CASE LAW UPDATE

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CHAPTER 1

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The case selection for this episode of Case Law Update, like all of them in the past, is very arbitrary. If a case is not mentioned, it is completely the author's fault.

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

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

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

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

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

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

TABLE OF CONTENTS

PART I MORTGAGES AND FORECLOSURES 1

PART II HOME EQUITY LOANS 4

PART III PROMISSORY NOTES, LOAN COMMITMENTS, LOAN AGREEMENTS 5

PART IV GUARANTIES 6

PART V USURY 7

PART VI DEEDS AND CONVEYANCE DOCUMENTS 8

PART VII LEASES 10

PART VIII VENDOR AND PURCHASER 14

PART IX BROKERS 19

PART X ADVERSE POSSESSION AND QUIET TITLE ACTIONS 19

PART XI EASEMENTS 20

PART XII CONDOMINIUMS AND OWNERS ASSOCIATIONS 22

PART XIII HOMESTEAD 23

PART XIV CONSTRUCTION AND MECHANICS' LIENS 24

PART XV AD VALOREM TAXATION 24

PART XVI CONDEMNATION 25

PART XVII LAND USE PLANNING AND RESTRICTIONS 26

CASE LAW UPDATE

PART I
MORTGAGES AND FORECLOSURES

A notice of a foreclosure sale must provide a description or other identification of the property to be sold. How good does that description have to be? On March 28 in ***Myrad Properties Inc.* v. *LaSalle Bank National Association***, 252 S.W.3d 605 (Tex.App.—Austin 2008, pet. granted), Austin's 3rd Court of Appeals was generous to a trustee whose foreclosure notice property description was less than ideal. In challenging economic times, this opinion is important for Texas lawyers whose clients will be involved in a rising number of foreclosure actions.

The court's opinion laid out the facts: Two tracts of land secured LaSalle's loan to Myrad. When Myrad defaulted, the substitute trustee filed, posted and sent notices of foreclosure that referenced the correct recording information for the deed of trust but referenced the property to be foreclosed as that shown on Exhibit A to the notice. Unfortunately, Exhibit A described only one of the two tracts. The foreclosure notice also contained a sentence that said, "Notice is hereby given of Holder's election to proceed against and sell both the real property and any personal property described in the Deed of Trust in accordance with the Holder's rights and remedies under the Deed of Trust and Section 9.604 of the Texas Business and Commerce Code."

The foreclosure sale was held, where the substitute trustee read only the one property description. LaSalle bid its entire debt, and a trustee's deed was executed that, again, described only the one tract.

The borrower claimed that the sale covered only the one parcel, the bid extinguished the entire debt, and it continued to own the other parcel free and clear.

According to the court, the statement in the foreclosure notice that the lender was electing to sell the real and personal property covered by the deed of trust "unequivocally" gave notice that LaSalle would sell all of the property described in the deed of trust. The property described in the deed of trust included both tracts of land. Other portions of the foreclosure notice provided detailed information regarding the deed of trust, including where it was recorded. The court found that all of these components of the foreclosure notice were sufficient under the deed of trust and Property Code §51.002 to inform the reader that both tracts would be sold.

The court also rejected the borrower's argument that the failure to identify both tracts in the foreclosure notice would "chill" the bidding at the foreclosure. At least one court has held that under Texas law a similar under-inclusion of property in a notice of foreclosure sale could be actionable under such a theory. However, to prevail on this theory, the borrower would have to show that the price or consideration received in the sale was grossly inadequate and that such inadequacy was caused by the complained-of irregularity. It did not do so.

Has this case relaxed the standards for trustees in foreclosure notices? Since attorneys in Texas and around the nation are going to be seeing a lot of foreclosures in the near future, this case provides some comfort that simple mistakes may not necessarily result in terrible consequences. We'll see. The Texas Supreme Court has decided to hear this case on appeal.

Lewis* v. *Wells Fargo Home Mortgage, Inc., 248 S.W.3d 828 (Tex.App.—Texarkana 2008, no pet.). Two weeks after she bought it, Lewis' house burned down. The insurance company paid her mortgage company, Wells Fargo, which, instead of paying off the note, used the money to build a house on the foundation remaining from the residence. After the house burned, Lewis made no payments on the note, and Wells Fargo foreclosed on the property. Lewis sued Wells Fargo, seeking a declaratory judgment, complaining that, despite the loan being paid in full by the insurer, Wells Fargo had continued to report negative information on her credit report, and complaining because the defendant, rather than applying the insurance proceeds to the note and releasing her from liability, had instead constructed a new house on the property-which was substantially different from the original house.

Based on these allegations, Lewis asked the trial court to declare that the home had attached to the real property, thus it belonged solely to Lewis and she owed no debt on it, and Wells Fargo had no lien on the property. Lewis also asked the court to declare that Wells Fargo had failed to foreclose in the manner required by law and that the foreclosure was void. Finally, Lewis alleged that Wells Fargo had breached its contract, apparently by building a new residence rather than extinguishing the loan.

The deed of trust provided that Lewis was to insure the premises; in the event of a loss, the insurance company was to pay the lender; all or any amount of the proceeds could be applied by the lender, at its option, to either: (a) the reduction of the indebtedness under the note or (b) the restoration or repair of the damaged property. The court held for Wells Fargo. The contract of the parties authorized the mortgagee to make that election. Having that contractual right, it is not the prerogative of Lewis or this Court to require the mortgagee to apply the insurance proceeds to the debt.

Lewis argues that the insurance proceeds were not properly used because the house was not repaired or restored. She alleges Wells Fargo simply built another house on the property that in many important respects

is inferior to the original one. The court held that this issue is a part of Lewis' contractual cause of action that was severed; it does not affect the ownership of the property. The parties' contract authorized the lender to determine whether to credit the note or repair or restore the property. The lender did restore the house that burned; whether Lewis is entitled to recover based on her allegations that it was not properly restored is a matter to be resolved in the remaining case.

EMC Mortgage Corporation* v. *Window Box Association, Inc., 264 S.W.3d 331 (Tex.App.—Waco 2008, no pet.). The Condo Owner died and no further payments were made on his mortgage. The Lender sent a notice of default and intent to accelerate in December 2001. That same month, the Condo Association filed a notice of lien based on unpaid dues. In January 2002, the Lender sent a letter to the Condo Owner's estate stating that the mortgage was in default and had been placed with an attorney "for the purpose of initiating a foreclosure action." The Condo Association posted a notice of trustee's sale in May 2002 and foreclosed in June 2002, purchasing the property for $6,059. The Lender hired a debt collection agency, which sent a notice of representation for collection in August 2002. At some point, EMC acquired the note and deed of trust from the Lender.

In February 2003, EMC filed suit seeking judicial foreclosure, but dismissed its claims without prejudice in November 2005. In June, August, and November 2006, EMC sent notices to the Condo Owner's estate. EMC posted a notice of trustee's sale in November 2006. The Condo Association subsequently filed suit.

The Condo Association argued that the statute of limitations barred EMC's right to foreclosure. The trial court granted the Condo Association motion and dismissed the suit.

On appeal, EMC contends that the Condo Association lacks standing to assert a statute of limitations defense.

Standing is a necessary component of subject matter jurisdiction and involves the court's power to hear a case. A question of subject matter jurisdiction is fundamental and may be raised at any time. To establish standing, an individual must demonstrate a particularized interest in a conflict distinct from that sustained by the public at large.

EMC asserts that, as junior lienholder, the Condo Association lacks standing to assert a statute of limitations defense because: (1) its lien is subordinate to EMC's lien; (2) it has an equitable right to surplus funds; (3) the Condo Owner's statute of limitations defense does not run with the land; and (4) its ownership status provides no additional rights because it acquired the property before the maturity date. The Condo Association responds that it is no longer merely a junior lienholder, but is the owner of the property and is entitled to rely on the statute of limitations.

As a general rule, only the mortgagor or a party who is in privity with the mortgagor has standing to contest the validity of a foreclosure sale pursuant to the mortgagor's deed of trust. However, when the third party has a property interest, whether legal or equitable, that will be affected by such a sale, the third party has standing to challenge such a sale to the extent that its rights will be affected by the sale. The Condo Association possessed an interest in the property that would be affected by a foreclosure sale. If an affected third party has standing to challenge a foreclosure sale, it follows that the party may also assert any applicable defenses in challenging the sale. The court could not say that the Condo Association lacks standing to assert a statute of limitations defense.

If a series of notes or obligations or a note or obligation payable in installments is secured by a real property lien, the four-year limitations period does not begin to run until the maturity date of the last note, obligation, or installment. Civil Practice & Remedies Code § 16.035(e). Although the note and deed of trust in this case specify a maturity date of January 1, 2017, the Condo Association argues that accrual was accelerated. Accrual may be accelerated where: (1) a note or deed of trust secured by real property contains an optional acceleration clause"; and (2) the holder actually exercises its option to accelerate" by sending both a notice of intent to accelerate and a notice of acceleration. Both notices must be clear and unequivocal. Absent evidence of abandonment or a contrary agreement between the parties, a clear and unequivocal notice of intent to accelerate and a notice of acceleration is enough to conclusively establish acceleration and therefore accrual. While accrual is a legal question, whether a holder has accelerated a note is a fact question.

The parties agree that the deed of trust contains an option to accelerate, but dispute whether EMC exercised that option. The Condo Association argues that the option was exercised because: (1) the December 2001 letter constitutes notice of intent to accelerate and the August 2002 debt collection letter constitutes notice of acceleration; and (2) the August 2002 letter combined with events that occurred both before and after the letter was sent illustrates acceleration.

EMC does not dispute that the December 2001 letter constitutes a notice of intent to accelerate, but contends that the August 2002 letter was sent pursuant to section 1692g of the Fair Debt Collection Practices Act and does not constitute notice of acceleration.

The court held that the collection letter merely advised owner of its right to verify the debt did not constitute notice of acceleration of the debt. Advising the debtor of these rights is not tantamount to advising the debtor that the entire debt is immediately due and payable. Otherwise, there would be no need to warn

creditors against including language in the notice that contradicts or overshadows the debtor's validation rights. At most, the August 2002 letter could be construed as a notice of intent to accelerate. It does not clearly and unequivocally advise the debtor that the debt is immediately due and payable.

Morrison* v. *Christie, 266 S.W.3d 89 (Tex.App.—Ft. Worth 2008, no pet.). When the Morrisons defaulted on their mortgage loan from Christie, they executed a "conveyance in lieu of (or in addition to) foreclosure" to Christie, basically a deed in lieu of foreclosure. The deed states that the conveyance was in consideration of Christie applying the net proceeds from the property's sale to the unpaid balance of the note and of the Morrisons agreeing to be liable for any deficiency after the sale. Christie sold the property to a third party, with the net proceeds applied to the note. He then sued the Morrisons for the deficiency.

The Morrisons argued that a conveyance of real property with the promise of the grantee to sell the property and satisfy an existing debt with the proceeds is generally held to be a transaction in the nature of a mortgage and, since Christie had failed to comply with Property Code §§ 51.002 and 51.003 in acquiring the property, he had failed to prove all of the elements needed to establish a deficiency on the note.

A deed-in-lieu of foreclosure is not a specific type of deed, such as a special warranty deed or a quitclaim deed; there is no such deed as a deed-in-lieu of foreclosure. But a deed given in satisfaction of a debt may serve as a convenient, efficient transfer of title upon default of a debt. No specific statutory scheme governs the format of this type of transaction, although the Texas Legislature provides some protections against undisclosed liens or encumbrances on the property to a holder of a debt secured by a deed of trust who accepts such a conveyance as payment.

The plain language of the deed evidenced an agreement that the borrower would convey the property to the lender in exchange for the lender agreeing to not move forward with foreclosure of the property and to apply to the debt the net proceeds from the sale of the property. The evidence establishes that the property served as security for a debt before the deed-in-lieu conveyance and that the deed-in-lieu conveyance was intended as payment on that debt and not to secure it.

The borrowers argued that under Property Code section 51.003, they have a right to contest the amount of deficiency and a right to a credit of the full fair market value of the property. That section applies to a deficiency judgment action brought after property is sold at a foreclosure sale under section 51.002; section 51.002 by its own terms applies to the "sale of real property under a power of sale conferred by a deed of trust or other contract lien." Because the sale of the real property in this case was not a sale under a power of sale in a deed of trust or other contract lien and was therefore not a foreclosure sale under section 51.002, this section does not apply.

Casstevens* v. *Smith, 269 S.W.3d 222 (Tex.App.—Texarkana 2008,no pet.). Ann Casstevens and her husband were defrauded by their neighbors when they bought the neighbors' house. Even though the Casstevenses paid the neighbors cash and executed a note for the balance and received a warranty deed, they were not informed that the neighbors still owed two debts on the house. The Casstevenses made payments for years but the neighbors did not pay off the existing debts on the house. To make matters worse, when the Casstevenses learned of the existing note, the neighbors prevailed on them to prepay $64,000 cash purportedly to allow the neighbors to pay off their obligation. But the neighbor did not pay off either their first or second lien on the house. Ultimately, one note was foreclosed and the Smiths bought the property at the foreclosure sale.

Casstevens argues that her monthly payments to the neighbors, which the neightbors in turn paid to the bank on the first lien mortgage, created an equitable right of subrogation. It is clear that the neighbors never completely paid off the first mortgage. Casstevens asserts that this alleged equitable subrogation right was in existence when the Smiths acquired title by buying the bank's lien on the property; therefore, they argued, the Smiths' title is subject to this alleged equitable subrogation right.

The right of equitable subrogation arises when one pays the debt of another for which the other is primarily liable. Equitable subrogation is a legal fiction whereby an obligation that is extinguished by a third party is treated as still existing to allow the creditor to seek recovery from the party primarily liable. The purpose is to prevent the unjust enrichment of the debtor who was primarily liable. The doctrine of equitable subrogation is not applied for the mere stranger or volunteer who has paid the debt of another, without any assignment or agreement for subrogation, without being under any legal obligation to make payment, and without being compelled to do so for the preservation of any rights or property of his own.

Here, the court noted, Casstevens is not attempting to assert a subrogation right against the neighbor, but asserts that this right defeats or dilutes the ownership acquired by the foreclosure purchasers when they acquired the bank's lien. The court did not believe this is the purpose of the equitable subrogation doctrine-instead, the doctrine allows the payor to assert rights owned by a creditor against the party primarily liable-in this case, the fraudulent neighbors. Here, any right of subrogation owned by Casstevens could be asserted only against the neighbors (the parties primarily liable), not against the bank or the Smiths.

Further, the Smiths purchased the property at a foreclosure sale and received a trustee's deed subject only to the first lien. A sale regularly exercised under a power is equivalent to strict foreclosure by a court of equity properly pursued. When a regular sale is made under a power contained in the instrument, not only the mortgagor, but all persons claiming any interest in the equity of redemption by a privity of estate with him are considered as parties to the proceeding, and are precluded by it as fully as if they had been made parties defendant by regular subpoena in an ordinary foreclosure suit.

PART II
HOME EQUITY LOANS

AMC Mortgage Services, Inc.* v. *Watts, 260 S.W.3d 582 (Tex.App.—Dallas 2008, no pet.). Lillie bought and house with a combination of a first lien mortgage to Long Beach Mortgage and a second lien mortgage to the seller. The seller sold his note and second mortgage to HSH. Lillie later refinanced the first lien mortgage with a new loan from Ameriquest. The original Ameriquest deed of trust said that it was in renewal and extension of the Long Beach loan. Later, Ameriquest filed a release of the Long Beach loan.

A year after that, Lillie borrowed a home equity loan from Ameriquest. The home equity loan documents did not say they were in renewal and extension of its original refinancing loan, and right after the home equity loan was made, Ameriquest filed a release of lien specifically stating that it was releasing the original refinancing loan and also stating that it was releasing the property from all other liens it held against the property.

A couple of years later, Lillie borrowed yet another home equity loan from Ameriquest, and Ameriquest released its prior liens after the new loan was made.

Both of the home equity loans included a subrogation provision which stated that Americquest was subrogated to any liens paid off by its loans.

Lillie defaulted on the second lien and HSH, the second lienholder, foreclosed. Watts bought the house at the foreclosure sale. Ameriquest then foreclosed on its home equity loan. After Ameriquest sought to evict Watts from the house, Watts brought an action for trespass to try title, action to quiet title, wrongful foreclosure, and declaratory judgment, claiming that the HSH lien was superior to the Ameriquest lien.

Ameriquest argued that its home equity deeds of trust, although later in time, are superior to the Smith deed of trust under doctrine of equitable subrogation. Equitable subrogation provides that a third party will succeed to the rights of the original lender when the third party satisfies the borrower's obligation to the original lender. Ameriquest asserted it had a valid first lien against the property under the 1999 refinance deed of trust and that the proceeds from the 2003 loan transaction were used to pay off the 2000 loan. It then concluded that its title interest is superior to Watts. The settlement statements for the home equity loans attached to Ameriquest's motion for summary judgment show the bulk of the funds from both home equity loans were disbursed to Ameriquest Mortgage for slightly more than the amount of the refinance loan and the home equity extension of credit.

Watts claimed, however, that he was a BFP who bought the property at foreclosure without notice of the equitable subrogation claim of Ameriquest. To qualify as a good faith purchaser, the party must demonstrate that the purchase was made (1) in good faith, (2) for valuable consideration, and (3) without actual or constructive knowledge of any outstanding claims of a third party. A party has constructive notice of instruments properly recorded in the proper county. A party claiming title through principles of equity has the burden of proving that a subsequent assignee of legal title is not a good faith purchaser.

Ameriquest did not contend that Watts and HSH lacked good faith or failed to give valuable consideration. Instead, they assert that Watts and HSH had actual or constructive knowledge of Ameriquest’s claim of superior title. The court disagreed.

Nothing in the documents filed in the real estate records indicates the debt secured by the refinancing deed of trust was paid with the proceeds of the home equity extensions of credit. Instead, the records show the refinancing deed of trust was released. When Ameriquest released the refinance deed of trust, the second lien deed of trust appeared to become the superior lien because the home equity deeds of trust were later in time and did not appear to relate to the refinance deed of trust. When HSH foreclosed on the second lien deed of trust, all liens inferior to its deed of trust were extinguished. Nothing in the records gave HSH or Watts actual or constructive notice of Ameriquest’s claim that the home equity deed of trust was not extinguished by the foreclosure of the HSH deed of trust or that equitable subrogation made the home equity deed of trust superior to the HSH deed of trust.

Rivera* v. *Countrywide Home Loans, Inc., 262 S.W.3d 834 (Tex.App.—Dallas 2008, no pet.). This is a case involving the statute of limitations for forfeiture of a home equity loan. The constitution provides that the cap on the amount of the home equity loan must not exceed eighty percent of the fair market value of the homestead “on the date the extension of credit is made.” Under the constitutional amendment, when a lender makes a loan in violation of the eighty-percent cap, the borrower has a right to bring suit for forfeiture of all principal and interest resulting from the extension of credit at any time after the loan closes.

Thus, the Riveras' cause of action for Countrywide's violation of the eighty-percent loan cap resulting in forfeiture of all principal and interest accrued September 28, 2001, the date of closing of the Riveras' home equity loan.

In reaching this conclusion, the court rejects the Riveras' argument that the cause of action did not accrue until the "maturity date of the last note, obligation, or installment." The Riveras claim it would be "manifestly unjust to permit a lender to force the sale of a property up to four years after the due date of the last payment (or acceleration) while limiting a borrower's defense against such action to four years after the making of the note." A lender's right to foreclose is based on a borrower's breach of the underlying note. This is not analogous to a suit for the constitutional violation of the eighty percent cap on a home equity loan. A borrower may make payments on the note for many years, but the lender's suit for breach of contract only accrues when the borrower fails to make a scheduled payment. The borrower's obligations under the note are only extinguished upon the "maturity date of the last note, obligation, or installment." In contrast, a borrower could sue a lender for a constitutional violation of the eighty percent cap on a home equity loan the day after closing on the loan.

PART III
PROMISSORY NOTES, LOAN COMMITMENTS, LOAN AGREEMENTS

U.S. Bank, National Association* v. *American Realty Trust, Inc., 275 S.W.3d 647 (Tex.App.—Dallas 2009, no pet.). The note and guaranty were generally non-recourse except for certain exceptions or "carve-outs" under which Borrower and Guarantor could be personally liable. One of the carve-outs in the guaranty made the Guarantor personally liable for and guarantees payment to lender for "Waste committed on the Property" and "fraud or material misrepresentation."

The Property was a 196-unit, full-service Holiday Inn located near the Kansas City International Airport. The Holiday Inn franchise was set to expire. To relicense the hotel, Borrower was required by Holiday Inn to complete an application and obtain a Property Improvement Plan inspection, which would include all the necessary improvements to the property before a new franchise license could be issued. The PIP was and the estimated costs of improvements was approximately $1.8 million. Although there was some dispute as to who decided not to pursue the relicensing, ultimately the Borrower did not renew with Holiday Inn and, instead, entered into a new franchise with Clarion.

Following the switch to Clarion, the occupancy and revenues declined. Borrower could not service the debt and eventually defaulted on the note, and the property was foreclosed. The Lender later learned Holiday Inn was in fact still interested in relicensing the hotel, and it was Borrower who decided not to reapply for a license. In their lawsuit, they argued the change from the Holiday Inn flag to Clarion was a breach of the note and guaranty under the "waste" and "fraud or material misrepresentation" carve-out provisions, which resulted in damages.

The Lender argued that the failure to relicense with Holiday Inn was waste, as contemplated by the carve-out guaranty. Specifically, the Lender contends waste, although not specifically defined by the guaranty, does not require actual, physical damage to the hotel because the terms of the guaranty, as intended by the parties, clearly encompass damage to intangible assets such as the franchise license.

The Guarantor responds that Lender failed to establish waste as a matter of law because waste has a specific common law meaning and requires actual, physical damage, which did not occur under these facts.

Although waste is not defined in the guaranty, the mortgage and security agreement, executed on the same date as part of the same transaction, expressly defined "property" to include physical assets such as land and improvements, and it also included certain contracts and intangibles. Construing these provisions together, the Lender asserts that Borrower was clearly required to keep the hotel operating as a Holiday Inn or as a comparable or better franchise, but failed to fulfill its obligations. By allowing the Holiday Inn franchise license to expire and failing to reapply, appellants claim Borrower committed waste on the property because the value of the franchise diminished when it became a Clarion.

After reviewing the relevant loan documents, the court first notes nothing within any of the documents specifically required Borrower to reapply for a franchise license with Holiday Inn. One of the covenants of the mortgagor simply states it agrees to "conduct and operate its business as presently conducted and operated," which means Borrower must continue to use the property as a hotel, but not necessarily as a Holiday Inn. Although the documents contemplate all future franchise agreements entered into would become "property," they do not include any potential franchise agreements, such as here, that never came into existence. As defined by the carve-out provision, for waste to have occurred, it must have been committed "on the property." The court refuses to interpret the loan documents to mean waste can occur on potential, future property, in this case a potential franchise license, that was never entered into.

The distinction is between breaching an existing contract and renewing or reapplying for a new contract. Had Borrower terminated its franchise license with Holiday Inn prior to September 24, 2002 and then

changed to a Clarion, this could possibly be waste to the existing property. However, by failing to reapply for a Holiday Inn franchise license and instead re-flag as a Clarion after the Holiday Inn franchise license expired, Borrower did not commit any "waste" on the "property."

The Lender then claimed damages for fraud or material misrepresentation. The trial court found Borrower claimed Holiday Inn had decided not to relicense when the franchise license expired. This representation was false because Borrower, not Holiday Inn, had decided to let the license expire. The trial court further found the change from a Holiday Inn to a Clarion resulted in significant diminution in value of the hotel. However, despite recognizing the loss in value because of the flag change, the trial court found these damages were not caused by Borrower's material misrepresentations.

The court of appeals agreed. As previously noted, the Lender had no property interest in any future franchise licensing agreements and did not specifically contract for the hotel to remain a Holiday Inn. Thus, regardless of any misrepresentations Borrower made regarding who decided not to reapply for a license, the misrepresentations could not have caused damages for something Borrower was not required to do, specifically, relicense as a Holiday Inn.

Austin* v. *Countrywide Homes Loans, 261 S.W.3d 68 (Tex.App.—Houston [1st Dist.] 2008, pet. denied). A maker of a promissory note has no standing to invoke the statute of frauds to invalidate the assignment of the note by the original holder to a subsequent holder. The statute of frauds does not give third parties the right to interfere with others' contracts

PART IV
GUARANTIES

Hasty* v. *Keller HCP Partners, L.P., 260 S.W.3d 666 (Tex.App.—Dallas 2008, no pet.). Keller, as landlord, leased space inside a medical center to At Home Pharmacy Keller, L.P. Hasty, the Pharmacy's president, signed the lease on behalf of the Pharmacy. A representative of Keller's general partner, Keller MOB GP, LLC, signed the lease on behalf of Keller. On the same day, Hasty entered into a lease guaranty that was designated as a rider to the lease and was expressly "made a part of" the lease. Unlike the lease, however, the guaranty identifies Keller GP, not Keller, as the "Landlord." When the Pharmacy defaulted, Keller sued Hasty on his guaranty. Hasty argued that he is not liable to Keller under the guaranty because the guaranty states that it is "to and for the benefit of Keller [GP]," not Keller.

Keller acknowledged that the guaranty identified its general partner, Keller GP, as the "Landlord," instead of Keller, but argued that "such an oversight will not provide the guarantor any defense where the parties are well aware of what lease the guaranty secures and which party is the true landlord."

To obtain summary judgment on a guaranty agreement, a party must conclusively prove: (1) the existence and ownership of the guaranty contract, (2) the performance of the terms of the contract by plaintiff, (3) the occurrence of the condition on which liability is based, and (4) guarantor's failure or refusal to perform the promise. Hasty argued that Keller cannot demonstrate ownership of the guaranty as a matter of law because the name of the landlord in the lease is different from the name of the landlord in the guaranty. In response, Keller argued that it has sufficiently demonstrated ownership as matter of law and describes the difference between the lease and the guaranty as a "typographical error ... of little moment."

Under Texas law, the court was required to construe the lease and the guaranty together because the guaranty states that "it is hereby made a part of that certain Lease." When one document is incorporated into another by reference, the two documents must be construed together. The primary concern is to ascertain the true intentions of the parties. The doctrine is well established that written contracts will be construed according to the intention of the parties, notwithstanding errors and omissions, when, by perusing the entire document, the errors can be corrected and omissions supplied, and, to this end, words, names, and phrases misused may be omitted entirely, and words, names, and phrases obviously intended may be supplied.

The court concluded that the reference to "Keller GP" as landlord instead of "Keller" is an error in the guaranty. There is no evidence, and Hasty does not contend, that the parties intended the guaranty to cover any lease or indebtedness other than the lease between the Pharmacy and Keller entered into the same day. Consequently, Keller demonstrated ownership of the guaranty as a matter of law and Hasty did not raise a fact issue on the element of ownership to defeat Keller's motion for summary judgment.

James Clark, Inc.* v. *Vitro America, Inc., 269 S.W.3d 681 (Tex.App.—Beaumont 2008, no pet.). Both the credit agreement and the individual personal guaranty appear on a one-page pre-printed form. The top half of the page contains the terms of the agreement to extend credit to Clarks' Glass & Mirror for purchases from VVP America, Inc. The bottom half of the page contains an individual personal guaranty signed by Becky Clark. Mistakenly, the blank that was supposed to show the name of the primary obligor instead showed the name of the party extending credit. When she was sued on the guaranty, Becky argued that the guaranty does not state that Becky guaranteed the payment of an obligation owed by Clark Inc., but said she guarantied obligations owed by the party extending credit.

Nonsense, said the court. In this case, there was certainly a mistake made in reducing the parties' agreement to writing. Of the two possible constructions of the contract, however, only one is reasonable. The single-page document reveals that the merchant agreed to sell merchandise to Becky's company on credit and that Becky agreed to guarantee payment. Read literally and without reference to its context, the payment Becky agreed to guarantee was a payment by one merchant entity to another. From the face of the document such a result is nonsensical.

The document shows that one party-the merchant (itself and through related entities)-was extending credit to one party only-Clark Inc. (itself or through an assumed name)-and one party-Becky-personally guaranteed payment of any debts that arose pursuant to the transactions under the credit agreement. Because the party mistakenly shown in the blank is a party extending credit, not a party receiving credit under the agreement, there is no reasonable interpretation of the contract under which ACI Distribution would be making a payment for Becky to guarantee. Because the only reasonable interpretation of the contract is that Becky guaranteed payment of debts incurred by Clark Inc. under the agreement, the trial court did not err in so construing the contract as a matter of law.

PART V
USURY

Bair Chase Property Company, LLC* v. *S & K Development Company, Inc., 260 S.W.3d 133 (Tex.App.—Austin 2008, pet. pending). Bair Chase executed and delivered to S & K a promissory note for a loan of $1.4 million, and a second promissory note for a loan of $100,000. The $1.4 million note provided that Bair Chase would pay interest on the unpaid principal balance at a rate equal to the lesser of 12% per annum or the maximum rate of interest permitted by applicable usury laws. The $100,000 note included a similar provision, capping interest at a rate equal to the lesser of 6% per annum or the maximum rate permitted by law. S & K agreed to extensions of the $1.4 million note's maturity date. After both notes matured, S & K brought suit to collect. Bair Chase counterclaimed for usury. S & K moved to abate for 60 days to permit it to cure the usury. During the abatement period, S & K declared the $100,000 note void and took other actions to cure the usury. S & K then amended its pleadings to continue its action on the $1.4 million note.

Finance Code § 305.007 states that the penalties provided in the Finance Code are the only penalties available for a violation of the usury statute. Bair Chase argued that usury provisions of the Texas Constitution include a self-executing provision that renders usurious contracts illegal and void, but that the voiding of usurious contracts is not a "penalty" for usury and, therefore, § 305.007 does not apply. The voiding of the contract for usurious interest is, argued Bair Chase, merely a natural consequence of the Constitutional provision, not a penalty.

Texas courts have historically treated the constitutional prohibition on usury as a self-executing provision. In ***Allee* v. *Benser***, 779 S.W.2d 61 (Tex.1988), the Texas Supreme Court referred to constitutionally void interest as a "common law" remedy for usury. Finance Code § 305.007 specifically states that "Common law penalties do not apply." Therefore, the court held that constitutional voiding of interest has been precluded by the Finance Code.

On another issue, Bair Chase argued that compounding of interest was not allowed under the $1.4 million note because the parties did not expressly agree to do so. However, the note contains an express provision allowing for the compounding of interest, stating, "All past due principal and/or interest shall bear interest from and after maturity at a rate equal to the lesser of (a) eighteen percent (18%) per annum or (b) the Maximum Rate." Bair Chase took the position that this language merely provides for simple interest on accrued interest, distinguishable from "true" compound interest, as discussed above. However, a court must give language in a contract its plain meaning and construe it to avoid rendering any language meaningless.

The $1.4 million note specifically states that "past due principal and/or interest shall bear interest from and after maturity." Furthermore, it must be presumed that the parties intended to enter into a legal contract, validating the contract as nonusurious if reasonably possible. Based on the plain language of the note stating that interest shall bear interest "from and after" maturity, the court held that the parties unambiguously agreed that interest on past due interest would be continuously incurred on that interest after maturity, so that any past due interest would be added to the principal. Bair Chase's construction would render the words "from and after" meaningless and would defeat the presumption that the parties agreed to a nonusurious contract. As a result, the court held that the parties expressly agreed to compound interest.

Finally, Bair Chase argued that S & K was not entitled to take the corrective action to cure because the cure provisions of the Finance Code were enacted after the usurious transaction took place. The court disagreed. Courts generally presume that an amendment to a statute applies prospectively unless it is expressly made retroactive. However, this general rule for prospective operation does not apply to a statutory amendment that is merely procedural or remedial. Here the court said, that, while it is a close case, the amendment to 305.006(d) was remedial and curative in nature and therefore applies retroactively.

As a result, S & K was not prohibited from taking corrective action under Finance Code § 305.006(d).

C & K Investments* v. *Fiesta Group, Inc., 248 S.W.3d 234 (Tex.App.—Houston [1st Dist.] 2007, no pet.). As a condition to making two loans (each of which bore interest at 18% per annum), the lender required the borrower to pay a "fee," "commission" or "equity" of 10% of the amount of each loan contemporaneously with funding. After the loans went into default, and the lender foreclosed on the property securing the loans, the borrower sued for usury. The trial court awarded separate statutory usury penalties for contracting for, charging, and receiving usurious amounts.

The lender argued that, since the trial court had found that the notes were not usurious on their face and contained a savings clause, there was not a violation of the "contracting for" element of the usury claim. The court disagreed. Although the notes in this case were non-usurious on their face, the borrower presented evidence that the loans were conditioned on the immediate payment of a fee of approximately 10% of the face amount of both loans, thus effectively reducing the true principal of the loans and increasing the effective interest rate above the maximum lawful rate of 18%, and resulting in a contract for usurious interest.

Also, in regard to the lender's argument that the savings clauses in the notes preclude the award of damages against Ken for "contracting for" usurious interest, the court first noted that Texas courts have acknowledged the validity of usury savings clauses and, in appropriate circumstances, enforced such clauses to defeat a violation of the usury laws. However, the mere presence of a usury savings clause will not rescue a transaction that is necessarily usurious by its explicit terms. This rule prevents a creditor from freely contracting for usurious interest knowing that for the few debtors who complain, the creditor will escape penalty by mere reference to a savings clause and refund of the usurious amounts. Furthermore, the effect of a usury savings clause is largely a question of construing the terms of the clause as a whole and in light of the circumstances surrounding the transaction.

Based on these guidelines, the court concluded that the savings clauses in the notes do not preclude judgment against the lender. First, although the notes are not usurious on their face, the borrower presented evidence that its payment of fees to the lender was contemporaneous with the parties' execution of the notes, and the jury found that the lender conditioned the loans on the payment of these fees. The borrower also presented evidence that the checks were signed on the date of the closings and were negotiated or presented by the lender shortly thereafter. Additionally, there is no evidence that the lender ever attempted to effectuate the savings clauses, and they cannot now seek the clauses' protection in this appeal.

Finally, the lender argues that the amount of interest contracted for was wrongly "spread over the entire term of the loan" instead of spread through the date of the foreclosure sale. Section 302.101 of the Finance Code provides that the determination of whether a real estate loan is usurious is made by amortizing or spreading all of the interest during the entire stated term of the loan. In this case, involving "contracting for" usurious interest, the borrower presented evidence properly spreading the interest under the stated term of the loans, as those terms existed at the time the lender engaged in the penalized conduct, i.e., at the time he contracted for the loans.

PART VI
DEEDS AND CONVEYANCE DOCUMENTS

Givens* v. *Ward, 272 S.W.3d 63 (Tex.App.—Waco 2008, no pet.). Ward purchased a 115-acre tract of land from Givens. The sales contract said the seller would reserve the minerals. The contract also contained a "further assurances" provision that said the parties would fully cooperate, adjust, and correct any errors or omissions and to execute any and all documents needed or necessary to comply with all provisions of the contract. The warranty deed contains no reservation of mineral interests. About six months after closing, the title company contacted Givens and Ward, explaining that the deed erroneously omitted the mineral reservation and asking the parties to sign a correction deed with the mineral reservation. Ward refused to sign.

Ward filed a declaratory judgment action against Givens seeking a judicial declaration that he owns the disputed mineral interests. Givens filed a general denial, asserted the affirmative defense of mistake, and counterclaimed for reformation of the deed due to mistake.

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. For reformation of a written instrument, a party must prove two elements: (1) an original agreement and (2) a mutual mistake, made after the original agreement, in reducing the original agreement to writing.

Givens contends that the requisite mutual mistake consists of the unilateral mistake in signing a deed which did not conform to the parties' agreement and Ward's knowledge that the deed did not conform. Unilateral mistake by one party, and knowledge of that mistake by the other party, is equivalent to mutual mistake.

Ward argued that when a deed is delivered and accepted as performance of a contract to convey, the contract is merged in the deed. Though the terms of the

deed may vary from those contained in the contract, still the deed must be looked to alone to determine the rights of the parties. However, the merger doctrine applies to deeds only in the absence of fraud, accident, or mistake. The court rejected Ward's claim that the merger doctrine barred reformation.

Watson v. Tipton, 274 S.W.3d 791 (Tex.App.—Fort Worth 2008, pet. denied). Tipton filed declaratory judgment actions against the Watsons and the Kennedys, asking the court to construe the validity of a warranty deed and to declare that Tipton held good and marketable title to the property described by the deed. He alleged that the Watsons and the Kennedys had each executed a deed to him of the houses they lived in, that Tipton had allowed them each to remain in their respective houses in exchange for an agreement to pay taxes and insurance on the property, that they had failed to do so, and that, when he tried to evict them, each raised the issue of validity of the deeds in question in order to oust the jurisdiction of the justice court.

The Kennedys and the Watsons, acting pro se, claimed that Tipton's attorney Alex Tandy, either alone or in complicity with Tipton, fraudulently obtained the signatures of the Watsons and Weldon and fraudulently appended them to the deeds at issue. Tipton alleged that the Watsons and the Kennedys had no evidence to support their contentions that they did not execute the deed, that the endorsements on the deed were not genuine, or that Tipton's suit was barred by the doctrine of release. He argued that because the deed was recorded in the public records, the presumption that the deed is valid applies and that an acknowledgment on a deed is conclusive evidence of the facts stated in the instrument.

The trial court granted summary judgment for Tipton. The court's order states that the Kennedy and Watson deeds passed good and marketable title to Tipton and also awards Tipton attorneys' fees.

When a grantor transfers property, title to the property vests in the grantee upon execution and delivery of the deed conveying the property. Whether the grantor intended to deliver the deed and convey the property in accordance with the deed is determined by examining all the facts and circumstances preceding, attending, and following the execution of the instrument. Proof that the deed was recorded creates a presumption of and establishes a prima facie case of delivery and intent by the grantor to convey the land. This presumption may be rebutted by showing (1) that the deed was delivered or recorded for a different purpose, (2) that fraud, accident or mistake accompanied the delivery or recording, or (3) that the grantor had no intention of divesting himself of title.

Tipton produced copies of the deeds at issue and proof that the deeds had been filed in the records of Parker County. The notarized deeds named him as grantee and Watsons and Kennedys as the grantors. By providing the deeds and proving that the deeds were recorded, Tipton established a prima facie case that the parties delivered the deeds and intended to convey the property described. A showing that the deeds were executed and delivered with an intent to convey the property is sufficient to establish that the deeds vested title to the properties in Tipton.

The Kennedys and Watsons argue that the deeds are not entitled to the presumption because the file stamp numbers suggest that the documents were somehow altered and pages interchanged. Specifically, they point out that the Watson deed has a file stamp and page number that is quite a bit lower than the file stamp and page number of the Kennedy deed, indicating that the Watson deed was filed much earlier than the Kennedy deed, which they argue is contrary to what one would expect if the deeds had been signed one day apart. A showing that fraud accompanied the recording of the deeds would rebut the presumption that Appellants intended to convey the property to Tipton.

The Watson deed was filed in October 2001 and that the Kennedy deed was filed in January 2003; the Watson deed has a lower record number because it was filed over a year before the filing of the Kennedy deed. There was no evidence explaining why the Kennedy deed was not filed until 2003, but the Kennedy's and Watsons make no argument as to how the delay in filing raises a fact issue on whether fraud accompanied the delivery or recording.

The Watsons and Kennedys contend that Tipton presented no summary judgment evidence that he paid consideration for the conveyances. Thus, they argue, Tipton did not carry his burden of proof. The Watsons and Kennedys do not cite any authority supporting their argument that Tipton had to prove consideration to prevail. And Tipton did not have to prove consideration because mere lack of consideration would not have prevented the deeds from conveying title.

Furthermore, the acknowledgments on the deeds constitute prima facie evidence that the deeds were executed for the consideration stated therein. Both deeds were acknowledged and notarized by Lana Trimble, a notary public of the State of Texas. The acknowledgment on the Watson deed states that Larry and Sheridan Watson personally appeared before Trimble and acknowledged that they executed the deed for the purpose and consideration expressed in it. The acknowledgment on the Kennedy deed states that Weldon Kennedy appeared before her and made an identical acknowledgment. An acknowledgment on a deed is prima facie evidence that the grantor executed the deed for the consideration expressed in the deed. Tipton therefore made a prima facie case as to the

genuineness of the signatures and as to the execution of the deeds

PART VII
LEASES

Prudential Insurance Company of America* v. *Italian Cowboy Partners, Ltd., 270 S.W.3d 192 (Tex.App.—Dallas 2008, pet. pending). 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 first claims dealt with by the Court of Appeals were Italian Cowboys' common-law fraud claim, the statutory fraud claim, and the negligent misrepresentation claim. The trial court found that the property manager made the following statements to Italian Cowboy during lease negotiations: (a) The tenant was lucky to be able to lease the premises because the building on the premises was practically new and was problem-free; (b) No problems had been experienced with the Premises by the prior tenant; (c) The building on the Premises was a perfect restaurant site and that the tenant could get into the building as a restaurant site for next to nothing; and (d) given the property manager's superior and special knowledge, these matters were represented as facts, not opinions.

The trial court also found that the statements were false; that the property manager and Prudential knew that they were false; and that they intended for the tenant to rely upon them. Further, the trial court found that the Tenant relied on the statements and would not have entered the lease and executed the guaranty if the representations had not been made.

Prudential and the property manager argue that common-law fraud, statutory fraud, and negligent misrepresentation all have the common element of reliance and that the tenant disclaimed any reliance on representations not contained in the lease. The lease contained a statement that there were no representations not set out in the lease and also contained a merger clause.

Relying on ***Schlumberger Tech. Corp.* v. *Swanson***, 959 S.W.2d 171 (Tex.1997), the court noted that the following elements will foreclose a claim of fraudulent inducement: (1) the parties were attempting to end a situation in which they had become embroiled in a dispute over the value and feasibility of the subject project, (2) highly competent and able legal counsel were involved in negotiating the release, (3) the parties were negotiating at arm's length, and (4) the parties were knowledgeable and sophisticated in business. Here, the parties were represented by counsel as well as real estate brokers both before and during the negotiations leading up to the signing of the lease and guaranty. The record also reveals that the parties to this arm's length transaction were sophisticated in dealings involving the leasing and the operation of restaurant properties, that several drafts of the lease were circulated, and that various changes were negotiated and made to both the lease and the guaranty.

When sophisticated business parties who have fully negotiated a contract and who have been represented by attorneys or other professionals in the field are dealing at arm's length, they should be able to enter a contract in which they effectively disclaim reliance, or in which they agree that there are no representations outside of the written contract, or in which they otherwise provide for merger. Such a rule will result in agreements with predictable results and liability limitations that are well-defined. In this negotiated, redrafted lease agreement the disclaimer and merger clauses must be considered to be a part of that negotiated agreement and not simply boilerplate as found by the trial court. Under such circumstances, sophisticated parties who are represented by counsel and other professionals certainly can bargain to have the details of any representations upon which they are relying inserted into the contract, rather than agreeing that there are none.

The court next dealt with Italian Cowboy's claim of breach of the implied warranty of suitability. Here, there is no express waiver of the implied warranty of suitability. Rather, the parties rely upon the placement of repair responsibilities in support of their respective positions. Prudential and the property manager argue that the cause of the sewer odor problem was related to plumbing, ventilating, air conditioning, or some other

mechanical installation. Prudential argues that, in accordance with the terms of the lease, the Tenant was required to make all repairs "foreseen or unforeseen" to the plumbing, ventilating, air conditioning, and "any other mechanical installations or equipment serving the Premises or located therein." In its arguments, the tenant contends that Prudential and the property manager ignore findings of fact regarding problems with a grease trap that contributed to the sewer gas odor problem. They also argue that, because the grease trap was located in the "Common Area," Prudential was obligated to repair it.

The court held as a matter of law that the lease placed the burden upon the Tenant to make any needed repairs, foreseen or unforeseen, to plumbing, heating, ventilating, air conditioning, and mechanical installations or equipment serving the premises. It went on to note that the subsequent tenant managed the odor problem by altering some of the ventilation pipes. The court also noted that, even if the grease trap, located in the common area, was implicated in the problem, the implied warranty of suitability applies only to the premises, and does not apply to the common area.

The third claim made by the tenant was that the odor problem constituted a constructive eviction and breach of the covenant of quiet enjoyment. The court held that, for an act to constitute a breach of the covenant of quiet enjoyment, it must occur during the lease term. Here, the misrepresentations were all made before the lease began, so they could not be the basis of a constructive eviction claim.

Motiva Enterprises, LLC* v. *McCrabb, 248 S.W.3d 211 (Tex.App.—Houston [1st Dist.] 2007, pet. denied). Motiva entered into a long-term ground lease with the McCrabbs for the purpose of operating a gas station and convenience store. The lease contained a provision that stated the lease would terminate upon condemnation of the leased premises. The provision said the tenant would be entitled to receive from any condemnation proceeds the amount attributed to any of the following: buildings or other improvements installed on the premises by tenant; any damages to tenant's personal property resulting from said condemnation; removal or relocation costs of tenant's anticipated business proceeds lost to tenant; or any special damages of tenant.

The State of Texas condemned a large portion of the land and awarded more than $1,700,000 in damages. The trial court concluded that the tenant owned the improvements to the land and was entitled to recover the $1,401,000 of the compensation allocated for those improvements, the landlord was entitled to recover the remaining $304,000 allocated for the land, and the tenant was not entitled to any compensation for its "leasehold advantage" under the terms of the lease. The so-called "leasehold advantage" is the difference between the rent provided for in the lease and the market rental value.

Motiva argues that, based on its reservation of the right to recover its "special damages," it is entitled to "recover its damages for its lost leasehold," i.e., the market value of its leasehold interest in the property under the ground lease. The McCrabbs argue that because Motiva's leasehold rights terminated, Motiva is not entitled to compensation for future benefits under the lease. They also assert that the general reference in the lease to "special damages" in regard to Motiva's reserved rights upon the termination of the lease does not overcome Motiva's specific, contractual relinquishment of its leasehold rights that occurred upon condemnation.

A lessee is entitled, as a matter of law, to share in a condemnation award when part of its leasehold interest is lost by condemnation. Unless a lease provides that it terminates upon condemnation, the tenant will recover compensation for the unexpired term. Under Texas law, parties have a right to contract for termination of a lease in the event of condemnation. If a lease provides that it terminates upon condemnation, the lessee has no interest in the condemnation award. Here, the lease agreement specifically provided that the lease itself would "terminate as of the date when possession is required to be given" in condemnation. Because the lease automatically terminated upon condemnation, Motiva had no compensable interest in regard to the termination of the lease. Motiva's construction of the term "special damages" in reference to its reserved rights upon termination of the lease conflicts with the specific language in the lease providing that it actually terminated upon condemnation. Because the lease itself actually terminated upon condemnation, Motiva, as a matter of law, was not entitled to recover any damages for its "lost leasehold."

Meridien Hotels, Inc.* v. *LHO Financing Partnership I, L.P., 255 S.W.3d 807 (Tex.App.—Dallas 2008, no pet.). LaSalle is the owner of the real property that included the Meridien Hotel in downtown Dallas. LaSalle leased the hotel space to a Meridien entity, Leasco. The hotel was operated by Meridien, and Leasco paid Meridien fees to manage the hotel.

The lease contained a provision if Leasco's parent transferred its interest in Leasco to a third party, the transfer would be a "Permitted Transfer" only if it was in conjunction with the sale of all or substantially all of the parent's hotel-management businesses. The "Permitted Transfer" could be made only if the parent gave LaSalle written notice of the proposed Permitted Transfer, after which LaSalle would have thirty days to decide whether to purchase the parent's interest in Leasco for its fair market value.

If LaSalle decided to purchase Leasco, then the closing had to occur within 60 days of the parent's

delivery of notice of the transfer. If the parties could not agree on the fair market value of the parent's interest in Leasco, the issue was to be submitted to binding arbitration, which "to the maximum extent practicable" was to be concluded within ninety days of filing the arbitration claim. If there was a change in control of Leasco other the Permitted Transfer, LaSalle had the right to terminate the lease on thirty days' notice and evict Leasco.

Leasco's parent gave LaSalle notice that it was selling substantially all of its Meridien hotel-management businesses, including Leasco. LaSalle gave Leasco and Meridien notice of its intent to purchase Leasco and gave a schedule for transition to a new management company. LaSalle estimated the value of Leasco the be zero, because there was no market for such a short lease (there were six years remaining in the lease's term) and the hotel had been one of the worst performers in its class of hotels for the past few years.

Leasco commenced an arbitration proceeding to determine its fair market value. The same day, it also filed suit in district court requesting the court declare that the closing on the sale of Leasco could not occur until determination of Leasco's fair market value and to declare that any provisions in the lease allowing LaSalle to enforce the purchase provision without paying any consideration were void for absence of mutuality. Also it sent a letter to LaSalle stating in light of LaSalle's failure to comply with the terms of the lease, "we do not anticipate being able to participate in a February 14, 2002 transition. Until the relevant terms of the Lease are satisfied, and determined to be enforceable, your demands are premature." The letter did not state which provisions of the lease were not followed or enforceable. LaSalle responded with a notice of default and termination of the lease. Under the lease, Leasco had thirty days from the notice of default and termination to cure the default before the lease would be terminated.

At trial, the court granted partial summary judgment holding: (1) the transfer provision and purchase provisions of the lease were enforceable, and a closing on the purchase pursuant may occur prior to the determination of fair market value; (2) Leasco's refusal to close on the purchase on the date specified in LaSalle's purchase notice and to surrender possession of the premises constitute an event of default under the lease; (3) As a result of Leasco's event of default under the lease, LaSalle has the right and has lawfully exercised the right to terminate the lease; and (4) Leasco and Meridien, Inc. no longer have a lawful right of possession to the hotel.

LaSalle brought an action for forcible entry and detainer, obtained a judgment for possession of the premises, and Leasco and Meridien vacated the hotel.

Most of the issues in this case concern the interpretation and application of the provision of the lease concerning the parties' rights when Leasco is about to undergo a change in ownership. LaSalle argues that the provision permitted it to terminate the lease when a transfer that is part of the sale of substantially all of Leasco's parent's hotel-management businesses fails to comply. Therefore, according to LaSalle, it was entitled to terminate the lease when Leasco refused to close the transaction and surrender the premises as required. The court agreed with LaSalle's interpretation of the contract. The lease provision contained a two-part definition of "permitted transfer." The first part is the requirement that the transfer be a part of the sale of all of the parent company's hotel-management businesses. The second part is that the transfer "shall be made only upon the following terms and conditions," paragraphs (a) through (f). If a "permitted transfer" can be made "only upon" certain conditions, then the failure to meet those conditions results in the transfer not qualifying as a "permitted transfer" under the lease.

Leasco and Meridien next assert they did not breach the lease by refusing to close because they were not required to close until Leasco's fair market value had been agreed upon or determined in arbitration. They cited cases for the proposition that a contract which leaves essential terms open for later negotiation is unenforceable until the essential terms are fixed. However, a purchase agreement for real property that does not contain the purchase price is enforceable if the agreement contains a standard for determining the purchase price.

In this case, the purchase price was not left for later negotiation. Instead, the lease provided a standard for determining the purchase price in the event of the parties' inability to agree on the price: the price would be determined by an arbitrator following the procedures in the lease.Thus, the lease's failure to set an exact purchase price for LaSalle's purchase of Leasco did not render that part of the lease unenforceable.

Leasco and Meridien also argue that the purchase price had to be determined before closing could occur because paragraph (f) of section 22.22 provides, "unless and until the Fair Market Value of the respective interests in Tenant have been fully determined, Landlord shall have no obligation to complete the Purchase." Leasco and Meridien argue paragraph (f) gave LaSalle the right to decide not to complete the purchase if it was dissatisfied with the fair market value as determined by the arbitrator. Thus, they argue, if the closing and Leasco's surrender of the premises could be required before determination of the purchase price, then "LaSalle could essentially kick Meridien out of the Hotel, participate in the arbitration but then pull out if it did not like where the arbitration

price was headed. This interpretation of paragraph (f), which is the basis of their argument, is incorrect. Paragraph (f) gave LaSalle the right to delay the closing until after determination of Leasco's fair market value. Paragraph (f) did not permit LaSalle to force the closing and then not pay the arbitrated price. Nor does it permit LaSalle to avoid either purchasing Leasco or paying the price set by the arbitrator.

Leasco and Meridien also argue that termination of the lease for failure to comply with section 22.22 would constitute a forfeiture and, as Leasco and Meridien observe, forfeitures are not favored. Forfeiture of a contract is to be avoided when another reasonable reading of the contract is possible. However, a clear and specific forfeiture provision in a contract will be honored.

Daitch* v. *Mid-America Apartment Communities, Inc., 250 S.W.3d 191 (Tex.App.—Dallas 2008, no pet.). Daitch slipped and fell in the bathroom of his apartment. He sued the landlord, Mid-America, alleging that water leaked from the air conditioning unit in the ceiling during the night and he slipped on the water the next morning. The air conditioner had been installed about nine months before the injury. The landlord had not received any notices from the tenant about the air conditioner not working properly.

The lease provides that Daitch takes the property as is except for conditions materially affecting the health or safety of ordinary persons. It requires him to use customary diligence in maintaining the apartment, but prohibits him from performing repairs or altering the property without authorization by Mid-America. The lease requires repair requests to be made in writing, signed, and delivered to Mid-America's designated representative. Daitch is required to give prompt notice of water leaks and other conditions that pose a hazard to property, health, or safety. The lease also requires Daitch to notify Mid-America as soon as possible of any problems or malfunctions in the air conditioning and requires Mid-America to use customary diligence to make repairs. The lease permits Mid-America to enter the apartment at reasonable times to respond to Daitch's requests, make repairs, or do preventive maintenance, among other things. Mid-America also agrees to act with customary diligence to maintain fixtures, heating and air conditioning equipment, and to make all reasonable repairs, subject to Daitch's obligation to pay for damages for which he is responsible.

Generally, a lessor has no duty to tenants or their invitees for dangerous conditions on the leased premises. This rule originates from the notion that a lessor relinquishes possession or occupancy of the premises to the lessee. One exception to this general rule is that a lessor may be liable for injuries resulting from a defect on a portion of the premises that remains under the lessor's control. Daitch argues Mid-America retained control of the air conditioning unit because Mid-America installed and maintained the unit and it was located in the bathroom ceiling. However, although the air conditioning unit was installed in the bathroom ceiling, there is no evidence Mid-America retained physical possession of the air conditioner or that Daitch used it in common with others. A contractual right of re-entry by the lessor to make repairs or improvements is not a reservation of control over a portion of the premises subjecting the lessor to liability.

Another exception to the no-duty rule is that a landlord who agrees to repair the leased property owes a duty to exercise ordinary care. Unless the contract provides that the landlord shall inspect the land to ascertain the need of repairs, a contract to keep the premises in safe condition subjects the landlord to liability only if he does not exercise reasonable care after he has notice of the need of repairs. Here the lease did not require Mid-America to inspect the property after the tenant took possession and required Mid-America to make repairs only on written notice from the tenant.

Meadows* v. *Midland Super Block Joint Venture, 255 S.W.3d 739 (Tex.App.—Eastland 2008, no pet.). The lease was for a term of one month. The lease provided an option for the tenant to renew for successive one-month terms by giving written notice by the first of the month. Delivery of the rent for the month was sufficient notice. The tenant put the check in the U.S. mail on September 30, it was post-marked on October 3, and received by the landlord on October 5. The landlord claimed that the renewal notice (i.e., the check) was not delivered timely and that the lease expired. The court agreed. The language of section 2 of the lease agreement is unambiguous: the tenant had to exercise the option by making certain that its check was delivered to the landlord on or before the first day of the next month.

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

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

Sometime later, Luccia again sought to purchase the property pursuant to the terms of the option. Ross declined to sell the property to Luccia, contending that a "new contract with new terms" would be necessary. Luccia responded to Ross's refusal to sell by filing this suit for breach of contract, seeking the remedy of specific performance or, alternatively, damages. Ross counterclaimed seeking a declaration that Luccia had

no right to exercise the option and also seeking damages for Luccia's breach of contract for failing to meet the terms of the original Lease Agreement.

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

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

Merit Management Partners I, L.P.* v. *Noelke, 266 S.W.3d 637 (Tex.App.—Austin 2008, no pet.). The County Court has no jurisdiction to hear a case involving the effect of a consent to assignment of lease because the existence and extent of the tenant's leasehold rights are so involved in the case as to make the landlord's claims a suit for the determination of the existence and extent of the tenant's leasehold and, thus, a determination of title to real property.

PART VIII
VENDOR AND PURCHASER

In re *Bank of America, N.A.*, 278 S.W.3d 342, 52 Tex. Sup. Ct. J. 400 (Tex. 2009). Bank of America and Mikey's Houses executed a real estate contract and a two-page Bank of America Mortgage Addendum, which contains a jury-waiver provision. The addendum comprises twenty numbered and separately-spaced paragraphs, five of which contain bolded introductory phrases that appear to be hand-underlined. Both parties signed the contract and afterwards separately executed the addendum. Mikey's Houses sued Bank of America for breach of contract.

When Mikey's Houses made a jury demand, Bank of America moved to enforce the jury waiver. The trial court agreed that the waiver should be enforced and issued an enforcement order. Mikey's Houses then filed an interlocutory appeal seeking to reverse the trial court's enforcement order. The court of appeals reversed, holding that Bank of America did not meet its burden of producing prima facie evidence that the representatives of Mikey's Houses knowingly and voluntarily waived their constitutional right to a jury trial. 232 S.W.3d at 147.

The court of appeals imposed this burden on Bank of America by inferring a presumption against contractual jury waiver from **In re *Prudential***, 148 S.W.3d 124 (Tex.2004) where the Supreme Court cited to ***Brady* v. *United States***, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), to recognize that the right to a trial by jury is a constitutional right. The Supreme Court said the court of appeals was wrong for two reasons: First, a presumption against waiver would incorrectly place the initial burden of establishing a knowing and voluntary execution on Bank of America, which is contrary to the rule that a conspicuous provision is prima facie evidence of a knowing and voluntary waiver and shifts the burden to the opposing party to rebut it. Second, a presumption against waiver would create an unnecessary distinction between arbitration and jury waiver clauses, even though the Supreme Court has previously said the rule should be the same for all similar dispute resolution agreements.

In holding that the waiver in this case was conspicuous, the court noted that the addendum which contained the waiver is only two pages long, and each of its twenty provisions are set apart by one line and numbered individually. Five of the twenty provisions included bolded introductory captions similar to the waiver provision in ***Prudentia***l, and the "Waiver of Trial By Jury" caption is one of the five. Furthermore, the introductory caption is hand-underlined, as is the word "waiver" and the words "trial by jury" within the provision. This bolded, underlined, and captioned waiver provision is no less conspicuous than those contractual waivers the court has previously upheld in both and therefore serves as prima facie evidence that the representatives of Mikey's Houses knowingly and voluntarily waived their constitutional right to trial by jury.

DiGiuseppe* v. *Lawler, 269 S.W.3d 588, 52 Tex. Sup. Ct. J. 29 (Tex. 2008). The purchase contract limited the remedies available to the parties in the event of a breach. In the event DiGiuseppe failed to close, Lawler's "sole and exclusive" remedy was to retain the earnest money as liquidated damages, and he expressly waived any right to claim any other damages or specific performance from DiGiuseppe. In the event Lawler defaulted in performing his obligations under the contract for any reason other than DiGiuseppe's default or a proper termination of the contract under its provisions, DiGiuseppe could choose between two remedies: (1) terminate the contract and receive a full

and immediate refund of the earnest money, or (2) "seek to enforce" specific performance of the contract. DiGiuseppe also expressly waived any right to claim damages.

The case was ultimately tried to a jury and the parties' breach of contract claims were submitted on broadform questions inquiring as to whether either party failed to comply with the contract. The jury answered favorably to DiGiuseppe that Lawler had failed to comply with the contract and that DiGiuseppe had not failed to comply. Although disputed at trial, no question was requested by either party or submitted to the jury with respect to specific performance or whether DiGiuseppe was ready, willing, and able to perform under the contract at the time he alleged the transaction should have closed. The trial court rendered a takenothing judgment against Lawler and granted DiGiuseppe specific performance of the purchase contract.

The court of appeals reversed the trial court's order granting specific performance, holding that DiGiuseppe had failed to conclusively establish, or to request and obtain a finding of fact on, an essential element of his claim for specific performancethat he was ready, willing, and able to perform under the terms of the purchase contract.

DiGiuseppe claimed that the purchase contract provided for the remedy of specific performance in the event of a breach by Lawler regardless of whether DiGiuseppe obtained a finding of fact that he was ready, willing, and able to perform. The court held that the remedy provision at issue here does not entitle DiGiuseppe to obtain specific performance merely upon a showing of a breach or default by Lawler. The provision at issue limits the available remedies to either (1) terminating the contract and receiving a refund of earnest money, or (2) seeking to enforce specific performance. It does not in any way alter the requirements for obtaining specific performance in the event DiGiuseppe decides to seek such a remedy.

An essential element in obtaining the equitable remedy of specific performance is that the party seeking such relief must plead and prove he was ready, willing, and able to timely perform his obligations under the contract. It is also a general rule of equity jurisprudence in Texas that a party must show that he has complied with his obligations under the contract to be entitled to specific performance.

A corollary to this rule is that when a defendant refuses to perform or repudiates a contract, the plaintiff may be excused from actually tendering his or her performance to the repudiating party before filing suit for specific performance. In such a circumstance, a plaintiff seeking specific performance is excused from tendering performance presuit and may simply plead that performance would have been tendered but for the defendant's breach or repudiation. This exception to the general rule - that actual tender of performance is a prerequisite to obtaining specific performance - is grounded in the notion that actual presuit tender of performance should be excused when it would be a useless act, an idle ceremony, or wholly nugatory. However, even when presuit tender of performance is excused, a plaintiff is still obligated to plead and prove his readiness, willingness, and ability to perform at relevant times before specific performance may be awarded.

As an alternative basis for relief, DiGiuseppe argued that the omitted jury finding as to his readiness, willingness, and ability to perform may be deemed found in his favor pursuant to Texas Rule of Civil Procedure 279. His theory was that specific performance was at least partially submitted to the jury in the form of a question regarding his compliance with the contract, and Lawler failed to object to the omission of a "ready, willing, and able" question. The court disagreed and held that a deemed finding under Rule 279 is not available here.

Besteman* v. *Pitcock, 272 S.W.3d 777 (Tex.App.—Texarkana 2008, no pet.). Besteman and the Pitcocks entered into a lease for two years with an option for the Pitcocks to purchase at the termination of the lease agreement. A condition precedent in the leases agreement to the Pitcocks' right to purchase was stated as follows: "90 days before the 24 month lease period expires, Lessee will notify Lessor of Lessee's intent to purchase said property." The agreement also contained a provision that required all notices to be in writing, and stating when notices given by different means would be deemed received. The final sentence says that notices "delivered otherwise" than by certified mail effective upon actual receipt.

The Pitcocks went into possession of the tract of land under the lease agreement and made timely payments of the lease installments. However, they failed to provide any written notice of their intention to exercise the option to purchase until some forty-nine days after the time specified in the contract. When the Pitcocks did send written notice by certified mail, it was not retrieved by the Bestemans and the notice was returned, undelivered.

Almost immediately after the notice was returned to them, the Pitcocks filed suit for specific performance, declaratory judgment, and breach of contract. In their petition, the Pitcocks alleged that they had provided unequivocal notice of their intention to exercise the option to purchase well before the required time and that they had, in reliance upon the option to purchase, invested substantial sums in improving the property. The Bestemans responded with a request for an award of reasonable rentals from the time of the termination of the two-year lease until the time of recovery of the property from the Pitcocks.

The Pitcocks maintain that although the contract states that all notices required under the agreement be in writing and delivered by certified mail, the paragraph concerning notices ends with the statement that "Notices delivered otherwise will be effective upon receipt." The Pitcocks insist that since the contract permits notices to be delivered "otherwise," that means that the notice could be delivered orally rather than in writing; in other words, the Pitcocks say that they effected notice by oral communication and that this was sufficient notice to invoke the option to purchase.

The Pitcocks also rely upon the equitable doctrine of disproportionate forfeiture (defined later) as a defense against the claims that they failed to conform to the ninety-day notice requirement.

It is a well-settled principle that strict compliance with the provisions of an option contract is required. Except in rare cases of equity, acceptance of an option must be unqualified, unambiguous, and strictly in accordance with the terms of the agreement. An option is unilateral. It imposes no liability on the optionee unless and until he exercises the option according to its terms. Acceptance of an option, unless excused on equitable grounds, must be unqualified, unambiguous, and strictly in accordance with its terms. Any failure to exercise an option according to its terms, including an untimely or defective acceptance, is simply ineffectual, and legally amounts to nothing more than a rejection. Consequently, an acceptance that does not comply with the option's terms, unless it is accepted by the optionor, binds neither the optionee nor the optionor.

The Bestemans maintain that written notice of the intent to exercise the option was required by the agreement. The Pitcocks seize on the final sentence of paragraph 18 and the use of the words "delivered otherwise" as permitting oral notice of the intent to exercise the option in lieu of a written notice. This interpretation would completely negate the first sentence of the paragraph, which plainly states that all notices "must be in writing." Therefore, to give those words the meaning urged by the Pitcocks would violate one of the principal tenets of contract construction. It is plain that the "delivered otherwise" wording of the contract pertains to the manner of delivery of the notice which (as is stated in another part of the contract) "must be in writing." To find otherwise, the writing requirement would mean nothing. Impliedly, the trial court determined that the contract was ambiguous; it is not.

Petras* v. *Criswell, 248 S.W.3d 471 (Tex.App.—Dallas 2008, no pet.). The first necessary element for a successful breach of contract claim is a valid, enforceable contract. The first paragraph of this contract in this case expressly provides that the contract would not be effective until the title company also signed the contract acknowledging receipt of the earnest money. Petras provided no summary judgment evidence that the title company ever signed the contract as required. He therefore failed to establish the validity of the contract, an essential element of his breach of contract claim.

Petras's argued, however, that the contract provision requiring the title company's signature to be effective was ambiguous. Here, the plain terms of the contract as recited above required the title company's signature for the contract to be effective. After reviewing the language of the contract in evidence, it is clear that it would not be valid or enforceable until the title company signed the contract acknowledging receipt of the earnest money.

Shin-Con Development Corporation* v, *I.P. Investments, Ltd., 270 S.W.3d 759 (Tex.App.—Dallas 2008, pet. denied). The parties own adjacent commercial property tracts, each of which contains a shopping center and parking lot. The parties discussed exchanging easements to facilitate the traffic between the two properties. Shin-Con's tract, however, was encumbered by a lien, and the lienholders would not readily consent to the granting of an easement. The parties signed a 30-month license agreement permitting vehicular and pedestrian access between their tracts along a shared boundary. The license agreement granted each party the right to drive vehicles across, walk across, and traverse across the parking and driveway areas of each other's tract. Additionally, IP agreed to pay Shin-Con $50,000 to remove a fence that was obstructing access between the shopping centers and to construct a driveway connecting the tracts.

Attached to the license agreement as "Exhibit C" was a document indicating that the license agreement was entered into in contemplation of the Mutual Easement Agreement and listing items forming the basic contents of the Mutual Agreement to be effective in the future. Among other things, "Exhibit C" provided that IP would pay appellants a total of $300,000 for the mutual easement agreement. It also confirmed that the $50,000 IP paid appellants under the license agreement was the down payment for the Mutual Agreement and that another $100,000 would be paid to Shin-Con once they obtained the lienholders' consent and after the Permanent Agreement was entered into by the parties. It further provided that sixty days after the $100,000 payment, an additional $150,000 would be paid at ten percent per annum for ten years.

The license agreement was extended. In connection with the extension, IP gave Shin-Con $30,000, and Shin-Con executed a promissory note providing, among other things, that in the event of a default, the parties' license agreement would be extended an additional forty months. Later, IP gave Shin-Con another $105,000, and the parties executed an addendum to the license agreement. The addendum

provided that if Shin-Con failed to obtain title to their property and execute a "permanent easement agreement" to IP by January 31, 2003, Shin-Con would forfeit the $185,000 they had received from IP and pay eighteen percent annual interest on the unpaid balance from the date the addendum was signed.

Shin-Con received a release of vendor's lien from their lienholders in 1998. Shin-Con did not, however, execute a "permanent easement agreement" by the January 31, 2003 deadline. Nor did they return to IP the $185,000 plus interest. In the lawsuit that ensued, IP argued that Shin-Con owed it $185,000 plus interest because Shin-Con failed to execute a permanent easement for IP's benefit by January 31, 2003. Shin-Con, on the other hand, contended that because the addendum merely set a deadline for the parties to reach and finalize a future mutual permanent easement agreement, it was merely an agreement to agree and IP was entitled to nothing on its claims.

Whether an alleged agreement constitutes an enforceable contract is generally a question of law. To be legally enforceable, an agreement must be sufficiently definite to allow a court to understand what the promisor undertook. The rules requiring definiteness in a contract's material terms are based on the concept that a party cannot accept an offer unless the terms of that offer are reasonably certain. If the agreement is so indefinite as to make it impossible for the court to determine the legal obligations of the parties, it is not an enforceable contract.

Shin-Con argues that because the parties never reached a mutual permanent easement agreement, the addendum is unenforceable. That argument is misdirected. There is nothing in the addendum or the other documents in the record requiring Shin-Con to execute either a mutual permanent easement agreement or a permanent easement to IP. The addendum merely required Shin-Con to return to IP $185,000 plus interest in the event Shin-Con failed to execute "a permanent easement agreement." Shin-Con's argument assumes the addendum required the parties to reach an easement agreement before appellants had a duty to execute anything. Nothing in the record supports this assumption, however. Even if essential terms were missing from the parties' future permanent easement agreement, such omissions would not render unenforceable the requirement to return monies advanced should they fail to reach an agreement within the designated time frame.

For the same reasons, the court rejected appellants' contention that the parties' agreement violated the statute of frauds because their agreement lacked the essential terms of the easement and an adequate description of the easement. As noted above, IP is not trying to enforce a promise to execute an easement or easement agreement but rather to enforce Shin-Con's obligation to repay monies upon their failure to execute an easement or easement agreement by the stated deadline.

Shin-Con also asserted that the liquidated damages clause in the addendum was an illegal penalty or forfeiture. Whether a contract term is a liquidated damages clause is a question of law for the court. Liquidated damages clauses fix in advance the compensation to a party accruing from the failure to perform a specified contractual obligation. The provision in the addendum, however, is different from a liquidated damages clause. Here, the specific contractual obligation Shin-Con failed to perform and for which IP sought recovery was the return of the money paid plus interest. Thus, IP's actual damages under the addendum were the amount Shin-Con agreed to repay if it they failed to execute an easement agreement.

San Antonio Properties, L.P.* v. *PSRA Investments, Inc., 255 S.W.3d 255 (Tex.App.—San Antonio 2008, no pet.). PSRA was searching for a property to purchase in order to complete a 1031 exchange. A real estate broker, who knew Quail Creek apartments had been listed for sale the previous year, told PSRA about the apartments. PSRA and SAP, the owner of Quail Creek, entered into negotiations for the sale of the property that ultimately culminated in the parties executing a Contract for Deed. After acquiring the property, PSRA began to experience problems with the plumbing, a decline in occupancy rate, and crime. Two years after closing the sale, Anderson met with SAP representatives in an effort to obtain concessions on the payment schedule. Eventually, PSRA stopped making payments and SAP reclaimed possession of the property under the terms of the Contract for Deed.

SAP sued PSRA for the balance of the payments owed under the Contract for Deed. PSRA sued SAP for common-law fraud, statutory fraud, and negligent misrepresentation. During the pendency of the suit, SAP sold the property, and distributed the proceeds to its partners.

The Contract for Deed contains the following provision: "Buyer agrees to-... Accept the Property in its present condition 'AS IS,' after having inspected the Property to Buyer's satisfaction." The contract also contains a merger clause that states: "This contract, including any attached exhibits, is the entire agreement of the parties, and there are no oral representations, express or implied warranties, agreements, or promises pertaining to this contract not incorporated in writing in this contract." SAP first argues that PSRA's agreement to purchase the property "as is" conclusively negates the element of causation in all of PSRA's claims.

A valid as-is agreement prevents a buyer from holding a seller liable if the thing sold turns out to be worth less than the price paid because it is impossible for the buyer's injury on account of this disparity to

have been caused by the seller. By agreeing to purchase something "as is," a buyer agrees to make his own appraisal of the bargain and to accept the risk that he may be wrong." Thus, a buyer's own evaluation constitutes a new and independent basis for the purchase, one that disavows any reliance upon representations made by the seller. However, an as-is agreement may not have this determinative effect in every circumstance. A buyer is not bound by an agreement to purchase something "as is" that he is induced to make because of a fraudulent representation or concealment of information by the seller.

Prior to entering into the Contract for Deed, the parties had executed a Purchase Agreement pursuant to which SAP agreed to provide PSRA with operating statements in which SAP represented that all assets were in good working order. SAP's marketing materials stated the property had undergone a major rehabilitation. In its petition, PSRA alleged it was fraudulently induced into entering into an agreement to purchase Quail Creek "as is" based upon the following misrepresentations made by SAP: (1) the apartments' economic performance was accurately represented in the operating statements provided to PSRA by SAP; (2) the property was in good working order; and (3) SAP and its limited partners repeatedly assured PSRA that they had spent millions on improvements for the property.

SAP argues the focus should be on whether the as-is clause itself was fraudulently induced, while PSRA argues the focus should be on whether the sale of the property was fraudulently induced thereby invalidating the entire agreement. The court agreed with PSRA. A buyer must prove that "but for" the representations of the seller regarding the condition of the property that is the subject of the contract, the buyer would not have assented to a contract that contained an as-is clause.

Zuniga* v. *Velasquez, 274 S.W.3d 770 (Tex.App.—San Antonio 2008, no pet.). The Zunigas entered into a contract for deed with Velasquez to purchase a house. The contract for deed provided for immediate possession by the Zunigas, but Velasquez was to retain title until the Zunigas paid the full purchase price, at which time Velasquez would convey the property to the Zunigas by general warranty deed. Under the contract for deed, the Zunigas could either pay a cash price of $37,000 or a deferred payment price of $57,228.49, less a cash down payment of $3,200. The deferred payment price called for 143 payments of $375.20, plus a final payment of $374.89 due on June 1, 2008. Payments more than 15 days late were to be assessed a 5% late fee. Additionally, the contract for deed provided that if the Zunigas did not pay the property taxes directly, the Zunigas would reimburse Velasquez for property tax payments she made, subject to an 8.5% interest charge.

The Zunigas gave Velasquez two cashier's checks totaling $14,517.93, asserting that they constituted the final payment under the contract for deed. The Zunigas asked Velasquez to transfer title to the property, but Velasquez refused, claiming the Zunigas owed her $1,694.49 for the 2004 property taxes. The Zunigas paid Velasquez $1,649.49 and renewed their demand that she convey the property to them; Velasquez again refused to transfer the title because she had a mortgage on the property and the Zunigas's early payoff amount was insufficient to pay off her mortgage. In October of 2005, the Zunigas filed suit, claiming Velasquez violated section 5.079(a) of the Texas Property Code by failing to convey title within 30 days after final payment was made, and seeking attorney's fees and statutory liquidated damages in the amount of $182,000 through October 1, 2005. Property Code § 5.079 provides that a seller of property covered by an executory contract who fails to convey legal title to the purchaser more than 30 days after the final payment is made is liable to the purchaser for liquidated damages in the amount of $250 per day from the 31st day to the 90th day after final payment is made, and $500 per day for each day after the 90th day after final payment is made.

Velasquest argued that because a balance was still due and owing on the property, no final payment had ever been made, and therefore she had no duty to transfer the title to the Zunigas. In support, Velasquez alleged that a balance remained due on the property because the Zunigas: (1) only paid her $375 each month, not $375.20 as required under the contract for deed; (2) failed to make timely monthly installment payments and therefore owed late fees; (3) owed interest on property tax payments that were made late; and (4) owed $45 on the 2004 property taxes because the Zunigas paid her $1,649.49-not $1,694.49 as required-due to a transposition error.

In order to recover damages under section 5.079 of the Texas Property Code, the Zunigas were required to prove they fulfilled the terms of the contract for deed, and Velasquez failed to convey title within 30 days after receiving the final payment. Although the Zunigas believed the final payoff amount to be correct at the time it was paid, they now concede they owe Velasquez for amounts that were not paid under the contract for deed. In fact, the evidence at trial conclusively established that the Zunigas failed to pay off the contract for deed. Most of the monthly installment payments made by the Zunigas were short by twenty cents. The Zunigas also concede that they did not pay the late fee for the October 2004 installment payment. Third, the evidence was uncontroverted that the Zunigas still owed $45 for the 2004 property taxes due to a transposition error. Finally, Velasquez testified that from 1997 to 2001, the Zunigas did not reimburse her for the taxes by the

specified deadline, and that the Zunigas further did not pay any of the late fees incurred by the late payments. In response, the Zunigas did not present any evidence to prove they paid the tax reimbursements on time, nor did they refute Velasquez's claim that they failed to pay the interest due on late property tax reimbursement payments.

Despite conceding these shortfalls, the Zunigas contend any deficiency was more than satisfied by excessive late fees they paid to Velasquez. Specifically, they argue Velasquez routinely demanded a $25 late fee instead of the 5% late fee-equating to $18.75-provided for in the contract for deed. Thus, the Zunigas maintain they overpaid Velasquez $200.00, which should offset any amount Velasquez claims was not paid under the contract for deed.

The court disagreed that such an offset, if even owed, triggered a duty to transfer title. The right of offset is an affirmative defense which must be pleaded and proved by the party asserting it. Generally, an affirmative defense must be pled in a responsive pleading, or the defense is waived. Here, the Zunigas did not plead the right of offset. Assuming, without deciding, that the Zunigas would be entitled to an offset, their complaint that their failure to make all required payments should be excused by excessive late fees paid to Velasquez was not asserted at the time they demanded title.

PART IX
BROKERS

ERA Realty Group, Inc.* v. *Advocates for Children and Families, Inc., 267 S.W.3d 114 (Tex.App.—Corpus Christi-Edinburg 2008, pet. denied). ERA's brokerage agreement with Advocates contained the following provision: "The parties agree that [ERA] will receive a commission calculated as follows: (1) 6.00% of the gross sales price if [Advocates] agrees to purchase property in the market area, and (2) if [Advocates] agrees to lease property in the market a fee equal to (check only one box) [] ___% of one month's rent or [] 6 % of all rents to be paid over the term of the lease." As to the lease provisions, neither box was checked but the number "6" was typed into the final blank space.

Advocates entered into a twelve year lease with College Church of Christ in Victoria County on July 8, 2005, without ERA's participation. ERA subsequently learned of Advocates' lease and filed a breach of contract suit seeking its purported commission and attorney's fees. Advocates moved for traditional summary judgment on the grounds that the agreement between the parties did not create a duty for Advocates to pay ERA a commission when Advocates leased property. The rationale for Advocates' argument was that the terms of the agreement did not obligate Advocates to pay a commission to ERA on a lease because an appropriate box was not checked. ERA responded to Advocates' summary judgment motion by arguing that the contract evidenced an intent to pay ERA commission on a lease because the number "6" was typed into an appropriate blank, even though no box was checked.

The primary goal in interpreting a contract is to give effect to the written expression of the parties' intent. To determine the parties' intent, courts must consider the entire writing in an effort to harmonize all the provisions of the instrument. Parol evidence is not admissible to render a contract ambiguous; however, the contract may be read in light of the surrounding circumstances to determine whether an ambiguity exists.

Not every difference in the interpretation of a contract creates an ambiguity. The mere disagreement over the meaning of a particular provision in a contract does not make it ambiguous. In order for an ambiguity to exist when the parties advance conflicting interpretations, both interpretations must be reasonable. If a contract is found ambiguous, it must be construed strictly against the author and in a manner so as to reach a reasonable result that is consistent with the intent of the parties.

The agreement, therefore, can be read in one of two ways: (1) as providing for a lease commission because the number "6" is typed, or (2) as making no provision for a lease commission because no box is checked. ERA argues that the number "6" is a specific provision that conflicts with the "general provision" reading "check only one box." The court disagreed. What ERA considers a "general provision" is in fact an instruction that ERA did not follow. The omission of a check and the number "6" in the lease provision, are properly characterized as scrivener errors rather than what ERA terms "specific provisions." Because an ambiguity exists and ERA completed the form, we strictly construe the agreement against ERA.

PART X
ADVERSE POSSESSION AND QUIET TITLE ACTIONS

Moore* v. *Stone, 255 S.W.3d 284 (Tex.App.—Waco 2008, pet. denied). Wolf acquired title to his property in 1974. Stone acquired title to his property in 1982. The fence, which included the disputed property with Stone's and Wolf's property, was built in the 1960's by Stone's father and Moore's father. There was no testimony as to its purpose. From Wolf's testimony, it appears that he broke ground on his claimed portion of the disputed property, that being about 3 acres, within the first two years after he purchased his property to plant "oats or something." Thereafter, he used the disputed land for cattle grazing. After acquiring title to his land in 1982, Stone only used the disputed land for grazing and cutting hay.

The adverse claimant who relies upon grazing only as evidence of his adverse use and enjoyment must show as part of his case that the land in dispute was designedly enclosed. When the disputed tract of land has been enclosed with other land, especially when such other land is held by the possessor under deed, the enclosure is casual or incidental, and the occasional grazing of the disputed tract by cattle will not amount to such adverse and hostile possession and use as will support the statute of limitations. If the fence existed before the claimant took possession of the land, and the claimant fails to demonstrate the purpose for which it was erected, then the fence is a "casual fence." Repairing or maintaining a casual fence, even for the express purpose of keeping the claimant's animals within the enclosed area, generally does not change a casual fence into a designed enclosure.

Further, the general rule is that cutting and gathering a natural crop, such as hay, does not constitute adverse possession. And sporadic cultivation also does not constitute adverse possession.

PART XI
EASEMENTS

Centerpoint Energy Houston Electric LLC* v. *Bluebonnet Drive, LTD., 264 S.W.3d 381 (Tex.App.—Houston [1st Dist.] 2008, pet. pending). The express easement conveyed to CenterPoint, as HL&P's successor, grants a right-of-way not only for "electric transmission and distributing lines consisting of variable numbers of wires," but also for "all necessary and desirable appurtenances." The easement then specifies that "necessary and desirable appurtenances" includes "towers or poles made of wood, metal or other materials, telephone and telegraph wires, props and guys." The plain meaning of these terms conveys the right to install "appurtenances" as "additions" or "attachments" when "necessary and desirable." The plain meaning of these terms further specifies that "telephone and telegraph wires" are among the appurtenances that may be installed when necessary and desirable.

No rights pass to the easement holder by implication except those that are "reasonably necessary" to enjoy the rights that the easement grants expressly. Accordingly, if the grant expressed in the easement cannot be construed to apply to a particular purpose, a use for that purpose is not allowed. The common law permits some flexibility in determining an easement holder's rights because the manner, frequency, and intensity of use of an easement may change over time to accommodate technological development. Changes must, however, fall within the purposes for which the easement was created, as determined by the grant's terms. Accordingly, an express easement encompasses only those technological developments for which the easement was granted.

The court held that the express terms of the CenterPoint easement encompassed installation and use of cellular transmission within the easement.

Gutierrez* v. *People's Management of Texas I, Ltd., 277 S.W.3d 72 (Tex.App.—El Paso 2009, pet. pending). Two tracts of land were involved in this adverse possession case. When the issue was submitted to the jury, the trial court submitted only one question to the jury on adverse possession of all of the Property. Gutierrez claimed that the trial court should have issued separate questions on each of the two tracts.

The court of appeals agreed. It is a reasonable inference that, when a party pleads adverse possession to a unit of land containing constituent parts, with separate legal descriptions, the claim will run to those constituent parts or elements individually.

In this case, the two tracts of land, each having its own legal description and unified under a single deed, were both touched jointly and severally by pleading adverse possession unspecifically. The pleading requirement of Rule 278 of the Rules of Civil Procedure was satisfied by Gutierrez's answer, in which he defended by asserting adverse possession under the 3-, 5-, and 10-year periods of limitations.

There was also sufficient evidence at trial to show that the two tracts of land were distinct enough to warrant the submission of separate questions for the two constituent tracts. Because there is more than a scintilla of evidence to support the submission of separate questions, Gutierrez is entitled to the submission of two separate questions.

Brownlow* v. *State of Texas, 251 S.W.3d 756 (Tex.App.—Houston [14th Dist.] 2008, pet. pending). The State sought to condemn Brownlow's 12.146 acres of land for the opening, construction and maintenance of a rainwater detention facility. The parties eventually settled the condemnation suit with an agreement for an easement on the property "for the purpose of opening, constructing, and maintaining a detention/mitigation facility in, over, and across the tract of land for the purpose of making additions to, improvements on, and repairs to said detention facility or an part thereof."

The State then began to remove a whole lot of dirt and use it in another section of the Highway 35 widening project. The Brownlows protested that the excavated soil was not part of the permanent easement condemnation. They contend that as the fee simple owners of the land the soil belongs to them.

A fee simple absolute title to land gives the owner the right to use the land in any way not hurtful to others. By contrast, an easement is a nonpossessory interest, though it authorizes its holder to use the property for a particular purpose. While establishment

of an easement, in general terms, implies a grant of unlimited reasonable use as is reasonably necessary and convenient, the fee owner retains title to the land and all that is ordinarily considered part of that land.

The Brownlows contend that they were unaware, and had not agreed, that soil would be removed from their property in order to create the detention facility. They contend that because no fee interest was transferred to the State at any time the State had no right to take the soil and use it for another purpose without additional compensation. They argue that while the State obtained the right to build and maintain a detention facility, it did not acquire the right to take soil from their land. As they point out, the Agreed Judgment says nothing about transferring ownership to the State of any soil or granting the State any right to carry away displaced soil. In the absence of any ambiguity, the contract is clear on this point.

The State responds that when it possess an easement over and upon property to build and maintain a detention facility, it has, by implication, the right to remove the soil necessary to that purpose and the right to use that soil elsewhere without the permission of, or compensation to, the fee owner of the estate.

The court disagreed with the State. The State actively negotiated and procured an easement for the single purpose of building a water detention facility, but then proceeded to remove thousands of cubic meters of soil from that location for a purpose unrelated to the construction of the detention facility. While it may be "reasonably necessary" for the State to displace the soil to dig the detention facility, the state provided no testimony or other evidence that it was reasonably necessary for it to cart off an enormous amount of soil to another location not owned by the Brownlows and use it for its own purposes. Having bargained only for an easement, the State is not entitled to ownership of the extracted soil. The Brownlows correctly contend that the State paid only for an easement to build a detention facility, and the court found that this is exactly what it purchased. To grant it more, by implication, would be contrary to the express terms of the Agreed Judgment. A party to a contract has a right to rely on the language of the contract, and in the case of a grant of easement, the right to trust that nothing passes by implication.

Smith* v. *Huston, 251 S.W.3d 808 (Tex.App.—Ft. Worth 2008, pet. denied). Easements relating to the use of an airstrip required the payment of certain fees. The Hustons, owners of the servient estate, claimed the right of self-help to deny access to the easement to easement owners who failed to pay the fees.

An easement is not forfeited by a grantee's failure to abide by its terms and conditions. The Hustons contend that they are not seeking to have the easements forfeited, only that they be allowed (without prior judicial intervention) to suspend the lot owners' right to access pursuant to the easements while any fees remain unpaid.

Under general easement law, the owner of the dominant estate (here, the lot owners) has a duty to maintain the easement, and the owner of the servient estate (here, the Hustons) has no right to interfere with the rights of the dominant estate to the easement. Here, the language in the easements indicates the parties' intent to limit unrestricted access to the easement area; access is to be in accordance with airport rules and regulations, and it does not include the right to park aircraft or other personal property, or to construct real property, on the easement. However, nothing in the easements addresses remedies available to the owner of the servient estate (the Hustons) in the event any lot owner fails to pay the easement fees, nor do the easements indicate that the owner of the servient estate has the right to deny the already limited access completely while fees are unpaid.

Mitchell* v. *Garza, 255 S.W.3d 118 (Tex.App.—Houston [1st Dist.] 2007, pet. denied). To establish the existence of an easement by estoppel, sometimes called estoppel in pais, the Mitchells had the burden of proving the following elements:(1) the owner of the servient estate [here, the adjacent property] communicated a representation, either by words or conduct, to the promisee [here, the Mitchells]; (2) the promisee believed the communication; and (3) the promisee relied on the communication. These elements apply at the time the communication creating the alleged easement is made.

The exact nature and extent of the doctrine of estoppel in pais have not been clearly defined. Particularly important in our analysis is that no easement by estoppel may be imposed against a subsequent purchaser for value, who has no notice, actual or constructive, of the easement claimed. Therefore, to assert their right to an easement against Garza, the Mitchells had the burden of proving that Garza had actual or constructive notice of an existing easement or that the easement was created while Garza was the owner of the adjacent property.

Garza testified that he has lived in the neighborhood since 1988 and purchased the adjacent property in 2002, but had only occasionally seen the Mitchells at the Mitchell property and was not aware that they or their predecessors were using the driveway. He assumed the house was abandoned due to its unkempt lawn and infrequency of visitors. This is legally sufficient evidence to support the implied finding that Garza was a purchaser for value without notice of the Mitchells' easement.

The Mitchells testified that they never discussed their use of the driveway with anyone. Likewise, Garza testified that he never talked with anyone from the Mitchell property about using the driveway. Furthermore, no one complained when Garza was

installing the fence, which Leta Mitchell admitted was properly placed on Garza's property line. The court held that there was legally sufficient evidence to support the trial court's implied finding that an easement by estoppel was not established while Garza was the adjacent property's owner.

The court then looked into whether Garza had notice of the easement when he acquired his property. Garza testified that he has lived in the neighborhood since 1988. In 1989, the Mitchells were successful in having the City of Houston restore the curb opening to the driveway after the City paved a curb that blocked their access to the Mitchell property's driveway. Furthermore, Leta testified that they generally made monthly trips to the Mitchell property, with six months being the longest period without a visit. They continued to make repairs to the Mitchell property, including the installation of siding in 1992 and new pipes beginning in 2001. The Mitchells also contend that the asphalt, which covers a portion of their driveway, is proof of a common use of the driveway.

In contrast, Garza testified that, in the time he had lived in the neighborhood, he had only occasionally seen the Mitchells at the Mitchell property, and he was not aware that they or their predecessors were using the driveway. During the years when the Mitchell property was being repaired and used for furniture storage, the driveway was not used by the Mitchells. They parked on the street. Garza testified that the previous owner of the adjacent property poured the asphalt, and, when he bought the adjacent property, the seller told him that the driveway belonged to the adjacent property. The court thus held that there is factually sufficient evidence to support the trial court's implied finding that Garza lacked actual or constructive notice of the Mitchells' alleged easement by estoppel.

The court next determined whether there was factually sufficient evidence to support the trial court's implied finding that the Mitchells did not acquire an easement by estoppel while Garza owned the adjacent property. To have an easement by estoppel, the Mitchells had the burden of proving that Garza communicated a representation, either by words or conduct, to them indicating a right to use the driveway and that the Mitchells believed in and relied on the communication. The evidence shows that the Mitchells never had a conversation with Garza concerning their use of the driveway. However, acquiescing behavior or the failure to object by a servient estate may be conduct that gives rise to a representation, if the dominant estate relied on this conduct in a way that should preclude the servient estate from denying it. Thus, the courts looks to see whether any acquiescence or failure to object on Garza's part represented a right to use the driveway and, if so, whether the Mitchells believed in and relied on any such representation.

After Garza bought the adjacent property in 2002, the Mitchells continued to repair and fix-up the Mitchell property. Garza testified that he sometimes came home from work early and saw the Mitchells at the Mitchell property. However, before the fence was erected, when they were visiting, the Mitchells usually parked in the street or in the front of the driveway, not in the driveway. The Mitchells' daughter, Carol Hughes, asked Garza to move his vehicles when they were blocking the driveway. Garza moved his vehicles once, and he actually drove Carol's car around his vehicles once, but he did not move his vehicles the third time he was asked. The evidence is factually sufficient to support the trial court's implied finding that Garza's behavior did not represent to the Mitchells a right to use the driveway.

PART XII CONDOMINIUMS AND OWNERS ASSOCIATIONS

Gillebaard* v. *Bayview Acres Association, Inc., 263 S.W.3d 342 (Tex.App.—Houston [1st Dist.] 2008, pet. denied). Owners of lots in the subdivision sought to block development of the Gillibaard's property as a condominium project by incorporating a proposed property owners' association and having the proposed association circulate a petition to simultaneously amend the subdivision's deed restrictions to create the association and amend the deed restrictions to add a single-family-use restriction. The plain language of the Condominium Act reflects a due order of action to invoke chapter 204: the existing deed restrictions must first be amended, by one petition, to create a property owners' association and to establish how it will operate, and only after the restrictions are amended to do so may that association then propose, approve, and circulate a new petition for the purpose of extending, adding to, or modifying the deed restrictions in other ways. Thus the single-family-use restriction was invalid though it was approved by 83 percent of the owners in the subdivision. By statute a proposed property owners' association could not attempt to amend deed restrictions if the deed restrictions had not yet been amended to create the association with the power to amend the deed restrictions on the owners' behalf.

Schindler* v. *Baumann, 272 S.W.3d 793 (Tex.App.—Dallas 2009, no pet.). Baumann owned the condominium unit above the one owned by the Schindlers. The Schindlers sued Baumann for damages to their condominium after water allegedly leaked into their unit from Baumann's condominium. Among other claims was an action for breach of contract and one for negligence.

Among the elements necessary to succeed on their breach of contract claim, the Schindlers needed to present evidence of a valid contract existing between them and Baumann. The Schindlers contend the amended and restated condominium declaration and annexation declaration for their condominium project, filed with the county clerk by the project developers, satisfy this element. Nothing in these declarations, however, purports to create a contract between the Schindlers and Baumann or vests the Schindlers with the right to sue to enforce the declarations. Although the Schindlers cite cases for the proposition that such declarations are treated as contracts, those cases are inapposite here as they did not involve claims between two owners but rather claims between condominium or homeowners' associations and owners. Absent any evidence of a valid contract between the Schindlers and Baumann, the trial court did not err in granting summary judgment against appellants on their breach of contract claim.

The Schindlers also assert they are entitled to recover damages caused by the water leak under section 82.117 of the Texas Uniform Condominium Act, which requires Baumann to pay for damage caused by negligence or wilful misconduct. The Schindlers presented no argument or authority to support their position that a private cause of action exists under this section of the Act, and the fact that a person has suffered harm from an alleged violation of statute does not automatically give rise to a private cause of action. Moreover, even if a private cause of action exists under the statute, the Schindlers would still be required to present evidence of Baumann's negligence or wilful misconduct in order to recover damages. The court held that the Schindlers did not present sufficient evidence of that misconduct.

PART XIII
HOMESTEAD

Smith* v. *Hennington, 249 S.W.3d 600 (Tex.App.—Eastland 2008, pet. denied). Smith and Martin obtained a judgment against Thomas in March 2000. Hennington owned a 40 acre tract of land. After issuing a writ of execution, the sheriff's department conducted a sheriff's sale of the property surrounding Thomas's designated ten-acre homestead. Smith and Martin purchased the property at the sheriff's sale and obtained a sheriff's deed.

Thomas contended at trial that the sheriff's sale was not valid because the property was part of his homestead and was, therefore, exempt from seizure. Thomas argued that the property was not in the city limits, that the property was rural rather than urban, and that he was therefore not limited to a ten-acre homestead but was entitled to include the property at issue in his homestead.

A homestead may be either urban or rural. Section 41.002. An urban homestead can be no more than ten acres of land in one or more contiguous lots. Section 41.002(a). A rural homestead can be no more than 200 acres for a family or 100 acres for a single adult and may be located in one or more parcels. Section 41.002(b). A homestead is considered urban if the property is (1) located within the limits of a municipality or its extraterritorial jurisdiction or a platted subdivision and (2) served by police protection, paid or volunteer fire protection, and at least three of the following services provided by a municipality or under contract to a municipality: electric, natural gas, sewer, storm sewer, and water. Section 41.002(c).

Although Thomas contends that the property is located outside the city limits of Ranger, there is ample evidence indicating otherwise. Testimony showed that, although the property was not inside the boundaries of the original town of Ranger, the property had been incorporated by vote into the city limits of Ranger in 1919. City taxes were levied and collected on the property. Thomas paid city taxes on the property. There was also testimony indicating that police protection, fire protection, electric service, city water, natural gas, drainage ditches, and the city sewer system were either being provided to the property or were available to the property. Because the property was not part of Thomas's homestead, it was not exempt from seizure.

Siller* v. *LPP Mortgage, Ltd., 264 S.W.3d 324 (Tex.App.—San Antonio 2008, no pet.). In 1967, Abel M. Siller, Mario M. Siller, Santiago Siller, and Jose Siller, Jr. purchased 520 acres of land in La Salle County, and the property was deeded to the four brothers individually. However, after purchasing the property, the brothers formed a partnership and began doing business together growing vegetables and raising cattle on the property. The property is mainly farming and grazing land, but there are also two houses and some barns on the property. Abel and his wife have lived continually in the main house on the property, while the other brothers and their wives have lived on and off the property over the years. According to the Sillers and their wives, they all claim a homestead interest in the property.

In the late 1970's and early 1980's, after suffering through a series of natural disasters, Mario, Abel, and Santiago sought a loan from the SBA The SBA promissory note was signed by the three brothers and their wives. The brothers also signed a deed of trust pledging the property as collateral for the loan. In the late 1990's, the Sillers began having trouble paying on the loan. To prevent foreclosure on the property, the partnership filed for bankruptcy. At some point, the SBA notified the Sillers that the note had been sold to LPP. LPP in turn notified the Sillers that full payment was due on the note. Although the Sillers maintain they

have always claimed a homestead exemption on the property, the Sillers had represented on various documents that the property was partnership property. For instance, partnership financial statements list the property as partnership property. When the partnership filed for bankruptcy, it listed the property as partnership property. The Sillers paid taxes on the property to various taxing authorities from the partnership account. The partnership claimed an agricultural exemption for the property. The partnership filed income tax returns listing the property as partnership property. The individual brothers and their wives, on the other hand, did not list the property on their individual income tax returns. When the Sillers applied for the SBA loan, they represented that the partnership owned the property and that there were no homestead rights on the property. Santiago admitted he wrote a letter during the course of the litigation stating the property had always been partnership property, but during his trial testimony he claimed he was mistaken.

LPP went forward with foreclosure, with September 4, 2001 set as the date for the foreclosure sale. The trustee conducted the sale, although there were no bidders. A bid was submitted by the trustee on behalf of LLP in the amount of $125,000, as a credit on the note. The trustee filed the trustee's deed (which admittedly had some typographical errors in it).

The Sillers brought suit for wrongful foreclosure on the grounds that the property was homestead.

For a homestead right to attach, there must be an existing bona fide intention to dedicate the property as a homestead, and the intent must be accompanied by such acts of preparation and such prompt subsequent occupation as will amount to notice of the dedication. However, if the property was, in fact, partnership property, it could not be considered property of the individual partners. Partnership property is not property of the partners. A partner or a partner's spouse does not have an interest in partnership property.

PART XIV
CONSTRUCTION AND MECHANICS' LIENS

Mustang Tractor & Equipment Company* v. *Hartford Accident and Indemnity Company, 263 S.W.3d 437 (Tex.App.—Austin 2008, pet. pending). The general contractor was building a Home Depot in Austin. Mustang provided equipment for the job through a subcontractor, Siteprep. When Siteprep didn't pay Mustang, Mustang sent funds trapping notices to all the appropriate parties. After sending the notices, Mustang filed lien and sent lien affidavits.

The lien affidavits provided by Mustang to the owner and general contractor contained each of the elements listed in Property Code § 53.054(a) except the information described in subparagraph 8-the date that notice of the claim was sent to the owner and the method by which notice was sent. However, the notices on their face identify the date and method by which they were sent and the parties do not dispute that the owner received timely notice of the claim. Mustang argues that because omission of the information described in subparagraph 8 was merely a technical defect that did not prejudice the contractor or owner, the lien affidavits substantially complied with the statutory requirements.

The specific issue before this Court is one of first impression, as there are no cases in which a lien affidavit failed to include the information described in subparagraph 8 of section 53.054(a). In general, courts that have addressed substantial-compliance issues have distinguished between mere technical defects, which can be excused, and those defects that are more substantive in nature and, if overlooked, would read a provision out of the statute or prejudice another party.

The court held that the efforts by the claimant in the present case were sufficient to fulfill the purposes of the statute. The parties do not dispute that Mustang provided the owner with pre-lien notices of its claims, which on their face identified the date and method by which they were sent, and there is no allegation that the owner did not receive actual notice of the claims in a timely manner. Because the omission of the date and method by which the notices were sent constitutes a mere technical error, and because there is no risk that anyone was misled to his prejudice as a result of such omission, the court held that Mustang's lien affidavits substantially complied with the statute.

Arias* v. *Brookstone, L.P., 265 S.W.3d 459 (Tex.App.—Houston [1st Dist.] 2007, pet. denied). Property Code section 53.055(a) states: A person who files an affidavit must send a copy of the affidavit by registered or certified mail to the owner or reputed owner at the owner's last known business or residence address not later than the fifth day after the date the affidavit is filed with the county clerk. Section 53.055 does not require that a mechanic's, contractor's, and materialman's lien affidavit be filed with the county clerk before the required notice is given.

PART XV
AD VALOREM TAXATION

Dallas Independent School District* v. *Outreach Housing Corporation/DeSoto I, Ltd., 251 S.W.3d 152 (Tex.App.—Dallas 2008, pet. denied). Outreach built a low-cost housing project and sought a tax exemption for one half its value under Tax Code § 11.1825. Just before the project was built, the land was subject to an agricultural open-space exemption.

Section 11.1825(x)(3)(A) allows the governing body of the taxing unit to deny the requested exemption if it determines that the taxing unit cannot afford the loss of ad valorem tax revenue that would

result from approving the exemption. DISD denied the exemption on this basis.

Outreach argued that there was no loss of tax revenue. Outreach argued that, before it developed the property, it was designated as agricultural, and it generated approximately $2500 in annual tax revenues to DISD. Even if DISD granted the fifty percent tax exemption Outreach requested, DISD would still receive over $50,000 a year in tax revenues. Because this would result in an increase in tax revenues of more than $50,000, Outreach argued, there could be no "loss" resulting from giving Outreach the fifty percent exemption. As Outreach argued, as long as DISD receives any amount in excess of the $2500 it received in tax revenues before completion of the project, it is benefitting from a gain-not suffering a loss-of ad valorem tax revenues.

In contrast, DISD contends this reading of section 11.1825 is incorrect, and the proper application of section 11.1825 involves an assessment of the total potential tax revenue from a property and consideration of the "loss" in tax revenues if a tax exemption is granted. The court agreed.

The "loss" referred to in section 11.1825 is loss as a result of approving an exemption, not loss of tax revenue when compared to tax revenues collected before a property is improved. In this case, without an exemption, the subject property would generate approximately $100,000 in tax revenues. If the fifty percent exemption is granted, the tax revenue would be only $50,000. Considering the statute as a whole, the court concluded this would result in a "loss" of $50,000 as a result of approving an exemption.

PART XVI
CONDEMNATION

PR Investments and Specialty Retailers, Inc.* v. *State of Texas, 251 S.W.3d 472, 51 Tex. Sup. Ct. J. 484 (Tex. 2008). A condemning authority's decision to change the traffic-flow design (revising the road's signs and stripes but not its intended use) does not divest the trial court of jurisdiction over the trial de novo.

The trial court held that TxDOT's change in the road's lane patterns after the special commissioners' hearing deprived the court of jurisdiction to hear the case. PRI argues that the trial court's jurisdictional ruling was correct because, in a condemnation proceeding, the trial court's jurisdiction is "appellate" and therefore TxDOT is prohibited from changing the roadway design in a manner that materially alters the "compensation issues on appeal" to the trial court. It argues that "the trial court, acting as an appellate court, should refuse to address compensation facts materially different from those considered by the special commissioners" if doing so would prejudice the property owner and "deprive him of a meaningful hearing before the special commissioners."

The Supreme Court held, however, that even assuming that TxDOT's pretrial shift to the Corder Plan altered facts relevant to the compensation due for the taking of property, this change of plans did not divest the trial court of jurisdiction to hear the case. There is no requirement that, for the trial court to retain jurisdiction over a condemnation case, all material facts relevant to damages must remain static after the special commissioners have ruled. The trial court's function in a condemnation proceeding is "appellate" in the sense that the case is first considered by the special commissioners, and hence, the court's jurisdiction "is appellate as distinguished from original or concurrent." The court's jurisdiction is not, however, "appellate" in the sense that the evidence is fixed in the record of the proceedings below and the court is confined to that paper record, as ordinarily occurs when an appellate court reviews a case. Quite the opposite, the statutory scheme makes no provision for the commissioners' hearing to be recorded, and provides that "[i]f a party files an objection to the findings of the special commissioners, the court shall cite the adverse party and try the case in the same manner as other civil causes." In other words, the proceedings that occurred before the special commissioners are not considered, and the case is tried to the court de novo.

State of Texas* v. *Central Expressway Sign Associates, 238 S.W.3d 800 (Tex.App.—Dallas 2007, pet. granted). Profits received from conducting a business on property are generally not admissible to prove value in an eminent domain case. This is because (1) the business, which was not taken, can be operated in another location, and (2) the amount of profit depends more upon capital invested, general business conditions and the trading skill and business capacity of the person conducting it than it does on the location of the business. On the other hand, evidence of profits derived from the intrinsic nature of the real estate itself, as distinguished from profits derived from operating a business on the land, can be considered in determining land value. Thus, it is proper to consider profits derived from use of property where earnings depend on the location, soil or character of the property itself.

The billboard site in this case, in a very busy location in North Dallas, generated a significant amount of income from advertisers. Viacom received this income by entering into "advertisement contracts." The contracts were location specific and required Viacom to do little more than post and maintain signs on the billboard structure. The value of the physical billboard structure itself was insignificant to the value of the billboard site and would have little or no value without real property. The amount paid for the

advertising was thus largely (if not completely) based on the location of the billboard site, not the skills and activities of Viacom or the structure of the sign. The court concluded that income generated from such advertising is generated by the real property upon which the billboard structure is located.

Reunion Hotel/Tower Joint Venture* v. *Dallas Area Rapid Transit, 250 S.W.3d 203 (Tex.App.—Dallas 2008, no pet.). During construction of a light-rail station, some flooding occurred in a pedestrian tunnel serving the Reunion Hotel. Reunion sued, alleging among other things that the flooding was an unconstitutional inverse condemnation.

In order to recover under the theory that property has been taken under article I, section 17 of the Texas Constitution, one must establish that the governmental entity intentionally performed certain acts that resulted in a "taking" of one's property for public use. Government-induced flooding must be intermittent, frequent, and inevitably recurring to constitute a compensable taking, otherwise it is merely a consequential injury or a tort. Flooding that can be characterized as a random occurrence, not inevitably recurring, does not amount to a taking of property. Proof of damage alone will not suffice to prove a taking.

The record shows the flooding at issue in this case occurred during construction, and there is no evidence the flooding continued after construction was complete. Thus, the flooding in this case was a random occurrence, not inevitably recurring, and did not amount to a taking of property.

PART XVII
LAND USE PLANNING, ZONING, AND RESTRICTIONS

Ski Masters of Texas, LLC* v. *Heinemeier, 269 S.W.3d 662 (Tex.App.—San Antonio 2008, no pet.). In 1956, Carlson platted and subdivided a 6.76 acre property into ten tracts of land of varying acreages. The plat was not recorded. Between 1957 and 1972, Carlson sold the ten tracts of land to various people.

The first lot Carlson sold had a residential only restriction and contained the following provision: Grantor also, by this instrument subjects the remainder of the 6.76 acres of land with these same restrictions, conditions and options, whether embodied in future instruments of conveyance or not. The deeds by which Carlson conveyed seven of the remaining nine original tracts reference and incorporate the restrictions contained in the Fleming Deed. Although the incorporating language is not identical, each of the seven deeds reference the volume and page number of the Fleming Deed and contain language similar to the following: "It is expressly understood that this conveyance is subject to the same restrictions, conditions, options and exceptions set out and recorded in Volume 311, Page 208 of the Guadalupe County deed records [i.e., the Fleming Deed]." Carlson did not include such language in the deeds conveying tracts 2 and 4.

In June 2004, Ski Masters purchased property including portions of tracts 4 and 5, as well as a very small amount of adjacent land that was not included in the original 6.76 acre tract. The deed by which Ski Masters purchased this property states that the conveyance is subject to the restrictive covenants set out in the Fleming Deed. Moreover, Ski Master and its realtor were aware of the deed restrictions at the time of purchase.

Ski Master wanted to operate a ski school on the property. The other residents sued to enforce the restrictions and Ski Master sought a declaration that the property was not subject to any valid restrictions enforceable by the residents.

Ski Masters asserts that the residents do not have standing because there was no overall development plan for the 6.76 acre tract, and even if there was such a plan, it was abandoned. The residents respond that evidence supports the trial court's findings that Carlson intended a "general plan or scheme" that the 6.76 acre tract be a residential subdivision and that this general plan or scheme has not been abandoned or waived.

A restrictive covenant is a contractual agreement between the seller and the purchaser of real property. In ordinary circumstances, a restrictive covenant is enforceable only by the contracting parties and those in direct privity of estate with the contracting parties. Circumstances do exist, however, in which a restrictive covenant may be enforced by someone other than the grantor or grantee. For example, a property owner may subdivide property into lots and create a subdivision in which all property owners agree to the same or similar restrictive covenants designed to further the owner's general plan or scheme of development. Under these circumstances, each purchaser within the subdivision is assumed to benefit from the restrictions and each has the right to enforce the restrictions.

The standing of a property owner within a subdivision to enforce a restrictive covenant against another similarly situated property owner does not turn on whether the deed of the owner against whom enforcement is sought contains the restriction. If the deed of the property owner against whom enforcement of the restriction is sought contains the restriction, standing is based on an implied mutuality of covenants among the various purchasers within the subdivision.

If, on the other hand, the deed does not contain the restriction, standing is based on application of the doctrine of implied negative reciprocal easement. The doctrine of implied reciprocal negative easement applies when a developer sells a substantial number of lots within a subdivision by deeds containing the restrictive covenant, and the party against whom the

restriction is sought to be enforced had notice of the restriction but the deed did not actually contain the restriction. The court held that the residents had standing.

Ski Masters argues that, as a matter of law, there was no scheme or plan, noting that (1) Carlson conveyed tracts 2 and 4 without the residential-only restriction, (2) the plat referenced in the restriction was never recorded, and (3) the ten original tracts have been re-subdivided in significant ways.

The argument that the existence of a general plan or scheme was negated by the conveyance of two tracts without the restriction at issue was raised and rejected in ***Hooper* v. *Lottman***, 171 S.W. 270 (Tex.Civ.App.-El Paso 1914, no writ). The Hooper court noted that uniformity of restrictions and deviation from that uniformity are evidentiary matters only, and that "there may be departures from the usual restrictions in individual cases without destroying the integrity of the scheme of development as a whole.

Likewise, Carlson's failure to record the plat is not dispositive of the existence of a general scheme or plan. The parties seeking to enforce the restrictive covenant in that case, like the Residents here, did not rely exclusively on unrecorded plat, but presented other evidence to establish the existence of general plan or scheme.

Finally, Ski Master failed to provide any case-law support for his proposition that the re-subdivision of the property somehow affected the residential scheme.

Rakowski v. Committee to Protect Clear Creek Village Homeowners' Rights, 252 S.W.3d 673 (Tex.App.—Houston [14th Dist.] 2008, pet. denied). The restrictions in question include a provision titled "Recreational Area" that references a "Recreation Area" labeled on the recorded plat for Section 1 of the Subdivision. The parties do not dispute that this "Recreational Area" in the restrictions and this "Recreation Area" on the plat, each refer to the Park. The restrictions reserve this area for the use and enjoyment of those owning or occupying residential lots in all current and future sections of Clear Creek Village.

The Association and Rakowski challenge the summary judgment that held that the restrictions apply to the Park, on the grounds that, among other things, the Park is not included within the platted boundaries of the Subdivision. In support of their contention that the Park is not included in the Subdivision boundaries, they rely on ***Sills* v. *Excel Servs., Inc.***, 617 S.W.2d 280, 284 (Tex.Civ.App.-Tyler 1981, no writ). There, homeowners in a subdivision sought to enjoin the construction of an apartment complex by enforcing a restrictive covenant that allowed lots to be used only for single family residences. The court in that case held that the restrictive covenants did not apply to the tract in question because: (1) the tract was not within the dark line delineating the subdivision's outer boundaries; (2) inclusion of the tract in the subdivision would have required flood plain data to be submitted, which was not done; and (3) the restrictions referred only to the subdivision lots and failed to show any scheme or plan of development imposing the restrictions on property not encompassed within the subdivision's boundaries.

In contrast to Sills, and applying part of its rationale, the restrictions in this case demonstrate "a scheme or plan of development imposing restrictions on property not encompassed within the subdivision's boundaries." The appurtenant property is arguably outside the dark line that demarcates the lots of the subdivision, but the restrictions specifically reference it, and a review of the recorded map of the subdivision clearly marks that section as Recreation Area, putting any person on notice that it is part of a plan or scheme of development. Any would-be purchaser could only determine the nature of this designation by reading the subdivision's restrictions.

In this case, the record contains a general plan of development expressly imposing the restrictions on the Park. Therefore, even if the Park is outside the platted boundaries of the Subdivision, that alone does not preclude the application of the restrictions.

The Association and Rakowski's second contention, that the restrictions are not recited in the deed, fails to note that a property may become subject to the restrictions and covenants of a general plan of development under a number of scenarios, including: (1) by grant; (2) by an express reference to the restrictions and covenants in the conveyance documents, which are duly recorded; and/or (3) when the parties otherwise have constructive knowledge of the restrictions through the recorded property records. As such, even if the Association and Rakowski are correct about the deed, an attack on the deed is insufficient to find that the restrictions and covenants are inapplicable to the Park.

Their third contention, the restrictions' enabling language specifies that the uniform plan of development shall govern "the use, development, improvement and sale of lots" and "does hereby place and impose the following restrictions, covenants, and conditions upon and against the lots." The Association argues that this language limits the application of the restrictions only to actual subdivision lots. However, this fails to read the restrictions as a whole and fails to give meaning to every provision, particularly those expressly referring to the Park.