CASE LAW UPDATE

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REAL PROPERTY SECTION
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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 374 S.W.3d and Supreme Court opinions released through December 27, 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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PART I
MORTGAGES AND FORECLOSURES

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.

See also ***Preston Reserve, L.L.C.* v. *Compass Bank***, 373 S.W.3d 652 (Tex.App.-Houston [14th Dist.] 2012, no pet. history to date), which has a thorough discussion of what it takes to establish fair market value for purposes of § 51.003.

McCray* v. *Hoag, 372 S.W.3d 237 (Tex.App.-Dallas 2012, no pet. history to date). The Federal Truth in Lending Act, 15 U.S.C. § 1603(3), applies to credit transactions in which a security interest is or will be acquired in real property used or expected to be used as the principal dwelling of the consumer. A borrower has certain rescission rights under the TILA. If those rights are available, they are exercisable by notifying the creditor of the rescission "by mail, telegram or other means of written communication." 12 C.F.R. § 226.23(a)(2); 15 U.S.C. § 1635(a). Once the borrower exercises the right of rescission, the creditor has twenty calendar days after receipt of a notice of rescission to return the money or property given and take any action necessary to reflect the termination of the security interest.

In this case, the Hoags' rescission rights, if any, were exercisable under the TILA by notifying McCray, the lender, of the rescission "by mail, telegram or other means of written communication." The Hoags claim they exercised a right of rescission by directing their attorney to send certified mail letter. The summary-judgment evidence shows the unopened envelope associated with the Hoags' rescission letter was marked "RETURN TO SENDER," "UNCLAIMED," "UNABLE TO FORWARD."

McCray contends that because the Hoags sent their rescission letter by certified mail, the notice was sent by "other means of written communication" under the statute. He argues the Hoags had to show the notice was actually delivered because the clear intent of the TILA is to make sure the creditor gets notice of the intent to rescind.

The court concluded, under the plain language of the statute, that " mail" as used in 12 C.F.R. § 226.23(a)(2) is not equivalent to certified mail and that rescission notice requires actual notice. Accordingly, the Hoags failed to show they exercised any rescission remedy under the TILA because their summary-judgment evidence negates actual receipt by McCray.

The statute provides that notice of rescission is presumed given "when mailed." If sent by "other means," notice is considered given "when delivered."

In the present case, any distinction between "mail" as used in the statute and certified mail makes no difference, because the summary-judgment record shows McCray did not receive the notice sent by certified mail. It was returned marked "unclaimed." Yet a fundamental difference exists generally between mail and certified mail. Specifically, regular United States mail does not require a delivery notice or receipt; it is placed in the mail receptacle at the posted address. Certified mail, sent return receipt requested as here, is returned

to the sender if not signed for. Common sense thus dictates that regular mail is presumed delivered and certified mail enjoys no presumption unless the receipt is returned bearing an appropriate notation.

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. 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, the court was 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 case law regarding these unusual factual circumstances, after considering all the evidence, the court found 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.

Comiskey* v. *FH Partners, LLC, 373 S.W.3d 620 (Tex.App.-Houston [14th Dist.] 2012, no pet. history to date). This case discusses whether a renewal and modification agreement relating to a loan that was cross-collateralized with another loan did away with the cross-collateralization. After an extensive discussion of the evidence, the court held that it did not and that the cross-collateralization provision was still in effect. Wording to the effect that the borrower "extends said liens on said property until said indebtedness and note as so renewed, modified and extended has been fully paid" does not indicate that the parties intended to nullify the cross-collateralization clause. The wording, rather, indicates that the terms of the existing lien, which included cross-collateralization, were extended as written.

PART II
PROMISSORY NOTES, LOAN COMMITMENTS, LOAN AGREEMENTS

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

Interstate 35/Chisam Road, L.P.* v. *Moayedi, 377 S.W.3d 791 (Tex.App.-Dallas 2012, no pet. history to date). Villages borrowed a loan secured by real property in Denton County. Moayedi executed a guaranty. The guaranty included two provisions dealt with in this case. First, in paragraph 7 of the guaranty, it provided that the guaranty would not be discharged, impaired, or affected by any defense that the guarantor might have, Second, in paragraph 13 of the guaranty, it provided that the guarantor waived and relinquished "all rights and remedies of surety."

The borrower defaulted and the lender foreclosed. At the time of foreclosure, the fair market value of the property was $840,000, but the lender bid only $487,200 at the sale. The lender sued the guarantor. He answered, claiming that Property Code § 51.003 provided an offset to the deficiency. The lender argued that the waiver of "all rights and remedies" and the waiver of defenses meant that § 51.003 did not apply.

Section 51.003 provides for a determination of the fair market value of the property sold at foreclosure. Then, if the fact-finder determines the fair market value is greater than the foreclosure sale price, the person obligated on the indebtedness is entitled to offset the deficiency amount by the difference be-tween the fair market value and the sale price.

The guarantor argued that the broad, vague language of the waiver provisions of the guaranty was not a waiver of any rights, much less the § 51.003 right to offset." The guarantor reasoned paragraph seven's language purporting to waive any defense to any undertakings, liabilities, and obligations did not encompass his right to offset because the offset right is not a defense to actual payment, but a claim for proper calculation of the deficiency. He contended paragraph thirteen's language stating he waived "all rights and remedies of surety" did not encompass his section 51.003 right to offset because by its own terms it applied to sureties. He also argued that the waivers in paragraphs seven and thirteen are too broad and general to waive his specific statutory right to offset. If the general language in the guaranty at issue were construed to waive a specific statutory right, that result would frustrate the stated purpose of § 51.003. The lender argued that the broad waiver language was enforceable as to any § 51.003 rights.

The court pointed out that the Texas Constitution protects the freedom to contract, and the Texas Supreme Court has long recognized a strong public policy in favor of preserving the freedom of contract. Absent a statute or fundamental public policy precluding waiver, a party may contractually waive even constitutional or statutory rights, whether present or future. In examining an agreement to determine if it

is contrary to public policy, a court looks to whether the agreement has a tendency to injure the public good and considers the development and policies underlying any applicable statutes. Unless the agreement contravenes some positive statute or some well-established rule of law, a court should refrain from characterizing the agreement as unenforceable and void as against public policy

Section 51.003 was designed to protect borrowers and guarantors in deficiency suits brought following the non-judicial foreclosure on realty. Further, § 51.003 provides for a judicial determination of the fair market value of the property and allows an offset against the deficiency in the amount by which the fair market value exceeds the sale price. However, in passing the bill into law, the legislature did not make the offset right non-waivable.

Based on the legislature's failure to preclude waiver of the offset right, the Fifth Circuit Court of Appeals, ***in LaSalle Bank N.A.*** **v.** ***Sleutel***, 289 F.3d 837, 842 (5th Cir.2003), and the Houston First District Court of Appeals in ***Segal*** **v.** ***Emmes Capital, L.L.C.***, 155 S.W.3d 267 (Tex.App.-Houston [1st Dist.] 2004, pet. dism'd) have concluded waiver of the offset right provided in section 51.003 is not void as against public policy.

Applying the law to the facts, the court refused to agree with the guarantor that § 51.003 was not a defense but a direction on how to calculate the true deficiency. The court said it was a defense because, if given effect, it would negate the lender's deficiency claim by the § 51.003 allowed offset.

The court also rejected the guarantor's argument that the waivers were too broad and vague and that the waivers needed to specifically express that § 51.003 or the right of offset was waived. It said that ***LaSalle*** and ***Segal*** did not stand for those propositions. Reaching for the dictionary, the court examined the meaning of "any," "each," and "every" and concluded that that just about covered it. In the context of paragraph seven of the guaranty, the use of the words "any," "each," and "every" encompass not just "some" or "certain" defenses, but all possible defenses that might exist. Paragraph seven is broad, inclusive, and conveys an intent that the guaranty would not be subject to any defense other than payment. That includes section 51.003's right of offset. Giving the words used their ordinary and generally accepted meanings, and considering the entire writing, the court concluded paragraph seven waives all defenses, statutory or otherwise, other than full payment of the debt.

Finally, the court rejected the guarantor's argument that the public policy embodied in § 51.003, is to prevent lenders from recovering more than their due at the guarantor's expense. The court noted that the ***Segal*** court did point that out, but that that court ultimately held that the statute could be waived. Again, the court cited the strong public policy in favor of freedom of contract.

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 suits 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, the court believed 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, 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

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. Because the court 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. 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.

See also ***Hardy*** **v.** ***Bennefield***, 368 S.W.3d 643 (Tex.App.-Tyler 2012, no pet. history to date).

Farm & Ranch Investors, Ltd. **v.** ***Titan Operating, L.L.C.***, 369 S.W.3d 679 (Tex.App.-Fort Worth 2012, pet. pending). Caldwell's Creek, Ltd. was the owner of roughly sixty acres of land in Colleyville known as the Caldwell's Creek Addition. In 1994, Caldwell's Creek, Ltd. recorded a dedication and restrictions for the land in the deed records. One of the restrictions stated, "No oil drilling, oil development operations, oil refining, quarrying or mining operations of any kind shall be permitted upon or on any lot. All mineral rights shall belong and shall continue to belong to the limited partnership of Caldwell's Creek, LTD."

After the restrictive covenants were recorded, Caldwell's Creek, Ltd. divided the land into lots and sold the lots to individual owners. Caldwell's Creek, Ltd. executed the first of the nine deeds at issue in 1994 and the last in 1999. The warranty deeds that conveyed the property to the individual owners stated, "This conveyance is made subject to any and all easements, restrictions, and mineral reservations affecting said property that are filed for record in the office of the County Clerk of Tarrant County, Texas." The deeds did not contain a separate reservation of the mineral interest. In October 2005, Caldwell's Creek, Ltd. purported to convey all of the oil, gas, and mineral rights to Farm & Ranch by special mineral deed. Caldwell's Creek, Ltd. believed it had retained the mineral rights to the Caldwell's Creek Addition based on the recorded restrictions and the statement in the lot owners' deeds that conveyed the property subject to any recorded restrictions.

When Farm & Ranch tried to lease the minerals to Titan, it was unable to do so because Titan had decided that the individual lot owners owned the minerals. Titan leased from them and then filed suit for a declaratory judgment that it controlled the minerals through its leases with the individual owners.

Farm & Ranch argues that the deed restrictions reserved the mineral rights to Caldwell's Creek, Ltd. and that the statement in the lot owners' deeds that conveyed the property subject to any recorded restrictions means that Caldwell's Creek, Ltd. conveyed only the surface estate to the lot owners.

At the time that Caldwell's Creek, Ltd. filed the restrictions, it owned both the mineral and surface rights to the Caldwell's Creek land. An owner cannot reserve to himself an interest in property that he already owns, and the restrictions did not convey any surface or mineral estates to

another party. Thus, the trial court held that the restrictions were not a reservation of the mineral rights by Caldwell's Creek, Ltd. Farm & Ranch does not directly challenge the trial court's finding but instead argues that the restrictions and the deeds must be read as an integrated instrument of conveyance. Farm & Ranch argues that the "subject to" language in the individual deeds imports the language of the restrictions into the deed and is constructive notice of the restrictions. The court disagreed. If the lot owners had looked back to the restrictions, they would only have found an affirmative statement that Caldwell's Creek, Ltd. did indeed own the mineral rights in fee simple and were thus able to convey them to the lot owners.

Farm & Ranch argues that the phrase "shall continue to belong" serves as a clear reservation of mineral rights. This argument first neglects both that the restrictions are neither a lease nor an instrument of conveyance, and thus, cannot reserve an interest, and that an owner cannot reserve to himself an interest that he already owns. A reservation must be made at the time of the conveyance or lease. Also, the court did not believe that the phrase "shall continue to belong" can only be interpreted as a future reservation. The trial court correctly interpreted it to mean that nothing in the restrictions and reservations deprived Caldwell's Creek, Ltd. of its ownership of the mineral rights in the property. Thus, Caldwell's Creek, Ltd. continued to possess the mineral rights and was therefore able to convey them in future deeds.

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

David Powers Homes, Inc.* v. *M.L. Rendleman Company, Inc., 355 S.W.3d 327 (Tex.App.—Houston [1st Dist.] 2011, no pet.). 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 the court 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

McGehee* v. *Hagan, 367 S.W.3d 848 (Tex.App.-Houston [14th Dist.] 2012, pet. pending). Hagan and McGehee, as co-lessees, entered into a lease with the landlord, Hansen. After signing the lease, there were substantial delays in the landlord delivering the premises and a good deal of wavering by both Hagan and McGehee. When the space wasn't completed four months after it was supposed to be delivered, McGehee decided to remain in his space and asked Hansen for his security deposit back. Hagan entered into a new lease with the landlord, then sued McGehee for breach of contract. The trial court ruled in favor of Hagan and awarded damages.

Hagan pled that McGehee owed a contractual duty to him under the joint lease. The lease provided that the co-lessees were obligated to pay rent and perform obligations in favor of the landlord; however, there was nothing in the lease providing that the co-lessees owed each other any duties. Nevertheless, Hagan argues that McGehee owed contractual duties to him simply because they were co-lessees. McGehee contends co-lessees do not inherently owe each other contractual duties.

Citing cases relating to co-obligors on notes that hold that co-obligors do not owe each other any duties arising from the note, the court held that a similar reasoning should apply in the present case. Under the joint lease, McGehee didn't promise Hagan that he would refrain from repudiating the lease. Thus the court concluded that the evidence is legally insufficient to support the trial court's finding that McGehee owed a contractual duty to Hagan under the joint lease. Consequently, the trial court erred by awarding benefit-of-the-bargain damages and damages for unreleased obligations under the joint lease against McGehee.

Assuming the trial court's award of damages for unreleased lease obligations was based on a theory of equitable contribution instead of on breach of express contract, the court also held that Hagan was not entitled to such award. Under the equitable theory of contribution, when two or more co-obligors share a common obligation, a co-obligor who makes compulsory payment of more than its fair share of the common obligation may seek contribution from the other co-obligors. As part of this issue, McGehee argues that Hagan did not establish entitlement to contribution because it is undisputed Hagan has never made any rental payment to, or received any demands for payment from, Lessor under the joint lease. The general rule is that there can be no recovery of contribution until after payment by the party seeking contribution.

Breof BNK Texas, L.P.* v. *D.H. Hill Advisors, Inc., 370 S.W.3d 58 (Tex.App.-Houston [14th Dist.] 2012, no pet. history to date). In connection with the renewal of a lease, the renewal agreement provided that the landlord would construct an ADA compliant restroom and complete the installation before November 1. November 1 came and went without any work being started on the restroom. Ultimately, the contractor told the landlord that it was

impossible to build the restroom at the designated location. Ultimately the tenant, Hill, moved out. The landlord, Breof, sued and Hill countersued. The trial court awarded damages to Hill.

Breof appealed. It argued that the November 1 completion date was not a material term of the lease, so Hill was not released from its duties under the lease when Breof failed to build the restroom by that date. For timely performance to be a material term in a contract, the parties must expressly state that time is of the essence or there must be something in the nature or purpose of the contract and the circumstances surrounding it making it apparent that the parties intended that time be of the essence. Unless the contract expressly makes time of the essence, the issue is a fact question. Id. When it is clear the parties intend that time is of the essence to a contract, untimely performance is a material breach discharging the duties of the non-breaching party.

Exhibit C of the lease provides that Breof "shall use commercially reasonable efforts to cause [all the contemplated improvements, including the bathroom, repainting, and installation of new flooring] to be completed prior to November 1, 2008." However, the lease does not go further to explicitly make time of the essence. This makes the parties' intent a fact issue. The trier of fact, the trial court, had found that November 1 was a material performance date based upon the history of negotiating the renewal. Because the November 1 date was material and because Breof failed to timely perform, it was a material breach by Breof, excusing Hill's performance.

Aspenwood Apartment Corp.* v. *Coinmach, Inc., 349 S.W.3d 621 (Tex.App.-Houston [1st Dist.] 2011, pet. granted). Coinmach had a laundry lease at the apartment complex. The lender foreclosed and later sold the complex to Aspenwood. Aspenwood gave Coinmach written notice to vacate the laundry room, stating that Aspenwood believed that the foreclosure had terminated the lease. Coinmach believed otherwise, and for 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, the court 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.

Fontaine* v. *Deutsche Bank Nat. Trust Co., 372 S.W.3d 257 (Tex.App.-Dallas 2012, no pet. history to date). The Protecting Tenants from Foreclosure Act of 2009 (Pub.L. No. 111-22, § 702, 123 Stat. 1632, 1660-61; 12 U.S.C. § 5220 note.) provides two different types of protection to "bona fide tenants" of residential property after a foreclosure sale. First, "the successor in interest in such property pursuant to the foreclosure" must provide a bona fide tenant ninety days' notice before requiring the tenant to vacate. Second, if a "bona fide lease" was entered into before the notice of foreclosure, then the lease is not terminated, and the successor in interest takes the property subject to the tenant's rights under the lease to occupy the premises until the end of the remaining term of the lease. The only exception is if the successor in interest sells the property to a purchaser who will occupy the premises as his primary residence. In that situation, the successor in interest may terminate the lease on the day of the sale but must still provide the tenant ninety days' notice to vacate. If there is a bona fide tenant but there is no lease or the lease is terminable at will, then the successor in interest may take possession of the property after giving the tenant ninety days' notice to vacate.

The PTFA defines " bona fide lease or tenancy" as one where (1) the tenant is not the mortgagor or the mortgagor's spouse, parent, or child; (2) the lease was entered into in an arm's-length transaction; and (3) the rent required by the lease or tenancy is not substantially less than fair market rent for the property, or the unit's rent is reduced or subsidized due to a federal, state, or local subsidy.

The bank argues that under Texas law, the lease was terminated at the foreclosure. Thus, the bank argues, if Fontaine was a bona fide tenant under the PTFA, then the only protection provided by the Act was the right to ninety days' notice to vacate, which appellant received.

The PTFA provides that the successor in interest due to the foreclosure shall assume such interest subject to the rights of any bona fide tenant, as of the date of such notice of foreclosure. Thus, it is the tenant's rights as of the date of the foreclosure notice, not as of the date of foreclosure, that limit the interest of the successor in interest. The Bank does not dispute that as of the date of such notice of foreclosure, Fontaine's lease was in effect, so the 90-day notice provision did not apply.

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 tenants 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. denied). 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. The court having concluded that the omission of the lessor's signature was not fatal to the lease's enforceability, it held that Sibley'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, the court concluded 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. The court found 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.

Effel* v. *Rosberg, 360 S.W.3d 626 (Tex.App.-Dallas 2012, no pet.). Rosberg bought a house from Effel as part of a settlement agreement. The settlement agreement provided that Lena, the current resident of the property could continue to occupy the property for the remainder of her natural life, or until such time as she voluntarily chose to vacate. The settlement agreement provided that a lease containing those terms would be prepared before the closing of the sale of the property to Rosberg. Lena was not a party to the settlement agreement.

The property was deeded to Rosberg with no reservation of a life estate. A lease for appellant was prepared by Effel's attorney. The term of the lease was "for a term equal to the remainder of the Lessee's life, or until such time that she voluntarily vacates the premises." The lease also contained various covenants relating to payment of rent and charges for utilities as well as the use and maintenance of the grounds. The lease provided that if there was any default in the payment of rent or in the performance of any of the covenants, the lease could be terminated at the option of the lessor. The lease was signed by Rosberg as lessor and by Henry Effel as attorney-in-fact for Lena.

Three years later, Rosberg sent a letter to Effel and Lena terminating the lease. He alleged a violation of the covenants of the lease. He gave Lena ten days to vacate and eventually brought this forcible detainer action to evict her. Both the justice court and the county court ruled in Rosberg's favor. The county court held that the lease created a tenancy at will, terminable by either party at any time.

Lena's first claim was that the courts lacked jurisdiction for the forcible detainer action. She claimed that she had a life estate in the property; however, she introduced no evidence that she actually did have a life estate. In fact, everything in the record spoke of a lease, just as the actual lease document said. In addition, as noted above, there was no reservation of a life estate in the deed.

Next, Lena attacked the finding that the lease created a tenancy at will. She claimed that the lease had to be read together with the settlement agreement; however, the court noted that Lena was not a party to the settlement agreement and that the lease alone was the basis for the forcible detainer action. So the court looked only to the lease.

The lease was "for a term equal to the remainder of the Lessee's life, or until such time that she voluntarily vacates the premises." It is the long-standing rule in Texas that a lease must be for a certain period of time or it will be considered a tenancy at will. Courts that have applied this rule to leases that state they are for the term of the lessee's life have concluded that the uncertainty of the date of the lessee's death rendered the lease terminable at will by either party.

Lena argued that the current trend in court decisions is away from finding a lease such as hers to be terminable at will. The court reviewed the cases Lena came up with and found no such trend. The rule continues to be that a lease for an indefinite and uncertain length of time is an estate at will.

Furthermore, in this case, not only was the term of the lease stated to be for the uncertain length of appellant's life, but her tenancy was also "until such time that she voluntarily vacates the premises." If a lease can be terminated at the will of the lessee, it may also be terminated at the will of the lessor. Because the lease at issue was terminable at will by either party, the trial court's first conclusion of law was correct.

Lena then attacked the notice to vacate. Property Code § 24.005 requires the landlord to give at least three days notice to vacate. The notice must be delivered either in person or by mail at the premises in question. It was undisputed that Rosberg's attorney sent a written notice both by regular and certified mail, giving her 10 days' notice to vacate. Nothing in the lease required a longer notice period. Rosberg did not begin the forcible detainer action until more than two months after the notice was sent. The court held that the notice was sufficient.

Lena then argued that the notice was defective because it contained two allegedly false statements, i.e., that she had breached the lease and that she didn't have a right to cure. There is nothing in the property code that requires the landlord to give a reason for the notice to vacate or an explanation of the right to cure. In addition, because the tenancy was one at will, Rosberg could terminate at any time regardless of whether there had been a default.

Morris **v.** ***American Home Mortgage Servicing, Inc.***, 360 S.W.3d 32 (Tex.App.-Houston [1st Dist.] 2011). At the hearing, the loan servicer introduced the substitute trustee's deed, showing that Wells Fargo was the successor in interest to the original lender, and that it, through its servicing agent, had purchased the property at the foreclosure sale. Evidence presented in the county court also established that the original deed of trust contained language establishing a landlord-tenant relationship between the borrower and the purchaser. The servicer also introduced the notice to vacate, which named it as the successor in interest, as a servicing agent, to the original lender. Because the evidence in the county court showed that the servicer was the service agent for Wells Fargo, and there was a landlord tenant-relationship between the borrower and Wells Fargo, the county court could determine possession without quieting title. Accordingly, the court held that the justice and county courts were not deprived of subject-matter jurisdiction.

Royalco Oil & Gas Corporation **v.** ***Stockhome Trading Corporation***, 361 S.W.3d 725 (Tex.App.-Fort Worth 2012, no pet.). The Lease in this case was a salt water disposal agreement. The Lease itself states that it "shall in no way affect ownership" of the oil, gas, or minerals in, on, or under the lease premises. The Lease is for the sole purpose of allowing Lessee to conduct activities relating to the disposal and treatment of water produced from oil and gas wells, but it does not include recovery of any minerals, or indeed the recovery of any natural resource. Because this Lease was not a lease for the production of minerals, the trial court correctly applied the law relating to leases generally, not the law governing oil and gas leases.

PART VII
VENDOR AND PURCHASER

Miller **v.** ***LandAmerica Lawyers Title of El Paso***, 362 S.W.3d 842 (Tex.App.-El Paso 2012, no pet.). The Millers bought some land to build a house. Lawyers Title closed the transaction and issued an owner's title insurance policy. Lawyers also provided the Millers a survey, which had been prepared at the request of the Millers' builder. The survey was inaccurate – it showed a single 15-foot easement at the rear of the property, when there were actually a 10-foot utility easement, and an adjacent 20-foot drainage easement, totaling 30 feet of easements at the back of the property. The survey stated that it was done without benefit of title work.

Lawyers issued a commitment with exceptions from coverage for matters set forth on the recorded plat, including setback lines, utility easements, etc., including the 10 and 20-foot easements along the rear of the property. The owner's policy contained this exception as well.

The Millers built their house and added a pool, deck and spa on the property, relying on the survey. Sometime later, the MUD sent the Millers a notice that their pool encroached on the 20-foot drainage easement and demanded that it be removed. Various lawsuits ensued, including this one by the Millers against Lawyers Title for negligent misrepresentation and deceptive trade practices. The trial court found for Lawyers Title and granted summary judgment against the Millers on the negligent misrepresentation and DTPA claims.

The elements of a cause of action for negligent misrepresentation are: (i) the defendant made a representation to the plaintiff in the course of the defendant's business or in a transaction in which the defendant had an interest; (ii) the defendant supplied false information for the guidance of others; (iii) defendant did not exercise reasonable care or competence in obtaining or communicating the information; (iv) the plaintiff justifiably relied on the representation; and (v) the defendant's negligent misrepresentation proximately caused the plaintiff's injury.

The tort of negligent misrepresentation frequently involves a defendant's statement that a contract exists, upon which plaintiff relies, only to later discover that the contract has been rejected or was never completed. Thus, negligent misrepresentation is a cause of action recognized in lieu of breach of contract and is not usually available where a contract was actually in force between the parties. A valid contract of title insurance does exist between the Millers and Lawyers Title, and thus its application in lieu of a breach of contract claim is questionable for that reason. However, the court declined to reach this issue because the evidence conclusively established the lack of any misrepresentation by Lawyers Title regarding the survey or its depiction of the relevant easements.

Simply put, it is the Millers' position that the title company affirmatively misrepresented the extent and location of easements by delivering the incorrect survey to them during closing. They claim that the survey itself was the misrepresentation. They acknowledge that generally a title company does not have a duty to discover or disclose information, but argue that by providing the survey to the Millers at closing, Lawyers Title assumed responsibility for its contents.

This argument fails. First, it does not account for the fact that Lawyers Title correctly described the easement in its own title commitment and insurance policy. The Millers urge that the contradictory easement descriptions do not establish the lack of misrepresentation, but rather serve to show that Lawyers Title did not use reasonable care in obtaining or communicating the survey information to the Millers. The court disagreed. If anyone did not show reasonable care when faced with contradictory information on the easements, it had to be the Millers. Indeed, Mr. Miller testified that he had never read the exceptions contained in the commitment and title policy, although there is no doubt he received them. The title company made two, and only two representations regarding the easements at the rear of the Millers' property. Those representations were consistent with each other and they were correct, describing "a drainage easement twenty feet in width along the rear and a utility easement ten feet in width along the rear of subject property." Although the property closing did include a review of all title documents, lien documents, and the survey, the summary judgment evidence conclusively established that the title company did not order the survey,

participate in preparing the survey, or otherwise vouch for its accuracy. Merely giving buyers a copy of a survey does not rise to the level of an affirmative misrepresentation, particularly where that survey is contracted by the representations actually made by Lawyers Title. Thus, an essential element of the negligent misrepresentation cause of action fails as a matter of law. The Millers' first issue on appeal is overruled.

The Millers also failed on their DPTA claims. Here, the only act or practice which could support the DTPA action is the delivery of the faulty survey. As discussed above, however, Lawyers Title did not prepare, request, incorporate or vouch for the survey, nor is there any evidence that it did anything to give that impression to the Millers. It simply gave the Millers a copy of the survey, prepared by the surveyor, at the request of Bella Vista Homes, as part of the closing process. Moreover, Lawyers Title's undertakings twice set out the correct information about the easements, which contradicted those of the survey. There was simply no misrepresentation upon which a DTPA action can be based.

Morton* v. *Nguyen, 369 S.W.3d 659 (Tex.App.-Houston [14th Dist.] 2012, pet. pending). Morton sold the Nguyens a house under a contract for deed. After a few years, the Nguyens notified Morton that they were exercising their right to rescind the contract. They stopped making payments. Morton ordered them out of the house. He also started harassing the Nguyens with profane emails demanding payment, placing unauthorized queries on their credit reports, and putting notices of the dispute in the Nguyens' neighbors mailboxes. Morton sued, and the Nguyens counterclaimed seeking rescission of the contract and damages for violation of Property Code §§ 5.069, 5.070, 5.072, and 5.085. The trial court awarded the Nguyens well over $200,000 in damages.

Morton appealed, claiming, among other things, that the trial court should have concluded that he had complied with the Property Code based on a good faith standard. Morton argued that the good-faith standard for compliance articulated in ***Flores* v. *Millennium Interests, Ltd.***, 185 S.W.3d 427 (Tex.2005). The Texas Supreme Court in Flores answered a number of questions regarding this section, including the question of whether a timely (under section 5.077(a)) but incomplete (under section 5.077(b)) annual accounting statement triggers the liquidated damages penalty. The Supreme Court held that a timely but incomplete statement does not, strictly speaking, trigger an award of liquidated damages under the statute, and that such a statement does not fail to comply with section 5.077(a) unless it is "so deficient as to be something other than a good faith attempt by the seller to inform the purchaser of the current status of their contractual relationship." Flores requires only a good faith attempt by the seller to inform the purchaser of the current status of their contractual relationship, not a good-faith attempt to comply with the statute.

The court of appeals held that the good-faith standard in Flores was applicable and reversed the trial court's award of liquidated damages.

Netco* v. *Montemayor, 352 S.W.3d 733 (Tex.App.-Houston [1st 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.

Sewing* v. *Bowman, 371 S.W.3d 321 (Tex.App.-Houston [1st Dist.] 2012, pet. pending). Bowman sued Sewing, seeking redemption of a partnership interest and damages for breach of contract, unjust enrichment, and breach of fiduciary duty. Bowman and Sewing entered into a partnership for the purpose of acquiring and rehabilitating real property. They were to each own half of the properties. Bowman contributed money and it was put into the Sewings' checking account.

Sewing argued that Bowman's partnership claim was "wholly derivative" of an agreement for the transfer in the

interest of land and, thus, whether or not the partnership agreement technically included a transfer in the interest of land, enforcing the agreement would still be barred by the statute of frauds. Though couched in terms of a partnership agreement," Bowman's partnership redemption claim is nothing more than a claim for a one-half interest in the partnership's properties.

An agreement to share in the profits of contemplated speculative deals in real estate simply does not involve the transfer of real estate, or an interest in real estate, within the meaning of the Statute of Frauds. Thus, Bowman's claim for redemption of his partnership interest may include an interest in the proceeds from the sale of the two properties without resulting in a transfer of interest in the two properties. Merely because a partnership agreement contemplates transactions in real estate does not transform the partnership itself into a transaction for the sale of real estate, bringing it under the statute of frauds.

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 it 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.

Vee Bar, Ltd.* v. *BP Amoco Corp., 361 S.W.3d 128 (Tex.App.-El Paso 2011, no pet.). Vee Bar owns 20,480 acres of land known as the Wheeler Ranch, which it acquired in 1994. Before 1994, the ranch owners had leased the ranch for oil and gas production. In 2006, Vee Bar sued various oil companies seeking damages for various environmental damages to the ranch. The oil companies filed pleas to the court's jurisdiction, claiming that Vee Bar did not have standing because the injuries all occurred before Vee Bar acquired the property and there had not been an express provision in the deed to Vee Bar assigning claims for damage to the property. Vee Bar then went back to the prior owners and obtained assignments of the claims from some, but not all of them. It joined the others as involuntary plaintiffs.

The oil companies then filed a supplemental plea, asserting that Vee Bar had assignments from only three of the prior owners and had improperly joined the others. The trial court granted the pleas and dismissed the suit.

Subject matter jurisdiction is essential to the authority of a court to decide a case. Standing is a component of subject matter jurisdiction. A court has no jurisdiction over a claim pursued by a plaintiff who lacks standing to assert the claim. The plaintiff has the burden to plead facts affirmatively showing that the trial court has jurisdiction.

In Texas, a cause of action for injury to real property belongs to the person who owned the property at the time of the alleged injury. A subsequent purchaser cannot recover for an injury committed before his purchase absent an express provision in the deed, or by virtue of an assignment granting him that power.

The oil companies' supplemental pleas to the jurisdiction relied on the well settled rule that in a suit to recover for injury to real property, all the tenants in common must join. The rationale for the joinder requirement is to prevent: (1) a multiplicity of suits; (2) several recoveries for one trespass and; (3) an inconvenience for the parties. But here, the court held that it was wrong for the trial court to dismiss the lawsuit. The oil companies should have filed a plea in abatement, and, in the absence of such a plea, the plaintiff may recover damages in an amount proportionate to its interest in the property.

The plea in abatement must give the plaintiff a better writ. Hence the defendant should not only have pleaded the nonjoinder, but the plea should have shown who were the owners of the other half interest. Not having done this, the oil companies cannot now complain that Vee Bar was permitted to recover its proportionate share of the damages.

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

Gordon* v. *West Houston Trees, Ltd., 352 S.W.3d 32 (Tex.App.-Houston [1st 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. denied). 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, 370 S.W.3d 705, 55 Tex.Sup.Ct. J. 501 (Tex. 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.

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 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 he 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.

Harrington* v. *Dawson-Conway Ranch, Ltd., 372 S.W.3d 711 (Tex.App.-Eastland 2012, pending). A prescriptive easement is not well-regarded in the law. To obtain a prescriptive easement, one must use someone else's land in a manner that is open, notorious, continuous, exclusive, and adverse for a period of ten years or more. Exclusivity is not met when landowner and claimant both use the road. When a landowner and a claimant of an easement both use the same road, use by the claimant is not exclusive to the landowner's use and is not adverse. Joint use of a road, no matter for how long, cannot ripen into an easement by prescription.

Courts have analyzed the acquisition of an easement by prescription as being analogous to the acquisition of title by adverse possession. Therefore, a claim of prescription must be supported by proof of all of the elements that are involved in the statute of limitations for adverse possession. The hostile and adverse character of the use necessary to establish an easement by prescription is the same as that which is necessary to establish title by adverse possession. One test to determine whether a claim is hostile as required to establish an easement by prescription is whether the adverse possessor's use, occupancy, and possession of the land is of such nature and character as to notify the true owner that the claimant is asserting a hostile claim to the land.

The party claiming an easement by prescription must give notice that its use of property is under a claim of right. Otherwise, the use (especially if joint) is presumed to be permissive, and a permissive use can never ripen into an easement by prescription. There must be an independent act of hostility to transform permissive use of an easement into an adverse use so as to begin the prescriptive period.

S & G Associated Developers, LLC* v. *Covington Oaks Condominium Owners Association, Inc., 361 S.W.3d 210 (Tex.App.-El Paso 2012, no pet.). The original developer planned a four-phase condominium project when he acquired the land in 1981. The four phases were to be served by a common gated entrance. The original developer built the first three phases, but lost title to Phase 4 before anything was built on it. S&G acquired Phase 4 in 1993 and planned to build a condo building on it.

A dispute then arose as to whether S&G and the Phase 4 project had the right to use the entrance and road that serve the first three phases. In 1995, the parties appeared to have entered into a settlement agreement that would permit Phase 4 to use the road after construction was completed. However,

in 2001, the owners association for the first three phases, COHOA, sent S&G a letter stating that the previous "proposed settlement" had not been consummated and that it considered the settlement no longer valid. A number of things happened after that, but nothing seemed to work out and this lawsuit ensued. Among other things claimed in the suit was that Phase 4 had an easement over the first three phases that was implied from existing use, implied by necessity and by estoppel. The trial court ruled against S&G on the easement issues.

There are two types of implied easements in Texas: easements implied by necessity and easements implied by prior use. The elements for an easement by necessity are: (1) unity of ownership at severance; and (2) necessity at the time of severance. The elements for an easement by prior use are: (1) unity of ownership at severance; (2) apparent and continuous use of the easement at severance; and (3) necessity. Easements may also be created by estoppel. The elements for an easement by estoppel are: (1) a representation communicated, either by word or action, to the promisee; (2) the communication was believed; and (3) the promisee relied on the communication.

In granting summary judgment, the trial court ruled against S&G on COHOA's no-evidence motion. But this court noted the motion did not list the generic elements of each easement claim as to which there is no evidence. Instead, it asserts that S&G has no evidence regarding ten issues, without explaining how these issues pertain to the elements of the easement claims. For example, in a few of the no-evidence claims, the motion claimed there was no evidence of unity of ownership; however, unity of ownership is not an element of easement by estoppel. Likewise, the motion claimed there was no evidence of necessity, but, again, necessity is not an element of easement by estoppel. The court pointed out several more of these shortcomings in the motion and ultimately held that summary judgment should not have been granted.

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
BROKERS

Defterios* v. *Dallas Bayou Bend, Ltd., 350 S.W.3d 659 (Tex.App.-Dallas 2011, pet. denied). 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. *Bayless, 366 S.W.3d 808 (Tex.App.-Fort Worth 2012, pet. pending). In August, 2002, Bunton executed a contract for the sale of real property to Bayless. Bunton made false representations to Bayless that there were no liens against the property. Bayless made a $30,000 down payment on the seller-financed purchase of the property, took possession of the property, and made monthly payments to Bunton. After that, Bayless began receiving notices of foreclosure of the property from a financial institution that held an undisclosed mortgage on the property. Bunton did not make any payments on the undisclosed mortgage and retained all of the funds that Bayless paid to him. Bayless agreed to pay the financial institution an additional $30,000, but the property was foreclosed on in February 2004. Bunton's misrepresentations, dishonesty, and fraud caused Bayless to lose $37,524.66. Bayless alleged claims against Bunton for common law and statutory fraud and for violations of occupations code section 1101.652(a)(3) and the DTPA, and she sought damages of $37,524.66 and attorney's fees. The trial court granted Bayless's motions for summary judgment and in April 2010, awarded her damages.

Approximately five months later, in September 2010, Bayless filed a claim and application for an order directing a payment from the Real Estate Recovery Trust Account. She alleged that she had given notice of the claim to TREC, that she had obtained a final judgment against Bunton based on his violations of the Occupations Code §1101.652(a)(3), that a writ of execution was issued but returned nulla bona, and that she had caused to be issued an abstract of judgment and perfected a judgment lien. Bayless asked the trial court to enter an order directing TREC to pay to her " an amount found to be payable on the claim" from the trust account.

TREC objected to Bayless's application for an order directing a payment out of the trust account, arguing that the claim is time-barred under Occupations Code § 1101.605(a), which, according to TREC, required Bayless to bring her underlying suit against Bunton no later than two years from February 2004, the date of the subject property's foreclosure. TREC argued that Bayless could not recover from the trust account because the limitations period had expired when she sued Bunton more than two years after February 2004.

Section 1101.605(a), titled in part, "Deadline for Action," provides that "[a]n action for a judgment that may result in an order for payment from the trust account may not be brought after the second anniversary of the date the cause of action accrues." Construing the plain and common meaning of the terms used in § 1101.605(a), the court held that legislature intended for the statute to apply to an "action" against a real estate license or certificate holder upon which an uncollectible "judgment" is based. If the legislature had instead intended for

section 1101.605(a) to apply to a claim against the trust account for payment of the unpaid amount of an uncollectible judgment and for the limitations period to accrue once a final judgment in the underlying action is entered, a writ of execution is returned nulla bona, and a judgment lien is perfected, then it could have simply stated as much, but it did not, and the court must presume that the legislature chose the words that it used for a purpose, and "we must not engage in a forced or strained construction of the statute."

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.

Litton Loan Servicing, LP* v. *Manning, 366 S.W.3d 837 (Tex.App.-Dallas 2012, pet. denied). Occupations Code § 1101.806(c) provides that "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."

Here, Manning claimed that the commission agreement was contained in an e-mail which set out some terms that had been "accepted," along with some other documents relating to the closing, constituted a written agreement to pay a commission; however, the court held that the e-mail and other documents did not provide a promise to pay a real estate commission or identify Manning as the broker to whom the commission would be paid.

839 E. 19th Street, L.P.* v. *Friedson, 373 S.W.3d 674 (Tex.App.-Houston [14th Dist.] 2012, no pet. history to date). Friedson, who is a licensed broker and was doing business as National Property Income, LLC, entered into a listing agreement with Waloon, the owner of the apartment complex. The listing agreement ended on April 30, 2006, with a "protection period" covering the ninety days after the ending date. Borenstein of 839 E. 19th Street found the Mesa Ridge property in an internet search, and contacted Friedson about the property. Friedson delivered a copy of a title insurance policy, financial information, rent rolls, and other due diligence materials

to Borenstein. Friedson brokered an offer from 839 E. 19th Street dated April 7, 2006, to purchase the property for $5,800,000. Waloon rejected this offer.

After the primary term of the listing agreement with Waloon expired, Borenstein contacted Friedson. Friedson entered into a buyer representation agreement with 839 E. 19th Street, covering only the property owned by Waloon. The term of the buyer representation agreement ran from May 9, 2006, through September 29, 2006, with a "protection period" extending for 120 days after the termination of the agreement.

Friedson brokered a second offer from 839 E. 19th Street dated May 30, 2006, to purchase the property for $6,250,000. This offer expired for lack of acceptance by Waloon. After the second offer expired, Waloon Properties told Friedson that it had decided not to sell the property, but, instead, refinance it. Borenstein represented to Friedson that he was no longer interested in purchasing the property or dealing with its owner.

Friedson did not list the prospects to be protected under the buyer representation agreement during the 120-day "protection period." 839 E. 19th Street placed the property under contract with Waloon on November 6, 2006, which was during the 120-day "protection period." Waloon sold the property to 839 E. 19th Street for $6,350,000.00.

Friedman didn't receive a commission. He fixed a broker lien on the property and filed suit. The trial court awarded judgment based on a breach of the buyer representation agreement.

The Court of Appeals reversed. The "protection period" began May 9, 2006 and applied only to property called to the client's attention between May 9 and September 29 of that year. Friedson had called the property to the client's attention in April 2006, so the protection period did not apply.

PART XI 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.

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, the court declined 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.

Jewelry Manufacturer's Exchange, Inc.* v. *Tafoya, 374 S.W.3d 639 (Tex.App.-Dallas 2012, pet. denied). It was improper for the trial court to grant summary judgment for retainage to a subcontractor based on the original contract price when the evidence showed that work under the original contract was not completed. Because the record did not show the "portion of the work done" to establish the actual amount of retainage due, a material fact question precluded summary judgment.

In addition, it was improper to require funds trapping from contractors hired to complete the work under the terminated contract. The Texas Supreme Court has made it clear that work must be defined in relation to a particular contract, thus, the owner was not authorized to withhold funds from replacement contractors who had no relationship to the subcontractor in question.

PART XII
CONDEMNATION

City of Dallas* v. *Stewart, 361 S.W.3d

562, 55 Tex.Sup.Ct. J. 271 (Tex. 2012). An unelected municipal agency's determination that a house was a nuisance, affirmed by a trial court under a substantial evidence standard, does not preclude a takings claim.

Collin County* v. *Hixon Family Partnership, Ltd., 365 S.W.3d 860 (Tex.App.-Dallas 2012, pet. denied). The County instituted condemnation proceedings for the purpose of obtaining real property owned by the Partnership. The trial court appointed special commissioners to assess the Partnership's damages occasioned by the condemnations. The awards of the special commissioners were filed with the trial court, and the Partnership filed objections to the amounts of the awards. The County filed pleas to the jurisdiction contesting the trial court's subject matter jurisdiction, based on the argument that the Partnership's certificate of registration had been cancelled by the Texas Secretary of State. The County asserted that because the Partnership had forfeited its right to transact business in the State, the Partnership could not maintain an action, suit or proceeding in a Court of this State. Business Organizations Code § 153.307(a). The trial court denied the County's motion.

The process of land condemnation in Texas involves several steps. If the condemnor and condemnee cannot agree on the value of the condemned property, the condemnor must file a petition in condemnation in either the district court or county court at law. The trial court will then appoint three special commissioners who hold an administrative hearing and file an award that reflects the special commissioners' determination of the value of the condemned land. The condemnor must pay the amount of the award to the condemnee or deposit that amount in the registry of the trial court. If either party is dissatisfied with the award, the party may file objections with the trial court.

The County's jurisdictional argument has three elements. First, the County contends the Partnership is the plaintiff in the condemnation lawsuit. In support of its argument, the County points to the fact that the Partnership withdrew the special commissioners' awards from the registry of the court and is seeking amounts in excess of the awards, the Partnership proceeded first with its evidence at trial, and the Partnership opened and closed with respect to jury argument. Second, the County contends that because the Partnership forfeited its right to transact business in Texas, the law does not permit the Partnership to maintain a lawsuit in the courts of the state. Third, the County posits that because the Partnership cannot maintain a lawsuit in Texas, the trial court lacked subject matter jurisdiction over the condemnation proceeding. The court disagreed with the County.

Contrary to the County's contention, a condemnee's filing of objections to a special commissioners' award does not constitute the initiation of a lawsuit by the condemnee; it simply converts the special condemnation proceeding, which was initiated by the filing of a petition by the condemnor, into a suit and invests the trial court with jurisdiction over the subject matter of the case.

The controversy between the parties in this case arose because the County sought to take the Partnership's real property. The County initiated the condemnation process by petitioning the trial court to appoint special commissioners to determine the value of the Partnership land to be taken. The Partnership did not agree with the award of the special commissioners, and it was entitled to a judicial determination concerning the value of the land. The Partnership's challenge to the special commissioners' awards caused the matter to transition from a special condemnation proceeding to a cause pending in the county court. Since at that point in the process the special commissioners' award was vacated, it was necessary that the County obtain a judgment from the trial court authorizing the taking of the Partnership's real property at a

price that reflected the fair market value of the property. Accordingly, the County was the plaintiff in the lawsuit and the Partnership was the defendant. The forfeiture of a limited partnership's right to transact business does not prevent the limited partnership from defending an action. Because the partnership was the defendant in the consolidated condemnation action and was not precluded by the laws governing Texas limited partnerships from defending the action, the County's claim that the trial court was without subject matter jurisdiction must fail.

PART XIII
LAND USE PLANNING, ZONING, AND RESTRICTIONS

Sanchez* v. *Southampton Civic Club, Inc., 367 S.W.3d 429 (Tex.App.-Houston [14th Dist.] 2012, no pet.). The restrictive covenant reserved a 3-foot strip of land at the rear of each lot for "the laying of gas mains, water mains, storm and sanitary sewer laterals and connections, and electric light poles, telephone poles and other proper or necessary public utility other than railroad, street railway, and other transportation lines."

The strip has a number of uses. Most importantly, it has been used for garbage collection throughout the subdivision. The City's trucks are too big, so the Southampton subdivision uses a private service.

Sanchez moved into the subdivision in 2009 and immediately began constructing a new fence within the three-foot tract on his property. After several meetings with Southampton representatives, in which they told him about an enhanced enforcement policy to remove obstructions and asked him to stop, Sanchez continued to build the fence. Southampton sued, seeking a permanent injunction for removal of the fence. The trial court ordered the removal of the fence.

In construing a restrictive covenant, the court's primary task is to determine the intent of the framers of the covenant. In that regard, it must decide whether the restrictive covenant is ambiguous, which is a question of law. If it is unambiguous, then its construction is also a question of law. The court held that the restriction was not ambiguous. It also held that garbage collection is a public utility falling within the boundaries of the restrictive covenant. Furthermore, the fact that a private contractor, as opposed to a government agency, is collecting the garbage has no bearing on whether the activity is a public utility.

City of Paris* v. *Abbott, 360 S.W.3d 567 (Tex.App.-Texarkana 2011, pet. denied). Abbott bought some land in Paris with the hope of using it as a mobile home park. The City Manager had told Abbott in a letter that the entire property was approved for nonconforming use, so long as it continued to be used as a mobile home park, although only about half of the property was being used as a mobile home park when Abbott bought it. Abbott submitted a plat showing new roads, drives, pads, utilities, etc. The City's P&Z Department told him that he needed to get the property rezoned to the category that allowed mobile home parks. He sued the City, and then submitted an application for a building permit, which was also denied. Abbott claimed that the letter from the City Manager created a contract between the City and him. The City claimed governmental immunity.

Abbott claimed that the denial of the building permit breached the contract he claimed was created by the City Manager's letter. However, here, Abbott failed to exhaust his administrative remedies against the City for denying the permit. In order to maintain a lawsuit against the City for an alleged breach of contract, Abbott was required to exhaust the administrative remedies.

Furthermore, such a suit is precluded by

governmental immunity. Immunity bars a suit against the state unless the state expressly consents to the suit. The party suing must establish the consent.

Abbott claimed that the City waived immunity by entering into the alleged contract formed by the City Manager's letter. Local Government Code § 271.152 provides that a local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into a contract waives sovereign immunity for breach of the contract claims, but subject to several conditions. The statute requires (1) a written contract, (2) properly executed, (3) stating the essential terms of the agreement, (4) for goods or services, (5) entered into by a local governmental entity, (6) who had authority to contract.

The court held that the City Manager's letter did not entail the provision of goods or services. The term "services" is pretty broad and encompasses a wide array of activities. However, there must be some obligation to perform. Here, Abbott's pleadings didn't suggest in any way that he was obligated to perform any service for the City or to provide any goods to the City.

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 XIV TAXATION

In re *Nestle USA, Inc.*, No. 12-0518 (Tex. October 19, 2012). The Texas Supreme Court has again upheld the Margins Tax on constitutional grounds. Nestle had argued that the tax bears no "reasonable relationship" to the value of the privilege of doing business in Texas, because of its many deductions and exemptions, and that the tax treats similarly situated taxpayers differently. Accordingly, Nestle contended that the Margins Tax violates the Texas Constitution's requirement of equal and uniform taxation (Texas Constitution article VIII, § 1(a)) and the U.S Constitutions' Fourteenth Amendment's Equal Protection and Due Process guarantees. It also argued that the tax violates the Commerce Clause of the U.S. Constitution because the tax is higher for manufacturers located outside of Texas and, so, discriminates against interstate commerce.

The Texas Supreme Court held that the Margins Tax doesn't violate the requirement of equal and uniform taxation. The court noted that exact uniformity and equality is unattainable. Differentiation among different classes of taxpayers is not prohibited as long as the differentiation is rational. The court wrote that the tax's classifications must relate to differences in doing business that affect the value of the privilege of doing business in Texas. Nestle pointed out a number of classifications that it didn't like, but the court concluded that the Legislature's structure of the franchise tax is reasonably related to its object and held that there was no violation of the Equal and Uniform Clause.

Turning to the Equal Protection arguments, the court held that, since it had held that the Legislature had a rational basis for structuring the franchise tax the way it

did, it did not violate Equal Protection in doing so.

Gonzales* v. *Razi, 338 S.W.3d 167 (Tex.App.-Houston [1st Dist.] 2011, pet. denied). 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.

Morris* v. *Houston Independent School District, No. 11-0650 (Tex. October 26, 2012). 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 court of appeals reversed and granted the plea to the jurisdiction. 355 S.W.3d 668, 671. The court of appeals reasoned that after the realignment, the Taxpayers became plaintiffs so the affirmative defense of non-ownership was no longer available under section 42.09(b)(1). Since the only other means for bringing up non-ownership was a protest before the appraisal review board under section 41.41(a)(7), and the Taxpayers brought no timely protest, the court of appeals held that the trial court lacked jurisdiction due to the Taxpayers' failure to exhaust administrative remedies.

The Taxpayers appealed, arguing that they were not stripped of their affirmative defense of nonownership when the taxing units non-suited and the Taxpayers were realigned as plaintiffs. The Supreme Court agreed and held that the court of appeals erred in reversing the trial court's order denying the taxing authorities' plea to the jurisdiction.

The Tax Code establishes a detailed set of proced dures that property owners must abide by to contest the imposition of property taxes. Those procedures are exclusive and a taxpayer must exhaust the remedies provided in order to raise most grounds of protest in defense of a suit to collect taxes or as a basis for a claim for relief. Section 42.09(b)(1), however, allows a person sued for delinquent taxes to assert as an affirmative defense "that the defendant did not own the property on which the tax was imposed" if the suit is to enforce personal liability.

The court of appeals emphasized the distinction between the Taxpayers' assertion of non-ownership as an affirmative defense and non-ownership as the basis for an affirmative claim for reimbursement of taxes paid under protest. That there is a distinction between an affirmative defense and an affirmative claim for relief is

beyond dispute. But the technical distinction between the two is insignificant in this context. In section 42.09(b)(1), the Legislature provided taxpayers a mechanism to avoid the imposition of tax liability for property they do not own. Under the court of appeals' reading of the statutory scheme, however, even persons who were never provided an opportunity to pursue the administrative remedy provided in section 41.41(a)(7) of the Code would be unable to recoup taxes paid under protest after being sued for delinquent taxes on property they did not own if the taxing authorities non-suited. Further, the court of appeals' construction of the statute discourages taxpayers' compliance with section 42.08 of the Tax Code, which requires prepayment of taxes under protest as a condition of judicial review; as the Taxpayers in this case note, they would have been in a better position had they resisted payment and pursued the litigation to the end, despite not availing themselves of administrative remedies.

While Section 42.09(b)(1) refers to non-ownership as an affirmative defense, it evidences the Legislature's intention to provide taxpayers with an opportunity to avoid tax liability for property that they do not own. Taxing statutes are construed strictly against the taxing authority and liberally for the taxpayer. The court of appeals' reading of the statute contravenes that precept: it allows taxing authorities to thwart the Legislature's intent by accepting taxes paid under protest and then non-suiting, just as happened in this case.

So, the Supreme Court held that the Taxpayers did not lose their entitlement to contest tax liability on the basis of non-ownership when the taxing units non-suited and the Taxpayers were realigned as plaintiffs.