056). It is well settled that the mechanic's and materialman's lien statutes are to be liberally construed for the purpose of protecting laborers and materialmen. Generally, for purposes of perfecting the lien, only substantial compliance is required in order to fulfill the statutory requirements.

The single issue in this appeal is whether Ready Cable's affidavit delivered to the Williamson County Clerk should be deemed timely filed. The question, then, is whether the August 15 affidavit fails to comply with the timing requirements of property code section 53.052(a) when the only reason for such failure is the county clerk's rejecting its filing.

The court held that, in this case, it does not. The county clerk was required to record the affidavit. RJP does not direct us to-and we do not find-any authority that would authorize the county clerk to refuse to file or record an affidavit of a materialman's lien based on an attachment bearing the property description also bearing the notation "unofficial document." There is no evidence that the property was incorrectly described, that the attachment failed to provide proper notice of which property was at issue, or that RJP would have been misled to its prejudice if the county clerk had accepted the affidavit with the attachment for filing. Thus, the county clerk's basis for rejecting Ready Cable's August 15 filing was not a defect that would cause the lien affidavit to fail to satisfy the substantial compliance requirement of Property Code § 53.054. The county clerk was not authorized to impose additional requirements for filing or recording a legal paper such as the removal of irrelevant notations. Filing the affidavit was a ministerial act, and the county clerk's refusal to accept the lien affidavit was improper.

Having found no authority for the county clerk's rejection of Ready Cable's filing, the court concluded that the clerk's failure to accept for filing Ready Cable's lien affidavit when it was timely delivered for filing did not result in invalidation of the lien claim for lack of timeliness. Property Code § 53.052(c) says "Failure of the county clerk to properly record or index a filed affidavit does not invalidate the lien." Moreover, RJP does not dispute its having received actual notice of the August 15 filing of the lien affidavit, or allege that it was otherwise misled to its prejudice.

Private Mini Storage Realty, L.P.* v. *Larry F. Smith, Inc., 304 S.W.3d 854 (Tex.App.-Dallas 2010, no pet.). Raus was the general contractor for a storage facility. It hired Smith as the concrete subcontractor. Smith submitted invoices for close to $600,000. Pursuant to its contract with Smith, Raus withheld retainage. Raus also did not pay any part of an $18,000 invoice. Smith sent a funds-trapping notice to the owner for payment of the retainage and the unpaid work. A month later, Smith notified the owner that it had filed a mechanics' lien affidavit for the unpaid work. The owner had retained 10% of Raus's contract amount, by never paid any of it to Smith. Smith filed suit.

Subchapter E of the property code requires an owner to retain ten percent of the funds to be paid to a general contractor to secure payment to "artisans and mechanics" who were not paid by the general contractor. When the time expires for filing a claim on these retained funds, the owner pays the retainage to the general contractor. Subchapter D permits an owner to retain additional amounts due to the contractor upon the request of a subcontractor when the contractor fails to pay the subcontractor as required during the performance of the contract. Under section 53.084, the owner will be personally liable for any amounts paid to the contractor after receiving the proper notice under the statute if the subcontractor's lien has been secured and its claim reduced to judgment.

Section 53.083 permits a subcontractor to demand payment from an owner who was authorized to retain funds under subchapter D. The subcontractor must send a copy of the demand to the general contractor, who then has thirty days to notify the owner of the general contractor's intent to dispute the subcontractor's claim. If the general contractor does not give timely notice of intent to dispute the claim, he is considered to have assented to the demand and the owner must pay the claim. Smith claims the owner was required to pay it because Raus failed to notify the owner within the thirty day period. He was granted summary judgment.

The court held that many of the owner's arguments against granting summary judgment were not timely. The court also held that there was sufficient evidence supporting summary judgment.

J.P. Morgan Chase Bank, N.A.* v. *Texas Contract Carpet, Inc., 302 S.W.3d 515 (Tex.App.-Austin 2009, no pet.). The Bank was the lender, Agape was the owner, AMHC was the contractor, and there were several subcontractors. The Bank agreed to lend money for construction of a low-income apartment complex. The funds became available as a result of a loan agreement between Agape and Capital Area Housing Finance Corporation, a public, non-profit housing finance corporation authorized under the Housing Finance Corporations Act to issue tax-exempt bonds for the purpose of loaning the proceeds of the

bonds to other entities for the development of low-income housing projects. In the loan agreement between Capital Area and Agape, Capital Area agreed to loan the proceeds of the sale of certain bonds to Agape in order to finance costs of the acquisition, construction, and equipping of the project. Capital Area assigned its rights under the loan agreement to the Bank, who became trustee of the funds pursuant to a trust indenture between Capital Area and the Bank. Also, in the construction contract between the Bank and Agape, the Bank agreed to issue a letter of credit in favor of the owner of the bonds.

The Bank initially funded a large portion of the loan into an account from which it would draw funds to pay Agape for construction costs. Funds were released when Agape satisfied certain conditions. The Bank could refuse to fund a draw request if any mechanics' liens were threatened or filed, unless Agape bonded around the liens. The Bank also kept the retainage and was directed to disburse it 31 days after completion and the satisfaction of certain additional conditions.

Agape hired AMHC as the contractor. AMHC entered into a contract with American Multi to act as prime contractor, and American Multi entered into the subcontracts. American Multi and AMHC were related entities.

Construction began in early 2001 and was completed in January or February 2002. During that time, Agape submitted twelve draw requests to the Bank, each of which was approved. Each of the draw requests was submitted to multiple entities before submission to the Bank, and by the time each request reached the Bank, it included various representations made by AMHC and Agape. Those representations included statements that all bills were paid and there were no liens.

After funding the twelfth draw, the Bank became aware that several of the subcontractors had not been paid for their work and had filed affidavits claiming liens on the property. At that point, Agape's construction consultant advised the Bank and Agape that they should not release any further funds until they received proof that the subcontractors had been paid and had released their liens. In February 2002, AMHC submitted a thirteenth draw request, this time bypassing intermediaries and submitting it directly to the Bank. Thus, the draw request did not contain the usual representations from Agape. The Bank did not release funds and notified Agape that it was in default under the loan agreement. The Bank also told Agape that the remaining funds in the construction account were insufficient to pay project costs and demanded that Agape promptly pay all of the remaining costs of the project, including all amounts necessary to remove the subcontractors' liens on the property.

The bondholder also demanded that the Bank draw on the letter of credit to pay interest on the bonds. The Bank paid the letter of credit and took possession of the bonds.

Everybody sued everybody else and many of the claims were settled. On appeal, the only issues were whether the Bank (i) was Agape's agent and, as such, breached its fiduciary duty by failing to withhold retainage in the construction account, (ii) misapplied trust funds under the Texas Trust Fund Act; (3) was negligent and grossly negligent in failing to withhold retainage in the construction account; (4) violated a fiduciary duty to the subcontractors; and (5) converted the subcontractors' funds.

The Bank contends that the trial court erred in determining that the Bank acted as Agape's agent with regard to the statutory duty to retain ten percent of the contract price of the project. Property Code § 53.101 imposes a duty to retain funds on owner of project or owner's agent, trustee, or receiver. The Bank argues that section 53.101 imposes the duty to retain funds on Agape as the owner of the project and that there is no evidence that Agape delegated the duty to the Bank as an agent or that the Bank accepted any such delegation.

To be an agent, a person must (1) act for and on behalf of another person and (2) be subject to that person's control. Both elements are required. The absence of one will prevent the conclusion that an agency relationship exists. The party claiming agency must prove that the principal has both the right to assign the agent's task and the right to control the means and details by which the agent will accomplish the task.

The subcontractors concede that Agape, as the owner of the project, would ordinarily be responsible for retaining funds in the construction account pursuant to the statute. However, the subcontractors argue that the construction agreement created an agency relationship between Agape and the Bank. As support for their position, the subcontractors point to the construction agreement that allegedly demonstrate the Bank's acceptance of Agape's statutory duty to withhold retainage. The agreement states that the Bank "shall make all decisions in connection with the day-to-day administration of the Construction Matters." Construction Matters is defined to include approval of construction draws, inspection of the project, and holding and disbursing retainage. There was also testimony from a loan officer who said it was her job to make sure the Bank complied with Texas laws regarding retainage.

The court did not find there was an agency, despite these provisions. Although there is evidence of

the first requirement of an agency relationship, that the Bank agreed to act on behalf of Agape in withholding retainage, there is no evidence of the second requirement, that the Bank was subject to Agape's control in accomplishing the task. To the contrary, considerable evidence supports a conclusion that it was the Bank, not Agape, that maintained sole control of the funds in the construction account and sole control over whether to release retainage from the account. Given that there is no evidence of the vital fact that the Bank was subject to Agape's control, the court concluded that the evidence is legally insufficient to support the trial court's finding that the Bank served as Agape's agent with regard to the duty to withhold retainage.

The Bank also asserted that the trial court erred in applying the Texas Construction Trust Fund Act (Property Code § 162.001) to it. The Bank argues that (1) whether the funds were "trust funds" under the Act is irrelevant because the Bank is exempt from the Act's requirements, and (2) even if the Bank were not exempt, the funds in the construction account were undisbursed bond proceeds held for the benefit of the bondholder and thus could not be considered "trust funds" under the Act.

The Act states that it does not apply to a bank, savings and loan, or other lender. The Bank, of course, is a bank, and was the entity lending money. Thus, the plain wording of the Act exempts the Bank from its application.

The subcontractors argue that the court should not follow the plain language of the provision because doing so would lead to an absurd result. According to the subcontractors, a plain-language interpretation of the provision would lead to the allegedly absurd result of allowing a bank to take on the attributes of an owner in a construction project while also permitting the bank to avoid all the responsibilities imposed upon an owner under the Act. The court disagreed. Although the specific circumstances of this case may have led to an undesirable result for the subcontractors, the circumstances do not create an absurd result out of the plain-language of the statute. At most, they demonstrate a gap or oversight in the statute that, if true, must be corrected by the legislature, not the courts. Further, although the subcontractors may consider the statute unfair under the circumstances of this case, whether a statute is fair or makes the most sense are questions for the legislature to consider, not the courts.

In its third issue, the Bank contends that the trial court erred in issuing a finding of fact that the Bank was negligent in failing to exercise reasonable care in disbursing retainage funds from the construction loan account, prior to completion of the project. To prove negligence, a party must establish: (1) the existence of a legal duty; (2) a breach of that duty; and (3) damages proximately caused by the breach. Duty is the threshold inquiry in a negligence case. In the absence of a duty, there can be no negligence. A duty can be assumed by contract or imposed by law.

The subcontractors allege the duty was established in the loan agreement. Because the subcontractors were not parties to the contract, they bring their claim as third parties. A third party may recover on a contract made between other parties only if the contracting parties: (1) intended to secure a benefit to the third party, and (2) entered into the contract directly for the third party's benefit. An agreement must clearly and fully express an intent to confer a direct benefit on the third party. The Bank contends that the subcontractors cannot be third-party beneficiaries of the construction agreement because the plain language of the agreement specifically disavows the existence of third-party beneficiaries. The court agreed, saying that the express disavowal of third-party benefits defeats the subcontractors' claims.

The subcontractors final attempt was to ask the court to impose a new common law on the Bank in its administration of construction loan agreements. In deciding whether to impose a new common-law duty, courts must first consider the risk, foreseeability, and likelihood of injury, and then weigh those factors against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant. The most important factor to consider is the foreseeability of the risk. The test for foreseeability is what a party should, under the circumstances, reasonably anticipate as a consequence of its conduct.

In addition to the balancing test, courts must also consider (1) whether one party had superior knowledge of the risk; (2) whether one party had a right to control the actor who caused the harm; (3) whether societal changes require recognition of new duties; (4) whether the creation of a new duty would be in conflict with existing statutory law; and (5) whether there are countervailing concerns that would support or hinder the recognition of a new duty.

The court first addressed the initial considerations: the risk, foreseeability, and likelihood of injury. Here, the subcontractors' injury was that they were not paid for some of their work on the project. Although the Bank could have anticipated this injury, it could have done so only in the same way that every party to every construction contract could foresee the possibility that a contractor, for whatever reason, may not pay subcontractors for their work. In fact, the danger of subcontractors remaining unpaid in construction

projects is so well known that the Texas legislature recognized and responded to it by enacting the Trust Fund Act, which was previously discussed in this opinion.

The court then looked the second set of considerations: the social utility of the Bank's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the Bank. The court found significant social utility in the Bank's general conduct of lending money to a non-profit organization for the construction of a low-income apartment complex. Regarding the second and third considerations, the court found the magnitude of the burden of protecting subcontractors and the consequences of placing that burden on lenders to be significant. Lenders currently do not carry such a burden unless they explicitly agree to do so. Thus, they are currently able to assess their liability at the time of entering into the contract. The more they can limit their liability, the more freely they can lend money for projects such as the one here. If courts were to impose a duty on them to withhold retainage and ensure that subcontractors were paid, they would be exposing them to a considerable number of costly lawsuits brought by parties that they may not even be able to identify at the time of entering into the contract. Also, placing the burden on lenders would interfere with their freedom to contract as they see fit, which is a strongly favored public policy in Texas.

The court addressed the final set of considerations: whether one party had superior knowledge of the risk; whether one party had a right to control the actor who caused the harm; whether societal changes require recognition of new duties; whether the creation of a new duty would be in conflict with existing statutory law; and whether there are countervailing concerns that would support or hinder the recognition of a new duty. Regarding the first consideration, whether the Bank had superior knowledge of the risk, the court first noted that the risk of harm in this case was allegedly created by the fact that the Bank was in control of the construction account but was not under a statutory obligation to withhold retainage in the account. Because the subcontractors did not know that the Bank had control over the construction account, it did have superior knowledge of the risk associated with the arrangement between the Bank and Agape. With respect to the second consideration, whether the subcontractors had a right to control the Bank, there is no evidence in the record that the subcontractors had a right to exert control over the Bank.

Although the first two considerations weigh against the Bank, the remaining three do not. For instance, there are no societal changes implicated in this case that would require our recognition of a new duty. In addition, the creation of a new duty would be in conflict with existing statutory law.

The court concluded that the factors weighing against the imposition of a new duty outweigh those in favor.

Scoggins Construction Company, Inc.* v. *Dealers Electrical Supply Co., 292 S.W.3d 685 (Tex.App.-Corpus Christi-Edinburg 2008, pet. granted). SCC was hired as the general contractor under a public work contract with the school district to build a school. In accordance with the McGregor Act, SCC executed performance and payment bonds for the full contract amount. SCC hired Diamond as the electrical subcontractor for the project. Dealers was the electrical supplier. SCC, Diamond, and Dealers entered into a joint check agreement in an effort to arrange for Dealers to extend credit to Diamond. The joint check agreement required SCC to issue joint checks to Diamond for labor supplied and to Dealers for materials supplied when Diamond completed its work and submitted a draw.

SCC claims that Diamond walked off the elementary school project, absconded with materials that were to be incorporated in the elementary school project, and otherwise failed to install electrical materials that had been paid for through Diamond’s draw requests.

Diamond sent SCC a notice demanding payment for supplies provided to the project. SCC refused to pay because the items were never installed and because Diamond did not complete the project. Dealers sued SCC, Diamond, and the bond sureties, alleging violations of the McGregor Act, the Trust Fund Act, and chapter 53 of the Texas Property Code. The trial court entered judgment against SCC.

On appeal, SCC contends that the McGregor Act was Dealers's exclusive remedy for this action and because Dealers failed to sue under the McGregor Act, Dealers should take nothing. Conversely, Dealers maintained throughout trial and on appeal, without citing relevant authority, that it has a choice to sue under either the McGregor Act or the Trust Fund Act.

The Texas legislature promulgated the McGregor Act to provide subcontractors and suppliers involved in public work contracts a basis for recovery because a subcontractor or a supplier may not place a lien against a public building. The McGregor Act is intended to be a simple and direct method for claimants who supply labor and materials in the construction of public works to give notice and perfect their claims. The McGregor Act requires prime contractors, such as SCC, to execute a performance bond to the govern-mental entity if the public work contract exceeds $100,000. The performance bond is solely for the protection of

the governmental entity awarding the public work contract and is conditioned on the faithful performance of the work in accordance with the plans, specifications, and contract documents. The McGregor Act also requires a payment bond for public work contracts exceeding $25,000 to be paid to the governmental entity awarding the public work contract. The payment bond is solely for the protection and use of payment bond beneficiaries who have a direct contractual relationship with the prime contractor or a subcontractor to supply public work labor or material.

The parties do not dispute whether the McGregor Act applies in the present case. Instead, Dealers claims that McGregor is not the exclusive remedy for its cause of action. The court disagreed with Dealers. The provisions of the McGregor Act are mandatory and provide the exclusive means to establish the existence of a cause of action by laborers or suppliers on a public project. Moreover, by allowing a claimant to pursue remedies on both the payment bond and under alternative theories, the prime contractor would be subject to double liability, which would reinstate the very evil the notice requirements of the McGregor Act were enacted to eliminate.

The Trust Fund Act, Property Code § 162.001, governs, among other things, construction payments made to a contractor or subcontractor or to an officer, director, or agent of a contractor or subcontractor, under a construction contract for the improvement of specific real property in this state. Under the Trust Fund Act, a trustee of funds is liable for misapplication of trust funds if he intentionally or knowingly or with intent to defraud, directly or indirectly retains, uses, disburses, or otherwise diverts trust funds without first fully paying all current or past due obligations incurred by the trustee to the beneficiary of the trust funds. Construction payments are trust funds if the payments are made to a contractor or subcontractor or to an officer, director, or agent of a contractor or subcontractor, under a construction contract for the improvement of specific real property. A party who misapplies these trust funds is subject to civil liability if (1) it breaches the duty imposed by the Trust Fund Act, and (2) the requisite plaintiffs are within the class of people that the act was designed to protect and have asserted the type of injury the act was intended to prohibit.

This court has held that a subcontractor or supplier in a public work contract could not recover under the Trust Fund Act where the full contract amount was covered by a payment bond. Texas courts have held, in cases not involving the McGregor Act or the Trust Fund Act, that where a payment bond is properly executed and recorded, subcontractors and suppliers may only recover on the payment bond.

Texas case law supports the premise that the McGregor Act applies exclusively to public work contracts of this nature. In reviewing Texas case law applying either the McGregor Act or the Trust Fund Act, the court found that Texas courts have continually applied the McGregor Act solely to disputes involving public work contracts where a payment bond is required and applied the Trust Fund Act to private construction contracts where a payment bond was not executed. The court concluded that Dealers does not have the choice to sue under either the McGregor Act or the Trust Fund Act given that SCC executed a valid payment bond. Moreover, the payment bond provision of the McGregor Act would be eviscerated if Dealers was allowed to proceed under the Trust Fund Act for the public work contract, which would be contrary to the intent of the legislature. Finally, the court did not find, nor has Dealers cited to, any authority where a reviewing court applied the Trust Fund Act to a public work contract.

PART XVI
CONDEMNATION

State of Texas* v. *Central Expressway Sign Associates, 302 S.W.3d 866, 53 Tex. Sup. Ct. J. 134 (Tex. 2009). The Texas Constitution provides that "[n]o person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person." Adequate compensation does not include profits generated by a business located on condemned land. In this case, the State condemned an easement that was leased to an advertising company for the purpose of erecting a billboard and selling advertising space.

The State filed a petition to condemn a 3,950-square-foot parcel of land in Dallas that was needed to improve a highway interchange. Central Expressway Sign Associates (CESA) held an easement for the construction and operation of a billboard on an 1,801-square-foot parcel, most of which was contained in the parcel to be condemned. The easement was leased to Viacom Outdoor, Inc., for the greater of $11,000 per year or twenty-five percent of billboard advertising revenues after paying limited agency commissions, with the base rent rising to $11,500 after one year and $12,000 after two. Viacom sold advertising space on a billboard that had been constructed on the property. At the time of condemnation, the billboard generated $168,000 per year in advertising revenue. After court-appointed special commissioners determined that the fair market value of the property to all of the interest holders was $2,012,300, the State objected and demanded a jury trial. The State reached a settlement

agreement with the underlying fee owner and another leaseholder, and the State acquired title to the fee interest. The State also settled its condemnation suit against Viacom by agreeing to pay relocation benefits, and Viacom relocated its billboard to a new location. Thus, this case does not involve the acquisition of a billboard structure and Viacom was able to place its billboard elsewhere. Viacom remained a party to the State's suit against CESA, however, because of a dispute arising out of the settlement agreement over interest and attorneys' fees, which dispute proceeded separately from the trial on the merits between the State and CESA. As a result, the trial court's final judgment included acquisition of both CESA's and Viacom's interests in the property.

Before trial, the State challenged CESA's appraisal expert, claiming that he had improperly included in his appraisal business profits that Viacom's billboard generated and had mischaracterized the billboard structure as realty rather than personalty. The trial court also granted CESA's challenge to the State's expert appraiser, Grant Wall. Wall used the income approach to valuing property, which estimates future rental income generated by the property and applies a capitalization rate to arrive at a present value. Wall capitalized the income Viacom paid CESA in rent for the easement, and estimated the fair market value to be $359,817. Because Viacom was paying a market rent, Wall assigned no value to the leasehold interest. The trial court excluded Wall's testimony as unreliable because he did not include billboard advertising revenues in his appraisal.

The State argues that it is entitled to a new trial because the trial court erred in excluding expert appraiser Grant Wall's testimony. The trial court found that Wall's testimony was unreliable because he did not include billboard advertising revenues in his estimate of the easement's value. Texas recognizes three approaches to determining the market value of condemned property: the comparable sales method, the cost method, and the income method. The comparable sales method is the favored approach, but when comparable sales figures are not available, courts will accept testimony based on the other two methods. The income approach is appropriate when the property would be priced according to the rental income it generates. All three methods are designed to approximate the amount a willing buyer would pay a willing seller for the property.

Texas law allows income from a business operated on the property to be considered in a condemnation proceeding in two situations: (1) when the taking, damaging, or destruction of property causes a material and substantial interference with access to one's property and (2) when only a part of the land has been taken, so that lost profits may demonstrate the effect on the market value of the remaining land and improvements. Absent one of these two situations, income from a business operated on the property is not recoverable and should not be included in a condemnation award. Courts have applied this rule for two reasons: first, because profits from a business are speculative and often depend more upon the capital invested, general market conditions, and the business skill of the person conducting it than it does on the business's location; and second, because only the real estate and not the business has been taken and the owner can presumably continue to operate the business at another location.

Texas courts have refused to consider business income in making condemnation awards even when there is evidence that the business's location is crucial to its success.

CESA and Viacom argue that billboard advertising revenue is derived from the intrinsic value of the land, and therefore that revenue should be treated like rental income for purposes of an income-method appraisal. But Texas courts have not recognized the exception for business profits derived from the intrinsic nature of the real estate. Profits from an existing farming business have been excluded as unreliable evidence of a property's value because they depend on weather, labor, market conditions, and other factors that may vary from year to year. Texas courts have also excluded evidence of profits from mining businesses operated on condemned land.

The Supreme Court said it was not inclined to create an exception for land on which a billboard is placed. Although CESA and Viacom consider billboards unique, there is nothing to indicate that a billboard's location is any more significant to their business than it would be to a retail establishment whose profitability depends upon visibility and easy access. Moreover, profits from a billboard advertising business depend upon more than just the land itself. The business involves securing permits for the operation of billboards, constructing, lighting, and maintaining the billboards, and employing personnel to sell advertising space and to place and remove the advertisements. If there were no business effort or skill involved in operating a billboard business beyond "renting" the space to advertisers, one would expect the rental rate of the easement to more closely approximate the advertising income Viacom received.

State of Texas* v. *Bristol, 293 S.W.3d 170, 52 Tex. Sup. Ct. J. 751 (Tex. 2009). When a taking occurs, all damages associated with the taking are not necessarily compensable, and diminished value is compensable only when it derives from a constitutionally cognizable injury. Remainder property

damages are generally calculated by the difference between the market value of the remainder property immediately before and after the condemnation, considering the nature of any improvements and the use of the land taken. While various methods can be used to determine the market value of a remainder property, the income approach is especially appropriate when, as with the hotel here, property would be valued on the open market according to the amount of income it already generates. The income approach consists of estimating the net operating income stream of a property and applying a capitalization rate to determine the property's present value.

Lost profits or injury to a business are not compensable over and above the value of the land taken and the diminution in the value of the remainder tract. Further, to the extent that the taking affects access to the remainder property, a partial, temporary disruption of access is not sufficiently material and substantial to constitute a compensable taking. In addition, disruption of use due to construction activities of the condemning authority during a roadway expansion project are not compensable.

PART XVII
LAND USE PLANNING, ZONING, AND RESTRICTIONS

Tellez* v. *City of Socorro, 296 S.W.3d 645 (Tex.App.-El Paso 2009, pet. denied). Under the common law, a non-conforming use of land or buildings is a use that existed legally when the zoning restriction became effective and has continued to exist. When determining whether there is a legal non-conforming use in a particular case, the proper focus is on the legislative enactments of the regulation body.

The City of Socorro's interpretation of non-conforming use is consistent with the common law. Its ordinance provides that non-conforming use means the use of land or a building, or a portion thereof, which does not conform with the current land use regulations of the zoning district in which it is located. A legal non-conforming use which existed prior to the enactment of a regulation is permitted to continue but cannot be expanded or enlarged. Further, the non-conforming use be continuous. The ordinance provides that if the non-conforming use ceases for any reason for more than thirty days or six consecutive months or eighteen months during a three year period (depending on the value of the structure), any subsequent use must conform to the existing regulations for the property.

Even if the evidence conclusively established that the Tellez property was being used as a salvage yard when the zoning ordinance was enacted, there is conflicting evidence whether the property was continuously used as a junkyard after that time as required to maintain the non-conforming use status. The court below specifically found that the 1991 post-enactment aerial photograph admitted into evidence showed the property was vacant. Consistent with this evidence, the property was listed on the appraisal district's records as vacant residential. Because there is no evidence of the replacement cost of the small cinder-block structure located on the property, it is unclear which vacancy time period would apply. However, there is evidence from which the Board of Adjustment could have found that the property was vacant for more than six months, and therefore, it could have concluded that the non-conforming use status had been lost under either subsection.

Letkeman* v. *Reyes, 299 S.W.3d 482 (Tex.App.-Amarillo 2009, no pet.). This case involves restrictive covenants as they relate to a house being moved into the subdivision. The house was originally built some years ago and subsequently acquired by the Letkemans. They had the house cut in half, moved into the subdivision, on a lot that they intended to buy. Before completing the process, they were told by one or more home owners in the development that their efforts violated several restrictive covenants. Despite hearing these complaints, they continued their efforts. The homeowners sued and the trial court enjoined the Letkemans from allowing the structure to remain on the lot and gave them 60 days to remove it.

The Letkemans appealed. Their first issue was whether the house was "pre-fabricated" and therefore prohibited by the restrictions. To the Letkemans, the word encompassed only structures built in a factory and then moved in sections or by wall panels onto a site where it was then constructed or assembled into a house.

As written in the covenants, the word in question contains the root "fabricated" and prefix "pre." he definitions assigned to the latter include "earlier than," "prior to," "before," "in advance," and "beforehand" to name a few of the most common. In turn, "fabricate" includes such meanings as to "invent," "create," "construct," "manufacture," "to construct from diverse and usually standardized parts," or to "make by art or skill and labor," and "make by assembling parts or sections." Combining this root and prefix, therefore, gives us a word meaning "to fabricate or construct beforehand," "to manufacture in standardized parts or sections ready for quick assembly and erection ...," or to "fabricate the parts of [as a house] at a factory so that construction consists mainly of assembling and uniting standardized parts." While those definitions do not mirror each other, they have one aspect in common. Each connotes something that is already or previously made (whether made as a whole or in parts

for later assembly) as opposed to something that is erected from scratch.

In their next issue, the Letkemans claimed the trial court abused its discretion by enjoining them to move the house from the subdivision. This was purportedly so because their opponents failed to prove a substantial violation of the restrictive covenants and the equities did not favor such relief.

Whether to grant a permanent injunction lies within the trial court's discretion. Generally, that discretion is abused and subject to reversal when the court acted without reference to guiding rules or principles or misapplied the law to the established facts. Next, injunctive relief ordinarily may issue when the applicant proves the occurrence of a wrongful act giving rise to imminent and irreparable harm for which there is no adequate remedy at law.

These elements change somewhat when the dispute concerns the enforcement of restrictive covenants. There, one need not establish the presence of imminent and irreparable injury. Nor must he prove the presence of actual damages arising from the breach. It is enough simply to prove a distinct or substantial breach.

As concluded in the first issue, the Letkemans breached that restrictive covenant prohibiting them from moving a pre-fabricated structure into the subdivision. Furthermore, the record illustrates that they knew of the restriction and objections raised by their prospective neighbors before completing the project. So too did their efforts continue despite having this knowledge. And though some evidence appears of record indicating that the finished structure could actually enhance neighboring property values, it does not matter that the home owners may suffer no actual damages.

Nash* v. *Peters, 303 S.W.3d 359 (Tex.App.-El Paso 2009, no pet.). Contending Peters violated certain deed restrictions by maintaining junked cars on his property and engaging in improper trash burning, Nash filed suit in the Justice Court. Peters denied the allegations, but a jury determined otherwise and found for Nash, awarding him $3,500 in punitive damages for breach of the restrictive covenant and $1,500 in attorneys' fees. Peters appealed the jury's verdict to the County Court. There, Nash also sought injunctive relief barring Peters' further violation of the deed restrictions. Claiming that the County Court lacked jurisdiction to consider Nash's contentions since Nash was seeking injunctive relief and could not prove any monetary damages from Peters' alleged breach of the deed restrictions, Peters moved for summary judgment on traditional and no-evidence grounds. In addition to responding to Peters' summary-judgment motion, Nash filed a motion to sever all causes of action that were not pled in the Justice Court. He also sought to sever the injunctive actions as the injunctive relief arose from the same core set of facts pled in the Justice Court. The court granted a partial summary judgment to Peters and denied Nash's action for injunctive relief.

Nash's suit for breach of deed restrictions was tried to a jury in the County Court. The jury found that Peters violated the restrictive covenant in question and awarded $20,262.50 in attorneys' fees. In response, Peters moved for judgment in his favor. The court agreed with Peters and rendered judgment that Nash take nothing, since he was not a prevailing party, and ordered Nash to pay the costs of the suit. After Nash's motion for rehearing was denied, he appealed.

Nash contends that the County Court abused its discretion by finding the Justice Court lacked jurisdiction to grant him relief in the deed-enforcement suit, and second, that the County Court erred in failing to grant him attorneys' fees.

The applicable statutes at issue are Section 27.034 of the Government Code, which provides that a justice court has concurrent jurisdiction with district courts in suits to enforce residential subdivisions' deed restrictions, and Section 5.006 of the Property Code, which provides that "[i]n an action based on breach of a restrictive covenant pertaining to real property, the court shall allow to a prevailing party who asserted the action reasonable attorney's fees in addition to the party's costs and claim."

Peters argues that only courts of record can enter a declaratory judgment and grant injunctive relief, and since justice courts are not courts of record, the Justice Court lacked jurisdiction to enter a declaratory judgment, and as such, could not have granted Nash the requisite injunctive relief, thus failing to make Nash the prevailing party.

Peters is correct that a justice court is not a court of record. However, a justice court does not lack the ability to enter a declaratory judgment when faced with a suit to determine whether restrictive covenants have been violated. Although the general rule is that only courts of a record may render a declaratory judgment, Section 27.034, a much more specific statute, inherently grants the justice court the ability to enter a declaratory judgment in suits relating to the enforcement of a deed restriction. By specifically granting the justice court jurisdiction in deed-enforcement suits, the justice court, in essence, must declare the parties' rights and status with respect to the enforcement of the deed restrictions. Section 27.034(j) states that a justice court may not grant injunctive relief to a party; however, that does not mean that a justice court could not grant a declaratory judgment.

Further, even if the court were to conclude that the Justice Court lacked the authority to enter a declaratory

judgment in this matter, that does not mean that the court lacked jurisdiction to hear the case, much less that Nash, having failed to obtain injunctive relief, was not the prevailing party in his suit to enforce the deed violations. Nor is there any requirement in such suits that the plaintiff must plead monetary damages to be labeled the prevailing party on a finding that a defendant violated a deed restriction. Rather, the plaintiff simply must prove that the defendant intended to do an act which would breach the deed restriction or that the defendant violated the deed restriction.

Here, the Justice Court, by statute, had jurisdiction to hear Nash's suit against Peters for violating the deed restrictions. Having received a verdict that Peters breached the restrictive covenants in question, Nash was the prevailing party in his suit and entitled to recover attorney's fees.

PART XVIII
MISCELLANEOUS

State of Texas* v. *$281,420.00 in United States Currency, 2010 WL 1933023 53 Tex. Sup. Ct. J. 741 (Tex. 2010). Johnny Mercado approached Gregorio Huerta, the owner of Greg's Towing, at a race track in Edinburg, Texas, and asked Huerta to tow a disabled Freightliner truck-tractor from Alvin to Mercedes for approx-imately $2,800. Huerta agreed, drove to Alvin that night to retrieve the truck, and returned to his office in Edinburg. Huerta contacted Mercado to request payment, and they planned for Huerta to follow Mercado with the truck to the final destination in Mercedes. When Mercado did not show up, Huerta became worried that the truck might be stolen and contacted Department of Public Safety Trooper Cesar Torres. Torres agreed to stop by Huerta's office to inspect the truck, but before he got there Mercado arrived and paid for the tow. Huerta informed Torres that it would no longer be necessary for him to come by, but Torres still had concerns about the truck and insisted on inspecting it. Together they devised a plan whereby Huerta would intentionally exceed the speed limit so that Torres would have probable cause to pull him over. When Torres stopped Huerta for speeding in San Juan, Mercado circled the area several times and then drove away.

Huerta gave Torres verbal and written permission to perform a road-side search of the truck cab. Unable to find anything during the field search, Torres asked Huerta to move the truck to the United States Customs point of entry at the International Bridge in Hidalgo for further inspection. There law enforcement officers examined the truck, x-rayed it, and searched it with drug sniffing dogs, but nothing was discovered. At some point, officers examined the center axle of the truck and, with Huerta's assistance, removed the housing around one of the axles. Inside the housing were a number of tightly-wrapped bundles containing $281,420 in United States currency. Torres told Huerta that if no one came forward to claim the money Huerta should get some sort of reward. When no one came forward, Huerta contacted Torres about a reward but was told he would have to speak to Torres's superiors. Huerta did not receive a reward for his role in the seizure.

The Hidalgo County District Attorney's Office commenced separate forfeiture proceedings against the truck and the currency. Approximately one month after the State initiated the proceedings, Huerta filed a petition seeking to intervene as the last person in possession of the currency at the time it was seized. According to Huerta, the currency was not contraband, Mercado and Pulido had abandoned any claims they held to the currency by failing to answer or appear, and Huerta's interest in the currency was superior to that of the State.

The trial court agreed, found the currency to be contraband, and ordered its forfeiture to the Hidalgo County Criminal District Attorney and DPS. A divided court of appeals reversed the trial court's judgment, holding that the currency had not been shown to be contraband and that Huerta was entitled to the entire $281,420.

Huerta first asserts that, as bailee of the Freightliner, he is entitled to the currency because it was abandoned by Mercado while in Huerta's possession. This argument, however, presumes that Huerta established a bailment as to the currency, something Huerta did not do. To create a bailment, there must be (1) delivery of personal property from one person, the bailor, to another, the bailee, for a specific purpose; (2) acceptance of delivery by the bailee; (3) an express or implied contract between the parties that the specific purpose will be realized; and (4) an agreement between the parties that the property will be either returned to the bailor or dealt with according to the bailor's direction.

That a bailment may have existed concerning the Freightliner does not mean that a bailment existed as to the currency. The bailee must, at a minimum, “knowingly [take the] property into possession or control” for there to be a bailment. Huerta admitted at trial that he did not enter into an agreement with Mercado to transport the currency and that he was not aware of the currency before it was discovered in the axle. A bailee's duty of care extends to undisclosed items in a vehicle that are in plain view. But if the undisclosed items are not in plain view, then the bailee's duty of care extends to items that are “reasonably anticipated to be found in the car based on

the surrounding circumstances." If undisclosed items are not in plain view and the bailee could not have reasonably anticipated that they would be in the vehicle, the bailment contract does not extend to those items.

Huerta appears to believe that, with or without a bailment, he may claim the cash because it was abandoned while in his possession. However, even if such a claim were viable, one who seeks to acquire abandoned property must take possession of the property with an intent to acquire title. Huerta contends he had possession of the currency before it was seized by law enforcement officers because he was the first to remove it from the axle and the first to discover that the bundles contained currency. The court disagreed. Huerta removed the hub housing while assisting law enforcement and customs officials. By the time the currency was discovered, Huerta had already turned the vehicle over to law enforcement, and it had been subjected to a roadside search, an x-ray, and a sniff search by dogs. The fact that Huerta was the first to remove the currency bundles from the axle does not establish that he was in legal possession of them. Huerta's theory of legal entitlement based upon simple abandonment is unavailing.

Huerta also claims a right to possession of the currency under a common law "treasure trove" or "finders keepers" doctrine. The treasure-trove doctrine applies to valuables found hidden in the ground or other private place, the owner of which is unknown. However, the court has previously declined to recognize the treasure-trove doctrine as part of Texas law. Instead, the court applies the common law distinctions of "lost" and "mislaid" property. Mislaid property includes property which the owner intentionally places where he can again resort to it, and then forgets. It is presumed that the owner or occupier of the premises on which the mislaid property is found has custody of the property. In this case, it is undisputed that Huerta did not own the "premises"-the Freightliner-on which the currency was found. Accordingly, Huerta cannot establish possession to the currency by characterizing it as mislaid property.

Neither can Huerta establish a right to possess the currency as lost property. In contrast to mislaid property, "lost" property includes that which the owner has involuntarily parted with through neglect, carelessness or inadvertence. Unlike mislaid property, the owner or occupier of the premises on which lost property is found does not acquire title to the property. Instead, the finder of lost property retains possession as against the owner of the premises on which the property is found, but not against the lost property's true owner. Where the owner does not part with property as a result of carelessness or neglect, but instead demonstrates a deliberate, conscious and voluntary desire to hide his property in a place where he thought it was safe and secure, and with the intention of returning to claim it at some future date, it is mislaid property. The property in this case was clearly deliberately hidden. The manner in which the money was placed in the axle forecloses any argument that it was lost rather than mislaid.

Intercontinental Group Partnership* v. *KP Home Loan Star, L.P., 295 S.W.3d 650, 52 Tex. Sup. Ct. J. 1204 (Tex. 2009). A provision in the contract for attorneys' fees read as follows: "If either party named herein brings an action to enforce the terms of this Contract or to declare rights hereunder, the prevailing party in any such action, on trial or appeal, shall be entitled to his reasonable attorney's fees to be paid by losing party as fixed by the court." "Prevailing party" was not defined.

KB sued Intercontinental for breach of contract, seeking damages, specific performance, injunctive relief, and attorneys' fees. It did not sue for declaratory judgment. At trial, KP sought only lost profits damages for Intercontinental's breach. The jury found that Intercontinental had breached the contract, but found $0 damages. Both parties then sought attorneys' fees as the "prevailing party."

Under the so-called American Rule, litigants' attorney's fees are recoverable only if authorized by statute or by a contract between the parties. Chapter 38 of the Texas Civil Practice and Remedies Code provides for attorneys' fees in wording that is similar to the contract provision in this case. "A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for ... an oral or written contract."

The Supreme Court has previously held that, before a party is entitled to fees under Chapter 38, the party must prevail on a cause of action for which attorneys' fees are recoverable and must recover damages. If that rule is applied in this case, KB could not recover damages. However, the court said the rule and Chapter 38 are not controlling here. Parties are free to contract for a fee-recovery standard either looser or stricter than Chapter 38's, and they have done so here. As KB points out, Chapter 38 permits recovery of attorney's fees "in addition to the amount of a valid claim," while nothing in the contract expressly requires that a party receive any "amount" of damages. The triggering event under the contract is that a party prevail in an action "to enforce the terms of this Contract or to declare rights hereunder...." The question remains, however: what does "prevailing party" mean under the contract?

It seems beyond serious dispute that KB achieved no genuine success on its contract claim. Whether a party prevails turns on whether the party prevails upon the court to award it something, either monetary or equitable. KB got nothing except a jury finding that Intercontinental violated the contract. It recovered no damages; it secured no declaratory or injunctive relief; it obtained no consent decree or settlement in its favor; it received nothing of value of any kind, certainly none of the relief sought in its petition. No misconduct was punished or deterred, no lessons taught. KB sought over $1 million in damages, but instead left the courthouse empty-handed: "That is not the stuff of which legal victories are made." Nor did the outcome materially alter the legal relationship between KB Home and Intercontinental.

A zero on damages necessarily zeroes out "prevailing party" status for KB.

KB argues that it should nonetheless recover attorney's fees because it sued to "declare rights" under the contract and prevailed by obtaining a jury verdict that Intercontinental breached the contract. The court disagreed. Neither law nor logic favors a rule that bestows "prevailing party" status upon a plaintiff who requests $1 million for actual injury but pockets nothing except a jury finding of non-injurious breach; to prevail in a suit that seeks only actual damages-compensation for provable economic harm-there must be a showing that the plaintiff was actually harmed, not merely wronged.

If KB had brought its breach-of-contract case and obtained favorable answers on the same "failure to comply" questions, but the jury also found that an affirmative defense barred KB's claim, a take-nothing judgment in favor of Intercontinental would have been rendered. There would be no dispute that KB had not prevailed, despite jury findings that Intercontinental breached. No rational distinction exists between that scenario and the one before the court. In both, the end result is a take-nothing judgment with no meaningful judicial relief for KB. Its only "relief" in either case is the gratification that comes with persuading a jury that Intercontinental behaved badly. But vindication is not always victory. However satisfying as a matter of principle, "purely technical or de minimis" success affords no actual relief on the merits that would materially alter KB's relationship with Intercontinental. Accordingly, KB, while perhaps a "nominal winner" in convincing the jury that it was "wronged," cannot be deemed a "prevailing party" in any non-Pyrrhic sense.

If KB "lost" by receiving no damages does that mean Intercontinental "won" by remitting no damages? The court could not reach this question if it was not properly presented, and it was not. Intercontinental neither preserved the issue nor presented any evidence (either before, during, or after trial) regarding its attorney's fees for defending KB's breach-of-contract claim. This failure waives any right to recovery.

The dissent accused the majority of ignoring the contract's language in order to reach an easy-to-apply answer.

"Nothing could be further from the truth," said the majority in response. Since the contract leaves "prevailing party" undefined, the court must do its best to effectuate the parties' intent. The most sensible interpretation is that a plaintiff prevails by receiving tangible relief on the merits.

Despite what the dissent contends, the court is not saying a plaintiff must recover a money judgment in every breach-of-contract action. Quite the opposite. The dissent cites a variety of situations where we agree the plaintiff would "prevail": when the plaintiff obtains rescission of the contract, specific performance, an injunction, or a declaratory judgment. Today's decision is not grounded on the fact that KB received no money damages, but rather on the fact that KB received nothing at all.