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 360 S.W.3d 82 and Supreme Court opinions released through May 24, 2012.

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.

A number of other terms, such as Bankruptcy Code, UCC, DTPA, and the like, should have a meaning that is intuitively understood by the reader, but, in any case, again refer to the statutes or cases as presented in the cases in which they arise.

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

Hemyari v. Stephens, 355 S.W.3d 10, 55 Tex.Sup.Ct.J. 59 (Tex. October 21, 2011). When Murphy threatened to foreclose on the deed of trust, the Stephens Groups sought bankruptcy protection. The bankruptcy court entered an order in which it established a procedure for the Stephens Groups to fulfill its original obligations. The order provided that the Stephens Groups were to make payment of $50,000 to Murphy by June 12, 2000, which they did. The order further provided that, after the initial payment, a conditional lift of the automatic stay would "allow [Murphy] to post the property for foreclosure in July, 2000, for a sale on August 1, 2000." Finally, the order provided that if the Stephens Groups did not pay the remaining $650,000 on or before August 1, Murphy could "proceed with the foreclosure sale on August 1, 2000." Murphy did not schedule the foreclosure sale in July, as allowed by the order, but waited until after the Stephens Groups missed the second payment to schedule the sale for September 5, 2000.

Hemyari purchased the property at the foreclosure sale. Following the foreclosure sale, the proceeds were used to complete the payment to Murphy, and the Stephens Groups moved to dismiss their bankruptcy case, having discharged their debts. Four years later, the Stephens Groups filed this suit in state court. The Stephens Group alleged, among other things, that the September 5 foreclosure sale was void because it violated the express terms of the lift-stay order.

The court of appeals held that the September 5 sale violated the lift-stay, stating its belief that the lift-stay order allowed a sale only on August 1. The Supreme Court disagreed and reversed the court of appeals.

In this case, the order's terms provided for a sale "on August 1, 2000," but as Hemyari points out, that may have been impossible. The Stephens Groups' first scheduled payment was due by noon on June 12, 2000. The $650,000 payment was due "on or before August 1, 2000," but the order did not specify any particular time. Thus, the presumption is that payment could be made at any point before or throughout August 1st. Reading the order as a whole, the court concluded that the Stephens Groups' proposed interpretation would render the entire foreclosure sale provision in the order meaningless. If the foreclosure could not occur until after a failure to pay, but the Stephens Groups could forestall payment until the end of the only day foreclosure was allowed, the Stephens Groups could avoid foreclosure altogether by simply doing nothing. The only way the foreclosure sale could have occurred on August 1st is if the Stephens Groups notified Hemyari ahead of time that payment would not be made. Furthermore, had Murphy actually conducted the foreclosure sale on August 1st as supposedly required by the order, the Stephens Groups could still have brought this suit challenging the sale, though on grounds that they were not given adequate time to make payment under the "unambiguous" terms of the order. The court of appeals recognized the incongruities in the order, but nevertheless concluded the order "unambiguously modified the stay to allow for a sale only on August 1, 2000." The Supreme Court construed the order in a way that avoids such a contradiction.

The Property Code brings this absurdity into further relief. The Property Code sets forth a variety of requirements for foreclosure and foreclosure sales. One particular provision requires that all public foreclosure sales take place between 10 a.m. and 4 p.m. of the first Tuesday of a month. Thus, under the Stephens Groups' interpretation, they had until midnight to pay even though Murphy only had until 4 p.m. to foreclose.

Bank of America v. Babu, 340 S.W.3d 917 (Tex.App.-Dallas 2011, no pet.). The Johns bought property from George that was also financed by George. The deed retained a vendor's lien and the Johns also executed a deed of trust, both securing the purchase money note. George later assigned the note and deed of trust to First Western until First Western received 31 monthly payments, at which time the note and deed of trust reverted to George. After that, George gave First Western another assignment, this time of the next 36 monthly payments.

In March 2004, George released his liens against the property, after which the Johns conveyed the property to George, taking back a note, a vendor's lien, and a deed of trust. George then borrowed some money from B of A, secured by a deed of trust on the property. George then defaulted on the note to the Johns, so the Johns foreclosed. Babu bought the property at the foreclosure sale.

B of A sued seeking a declaratory judgment that the March 2004 release was void because the lien had been assigned to First Western and claiming that B of A was subrogated to First Western's lien because it had paid off First Western.

The trial court found that Babu was a good faith purchaser of the property at foreclosure because no documents appeared of record at the time of the foreclosure that would give actual or constructive notice of a lien that was superior to the Johns's lien.

Status as a bona fide purchaser is an affirmative defense to a title dispute. A bona fide purchaser is not subject to certain claims or defenses. To receive this special protection, one must acquire property in good faith, for value, and without notice of any third-party

claim or interest. Notice may be constructive or actual. Actual notice rests on personal information or knowledge. Constructive notice is notice the law imputes to a person not having personal information or knowledge.

A party has constructive notice of instruments properly recorded in the proper county. A party claiming title through principles of equity has the burden of proving that a subsequent purchaser was not a good faith purchaser.

The second assignment was filed in the Dallas County real property records well before the foreclosure sale. Under the terms of that assignment, George assigned to First Western all of his right, title, and interest in and to his deed of trust for a period lasting until First Western has received certain payments. Attached to the second assignment was an "Exhibit 'A'" that listed the due dates of the payments, with the first being "10/15/2003" and the last being "9/15/2006." Thus, under the express terms of the second assignment, First Western was assigned the rights under the George deed of trust until September 15, 2006. The March 16, 2004 release was executed only by George. The release did not identify or mention the second assignment. Accordingly, as a matter of record, the lien rights assigned to First Western under the terms of the second assignment were unreleased on the date of the foreclosure sale.

The court also held in favor of B of A on its subrogation claim. Equitable subrogation "is a legal fiction" whereby "an obligation, extinguished by a payment made by a third person, is treated as still subsisting for the benefit of this third person, so that by means of it one creditor is substituted to the rights, remedies, and securities of another." It essentially allows a subsequent lienholder to take the lien-priority status of a prior lienholder. Texas courts are particularly hospitable to the doctrine of equitable subrogation.

The general purpose of equitable subrogation is to prevent the unjust enrichment of the debtor who owed the debt that is paid. The trial court stated that B of A failed to establish that Babu would be unjustly enriched if equitable subrogation was not allowed. Babu argued the trial court's focus on unjust enrichment as to him, rather than the debtor, was correct because the analysis of the unjust enrichment aspect must focus solely on the parties whose interests are affected by whether or not the court grants a party's claim of equitable subrogation. Babu cited ***Med Center Bank* v. *Fleetwood***, 854 S.W.2d 278 (Tex. App.—Austin 1993, writ denied) for its proposition, but ***Med Center*** did not extend the analysis beyond the debtor, so this court wasn't going to do so either.

Babu further argued that the case law supports rejecting the application of equitable subrogation against non-debtors. The court was not persuaded by the cases Babu relied upon.

The court then addressed the trial court's "balancing of the equities." The trial court apparently balanced those equities taking into account the circumstances as of the foreclosure. The court of appeals said that the determination is made, not as of the foreclosure date, but as of the time of the transaction supporting subrogation, which was when the debtor's obligation was repaid by B of A. The consequences of subsequent transaction or events are not relevant to the inquiry. The trial court should have considered only whether equitable subrogation would have prejudiced interests existing at the time Bank paid off the Johns's debt to First Western.

Finally, the trial court had stated that B of A was negligent in failing to file any documents in the real property records evidencing its "alleged lien" on the property. The court held that B of A had no duty to file anything, so there could be no negligence.

Noble Mortgage & Investments, LLC v. D&M Vision Investments, LLC, 340 S.W.3d 65 (Tex.App.-Houston [1st Dist.] 2011, no pet.). Noble made a loan in October 2007 which paid off three prior loans. Unbeknownst to Noble, FHI had obtained a default judgment against Banks, the immediately prior owner of the property, a year earlier. FHI did not obtain and file an abstract of judgment. It did, however obtain an execution and sale of the property in September 2007, a month or so before Noble's deed of trust was recorded. The sale was documented in the litigation records of the court by the constable's filing of a return of execution. After the Noble deed of trust was recorded, the constable prepared a deed transferring the property to Whitfield, the purchaser at the execution sale. The filing of that deed was the first time any document appeared in the real property records relating to the judgment lien or the execution sale. Whitfield deeded the property to D&M and in the meantime, Noble foreclosed on its lien. After Whitfield posted a no trespassing sign on the property, the parties figured out they had competing claims to the same property.

D&M filed a trespass to try title suit against Noble seeking to quiet title based on the execution sale. Noble counterclaimed and, alternatively, asked to be subrogated to the rights of the lienholders it had paid with the proceeds of its loan. D&M argued that Noble knew or should have known of the judgment and the execution sale because the underlying judgment, though unrecorded in the real property records, was nonetheless of public record in the civil court records. The trial court held in favor of D&M on the title issue and in favor of Noble on the subrogation claim.

Noble appealed, claiming that the recording statute, Property Code § 13.001, made Noble a bona fide mortgagee. A bona fide purchaser is one who

acquires property in good faith, for value, and without notice, constructive or actual, of any third party claim or interest. In Texas, a bona fide purchaser prevails over a holder of a prior unrecorded deed or other unrecorded interest in the same property. A bona fide mortgagee is entitled to the same protections as a bona fide purchaser.

Under section 13.001, a lender can be a bona fide mortgagee, if the lender takes a lien in good faith, for valuable consideration, and without actual or constructive notice of outstanding claims. Notice sufficient to defeat bona fide purchaser status may be actual or constructive. Actual notice rests on personal information or knowledge. Constructive notice is notice the law imputes to a person not having personal information or knowledge. Constructive notice creates an irrebuttable presumption of actual notice in some circumstances.

An instrument that is properly recorded in the proper county is notice to all persons of the existence of the instrument. 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.

Texas law does not provide a definitive explanation for what constitutes "good faith" sufficient to make one a bona fide purchaser" in the sale of real property context. This court has analyzed good faith in terms of whether a subsequent purchaser is aware of circumstances independent of the chain of title that would put it on notice of an unrecorded claim. Whether Noble is a bona fide mortgagee or purchaser turns largely on the issue of whether recording of a sale on an execution docket in compliance with Rule 656 of the Texas Rules of Civil Procedure is a "recording" for the purpose of putting subsequent creditors and purchasers on constructive notice under sections 13.001 and 13.002 of the Texas Property Code. This presents an issue of first impression in Texas. The trial court held that a Rule 656 filing satisfied the recording statutes. The court of appeals disagreed.

Recording under Rule 656 is not a recording for purposes of imputing constructive knowledge to defeat a claim of bona fide purchaser. Section 13.001 of the Texas Property Code provides that a real property mortgage or deed is "void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless the instrument has been . . . filed for record as required by law." While Rule 656 states that execution recorded on the execution docket under that rule "shall be taken and deemed to be a record," it would be inconsistent with the overall recording scheme long embodied in the Texas Property Code to hold that because a document is a "record" under Rule 656, that instrument is "filed for record" under section 13.001.

Texas law has long favored the purpose of recording acts, which make land title information available to interested persons. The intention of the recording acts is to compel every person receiving conveyances of real property to place such an instrument of record, not only that he may thereby protect his own rights, but also those of all others who may afterwards seek to acquire an interest in the same property. To be effectively recorded, an instrument relating to real property must be recorded in the public records in the county in which a part of the property is located. The recording laws in Texas were meant to protect innocent purchasers and creditors without notice of the prior transfer from being injured or prejudiced by their lack of knowledge of the competing claim.

Whittle Development Inc. v. Branch Banking & Trust Co., 463 B.R. 796 (Bkrtcy. N. Dist. Texas 2011). The US Bankruptcy Court for the Northern District of Texas denied the lender's motion to dismiss and held that a debtor can avoid a prepetition foreclosure as a preference. The lender who foreclosed on a debtor's property prepetition by purchasing it through a credit bid for less than its alleged market value.

Under section 547(b) of the Bankruptcy Code, a trustee can avoid a transfer of a debtor's property as a preference if the transfer (1) was to or for the benefit of a creditor, (2) was for or on account of an antecedent debt owed by the debtor before the transfer was made, (3) was made while the debtor was insolvent, (4) was made within 90 days before the filing of the petition (or within one year, if made to an insider), and (5) enabled the creditor to receive more than if the bankruptcy case was governed by Chapter 7 of the Bankruptcy Code and the transfer had not been made.

The lender argued that this foreclosure should not be subject to section 547(b) because the US Supreme Court held in ***BFP v. Resolution Trust Corp.***, 511 U.S. 531, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994) that the price paid at a non-collusive foreclosure sale conducted in accordance with state law was, as a matter of law, "reasonably equivalent value." In other words, the last condition of section 547(b) cannot be satisfied because the price determined by bid at the foreclosure sale is the fair market value of the property and the lender would recover the same amount in a Chapter 7 liquidation.

However, the bankruptcy court distinguished the Supreme Court's reasoning, which analyzed what "reasonably equivalent value" meant in connection with fraudulent transfers under section 548(a)(2)(A) of

the Bankruptcy Code, from the case at hand. Rather, it held that section 547(b) does not present any similar legal issues because the operative question is whether the creditor did in fact receive more than it would have received under a Chapter 7 liquidation and if the transfer had not been made. Because a Chapter 7 trustee has the time and incentive to promote a competitive auction in a Chapter 7 liquidation, a trustee can hypothetically generate a higher price for the property than the price a foreclosing creditor may pay at a foreclosure sale. Therefore, it is possible to avoid a prepetition foreclosure sale as a preference, even if the foreclosure complied with state law and was non-collusive.

Wind Mountain Ranch v. City of Temple, 333 S.W.3d 580 (Tex. 2010). Texas Civil Practice & Remedies Code § 16.035(a) requires a foreclosure to be held within four years after the cause of action accrues. Section 16.036 permits the parties to suspend the four-year limitations by executing, acknowledging, and filing an agreement extending the maturity of the loan. An extension agreement is ineffective as to BFPs, lienholders, and lessees who are without actual notice before the agreement is filed.

In this case, the note was set to mature in 1993. In a complicated series of events, a bankruptcy was filed and a reorganization plan was approved extending the maturity to 1999. The bankruptcy order extending the maturity was not recorded.

Meanwhile, the City of Temple obtained a judgment against the owner of the property and filed an abstract of judgment in 2003. A month after the AJ was filed, Wind Mountain acquired the note and deed of trust on the property and subsequently foreclosed. The City sought a declaration that, because the foreclosure occurred after the four-year period of limitations, it was invalid. The City contended that the bankruptcy court's extension was not filed as required by the Civil Practice & Remedies Code and was therefore void as to the City.

The trial court ruled in favor of the City and the court of appeals affirmed. The Supreme Court reversed. The Supreme Court agreed that § 16,036 requires an extension agreement to be recorded; however, the plain language of the statute imposes no such requirement on a bankruptcy court order. And the court would not say that an order issued by the bankruptcy court amounts to an agreement between the parties. It necessarily follows that a bankruptcy court order need not be recorded to effectively extend a note's maturity date. The Civil Practice & Remedies Code requirements for recording an extension agreement are clear and unambiguous and the court declined to look beyond the statute's plain language. As such, the maturity date of the note was effectively extended to 1999. Wind Mountain foreclosed on the property before the statute of limitations lapsed, and its interest is superior to the City's.

Schlichting v. Lehman Brothers Bank FSB, 346 S.W.3d 196 (Tex.App.-Dallas 2011, pet. dismissed w.o.j.). Lehman foreclosed on Schlichting, making him, according to his deed of trust, a tenant at sufferance. Lehman sent a 3-day notice to vacate and filed a forcible detainer action to evict him. The justice court awarded possession to Lehman and Schlichting appealed to the county court, where he lost again. He then appealed to the Court of Appeals.

At trial, Schlichting had introduced evidence of a "senior deed" showing that Lehman had no valid title or interest in the property. According to Schlichting, an earlier foreclosure of this "senior deed" voided Lehman's lien interest. Therefore, the trustee's deed Lehman had obtained at foreclosure was void. The court didn't buy his argument.

Any defects in the foreclosure process or with the purchaser's title to the property may not be considered in a forcible detainer action. Such defects must be pursued, if at all, in a separate suit for wrongful foreclosure or to set aside the substitute trustee's deed. Where a foreclosure pursuant to a deed of trust establishes a landlord and tenant-at-sufferance relationship between the parties, the trial court has an independent basis to determine the issue of immediate possession without resolving the issue of title to the property. In this case, the foreclosure pursuant to the deed of trust created a landlord and tenant-at-sufferance relationship between appellant and Lehman. Thus, it was not necessary for the trial court to resolve the title dispute to determine the right of immediate possession.

Cabot Capital Corporation v. USDR, Inc., 346 S.W.3d 634 (Tex.App.-El Paso 2009, pet. denied). For purposes of satisfying Texas Property Code § 51.003, fair market value is defined as the price the property will bring when offered for sale by one who desires to sell, but is not obliged to sell, and is bought by one who desires to buy, but is under no necessity of buying. In the case of a foreclosure, the fair market value to be determined was the value of the property at the time of the foreclosure. The burden of proof is on the borrower to prove fair market value, since the offset under § 51.003 is an affirmative defense. In this case, the evidence of value was as of the time of trial, not the time of the foreclosure, so the trial court's determination of fair market value was in error.

Riner v. Neumann, 353 S.W.3d 312 (Tex.App.-Dallas 2011, no pet.). Riner bought the condo in June at a foreclosure sale based on an assessment lien against the condo. Neumann bought the condo in August at a foreclosure sale based on a home-equity loan secured

by the condo. Neumann started moving his stuff into the condo. Riner removed Neumann's stuff and moved into the condo himself.

Neumann sued Riner for trespass to try title and damages. The trial court awarded title and possession to Neumann, along with damages for Riner's retention of possession.

Among other arguments in this appeal, Riner claimed that the assessment lien he foreclosed on was superior to the home equity lien.

The condo owner, Lopez, bought the condo in 1989. In 2004, Lopez borrowed the home equity loan. At that time, he was not delinquent in any assessments. The loan was used to pay off the existing loan and to do some improvements to the unit.

Section 5.8 of the condo declaration provided that the assessment lien was prior to all other liens except taxes and "any prior recorded purchase money mortgage, vendor's lien, or deed of trust." It also provided that the lien attaches as of the date of failure to pay an assessment. (The Uniform Condominium Act, Property Code §§ 82.001 et seq., does not apply in this case because the condo declaration here was recorded before the Uniform Act was adopted.)

The first question is whether the assessment lien attached before or after the date of the home equity lien. The evidence was clear that the home equity lien attached first. Lopez was current in his assessment payments at the time the home equity lien was recorded. Riner argued that § 82.113(c) of the Uniform Act provides that the assessment lien is created by filing the declaration, which was before the home equity lien. The court said that applying the Uniform Act in that way would be contrary to the declaration's provision that assessment liens attach only when assessments are delinquent. So, said the court, the home equity lien was a prior recorded lien.

The next question is whether the home equity security instrument is a "deed of trust" within the meaning of the condo declaration. In this state we use a deed of trust in the nature of a mortgage in transfers of real property. Thereby a lien is retained or given as security, with simultaneous execution of a deed of trust to one who is to hold the office of trustee for the purpose of foreclosure without necessity of resort to litigation. The deed of trust transaction is a conveyance in trust by way of security, subject to a condition of defeasance, or redeemable at any time before the sale of the property. In other words it is a conveyance in trust for the purpose of securing a debt, subject to a condition of defeasance. Texas courts have also described a deed of trust more simply as a mortgage with power to sell on default.

Looking at the security instrument, the court noted that it names a trustee and recites that, for purposes of securing the debt evidenced by a specified note, "Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale," the condominium unit involved in this case. Section 21 of the instrument authorizes the lender to accelerate the debt in the event of default and to "invoke the power of sale" if the default is not cured. For that reason and for others, the court held that the security instrument incorporates the main features of a deed of trust.

Riner argued, though, that an essential element of a deed of trust is the power to sell at a foreclosure sale without judicial involvement. As a home equity lien, this one could only be foreclosed by court order. Thus, said Riner, this is not a deed of trust. The court rejected this argument. Under Texas law, the maker of a deed of trust with power of sale may condition the exercise of the power upon such conditions as he may prescribe. Moreover, the trustee must strictly comply with all the terms prescribed in the power of sale. From these principles it follows that a deed of trust does not lose its character as a deed of trust merely because its maker imposes conditions and limitations on the trustee's power of sale. In this case, the security instrument requires a court order as a condition for a foreclosure sale, as is constitutionally required for foreclosure on a home-equity loan on a homestead. Nevertheless, despite that condition (not to mention other conditions in the instrument governing the notice of the sale and the time and place of the sale), the home equity security instrument still confers the power of sale upon the trustee. Accordingly, the court held that the instrument was a deed of trust in the ordinary meaning of the term.

Williams v. Nationstar Mortgage, LLC, 349 S.W.3d 90 (Tex.App.-Texarkana 2011, pet. denied). The Birds bought a house in Gregg County. Their deed retained a vendor's lien in favor of Nationstar, securing payment of two notes, one for $148,800 and another for $37,200— both payable to Nationstar. The Birds also executed two deeds of trust, both dated March 14, 2007, each securing one of the notes. The warranty deed with vendor's lien and both deeds of trust were each recorded, apparently simultaneously, in the records of Gregg County, Texas.

In March of 2008, a notice of trustee's sale was posted by a substitute trustee referencing the $37,200 lien. The notice did not reference the $148,800 note or its deed of trust. On April 1, 2008, the substitute trustee conducted a foreclosure sale, sold the property to Williams for $9,000, and conveyed the property without any reservation or mention of the other note or deed of trust. Williams later discovered the existence of the $148,800 note and deed of trust on the property. He demanded that Nationstar release the lien, but Nationstar refused and commenced nonjudicial foreclosure under the $148,800 deed of trust. Williams filed suit to quiet title, arguing that he purchased the property free of all other liens, while Nationstar

contended that the $148,800 deed of trust had priority over the foreclosed note. After a bench trial, the trial court agreed with Nationstar, and found that the $148,800 lien had priority and remained on the property.

Williams argues that the trial court erred because: (1) the evidence supporting the trial court's finding of priority was legally and factually insufficient; (2) the trustee's deed to Williams conveyed all of Nationstar's rights to the property; and (3) Nationstar's nonjudicial foreclosure of one of the notes discharged the lien against the property on the second note.

The trial court had found that the $37,200 lien was a second lien, recorded second in time and printed on a second mortgage form. The vendor's lien in the deed also referred to it as a second lien and the $148,800 lien as a first lien.

Generally, different liens upon the same property have priority according to the order in which they are created. This rule is known as "first in time is first in right." In this case, we are faced with the unique fact that the two competing deeds of trust securing the two purchase money promissory notes, as well as the warranty deed retaining a vendor's lien, were recorded in the Gregg County clerk's office on the same day at exactly the same hour, minute, and second. However, the three documents were filed in specific order and received different recording page numbers.

Though there is no guiding caselaw regarding these unusual factual circumstances, after considering all the evidence, we find that the evidence supporting the trial court's judgment is within the zone of reasonable disagreement and is not so weak as to be manifestly wrong.

In his second point of error, Williams contends that he owns the property free of any lien held by Nationstar because: (1) Nationstar's lien is invalid because the trustee's deed contains warranties of title, and therefore, the deed conveyed all of Nationstar's rights to the property, including its rights under the $148,800 lien; and (2) foreclosing one deed of trust without reserving interest in the other divests Nationstar of all title and interest in the property and vests it in Williams.

The court held in favor of Nationstar. First, while the trustee's deed contains warranty language, both the trustee's deed and the deed of trust make clear that the warranties are made by the Birds rather than Nationstar. Because the warranty is from the Birds, who hold only legal title, the warranty language has no bearing on Nationstar's equitable title interests in the property. Second, foreclosure does not terminate interests in the foreclosed real estate that are senior to the mortgage being foreclosed. In fact, the general rule is that the successful bidder at a junior lien foreclosure takes title subject to the prior liens. The purchaser takes the property charged with the primary liability for the payment of the prior mortgage and must therefore service the prior liens to prevent loss of the property by foreclosure of the prior liens.

Pratt v. Amrex, Inc., 354 S.W.3d 502 (Tex.App—San Antonio 2011, pet. denied). Curtis and Nancy borrowed a loan from the Bank, using some Uvalde County land as collateral. Later, after Curtis was sued in New Jersey, Curtis and Nancy executed a Partition Agreement, conveying all of Curtis's community property to Nancy, including his interest in the Uvalde property. The Partition Agreement was recorded in Gillespie County, where Curtis and Nancy lived, but not in Uvalde County.

A judgment was obtained against Curtis in New Jersey and domesticated in Houston, where the judgment creditor had a Receiver appointed for Curtis's estate. The Receiver executed and recorded a deed conveying the Uvalde property from Curtis to the Receivership estate.

About a year later, without the Receiver's knowledge and without approval from the Harris County court, the Bank foreclosed on the Uvalde property and sold the property to Amrex at the foreclosure sale. The Receiver found out about it and filed suit against Amrex, seeking a declaratory judgment that the trustee's deed from the foreclosure was void because the Bank had failed to obtain approval for the foreclosure from the Harris County court. In that action, Amrex sought a declaratory judgment that the Receiver's deed was void. The trial court held in favor of Amrex.

The Receiver argues the trial court erred in declaring the Receiver's special warranty deed void because (1) the Partition Agreement did not divest Curtis of his community property interest in the Uvalde property because it was not recorded in Uvalde County and, therefore, was ineffective against the Receiver; (2) the Receiver's special warranty deed properly placed the Uvalde property in custodia legis; (3) Security State Bank had no authority to foreclose its lien against the Uvalde property because the property was in custodia legis; and (4) because Security State Bank improperly foreclosed, it had no title to convey to Amrex, thereby making Amrex's substitute trustee's deed void as a matter of law.

First, the court held that the Partition Agreement did not divest Curtis of his interest in the Uvalde property. Family Code § 4.106(b) requires a Partition Agreement of this type to be recorded in the county where a party resides and where the real property is located. It is constructive notice only if the instrument is recorded in the county where the property is located.

Next, the court looked at whether the Bank had authority to foreclose on the Uvalde property without the Harris County court's permission and, if not,

whether the substitute trustee's deed to Amrex is void as a matter of law.

When the Receiver deeded the Uvalde property to the receivership estate, the property was placed in custodia legis. Property held in custodia legis is "in the custody of the law." No one, even a lienholder under a prior deed of trust, has authority to sell property held in custodia legis by a court-appointed receiver, unless the court in which the receivership is pending authorizes the sale. Any sale or transfer of property in violation of this rule is void as a matter of law.

Here, the Receiver's deed was recorded in Uvalde County prior to the foreclosure, and Amrex concedes in its motion for summary judgment that the Harris County court did not give Security State Bank permission to foreclose on the Uvalde property. However, Amrex argues its substitute trustee's deed is nonetheless valid because Amrex was a bona fide purchaser without notice.

The court held that no one, not even a bona fide purchaser without notice of the pendency of the receivership estate, can obtain title to property held in custodia legis. The apparent harshness of this rule is tempered somewhat by the fact that a purchaser without actual notice under an execution or deed of trust sale is entitled to recover his money from the seller.

PART II
PROMISSORY NOTES, LOAN COMMITMENTS, LOAN AGREEMENTS

Pineridge Associates, L.P. v. Ridgepine LLC, 337 S.W.3d 461 (Tex.App.-Fort Worth 2011, no pet.). Pineridge signed a typical non-recourse promissory note which included typical "carve-outs." Among the carve-outs was one which made Pineridge personally liable for the full amount of the loan if there were mechanics' liens not released within 30 days after the date of creation. Mechanics' liens of close to $130,000 were filed against the property that were not released. The lender foreclosed because of payment defaults, not raising the issue of mechanics' liens before foreclosure. The foreclosure wiped out the mechanics' liens.

The lender brought suit based on the mechanics' lien carve-out and the trial court awarded it damages in the amount of almost $150,000 as a deficiency following the foreclosure.

Pineridge argued that the effect of foreclosure, i.e., wiping out the mechanics' liens, was the same as releasing them of record. The court disagreed.

There was no dispute between the parties or disagreement from the court that all of the mechanics' liens were wiped out. Still, the court held that extinguishing the liens by foreclosure was not the same as releasing them of record.

Property Code § 53.157 lists six ways that a mechanics' lien may be discharged of record. One way is to file a release. Four others require filing a bond of some type. The sixth way is by not foreclosing the mechanics' lien within the period of limitations. Pineridge argued, to no avail, that extinguishment by foreclosure is analogous to the lien lapsing by limitations, the court stuck with the wording of the statute and would not extend section 53.157 to extinguishment by foreclosure. "Of record" means "recorded in the appropriate records" to denote that a document has been made a part of the public record by filing the document in the appropriate place. The foreclosure extinguishment didn't do anything "of record" to these mechanics' liens.

Pineridge raised the argument that the mechanics' lien issue was not raised during the existence of an event of default under the loan. The lender knew about the mechanics' liens when it bought the loan from Freddie Mac but did not originally seek personal liability because of them. Pineridge argued that the lender could have invoked the liens as an event of default before the foreclosure but did not, so the issue of mechanics' liens was no longer an event of default because the liens had been extinguished. The court stuck to its literalist reading of the provision and said that "released of record" means what it says. It is undisputed that lien releases were never filed. Because lien releases were never filed, the failure to release the mechanic's liens of record means the mechanic's liens continued to qualify as an event of default.

Pineridge then tried to attack the calculation of the deficiency. Among the items included in coming up with the deficiency was the lender's proration of taxes for the current year. The deed of trust permitted the lender to add taxes to the indebtedness if they were paid by the lender because they weren't paid by the borrower when due. In this case, the lender hadn't paid the taxes because they weren't yet due and payable. However, the loan documents required Pineridge to make escrow deposits for taxes and it hadn't done so, meaning that the lender did not have sufficient funds to pay the taxes when they did become due. So the court held that the failure to maintain the escrow was tantamount to not paying taxes when they were due, so that was enough to allow the lender to include the prorated taxes in its deficiency calculation.

ECF North Ridge Associates, L.P. v. Orix Capital Markets, L.L.C., 336 S.W.3d 400 (Tex.App.-Dallas 2011, pet. denied). ECF and TCI owned property in Texas and California. Their lender's servicer was Orix who was responsible for collecting monthly payments of principal and interest, monitoring whether the property was properly insured, and addressing any issues of default under the loan documents.

The loan documents required specified insurance on the properties, including "all-risk" insurance. At the time the loan was made, all-risk insurance did not exclude for acts of terrorism, but after 9-11, insurance companies began excluding terrorism coverage from all-risk policies. So Orix began requiring terrorism insurance. ECF and TCI objected, primarily because the cost purportedly ran too high (although evidence later showed it wouldn't have been that high).

When ECF and TCI refused to obtain the insurance Orix declared defaults under the loan documents. ECF and TCI responded by filing suit for breach of contract and declaratory judgment and Orix counterclaimed for default interest and attorneys' fees. Orix prevailed at trial.

The first issue raised in the appeal was Orix's standing to sue. Orix claimed that its pooling and servicing agreement conferred standing to sue. Standing is a component of subject matter jurisdiction. Whether a trial court has subject matter jurisdiction is a matter of law, which the court of appeals reviews de novo.

No Texas case directly addresses the standing question in this case. However, Orix cited ***ORIX Capital Markets, LLC* v. *La Villita Motor Inns, J.V.***, 329 S.W.3d 30, 39-42 (Tex.App.-San Antonio 2010, pet. denied), where that court concluded the record contained sufficient evidence ORIX Capital Markets had proven its right to enforce a note as the current "special servicer" and pursuant to a servicing agreement containing language similar to the PSA in this case. Recently, a federal appeals court addressed the very issue of whether a mortgage servicer had standing to pursue claims against a borrower for an alleged default under a mortgage loan to which the servicer was not a party. See ***CWCapital Asset Mgmt., LLC* v. *Chicago Props., LLC***, 610 F.3d 497 (7th Cir.2010).

In ***CWCapital***, the court addressed whether a mortgage servicer, CWCapital, was entitled to bring suit against the commercial landlord (the borrower) and its former tenant for money the former tenant paid the landlord in settlement of a separate dispute. Examining the servicer's role in administering a mortgage-backed security, the court explained how a "servicer must balance impartially the interests of the different tranches as determined by their contractual entitlements." The court turned to the language of CWCapital's PSA with its trustee, stating the servicer is the trust's collection agent because it "shall ... have full power and authority, acting alone, to do or cause to be done any and all things in connection with such servicing and administration which it may deem necessary or desirable,"thus making the delegation of the trustee's rights to the servicer "comprehensive." According to the ***CWCapital*** court: "There is no doubt about Article III standing in this case [of a servicer bringing suit]; though the plaintiff may not be an assignee, it has a personal stake in the outcome of the lawsuit because it receives a percentage of the proceeds of a defaulted loan that it services."

The ***CWCapital*** case ultimately held that it is thus the servicer, under the agreement, who has the whip hand; he is the lawyer and the client, and the trustee's duty, when the servicer is carrying out his delegated duties, is to provide support. The securitization trust holds merely the bare legal title; the Pooling and Servicing Agreement delegates what is effectively equitable ownership of the claim (albeit for eventual distribution of the proceeds to the owners of the tranches of the mortgage-backed security in accordance with their priorities) to the servicer. For remember that in deciding what action to take with regard to a defaulted loan, the servicer has to consider the competing interests of the owners of different tranches of the security.

Having concluded ORIX had standing to bring suit, the court turned to the question of whether ECF and TCI were contractually obligated to procure terrorism insurance. In response to ECF's and TCI's challenge to the legal and factual sufficiency of evidence to support the trial court's judgment, ORIX contends that terrorism insurance is required under two separate provisions of the relevant loan documents—"other insurance" and "all-risk insurance."

In the "other insurance" provision of the loan agreements, ECF and TCI were required to have "Such other insurance on the Property or on any replacements or substitutions thereof or additions thereto as may from time to time be required by Mortgagee against other insurable hazards or casualties which at the time are commonly insured against in the case of property similarly situated, due regard being given to the height and type of buildings, their construction, location, use and occupancy."

The court held that the language of these contracts is clear: ORIX as servicer may require ECF and TCI to obtain certain insurance coverage— such as certified terrorism insurance— if such perils are commonly insured against for similar properties. The court reviewed the evidence and found that there was sufficient evidence to support the requirement that the terrorism peril was commonly insured against for similar properties.

Guniganti v. Kalvakuntla, 346 S.W.3d 242 (Tex.App.-Houston [14th Dist.] 2011, no pet.). The original principal amount of the note was $2,948,523.45 "or so much thereof as is advanced and outstanding from time to time . . . ." The Note also provided, "NOT ALL of the principal amount of this Note has been advanced on the date hereof. Additional advances will be made in accordance with the terms and conditions of the Loan Agreement, reference to

same being here made for all purposes." The note was later modified pursuant to a modification agreement which recited that the principal balance remaining was $1,439,491.21 and the final maturity date was December 12, 2002. The modification provided that the terms of the note remained unchanged except as modified and said that "If any inconsistency exists between this [Modification] and the terms of the Note and/or Security Documents, this [Modification] shall control and the Note and Security Documents shall be construed accordingly."

The note went into default. In November 2007, Guniganti (who had acquired an interest in the note) brought suit for damages and judicial foreclosure of the property securing it. The maker of the note claimed enforcement of the note and lien were barred by the four year statute of limitations. Civil Practice & Remedies Code § 16.004(a)(3), which is the statute of limitations for debts. Guniganti argued that the UCC § 3.118(a) six-year limitations period for negotiable instruments was applicable.

The negotiability of an instrument is a question of law. As defined in UCC § 3.104, "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order.

A promise or order is unconditional unless it states (i) an express condition to payment, (ii) that the promise or order is subject to or governed by another record, or (iii) that rights or obligations with respect to the promise or order are stated in another record. A promissory note is not a negotiable instrument if it contains a statement indicating that the rights and obligations of the parties with respect to the note are stated in another agreement. The rationale for precluding reference to other documents is that the holder of a negotiable instrument should not be required to examine another document to determine rights with respect to payment. However, a mere reference to another record does not of itself make the promise or order conditional.

Here, the modification, which the court said must be read together with the note, made references to the deed of trust, a guaranty, and the loan agreement. The court assumed, without deciding, that those references in the modification were to statements of rights, and do not defeat negotiability.

The note also referred to the loan agreement and here the court held that the note's reference to the loan agreement rendered the note non-negotiable. The problem was that the note said advances were to be made in accordance with the loan agreement and that any default under the loan agreement was a default under the note. This was more than a "mere statement" referring to the loan agreement. This language burdened the note with the conditions of the loan agreement. The modification brought this wording forward by saying that the unmodified terms of the note remained unchanged.

Principal Life Insurance Co. v. Revalen Development, LLC, 358 S.W.3d 451 (Tex.App.-Dallas 2012, pet. denied). Principal held a note secured by a shopping center. The borrower was in default and Principal was unable to work out an extension of the loan. Principal decided it would prefer to sell the note rather than to foreclose on the real property. Cheng was interested in buying the note. The transaction required approval of Principal's real estate committee, and when that was obtained, Principal's officer, Logsdon, contacted Cheng and told him that the sale of the note was approved. Cheng responded that he agreed to it. He and Principal contemplated that a note purchase agreement would be entered into.

Principal sent Cheng its standard shell form of note purchase agreement. Cheng sent it back with a number of redlined changes, including changing the buyer from Cheng to Revalen Development, changing the purchase price by a small amount, reducing the earnest money from 5% of the sales price to $100, and giving the buyer a right to extend closing.

In the meantime, the borrower and Principal struck a deal to refinance the loan, so Principal pulled the deal. Revalen filed suit alleging breach of an oral contract to sell the note. The trial court entered judgment in favor of Revalen and Principal appealed.

Principal contends the evidence is legally and factually insufficient to support the judgment because there was no evidence of an offer, acceptance, or a meeting of the minds on the essential terms of the agreement. Rather, it asserts the evidence showed only continued negotiations of a deal that was to be consummated only by a formal written contract. According to Principal, the investment committee approval of the proposed transaction meant only Cheng and Principal were authorized to move forward with negotiating the written PSA. Communication of that approval did not transform the approval into an offer to enter into an oral contract.

To prove contract formation a party must prove, among other elements, an offer and acceptance and a meeting of the minds on all essential elements. For there to be an offer which may ripen into a contract by simple acceptance, the offer must be reasonably definite in its terms and must sufficiently cover the essentials of the proposed transaction that, with an expression of assent, there will be a complete and definite agreement on all essential details. The term "meeting of the minds" refers to the parties mutual understanding and assent to the expression of their agreement. To create an enforceable contract, the minds of the parties must meet with respect to the

subject matter of the agreement and all its essential terms. The parties must agree to the same thing, in the same sense, at the same time.

If parties negotiating a contract intend that the contract shall be reduced to writing and signed by the parties before it is binding, either party may withdraw at any time before a written agreement is executed. However, that parties intend for an informal agreement to be reduced to a more formal writing will not necessarily prevent present, binding obligations from arising. If the parties have definitely agreed to undertake certain obligations, they have concluded the contract, even though the contemplated formal writing is never drawn up and executed. Depending on the circumstances, though, such informal writings may also demonstrate that the parties have simply engaged in preliminary negotiations, in which case, there is no binding agreement.

The ultimate issue is the intent of the parties. Some factors that have been considered in determining whether contracting parties intended to be bound by an informal agreement prior to the execution of a formal writing include (1) whether the contract is of that class usually found to be in writing, (2) whether the contract is of such a nature to need a formal writing for its full expression, (3) whether the contract has few or many details, (4) whether the amount involved is large or small, (5) whether it is a common or unusual contract, and (6) whether negotiations themselves indicate that a written draft is contemplated as a final conclusion of negotiations.

Here, the only trial court finding to support an offer was the phone call in which Logsdon notified Cheng that Principal's committee had "approved his proposed purchase" of the note and outlined the general terms that were presented to the Committee. The Court of Appeals said it cannot agree a communication of an internal approval process, under the circumstances in which it was made, clearly communicated an offer that Cheng could accept. Initially, the precise language used did not clearly communicate an offer. Nor did the context in which the phone call was made suggest it was intended to communicate a binding offer such that an acceptance would conclude formation of an oral contract. To the contrary, the only evidence in the record concerning the approval process shows it was an internal preliminary step in contract formation that applied only to larger business deals.

All surrounding circumstances suggest the parties intended to be bound only with a formal written agreement. At the time of the phone call, both Principal and Cheng were aware that Cheng's counsel was reviewing Principal's written shell agreement, making modifications on provisions that had yet to be discussed but were clearly contemplated. Indeed, the parties had yet to even determine what Cheng entity would enter the contract. Other provisions that had yet to be determined included termination provisions, due diligence periods, earnest money, and liquidated damage provisions. Revalen asserts these terms could not have been material because they were not discussed. But Revalen ignores the undisputed facts that these terms were included in the shell agreement, in his redline, and that all the parties were aware that these details would ultimately need to be determined in a written contract. That they had yet to reach this phase of the negotiations does not suggest the terms were not material. Finally, Revalen's argument that they would have ultimately agreed upon the terms if Principal had not renegotiated with the borrower is not relevant to whether the terms were material.

The conclusion that no oral contract was formed after Logsdon's phone call is reinforced by the subsequent actions of both Cheng and Principal. The day after the phone call, Cheng sent the redline of the written agreement to Principal. While the redline may be irrelevant if an oral agreement was previously reached, it is nevertheless highly relevant in determining whether the parties believed they were already contractually bound.

Manley v. Wachovia Small Business Capital, 349 S.W.3d 233 (Tex.App.-Dallas 2011, pet. denied). The debt at issue is evidenced by a promissory note in the amount of $420,000 made in 1998 and payable to Independent National Bank. The note was signed by Daniel Manley, and secured by a deed of trust on real property and a security agreement. Daniel's father, Thomas Manley, signed a guaranty of the note. "After that it gets complicated."

Wachovia obtained the note. Daniel started having trouble making payments and began receiving default notices. Wachovia filed suit to collect on the note and obtain a judicial foreclosure of the real property. At trial, Thomas Manley testified that he took $375,000 in $100 bills to a Wachovia branch in Irving as a payment on the note. Thomas testified he left the cash with a bank employee and asked for a receipt. He was told a receipt would be mailed to him after the amount was verified. Thomas never received a receipt. In January 2007, Daniel received the original note in the mail in a Wachovia envelope. The note had been stamped "Paid."

Wachovia employees testified they had no record of the $375,000 cash payment. Bank VP Arriaga conducted an investigation to determine where the original note was. He had no idea how Daniel came to be in possession of it or how it had been marked paid. There was no evidence in the loan file that normal procedures for paid notes had been followed. Arriaga testified that the note had not been paid and that it was a mistake for Daniel to receive the note.

Daniel argued that UCC § 3.604, which provides that the person entitled to enforce an instrument may discharge the obligation by an intentional voluntary act, meant that Wachovia's acts of stamping the original note "paid" and sending it to Daniel were intentional and voluntary and are conclusive evidence that Wachovia discharged the note. Daniel asserts that only the act (stamping and returning the note) must be intentional and voluntary, not the result (discharge of the obligation).

The court disagreed. Section 3.604 cannot be read to allow for the unintentional discharge of the obligation of a party to a negotiable instrument. Section 3.604 provides the means through which a person entitled to enforce the instrument may effectuate his intent to discharge the obligation. But it does not mean that a party entitled to enforce the note may— through the acts specified in the statute— unintentionally discharge the instrument.

Under the prior version of section 3.604, courts recognized that cancellation of a negotiable instrument is a manifestation by act of intention with reference thereto to render same inefficacious as a legal obligation. Discharge requires the intent to render the instrument ineffective as a legal obligation. Clearly, it is the result of the act— intentional discharge— not the act itself that has legal significance. Like the prior statute, the current statute requires intentional and voluntary conduct to accomplish a discharge of the obligation. This intent requirement has led courts, whether construing the pre-1990 or revised Article 3, to conclude that mistakenly marking a note "paid" (or the equivalent) will not discharge the debt.

PART III
GUARANTIES

Barnes v. LPP Mortgage, Ltd., 358 S.W.3d 301 (Tex.App.—Dallas 2012, pet. pending). The SBA made a disaster loan to Antonio's after its building was damaged in a tornado. Barnes and Lindsey, principals of the corporation, guaranteed the loan. The loan was made in 1997 for a ten-year term, but Antonio's quit making payments in 1999.

LPP purchased the loan from the SBA in 2000, and filed suit in 2009 to collect on the guaranties. The guarantors argued that the statute of limitations had run. The trial court held that the federal six-year statute applied. 28 USCS § 2415(a)

The guarantors argued that the six-year statute is limited to suites brought by the United States. Because LPP now owns the loan, not the SBA, the federal statute should not be available.

The issue of whether purchasers of notes from a federal agency may obtain the benefit of the federal statute of limitations was considered by the Texas Supreme Court in ***Jackson* v. *Thweatt***, 883 S.W.2d 171 (Tex.1994), and ***Holy Cross Church of God in Christ* v. *Wolf***, 44 S.W.3d 562 (Tex.2001). In ***Jackson,*** the court held that purchasers of notes from the Federal Deposit Insurance Corporation (FDIC) obtained the benefit of the federal six-year limitations period to bring suit on the notes. In ***Holy Cross Church***, however, the court held that the FDIC's successors could not obtain the benefit of the federal statute of limitations if the note was not in default until after the FDIC transferred it. The court concluded the policy reasons supporting ***Jackson*** did not apply when the cause of action had not accrued before transfer of the note. An assignee would have the full four years after default under the state statute of limitations to bring suit, so refusal to extend limitations in this situation does not significantly impact the FDIC's notes' marketability. Here, the parties do not dispute that the note was in default when the SBC transferred it to LPP, so the rule of ***Holy Cross Church*** does not apply.

The court next sought to determine when the six-year limitations period began to run on appellants' guaranties. The guarantors argue the limitations period began to run on August 8, 2000, so that LPP's suit in 2009 was barred even if the six-year limitations period is applied. They contend the entire indebtedness became due on August 8, 2000, because Antonio's made an assignment for benefit of its creditors on that date. Because of this assignment the entire indebtedness immediately became due under the terms of the note, and the statute of limitations began to run. The court disagreed.

Recent case law on either statutory or common law assignments for the benefit of creditors is scarce. At a minimum, however, we believe there should be evidence of an agreement under which a debtor assigns its property to an assignee for distribution to particular creditors. Here, while there was evidence of the borrower entering into an agreement to transfer some assets to another lender, there was no evidence of any agreement for distribution of assets to creditors. So the cause of action did not accrue in 2000.

The "general rule" that when recovery is sought on an obligation payable in installments, a separate cause of action accrues for each missed payment and a separate limitations period runs against each installment from the time it becomes due. LPP's second motion for summary judgment sought recovery of only those payments that accrued within a six-year statute of limitations.

Haggard v. Bank of the Ozarks, 668 F.3d 196 (5th Cir. 2012). Haggard signed a guaranty which provided that his liability "is limited to the last to be repaid $500,000.00 of the principal balance of the loan and all accrued and unpaid interest thereon from time to time, it being understood that until the principal balance of the Loan is reduced to less than $500,000.00, there will

be no reduction in the amount guaranteed hereunder and that the amount guaranteed hereunder will only be reduced on a dollar for dollar basis as the principal balance of the Note is reduced below $500,000.00." The borrower defaulted and various lawsuits were filed.

Haggard filed this suit seeking a declaratory judgment that the Bank could not pursue him as the guarantor until the balance of the loan was reduced to $500,000. The Bank counterclaimed for breach of the guaranty contract, seeking $500,000 in principal, plus interest accrued on the entire balance, attorney's fees, and costs. The district court held that Haggard owed $500,000 in principal, and owed interest on that balance but did not owe interest on the entire principal balance of the loan.

Haggard contends that the district court erred by misconstruing the language of the guaranty agreement and concluding that he is immediately liable for $500,000. The dispute is whether the terms of the guaranty agreement impose a condition that Haggard becomes liable as a guarantor only after the principal balance is reduced to $500,000. In other words, Haggard claims that the guaranty expressly limits his liability to the last $500,000 due on the loan.

Pursuant to Texas law, a guarantor is a so-called favorite of the law and as such, a guaranty agreement is construed strictly in favor of the guarantor. If the guaranty is ambiguous, then the court must apply the `construction which is most favorable to the guarantor.

The district court rejected Haggard's claim largely because it determined that the guaranty was unconditional. However, our precedent indicates that even when a guaranty is unconditional, the reviewing court must look to the terms of the agreement to determine the obligation of the guarantor. On one hand, the district court and the Bank's interpretation does not give effect to the language that: (1) the guarantor's liability is limited to the last to be repaid $500,000 of the principal balance of the loan; and (2) until the principal balance of the Loan is reduced to less than $500,000.00, there will be no reduction in the amount guaranteed hereunder and that the amount guaranteed hereunder will only be reduced on a dollar for dollar basis as the principal balance of the Note is reduced below $500,000.00." On the other hand, Haggard's contention that the balance of the loan must be reduced either by the Bank collecting or forgiving a portion of the loan is arguably in tension with the guaranty provisions that the Bank does not have to first seek payment from the Debtor or the collateral.

The court concluded that the language of the guaranty agreement is open to different interpretations and thus ambiguous. Because the terms of the guaranty are ambiguous, the district court erred by accepting the Bank's interpretation.

PART IV
DEEDS AND CONVEYANCE DOCUMENTS

Morris* v. *Wells Fargo Bank, N.A., 334 S.W.3d 838 (Tex.App.-Dallas 2011, no pet.). Morris owned a house in East Dallas. Two deeds purporting to be signed by Morris were filed in Dallas County. One was a General Warranty deed purporting to convey all of the property but a two foot strip to EDPC. That deed was notarized by Taulease Bailey, sister of Curtis Bailey, the owner of EDPC. The signature appeared as "Cyndia A. Morris." The second deed was entitled "Correction General Warranty Deed," and it purported to convey EDPC all of the property. It was notarized by Franklin Brown. The signature on the second deed was "Cyndia A. Morris as Independent Executrix." EDPC sold the property to Jordan, who borrowed a loan secured by the property from Wells Fargo. Wells Fargo foreclosed after Jordan defaulted. Morris sued Bailey and Wells Fargo seeking a declaratory judgment that the deeds were null and void because of forgery.

The trial court found that the first deed was not forged, but that the second deed was a forgery. It held that Wells Fargo was a bona fide mortgagee and was vested with title after its foreclosure.

A void instrument passes no title, and the fact that the grantee-mortgagee is an innocent purchaser makes no difference. A forged deed is void *ab initio*. However, deeds obtained by fraud are voidable rather than void, and remain effective until set aside.

A certificate of acknowledgment is prima facie evidence that the grantor appeared before the notary and executed the deed in question for the purposes and consideration therein expressed. Clear and unmistakable proof that either the grantor did not appear before the notary or that the notary practiced some fraud or imposition upon the grantor is necessary to overcome the validity of a certificate of acknowledgment.

The court reviewed all of the evidence and held that it was factually and legally sufficient to support the trial court's finding that Morris's signature on the first deed was genuine.

Simpson v. Curtis, 351 S.W.3d 374 (Tex.App.-Tyler 2010, no pet.) The Curtises agreed to sell 85 acres to the Simpsons. The earnest money contract provided that the Seller reserved the minerals and timber; however, the reservations were not included in the deed delivered at closing. When the Curtises asked the Simpsons to execute a correction deed, the Simpsons refused, so the Curtises sued.

The trial court held that the failure to include the reservation in the deed was a scrivener's error and that the Curtises were entitled to reformation of the deed.

The underlying objective of reformation is to correct a mutual mistake made in preparing a written instrument, so that the instrument truly reflects the

original agreement of the parties. By implication, reformation requires two elements: (1) an original agreement; and (2) a mutual mistake, made after the original agreement, in reducing the original agreement to writing. A mutual mistake is one common to both or all parties, wherein each labors under the same misconception respecting a material fact, the terms of the agreement, or the provision of a written agreement designed to embody such an agreement. Moreover, if a mistake has been made by a scrivener or typist, an instrument may be reformed and modified by a court to reflect the true agreement of the parties.

The court held that there was sufficient evidence to support the finding that the failure to include the reservation was a scrivener's error and a mutual mistake. The Simpsons contend, however, that the merger clause in the deed precluded the trial court from considering the variance between the terms of the earnest money contract and the deed in determining the existence of a mutual mistake. The court disagreed. The merger doctrine applies to deeds only in the absence of fraud, accident, or mistake. In an equitable action to reform an instrument that fails to express the real agreement due to mutual mistake, parol evidence is admissible to show the true agreement. Further, the statute of frauds is not an impediment to the introduction of parol evidence to establish an agreement for a mineral interest in an action for reformation based on mutual mistake. Id. Because we have determined that there was a mutual mistake in the signing of the deed, the merger doctrine is inapplicable.

The Simpsons also claimed that the failure to join their mortgagee barred the trial court from reforming the deed. The court of appeals disagreed. A mortgagee need not be joined in a suit involving title to land. A mortgagee has no right against the property except to enforce payment of the debt. Id. Here, the issue is whether the Curtises or the Simpsons are entitled to the mineral interest in question. Because there is no issue regarding the mortgagees' right to payment, the mortgagees are not necessary parties to the suit.

XTO Energy Inc. v. Nikolai, 357 S.W.3d 47 (Tex.App.—Ft. Worth 2011, pet. pending). XTO sought summary judgment on the Nikolais' claims on the ground that the Nikolais were estopped by a deed in their chain of title from denying the validity of the mineral reservation. XTO contends that the trial court erred by denying its motion for summary judgment that was based on its affirmative defense of estoppel by deed.

Estoppel by deed precludes parties from alleging title in derogation of the deed or denying the truth of any material fact asserted in it. The doctrine of estoppel by deed is of universal recognition. The doctrine does not validate something that is otherwise invalid; rather, it figuratively "closes the mouth of the complainant."

PART V
LIS PENDENS

In re Cohen, 340 S.W.3d 889 (Tex.App.-Houston [1st Dist.] 2011, no pet.). During the pendency of an action involving title to real property, the establishment of an interest in real property, or the enforcement of an encumbrance against real property, a party seeking affirmative relief may file a lis pendens in the real property records of the county where the property is located. Property Code § 12.007. The notice must contain certain information, including the style and cause number of the proceedings, the court where it is pending, the names of the parties, identification of the kind of proceedings, and a description of the property affected. A properly filed lis pendens is not itself a lien, but rather it operates as constructive notice "to the world of its contents."

To challenge notices of lis pendens that, as here, were filed after September 1, 2009, a party may file an application to have a lis pendens expunged. Property Code § 12.0071. The court must grant the motion if (1) the pleading on which the notice is based does not contain a real property claim, or (2) the claimant fails to establish by a preponderance of the evidence the probable validity of the real property claim. This is because the property against which the lis pendens is filed must be the subject matter of the underlying lawsuit. If the suit seeks a property interest only to secure the recovery of damages or other relief that the plaintiff may be awarded, it is not an action involving: (1) title to real property, (2) the establishment of an interest in real property, or (3) the enforcement of an encumbrance against real property as required by section 12.007 to render a notice of lis pendens proper.

Before section 12.0071 was enacted, there was a split in authority about whether the classification of a claim as direct or collateral should be made solely by reference to the pleadings or by examining the evidence. The new section 12.0071 resolves that split, expressly providing avenues for both by allowing expungement based on the (1) failure to adequate plead "a real property claim," or (2) failure to demonstrate by a preponderance of the evidence "the probable validity of the real property claim."

In evaluating whether a plaintiff has sufficiently pleaded a real property claim for purposes of supporting a notice of lis pendens, this court has consistently held that a pleading requesting the restoration of a prior ownership interest in a particularly identified property—through actual title or a constructive trust—is sufficient. It has also upheld the validity of a notice of lis pendens filed on specifically identified property alleged to have been

purchased with "the fruits" of the defendant's fraud on the plaintiff.

In contrast, in cases in which the plaintiff requests title to the property, or a constructive trust, only to satisfy a money judgment against the defendant, courts have found cancellation of lis pendens proper because those claims do not involve a sufficient direct interest in real property.

Cohen does not seek a judgment lien, but instead requests that real property liens and title transfers be set aside, and that a constructive trust be placed on properties he alleges were fraudulently transferred. These are real property claims sufficient to support a notice of lis pendens.

David Powers Homes, Inc. v. M.L. Rendleman Company, Inc., 355 S.W.3d 327 (Tex.App.—Houston [1st Dist.] 2011, pet. granted). Fiberglass Insulators filed 37 separate instruments in the Harris County real property records pertaining to 37 separate parcels of real property owned by DPH on which single-family residences had been constructed. Each was entitled "Affidavit of Notice to Potential Transferee." Each Affidavit provides that the "purpose of this Affidavit is to provide notice to potential buyers of the below described real property that the real property described below is involved in a lawsuit in Harris County, Texas, and that, subject to the outcome of the litigation, any future sales of the real property may be avoided by the Court."

DPH filed a motion for judicial review of the Affidavits pursuant to Property Code § 51.903(a), asserting that they were fraudulent documents. The trial court found that the Affidavits were not fraudulent documents, that they were provided for by specific state or federal statutes or constitutional provisions.

The central issue is whether the trial court erred when it determined that the Affidavits of Notice to Potential Transferees are provided for by specific state or federal statute or constitutional provision, an implicit determination that the Affidavits are not fraudulent. DPH first focuses on the title of the instruments at issue here: "Affidavits of Notice to Potential Transferees." DPH contends that its "computerized legal research" did not locate any state or federal statutory or constitutional provision authorizing the filing of a document so named.

Although the title of a document may in some instances have some bearing on a court's determination of whether the document is provided for by the constitution or laws of Texas or the United States, it is the substance of the document that determines whether it is fraudulent. Fiberglass Insulators contends that the Affidavits are provided for by Texas statute. It points out that the Affidavits contain the required elements of a notice of lis pendens, as set forth in Property Code § 12.007.

A notice of lis pendens must contain certain information, including (1) the style and cause number of the proceedings, (2) the court where it is pending, (3) the names of the parties, (4) identification of the kind of proceedings, and (5) a description of the property affected. A properly filed lis pendens is not itself a lien; rather it operates as constructive notice to the world of its contents.

DPH acknowledges that the Affidavits contain the information statutorily required for a notice of lis pendens. Nonetheless, DPH contends that the Affidavits are qualitatively different from lis pendens, and so much so that they manifestly are not the type of filing authorized by the lis pendens statute. The qualitative difference claimed by DPH was that the Affidavits contain information in addition to what is required by the lis pendens statute. DPH argues that the additional content in the Affidavits does not serve to give notice of a pending lawsuit that impacts title to real property but instead serves as a warning that the properties identified in the Affidavits are off limits to new buyers that do not want to be sued. DPH asserts that the Affidavits are not the type of notice authorized by the lis pendens statute; rather, they are a form of "economic terrorism" designed to dissuade purchasers from buying the property identified in the Affidavits. DPH contends that the statement in the Affidavits that a transfer of the real property described in the Affidavit may be avoided by the Court pursuant to TUFTA is a false statement under the substantive law. DPH asserts that the statement is legally incorrect with respect to the transfer of the properties identified in the Affidavits; that is, the transfers would not be avoided pursuant to the TUFTA as represented by Fiberglass Insulators in the Affidavits.

The court agreed with Fiberglass Insulators that DPH's contentions exceed the scope of Government Code §§ 51.901 and 51.903. Section 51.903 limits the trial court's determination to whether the document or instrument is fraudulent as defined by § 51.901. The court may not rule on the validity of the underlying lien itself or claim between the parties.

DPH does not dispute that the Affidavits contain all of the information required in Property Code § 12.007(b) to constitute a notice of lis pendens. Instead, DPH contends that the Affidavits contain too much information, namely, that a transfer of the real property described in the affidavit may be avoided by the court in the pending lawsuit pursuant to TUFTA. DPH intimates that this additional information transforms the Affidavits from a notice of lis pendens into a coercive threat levied for the purpose of harming DPH economically. It asserts this is demonstrated by Fiberglass Insulators's purported misstatement of the law that any transfers of the property may be avoided under TUFTA. DPH further asserts that Fiberglass Insulators's ill motives in filing the Affidavits are

shown by its failure to request that any property transfers be set aside in the lawsuit identified in the Affidavits.

For the court to agree with DPH, it would have to ignore that the Affidavits contain all the statutory requirements of a notice of lis pendens. It would also have to focus solely on the provision of the Affidavits warning potential purchasers of the possibility that the property transfer might be set aside. And we would have to read subjective ill motives into Fiberglass Insulators's inclusion of the additional information regarding its possible remedy in the lawsuit identified in the Affidavits. DPH provides us with no authority to view the Affidavits in such a manner or to penalize a party asserting a claim in property for including information beyond that which is required to assert the claim. Such a reading of the Affidavits would require us to exceed the scope of what is permitted by Government Code sections.

PART VI
LEASES

Hoppenstein Properties, Inc. v. McLennan County Appraisal District, 341 S.W.3d 16 (Tex.App.-Waco 2010, pet. denied). Hoppenstein leased space to MCAD. The lease required Hoppenstein to construct some improvements and make repairs. The lease was to commence after completion of the work. The parties got into a number of disputes about the work and eventually, MCAD abandoned the leased premises. Hoppenstein then sued, claiming, among other things, future damages.

MCAD claims immunity from future damages. Hoppenstein contends that: (1) MCAD's immunity from suit has been waived by Local Government Code § 271.152 because the lease constitutes a contract for the provision of services to MCAD; and (2) the waiver of immunity provided by section 271.152 applies on a "contract-by-contract basis" rather than a "promise-by-promise basis."

Local Government Code § 271.152 waives the immunity from suit of certain local governmental entities for breach-of-contract claims arising from written contracts that state "the essential terms of the agreement for providing goods or services to the local governmental entity." The relevant inquiry is whether the lease entails "the provision of 'goods or services'" to MCAD. The term "services" is broad enough to encompass a wide variety of activities. The services provided need not be the primary purpose of the agreement, but they must be provided directly to the local governmental entity.

The construction addendum requires Hoppenstein to renovate the premises according to a floor plan agreed to by MCAD. Thus, the lease entails the provision of services to MCAD within the meaning of the statute. ***Kirby Lake Development, Ltd. v. Clear Lake City Water Authority***, 320 S.W.3d 829 (Tex. 2010).

Hoppenstein contends in its second issue that the waiver of immunity provided by section 271.152 applies on a "contract-by-contract basis" rather than a "promise-by-promise basis." Thus, Hoppenstein argues that MCAD's immunity is waived not only for damages flowing from any breach of the "services provisions" of the lease but also from any breach of the remainder of the lease terms. The court agreed with Hoppenstein. Here, the lost rentals Hoppenstein seeks to recover are those rentals which it would have received under the lease with MCAD, not from some other contract. These are direct damages.

Jones & Gonzalez, P.C. v. Trinh, 340 S.W.3d 830 (Tex.App.-San Antonio 2011, no pet.). To be liable for bad faith retention of a security deposit, a landlord must have failed to return the tenant's security deposit and a written list of itemized deductions, if any, for any portion of the security deposit that the landlord retains. Property Code § 93.005. The landlord must send to the tenant the remaining security deposit and the list of itemized deductions within sixty days of the tenant's surrendering possession of the premises. However, the sixty-day period does not start until after the tenant provides the landlord with a written statement of a forwarding address for the purpose of returning the security deposit. Given the penal nature of the statutory remedy, this requirement is strictly construed.

At trial, Trinh presented no evidence that the Tenant sent the Landlord a written notification of a forwarding address to where the Tenant's security deposit and list of itemized deductions should be sent. Because this requirement is strictly construed, it does not matter whether or not the Landlord had actual knowledge of an address where the Tenant could be contacted. Thus, because the Landlord had no obligation to send the security deposit to the Tenant, the Landlord was not liable for bad faith retention of the Tenant's security deposit.

Mesquite Elks Lodge #2404 v. Shaikh, 334 S.W.3d 319 (Tex.App.-Dallas 2010, no pet.). The Lodge leased space in a shopping center. It gave a security deposit of $4,250 to the landlord. The lease was for a year ending April 30, 2005. In May of 2005, Shaikh bought the center from the original landlord. The Lodge had held over and ultimately give Shaikh notice that it intended to vacate in November of 2005. The Lodge moved out in December and asked for its security deposit. In January, Shaikh responded with a letter stating that damages to the property exceeded the deposit and demanding payment for the damages. After some time, the Lodge responded with a request for an accounting or a refund. Shaikh responded by re-

sending the January letter and again demanding payment.

Shaikh filed suit for breach of the lease and damages. The trial court found in his favor and awarded damages. The court of appeals found that there was not sufficient evidence to support the damages awarded to Shaikh. When the injury to realty is reparable, the proper measure of damages is the reasonable cost of repairs necessary to restore the property to its prior condition. In question was the portion of damages related to replacing some steel doors. During the course of his testimony, Shaikh admitted replacing the doors would actually constitute an improvement of the space, rather than bringing it back to the same condition as when it was rented to the Lodge.

Moncada v. Navar, 334 S.W.3d 339 (Tex.App.-El Paso 2011, no pet.). Navar bought the Moncadas' home at a foreclosure sale. When they refused to vacate, Navar brough an action to evict them. The JP ruled in Navar's favor and the Moncadas filed a notice of appeal and pauper's affidavit.

At the trial de novo in county court, Navar testified that he did not want the Moncadas as tenants and that there had never been a rental contract between him and the Moncadas. Juana Moncada testified the same; that she and her husband had never entered into any kind of agreement to rent the property from Navar. At the conclusion of the trial, the judge announced that the Moncadas had not properly perfected their appeal because they failed to pay rent into the court's registry. She signed an order of dismissal, which states that the Moncadas "failed to perfect the appeal as required by Texas Rules of Civil Procedure 749(b)." The Moncadas appealed the dismissal to the court of appeals.

Within five days after a justice of the peace signs a judgment in a forcible entry and detainer case, a party may appeal to a county court by filing either a bond or a pauper's affidavit. If the appellant files a pauper's affidavit, the appellee has five days to contest the affidavit. If the appellee does not contest the affidavit, it will be considered approved. When an appeal bond has been timely filed in conformity with Rule 749 or a pauper's affidavit approved in conformity with Rule 749a, the appeal is perfected.

The court of appeals held that the county court mistakenly relied on Rule 749b, which states that the tenant has to timely pay rent into the registry of the court in a nonpayment of rent case. By its terms, Rule 749a applies only if a suit for rent has been joined with the suit for forcible detainer. In this case, the complaint did not allege that the Moncadas failed to pay rent.

Navar alleged that he had sent a letter to the Moncadas requesting they pay rent into the court registry every month until resolution of the appeal. The court said that Navar's letter did not establish an agreement to pay rent. At most, the letter is an offer to enter into a rental agreement.

Furthermore, even if Rule 749b applied to this case, it would have no effect on the Moncadas's perfection of their appeal to the county court. In focusing on Rule 749b, Navar, like the county court, ignores Rule 749c, which expressly defines when an appeal is perfected. In the case of an indigent appellant, all that Rule 749c requires is the approval of a pauper's affidavit.

Rule 749b simply provides a procedure by which an indigent appellant may remain on the premises during the appeal: an appellant who appeals by filing a pauper's affidavit "shall be entitled to stay in possession of the premises during the pendency of the appeal" by complying with the procedures set forth in the rule. One of the rule's procedures is that the appellant "must pay into the justice court registry one rental period's rent." Isolating the word "must," Navar argues that paying rent is mandatory whenever an appellant appeals with a pauper's affidavit. Read in context, however, it is clear that paying rent is mandatory only if the appellant wishes to stay on the premises during the appeal.

Thus, the court held that the county court erred in concluding that the Moncadas' failure to pay rent into the court registry precluded them from perfecting an appeal.

Aspenwood Apartment Corp. v. Coinmach, Inc., 349 S.W.3d 621 (Tex.App.-Houston [1st Dist.] 2011, pet. denied). Coinmach had a laundry lease at the apartment complex. The lender foreclosed and later sold the complex to Aspenwood. Aspensood gave Coinmach written notice to vacate the laundry room, stating that Aspenwood believed that the foreclosure had terminated the lease. Coinmach believed otherwise, and a long and extended period, litigation continued while Coinmach remained on the premises.

When a landlord-mortgagor is foreclosed upon, the general rule is that a tenant's lease is terminated. A tenant who continues to occupy the premises after expiration of a lease is a holdover tenant. Absent evidence to the contrary, a holdover tenant is presumed to be bound by covenants that were binding on him during the term of the lease. Even when the lease does not contain a holdover provision, if the tenant remains in possession and rent continues to be accepted by the landlord, the terms of the expired lease are presumed to continue unless there is an agreement to the contrary.

The tenant and a foreclosure-sale purchaser may also independently enter into a new landlord-tenant relationship, but both parties must manifest consent to enter into a new lease. Thus, we must look at the post-foreclosure conduct of the parties to determine whether

a new lease, with terms supplied by the previous one, was created by implication. The fact that the parties are held to the terms of the previous lease does not alter this conclusion, because it is merely the origin of the new contractual relationship that is independent of the prior lease, not the substance of the relationship.

When no new lease is formed and a tenant continues in possession of land covered by a prior lease but omitted from a succeeding lease, that tenant is either a tenant at sufferance or a tenant at will. A tenant at will is one who is in lawful possession of premises by permission of the owner or landlord for no fixed term. Tenancy at sufferance is created and exists where a person who has entered as a tenant for a term holds over after the expiration of the term or when a person holds over after a judgment has divested him or her of title to real property. Tenancy at sufferance is a lesser possessory estate than tenancy at will.

No one disputed that the lease was terminated by the foreclosure, so the only determination was whether a new lease was formed. The court looked at the evidence and determined that no new lease was formed. The evidence pretty much showed that Aspenwood did not consent to Coinmach's presence on the property. It gave several notices to vacate. It never cashed any of Coinmach's rent checks. It filed forcible detainer actions. So, as a matter of law, there was no actual or implied contractual landlord-tenant relationship between Aspenwood and Coinmach.

Jones v. Providence Land Services, LLC, 353 S.W.3d 538 (Tex.App.-Eastland 2011, no pet.). The Howells owned land where some lake lots are located. Beginning in the 1970s, the Howells began to lease individual lots to people who wanted lake property. The lake lots were known as the "Howell Properties," and they consisted of forty-three total lots.

The Howells and their tenants executed written lease agreements for each of the lots. The terms of the leases were drafted by the Howells without the aid of an attorney. With respect to the duration of the leases, the leases can be classified into three categories: (1) leases that expressly provided that they were "indefinite;" (2) leases with no express end date; and (3) leases with fixed termination dates. The trial court labeled these categories respectively as "Indefinite Term Leases," "No End Term Leases," and "Fixed Term Leases."

The original Howells died and their son Rex gained control of Howell Properties. He sold the lots to Providence. Soon after acquiring the lake lots, Providence sent new leases to the tenants proposing new lease terms including thirty-day termination provisions and higher lease payments. Providence based this action on its assertion that the leases signed by the tenants and the Howells were tenancies at will. The tenants instituted the underlying action against Providence in an effort to establish that their original leases were long-term leases as a result of written and verbal agreements that they had made with the Howells.

The trial court determined that the use of the word "indefinite" to define the end date of the leases' duration was ambiguous as a matter of law, and ultimately determined that the duration of the Indefinite Term Leases was ninety-nine years. The court of appeals said that the determination of whether a contract is ambiguous is a matter of law for the court to decide.

The key word in the court's analysis is use of the word "indefinite" to define the end date of the term of the leases. The tenants contend that "indefinite" is subject to two meanings: a "legal definition" of uncertain or vague, and a layperson's definition of "not limited." Thus, the tenants contend that the use of "indefinite" in the leases indicates that their duration was ninety-nine years or longer.

The court disagreed. "Indefinite" is not synonymous with "infinity," "perpetual," or "forever." The definition of "not limited" for "indefinite" is simply another way of saying that it means "uncertain." The use of "indefinite" in the leases has a definite and certain legal meaning; the leases, as written, have no end date. As a matter of law, the leases are not ambiguous. If the tenant is holding the premises for no certain time as provided by the contract, he is merely a tenant at will, and the tenancy may be terminated at the will of either party.

As to the No End Term Leases, the tenant's under those leases argued that the leases were ambiguous and that parol evidence should have been admitted to show that the parties intended them to be long term leases. Ambiguity in contract language is not to be confused with silence. Ambiguity results when the intention of the parties is expressed in language that is susceptible of more than one meaning. In contrast, when a contract is silent, the question is not one of interpreting the language but, rather, one of determining its effect. The court of appeals held that the No End Term Leases were not ambiguous. As noted previously, a lease for an uncertain length of time is an estate at will.

Thomas P. Sibley, P.C. v. Brentwood Investment Development Company, L.P., 356 S.W.3d 659 (Tex.App.—El Paso 2011, pet. pending). A lease was drawn up between Brentwood, as Landlord, and Sibley, as Tenant. Sibley signed the document, but, although there was a signature block for the Landlord, Brentwood did not sign the lease. Sibley moved into the office building, but failed to pay all of its rent payments. Brentwood sued Sibley for breach of the lease.

Sibley claims that the lease is not enforceable because it was never signed by Brentwood. But, said

the court, the absence of a party's signature does not necessarily destroy an otherwise valid contract. A party may accept a contract, and indicate its intent to be bound to the terms by acts and conduct in accordance with the terms. In this instance, although Brentwood did not sign the agreement, the uncontested evidence indicates that the parties proceeded with the lease as though the lease had been fully executed. There is no dispute that Sibley occupied the space defined in the lease, and operated a law firm from the premises, and made several partial payments of base rent. Likewise, there is no dispute that Brentwood, continually operated and maintained Tuscany Park, including Sibley's offices in accordance with the lease terms. As such, the failure by Brentwood to sign the lease document does not create a fact issue as to the parties' mutual assent to the agreement, or the instrument's enforceability against Sibley.

Sibley then argued that the lease did not satisfy the statute of frauds and was unenforceable. Sibley's argument was based on the conclusion that a written agreement did not exist between the parties based on Brentwood's failure to sign the lease. As we have concluded that the omission of the lessor's signature was not fatal to the lease's enforceability, Sibley, P.C.'s statute of frauds argument is without merit.

Southern v. Goetting, 353 S.W.3d 295 (Tex.App.-El Paso 2011, pet. denied). In 1996, pursuant to an oral agreement, Goetting sold to Crouse a one-half interest in a building and lot known as 1602 Olive in El Paso, Texas, for $150,000 with interest. At trial, Goetting stated that Crouse paid him more than $170,000 and obtained a one-half interest in the property. Crouse operated a successful business from the property and paid one-half of the property taxes from 1996 to 2002. Although there is no dispute that Crouse fully paid for his one-half interest in the property, Goetting never executed a deed to any part of the property in Crouse's name. Thereafter, Goetting orally agreed to repurchase Crouse's one-half share of the property and paid Crouse $1,200 per month for several years. After Crouse died in May 2007, Goetting soon stopped making payments for the repurchase of the property and claimed that he owed nothing more for the repurchase.

After Crouse's death, Southern, as executor of his estate, brought suit to have the half interest in the building and lot conveyed to the estate. At trial, Goetting admitted that he had paid Crouse $76,180 of the $150,000 repurchase amount for the property but had not paid the remaining balance of $73,820. Although not pled in his answer, Goetting asserted during trial that Crouse had agreed to pay rent during his occupancy of the property and, because Crouse had not done so during his purchase of the property, Crouse had agreed to offset the unpaid rent against Goetting's repurchase obligations. Goetting admitted that he did not make any rent calculations until after Crouse had died and said that he never discussed any rental figures or terms with Crouse.

Although the jury found that Crouse failed to comply with an agreement to pay rent and awarded to Goetting rental damages totaling $73,820, after a thorough review of the record, we conclude that no evidence was presented to prove the following essential terms of the purported agreement to pay rent: (1) the specific area or portion of the property that the parties agreed would be subject to rental; (2) the amount of rent Crouse agreed to pay; (3) the agreed-upon method for calculating the rental amount; (4) the frequency and manner for making rental payments; (5) the period or length of time for which rental payments would be made; and (6) the date on which Crouse, as owner of one-half interest in the property, would no longer be obligated to pay the agreed-upon rental amount. We find that reasonable parties would regard these terms to be vitally important elements of the rental bargain in this case, and that these essential elements were missing from the alleged agreement to pay rent.

Because the essential terms of the alleged rental agreement are indefinite, uncertain, and unclear, because the evidence reflects that no less than one of the essential terms of the alleged rental agreement was left open for negotiation in the future, and because there was no evidence of a meeting of the minds between Crouse and Goetting regarding the essential terms of the alleged rental agreement, the court concluded as a matter of law that no binding contract to pay rent exists under these facts.

Mekeel v. U.S. Bank National Association, 355 S.W.3d 349 (Tex.App.—El Paso 2011, no pet.). Texas Property Code § 24.002(b) requires a notice to vacate and demand for possession be written by a person entitled to possession of the property. Mekeel complains that no valid demand for possession exists because the letter does not state that it is made on behalf of U.S. Bank. Select Portfolio sent the notice. Select Portfolio was the servicing agent for U.S. Bank. As such, it is authorized to represent U.S. Bank by virtue of its servicing agreement.

PART VII
VENDOR AND PURCHASER

Barham v. McGraw, 342 S.W.3d 716 (Tex.App.-Amarillo 2011, no pet.). The case begins with these two quotes: "Blood may be thicker than water, but money beats everything." Lizzy. And "He that is greedy of gain troubleth his own house." Proverbs 15:27. It goes on to detail a battle between brother and sister over the settlement of their father's estate.

When father died, the real property became the corpus of a trust to benefit his widow, Margie. After her death, it was to be distributed to father's descendants, including his children Bobby and Patricia.

At some point, Margie, as trustee of the trust for her benefit, had the power to convey the property, so she did so by conveying some to Bobby and Patricia. Bobby thought the conveyances were unfair and resulted in Patricia getting more than he did. He came to this conclusion based upon a writing between him, Patricia, and Margie that had "partitioned" the property. He claimed the actual conveyances varied from the agreement.

Because Bobby had been praying for guidance and felt very comfortable with proposals that were made and was so sure that the way his sister convinced Margie to make the conveyances was so unfair to him and his family that he could not let the matter go unchallenged, he sued his sister and sought the specific performance of the so-called partition agreement.

To be entitled to specific performance, an agreement must be valid and enforceable. But, a deed or conveyance that does not sufficiently describe the land to be conveyed is not of such ilk. The agreement merely mentioned the properties by common names, like Sheppard Place and Rutledge Place. When the essential elements of a property's description are left to inference or to development by parol, the description is insufficient to support a suit for specific performance irrespective of whether the parties themselves understood what land formed the subject matter of the conveyance.

Bobby, however, argues that there need not be an adequate description in the letter since the document merely evinced a partition of lands. Authority does exist indicating that a partition is not subject to the statute of frauds. Nonetheless, Bobby's argument rests upon a false premise. The document at issue cannot be construed as a partition. The latter serves to divide property owned by co-tenants and concerns possession, not title. Neither Patricia nor Bobby had a right to possession of any realty held in the trust. Right to possession resided in Margie, the trustee. This agreement was not a partition.

Ganim v. Alattar, 54 Tex.Sup.Ct.J. 1260 (Tex. 2011). Ganim and Alattar were friends who began looking for properties to invest in together. They visited a 3,800 acre tract in Washington County that was for sale. Two days later Alattar, while accompanied by Ganim, executed an agreement as "Frank Alattar, Trustee" to purchase the Property.

In the days following Alattar's execution of the purchase agreement, Alattar, Ganim and their lawyers exchanged documents culminating in Alattar and Ganim executing an Agreement of Limited Partnership. Despite Ganim and Alattar each signing the LP Agreement, they later disputed whether it correctly reflected the terms of their agreement. Because of the disagreement, Alattar notified Ganim that he would not enter into a partnership and denied that Ganim had, or would have, any interest in the Property. Ganim subsequently sued Alattar. While suit was pending the sellers conveyed the Property by special warranty deed to "Farouk Alattar, Trustee." Neither the purchase agreement nor the deed identified a trust or named any trust beneficiaries.

Ganim's position at trial was that he and Alattar agreed to purchase the Property as partners and six documents, taken collectively, established that Alattar acquired the Property on behalf of the Partnership. Alattar contended he had no agreement with Ganim to acquire the Property as partners. He insisted that he had purchased the property for himself and his family. The trial court ruled in favor of Ganim, with the jury finding that the Property had been acquired by Alattar for the benefit of the Partnership.

The court of appeals reversed, concluding that the agreement was one for the sale of real estate and subject to the statute of frauds. The court of appeals held that the parties' agreement, alleged by Ganim to exist by reading six different documents together, did not comply with the statute of frauds because no single document contained the terms of the deal or the signature of the party to be charged. In addition, the six documents couldn't be read together because the later documents did not refer to each other.

Ganim argues that Alattar purchased the Property for their mutual benefit. Thus, Ganim contends, this was an agreement for the joint acquisition of real property, not a land purchase agreement, and it is not subject to the statute of frauds.

Alattar argues that Ganim has shifted positions on appeal: in the trial court he argued Alattar agreed to convey the Property to the partnership, but he now contends Alattar agreed to purchase the Property for the partnership and a second conveyance was not required. Alattar further contends that both of Ganim's positions fail because each requires Alattar to have purchased the Property as trustee for benefit of the partnership and such an agreement would be an express parol trust in land, which the Texas Trust Code makes unenforceable.

The court concluded that neither the statute of frauds nor the Texas Trust Code bar the enforcement of the agreement.

Business & Commerce Code § § 26.01(a), (b)(4) provides that a contract for the sale of real estate must be in writing. But the Supreme Court has long held that an agreement between two or more persons for the joint acquisition of land is not a contract for the sale of land and is not required by our statute of frauds to be in writing. ***Gardner* v. *Randell***, 70 Tex. 453, 7 S.W. 781, 782 (Tex. 1888); ***Reid* v. *Howard***, 71 Tex. 204, 9 S.W.

109, 110 (Tex. 1888); ***James* v. *Fulcrod***, 5 Tex. 512 (1851).

The agreement found by the jury was that Alattar purchased the Property for the Partnership. It was not an agreement for the sale of real estate nor did it create an express trust. Thus, it was not required to comply with the provisions of either Business & Commerce Code § 26.01 or the Trust Code provisions in Property Code § 112.004.

Fitzgerald v. Shroeder Ventures II, LLC, 345 S.W.3d 624 (Tex.App.-San Antonio 2011, no pet.). The earnest money contract contained a provision for attorneys' fees that said the "prevailing party" in any legal proceeding would be entitled to recover reasonable attorneys' fees. After the sale, Schroeder, the buyer, sued the seller, Fitzgerald, for fraud and other things. The jury found in favor of Fitzgerald on all of the liability questions. The jury also awarded Fitzgerald attorneys fees for the trial and appeal to the court of appeals.

Schroeder claimed that under the Supreme Court's recent ruling in ***Intercontinental Group Partnership* v. *KB Home Lone Star, L.P.***, 295 S.W.3d 650 (Tex. 2009), because they were not "prevailing parties" as defined in that case. The trial court agreed and did not award the attorneys' fees. Fitzgerald sued.

Generally, a trial court's award of attorney's fees is reviewed for an abuse of discretion. The trial court has discretion to fix the amount of attorney's fees, but it does not have discretion to deny attorney's fees entirely if they are proper.

In ***Intercontinental***, KB Homes sued Intercontinental for breach of contract, and sought money damages for lost profits. The jury found in favor of KB Homes on its breach of contract claim, but awarded no damages. Intercontinental counterclaimed against KB Homes for breach of contract, but the jury found no breach of contract by KB Homes. In its opinion, the Texas Supreme court concluded KB Homes was not entitled to an award of attorney's fees under the contract because even though it had obtained a breach of contract finding in its favor, it had not obtained any damages. Because KB's goal in the litigation was recovery damages, the Texas Supreme Court concluded KB Homes had not prevailed in any meaningful sense. In announcing its holding, the Supreme Court stated that, to prevail, a claimant must obtain actual and meaningful relief, something that materially alters the parties' legal relationship. A plaintiff must prove compensable injury and secure an enforceable judgment.

Here the court said that the ***Intercontinental*** decision illustrates what a plaintiff must accomplish; it does not answer the question of what a defendant must do to be a prevailing party. Because ***Intercontinental*** is tailored to what a plaintiff must do, it is not provide a reason for denying attorneys' fees in this case. The court pointed out that the ***Intercontinental*** case did not deal with the defendant's right to attorneys' fees because the defendant in that case did not preserve the issue on appeal.

Epps v. Fowler, 54 Tex.Sup.Ct.J. 1759 (Tex. 2011). A defendant is not a prevailing party when the plaintiff nonsuits a claim without prejudice unless the court determines, on the defendant's motion, that the plaintiff took the nonsuit in order to avoid an unfavorable judgment. Because a nonsuit with prejudice immediately alters the legal relationship between the parties by its res judicata effect, a defendant prevails when the plaintiff nonsuits with prejudice.

SP Terrace, L.P. v. Meritage Homes of Texas, LLC, 334 S.W.3d 275 (Tex.App.-Houston [1st Dist.] 2010, no pet.). SP Terrace entered into an earnest money contract with Meritage to develop and sell ninety-six lots in a proposed Harris County subdivision. The development plan required small and narrow lots, and Meritage was one of a few builders who could construct houses to fit the particular lot sizes. The contract terms required SP Terrace to improve the overall subdivision. In particular, it required SP Terrace to file a subdivision plat with Harris County by a December 31, 2005 substantial completion deadline. After substantial completion, Meritage would then purchase the lots in a series of transactions. If SP Terrace did not achieve substantial completion by December 31, 2005, Meritage could terminate the contract and recover its earnest money deposit. But, if Meritage delayed SP Terrace's performance of its contractual obligations, the substantial completion deadline would be extended to the extent of any such delay.

On November 30, representatives from Meritage and SP Terrace met to discuss the project. At this point, SP Terrace was ready to file the subdivision plat. Meritage asked for changes to the plat, and it requested that SP Terrace postpone filing the plat to accommodate those changes. SP Terrace agreed, but informed Meritage that a six-month extension of the substantial completion deadline would be necessary to address these and any future changes to the development. The parties orally agreed to extend the substantial completion deadline, and the representatives of Meritage agreed to sign a written extension memorializing the oral modification. SP Terrace mailed a written agreement to Meritage before December 31, 2005, but never received a response.

The parties continued to work together to make changes and improvements to the development into early February 2006. But on February 3, Meritage informed SP Terrace that, due to SP Terrace's failure

to meet the substantial completion deadline, Meritage was terminating the contract and demanding the return of its earnest money deposit.

SP Terrace first contends that an oral modification to the contract exists and thus it is not liable for any breach associated with missing the December 31 deadline. Under the statute of frauds, a contract for the sale of real estate must be in writing and signed by the party charged with compliance with its terms. Generally, if a contract falls within the statute of frauds, then a party cannot enforce any subsequent oral material modification to the contract.

Usually, an oral modification extending performance would not ordinarily materially alter the underlying written contract and would be enforceable. However, in ***Dracopoulas* v. *Rachal***, 411 S.W.2d 719 (Tex.1967), the Texas Supreme Court held unenforceable an oral modification that extended the time for performance indefinitely. The court reasoned that the termination date of the contract was the hinge upon which still other contractual rights and duties turn, and extending the termination date indefinitely would destroy other contractual provisions that depended on the termination date to become operative. This case presents one of those circumstances. Even if the oral modification extending performance would not ordinarily materially alter the underlying written contract, when a party relies on the modification to assert that the other party is in material breach to excuse further performance, the modification then becomes material and unenforceable unless in writing.

Williams v. Dardenne, 345 S.W.3d 118 (Tex.App.-Houston [1st Dist.] 2011, no pet.). The Dardennes bought a house from the Williams. They used a TREC form. The form contained a line that said "Buyer accepts Property in its present condition; provided that Seller, at Seller's expense, shall complete the following specific repairs and treatments: _____________. In the blank space, the parties typed in "Termite if necessary." The contract does not contain a merger clause or disclaimer of reliance on oral representations.

The Seller's Disclosure Statement asked the Williamses to list all inspection reports they had received in the last four years. They listed three, but did not list one they had received by didn't keep a copy of. Section 5.008 does not mandate the disclosure of prior reports. Two of the listed reports address the foundation, one saying that there were some issues, but said they were cosmetic and that the foundation was within an acceptable range given its age. The other saying that the foundation was not functioning and needed repair. The Dardenne's didn't remember seeing the second report, but admitted they had access to it.

The report not listed by the Williamses was the Knight Engineering Report, which more resembled a bid for repairs, but listed some of the same issues raised by the other reports. The Williamses did not retain Knight for the repairs so they couldn't give a copy to the Dardennes.

Before the closing, the Dardennes had the property inspected by their independently selected inspector. Before the inspection, the Dardennes told the inspector about the reports. Their inspector did not indicate that repairs were needed and said the foundation appeared to be working. The parties extended closing and provided for some repairs to the property, but did not provide for repairs to the foundation.

About six months after they purchased the property, the Dardennes noticed large cracks in the walls and that doors would not close. That was when they discovered the Knight Engineering Report and the bid for repairs. They then sued the Williamses for DTPA violations, fraud and negligent misrepresentation based on the failure to disclose the Knight Engineering Report. The jury found in favor of the Dardennes.

The Williamses contend that the "Acceptance of Property Condition" provision in the TREC form constitutes an "as is" clause. The Dardennes did not disagree with that contention but claimed that it was fraudulently induced.

Fraudulent inducement is a particular species of fraud that arises only in the context of a contract and requires the existence of a contract as part of its proof. That is, with a fraudulent inducement claim, the elements of fraud must be established as they relate to an agreement between the parties. The elements of fraud are that a material representation was made, the representation was false, the speaker knew the statement was false when made, the statement was made to induce reliance, it did induce reliance, the reliance was justifiable, and the relying party suffered injury as a result.

Under certain circumstances, a buyer's independent inspection of the property may conclusively defeat two elements of a fraud claim: causation and reliance. Although the courts of appeals have articulated different tests for when a buyer's independent inspection will defeat causation and reliance as a matter of law, the courts have consistently applied these tests such that a buyer's independent inspection precludes a showing of causation and reliance if it reveals to the buyer the same information that the seller allegedly failed to disclose. This is consistent with the principle that a party who has actual knowledge of specific facts cannot have relied on a misrepresentation of the same facts.

The issue, then, is whether the Dardennes presented any evidence of reliance to support their claim for fraudulent inducement. In the context of fraudulent inducement, this requires evidence that the

claimant would not have entered into the contract but for the alleged misrepresentation or fraudulent nondisclosure. The court said there is also evidence in the record that the Dardennes would have read the Knight Engineering letter if it had been listed in the seller's disclosure. The Dardennes did not review the second report, which was listed in the disclosure.

The court said that the absence of reliance evidence is particularly troublesome in this case, because the information contained in the undisclosed report was the same information contained in the reports that were disclosed. Because there is no evidence that the Dardennes would not have entered into the contract to purchase the property if the Williamses had listed the Knight Engineering letter in their disclosure, the trial court erred in failing to grant the Williamses' motion for judgment notwithstanding the verdict on the Dardennes' fraudulent inducement claim.

Netco v. Montemayor, 352 S.W.3d 733 (Tex.App.-Houston [1 Dist.] 2011, no pet.). In 2002, Montemayor entered into a contract for deed with Logan to buy a house in Houston. After a year of making payments, she decided that she and her cousin, Flores, would purchase the property through a mortgage and deed of trust. Sterling Bank had a lien on the Kimwood property to secure a loan that it had made to Logan. NETCO handled the closing of the purchase and sale. As part of the closing, NETCO prepared a title commitment and a HUD-1 settlement statement. Montemayor and Flores bought a title policy for their lender.

The title commitment showed the Sterling Bank lien; however, the HUD-1 did not show a payoff of that loan. The line item for "Payoff of first mortgage loan" was left blank, so the funds that would have paid off the loan were instead paid to the seller, Logan. Montemayor and Flores signed the HUD-1 and NETCO's disbursement instructions authorizing the disbursements as shown on the HUD-1.

In 2005, when Montemayor and Flores wanted to sell the house, they made the unfortunate discovery that the Sterling Bank lien was still encumbering it. Because they couldn't deliver title, they abandoned the property and Sterling Bank foreclosed. In 2007, Montemayor and Flores sued NETCO. NETCO claimed that the suit was barred by limitations. The trial court found in favor of Montemayor and Flores, so NETCO appealed.

Montemayor and Flores maintain that the jury's finding that the limitations period did not begin to run until they attempted to sell the property and "discovered" the Sterling Bank lien on May 30, 2005, is legally correct. NETCO responds that the discovery rule is not applicable here, and that the limitations period began to run on the date of the real estate closing. NETCO further asserts that because it was not served with process within four years of that date, the breach of fiduciary duty claims against it are time barred as a matter of law.

The discovery rule defers the accrual of a cause of action until the plaintiff knows, or by exercising reasonable diligence, should know of the facts giving rise to the claim. For the discovery rule to apply, the injury must be inherently undiscoverable and objectively verifiable. When analyzing the applicability of the discovery rule in cases in which the alleged injuries arise from a breach of fiduciary duty, the claims are generally considered inherently undiscoverable. Nonetheless, once the fiduciary's misconduct becomes apparent, the claimant cannot ignore it, regardless of the fiduciary nature of the relationship. In other words, such claims accrue when the claimant knows or in the exercise of ordinary diligence should know of the wrongful act and resulting injury. The date that a claimant knew or should have known of an injury is generally a fact question. However, if reasonable minds could not differ about the conclusion to be drawn from the facts in the record, the start of the limitations period may be determined as a matter of law.

Based on the evidence presented at the jury trial, NETCO established as a matter of law that Montemayor and Flores knew or should have known about their injury at the date of the closing. The closing documents showed the existence of the Sterling Bank lien on schedule C of the title commitment. The owner's affidavit that Montemayor and Flores executed contained this commitment. In contrast, the HUD-1 settlement statement authorized the disbursement of funds to Logan, the Harris County tax commissioner, and the local school system, but did not authorize a disbursement to Sterling Bank.

Thus, the record shows that at closing, Montemayor and Flores signed documents (1) indicating the existence of a lien by Sterling Bank, but (2) recognizing that NETCO proposed to disburse funds to parties that did not included Sterling Bank. They are presumed to know the content and effect of the documents they signed.

Forney 921 Lot Development Partners I, L.P. v. Paul Taylor Homes, Ltd., 349 S.W.3d 258 (Tex.App.-Dallas 2011, pet. denied). When property located within a municipal utility district (MUD) is sold, the seller is required to provide the purchaser with notice of certain tax and bond information about the property. Texas Water Code § 49.452(a). The Water Code mandates the form to be used to provide the notice. Water Code § 49.452(b). Section 49.452(f) provides that if the Seller fails to give the notice prior to the execution of a binding contract, the buyer is entitled to terminate the contract.

Forney 921 and PTH entered into a contract covering property located in a MUD. The contract stated that the statutory notice was attached as Exhibit D, which was the case, except that the Exhibit was merely the form, without the blanks filled in. Exhibit D shows no amounts for the tax rates, bond amounts, or standby fees. The contract itself contained a provision that said "Purchaser's and Seller's execution of this Agreement shall be deemed to constitute their execution of the Statutory Notice and Purchaser's acknowledgment of receipt of the Statutory Notice prior to execution of a binding contract for purchase of the Lots."

After the contract was executed, Forney 921assigned to as collateral to its lender. In connection with the assignment to the lender, PTH executed an estoppel and consent, in which it made representations to the lender about the enforceability of the contract. Still later on, the parties entered into an amendment to the contract which ratified the initial contract.

A few months later, after land values and housing starts plummeted, PTH sent a letter to Forney 921 terminating the contract because of the failure of the MUD notice to have disclosed information in the form's blanks.

The question presented to the court was whether the failure to fill in the blanks allows the buyer to terminate the contract. The court held that they do not.

Quasi-estoppel (estoppel by contract) is a term applied to certain legal bars, such as ratification, election, acquiescence, or acceptance of benefits. It is a long-standing doctrine applied to preclude contradictory positions: it precludes a person from asserting, to another's disadvantage, a right inconsistent with a position previously taken. The doctrine applies when it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced. Unlike equitable estoppel, quasi-estoppel does not require a showing of a false representation or detrimental reliance.

The court held that the wording of the contract whereby the parties agreed that the notice had been given before execution of the agreement meant that PTH agreed that Exhibit D satisfied the statutory notice requirement – whether or not it in fact did so. The court also noted the estoppel to the bank, certifying the continuing validity and enforceability of the contract, and the ratification of the contract when amended. The court noted that Forney 921 had undertaken substantial debt to develop the lots.

Ritchy v. Pinnell, 357 S.W.3d 410 (Tex.App.—Texarkana 2012, no pet.). Ritchey purchased a house in Winnsboro, Texas, from the Pinnells pursuant to a sales agreement that provided that Ritchey accepted the property "as is." Prior to sale, Mr. Pinnell (who was licensed neither as a plumber nor an electrician) had remodeled the house, doing most of the electrical work and all of the plumbing work himself without obtaining permits from the City of Winnsboro. After the sale had been completed, Ritchey was unable to obtain a certificate of occupancy from the City because Pinnell's electrical and plumbing work failed to comply with building code requirements. With no such certificate of occupancy, Ritchey was barred by municipal authorities from occupying the house. Ritchey filed suit against the Pinnells for statutory real estate fraud, alleging that the Pinnells' failure to disclose in the statutorily mandated seller's disclosure notice that the repairs to the house made by Steve violated building code requirements amounted to misrepresentation or concealment of a material fact. The Pinnells moved for summary judgment, arguing that the "as is" clause in the purchase agreement defeated the reliance element of statutory real estate fraud. The trial court held in favor of the Pinnells.

In her sole point of error, Ritchey argues that the trial court erred by granting the summary judgment because there is evidence of fraud, in that the Pinnells made material misrepresentations in the seller's disclosure notice, and she relied on those misrepresentations in entering into the "as is" sales agreement. In other words, Ritchey maintains that she was fraudulently induced to enter into the purchase agreement that contained the "as is" clause.

The Pinnells' disclosure statement to Ritchey states, in relevant part, that they were unaware of, "[r]oom additions, structural modifications, or other alterations or repairs made without necessary permits or not in compliance with building codes in effect at the time." Prudential is distinguishable from this case because the buyer in this case was clearly and explicitly relying on the disclosure notice, while the buyer in Prudential was expressly not relying on any representations.

PART VIII
ADVERSE POSSESSION, TRESPASS TO TRY TITLE, AND QUIET TITLE ACTIONS

Dyer v. Cotton, 333 S.W.3d 703 (Tx.App-Houston [1st Dist.] 2010, no pet.). A co-tenant may not adversely possess against another co-tenant unless it clearly appears he has repudiated the title of his co-tenant and is holding adversely to it. Whether there has been a repudiation of a non-possessory co-tenant's title generally is a question of fact, but when the pertinent facts are undisputed, repudiation may be established as a matter of law.

Dyer received a deed to the property in question which purported to convey the entire fee simple estate to him, not the actual 1/7th interest owned by Baker. Dyer contends that, by claiming title in a conveyance that purported to convey the entire title to him—a conveyance that went unchallenged for the length of

the statutory period—the co-tenancy relationship ceased to exist, and he was entitled to take actual title through adverse possession. Relying on ***Evans* v. *Covington,*** 795 S.W.2d 806 (Tex.App.-Texarkana 1990, no writ) and ***Easterling* v. *Williamson***, 279 S.W.2d 907 (Tex.Civ.App.-Dallas 1955, no writ).

The court disagreed. The two cases did not support Dyer's contention. Furthermore, co-tenants are not agents; a co-tenant may not convey more than his interest in the shared property. A deed by one co-tenant purporting to convey the entire interest in a part of the commonly owned land conveys such interest, and only such interest, in the land as the maker of the deed possesses. The mere recording of a deed to a claimant who initially entered into possession as a permissive user is no evidence of an adverse holding or the repudiation of the tenancy.

Also, a deed puts co-tenants on constructive notice of an adverse claim only if it is on record before they acquire their interests. The recordation of a deed after the other co-tenants have already acquired their property interests does not put those co-tenants on constructive notice that their co-tenant claimed an adverse interest. Record notice goes forward, not backwards

Gordon v. West Houston Trees, Ltd., 352 S.W.3d 32 (Tex.App.-Houston [1 Dist.] 2011, no pet.). West Houston Trees obtained a judgment against Rodney Gordon's father, Winter Gordon. At the time, Winter owned a tract of land in Fort Bend County. WHT obtained an abstract of judgment and filed it in the real property records.

Rodney and Winter entered into a Purchase and Sale Agreement, which they recorded in the Fort Bend County real property records about a week before WHT acquired the property at an execution sale under its abstract of judgment. WHT obtained and filed a deed. After that, Rodney filed a "Quit Claim Deed" conveying the property to a trust and even later, Rodney and Winter filed an "Amended Warranty Deed" backdated to the date of the Purchase and Sale Agreement purporting to correct errors in the Purchase and Sale Agreement. No original warranty deed was filed (or, in all likelihood, ever existed).

On the same day he filed the Amended Warranty Deed, Rodney filed suit for wrongful foreclosure and WHT, claiming that the WHT abstract of judgment was invalid, that the sale from Winter to Rodney was valid, and that title had been conveyed to him.

The first argument from Rodney was that the abstract of judgment was invalid. In order to obtain a lien on a judgment, the judgment creditor must comply with the statutory requirements for creation of the lien. Texas Property Code §§ 52.001 et seq. Because a judgment lien is created by statute, substantial compliance with the statutory requirements is mandatory before the lien will attach. Substantial compliance allows for a minor deficiency in a required element of the abstract of judgment but does not allow for the complete omission of a required element.

The only defect in the abstract of judgment was that the cause number shown in the AJ contained a typo. The actual cause number for the suit is "03-CV-130474," but the AJ showed it as 03-CV-10474. WHT argues that this is a minor deficiency and that the abstract substantially complied with the statutory requirements. The court agreed. The court also held that the abstract was notice to third parties of the existence of the lien. The cause number of the underlying judgment is not used in the recordation or indexing of the lien in the real property records. Accordingly, any typographical error in the cause number does not affect the abstract of judgment's ability to put subsequent purchasers on notice of the lien's existence.

The court moved on to consider Rodney's argument that WHT's quiet title suit fails. A suit to quiet title, also known as a suit to remove cloud from title, relies on the invalidity of the defendant's claim to the property. It exists to enable the holder of the feeblest equity to remove from his way to legal title any unlawful hindrance having the appearance of better right. A cloud on title exists when an outstanding claim or encumbrance is shown, which on its face, if valid, would affect or impair the title of the owner of the property. Accordingly, WHT's suit to quiet title depends on its establishing that the claim asserted by Gordon (1) constitutes a hindrance having the appearance of a better right to title than its own, that (2) appears to be valid on its face, and that (3) for reasons not apparent on its face, is not valid. Having held that West Houston Trees had superior rights in the property on the date of the Execution Sale, that the sale of the property to it was proper, and that it is the owner of the property under the Execution Deed, which was properly recorded in the Fort Bend County property records, the court went on to hold that the Purchase and Sale Agreement, which appears to record a valid earlier purchase of the property by Gordon, is invalid for reasons not apparent on its face and constitutes a hindrance on West Houston Trees' title which West Houston Trees is entitled to have removed.

Even if WHT was not entitled to removal of the cloud on its title by virtue of its superior right to the property under its judgment lien, the court said it would still hold that the instruments filed in the property records did not record valid conveyances of the property, that no title passed to Gordon or to the Gordon Trust, and that West Houston Trees' Execution Deed is valid and it is therefore entitled to the removal of each of these instruments from its chain of title as invalid hindrances. To validly convey an interest in land, a contract for the sale of real estate must satisfy

the requirements of both the statute of conveyances, Property Code § 5.021, and the statute of frauds, Business and Commerce Code § 26.001. 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. To convey an interest in land under the statute of conveyances, the instrument of conveyance must be in writing, must be signed, and must be delivered by the party disposing of his interest.

In essence, the instrument conveying the land must contain the essential characteristics of a deed. There is no longer a requirement that a deed or instrument to effect the conveyance of real property must have all the formal parts of a deed recognized at common law or technical language. If (1) from the instrument as a whole a grantor and grantee can be ascertained and (2) there are operative words or words of grant showing an intention by the grantor to convey to the grantee title to a real property interest, (3) which is sufficiently described, and (4) the instrument is signed and acknowledged by the grantor, then the instrument of conveyance is a deed that accomplishes a legally effective conveyance.

Here, the contract did not evidence a present intention to convey the property; rather, it clearly said that a deed would be executed later on to effect the conveyance. And there was no evidence that such a deed was every drafted, signed, or delivered before the WHT abstract was filed.

Conley v. Comstock Oil & Gas, LP, 356 S.W.3d 755 (Tex.App.—Beaumont 2011, pet. denied). The doctrine of presumed lost deed, which is also referred to as title by circumstantial evidence, has been described as a common law form of adverse possession. Its purpose is to settle titles where the land was understood to belong to one who does not have a complete record title, but has claimed a long time. The doctrine has been applied to establish title in a party who failed to prove title under the adverse possession statutes.

In ***Magee* v. *Paul***, the Texas Supreme Court held that:

> Since it is not consistent with human experience for one really owning property of value to assert no claim thereto, but to acquiesce for a long period of time in an unfounded, hostile claim, the rule is sound which permits the inference that an apparent owner has parted with his title from evidence, first, of a long-asserted and open claim, adverse to that of the apparent owner; second, of nonclaim by the apparent owner; and third, of acquiescence by the apparent owner in the adverse claim. ***Magee* v. *Paul***, 110 Tex. 470, 221 S.W. 254, 256-57 (1920).

The presumption of a grant of title is generally one of fact and not of law. The presumption of a lost grant or conveyance may be established as a matter of law under circumstances where the deeds are ancient and the evidence is undisputed.

The summary judgment record in this case reveals that the Escobeda Survey was filed in 1835. Of the surveys that form the source of the landowners' titles, one survey was filed in 1908, and the other surveys that form the source of title for Comstock and the landowners were filed between 1847 and 1884. The controversy over the location of the Escobeda arose long ago; a document archived in the General Land Office shows that in 1860 it was suggested that the Escobeda was represented incorrectly on a map on file and that the calls in the field notes were incorrect. Although the location of the Escobeda was unsettled and other surveys were being recorded, none of the documents in the summary judgment record indicate that anyone holding under the Escobeda chain of title asserted a claim to the land at issue here. The long period of time in which the Escobeda grantees were claiming the neighboring land supports a conclusion that they acquiesced in the claims of the persons who claimed title under the fifteen ancient surveys at issue in this case. Acquiescence is generally a fact issue but where the deeds are so ancient and the evidence is undisputed it may be established as a matter of law.

The undisputed facts in this case are that since its filing in 1835 the only efforts to assert ownership in the chain of title for the Escobeda were directed at the neighboring land and not the land that is the subject of Conley's trespass to try title suit presently. Thus, the trial court did not err in granting summary judgment on the ground that Comstock and the Landowners established their title by presumed grant.

RDG Partnership v. Long, 350 S.W.3d 262 (Tex.App.-San Antonio 2011, no pet.). This case makes two important points.

First, mere acquiescence in a line other than the true boundary line will not support a judgment in favor of such other line when there is no evidence, other than such acquiescence, of an agreement fixing the line. In order to establish a boundary by acquiescence, evidence must be presented to show that there was some uncertainty as to the true boundary, which resulted in a line being established (generally by a fence), and that thereafter the adjoining land owners acquiesced in and recognized this line as the true boundary line between them. The mere erection of a fence off the boundary line is not in itself sufficient to make the doctrine applicable. Evidence must show an agreement between adjoining landowners stemming

from some initial uncertainty or dispute over the true boundary line, and evidence must show that the doubt or uncertainty was known to the landowners at the time they agreed to the boundary.

In this case, no evidence was presented to show that the fence was placed between the properties owned by the parties as part of an agreement to resolve a dispute or uncertainty as to the boundary line. Instead, the only evidence regarding the construction of the fence was Long's testimony that he constructed a fence in the area where a barbed wire fence previously existed in order to contain deer for his breeding operation. Because no evidence was presented to warrant the submission of a question to the jury regarding boundary by acquiescence, the trial court did not err in excluding the question.

The court also dealt with a claim of easement by prescription. In order to establish entitlement to a prescriptive easement, the plaintiff must use someone else's land in a manner that is open, notorious, exclusive, and adverse for the requisite period of time. 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.

Long argues that joint use will not preclude the existence of an easement by prescription if the evidence also shows a claim of right by the party seeking to establish the easement. The court disagreed. Both the Texas Supreme Court and this court continue to cite joint use as a basis for rejecting a claim of easement by prescription.

Teon Management, LLC v. Turquoise Bay Corporation, 357 S.W.3d 719 (Tex.App.—Eastland 2011, pet. pending). In most cases, the proper cause of action when title to real property is in question is a trespass to try title action. Here, Turquoise Bay sued Teon seeking a declaratory judgment that seven oil and gas leases had not terminated. The trial court entered a declaratory judgment. Teon argued that, because Turquoise Bay's suit was primarily one to determine title to land, it was required to file a trespass to try title action rather than a suit for declaratory judgment.

Turquoise Bay argues that the general rule requiring the action to be brought as a trespass to try title is inapplicable here because the relief it sought and was awarded is significantly different from the relief available in a trespass to try title action. It notes that it received a declaratory judgment that it was the proper operator of three wells, that it was not a trespasser as to those wells, and that the purchasers were authorized to release all production payments to it. Turquoise Bay also argues that the judgment does not vest any title but merely recites that some of the leases were valid.

The court disagreed. Turquoise Bay's argument misreads the trial court's ruling. When the trial court found that Turquoise Bay's leases were valid, the court was not resolving a question about the validity of those leases at the time of their execution or whether they were otherwise proper and enforceable. It found that those leases were still in existence. When the trial court found that Turquoise Bay was the proper operator, it was because Turquoise Bay had timely commenced reworking operations; therefore, the leases were still valid. When it found that Turquoise Bay and not Teon Management was entitled to the suspended runs, this was because Turquoise Bay's leases were still in existence. Each of these decisions is a title determination.

Turquoise Bay next contends that it was not required to file a trespass to try title action because its suit was more akin to a suit to remove a cloud on title. The purpose of a traditional suit to quiet title is to remove a cloud from the title created by an invalid claim. Even if Turquoise Bay is correct and this is a suit to remove a cloud on title, that would not eliminate the need to satisfy the burden of proof required in trespass to try title suits because of the competing claims to title.

Turquoise Bay argues that this is more than a title dispute because the trial court resolved other issues, such as its entitlement to production from the four wells. But, said the court, the underlying dispute concerned such questions as who was the proper operator of the wells and who was entitled to the production payments, but these are merely restatements of the ultimate question: Whose leases were in effect?

The court did not hold that questions over who is the proper operator or who is entitled to suspended runs can never be resolved in a declaratory judgment action. The dispositive question is: What is the nature of the dispute? For example, if Teon and Turquoise Bay's dispute over who was the proper operator required a construction of a joint operating agreement to determine if an election was properly conducted or if their dispute over suspended runs required a construction of an assignment to determine the percentage of ownership it conveyed, a declaratory judgment would be appropriate. But this case involved rival claims to the mineral estate, and every substantive issue was resolved when the trial court determined who owned the mineral estate. It was, therefore, a title determination, and Turquoise Bay should have proceeded with a trespass to try title suit.

PART IX
EASEMENTS

Severance v. Patterson, No. 09-0387 (Tex. March 30, 2012). The court's earlier opinion, reported at 345 S.W.3d 18, is withdrawn and substituted with the March 30, 2012 opinion. The opinion on rehearing

doesn't change the Supreme Court's original opinion that Texas does not recognize a "rolling" public beach-front access easement.

Brookshire Katy Drainage District v. Lily Gardens, LLC, 333 S.W.3d 301 (Tex.App.-Houston [1st Dist.], 2010 pet. pending). The District had an easement for a drainage canal across two tracts of land. It constructed a drainage ditch across both tracts and installed a concrete bridge across the ditch. Lily gardens acquired the two tracts. After buying them, Lily Gardens undertook to beautify the property for use as an outdoor event venue. Among other things, Lily Gardens added a picturesque covering to the cement bridge. Lily Gardens intended to use the bridge to transport visitors from a reception facility at the front of the property to a gazebo at the back. Lily Gardens left all existing structures in place and merely affixed the bridge covering to the existing bridge at ground level. It did not touch culverts or pipes beneath the bridge.

The District sent Lily Gardens a letter demanding that it remove the covering, claiming that the structure was attached to the District's culverts, which interfered with the drainage plans and violated the easement. Lily Gardens refused to remove the covering. The District filed suit. The trial court found that the bridge covering did not encroach on the District's easement and that Lily Gardens was not required to remove it.

An easement does not convey title to property. Instead, an easement is a nonpossessory interest in another's property that authorizes its holder to use that property for a particular purpose. The contracting parties' intentions as expressed in the grant determine the scope of the interest conveyed. In determining the scope of an easement, a court may only imply those rights reasonably necessary to the fair enjoyment of the easement with as little burden as possible to the servient owner. If a particular purpose is not provided for in the grant, a use pursuing that purpose is not allowed.

Here, the easement's stated purposes was for "constructing, maintaining, operating, repairing, and re-constructing a drainage canal, including drains, ditches, laterals and levees." The bridge covering added by the Defendants is affixed to the preexisting cement bridge above the drainage canal, as distinguishable from construction in or obstructing the canal. It is undisputed that the cement bridge was built around the time the District built the drainage canal. The pictures attached as summary judgment evidence by the District show that the bridge covering was attached to this preexisting bridge. The District does not provide any evidence showing that the structure was actually built onto or extended into the drainage canal.

Seber v. Union Pacific Railroad Company, 350 S.W.3d 640 (Tex.App.-Houston [14th Dist.] 2011, no pet.). This dispute centers on the closing of a private crossing over Union Pacific's railroad right-of-way, which runs along the entire southern boundary of the Sebers' property. Before it was closed, the crossing allowed access between the Sebers' property and Hufsmith-Kuykendahl Road on the opposite side of the railroad right-of-way. The Sebers' property is landlocked along its northern and eastern boundaries. The western boundary abuts Stuebner-Airline Road. This litigation involves the title history of a formerly distinct 1.5 acre tract that is now part of the larger parcel of land owned by the Sebers, and for which the crossing allegedly was constructed.

There are two forms of implied easement in Texas. The first is an easement by necessity, commonly called a way of necessity. A second type of implied easement is based on prior use of the land and is called an easement implied from a "quasi-easement." Texas courts routinely refer to implied easements based on prior use characteristics simply as implied easements.

Union Pacific argued in its summary judgment motion that the Sebers could not establish their right to use the crossing pursuant to an "implied easement" because an easement by necessity no longer was strictly necessary when the 1.5 acre tract became part of the larger tract of land accessible via Stuebner-Airline Road. The Sebers argued in response and on appeal that (1) their claim is for an implied easement by prior use rather than an easement by necessity; (2) they are required to show reasonable rather than strict necessity; and (3) the evidence presents a fact issue precluding summary judgment on whether the crossing is reasonably necessary to the use and enjoyment of the land.

The "strict necessity" requirement applies to an implied reservation of an easement, and the "reasonable necessity" requirement applies to an implied grant of an easement.

An easement by necessity is temporary; it continues only so long as the necessity exists and terminates upon the cessation of the necessity. Under this rule, a grantee must establish that its use of the easement continues to be reasonably necessary to its use of its property. However, the Sebers expressly deny that they claim an easement by necessity; therefore, they need not establish that their use of the crossing continues to be reasonably necessary to their use of their larger tract of land. The dispute here centers on an easement by prior use. The court could not identify and the parties do not cite any Texas authority applying this "continued necessity" rule to an otherwise valid implied easement by prior use.

Applying the "continued necessity" rule to easements by prior use would contradict the principle

that the existence of such an easement depends only on the situation of the parties at the time of severance.

Hamrick v. Ward, 359 S.W.3d 770 (Tex.App-Houston [14th Dist.] 2011, pet. pending). Hamrick sued to stop Ward from using a dirt road that runs along the edge of Hamrick's two lots. At the time of the suit, Ward was using the road to move construction equipment to his two acres where he was building a house. Ward counterclaimed seeking a declaratory judgment that he owned an easement across the dirt road.

The easement argued for by Ward was allegedly established in 1953 when the then owner of a 40 acre tract sold the two of those acres now owned by Ward. At the time, the dirt road was the only access to the two acres.

A later purchaser of the 40-acre tract began developing it into a residential subdivision. In connection with that, the developer filed a document called a "special restriction" stating that the then owner of the two acres, Mrs. Gomez, was permitted to use the dirt road for herself, her family and guests, limiting the size and type of vehicles that could use it.

The trial court held that Ward had established an easement by implied grant, the elements of which are (1) unity of ownership between the dominant (Ward's property) and servient (Hamrick's property) estates; (2) apparent use of the easement at the time the dominant estate was granted; (3) continuous use of the easement, so that the parties must have intended its use to pass by grant with the dominant estate; and (4) reasonable necessity of the easement to the use and enjoyment of the dominant estate.

Hamrick contends that the trial court erred in granting summary judgment because (1) there is no evidence of beneficial use prior to severance; (2) Ward failed to prove the continuing necessity of the easement; (3) Hamrick was were a bona fide purchaser without notice who thus took the property free from the unrecorded easement; (4) Ward is estopped from asserting the easement because they expressly adopted inconsistent rights; and (5) Ward's predecessor in interest, Mrs. Gomez, waived any right to the easement.

Implied easements are an exception to the rule that easements appurtenant to land must generally be created or transferred in writing. Put succinctly, the circumstances surrounding an owner's conveyance of part of a previously unified tract of land may create an easement benefitting one parcel and burdening the other parcel. If an implied easement benefits the parcel granted, it is called an "implied grant." If the easement benefits the parcel retained, it is called an "implied reservation." The law reads into the instrument that which the circumstances show both grantor and grantee must have intended, had they given the obvious facts of the transaction proper consideration.

The circumstances creating implied easements may demonstrate either necessity or prior use of land. An easement by necessity may be created when the conveyed or retained parcel cannot be accessed except by traveling over the remaining tract of land. An easement by necessity has three requirements: (1) unity of ownership of both parcels must exist prior to separation; (2) access across the servient parcel is necessary and not a mere convenience; and (3) such necessity must exist at the time of severance.

A party claiming an easement based on prior use must prove that at the time of severance (1) both parcels were under unified ownership; (2) the use was apparent; (3) the use was continuous; and (4) the use was necessary to the use of the dominant estate.

Hamrick argued that Ward failed to prove the element of necessity. The parties initially disagree as to whether the necessity element must be assessed just at the time of severance, as claimed by Ward, or both at the time of severance and in the present time, or "continuing necessity," as claimed by Hamrick. The court held that only the time of severance need be looked at. This court had recently addressed this very question in ***Seber* v. *Union Pacific R.R. Co.***, 350 S.W.3d 640, 647-48 (Tex. App.-Houston [14th Dist.] 2011, no pet.). In that case, the court concluded that requiring a showing of continuing necessity would contradict the very elements of an easement by prior use, which look only to the circumstances at the time of severance.

Hamrick then argued that Ward failed to establish that, at the time of severance, the owner of the 40-acre tract and grantor of the two-acre tract was using the using the dirt road to access the two-acre tract. The court held that the facts showed that the dirt road was being used.

Hamrick then argued that he took title as a BFP and without notice of the easement. Ward claims that the bona fide purchaser defense is not applicable in implied easement by prior use cases. The court decided that the BFP defense may apply.

A bona fide purchaser is one who acquires property in good faith, for value, and without notice, actual or constructive, of any third-party claim or interest. Actual notice requires a showing of personal knowledge; constructive notice, on the other hand, is notice that the law imputes to a person who does not have personal knowledge. A purchaser may be charged with notice if circumstances existed creating a duty in the purchaser to ascertain the rights of a third-party. When such a duty arises, the purchaser is charged with notice of all the party's claims which the purchaser might have reasonably discovered on proper inquiry, i.e., the exercise of ordinary diligence and understanding.

Hamrick acknowledged that the knew about the dirt road and made inquiries before he purchased his land; however, those inquiries let him to the document filed giving Mrs. Gomez limited rights to the road. Having landed there, Hamrick claimed he was not required to look any further. The court disagreed and found that Hamrick's inquiries were not reasonable under the circumstances. A prospective purchaser of real property cannot simply rely on deed recitations in the property records even when a possessor's possession appears to be consistent with those deed records.

Here, Hamrick did not examine the deed records or make inquiries of either the person expressly named in Mrs. Gomez's document or of the people who owned the tract described in the special restriction as being served by the dirt road. Simply examining the survey, or even the special restriction, was not a reasonable inquiry when appellants knew that a third party or third-parties were using, or had a right to use, the dirt road to access other property.

Having found that Hamrick had a duty to ascertain information regarding the nature of the dirt road across the property and having found that the inquiry undertaken by Hamrick was not reasonable, the court next considered whether the evidence conclusively demonstrated, or at least raised a fact issue, regarding what a reasonable investigation would have revealed. A subsequent purchaser can be held to notice of what the purchaser might have reasonably discovered on proper inquiry. The dirt road running across Hamrick's properties is highly visible and clearly serves the two-acre tract. It is unclear from the record whether Hamrick knew that Ward owned the two-acre tract at the time he purchased his tracts; however, either he knew or he would have discovered this fact had he inquired of Mrs. Gomez, who was the only one living on the property at that time, or examined the property records regarding ownership of the two-acre tract.

Hamrick made a big deal out of the fact that, when Ward obtained a loan secured by his property, his deed of trust to the bank did not mention the implied easement, and to the court, this was enough to raise a material issue of fact.

Because of the uncertain and conflicting nature of the evidence regarding what a proper inquiry would have revealed, there is a material issue of fact on the absence of notice element of appellants' bona fide purchaser defense. The court remanded for a determination of what a reasonable inquiry would have uncovered relating to the easement.

McClung v. Ayers, 352 S.W.3d 723 (Tex.App.-Texarkana 2011, no pet.). The McClungs attack the jury's failure to find a prescriptive easement. As claimants seeking to establish an easement by prescription, the McClungs must have shown that their use of the Ayers land was: (1) open and notorious, (2) adverse to the owner's claim of right, (3) exclusive, (4) uninterrupted, and (5) continuous for a period of ten years.

Burdening another's property with a prescriptive easement is not well-regarded in the law. The hostile and adverse character of the use is the same as that necessary to establish title by adverse possession. One test to determine whether a claim is hostile is whether the claimant's use, occupancy, and possession of the land is of such a nature and character as to notify the true owner that the claimant is asserting a hostile claim. Use by express or implied permission, no matter how long continued, cannot ripen into an easement by prescription since adverse use is lacking.

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 does not exclude the owner's use and therefore will not be considered adverse.

The easement claimant must exclude, or attempt to exclude, all other persons, including the true property owner, from using the roadway. Joint continuous use, without a legally adverse or hostile act, is not sufficient to establish a prescriptive easement.

There is conflicting evidence regarding whether the McClungs were given permission to cross the Ayers land. It is the function of the jury to pass on the weight of the evidence and the credibility of the witnesses; and, where there is conflicting evidence, the jury verdict on such matters is generally regarded as conclusive. A court cannot substitute its judgment for that of the jury. The McClungs failed to prove a prescriptive easement as a matter of law because there is more than a scintilla of evidence supporting the jury's finding that the McClungs' use was permissive.

Thompson v. Clayton, 346 S.W.3d 650 (Tex.App.-El Paso 2009, no pet.). Generally, an easement constitutes an interest in the land itself, while a license merely confers a privilege to do some act or acts upon the land without conveying any interest in or title to the land itself. An easement has been further defined as a "liberty, privilege, or advantage in land without profit, existing distinct from the ownership of the soil." Since an easement is an interest in land, the creation and transfer of such an interest is subject to the statute of frauds, unless the easement is imposed by operation of law.

A license is defined as a privilege or authority given to one or retained by one to do some act or acts on the land of another, but which does not amount to an interest in the land itself. The general rule is that gratuitous licenses are revocable at will. A license in real estate is revocable at will. A license terminates upon the death of the licensor. There are exceptions to

the general rule, one of which is where the licensee has been induced to expend a considerable amount of money or labor in reliance on the subsistence of his license.

Here, the written agreement initially states Mr. Clayton is granting permission to Thompson to pass over his land. However, the agreement states in the body that Thompson, has the right to pass on to the lands of Mrs. Ann Cole Lauffer for the purpose of drilling, exploring, developing and producing the lands presently held by Thompson on the Ann Cole Lauffer mineral estate. The agreement also gives Thompson the right and privilege of passing to and from at their sole discretion. The right of entrance to and exit from an estate is generally an appurtenant easement. The court held that the right and privilege of passing to and from at their sole discretion shows an intent to create an easement.

Clayton argued that the agreement did not satisfy the statute of frauds because the easement was not adequately described, the signatures to the agreement were not acknowledged, and the document was not recorded and could not be recorded. The Statute of Fraud requires that the agreement be in writing and signed by the grantor. The Statute of Conveyances requires a writing signed by the grantor as well.

The court found the legal description to be adequate. An easement has been found where the tract of land to be burdened by an express easement is sufficiently identified even if there is no exact designation of the location of the easement.

Clayton's argument that the agreement did not form a valid easement because the signatures were not acknowledged, and thus the document cannot be recorded, did not persuade the court. An unrecorded easement is binding on a successor in interest who has notice of the agreement, and Clayton's affidavits showed she was aware of the agreement.

PART X
HOMESTEAD

London v. London, 342 S.W.3d 768 (Tex.App.-Houston [14th Dist.] 2011, no pet.). Jeffrey and Leticia are divorced, but still arguing over money. After Jeffrey was awarded a judgment against Leticia, he learned that Leticia was about to sell her homestead and had instructed the title company to pay various creditors from the proceeds of the sale. Before the closing, Jeffrey asked the court to appoint a receiver and order Leticia to deliver the proceeds of any sale to the receiver. The court signed an order appointing a receiver to collect the sales proceeds from the homestead and pay them to Jeffrey.

In "partial compliance" with the court's order, Leticia delivered a portion of the sales proceeds to the receiver, and appealed the trial court's order. When some of Leticia's creditors were paid from the sales proceeds, the trial court requested (but did not order) that the funds be returned.

Receivership is a drastic remedy, to be used sparingly in the context of private litigation. Nevertheless, it is a matter committed to the trial court's discretion, and will not be disturbed absent a clear abuse of discretion.

The "turnover" statute is a procedural device used by judgment creditors to reach a debtor's non-exempt assets that otherwise would be difficult to reach by attachment or levy through ordinary legal process. Civil Practice & Remedies Code § 31.002. Under the turnover statute, the trial court can appoint a receiver to take possession of the debtor's non-exempt assets, sell them, and pay the debtor's creditors with the proceeds. But assets that are exempt from attachment, execution, or seizure are not subject to the turnover statute.

With certain exceptions inapplicable here, a homestead is exempt from seizure to satisfy creditors' claims. And if a homestead claimant sells her home, the sales proceeds similarly are exempt from seizure for six months.

On its face, then, the final judgment demonstrates that the trial court violated the turnover statute by appointing a receiver to hold the proceeds of the homestead's planned sale and by ordering Leticia to turn over the sales proceeds to the receiver. Because these actions violated the turnover statute, the trial court abused its discretion in issuing such an order.

Jeffrey contends that the statutory exemption applies only to those proceeds the debtor intends to apply toward the purchase of a new homestead within six months of the original homestead's sale. He therefore maintains that because Leticia expressed an intention to use some of the sale proceeds to pay for debts and living expenses rather than to buy a new homestead, she waived the exemption over that portion of the proceeds. Jeffrey argues that in issuing the turnover over, the trial court balanced Leticia's right to protect the homestead-sale proceeds from turnover for six months against Jeffrey's present right to preserve the homestead proceeds for distribution to him conditioned upon Leticia's failure to purchase a substitute homestead within the statutory six (6) month period. He additionally argues that within the six months after the sale, Leticia is not free to use these proceeds to pay other creditors.

Each of these assertions is incorrect. Jeffrey did not have the right to preserve Leticia's homestead-sale proceeds, and Leticia did have right to use the proceeds to pay other creditors. In arguing to the contrary, Jeffrey relies on federal bankruptcy cases that he contends support his position that Leticia waived the exemption. But, unlike the federal cases on which Jeffrey bases his argument, this is not a bankruptcy case, and this is not a case involving an attempt to defraud a creditor. When a debtor files for bankruptcy

protection, federal bankruptcy law limits a debtor's asset-management and debt-payment choices, but those limitations are inapplicable here. Instead, this is a case concerned with the validity of a turnover order. In the cases on which Jeffrey relies, no court held that a judgment creditor without a secured interest in the property could use the turnover statute to sequester exempt homestead-sale proceeds.

Jeffrey argued that certain dicta in his cases supported the "replacement homestead" requirement, but the court noted that the homestead statutes do not place any such limit on proceeds from a homestead sale. The statutory exemption for homesteadsale proceeds instead provides in its entirety, "The homestead claimant's proceeds of a sale of a homestead are not subject to seizure for a creditor's claim for six months after the date of sale." Property Code § 41.001(c). Thus, the statute limits the options available to creditors, not the options available to homestead claimants.

Finally, the court agreed to extend the beginning of the exemption period until the later of the issuance of the court's opinion or the release of funds to Leticia. Here, an unsecured creditor has caused the homestead-sale proceeds to be wrongfully withheld from the judgment debtor in an attempt to accomplish the very thing the statute forbids—payment of his debt from homestead-sale proceeds. Thus, it was quite appropriate to extend the beginning of the exemption period.

PART XI
BROKERS

Romo v. Payne, 334 S.W.3d 364 (Tex.App.-El Paso 2011, no pet.). Romo is a licensed mortgage broker who operated several businesses in El Paso. Romo's businesses focused on obtaining refinancing for homeowners facing foreclosure. In May 2004, the State of Texas and the Commissioner of the State sued Romo, alleging that he violated the Texas Mortgage Broker License Act and the DTPA. The State asserted that Romo employed loan officers from September 2002 to May 2004.

The central issue in this case is whether the Broker Act required loan officers to be licensed between the years of 2002 and 2004, which is when Romo employed Simpson and Blanchet. If licenses were not required, Romo could not have violated the Broker Act by allowing unlicensed loan officers to work for him and there would be no basis for requiring him to disgorge the profits he earned by reason of her employment.

The Broker Act is §§ 156.001-.508 of the Texas Finance Code. It was enacted in 1999 and has been amended several times. There are no prior cases construing its scope.

Romo cites two of the Broker Act's provisions—Section 156.201(b) and Section 156.204(c) of the Finance Code—to establish that licenses were not required. Between the years 2002 and 2004, Section 156.201(b) stated: An individual may not act or attempt to act as a loan officer unless the individual at the time is (1) licensed under the Broker Act, (2) sponsored by a licensed mortgage broker and acting for the licensed broker, or (3) exempt. Although the plain meaning of Sections 156.201(b)(2) and 156.204(c)(4) indicates that a person did not need a license to work as a loan officer if she was sponsored by a mortgage broker, the State argues that this interpretation cannot be correct when the statutes are read in conjunction with Section 156.406. Section 156.406 provides: "A person who is not exempt under this chapter and who acts as a . . . loan officer without first obtaining a license required under this chapter commits an offense. However, the plain language of Section 156.201(b)(2) effectively provided an exemption for persons who were sponsored by a mortgage broker.

In short, the statutory language is plain, and the State has provided no compelling reason to deviate from it. The court focused on the statutory language because ordinary citizens should be able to rely on the plain language of a statute to mean what it says.

Clouse v. Levin, 339 S.W.3d 766 (Tex.App.-Houston[14th Dist.] 2011, no pet). Levin was an agent/independent contractor with Coldwell Banker. The Clouses were interested in buying a house and contacted Levin. Before making an offer on behalf of the Clouses, an agreement was signed by the Clouses and by Levin on behalf of Coldwell Banker. Levin individually was not a party to the agreement. The agreement specified that Coldwell Banker was the Clouses' "exclusive agent" from November 11, 2007 until May 11, 2008. The agreement also contained a provision indicating that Coldwell Banker would receive a three-percent commission on any real estate purchased by the Clouses in the market area. Before the end of November, the Clouses' offer on the house was rejected and they were no longer actively working with Levin to find a house.

In late December, the Clouses purchased a house in Katy through a different real-estate broker and agent. Coldwell Banker assigned its rights to commissions in the Clouse agreement to Levin and he sued the Clouses for breach of the agreement.

The Clouses argue there is no written contract between the Clouses and Levin as required under Occupations Code § 1101.806(c) and no proof Levin or Coldwell Banker were licensed in Texas as required under Occupations Code §1101.806(b). The court agreed with the Clouses. Although the agreement on which Levin based his action was in writing and signed by the Clouses, Coldwell Banker, not Levin, was the

other party to the agreement. An agent cannot maintain action for commission when he was not a party to buyer-representation agreement. The court acknowledged that Levin pleaded and presented evidence that he had a right to recover under the agreement because Coldwell Banker assigned to Levin its right to collect commissions under the agreement. However, this theory of recovery was neither submitted to the jury nor proved as a matter of law.

Neary v. Mikob Properties, Inc., 340 S.W.3d 578 (Tex.App.-Dallas 2011, no pet.). The brokers brought suit to recover commissions when the sale of eight apartment complexes to Comunidad. The purchase contract did not contain a provision for broker fees. The brokers claimed that a "Term Sheet" along with several e-mails exchanged around the time the contract was entered into constituted a contract for broker fees. Comunidad argued that the Term Sheet and other correspondence did not satisfy the requirements of Occupations Code § 1101.806(c).

The Term Sheet is signed by the parties; however, in handwriting above the signature lines appears the sentence, "This term sheet is a guideline only, and is not binding." The Term Sheet identifies the "Purchaser" as "A Texas limited liability company to be formed with 100% of the membership interest being owned by Comunidad Corporation, a Texas non-profit corporation (IRS 501 C-3)." Although the term "Seller" is used in the Term Sheet, no seller is identified. The "Property" is defined as "Those particular Apartment Communities commonly known as Harbortree, Balboa, Capital Estates, Wisteria Gardens, Oaks of Brittany, Kensington Club I & II, Stonehaven at the Galleria, and Fondren Court. A separate LLC shall be formed for the purchase of each property." The Term Sheet also includes a paragraph entitled "Brokerage Fee."

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. The brokers concede this provision applies to their claim for a commission, but contend that the statutory requirements have been met by reading together the Term Sheet and the e-mail messages.

To comply with Occupations Code § 1101.806(c), an agreement or memorandum must (1) be in writing and must be signed by the person to be charged with the commission; (2) promise that a definite commission will be paid, or must refer to a written commission schedule; (3) state the name of the broker to whom the commission is to be paid; and (4) either itself or by reference to some other existing writing, identify with reasonable certainty the land to be conveyed. The court held that the Term Sheet and e-mails did not amount to a written agreement to pay a commission.

First, the Term Sheet said it was "a guideline only and not binding." "Not binding" in this case means exactly that, not binding. Second, the Term Sheet provides that the "Seller" will pay the commission. The Term Sheet, however, never identifies the "Seller." Further, as to the requirements of a definite commission and the name of the broker to be paid, the Term Sheet provides that SJH and two others will receive a commission "equal to a total of 2.0% of the Purchase Price," and includes terms for payment. Neary, however, is not identified as a "broker to whom the commission is to be paid." Finally, as to the requirement that the agreement identify the property with reasonable certainty, the court pointed out that only the names of various apartment complexes were given. No further location or address is given, and no reference is made to any other existing writing that further describes or identifies the property. While a metes and bounds description is not necessary, the writing must furnish the data to identify the property with reasonable certainty. Parol evidence may be used to explain or clarify the written agreement, but not to supply the essential terms.

The court went on to hold that the Term Sheet was not rescued by the exchange of e-mails. Even when the Term Sheet and e-mail messages are read together, however, they indicate at most an effort to negotiate an agreement on the terms upon which a commission would be paid. The documents do not constitute a signed, written memorandum setting forth the essential terms of an agreement as required for strict compliance with the Occupations Code.

Defterios v. Dallas Bayou Bend, Ltd., 350 S.W.3d 659 (Tex.App.-Dallas 2011, pet. pending). The Developer received a call from Defterios, a broker, stating that his client, Flaven, was interested in purchasing the Developer's portfolio of properties. Defterios told the Developer that Flaven was the beneficiary of a multimillion dollar trust fund and wanted to use those trust funds to purchase the properties. Flaven eventually signed contracts to buy nine of the properties. The contracts initially called for an August 2004 closing, but the closings were rescheduled a number of times. Defterios told the Developer that the reason for the delays was that the trust fund was not releasing the funds.

On many occasions, Defterios told Nussbaum that Defterios had verified the existence of the funds and that the closings were imminent. Over a year after the contracts were signed, however, the deals still had not closed. At that time, Nussbaum came to believe that Flaven did not have the financial resources to close on the properties and that all of appellants' representations

about Flaven and the trust fund had been false. As it turned out, Flaven was a Massachusetts truck driver and was not the beneficiary of a multimillion dollar trust fund; he never closed on the contracts. Some of the properties were deeded to the lender banks in lieu of foreclosure and others were sold for a loss. Many of the individual investors in the properties lost all the savings they had invested in the properties. The jury found no direct benefit-of-the-bargain damages, but awarded over $12 million in consequential damages to appellees for fraud and negligent misrepresentation.

On appeal, Defterios did not challenge the finding of liability, but argued that the evidence did not support the damages and the types of damages awarded.

Consequential damages are those damages that result naturally, but not necessarily, from the defendant's wrongful conduct. Consequential damages must be foreseeable and directly traceable to the defendant's wrongful act and result from it. In other words, the consequential damages must be proximately caused by the wrongful conduct. The elements of proximate cause are cause-in-fact and foreseeability. Proximate cause is for the jury to determine. Defterios claimed there was no evidence that the misrepresentations about Flaven and the trust fund were a cause-in-fact of the Developer's damages. Cause-in-fact means that a defendant's act was a substantial factor in bringing about the injury which would not have occurred otherwise. The defendant's act does not have to be the sole cause. The inquiry is whether reasonable minds could draw an inference that the defendant's wrongful conduct caused the plaintiff's damages.

The court reviewed the evidence and held that the jury could have reasonably found that appellants' misrepresentations were a cause-in-fact of appellees' damages. The evidence showed that appellees did not cancel the contracts with Flaven because appellants continually represented that the trust funds had been verified and that Flaven was going to purchase the properties. The evidence showed that if Defterios had not represented that he had verified the existence of the trust funds and that the closings were imminent, Nussbaum would not have extended the closing date and would have put the properties back on the market on September 9, 2004. The evidence also showed that the Developer deferred maintenance on the properties because of the contracts with Flaven. By the time the Developer realized that Flaven would not purchase the properties, the market had declined and the properties needed repairs. The Developer had to take the properties off the market and make the repairs before he could place the properties back on the market. Additionally, the evidence showed that the properties had to be taken off the market because they were "shop worn" and prospective buyers had lost interest in them. The jury could have reasonably found from the evidence that the broker's representations caused the Developer to incur expenditures for capital improvements, operating losses, and a loss in market value that they would not otherwise have incurred if the properties had closed according to the contracts.

Defterios also argued that they could not foresee that his misrepresentations could cause the Developer to incur capital expenditures, operating losses, or decline in values of the properties. Foreseeability requires that a person of ordinary intelligence should have anticipated the danger created by a negligent act or omission. Defterios contends that the evidence shows that no one can foresee what a market will do long-term. They cite the Developer's testimony in which he acknowledged that markets are cyclical; they go up and down always. Defterios argues that to hold him liable for all the damages from a downturn in the market, capital expenditures, and operating losses makes them an insurer of the Developer's entire investment.

Again, having reviewed the evidence and the parties' respective arguments, the court concluded that the jury could have reasonably found that the types of damages incurred bythe Developer were foreseeable to appellants. The evidence showed that Defterios was a real estate broker and, as such, was familiar with the market. The jury could have reasonably inferred that a person in Defterios's position could have contemplated that the types of losses awarded here would be incurred if his representations were false.

Texas Real Estate Commission v. Bucurenciu, 352 S.W.3d 828 (Tex.App.-San Antonio 2011, no pet.). The Texas Real Estate Recovery Trust Account is administered by TREC. Bucurenciu engaged McKinley, a real estate salesman and mortgage broker, to facilitate a lending transaction. The transaction went badly, so she sued the McKinley for fraud and obtained a judgment. She was unable to execute on the judgment, so she brought a claim against the RERTA fund.

TREC argued that RERTA is not available in this case which concerns a mortgage transaction and not a real estate transaction. The issue, thus, is whether McKinley was acting in the capacity of a real estate salesman or a mortgage broker. According the Occupations Code, a "salesperson" is a person who takes certain actions in relation to real estate. Bucurenciu contends the underlying transaction had everything to do with real estate because McKinley put together a relationship under which Bucurenciu provided funds for what she believed was the purchase of real estate and improvements. According to Bucurenciu, from the borrowers' standpoint, McKinley enabled the borrowers to obtain the purchase money for real estate. Bucurenciu also argues that had

McKinley been selling, exchanging, purchasing, or leasing existing mortgages to investors in a secondary market, that conduct would be excluded from the scope of the definition of real estate.

The court would not go that far. The Occupations Code defines "real estate" to mean any interest in real property, including a leasehold, located in or outside this state. The term does not include an interest given as security for the performance of an obligation.

PART XII CONSTRUCTION AND MECHANICS' LIENS

Ashford Partners, Ltd. v. ECO Resources, Inc., No. 10-0615 (Tex. April 20, 2012). ECO signed a lease with TASL for construction of an office building and laboratory. While the building was being constructed, TASL agreed to sell the property to Ashford. The earnest money contract provided that the ECO lease would be assigned to Ashford within 30 days after it commenced. ECO's lease was to begin when the building was substantially complete and a certificate of occupancy issued. The lease defined "substantially completed" to mean that such improvements have been substantially completed in accordance with the Plans, subject only to completion of minor punch list items.

ECO accepted the building as substantially complete, submitting an eight-page punch list of items in need of repair to TASL. About this same time, ECO received formal notice of the property's pending sale in a document entitled "Notice of Assignment of Lease and Estoppel Certificate." ECO promptly executed the estoppel certificate, as its lease required, and returned it a mere twelve days after submitting its punch list to TASL. Two weeks later, Ashford became ECO's landlord. Four days after that, the deadline for completing ECO's punch list expired. At least one repair on the punch list, a requirement for caulking between the tilt wall panels under grade, had not been performed.

Two years passed, and ECO began to have problems with the building. Ashford hired engineers to investigate, and they determined that water had collected under the foundation. The cause for this was traced to the failure to caulk between the tilt wall panels below grade, the omitted repair on ECO's punch list. Ashford spent over $313,000 to make repairs and correct the problem and then sued the construction contractor that TASL had used on the project.

ECO claimed that Ashford had breached the lease and, as its measure of damages, based its claim on the difference between the rent required under the lease and the rental value of the premises in its actual condition. The jury found the diminished value of the lease to be over a million dollars.

Ashford appealed, and the court of appeals agreed with the trial court was correct in using the diminished value of the premises as the correct measure of damages. Ashford argues that ECO's damages should be measured as in other cases involving construction deficiencies, since it has been held to have breached a construction-related duty. A contractor who has substantially performed its contract, but whose performance is deficient in some respect, is generally responsible for the cost of repair. Similarly, Ashford argues that the appropriate damages measure for a substantially-completed building under a build-to-suit lease is the cost to cure a remedial defect.

Recognizing that discrepancies inevitably arise during construction, the doctrine of substantial completion generally controls the measure of damages for failure to make repairs or complete construction. Substantial completion has been described as the "legal equivalent of full compliance less any offsets for remediable defects. Once a construction project has been substantially completed, the damages for errors or defects in construction "is the cost of completing the job or of remedying those defects that are remediable" without impairing the building as a whole. On the other hand, a difference-in-value measure of damages may apply when the contractor has failed to substantially comply with the contract or when repairs will impair the structure or materially damage it. Substantial completion, however, implies that the parties have been given the object of their contract and that any omissions or deviations can be remedied.

Under the lease, it was substantial completion that triggered ECO's obligation to submit its punch list of remediable defects. Substantial completion likewise entitled ECO to obtain a certificate of occupancy and commence the lease's 25-year term. The court of appeals concluded that Ashford's liability rested "exclusively" on its failure to complete a single punch list item on a substantially completed building and that the diminished value of the leasehold was the appropriate measure of ECO's damages. The Supreme Court concluded, however, that cost of repair is the appropriate measure of damages to remedy an omitted item on a substantially-completed building. Because Ashford made these repairs at no cost to ECO, it further held that ECO has suffered no damages under the appropriate measure.

Gray v. Entis Mechanical Services, 343 S.W.3d 527 (Tex.App.-Houston [14th Dist.] 2011, no pet.). Gray was a subcontractor for Entis on the Tomball Property and four other properties. When he wasn't paid, he had his lawyer send a notice of intent to file a mechanic's lien on the Tomball property as well as the other properties. When he still wasn't paid, he filed a lien affidavit and sent a notice to Entis. He filed suit to collect.

Entis mailed a check for less than the amount owed, with a "paid in full" notation. Gray did not cash

the check and refused to release his lien. So Entis filed its own lawsuit against Gray, alleging that Gray had violated Civil Practice & Remedies Code § 12.002 by filing a fraudulent lien. Entis moved for summary judgment and the trial court awarded it $10,000 plus attorneys' fees and entered an order discharging Gray's lien.

Entis, as the party asserting that appellant's lien was fraudulent, had the burden to prove the requisite elements of the statute. In order to establish a fraudulent-lien in this case, Entis's summary judgment evidence had to conclusively prove as a matter of law that Gray (1) made, presented, or used a document with knowledge that it was a fraudulent lien; (2) intended the document be given legal effect; and (3) intended to cause Entis financial injury. The court focused only on the third element, i.e., the intent to cause financial injury.

Entis's argument for Gray's intent to cause it financial injury was based on extrapolating that intent from the fact that Gray had filed lien affidavits on several properties and refusing to release them, making it appear that Entis did not pay its contractors or suppliers. (Oddly, the wording of Entis's affidavit was that "None of these liens have not been released." The court declined to address what, if any effect the use of a double negative might have had on this case.) Entis contended that this evidence established Gray's intent. The court disagreed.

First, the court could not see how liens filed on other properties had any relevance to the dispute in this case. Second, the court could not see how Gray's refusal to accept a "paid in full" check for a disputed amount established intent to cause financial harm as a matter of law. At most, the evidence creates a genuine issue of material fact for a jury to consider.

The concurring opinion pointed out reasons why the court should have considered the effect of the double negative in the affidavit.

Morrell Masonry Supply, Inc. v. Loeb, 349 S.W.3d 664 (Tex.App.-Houston [14th Dist.] 2011, no pet.). Morrell supplied stucco materials for a subcontractor working on a construction contract to build the Loeb's new home. The subcontractor never paid for the materials, so Morrell sent the Loebs and the general contractor, Cellar Door, notice of its claim against the stucco subcontractor via certified mail. The notice further informed the Loebs that, as owners of the property, they may be held personally liable for the debt and a lien may be attached to their property. The notice included copies of unpaid invoices ranging from August 21 to November 10, 2007. The Loebs signed for the notice of the unpaid balance on January 15, 2008. After receiving the notice, the Loebs authorized the release of the remaining $54,514 balance of their construction funds to Cellar Door. On February 11, 2008, Morrell attempted to file a lien on the Loebs' homestead, and on March 12, 2008, Morrell sued the Loebs and Cellar Door, seeking foreclosure on its materialman's lien. Morrell also sought quantum-meruit damages as well as damages for misapplication of construction-trust funds under Chapter 162 of the Texas Property Code, and further requested an award of statutory interest on the unpaid balance.

After a bench trial for which Cellar Door never appeared, the trial court concluded Morrell should take nothing and awarded the Loebs attorney's fees. The trial judge filed findings of fact and conclusions of law reflecting the court's conclusion that Morrell did not give the Loebs timely notice of its lien claim or its claim to retainage funds the Loebs were statutorily required to withhold. The trial court further concluded Morrell never perfected a valid lien on the Loebs' homestead and that its lien claim was null and void because it failed to satisfy requirements outlined by the Property Code.

The $8,476.74 unpaid balance Morrell claims it is owed is reflected through a series of thirteen invoices beginning on August 21, 2007, and ending on November 10, 2007. The trial court found Morrell failed to give the Loebs timely notice of the unpaid balance documented by the individual invoices except for the last invoice, which is dated November 10, 2007, and reflects a balance of $326.60. Morrell gave the Loebs notice of its lien claim via certified mail in a letter dated January 9, 2008, with the "green card" reflecting the Loebs received the notice on January 15, 2008. The first twelve invoices are dated in the months of August, September, and October of 2007. Accordingly, the notice deadline was October 15, 2007 for the August invoices; November 15, 2007 for the September invoices; and December 15, 2007 for the October invoices. The court held that the trial court did not err in calculating the statutory deadlines for notice of a lien claim under Property Code § 53.252(a).

Additionally, the trial found the pre-lien claim notice insufficient because it did not include the complete statutory notice required by section 53.254(g) of the Property Code. The trial court found the pre-lien claim notice filed in this case failed to include the complete notice required by statute, and Morrell concedes on appeal that its notice omitted the statement's last sentence: "In addition, except for the required 10 percent retainage, you are not liable to a subcontractor or supplier for any amount paid to your contractor before you received written notice of the claim." Based on this finding, the trial court concluded Morrell's lien claim is null and void."

Morrell does not argue the trial court incorrectly calculated the statutory deadline to give notice of a lien claim. Rather, it argues that stipulations offered at trial establish that Property Code §§ 53.081-085, commonly referred to as the "fund-trapping statute," required the

Loebs to hold back enough money to pay the unpaid balance before exhausting their construction funds in payments to the original contractor. Morrell seemingly argues that the January 9, 2008 pre-lien claim notice triggered the fund-trapping statute even if it was insufficient to fulfill the statutory requirements for filing a valid lien. Morrell also notes that $54,514 in construction funds was available for disbursement. The Loebs later paid those funds in full to the original contractor, Morrell argues, despite having knowledge of Morrell's claim.

Morrell's argument is flawed because it ignores the notice requirement imposed by the fund-trapping statute. Property Code § 53.081 requires that the property owner must receive notice of a claim before he is authorized to withhold funds from the original contractor, and the requirements for this notice to be effective are intertwined with the requirements for effective notice of a pre-lien claim notice. A property owner is authorized to withhold from the original contractor an amount necessary to pay the derivative claimant if the owner receives notice under one of five provisions of the Texas Property Code, one of which is § 53.252, the notice requirement applicable in this case.

Morrell argued that the failure of a subcontractor to perfect its lien does not release the authorization to withhold which the fund-trapping notice gives to the owner, nor does such failure release the owner's obligation to pay the subcontractor's claim upon an undisputed demand. But the case cited by Morrell did not support that argument. There is no authority for holding that a claimant can fail to serve a property owner with timely notice yet still reap the full benefit of the fund-trapping statute simply because the property owner acknowledges receiving notice at some later time. To so hold would be to write the deadline for timely notice out of section 53.081 of the Property Code.

While conceding it omitted part of the required statutory statement from its pre-lien claim notice, Morrell argues it nonetheless substantially complied with § 53.254(g). Morrell argues that the court should apply a liberal construction to the fund-trapping statute to protect laborers and materialmen, urging that the legislature did not intend that the materialman should lose his lien through the technicalities of a warning, where the owner was not misled to his prejudice. But Morrell makes no effort explain why a complete reproduction of the statutory statement required by § 53.254(g) is merely a technical requirement. Section 53.254(g) says the notice must include the statement. The statement is an explanation to the property owner of the possibility that a lien may be filed on his property and his potential liability to the derivative claimant. Without any additional argument from Morrell, we decline to hold it is a mere technical requirement that may be excused by substantial compliance.

Morrell then argued the trial court erred in concluding Morrell never gave timely notice nor perfected a claim to the statutory ten-percent retainage fund the Loebs were required to maintain. The court noted that a claimant has a lien on retained funds only if it sends the notices required by this chapter in the time and manner required. The court had already held that Morrell had failed to do so, so Morrell's failure to comply with the notice requirements also defeated its claim to the retainage.

Finally, Morrell argued that that trial court erred in holding that the Morrell's lien claim against the Loebs' property was null and void. The trial court properly concluded the lien claim was null and void. An additional basis for the trial court's conclusion is that Morrell's lien affidavit did not contain the following language, which § 53.254(f) requires for lien affidavits filed on homesteads: "THIS IS NOT A LIEN. THIS IS ONLY AN AFFIDAVIT CLAIMING A LIEN." Accordingly, both Morrell's pre-lien claim notice and its lien affidavit failed to comply with statutory requirements. The trial court did not err in concluding Morrell's lien claim on the Loebs' property is null and void.

PART XIII
CONDEMNATION

In re *State of Texas*, 54 Tex.Sup.Ct.J. 1754 (Tex. 2011). After the State sought to condemn a tract of land, the owners subdivided the property into eight separate parcels. After the subdivision, the State added the owners as parties claiming an interest in the Acquisition, but the State nonetheless continued to proceed against the Acquisition as a single plot of land. The State's appraisal expert testified at the hearing that because of the lack of significant retail and commercial development in the area, the property should be appraised as a single unit and that its best and highest use was to hold the frontage for future commercial use. On this basis, the State appraised the land at $0.65 per square foot and valued the whole property, including the drainage easement, at $1,155,693.

The property owners' appraiser, however, appraised each of the eight subdivided tracts separately. He determined that the best and highest use of each of the tracts was as highway frontage commercial property. On this basis, he recommended total compensation of $4,145,000.

The special commission split the baby in half and awarded $2,487.991, apportioning it among the eight tracts. The property owners and the State both objected to the award and the case was transferred to the County Court.

The County Court then severed the case into eight different proceedings. The State contends that the

severance was improper, and it sought a writ of mandamus requiring the trial court to vacate the order.

Courts permit severance principally to avoid prejudice, do justice, and increase convenience. The court has previously numerated several requirements for proper severance: (1) the controversy must involve multiple causes of action, (2) the severed claim would be the proper subject of a lawsuit if independently asserted, and (3) the severed claim must not be so interwoven with the remaining action that they involve the same facts and issues.

Assuming the validity of the conveyances, the court focused particularly on the issue of interrelatedness. The owners have sought to have one trial separated into eight, but in each case, the legal and factual issues would be much the same. The legal issues raised in the eight trials would be essentially identical, and, because the land was all originally part of a single plot, the factual valuation testimony would likely be very similar, even if the value of the different parcels varied somewhat. Both the owners and the State would thus pay the same lawyers to argue, and same experts to testify, in eight separate cases, an issue that could be tried once. Such duplication is inconvenient, and, worse, prejudicial to the State, which has a right to offer evidence that the entire property being taken should be valued as a single economic unit.

Because of this, and because of the waste involved in having valuation experts give testimony eight times that they could give once, the court held that the trial court abused its discretion by ordering a severance that, by breaking up a deeply interrelated set of legal and factual issues, prejudices the parties and causes great inconvenience.

PART XIV
LAND USE PLANNING, ZONING, AND RESTRICTIONS

Lesley v. Veterans Land Board, 352 S.W.3d 479, 54 Tex.Sup.Ct.J. 1705 (Tex. 2011). The right to lease minerals — the executive right — is one "stick" in the bundle of five real property rights that comprise a mineral estate. The Supreme Court held long ago that the executive owes other owners of the mineral interest a duty of "utmost fair dealing," has seldom had occasion to elaborate. In this case, a land developer, who also owned part of the mineral estate and all of the executive right, imposed restrictive covenants on a subdivision, limiting oil and gas development in order to protect lot owners from intrusive exploratory, drilling, and production activities. The non-participating mineral interest owners complain that the developer, as the executive, breached its duty to them. The court of appeals held that the developer, never having undertaken to lease the minerals, had not exercised the executive right and therefore owed no duty to the other mineral interest owners. The court disagreed.

The Developer owned 4.100 acres southwest of Fort Worth. Lesley and others had conveyed the land to the Developer, retaining part of the minerals. The developer acquired the "full, complete and sole right to execute oil, gas and mineral leases covering all the oil, gas and other minerals in the following described land."

The Developer recorded restrictive covenants which, among other things, prohibited commercial oil drilling, development, refining, quarrying, or mining. The lots were sold to over 1,700 different owners, and in each case, the Developer conveyed the minerals, subject to the restrictive covenants and the previously reserved mineral interests. The deeds to the owners did not mention executive rights.

As the land was being developed, so was the Barnett Shale, which underlay a part of the subdivision. It was estimated that the subdivision sits on top of $610 million worth of minerals that cannot be reached outside the subdivision.

Lesley sued the Developer and the lot owners, one of which is the Veterans Land Board. The trial court held that the Developer had not conveyed the executive right and remained the exclusive owner of the executive right. The trial court also held that the Developer had breached its duty Lesley by imposing restrictive covenants limiting oil and gas development and by failing to lease the minerals. The trial court also held that the Developer also breached a requirement in the Lesley deeds by failing to give notice of its filing of the restrictive covenants. For these reasons, the trial court held that the restrictive covenants are unenforceable. The court of appeals reversed the trial courts holdings. It held that, because the Developer did not expressly reserve the executive right, it passed to the individual lot owners. It also held that the owner of an executive right owes a mineral interest owner no duty until the right is exercised by leasing the minerals, and then its duty is only to acquire for the mineral interest owner every benefit it acquires for itself. An executive has no duty to lease minerals. Because the Developer never exercised the executive right, it had no duty to Lesley. The Developer was not bound by the notice requirement in the Lesley deeds because the Developer was not in privity with Lesley and the requirement did not run with the land. The Supreme Court disagreed.

Everyone agreed that the Developer owned the executive right to all of the 4,100 acre mineral estate when it implemented the restrictive covenants. The dispute is whether the deeds to the individual owners included the executive right. As noted, the deeds themselves did not mention the executive right. The Supreme Court has earlier held that, when a mineral interest is conveyed, the executive right incident to that

interest passes to the grantee unless specifically reserved. That would mean that the individual deeds to lot owners conveyed the executive right. However, Lesley argued that the exception in each deed for the restrictive covenant limiting development of the minerals effectively reserved the executive right to the Developer because the covenant prohibited the lot owners from developing the minerals, and thus from leasing them. The court noted that this overlooks the provisions of the restrictions that allow the owners to modify the restrictions. The exception did not withdraw the executive right from the conveyances in the lot owners' deeds but merely subjected the exercise of the right to the covenant's limitations. Thus restricted, the right was conveyed by each lot owner's deed.

The court then turned to the principal issue in the case, i.e., the nature of the duty that the owner of the executive right owes the non-executive interest owner and whether that duty has been breached.

"The executive right is the right to make decisions affecting the exploration and development of the mineral estate", but it is "most commonly exercised . . . by executing oil and gas leases." Executive rights are frequently severed from other incidents of mineral ownership, as they were from the mineral interests reserved to Hedrick and Leslie. The non-executive mineral interest owner owns the minerals in place but does not have the right to lease them. The non-executive royalty interest owner owns an interest in the royalty when the executive leases the minerals. Non-executive interests may be perpetual or only for a term. They are created for many different reasons, among them the simple convenience of reserving the power to make leasing decisions in one person. And because executive and non-executive interests are real rather than personal, they survive the parties who created them and persist long after circumstances have changed. The executive right was conveyed decades before anyone contemplated developing a residential subdivision on the property or producing natural gas from the Barnett Shale beneath it.

For most mineral interest owners, revenue comes through leasing. If the exclusive right to lease the minerals could be exercised arbitrarily or to the non-executive's detriment, the executive power could destroy all value in the non-executive interest, appropriating its benefits for himself or others. The law has never left non-executive interest owners wholly at the mercy of the executive. But the variety of non-executive interests and the reasons for their creation, and the effects of changing circumstances, make it difficult to determine precisely what duty the executive owes the non-executive interest. The Supreme Court has held that the owner of the executive right has a duty of "utmost fair dealing."

The executive's duty of utmost fair dealing is fiduciary in nature, so that the discovery rule is invoked in determining when a claim against the executive accrues. The Developer and owners in this case were arguing that the Supreme Court's earlier decisions meant that the executive owner could not breach his duty until the executive power is actually exercised; the Lesley claimants argued that those cases held that the executive could be liable for failure to lease, even if not requested to do so. The court took a middle ground.

It may be that an executive cannot be liable to the non-executive for failing to lease minerals when never requested to do so, but an executive's refusal to lease must be examined more carefully. If the refusal is arbitrary or motivated by self-interest to the non-executive's detriment, the executive may have breached his duty. But the court said it need not decide here whether as a general rule an executive is liable to a nonexecutive for refusing to lease minerals, if indeed a general rule can be stated, given the widely differing circumstances in which the issue arises. The Developer here did not simply refuse to lease the minerals in the 4,100 acres; it exercised its executive right to limit future leasing by imposing restrictive covenants on the subdivision. This was, said the court, an exercise of the executive right, and the court held that the Developer had breached its duty.

The remedy, said the court, was cancellation of the restrictive covenants. It recognized that the Developer, as a land developer, acquired the executive right for the specific purpose of protecting the subdivision from intrusive and potentially disruptive activities related to developing the minerals. But the common law provides appropriate protection to the surface owner through the accommodation doctrine.

City of Dallas v. Billingsley Family Ltd., 358 S.W.3d 457 (Tex.App.—Dallas 2012, no pet.). Billingsley owns an apartment complex on Gaston Avenue in Dallas. The CO issued to Billingsley is for use as a multifamily dwelling. The rooms were rented as "roommate" rentals and advertised as "rooms for rent." The original living rooms in the apartments were walled and doored, making each apartment either a two- or three-unit rental. Each bedroom shared the kitchen and bathroom. Each bedroom was labeled with a letter A, B, or C and had a deadbolt lock on the door. The current tenants all entered into apartment leases and agreed to pay the monthly apartment rate. The lease provides that it may be subject to a separate roommate agreement.

The City claimed that Billingsley was operating the complex as a residential hotel in violation of the city code. The city code defines a residential hotel as a facility that receives more than 50 percent of its rental income from occupancies of 30 consecutive days and

contains six or more guest rooms with living and sleeping accommodations, each of which is individually secured and rented separately to one or more individuals who have access to bathroom, kitchen, or dining facilities outside the guest room on a common basis with other occupants of the structure. Dallas Ordinance No. 23069, § 8(a)(1)(C).

Among the elements the City has to establish conclusively or by a great weight and preponderance of the evidence to prevail on appeal is the requirement that the complex contain six or more guest rooms that were rented separately to one or more individuals. The evidence before the trial court on this issue included Billingsley's testimony and that of his general manager that the complex no longer rented individual bedrooms and that all tenants now signed a lease for a particular apartment unit that may be subject to a roommate agreement in which co-tenants were assigned a particular bedroom unit for their exclusive possession. Billingsley's general manager further testified that the co-tenants of each apartment unit act as a single housekeeping unit and take turns cleaning the common areas of their apartment and share various kitchen items. The apartment leases specifically obligate each tenant to pay a monthly rent for the entire apartment unless a roommate agreement is entered into with co-residents of the apartment. In the separate roommate agreements, each co-resident of a unit agrees to share the expense of the rent set forth in the lease agreement and pay a specified portion of the total apartment rental.

Reviewing the record before it under the applicable standards of review set forth above, the court said that it cannot conclude the evidence established conclusively Billingsley was separately renting six or more guestrooms at the time of trial or that the trial court's finding to the contrary was against the great weight and preponderance of the evidence.

Leake v. Campbell, 352 S.W.3d 180 (Tex.App.-Fort Worth 2011, no pet.). The Campbells and the Leakes each owned houses in their subdivision. The subdivision restrictions contained a number of provisions relating to what could be built on the property. Among other things, it provided for architectural control committee approval of plans, although the requirement was included in a pretty badly drafted provision that said: Committee's approval for [sic] disapproval as required by this covenant shall be in writing. In the event the committee or it's [sic] designated representative fails to approve or disapprove within 15 days after plans, specifications and plot plan have been submitted to it or ***in any event*** if no suit to enjoin the construction has been commenced prior to the completion thereof, approval will not be required and the restrictive covenants herein contained shall be deemed to have been fully complied with.

The Campbells built some structures that the Leakes didn't like. Among other things, the Campbells began to build an RV shelter. They approached the Leakes who told them the structure would violate restrictive covenants. The ACC didn't approve the plans, but the Campbells went ahead and completed the structure. The ACC later demanded that the Campbells remove all of the structures they had build, but the Campbells refused. The Leakes sued seeking a declaratory judgment that the structures violated the restrictions and also asking for an injunction to remove the structures.

The case revolves around the meaning of the ACC provision mentioned above, and specifically around the effect of the "in any event" clause. The Leakes contend that the deemed approval language is effective only after plans and specifications have been submitted to the ACC in writing by a homeowner. Thus, under the Leakes' interpretation, the "in any event" language does not apply to situations in which the homeowner fails to seek approval before beginning and completing construction. The Campbells argue that the phrase allows for deemed approval of violations in any situation other than those in which the ACC has given its approval or has failed to disapprove of plans, e.g., when the ACC disapproves but fails to enjoin construction of violating structures before their completion. According to the Campbells, it does not matter whether plans are submitted before construction because a plain reading of "in any event" suggests an acceptance of all scenarios.

The court rooted around in the restrictions and managed to skirt a decision regarding the "in any event" wording by focusing on a "no waiver" provision in the restrictions which said that the failure of property owners to enforce any of the restrictions at the time of violation is not a waiver of a right to do so thereafter.

The no-waiver language is found in the first section of the Right to Enforce section of the restrictions. The language about deemed approval is found two sections later in the Architectural Control Committee section that discusses the procedure for approval or disapproval of plans that are actually presubmitted to the ACC for review. To construe these seemingly conflicting provisions in a way that does not render the covenants meaningless compels only one conclusion: the "in any event" deemed approval language applies only when a homeowner actually submits plans to the ACC for matters which require preapproval by the ACC and the ACC fails to act within the specified time period. In other words, the no-waiver language applies generally, and the "in any event" language is a carveout that applies only if the ACC has been put on notice that a homeowner is

seeking to make alterations that require approval under the applicable restrictions.

Patel v. Wofford, 349 S.W.3d 50 (Tex.App.-El Paso 2010, no pet.). Patel bought a lot in the subdivision and intended to build a triplex on it. He obtained a waiver of protective covenants from Arnett, who, at the time, was the sole remaining member of the subdivisions ACC. The waiver was recorded. A few days later, Arnett resigned from the ACC and a new ACC was appointed. Shortly after the new appointments were made, the ACC sent a letter to Patel telling him that his plans didn't comply with the restrictions. Patel did not respond and started building. The ACC's counsel sent a cease and desist letter, but Patel refused to do so.

Patel was sued and the trial court issued a temporary injunction prohibiting him from completing the triplex. The trial court found that the waiver obtained by Patel was ineffective because Arnett had no authority to issue it.

The parties agree that the restrictive covenants are unambiguous, that at the time he executed the waiver, Arnett was the sole ACC member. The restrictions thus gave Arnett the authority to act as a representative on behalf of the entire committee. Even if the plans didn't comply with the restrictions, Arnett had authority to provide, and did provide, his written approval.

The court also reversed the trial court's holding that Arnett lacked authority because he owned less than half the lots in the subdivision. The only provision relating to the powers of the majority owners is specifically limited to changing the membership of the Architectural Control Committee by a duly recorded written instrument. Certainly, the majority owners could have acted to change the membership following the deaths of two Committee members. It failed to do so. Because the owners failed to exercise their rights under the covenants, Arnett remained the Committee's designated representative until he appointed his successors.

PART XV
AD VALOREM TAXATION

Gonzales v. Razi, 338 S.W.3d 167 (Tex.App.-Houston [1st Dist.] 2011, pet. pending). The Gonzalezes owned certain property that was foreclosed upon on May 1, 2007, due to outstanding taxes owed. The property was purchased by Razi. Razi recorded the sale in the county records on July 13, 2007.

Claiming the residence was their homestead, the Gonzalezes attempted to redeem their property. The Gonzalezes sent a letter to Razi at the address listed on the deed requesting an itemization of costs incurred by Razi. The address on the deed, however, was incorrect, and Razi never received the letter.

The Gonzalezes subsequently submitted affidavits to the county tax assessor-collector representing that they had made a diligent search for Razi in the county in which the property was located; that Razi was not believed to be a resident of the county; that they attempted to contact Razi multiple times to no avail; and that Razi, by avoiding contact with them, refused to give them a quitclaim deed to the property. They also delivered $16,757.29 to the county tax assessor-collector as the amount believed to be owed for redemption of the property. The county tax assessor-collector gave a receipt for redemption to the Gonzalezes.

One month later, Razi filed suit against the Gonzalezes seeking a declaratory judgment that the property was not their homestead and that they had not properly exercised their right to redeem the property.

Razi testified that the property was not listed as a homestead in the notice he received of the foreclosure sale. He visited the property once before the foreclosure sale and several times after the foreclosure sale. Razi never saw the Gonzalezes on the property. Razi also testified that the residence was uninhabitable at the time of his visits. The trial court held that the property was not the Gozalezes' homestead, so they appealed.

The court of appeals first had to determine who had the burden of proof as to the homestead issue. The party who brings an action for declaratory judgment is not necessarily the party that carries the burden of proof at trial. Ordinarily, the burden of proof is not imposed on the plaintiff merely because he files his petition first but because he asks for action on his behalf from the court, either preventive or in the nature of redress. The other party is usually content with the status quo. Both logic and fairness demand that the plaintiff shoulder the responsibility of convincing the court that action should be taken.

The parties' dispute concerns the application of Tax Code § 34.21 as it applied when the Gonzalezes took steps to redeem their property. The issue to be resolved is the position of the parties relative to the property when the suit was commenced. If an act of redemption under the section is presumptively effective, then the Gonzalezes held legal title to the property and Razi bore the burden of proof to obtain affirmative relief in undoing the redemption. If, instead, an act of redemption under the section is not presumptively effective, then title remained with Razi and the Gonzalezes bore the burden of proof to obtain affirmative relief in effectuating the redemption.

A reading of section 34.21 shows that an act of redemption by the original owner of the property is presumptively effective and whatever title was held at the time prior to redemption automatically reverts to the original owner. Furthermore, it has been the practice in Texas since at least 1909 to liberally

construe redemption statutes in favor of redemption. Here, the court held that, based on the language of section 34.21, an act of redemption under the section is presumptively effective. Title to the property reverted to the Gonzalezes prior to trial, and Razi, by filing his action for declaratory judgment, was seeking affirmative relief. Accordingly, Razi bore the burden of proof at trial to overcome the presumption that the redemption.

The court then turned to the determination whether the property was homestead. Under section 34.21, if the property was their residence homestead, then the Gonzalezes had two years to redeem the property from the date the purchaser's deed was filed for record. If the property was not their residence homestead, then the Gonzalezes had 180 days to redeem the property from the date the purchaser's deed was filed for record. It is undisputed that the Gonzalezes sought redemption of the property outside of the 180-day period but within the two-year period.

Razi bore the burden of proof as to the homestead issue. The Gonzalezes testified that they had owned the property since 1993. Jose Gonzalez testified that they had lived there since 1993, while Esperanza Gonzalez testified that they had a water well and septic tank installed in 1994 and they moved onto the property in 1995. The Gonzalezes both testified that they lived on the property continuously since 1993 or 1995 and that the property was their primary residence. Esperanza Gonzalez testified that their younger children attended school in the area and the address for the property was the address registered with the school.

The only other evidence concerning the status of the property as a residence homestead came from the testimony of Razi, based on his visits to the property, when he did not see the Gonzalezes in possession. That did not end the inquiry, however. Tax Code § 11.13 provides that a qualified residential structure does not lose its character as a residence homestead if the owner stops occupying the residence as a principal residence for a period of less than two years as long as the owner intends to return to the property as the principal residence and does not establish a different principal residence during the absence. Razi did not prove that the Gonzalezes hadn't lived in the house for more than two years.

Razi further argues that, because the home was uninhabitable, it was not "designed or adapted for human residence," a required element for property to qualify as a residence homestead. The court disagreed. A residential home and a mobile home are "designed for human residence." To hold otherwise would mean that any property with a residential home that suffers a natural disaster would automatically cause the owner to lose the residential homestead protections. The court would not read the statute so narrowly. Thus, the court held that Razi had failed to meet his burden of proof that the property was not homestead.

Razi then claimed that the Gonzalezes had not complied with the redemption statute. His argument was that they had failed to pay the proper amount for redemption. Razi had paid the taxes and had also removed a mobile home from the property and evicted a resident. He claimed to be entitled to receive reimbursement for the removal and eviction, but the court held that the statute does not require that. While he was entitled to be reimbursed for amounts spent to maintenance, preservation, or safekeeping of the property, the mobile home removal and eviction were not those things.

The court held that the Gonzalezes were required to pay $16, 930.01 for redemption. They actually paid $16,757.29, or 98.98% of what they were required to pay. The court held that this was substantial compliance with the redemption statute.

Houston Independent School District v. Morris, 355 S.W.3d 668 (Tex.App.—Houston [1st Dist.] 2011, pet. pending). Harris CAD listed the Taxpayers as owners of 9.38 acres that the Taxpayers actually owned and as owners of .96 acres that the Taxpayers didn't own. The Taxpayers did not timely challenge this determination administratively. The Taxing Units filed suit against the Taxpayers to collect taxes unpaid on all 10.34 acres for the years 1983 through 2003. The Taxing Units placed a lien on the properties to secure the payment of taxes, penalties, interest, and costs. The Taxpayers answered with a general denial and affirmative defenses, including that the petition failed to comply with the requirements in the Tax Code, that the Taxing Units never properly notified the Taxpayers of the delinquent taxes, that the assessment of taxes is erroneous based on the description of the property, and that designated parties to the lawsuit have no ownership interest in the properties.

While the suit was pending, the Taxpayers, under protest, paid the taxes to stop further penalties and interest from accruing, to avoid foreclosure of the 9.38 acres that they did own, and to avoid breaching a contract to sell the 9.38 acres. The Taxpayers explained that they paid under protest the entire amount because the Taxing Units would not accept payment of the taxes apportioned between the 9.38 acres that the Taxpayers did own and the .96 acres that the Taxpayers did not own. Shortly after paying the taxes, the Taxpayers filed a counterclaim for a refund of the taxes, penalties, and interest they had paid on the .96 acres. After receiving payment, the Taxing Units nonsuited their claims for delinquent taxes. At the Taxpayers' motion, the district court realigned the parties, designating them as the plaintiffs.

The Taxpayers contended they have never owned any interest in the .96 acres for which they paid taxes

under duress and they sought a refund of that amount through a declaratory judgment. The Taxing Units answered by asserting affirmative defenses of governmental immunity, failure to exhaust administrative remedies, voluntary payment, and other allegations. The Taxing Units filed a plea to the jurisdiction asserting the district court lacked jurisdiction because the Taxpayers failed to exhaust their administrative remedies as required by the Tax Code.

The Texas Constitution expressly allows the Legislature to bestow exclusive original jurisdiction on administrative bodies. Pursuant to this power, the Texas Tax Code limits the general jurisdiction of the district courts and provides detailed administrative procedures for those who would contest their property taxes. A taxpayer's failure to pursue an appraisal review board proceeding deprives the courts of jurisdiction to decide most matters relating to ad valorem taxes. The administrative procedures are exclusive and most defenses are barred if not raised therein. Tax Code § 42.09.

The parties dispute whether Tax Code § 42.09(a) applies to the Taxpayers because it uses the term "property owners, and they contend that the exhaustion requirement is inapplicable to one whom, in fact, does not own the property in question. The court disagreed, holding that a "property owner" is a person listed as the property owner on the tax rolls.

PART XVI
MISCELLANEOUS

Barth v. Bank of America, N.A., 54 Tex.Sup.Ct.J. 1771 (Tex. 2011). Barth sued "Bank of America Corporation." Bank of America, N.A. answered, asserting that it had been, in its words, "incorrectly named." At trial, the witnesses referred simply to "Bank of America", with one exception: Bank of America, N.A.'s representative testified, in response to a corporate question by Bank of America, N.A.'s counsel regarding the actual entity involved in the dispute that it was "Bank of America National Association." Bank of America Corporation was not mentioned in the evidence. During the jury charge conference after the close of the evidence, the trial court granted Barth a trial amendment to correct the misnomer, but the liability questions submitted to the jury and answered in Barth's favor all referred to Bank of America Corporation. The trial court rendered judgment against Bank of America, N.A. on the verdict. The court of appeals reversed and rendered, holding that the verdict does not support the judgment.

Bank of America, N.A. argues that this is a case of misidentification, not misnomer. The argument, contrary to Bank of America, N.A.'s own answer in the trial court, is clearly wrong.

A misnomer differs from a misidentification. Misidentification, the consequences of which are generally harsh, arises when two separate legal entities exist and a plaintiff mistakenly sues an entity with a name similar to that of the correct entity. A misnomer occurs when a party misnames itself or another party, but the correct parties are involved. Courts generally allow parties to correct a misnomer so long as it is not misleading.

Bank of America, N.A. agrees that it has not been misled. This is a clear case of misnomer.

Bank of America, N.A. also argues that the jury findings of Bank of America Corporation's liability support a judgment only against Bank of America Corporation. But there was no evidence at trial that Bank of America, Bank of America, N.A., and Bank of America Corporation were different entities, and Bank of America, N.A.'s representative testified that Bank of America, N.A. was the entity involved in the dispute. Nothing in the record suggests that the jury could possibly have been confused, and its answers must be taken to be applicable to Bank of America, N.A.