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CASE LAW UPDATE

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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 336S.W.3d and Supreme Court opinions released through September 2, 2011.

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
PROPERTY CONDITION

Italian Cowboy Partners, Ltd.* v. *Prudential Insurance Company of America, --- S.W.3d ----, 2011 WL 1445950 (Tex. 2011). The Secchis wanted to expand their restaurant business. In late 1999 and early 2000, with the help of their real estate broker, the Secchis began to look for additional restaurant property. Hudson's Grill was a restaurant located in a building at Keystone Park Shopping Center. Keystone Park, as well as the Hudson's Grill building, was owned by Prudential. The Secchis' broker told them that Hudson's Grill was probably going to close and that the restaurant site might be coming up for lease. The Secchis met with the property manager and discussed the Hudson's Grill building. They entered into a letter of intent to lease the property and began negotiating the lease. Negotiations continued for about five months. At least seven different drafts of the lease were circulated. During this period of time, the Secchis visited the site on several occasions.

After the parties executed the lease, Italian Cowboy began remodeling the property. While it was remodeling the building, several different persons told Italian Cowboy that there had been a sewer gas odor problem in the restaurant when it was operated by Hudson's Grill. One of the owners also personally noticed the odor. He told the property manager about it about the problem but continued to remodel. After Italian Cowboy was operational and opened for business, the sewer gas odor problem continued. Although Prudential attempted to solve the problem, the transient sewer gas odor remained the same. Eventually, the restaurant closed. Italian Cowboy then sued Prudential.

The lease with Italian Cowboy contained the following relevant provisions:

> 14.18 Representations. Tenant acknowledges that neither Landlord nor Landlord's agents, employees or contractors have made any representations or promises with respect to the Site, the Shopping Center or this Lease except as expressly set forth herein.
>
> 14.21 Entire Agreement. This lease constitutes the entire agreement between the parties hereto with respect to the subject matter hereof, and no subsequent amendment or agreement shall be binding upon either party unless it is signed by each party....

The court first turned to the question whether the lease contract effectively disclaims reliance on representations made by Prudential, negating an element of Italian Cowboy's fraud claim and concluded that it does not. First, a plain reading of the contract language at issue indicates that the parties' intent was merely to include the substance of a standard merger clause, which does not disclaim reliance. Moreover, even if the parties had intended to disclaim reliance, the contract provisions do not do so by clear and unequivocal language. For these reasons, the court held, as a matter of law, that the language contained in the lease agreement at issue does not negate the reliance element of Italian Cowboy's fraud claim.

A contract is subject to avoidance on the ground of fraudulent inducement. For more than fifty years, it has been the rule that a written contract even containing a merger clause can nevertheless be avoided for antecedent fraud or fraud in its inducement and that the parol evidence rule does not stand in the way of proof of such fraud.

The court has recognized an exception to this rule in ***Schlumberger Technology Corp.* v. *Swanson***, 959 S.W.2d 171 (Tex.1997), and held that when sophisticated parties represented by counsel disclaim reliance on representations about a specific matter in dispute, such a disclaimer

may be binding, conclusively negating the element of reliance in a suit for fraudulent inducement. In other words, fraudulent inducement is almost always grounds to set aside a contract despite a merger clause, but in certain circumstances, it may be possible for a contract's terms to preclude a claim for fraudulent inducement by a clear and specific disclaimer-of-reliance clause. In Schlumberger, the court stated that it had a clear desire to protect parties from unintentionally waiving a claim for fraud, but also identified a competing concern—the ability of parties to fully and finally resolve disputes between them.

Here, the parties dispute whether a disclaimer of reliance exists, or whether the lease provisions simply amount to a merger clause, which would not disclaim reliance. The question of whether an adequate disclaimer of reliance exists is a matter of law. The analysis of the parties' intent in this case begins with the typical rules of contract construction.

Prudential focuses on section 14.18 of the lease contract, suggesting that Italian Cowboy's fraud claim is barred by its agreement that Prudential did not make any representations outside the agreement, i.e., that Italian Cowboy impliedly agreed not to rely on any external representations by agreeing that no external representations were made. Standard merger clauses, however, often contain language indicating that no representations were made other than those contained in the contract, without speaking to reliance at all. Such language achieves the purpose of ensuring that the contract at issue invalidates or supersedes any previous agreements, as well as negating the apparent authority of an agent to later modify the contract's terms. The court disagreed and held that the only reasonable interpretation of the contract language at issue here is that the parties to this lease intended nothing more than the provisions of a standard merger clause, and did not intend to include a disclaimer of reliance on representations. Pure merger clauses, without an expressed clear and unequivocal intent to disclaim reliance or waive claims for fraudulent inducement, have never had the effect of precluding claims for fraudulent inducement.

To disclaim reliance, parties must use clear and unequivocal language. This elevated requirement of precise language helps ensure that parties to a contract—even sophisticated parties represented by able attorneys—understand that the contract's terms disclaim reliance, such that the contract may be binding even if it was induced by fraud. Here, the contract language was not clear or unequivocal about disclaiming reliance. For instance, the term "rely" does not appear in any form, either in terms of relying on the other party's representations, or in relying solely on one's own judgment.

The court then discussed Italian Cowboy's fraud claims, which the Court of Appeals did not deal with and, holding that the actions of the property manager were actionable as fraud, remanded the fraud claims to the Court of Appeals for further consideration.

The court then dealt with the claims of breach of the implied warranty of suitability. In a commercial lease, the lessor makes an implied warranty that the premises are suitable for the intended commercial purposes. Specifically, a lessor impliedly warrants that at the inception of the lease, no latent defects exist that are vital to the use of the premises for their intended commercial purpose. Moreover, a lessor is responsible for ensuring that essential facilities will remain in a suitable condition. However, if the parties to a lease expressly agree that the tenant will repair certain defects, then the provisions of the lease will control.

Here, Italian Cowboy did not expressly waive the implied warranty of suitability. However, it did accept responsibility to make certain repairs that might otherwise have run to Prudential as a result of the

implied warranty of suitability. The parties dispute whether Italian Cowboy's responsibilities under the lease included repairs to the particular defect in the premises—the sewer gas odor, or its cause. While Italian Cowboy characterizes the defect as the presence of the odor itself, the court said that the proper analysis of the defect in this particular case must inquire into the cause of the odor because this is the condition of the premises covered by the duty to repair. Italian Cowboy offered uncontroverted evidence that a grease trap had been improperly installed, causing raw sewage to back up from the sewer lines. The court looked to the lease to see which party had the responsibility for repairing that defect.

The lease provided that the landlord was responsible for repairs to the common area and for structural repairs. At various points, the lease assigned repair obligations in different ways to both parties. With respect to plumbing matters, however, the court noted that while Italian Cowboy may have assumed at least some duty to repair, it was at the same time expressly precluded from making alterations to utility lines or systems without consent. Although the court of appeals did not discuss it, the trial court credited this distinction, finding the fact that "structural components and ... utility lines or systems serving and within the Premises ... ultimately had to be altered (not just repaired) to arrest the sewer gas odor. Because, as the court noted, the ultimate cure for the odor problem was an alteration of the sewer lines, and because Italian Cowboy was prohibited from making alterations, the obligation was Prudential's and this was covered to the implied warranty.

The court also noted Prudential's obligation to maintain the common areas, which included sanitary sewer lines. Thus, Prudential was not relieved by the contract from liability for breach of the implied warranty of suitability as to a latent defect in facilities that were vital to Italian Cowboy's use of the premises as a restaurant.

Prudential asserts that even if rescission might have been proper at some point, Italian Cowboy ratified the lease by continuing in the lease for a period of time after having knowledge of the defect. However, even if ratification were a defense to breach of the implied warranty of suitability, Italian Cowboy's actions in this case could not give rise to ratification. Texas law requires only that one rescind within a reasonable time from discovering the grounds for rescission. The court reviewed the facts and determined that Prudential failed to establish ratification. It was in no way injured or suffered unjust consequences by Italian Cowboy's temporary efforts alongside Prudential to remedy the odor. Moreover, Prudential has not established that Italian Cowboy waited an unreasonable length of time to terminate the lease. The latent defect was not yet remedied—indeed, the underlying causes of the odor remained unknown—when Italian Cowboy closed and stopped paying rent, only a few weeks after the persistent odor materialized.

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

The lease defined the Premises as the land and improvements. It also provided that the tenant has the right to install trade fixture and stated that trade fixtures and other personal property remained the property of the tenant. The lease did not define "trade fixtures;" however that term has a well-established, commonly understood meaning in Texas. It is now well settled that, as between a landlord and

his tenant, the term "trade fixtures" means such articles as may be annexed to the realty by the tenant to enable him properly or efficiently to carry on the trade, profession, or enterprise contemplated by the tenancy contract or in which he is engaged while occupying the premises, and which can be removed without material or permanent injury to the freehold.

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

PART II
PERMITTED USE

Merry Homes, Inc.* v. *Chi Hung Luu, 312 S.W.3d 938 (Tex.App.-Houston [1st Dist.] 2010, no pet.). Luu's lease provides that Luu may use the premises only for the purpose of operating a nightclub or bar and for no other purpose. The lease also prohibits Luu from using the premises for any activity that violates any applicable law, regulation, zoning ordinance, restrictive covenant, or governmental order or for any activity that violates any applicable federal, state, or local law. An additional provision requires Luu to "satisfy himself that the leased premises may be used as Luu intends by independently investigating all matters related to the use of the leased premises or Property.

Luu submitted his liquor license application to the City of Houston. Approximately one month later, the city faxed a letter to Luu, informing him that the city denied his application since the premises is located less than 300 feet from a public school and less than 300 feet from a public hospital. The city mailed a follow-up letter, again informing Luu that it denied his application, but also suggesting that he attempt to qualify for the restaurant exception, which would allow Luu to operate a restaurant that serves alcohol at the premises. Luu testified that immediately after he received the first denial from the City of Houston, he contacted his landlord, Merry Homes, and requested a meeting to determine how to proceed under the lease.

Luu ultimately determined that opening a restaurant instead of a bar would not be financially feasible. Merry Homes refused to refund Luu's deposit or cancel the lease. Luu sought a declaratory judgment that the lease was void since it could not be performed legally, and also asserted claims of common law and statutory fraud, negligent misrepresentation and statutory fraud, negligent misrepresentation, and violations of the Deceptive Trade Practices Act.

The trial court declared the lease void on two grounds: (1) the provisions of the lease that restricted the use of the premises to that of a nightclub or bar, fatally conflicted with the provisions that prohibited any use of the

premises that violates an applicable law or regulation; and (2) Luu could not perform his contractual obligations legally, since he could not obtain a liquor license for the premises due to its proximity to a public school.

The Texas Supreme Court previously has held that a contract to fulfill an obligation which cannot be performed without violating the law contravenes public policy and is void. The purpose behind this principle is to benefit and protect the public, not to punish or protect a party to the contract. If the illegality does not appear on the contract's face, a court will not find it void unless facts showing the illegality are before the court. If the parties could perform the contract in a legal manner, the contract is not void merely because the parties may have performed the contract in an illegal manner or committed illegal acts in carrying out the contract.

Whether a contract violates a statute is determined by looking at the specific facts of the case and deciding the intention of the parties in executing the contract. Here, the Texas Alcoholic Beverages Code authorizes counties and cities to adopt regulations prohibiting the sale of alcohol within 300 feet of a public school. The City of Houston has adopted such a regulation.

Although the lease, on its face, does not require violation of the law, the only permissible use of the premises under the lease's terms is impossible and illegal, given the location of the premises relative to a school. As Luu cannot obtain a liquor license and therefore cannot perform under the lease without violating the statute and ordinance, the trial court properly determined that this lease is void for illegality.

PART III
INSURANCE

ECF North Ridge Associates, L.P.* v. *Orix Capital Markets, L.L.C., 336 S.W.3d 400 (Tex.App.-Dallas 2011, no pet. history to date). ECF and TCI owned property in Texas and California. Their lender's servicer was Orix who was responsible for collecting monthly payments of principal and interest, monitoring whether the property was properly insured, and addressing any issues of default under the loan documents.

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

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

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

No Texas case directly addresses the standing question in this case. However, Orix cited ***ORIX Capital Markets, LLC* v. *La Villita Motor Inns, J.V.***, 329 S.W.3d 30, 39-42 (Tex.App.-San Antonio 2010, pet. abated), where that court concluded the record contained sufficient evidence ORIX Capital Markets had proven its right to

enforce a note as the current " special servicer" and pursuant to a servicing agreement containing language similar to the PSA in this case. Recently, a federal appeals court addressed the very issue of whether a mortgage servicer had standing to pursue claims against a borrower for an alleged default under a mortgage loan to which the servicer was not a party. See ***CWCapital Asset Mgmt., LLC* v. *Chicago Props***., LLC, 610 F.3d 497 (7th Cir.2010).

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

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

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

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

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

PART IV
EXPENSE PASS-THROUGHS

Five Star International Holdings Incorporated* v. *Thomson, Incorporated, 324 S.W.3d 160 (Tex.App.-El Paso 2010, pet. denied). Thomson leased 950,000 square feet of commercial and industrial space from Five Star. Thomson was to pay base rent and "additional rent" comprised of CAM, taxes, and insurance. Five Star was required to submit annual statements of additional rent and Thomson was to pay based on estimates during each year, subject to an adjustment at the end of each year. If payments were less than actual expenses, Thomson would pay the landlord the shortfall and if payments were more than actual, Thomson would get a refund. Between 1998 and 2005 Thomson paid approximately 2.3 million dollars for CAM, over 3 million dollars in taxes, and approximately $226,000 for insurance.

Thomson filed suit against Five Star alleging Thomson had been overcharged for common area expenses. In its third amended petition, Thomson also alleged that Five Star had breached the lease agreement by consistently overcharging Thomson for property taxes and common area expenses and by refusing to refund the overpayments. Thomson claimed that it was overcharged for property taxes because Five Star did not pass on the benefit of tax abatements and exemptions which the landlord received from local taxing authorities. At trial, Thomson also claimed that Five Star failed to segregate the property taxes due on the leased property from the taxes due on the larger tract, and was therefore billing Thomson for taxes owed on property beyond the acreage covered by the lease.

The lease also required Thomson to sign estoppel certificates from time to time certifying, among other things, that there were no defaults on the part of the landlord. The lease provided that, if Thomson failed to provide the estoppels, its failure was conclusive that: (1) the lease was in full force and effect; (2) there were no uncured defaults in the landlord's performance; (3) not more than one month's rent and charges had been paid in advance; and (4) the lease had not been modified. F–Star made two estoppel certificate requests which were not timely answered by Thomson; one in 2003, and another in 2005.

The jury found in favor of Thomson and also found that Thomson had not waived its right to recover the overpayment.

Five Star challenged the jury's finding that Thomson had not waived its right to a refund. Waiver is an affirmative defense for which Five Star bore the burden of proof at trial. When a party attacks the factual sufficiency of an adverse finding on an issue on which it has the burden of proof, it must demonstrate that the finding is against the great weight and preponderance of the evidence. While the lease provisions relating to estoppel certificates and the related certificate requests may serve as evidence contradicting the jury's finding, a court may not consider such evidence in a "matter of law" legal sufficiency review unless it first determines there is no evidence in the record to support the finding. The court noted that at the time the estoppel certificates were requested, the parties were already involved in litigation. The evidence of Thomson's actions in pursuit of its claims supports the jury's determination that the company did not intend to surrender its right to recovery. As this constitutes some evidence in support of the verdict, the court may not consider evidence to the contrary in its review. Therefore, the evidence is legally sufficient to support the jury's verdict regarding the estoppel certificates.

PART V
SECURITY DEPOSIT

Mesquite Elks Lodge #2404 v. Shaikh, 334 S.W.3d 319 (Tex.App.-Dallas 2010, no pet.). The Lodge leased space in a shopping center. It gave a security deposit of $4,250 to the landlord. The lease was for a year ending April 30, 2005. In May of

2005, Shaikh bought the center from the original landlord. The Lodge had held over and ultimately give Shaikh notice that it intended to vacate in November of 2005. The Lodge moved out in December and asked for its security deposit. In January, Shaikh responded with a letter stating that damages to the property exceeded the deposit and demanding payment for the damages. After some time, the Lodge responded with a request for an accounting or a refund. Shaikh responded by re-sending the January letter and again demanding payment.

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

PART VI
MITIGATION

Hoppenstein Properties, Inc.* v. *Schober, 329 S.W.3d 846 (Tex.App.-Fort Worth 2010, no pet.). A tenant's assertion that a landlord failed to mitigate damages is an affirmative defense. Thus, the tenant properly bears the burden of proof to demonstrate that the landlord has failed to mitigate damages and the amount by which the landlord could have reduced its damages. A defendant is not entitled to any reduction in the amount of damages if it does not prove the amount of damages that could have been avoided.

Here, the jury awarded the landlord only the amount of the past due rental that had accrued before the tenant vacated the premises. The jury did not award any amounts—rental, late fees, cost of improvements to the premises (all authorized by the lease agreement in the event of a tenant default)—for any time after the tenant vacated the premises. But the tenant failed to prove that the landlord could have immediately rented the premises and therefore avoided all damages. Accordingly, the court held that the evidence was factually insufficient to support the jury's finding that the landlord sustained no post-abandonment damages because of the tenant's breach.

PART VII
MEASURE OF DAMAGES

GKG Net, Inc.* v. *Mitchell Rudder Propertyies, L.P., 330 S.W.3d 426 (Tex.App.-Houston [14th Dist.] 2010, no pet.). Traditionally, Texas courts have regarded the landlord whose tenant has abandoned the lease before the end of its term as having four options. First, the landlord can maintain the lease and sue for rent as it becomes due. Second, the landlord can treat the breach as an anticipatory repudiation, repossess, and sue for the present value of future rentals reduced by the reasonable cash market value of the property for the remainder of the lease term. Third, the landlord can treat the breach as anticipatory, repossess, release the property, and sue the tenant for the difference between the contractual rent and the amount received from the new tenant. Fourth, the landlord can declare the lease forfeited (if the lease so provides), and relieve the tenant of liability of future rent. If the landlord re-lets the premises for only a portion of the unexpired term, as here, then the measure of damages has two components: (1) the measure of damages for the period of re-letting is the contractual rent provided in the original lease less the amount realized from the re-letting, and (2) the measure of damages for that portion or period of the lease term as to

which there has been no re-letting is the difference between the present value of the rent contracted for in the lease and the reasonable cash market value of the lease for its unexpired term.

PART VIII
FORCIBLE DETAINER

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

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

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

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

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

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

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

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

PART IX
BROKERS

S&I Management, Inc.* v. *Choi, 331 S.W.3d 849 (Tex.App.-Dallas 2011, no pet.). When Lee was looking to buy some property for a gas station, he met with Choi, who said he worked for the Michael Group real estate brokerage. They found a site and Lee agreed to buy it. Before the purchase, Lee and Choi were looking at other businesses in the neighborhood when Lee asked Choi about a nearby property with a defunct gas station. Choi told Lee that no one would move into that space because the gas station there was decrepit and old. After the purchase, Quiktrip opened a gas station on the lot with the defunct gas station, taking business away from Lee and reducing the value of his property. Lee sued Choi and the Michael Group for fraud and DTPA violations. The claims against the Michael Group were based on theories of vicarious liability under the doctrine of respondeat superior.

Under the doctrine of respondeat superior, an employer is vicariously liable for the negligence of an agent or employee acting within the scope of his agency or employment even though the principal or employer has not personally committed a wrong. The justification for imposing this liability is that the principal or employer has the right to control the means and methods of the agent or employee's work. An employer is not vicariously liable for the torts of an independent contractor it hires because an independent contractor has sole control over the means and methods of the work. A contract between the parties that establishes an independent contractor relationship is determinative of the parties' relationship in the absence of extrinsic evidence indicating that the contract was a “sham or cloak” designed to conceal the true legal relationship of the parties or that despite the contract terms, the true agreement vested the right of control in the principal.

The Michael Group attached a form contract to its motion for summary judgment. The Independent Contractor Agreement provided that Choi was an independent contractor but that the Michael Group was “legally accountable” for Choi’s activities. Nothing in the contract gave the Michael Group the right to control the means and methods of Choi’s work.

Lee argues that the Agreement was insufficient to establish Choi's independent-contractor status as a matter of law because it does not identify the contractor and it is not signed by the alleged contractor. Under the statute of frauds, certain contracts are not enforceable unless they are in writing and signed by the person against whom enforcement of the contract is sought. However, the Michael Group was not seeking to enforce the Agreement against Choi or anyone else; it attached the Agreement to show the terms of the agreement between it and Choi.

Lee also points to the statement in the contract that “Contractor understands that Broker is legally accountable for the activities of Contractor.” However, whether The Michael Group is vicariously liable to third parties under the doctrine of respondeat superior for Choi's torts depends on whether it had sole control over the means and methods of Choi's work. Nothing in the contract, and no other evidence presented by Lee, purports to give it that authority. The statement that “Contractor understands that Broker is legally accountable for the activities of Contractor” did not give The Michael Group sole control over the manner and means used by Choi to sell real estate.

The Independent Contractor Agreement established Choi's independent-contractor relationship with the Michael Group. Accordingly, the court concluded the trial court did not err in granting The Michael Group's traditional motion for summary judgment.

SJW Property Commerce, Inc.* v. *Southwest Pinnacle Properties, Inc., 328 S.W.3d 121 (Tex.App.-Corpus Christi-Edinburg 2010, pet. pending). At the tail end of a very long case dealing with fraud, tortious interference, and the like, the court dealt with a broker's claim for its brokerage fee. The seller argued that the listing agreement in question was unenforceable because it did not contain an adequate property description. The court said that it had reviewed Occupations Code § 11001.806(c) and found "that the statute merely requires that an agreement to sell or purchase real estate be in writing and signed by the party against whom an action is brought, which does not appear to support the seller's argument that the listing agreement is unenforceable. "We therefore reject the Palmer companies' argument that the Listing Agreement was unenforceable because it lacked an adequate property description."

This would certainly be news to the Texas Supreme Court, which has consistently held that § 11001.806(c) requires an adequate property description. The sufficiency of the description is determined by the test that is used in cases arising under the Statute of Frauds and the Statute of Conveyances. See ***Owen* v. *Hendricks***, 433 S.W.2d 164, 166 (Tex.1968), ***Texas Builders* v. *Keller***, 928 S.W.2d 479 (Tex.1996), and a whole lot of other cases.

PART X
CONSTRUCTION AND MECHANICS' LIENS

Solar Applications Engineering, Inc.* v. *T.A. Operating Corporation, 327 S.W.3d 104, 54 Tex. Sup. Ct. J. 238 (Tex. 2010). After the contractor, Solar, substantially completed the project, disputes arose regarding the completion of certain remaining work and the attachment of liens on the property by subcontractors and Solar. TA eventually terminated the contract and refused to make final payment to Solar. TA argued that because Solar did not provide a lien-release affidavit, which TA argues was a condition precedent to final payment under the contract, Solar cannot recover for breach of contract. The Court of Appeals agreed with TA and held that the lien release provision was a condition precedent and that Solar failed to prove it complied with the lien-release provision.

The issue before the Supreme Court is whether the lien-release provision is a condition precedent to Solar's recovery for breach of contract and whether failure to provide it is a bar to recovery. TA reasonably argues that an owner who has paid the contract amount to the general contractor is entitled to a building free of subcontractor's liens. Solar contends, also reasonably, that it is entitled to the balance remaining under the contract for completing the project offset by the cost to remedy defects and omissions. Under normal circumstances, Solar might have provided a conditional lien-release affidavit to allow Solar to fulfill its obligation under the contract, to allow TA to be assured that it will not be double-billed for work on the project, and to allow the parties to resolve their dispute regarding the scope of the work. But the standard operating procedure broke down here, and the court of appeals ultimately ruled that TA was entitled to a windfall, even though the issue of breach or satisfaction of conditions precedent was not tried to the jury.

Whether Solar is barred from receiving the contract balance depends on whether the lien-release provision is a condition precedent to Solar's recovery for breach of contract. A condition precedent is an event that must happen or be performed before a right can accrue to enforce an obligation. Breach of a covenant may give rise to a cause of action for damages, but does not affect the enforceability of the remaining provisions of the contract unless the breach is a material or total breach. Conversely, if an express condition is not satisfied, then the

party whose performance is conditioned is excused from any obligation to perform.

Solar claims that the court of appeals erred in concluding that the lien-release provision is a condition precedent because it lacks conditional language normally associated with express conditions. When the lien-release provision is read in context, Solar contends it constitutes a “hoop” or step that the general contractor must follow in order to collect final payment, not a condition precedent to sue and recover under the contract. Because a different and reasonable interpretation of the contract is possible, Solar argues the Court should construe the provision to prevent a forfeiture. Further, the lien-release provision should not be applied as a condition precedent because its purpose—to protect TA from the possibility of having to pay twice—was accomplished by the trial court's severance of the subcontractors' claims against the project and order that the sums awarded to Solar be held in trust to pay outstanding subcontractor liens.

In order to determine whether a condition precedent exists, the intention of the parties must be ascertained; and that can be done only by looking at the entire contract. In order to make performance specifically conditional, a term such as “if”, “provided that,” “on condition that,” or some similar phrase of conditional language must normally be included. While there is no requirement that such phrases be utilized, their absence is probative of the parties intention that a promise be made, rather than a condition imposed.

The contract provided that final application for payment “shall be accompanied” by lien releases. The operative language does not contain language that is traditionally associated with a condition precedent. The language preceding the lien-release provision does not make performance conditional. In the absence of any conditional language, a reasonable reading of the lien-release provision is that it is a promise or covenant by Solar to provide a lien-release affidavit in exchange for receiving final payment. This interpretation avoids forfeiture and completes the contract: Solar is paid for the work it completed, and TA receives an unencumbered building. TA correctly noted in its motion for rehearing at the court of appeals that Solar's breach results in “a delay in payment to Solar until the liens are released.” The court of appeals' contrary interpretation results in a forfeiture to Solar and a windfall to TA.

PART XI
ACCORD AND SATISFACTION

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

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

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

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

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

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

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

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

Cooke argued that the trial court disregarded UCC § 3.311 and erred by relying instead on common-law principles in rejecting Cooke's contentions. In other words, Cooke claimed that the UCC and the common law are inconsistent. But, held the court, § 3.311 does not conflict with the common-law doctrine of accord and

satisfaction, rather, the statute is consistent with the doctrine as interpreted by Texas courts. As noted in the comments to the UCC, §3.311 is based on a belief that the common law rule produces a fair result and that informal dispute resolution by full satisfaction checks should be encouraged.

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

PART XII
PURCHASE OPTIONS

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

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

Almost a year after Moosavideen gave notice of his exercise of the option, the heirs notified him that he was in default under the terms of the lease. The property had been used as a gas station and there was an environmental contamination that the heirs claimed violated the lawful use clause. The trial court found for the heirs and awarded them damages for breach of the lease and found that, because of the breach, Moosavideen was not entitled to exercise the option.

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

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

purchase almost one year before he was given notice of his default under the lease.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PART XIII
ASSIGNMENT

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

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

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

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

Cottman also contends the evidence is insufficient to support the finding that it assumed the lease. Cottman makes the following two arguments: (1) the lease rider required it to provide written notice to FVLR of its intent to assume the lease and it

never provided such written notice; and (2) its actions did not constitute partial performance under the lease rider.

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

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