CASE LAW UPDATE

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CHAPTER 1

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CASE LAW UPDATE

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

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 9

PART V USURY 10

PART VI LENDER LIABILITY 11

PART VII DEEDS AND CONVEYANCE DOCUMENTS 12

PART VIII LEASES 13

PART IX VENDOR AND PURCHASER 18

PART X BROKERS 33

PART XI TITLE INSURANCE AND ESCROW AGENTS 33

PART XII ADVERSE POSSESSION 38

PART XIII EASEMENTS 39

PART XIV RESTRICTIVE COVENANTS, SUBDIVISIONS, AND CONDOMINIUMS 41

PART XV HOMESTEAD 43

PART XVI CONSTRUCTION AND MECHANICS' LIENS 45

PART XVII AD VALOREM TAXATION 49

PART XVIII CONDEMNATION 52

PART XIX MISCELLANEOUS 53

CASE UPDATE

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PART I
MORTGAGES AND FORECLOSURES

Canfield* v. *Countrywide Home Loans, Inc., 187 S.W.3d 258 (Tex.App.—Beaumont 2006, no pet.). Brian and Barbara Boyd bought a house and got a loan from Countrywide's predecessor. Brian died and Barbara defaulted on the mortgage. The Boyd's loan was an HUD loan that restricted sales to investors or other non-HUD approved owners.

When Canfield found the foreclosure posting for the Boyd's house, he entered into a transaction with Barbara whereby she conveyed the house to Canfield's relatives subject to (but not assuming) the existing debt.

In order to keep the lender from knowing what was going on, Canfield had Barbara send some "form" letters that told the lender she was going to be out of town for a while and to send any notices and payment coupons to another address. She also requested that, on payoff of the loan, all of the existing escrow accounts be delivered to Canfield's designee.

After the loan payoff, Canfield asked Countrywide to send him the escrow balance. Countrywide declined to do so, and Canfield sued. Canfield argued that he was the "successor and assign" of the Boyds and was thus entitled to the escrow balances. Canfield's argument was that his legal entitlement to the escrow account funds derived from paragraph twelve in the deed of trust and from the notation in the warranty deed from Barbara Boyd that "all escrows pass to grantee." The pertinent language he pointed to was that the covenants and agreements of the deed of trust "shall bind and benefit the successors and assigns of Lender and Borrower."

The fact that a person might receive an incidental benefit from a contract to which he is not a party does not give that person a right of action to enforce the contract. A third party may recover on a contract made between other parties only if the parties intended to secure some benefit to that third party, and only if the contracting parties entered into the contract directly for the third party's benefit. Therefore, the intentions of the contracting parties are controlling. A court will not create a third-party beneficiary contract by implication. The intention to contract or confer a direct benefit to a third party must be clearly and fully spelled out or enforcement by the third party must be denied. Consequently, a presumption exists that parties contracted for themselves unless it clearly appears that they intended a third party to benefit from the contract.

In this case, the court found nothing in the terms of any of the documents executed by the Boyds and North American intending to confer a direct benefit on Canfield. Furthermore, because Canfield explicitly and openly refused to formally assume the Boyds' financial obligation, Countrywide was under no duty to recognize any putative "successor" or "assign" of the Boyds that was not first determined to be a "creditworthy owner-occupant" in compliance with the provisions contained in the "notice to homeowner" document.

Lavigne* v. *Holder, 186 S.W.3d 625 (Tex.App.—Ft.Worth 2006, no pet.). Lavigne bought some property from Holder and the purchase price was paid, in part, by a note secured by a deed of trust. The deed of trust contained a provision that prohibited creating encumbrances against the property other than one that was subordinate to the deed of trust. When Lavigne granted an easement, Holder accelerated the indebtedness and attempted to foreclose. Lavigne sued Holder to enjoin the foreclosure sale, seeking both a temporary and a permanent injunction. Both parties moved for summary judgment on the issue underlying Lavigne's request for injunctive relief, namely, whether the easement triggered the acceleration clause. The trial court granted Holder's motion, denied Lavigne's, and denied Lavigne's request for a temporary injunction.

In his first issue, Lavigne argues that the trial court erred by granting Holder's motion for summary judgment. Lavigne contends that an easement is an encumbrance subordinate to the deed of trust and thus falls within exclusion (a) of the acceleration clause. It is undisputed that Lavigne transferred the easement to a third party without Holder's prior written consent. Thus, the court addressed three questions to resolve this issue: (1) Is the easement an "interest" in the underlying property, (2) is the easement an "encumbrance," and (3) is the easement subordinate to the deed of trust? The answer to all three questions was "yes."

First, as the parties concede, an easement is an interest in land. Second, Texas courts have long held that the term "encumbrance" includes easements. Third, an easement is subordinate to a prior deed of trust. When the owner of real estate executes a valid deed of trust, and then conveys an interest in the mortgaged property to a third party, the rights of the mortgagor's vendee are subject to the rights held by the beneficiary of the deed of trust. The court held that the easement granted by Lavigne was an encumbrance subordinate to the deed of trust and therefore fell within exclusion (a) of the acceleration clause. Thus, as a matter of law, the easement did not trigger the acceleration clause and did not give Holder the right to accelerate the note and foreclose on the property, and the trial court erred by granting Holder's motion for summary judgment.

Next, the court went on to determine whether the trial court erred by failing to issue a temporary injunction as requested by Lavigne in his motion for summary judgment. An applicant for a temporary injunction must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) probable injury in the interim. When the only relief sought on final trial is injunctive, the applicant must show a probable right on final hearing to a permanent injunction. A probable injury is one that is imminent, irreparable, and has no adequate remedy at law. Disruption to a business can be irreparable harm. Moreover, every piece of real estate is unique, and foreclosure can be an irreparable injury for which there is no adequate remedy at law.

In this case, the summary judgment evidence satisfies each element of the temporary injunction test. First, Lavigne's original petition stated a claim for a permanent injunction. Second, the court already determined that the easement did not trigger the acceleration clause; thus, Lavigne showed a probable right on final hearing to a permanent injunction. Third, Lavigne established an imminent threat of irreparable injury. The threat is imminent because Holder has actually posted the property for foreclosure on at least two different dates. Lavigne filed an affidavit with the trial court averring that he earns his livelihood by operating an auto body shop on the property and has done so since 1983. Holder proffered no summary judgment evidence to controvert Lavigne's affidavit. Thus, foreclosure would cause irreparable injury to Lavigne for which there is no adequate remedy at law because it would disrupt his business and because the property, like all real estate, is unique.

US Bank National Association* v. *Safeguard Insurance Company, 422 F.Supp.2d 698 (N.D. Tex. 2006). Triad executed a promissory note payable to Bankers and a deed of trust, security agreement, and assignment of leases and rents, fixture filing, and financing statement in Bankers' favor. The deed of trust covered four properties in or near Dallas, Texas, and there was no separate value assigned to each individual property. A provision of the deed of trust required Triad to maintain property insurance on the mortgaged property. It also required that the insurance policy contain a mortgagee clause or loss payee endorsement for the benefit of Bankers (U.S. Bank's predecessor), the mortgagee. Safeguard provided insurance coverage for Triad's properties.

The policy relevant to this litigation was for the period November 1, 2002 to November 1, 2003 and insured the Triad properties as a single unit compromised of the four individual properties. The policy listed Triad as the named insured. Contrary to the deed of trust provision that required that insurance policies contain a mortgagee clause or loss payee endorsement, and despite the fact that Bankers itself had paid the premium for the 2002-03 policy, the policy neither identified Bankers as an additional insured nor contained a mortgagee clause.

Hailstorms damaged skylights and air conditioner coils at Atrium and damaged the roof and air conditioner units at one of the properties. Soon thereafter, Triad defaulted and U.S. Bank foreclosed on three of the four properties. In the substitute deed of trust and bill of sale, the parties agreed that the lien and security interest of the deed of trust remained in full force and effect as to the fourth secured property, which was not part of the foreclosure proceedings. The original deed of trust provided that, in the event of a partial sale of the mortgaged property where the proceeds amounted to less than the aggregate secured indebtedness, the deed of trust and lien remained in full force and effect as to the unsold portions of the four Triad properties, as if no sale had been made.

Later the property manager for the damaged submitted a property loss notice to the insurance agent concerning the hailstorm. She separately mailed to Safeguard's counsel a copy of the substitute trustee's deed and bill of sale and notice of substitute trustee's sale. Her cover letter noted that she had enclosed documents pertaining to the ownership and foreclosure of Courtyard. Also the manager of one of the other foreclosed properties filed a property loss notice for damage sustained in the hailstorm. She faxed the notice to the insurance agent and included on the coversheet a note that advised that any claim checks representing proceeds for repairs due to hail damage should be made payable to Triad and U.S. Bank. Safeguard refused to pay insurance proceeds to U.S. Bank, contending that U.S. Bank was not a party to the insurance policy and was not an insured party under the policy. U.S. Bank responded by filing the instant lawsuit against Safeguard.

U.S. Bank contended that the Texas equitable lien doctrine compels Safeguard to treat U.S. Bank as if it were listed as an additional named insured and loss payee on the policy and that the policy provides coverage to U.S. Bank as if it were. Safeguard argued that the equitable lien doctrine is inapplicable because there was no deficiency remaining on the loan as to the two damaged properties.

The equitable lien doctrine provides that, where a mortgagor is charged with the duty of obtaining insurance on a property with loss payable to the mortgagee, but the policy does not contain such a provision, equity will treat the policy as having contained the loss payable provision and entitle the mortgagee to recover under the policy.

The equitable lien doctrine, however, does not treat the mortgagee and mortgagor as indistinctive entities. Rather, it operates to the extent necessary to preserve the mortgagee's interest. The purpose of the mortgagee clause in an insurance policy is to protect the lender who has lent money for the purchase of property. Accordingly, when a mortgagee reduces the indebtedness by purchasing property at a foreclosure sale, the amount of the mortgagee's interest is limited to the amount of the deficiency remaining on the note after the sale. Safeguard does not contest that Triad agreed to obtain insurance for Bankers' benefit or that Safeguard had notice of the agreement. Instead, Safeguard maintains that the equitable lien doctrine is inapplicable because there is no deficiency remaining on the loan as to the damaged properties.

U.S. Bank claimed that the foreclosure on the three Triad properties did not satisfy the mortgage obligation. It points to the state court judgment as evidence that Triad owes U.S. Bank approximately $22 million under the original deed of trust and promissory note. Safeguard countered that no deficiency remains concerning the three properties foreclosed on because U.S. Bank elected to attach its security interest and any remaining debt thereunder solely against the remaining unsold property. The substitute deed of trust provides that the lien and security interest of the original deed of trust remain in full force and effect as to remaining real and personal property. The deed of trust similarly provides that, upon partial sale, the deed of trust and lien remain in full force and effect as to the unsold portions of the properties, "just as though no sale had been made." Relying on these deed of trust provisions Safeguard maintained that, because Triad and U.S. Bank agreed that any deficiency that remained on the original mortgage loan was no longer secured by the three foreclosed-on properties, no deficiency exists as to these properties.

The facts of this case complicate somewhat the otherwise basic determination of the existence of a loan deficiency. Nevertheless, the narrow question the court must decide is whether Triad still owes money on the loan, that is, whether a deficiency remains. The court concluded that the summary judgment evidence established "beyond peradventure" that there was a deficiency on the loan.

Stephens* v. *Hemyari, 216 S.W.3d 526 (Tex.App.—Dallas 2007, pet. pending). Before its properties could be foreclosed on, two limited partnerships filed bankruptcy. The noteholder moved to lift the automatic stay. The bankruptcy court granted a conditional order to lift the stay to permit posting and foreclosure if a $700,000 payment was not timely made.

Under the bankruptcy court's order, the debtor had to pay $50,000 by noon on June 12 and $650,000 on or before August 1, 2000. If the debtor timely made the first payment, then the noteholder could post the property for foreclosure in July for sale on August 1. If the debtor failed to make the $650,000 payment on or before August 1, 2000, then the noteholder and the trustee could proceed with the foreclosure sale on August 1, 2000 or record a Deed in Lieu of Foreclosure, at their option. The debtor made the June 12 $50,000 payment, but August 1 came and went without his paying the $650,000. On August 15, 2000, the substitute trustee posted the property for foreclosure. On September 5, 2000, the substitute trustee conducted the foreclosure sale, at which appellants' attorney was present, and sold the property to Hemyari.

Afterward, the debtor sued Hemyari seeking to have the foreclosure sale set aside, the substitute trustee's deed canceled, and the cloud on the partnerships' title to the property removed. They alleged the foreclosure sale and the substitute trustee's deed were void because the sale violated the bankruptcy automatic stay. They argued that the bankruptcy court's order conditionally lifting the automatic stay authorized posting for foreclosure in July 2001 and foreclosure sale "on August 1, 2001. They argued that because the posting occurred in August and the sale in September, contrary to the specific dates permitted in the bankruptcy court's order, the foreclosure sale violated the automatic stay and the sale was void.

An action taken in violation of the automatic stay is void, not merely voidable. A foreclosure sale that occurs during the automatic stay is void and passes no title. The terms of an order modifying the automatic stay must be strictly construed.

Hemyari's argued that the sale did not violate the automatic stay because the case **In re *Matheson***, 84 B.R. 435 (Bankr. N.D.Tex.1987), held that a foreclosure under similar circumstances did not violate the automatic stay. In ***Matheson***, a bank filed a motion for relief from the automatic stay to permit the foreclosure on Matheson's property. The bankruptcy court's order granted the motion for relief from stay 'in all respects' and specifically permitted a May foreclosure. The foreclosure sale then took place in June. Matheson argued the sale was improper because the court order permitted only a May foreclosure. The bankruptcy court held that by granting the relief in all respects as prayed for in the motion, the lifting of the stay was not limited to a May foreclosure.

In this case, the bankruptcy court's order did not grant relief "in all respects," as the ***Matheson*** court order did, but conditionally lifted the stay to allow foreclosure on a specific date. The order stated, "the trustee may proceed with the foreclosure sale on August 1, 2000...." Strictly construing the order did not permit the court to interpret it as allowing foreclosure after August 1, 2000.

PART II
HOME EQUITY LOANS

Marketic* v. *U.S. Bank National Assoc., 436 F.Supp.2d 842 (N.D. Tex. 2006). Marketic borrowed a home equity loan secured by 10 acres of land. After Marketic defaulted, the Bank began foreclosure proceedings. Marketic brought this action to enjoin the foreclosure. Marketic complained that the Bank did not comply with several of the requirements for a valid homestead lien and also alleged that, as a matter of state constitutional law, the Bank cannot foreclose upon her property because it is designated for agricultural use under the relevant property tax statutes.

In 1997, the Texas Constitution was amended to permitt home equity lending against homestead property. In order for a home equity lien to be valid, the home equity loan must comply with the numerous requirements set forth in subsections (A)- (Q) of section 50(a)(6). Marketic challenged the validity of U.S. Bank's lien on her home under two of those provisions--subsections (E) and (I) of § 50(a)(6).

Section 50(a)(6)(E) prohibits foreclosure on property to pay a debt that arises from a line of credit that required the owner to pay fees to necessary to originate, evaluate, maintain, record, insure, or service the extension of credit that exceed three percent of the original principal amount of the extension of credit. Marketic claimed that the home equity loan that she received violated this 3% cap on fees and, therefore, cannot be subject to forced sale.

U.S. Bank showed that the HUD-1 Settlement Statement, which Plaintiff signed, states that she paid only $5,391.90 in total fees. Notably absent from U.S. Bank's calculation is a loan discount fee of $3,900 that Marketic paid in connection with obtaining the loan. When added to the amounts previously mentioned, the aggregate amount paid exceeds the 3% constitutional limit.

The Court disagreed with Marketic. The 3% percent cap on fees was not exceeded because the $3,900 that Marketic paid for discount points qualifies as "interest" under § 50(a)(6)(E). In Texas, "discount points" that are charged to originate a home-equity loan are not "fees" related to the origination of the loan for purposes of § 50(a)(6)(E), as long as the points are charged at the beginning of the loan term and were paid in consideration for a lower interest rate on the outstanding debt.

Next US Bank argued against that Marketic's claim that her property cannot be foreclosed upon because it was (and is) designated for agricultural use under the relevant property tax laws. Subsection (I) of § 50(a)(6) protects property "designated for agricultural use as provided by statutes governing property tax" from foreclosure to satisfy outstanding debt on a home equity loan.

The court dealt with conflicting interpretations of § 50(a)(6)(I). On the one hand, Marketic claimed that the home equity lien was invalid because her home equity lender knew that her property was designated for agricultural use but insisted that she change the designation in order to obtain the loan, which she claims she did. She also alleged that the US Bank was now unable to foreclose on the loan because she subsequently re-designated her land for agricultural use. In this regard, Marketic is asserting that the relevant agricultural "designation" under § 50(a)(6)(I) is either the designation before the loan is extended--if known by the lender before extending the loan--or the designation at the time of foreclosure. By contrast, US Bank argued that the only relevant designation under the amendment is the designation in effect at closing, when the lien was created.

The text of § 50(a)(6)(I) is ambiguous because there is no temporal context for the verb phrases "not secured by" and "property designated for agricultural use." Therefore, both parties have reasonably construed § 50(a)(6)(I). The only difference between their interpretations is that they presuppose different times at which the property's designation will affect the validity of the lien.

The only court to have interpreted § 50(a)(6)(I) has interpreted the phrase "property designated for agricultural use as provided by the statutes governing property tax" as referring to land assessed under both subchapter C of the Tax Code, entitled "Land Designated for Agricultural Use," and subchapter D of the Tax Code entitled "Appraisal of Agricultural Land." Under both of those statutory schemes, a property's designation may vary from year-to-year. The legislature must have known this when drafting § 50(a)(6)(I), and, therefore, the must have contemplated that this situation might arise in the future. Had the legislature intended for the property tax designation to be relevant only at the time that "debt" underlying the foreclosure action was incurred, it would have written such a condition into the constitutional text.

LaSalle Bank National Association* v. *White, 217 S.W.3d 573 (Tex.App.—San Antonio 2006, pet. pending). White borrowed a home equity loan from Alliance Funding, which assigned the note to LaSalle Bank. The note was secured by a lien against 10.147 acres of land, which was a portion of a 53.722 acre tract owned by White. At the time the note was executed, a third party held a valid purchase money lien against the 53.722 acre tract. The debt to the lender was paid off with a portion of the home equity loan proceeds. In addition, outstanding property taxes were paid. The remaining balance was advanced directly to White.

White did not make her first payment under the note for several months. She made a few additional payments, but then she quit making payments altogether. LaSalle Bank filed an application for a home equity loan foreclosure. White filed a separate lawsuit seeking a declaratory judgment that LaSalle Bank had forfeited all principal and interest because the loan violated the Texas Constitution. White also sought a declaration that the lien against the property was invalid.

The trial court found that the property was designated for agricultural use and, therefore, the Constitution prohibited it from being used as security for a home equity loan. LaSalle Bank argues that the constitutional bar applies only to land designated for agricultural use under Texas Tax Code chapter 23, subchapter C. Because it is undisputed that White's property was designated under subchapter D, and not subchapter C, LaSalle Bank contends the constitutional bar does not apply. The court disagreed.

The Texas Constitution prohibits "homestead property designated for agricultural use as provided by statutes governing property tax" from being pledged to secure a home equity loan unless the property "is used primarily for the production of milk." It is undisputed that White did not use her property for the production of milk. Therefore, the issue is what constitutes "property designated for agricultural use as provided by [t]he statutes governing property tax."

The record establishes that, with the exception of one acre, White's land was valued for agricultural use based on the 1998 and 1999 tax rolls. The land valued for agricultural use included the property described in the deed of trust securing LaSalle Bank's note. Smith testified that all appraised land in Mason County valued pursuant to an agriculture use exemption, including White's, was based on Subchapter D of the Texas Property Tax Code. Evidence was introduced to show that a copy of a tax certificate relating to White's property that identified the property as receiving a special valuation based on its use was located in the files of LaSalle Bank and the title company that closed the transaction. The chief appraiser and tax collector for Mason County in 1998 and 1999, agreed that White's land was valued under Subchapter D with the exception of one acre. The chief appraiser also agreed that the tax certificate in LaSalle Bank's files reflected that White's land was receiving a special valuation. The chief appraiser also testified that when White was applying for the loan in question, both the chief appraiser and the lender contacted her and asked that ten acres of White's land be changed from agricultural value to market value. The chief appraiser informed White and the lender that the valuation could only be changed on the following January 1. Because White's land was designated for agricultural use as provided by subchapter D of the property tax code, the Texas Constitution prohibited it from being used as security for a home equity loan.

LaSalle Bank argued in the alternative that if the loan failed to comply with the constitutional requirements, it was equitably subrogated to the liens held by the third parties who were paid the balance of the existing purchase money lien and the accrued ad valorem taxes. Accordingly, LaSalle Bank contended that its rights were not forfeited with regard to the portion of the loan to which its equitable subrogation rights extended.

The trial court found that a portion of the loan proceeds were used to pay the purchase money indebtedness to the existing lender and to pay outstanding taxes. The trial court concluded, however, that LaSalle Bank was not entitled to equitable subrogation for the amount paid to the existing lender or for the taxes because Article XVI, section 50(e) bars any lien based upon equitable subrogation.

LaSalle Bank did not contend that it meets the conditions imposed by section 50(e). Instead, LaSalle Bank asserted that the doctrine of equitable subrogation is not eliminated by section 50(e). The court disagreed.

The home equity loan in this case is not simply a "contract" but only exists by means of a constitutional amendment. The constitution imposes specific restrictions and requirements on home equity loans, and the failure to comply with the constitutional restrictions and requirements results in forfeiture if the lender fails to comply with its obligations within a reasonable time after the lender is notified of the lender's failure to comply.

LaSalle Bank conceded that it failed to comply with the specific restrictions imposed on home equity liens that include an advance of additional funds. LaSalle Bank also failed to comply with its obligations within a reasonable time after it was notified of its failure to comply. The doctrine of equitable subrogation cannot be applied to circumvent the constitutionally-mandated penalty of forfeiture.

PART III
PROMISSORY NOTES, LOAN COMMITMENTS, LOAN AGREEMENTS

BACM 2001-1 San Felipe Road Ltd. Partnership v. Trafalgar Holdings I, Ltd., 218 S.W.3d 137 (Tex.App.-Houston [14 Dist.] 2007, no pet.). The three Borrowers, Trafalgar, Royal, and Lexington are all owned by RCA Holdings. The three Borrowers share a common ownership form. Ninety-nine percent of each company is owned by RCA, and the remaining one percent is owned by a limited liability corporation that acts as the general partner. The general partner is also owned by RCA. Bank of America made commercial real estate loans to the Borrowers totaling $41.4 million, secured by first lien mortgages on three apartment complexes, two located in Texas and one in Mississippi. The loans were conduit loans, and were ultimately assigned to a securitization pool, serviced by GMAC as Master Servicer, responsible for normal servicing, and Lennar as Special Servicer, responsible for post-default servicing. Lennar was authorized to modify loans but not to make new ones.

After payments were not made, GMAC transferred servicing to Lennar. Lennar sent out a "pre-negotiation agreement" to each borrower, which contained disclaimers of any agreements that were not made in writing by Lennar. The loans were declared to be in default, but work-out negotiations continued. At one point, the principal of RCA sent a proposal to Lennar for a write-down of principal on each of the loans in exchange for payment of the written-down amount within a short period of time. According to RCA, Lennar orally accepted this offer, subject to RCA making a $250,000 "good faith" payment immediately. RCA sent a payment in that amount, along with a letter and a notation on the check that the payment was confirmation of the oral agreement for the write-down of the loans.

Negotiations continued regarding a proposed forbearance, but no further discussions were made regarding the write-down proposal. Ultimately, with no written agreement in hand, Lennar posted the properties for foreclosure. RCA and the Borrowers filed suit to enjoin the foreclosure and asserted claims for breach of contract and declaratory judgment. They alleged that the Lenders accepted the terms of the Proposal by negotiating the $250,000 check, then repudiated the agreement by sending forbearance proposals and attempting to foreclose on one of the properties. After receiving the petition and reviewing the allegations, the Lenders tendered a refund of the $250,000 payment, which RCA and the Borrowers refused.

A sale of one of the projects was attempted, but it required approval of an assumption of the loan, which, in turn, required lender approval. No approval was forthcoming because of the disputes regarding the amount of the loans, etc. When that deal fell through, RCA and the Borrowers added a claim to their lawsuit regarding the sale.

The trial court ruled in favor of RCA and the Borrowers, ordering Lennar, GMAC, and Wells Fargo to pay them $6,640,222 for the lost benefit of the twenty percent discount; $5,690,011 for lost equity from the prospective sales of the properties; more than $280,855 for prejudgment interest; $300,000 for attorneys' fees through trial; and conditional attorneys' fees of $150,000 for the costs of appeal and review by the Texas Supreme Court.

The lenders appealed, claiming that the so-called agreement for the write-down of the loans was barred by the Statute of Frauds. To satisfy the Statute of Frauds, all loan agreements involving amounts exceeding $50,000 must be in writing. Business & Commerce Code § 26.02. Specifically, there must be a written memorandum which is complete within itself in every material detail and which contains all of the essential elements of the agreement so that the contract can be ascertained from the writings without resorting to oral testimony. The written memorandum must, within itself or by reference to other writings and without resort to parol evidence, contain all the elements of a valid contract, including an identification of both the subject matter of the contract and the parties to the contract. In a contract to loan money, the material terms also include the amount to be loaned, the maturity date of the loan, the interest rate, and the repayment terms. Finally, the agreement must be signed by the party to be bound or by that party's authorized representative.

The Borrowers argued that the agreement consists of the proposal, the $250,000 check with its endorsements, and the cover letter accompanying the check. Construing that as a new contract and reviewing only these written documents without reference to parol evidence, the Court of Appeals was unable to ascertain several essential terms with certainty. First, it couldn't determine the identities of the parties to the Repayment Agreement. The Borrowers argued that RCA had promised to bring the loans current immediately and pay off the mortgage balances within four months in exchange for a twenty percent reduction on the mortgage balances. But, the proposal contained no promises by RCA. Although the proposal was typed on RCA's letterhead, it was signed "Bernard Aptaker, Chairman of the Board of the General Partner." RCA's general partner, however, was identified in the original Loan Documents as Fidelity "S" Corporation. Thus, it appears that the promisor was Fidelity "S" Corporation, an entity not named in any of the documents forming the Repayment Agreement.

The second failure was that the alleged agreement did not specify an interest rate.

By omitting essential terms such as the applicable interest rate and the identities of the parties, the repayment agreement, if treated as a new contract, contained insufficient information to satisfy the Statute of Frauds.

However, appellees' alternative theory of liability characterizes the Repayment Agreement as a modification of the original Loan Documents. A contract required to be in writing cannot be orally modified except in limited circumstances inapplicable here. A modification to a contract need not restate all the essential terms of the original agreement. A modification alters only those terms of the original agreement to which it refers, leaving intact those unmentioned portions of the original agreement that are not inconsistent with the modification. Thus, if the court construed the Repayment Agreement as a modification, terms not addressed in the repayment agreement would be supplied by the original loan documents. Because the original loan documents supply essential terms missing from the repayment agreement, this construction arguably supports the argument that the agreement satisfies the Statute of Frauds.

The lenders argued that even if the repayment agreement satisfied the Statute of Frauds, it was nevertheless unenforceable because the Borrowers materially breached the terms of the contract. The only terms of the original loan documents the proposal purported to modify were (a) the amount of principal, (b) the maturity date of the loans, and (c) certain accounting requirements. But, the repayment agreement did not alter the dates on which principal and interest payments were due, contained no mention of the treatment of late fees and default interest that had already accrued under the original loan documents, and did not address the pre-payment penalties that would be assessed under the original loan documents. The borrowers argued that the proposal excluded these costs because they had no intention of paying them--they simply were not part of the deal. This position ignores the undisputed fact that these past and future penalties were part of the original loan documents, and the proposal contained no request to modify these provisions of the original agreements. Other arguments were put forth, but ultimately the court held that, even if the original loan agreements had been modified in a way that satisfied the Statute of Frauds, the Borrower had breached the modified agreement and thus the lender was entitled to treat the modification as repudiated and was excused from performing.

First National Acceptance Company* v. *Bishop, 187 S.W.3d 710 (Tex.App.—Corpus Christi-Edinburgh 2006, no pet.). Bishop held a note and deed of trust. She read a newspaper ad run by ANI that offered to buy promissory notes and contacted ANI. ANI's principal lender was FNAC, a Michigan corporation involved in lending money to businesses to facilitate the purchase of secured promissory notes, which FNAC itself would then repurchase and service. FNAC would also use ANI to conduct in-house closings of ANI's purchase of secured promissory notes with FNAC-funds. ANI would typically contact FNAC regarding potential promissory notes available for purchase. If FNAC approved the purchase of the note, it would release the funds to ANI with instructions regarding how to disburse the funds. ANI would then purchase the note from the individual holder and transfer its interest in the note to FNAC. FNAC would begin to service the note and collect payments directly from the individual debtors, although ANI would be notified if the note went into default. ANI was obligated to follow FNAC's instructions regarding the purchase of notes exactly. Neither ANI nor FNAC would disclose their relationship to individual note holders seeking to sell their notes to ANI.

When Bishop responded to ANI's newspaper advertisement, ANI allegedly sent FNAC information about the note and the property, including a broker worksheet and appraisal. After receiving approval, ANI sent FNAC the original note, the deed of trust, and note endorsement. FNAC responded with a "funding memo," by which ANI was instructed to conduct the closing for the Bishop property and then, once all FNAC's requirements were met, to disburse the sale funds to Bishop.

ANI failed to disburse any funds to Bishop. Bishop attempted to cancel her agreement and demanded the return of her documents. ANI failed to return the note, deed of trust, and note endorsement to Bishop, having already transferred these to FNAC. ANI then ceased doing business. FNAC also failed to disburse any funds to Bishop and refused to return the note, deed of trust, and note endorsement.

Shortly thereafter, FNAC notified the makers of the note that FNAC had purchased their note and deed of trust and was therefore entitled to collect in full upon the Note, even if Bishop was not paid by ANI for her assignment based on the assignment executed by Bishop. Bishop and the makers of the note sued for a declaratory judgment declaring that (1) Bishop is the lawful owner of the note secured by the deed of trust, (2) neither ANI nor FNAC have an interest in the note due to a failure of consideration, and (3) the transfer of the lien from Bishop is null and void.

FNAC argues that because ANI and FNAC enjoyed independent contractual relationships, the court could not impute that an agency relationship existed between them sufficient to defeat FNAC's holder-in-due-course status for the Bishop note. The trial court held as a conclusion of law that ANI was the agent of FNAC for the closing of the Bishop Sales Agreement, and therefore all knowledge of ANI regarding the closing of the Bishop Sales Agreement, as agent for FNAC is imputed to FNAC including notice of the failure of ANI to pay the consideration to Bishop.

The question of whether a principal-agent relationship exists under established facts is a question of law for the court. An agent is one who consents to the control of another, the principal, where the principal manifests consent that the agent shall act for the principal. A principal-agent relationship is not presumed, and the party asserting the relationship has the burden of proving it. The party claiming agency must prove the principal has both the right to assign the agent's task and the right to control the means and details by which the agent will accomplish the task. The principal's extent of control over the details of accomplishing the assigned task primarily distinguishes the status of agent from that of independent contractor. The right of control is "the supreme test" in establishing an agency relationship.

An agent need not disclose his or her principal's identity in order to act on behalf of that principal. An agent may make a contract for an undisclosed principal in his own name, and the latter may sue or be sued on the contract.

The court agreed with Bishop that the trial court was presented with sufficient evidence to conclude that ANI acted as an agent for its principal, FNAC, for the closing of the Bishop sale. Bishop met her burden of proof to establish that ANI, over an extended period of time, repeatedly closed sale agreements funded by FNAC, as an "inside" closing under strict written instructions from FNAC. For these "inside" closings, ANI prepared the transaction documents and conducted the closing as the sole representative of FNAC. This "inside" closing of sales agreements by ANI for FNAC was outside of and apart from the specific and limited requirements and duties imposed by the ANI-FNAC loan agreement. FNAC accepted the benefit of the ANI-conducted "inside" closings, repeatedly referred to ANI as its "broker," and took possession of the note before funding the transaction. This demonstrates that FNAC had both the right to assign ANI's task and the right to control the means and details by which ANI accomplished the task of acquiring and purchasing promissory notes.

The protections bestowed on those who qualify for holder-in-due-course status are intended to safeguard innocent holders who acquire a note without prior knowledge of any problems or defenses. Thus, because FNAC knew that Bishop, once she was not paid, had cancelled the sale of her note and demanded its return from ANI, and because ANI was acting as an agent of FNAC in this sale, FNAC cannot be considered a holder in due course and thus exempt from Bishop's claims.

Shankles* v. *Shankles, 195 S.W.3d 884 (Tex.App.—Dallas 2006, no pet.). On May 14, 1986, appellees executed a "Real Estate Lien Note" listing their father, Douglas L. Shankles, as payee, secured by a deed of trust executed the same day. The note provided it was payable on demand. In July 2004, appellants, as executors of Shankles' estate, made demand upon appellees to pay the note. Appellants argue the trial court erred in concluding as a matter of law that the 1986 note and deed of trust were barred by the statute of limitations.

A four-year statute of limitations applies to a suit on a promissory note. The statute of limitations begins to run on a demand note on the date of making. The only item listed on the 1986 note under "Terms of Payment" is "ON DEMAND." The court concluded that the note at issue was therefore an "on demand" note, and the four-year statute of limitations applies. Thus, appellants' demand upon appellees to pay the note nearly eighteen years after origination was barred by limitations.

Doss* v. *Homecomings Financial Network, Inc., 210 S.W.3d 706 (Tex.App.—Corpus Christi-Edinburg 2006, no pet.). Bobby and Charlotte Doss owned two properties, each financed by Homecomings. When they divorced, Bobby got Property No. 1 financed by Note No. 1 and Charlotte got Property No. 2 financed by Note No. 2. Charlotte refinanced Property No. 2 after the divorce. The proceeds of the refinancing were delivered to Homecomings, but it erroneously applied them to payment of Bobby's Note No. 1 rather than Charlotte's Note No. 2. Homecomings sent a release of lien and also sent him the escrow accounts for Note No. 2. The release of lien was recorded.

Homecomings found out about its mistake and demanded that Bobby (1) agree to set aside the release of lien, (2) revive the lien under the deed financed by Note No.1, (3) refund the deposits sent to Bobby from the escrow account, and (4) give his authorization to apply the misapplied funds to Note 2 for the benefit of Charlotte. Bobby refused to comply with the demands. Homecomings filed suit against Bobby and Charlotte.

Homecomings's claim for money had and received is an equitable action that may be maintained to prevent unjust enrichment when the defendant obtains money, which in equity and good conscience belongs to the plaintiff. A cause of action for money had and received is not based on wrongdoing but instead, looks only to the justice of the case and inquires whether the defendant has received money which rightfully belongs to another. It is essentially an equitable doctrine applied to prevent unjust enrichment.

Bobby did not produce any evidence to challenge the summary judgment motion on any of the causes of action advanced by Homecomings. Instead, Bobby contended that Homecomings was precluded from seeking an equitable remedy because it made a mistake in applying Charlotte's funds to the wrong note. However, wrongdoing is not an element in a claim for money had and received. Moreover, there was no evidence that Bobby materially changed his position in reliance on the misapplication of funds, the release of lien, or the escrow account refund.

Instead, the record conclusively establishes that Homecomings received funds intended for Charlotte's note, mistakenly applied the funds to Bobby's note, and that the funds in equity and good conscience belong to Homecomings so that they can be rightfully applied to Charlotte's note. Therefore, there is no disputed issue of material fact with regard to Homecomings's money had and received claim. Thus the trial court could have granted Homecomings's summary judgment based upon a claim for money had and received.

PART IV
GUARANTIES

First Commerce Bank* v. *Palmer, 2007 WL 1576023, 50 Tex. Sup. Ct. J. 830 (June 1, 2007). In 1983, the Bank made a loan to JV3. The loan was secured by a deed of trust and guarantied by various individuals, including the Palmers. In March of 1988, after accelerating the note, JV3 executed a renewal note. All of the original guarantors except the Palmers executed new guaranties concurrently with the execution of the renewal note. Several months after the 1988 renewal note was signed, the Palmers executed guaranties of the renewal note. Right after the Palmers signed the new guaranties, JV3 and all of the guarantors executed a document called modification, renewal, and extension of real estate note and lien, reciting the terms of their March 1988 agreement with the Bank.

When the Bank sued JV3 and the Palmers, the Palmers argued that their guaranties were not supported by consideration and were unenforceable.

The trial court viewed the timing of the renewal note's execution as the primary issue. The Bank's president testified that the 1988 note's purpose was to renew and extend J.V.3's 1983 debt. He further testified that the renewal note was executed after all the shareholders had signed their guaranties, including the Palmers, but was backdated to March 30, 1988, the anniversary date on which the original note was to be rolled into the new one.

The court of appeals concluded, however, that the March date on the promissory note was some evidence that it was executed before the Palmers' guaranties and that the trial court was free to disbelieve the Bank president's testimony to the contrary. The court further reasoned that because four months passed between the date of the note and the guaranty agreements that some new consideration, independent of the promissory note, was required. The court gleaned this requirement from ***Fourticq* v. *Fireman's Fund Ins. Co.***, 679 S.W.2d 562 (Tex.App.-Dallas 1984, no writ) in which the court of appeals stated that when "a contract of guaranty is entered into independently of the transaction which created the primary debt or obligation, the guarantor's promise must be supported by consideration distinct from that of the primary debt."

The Supreme Court said, however, "Determining whether a guaranty agreement is independent of the debt it guarantees, however, is not simply a question of the order in which the documents are signed. If the guarantor's promise is given as part of the transaction that creates the guaranteed debt, the consideration for the debt likewise supports the guaranty." Even when the guaranty is signed after the principal obligation, 'the guaranty promise is founded upon a consideration if the promise was given as the result of previous arrangement, the principal obligation having been induced by or created on the faith of the guaranty. Guaranty agreements that post-date the underlying obligation have thus often been enforced in Texas without the requirement of additional consideration to the guarantor.

The question then was whether the Palmers' 1988 guaranties were independent transactions. They were not, of course, because these guaranties without dispute were signed in connection with the renewal of the 1983 note. Had that note not been renewed, JV3 and the guarantors, including the Palmers, would have been responsible for paying it in 1988. The Palmers thus benefited from the renewal and extension of their obligation to repay the earlier note. Thus, the court concluded that there was consideration for the Palmers' 1988 guaranty agreements, consisting of the Bank's forbearance on the 1983 guaranties, as well as its agreement to renew and extend JV3's original debt.

Lavender* v. *Bunch, 216 S.W.3d 548 (Tex.App.—Texarkana 2007, no pet.). Lavender and three other co-owners of the business borrowed an $80,000 loan from the bank. Each of the four executed a guaranty of the loan and pledged a $100,000 CD owned by Bunch, one of the other three guarantors.

Bunch purchased the note and lien from the bank, released the CD to himself, and brought suit against the remaining guarantors on their guaranty agreements for the full amount of the promissory note with accrued interest. Bunch's petition also sought to recover for loans he urged that he had made to the business, and which he alleged that Lavender and the others had orally agreed to guarantee.

Lavender claimed that Bunch, as the assignee of the note and lien from the bank, attained no more privileges than the bank had held; that when Bunch had received the CD, he had the obligation to apply it to the debt and, in so doing, had satisfied the outstanding debt in its entirety. They also alternatively maintained that Bunch, who was one of the four guarantors of the loan, was responsible for at least twenty-five percent of the debt and could not recover the entire loan amount for which the guaranties were given. Neither Bunch nor Lavender brought suit against the business.

An assignee of a promissory note stands in the shoes of the assignor and obtains the rights, title, and interest that the assignor had at the time of the assignment. Therefore, when Bunch acquired the note from the bank, he stepped into the shoes of the bank, having the same rights which the bank possessed.

Among those rights which were granted under the guaranty agreements to the holder of the note and lien was the right to "release any security, with or without substitution of new collateral." This was precisely what Bunch did. He released the CD which was the security for the note; there is no evidence that he actually foreclosed the security interest with which the CD was impressed and did not, therefore, need to follow the dictates of the law in the procedure to be followed in effecting foreclosure. The guaranty agreements signed by the parties permitted the holder of the note to release the security of the note without jeopardizing the holder's claim against the guarantors. Under such an agreement, the release of a secured item does nothing to require application of the proceeds of the security to the underlying debt; accordingly, the release of the CD to the owner of it did not constitute accord and satisfaction of the debt secured by it.

Bunch, in his capacity as the holder of the promissory note, also attempted to release himself from liability as a guarantor of the note. We determine that he could not use this means to unilaterally exculpate himself of any proportional liability he may hold as one of the four guarantors of the note. When Bunch acquired the promissory note from the bank, he did not trade the hat of guarantor of the note for that of holder of the obligation; he wore both hats. As between the coguarantors, he still maintained some liability to his coguarantors for the satisfaction of the debt.

Surprisingly, this issue of a guarantor cum noteholder seeking relief from his coguarantors had not been presented to Texas courts until 2004, when it was shown as an issue in ***Byrd* v. *Estate of Nelms***, 154 S.W.3d 149 (Tex.App.-Waco 2004, no pet.). As here, a guarantor of a promissory note purchased the underlying obligation and brought action against its coguarantors in its new capacity as the holder of the promissory note. The Waco court concluded that contribution is an equitable remedy that implies a contract between guarantors ensuring that in the event one of the guarantors is called to pay the debt, the other guarantors would contribute their proportionate share, and no more. The assignment of an underlying note and guaranty agreement to a guarantor does not change the status of the guarantor in relation to his co-guarantors. Therefore, as a matter of law, the relationship between guarantors restricts recovery to their contributive share.

Although the particular fact situation presented here has only recently been addressed by the courts of this State, the question of liability of coguarantors to each other has a long history. For well over a hundred years, it has been a "general and familiar rule of law" that, as among coguarantors, each will bear his proportional part of the burden to the effect that should one of them pay more than his proportional part, the others will contribute equally to indemnify him for any amount in excess of his proportional part. Bunch, still being among the joint guarantors of the note, is not entitled to recover the entire amount of the promissory note from his coguarantors. There were four joint guarantors of the note. Therefore, Bunch can recover judgment for only three-fourths of the jointly-owed amount.

PART V
USURY

Anglo-Dutch Petroleum International, Inc.* v. *Haskell, 193 S.W.3d 87 (Tex.App.—Houston [1st Dist.] 2006, pet. denied). Anglo-Dutch sued Halliburton for a $650 million for appropriation of trade secrets and other alleged derelictions. Due to the expense associated with prosecuting the Halliburton lawsuit, and in order to operate its business, to retain its employees, and to avoid bankruptcy until it could recover a judgment, Anglo-Dutch needed to raise money. Anglo-Dutch initially, but unsuccessfully, sought to borrow money from commercial banks, using the Halliburton lawsuit as collateral. Anglo-Dutch then contacted multiple parties and solicited investments in the Halliburton lawsuit. Haskell and others agreed to invest monies, at least in part, to fund the Halliburton lawsuit. Pursuant to the terms of multiple Claims Investment Agreements, investors invested a total of approximately $560,000. These agreements defined the terms of the parties' relationships and set forth the formulas for calculating any returns the investors would be entitled to receive in the event that Anglo-Dutch obtained a cash recovery in the Halliburton lawsuit.

After the Halliburton lawsuit was tried to a jury, the trial court entered a judgment in the amount of approximately $81 million, including approximately $10 million in attorneys' fees, against the Halliburton defendants. Anglo-Dutch and Halliburton subsequently entered into a settlement agreement. Following Anglo-Dutch's and Halliburton's settlement, Anglo-Dutch sent each investor a letter in which it disputed the validity of the litigation funding agreements and asserted that the agreements were contrary to Texas public policy and unenforceable under Texas law. Consequently, Anglo-Dutch requested that the investors accept a reduced payment contrary to the terms of the agreements.

The investors refused Anglo-Dutch's offer of reduced payments and filed suit against Anglo-Dutch, asserting claims for breach of contract, fraud, breach of fiduciary duty, conspiracy, and conversion. One of Anglo-Dutch's defenses was usury.

Anglo-Dutch urged the court to look beyond the language of the agreements to determine the parties' intent. Anglo-Dutch asserted that the summary judgment evidence showed that the alleged contingency was not a real contingency and, therefore, the parties intended their agreements to be loans, which Anglo-Dutch had an absolute obligation to repay. Anglo-Dutch further asserted that parol evidence was admissible to establish that the parties intended their transactions to be loans and that such extrinsic evidence, contradicting the terms of an agreement, may be considered in determining if an agreement is usurious. Anglo-Dutch noted that, despite the terms of the agreements, the investors understood the agreements to be loans, that Anglo-Dutch believed it had an absolute obligation to repay the principal on the loans, and that the investors understood that their agreements were not speculative and involved no risk. Alternatively, Anglo-Dutch argued that even if there was a "real contingency" in the agreements, the agreements were still usurious because, once Anglo-Dutch settled with Halliburton, it had an absolute obligation to repay the investors.

The investors contended that, based on the "specific and unambiguous terms" of the agreements, repayment of their investments was based on an absolute contingency, the transactions were not loans, and usury laws do not apply. They also noted that the agreements did not describe the investments as loans, did not use the word interest, did not state an interest rate, and did not provide a specific repayment date for a sum certain.

The essential elements of a usurious transaction are (1) a loan of money, (2) an absolute obligation to repay the principal, and (3) the exaction of a greater compensation than allowed by law for the use of the money by the borrower. A factor that courts consider when determining usury is whether repayment was based on a contingency. This factor is important because it helps a court in determining whether a transaction was a loan or a business investment. If a transaction is missing any of the above identified three elements, it cannot be usurious. Thus, if the agreements did not constitute a loan, if the agreements did not create an absolute obligation to repay, or if the agreements did not charge "usurious interest," Anglo-Dutch's usury defense fails as a matter of law.

Under the plain terms of the agreements, the investors' right to recover their principal and any return on their investment was contingent upon Anglo-Dutch's cash recovery, if any, in the Halliburton lawsuit. Per the unambiguous terms of the agreements, Anglo-Dutch did not have an absolute obligation to repay the principal amounts that the investors invested. In its arguments, Anglo-Dutch confuses the terms "contingency" and "risk." The investors' belief that they were exposed to little or no risk does not negate the contingency in the agreements. Here, it is indisputable that, if Anglo-Dutch recovered nothing or an insufficient amount of damages, then according to the plain terms of the agreements, Anglo-Dutch had no obligation to reimburse the investors for the principal amounts invested, much less pay them any return on their investments. Thus, as a matter of law, the agreements cannot be usurious.

As Anglo-Dutch emphasizes, however, the court must examine the form of the transaction and its substance in determining the existence or non-existence of usury. Thus, the court recognized that whether an amount of money being charged constitutes interest depends not on what the parties call it, but on the substance of the transaction. However, the "extrinsic evidence" offered by Anglo-Dutch was not sufficient to create a fact issue concerning Anglo-Dutch's absolute obligation to repay the investors. Anglo-Dutch's "extrinsic evidence" consisted almost entirely of the affidavit of one investor, in which he testifies that both he and Anglo-Dutch considered the agreements to be loans. But, even as Anglo-Dutch recognizes, any particular "label placed upon the transaction by the parties should not control the determination of whether that transaction is a loan."

PART VI
LENDER LIABILITY

1001 McKinney Ltd.* v. *Credit Suisse First Boston Mortgage Capital, 192 S.W.3d 20 (Tex.App.—Houston [14th Dist.] 2006, pet. denied). McKinney borrowed a loan from Credit Suisse to renovate a building in Dallas. After borrowing $39 million and beginning the renovation, McKinney discovered that it needed an extra $7.5 million to build extra office and retail space on the lower floors of the building. McKinney's principals met with Credit Suisse in Las Vegas to discuss the additional funds and were told that the bank would have no problem in making the additional loan. According to McKinney, it was assured by the bank that an additional loan of $6.75 would be made. Instead, around the time that McKinney was expecting the loan, Credit Suisse told it that the additional loan would not be made.

McKinney sued, alleging causes of action for statutory and common law fraud, civil conspiracy, negligent misrepresentation, breach of oral contract, and promissory estoppel. Credit Suisse moved for summary judgment, arguing that McKinney's causes of action were barred by the statute of frauds contained in sections 26.01 and 26.02 of the Texas Business and Commerce Code. Section 26.02(b) states: "A loan agreement in which the amount involved in the loan agreement exceeds $50,000 in value is not enforceable unless the agreement is in writing and signed by the party to be bound or by that party's authorized representative." Loan agreement is defined as: one or more promises, promissory notes, agreements, undertakings, security agreements, deeds of trust or other documents, or commitments, or any combination of those actions or documents, pursuant to which a financial institution loans or delays repayment of or agrees to loan or delay repayment of money, goods, or another thing of value or to otherwise extend credit or make a financial accommodation. Because the alleged oral promise to lend $6.75 million constitutes a loan agreement that exceeds $50,000, the trial court found the agreement unenforceable.

McKinney contended that Credit Suisse was estopped from claiming the statute of frauds as a defense to their breach of contract claim because its officers promised to prepare and sign written agreements to document the new loan. For promissory estoppel to create an exception to the statute of frauds, there must have been a promise to sign a written agreement that had been prepared and that would satisfy the requirements of the statute of frauds. It is the promise to sign a written agreement or enter into a written agreement that is determinative. A mere promise to prepare a written contract is not sufficient. Here, the testimony was that Credit Suisse promised to make the additional loan under the same terms as the original loan and promised to prepare and sign written agreements to document the new loan. No documents were prepared. Further, the parties never agreed on the wording of the loan document. McKinney presented no evidence that a written agreement had been prepared or that the parties had agreed on the wording of the agreement. Therefore, McKinney failed to raise the essential elements of its claim of estoppel.

PART VII
DEEDS AND CONVEYANCE DOCUMENTS

Glover* v. *Union Pacific Railway Company, 187 S.W.3d 201 (Tex.App.—Texarkana 2006, pet. denied). Before he became governor of Texas in 1907, T.M. Campbell owned a particular parcel of Gregg County real property which straddled a railroad right-of-way and included the minerals beneath that right-of-way. In 1904, Mr. Campbell executed a deed conveying to G.B. Turner the 165 acres of that land lying south of the south boundary line of the railroad right-of-way, which 165-acre tract is herein called the "Nettleton Tract." Though the deed to Turner did not describe Campbell's six acres lying within the railroad right-of-way and south of the track centerline--the six acres herein called the "Campbell Tract"--central to this case is whether that deed to Turner conveyed not only the Nettleton Tract, but also the Campbell Tract's minerals.

In 1940, the Texas Supreme Court ruled that the minerals in Campbell's railroad right-of-way, but north of the track centerline, passed to the grantee of Campbell's acreage lying north of the right-of-way. The Glovers succeeded to a fractional interest in the Nettleton Tract and Union Pacific succeeded to a fractional interest in the Campbell Tract.

The Glovers claim ownership in the right-of-way through the conveyance of a 165-acre tract of land immediately south of the right-of-way. Union Pacific contends that T.M. Campbell retained the Campbell Tract when he deeded the land to Turner. The court disagreed. Under the strips and gores doctrine, because T.M. Campbell did not expressly reserve the Campbell Tract mineral interests, they passed to Turner with the Nettleton Tract. In ***Rio Bravo Oil Co.* v. *Weed***, 121 Tex. 427, 50 S.W.2d 1080 (1932), the Texas Supreme Court held there was a presumption that a deed conveys land to the center of the right-of-way even when the deed describes the abutting land as extending only to the edge of the right-of-way. The court was bound by Texas Supreme Court precedent to hold that the Campbell to Turner deed conveyed the property interests Campbell held to the center of the right-of-way.

Union Pacific argued that the strips and gores doctrine does not apply because the property is of significant value. The strips and gores doctrine requires the strip (1) to be small in comparison to the land conveyed, (2) to be adjacent to or surrounded by the land conveyed, (3) to belong to the grantor at the time of conveyance, and (4) to be of insignificant or little practical value. While the tract may be valuable now--and certainly the mineral production proceeds from the Campbell Tract over at least seventy years is quite valuable--the land underneath a railroad right-of-way was of little perceived value in 1904 before oil was discovered in the area. In comparison to the adjacent tract explicitly conveyed to Turner, the Campbell Tract was small and had little practical value at the time conveyed. Under the strips and gores doctrine, T.M. Campbell did not retain any interest in the Campbell Tract.

Troxel* v. *Bishop, 201 S.W.3d 290 (Tex.App.-Dallas 2006, no pet.). The three elements constituting a gift are: (1) donative intent, (2) delivery of the property, and (3) acceptance of the property. All dominion and control over the property must be released by the owner. The one claiming the gift has the burden of establishing these elements. A gift of realty can be made in two ways: either by deed or by parol gift. There are three requisites to uphold a parol gift of realty in equity: (1) a gift in praesenti (i.e., at the present time), (2) possession under the gift by the donee with the donor's consent, and (3) permanent and valuable improvements made on the property by the donee with the donor's knowledge or consent or, without improvements, the existence of such facts as would make it a fraud upon the donee not to enforce the gift.

PART VIII
LEASES

Gym-N-I Playgrounds, Inc* v. *Snider, 2007 WL 1164117, 50 Tex. Sup. Ct. J. 634 (Tex. April 20, 2007). The Landlord and Tenant entered into a lease that contained an as-is provision that read as follows: Tenant [Gym-N-I] accepts the Premises "as is." Landlord [Snider] has not made and does not make any representations as to the commercial suitability, physical condition, layout, footage, expenses, operation or any other matter affecting or relating to the premises and this agreement, except as herein specifically set forth or referred to and Tenant hereby expressly acknowledges that no such representations have been made. Landlord makes no other warranties, express or implied, of merchantability, marketability, fitness or suitability for a [document not legible]. Any implied warranties are expressly disclaimed and excluded." The lease term was extended, but finally the term expired, although the Tenant continued to occupy the premises and to pay rent.

Other than the unexercised renewal option, the sole written instrument in the record contemplating a continuation of the original lease was a holdover clause.

A fire completely destroyed the building and its contents. Gym-N-I sued Snider, claiming that Snider's failure to install a sprinkler system as required by the City constituted gross negligence and negligence per se and that leasing the premises in such a condition violated the DTPA and breached the implied warranty of suitability.

Snider filed motion for summary judgment asserting that all of Gym-N-I's claims were barred by the "as is" clause and by a valid waiver-of-subrogation clause. Snider further argued that the lease contained other valid waivers of express and implied warranties that barred certain claims and that Gym-N-I had admitted that no misrepresentations had been made by Snider.

In its first issue, Gym-N-I asserts that the "as is" clause in the original lease did not survive during the month-to-month tenancy under which it was leasing the property at the time of the fire. Gym-N-I asserts that the holdover provision failed to incorporate the "as is" clause and that only a formal, written, lease extension or renewal could carry that provision beyond the term of the original lease. The court disagreed. The lease's holdover provision states that "any holding over . . . shall constitute a lease from month-to-month, under the terms and conditions of this lease to the extent applicable to a tenancy from month-to-month . . ." The court gave this provision its plain, ordinary, and generally accepted meaning and held that the "as is" clause from the original lease was incorporated into the holdover lease and was applicable at the time of the fire. To do otherwise would be to give the phrase "under the terms and conditions of this lease" no meaning or effect.

Gym-N-I argued that the "as is" provision cannot nullify the implied warranty of suitability as to the defects at issue in this case. Gym-N-I contends that ***Davidow* v. *Inwood North Professional Group-Phase I***, 747 S.W.2d 373, 377 (Tex.1988) authorized a waiver of the implied warranty of suitability only when the lease makes the tenant responsible for certain specifically enumerated defects. Consequently, the general "as is" provision in this lease could not waive the warranty. Snider answers that Gym-N-I's claim for breach of the implied warranty of suitability is waived because the lease's "as is" clause expressly disclaimed that warranty. See ***Prudential***. The Supreme Court agreed with Snider.

The court first recognized the implied warranty of suitability for intended commercial purposes in ***Davidow***. The warranty means "that at the inception of the lease there are no latent defects in the facilities that are vital to the use of the premises for their intended commercial purpose and that these essential facilities will remain in a suitable condition." ***Davidow*** did not address whether or how the implied warranty of suitability may be waived; however, the court did say that if "the parties to a lease expressly agree that the tenant will repair certain defects, then the provisions of the lease will control." The court also listed several factors to consider when determining a breach of the warranty, including the nature of the defect, its effect on the tenant's use of the premises, the length of time the defect persisted, the age of the structure, the amount of the rent, the area in which the premises are located, whether the tenant waived the defects, and whether the defect resulted from any unusual or abnormal use by the tenant.

In ***Prudential***, the Supreme Court was asked to determine the effect of an "as is" clause on a buyer's claim for damages against the seller based on the condition of the commercial property. The court did not address what effect, if any, an "as is" provision would have on a claim for breach of the implied warranty of suitability, as this warranty applies only to commercial leases and ***Prudential*** involved a sale of commercial property. In this case, the court squarely addressed whether an express disclaimer may waive the implied warranty of suitability in a commercial lease. ***Davidow*** noted that the provisions of the lease would control if the parties expressly agreed that the tenant would repair certain defects. ***Prudential*** stands for the proposition that--absent fraud in the inducement--an "as is" provision can waive claims based on a condition of the property. Taken together, these cases lead to one logical conclusion: the implied warranty of suitability is waived when, as here, the lease expressly disclaims that warranty. Thus, the court held that as a matter of law, Gym-N-I waived the implied warranty of suitability.

The conclusion that the implied warranty of suitability may be contractually waived is also supported by public policy. Texas strongly favors parties' freedom of contract. Freedom of contract allows parties to bargain for mutually agreeable terms and allocate risks as they see fit. A lessee may wish to make her own determination of the commercial suitability of premises for her intended purposes. By assuming the risk that the premises may be unsuitable, she may negotiate a lower lease price that reflects that risk allocation. Alternatively, the lessee is free to rely on the lessor's assurances and negotiate a contract that leaves the implied warranty of suitability intact.

The court recognized that its holding stands in contrast to the implied warranty of habitability, which "can be waived only to the extent that defects are adequately disclosed." ***Centex Homes* v. *Buecher***, 95 S.W.3d 266, 274 (Tex.2002). The implied warranty of habitability "applies in almost all jurisdictions only to residential tenancies" while commercial tenancies are "excluded primarily on the rationale that the feature of unequal bargaining power justifying the imposition of the warranty in residential leases is not present in commercial transactions."

2616 South Loop L.L.C.* v. *Health Source Home Care, Inc., 201 S.W.3d 349 (Tex.App.-Hous. (14 Dist.) 2006, no pet.). The Tenants leased office space in a building in Houston. Health Source contracted to lease a suite on the Property through December 31, 2003, and Pinwatana contracted to lease space through January 3, 2008. Both leases identify Quad Atrium Realty as the lessor, and contain provisions requiring that all notices to the lessor be sent to Quad Atrium Realty at its offices on the Property. The leases were signed by D.H. Virani, who was identified in the leases as the property manager for Quad Atrium Realty. However, at the time the Tenants signed their respective leases, the Property was owned by Quad L.P.

South Loop later bought the property. The day after the sale, South Loop's property manager notified the Tenants that South Loop now owned the Property, and informed the Tenants that their "month-to-month" leases were terminated "effective immediately." The Tenants were also told they had thirty days to vacate the property unless they entered into new leases with Boxer.

The primary issue involved was whether the leases, signed by Virani on Quad Atrium Realty, were validly executed.

The Statute of Conveyances requires that "a conveyance of an ... estate for more than one year, in land and tenements, must be in writing and must be subscribed and delivered by the conveyor or by the conveyor's agent authorized in writing." Property Code § 5.021. Its contract law counterpart, the Statute of Frauds, requires a lease of real estate for a term of longer than one year to be in writing and "signed by the person to be charged with the promise ... or by someone lawfully authorized to sign for him." Business and Commerce Code § 26.01(a)(2).

A lessor may validly lease property to another, despite the fact that the title to the property is in a third person, if the lessor lawfully possesses the property. In such a case, the lessee may enforce the lease against the lessor. But, this does not necessarily mean that the lessee can enforce the lease against the property owner. Although the lessee may have had a subjective, good faith belief that the lessor was the owner or an agent of the owner, this is not enough to create an agency relationship between the lessor and the property owner that binds the owner to the lessor's agreement. In the absence of the owner's ratification of the lease or the lessor's actual or apparent authority to act on the owner's behalf, there is no basis on which to enforce the lease against the property owner.

Here, the Tenants failed to produce any document in which Quad L.P. authorized Virani or Quad Atrium Realty to execute the leases on Quad L.P.'s behalf, instead arguing that it was obvious that when South Loop purchased the property, its purchase was subject to the existing leases of the property. But this contention presupposes that the leases were binding on the prior owner of the property, Quad L.P., and were conveyed to South Loop at the time of purchase. The Tenants apparently presume that Quad Atrium Realty had actual or apparent authority to execute the leases on behalf of Quad L.P. Alternatively, the Tenants presume Quad L.P. ratified the leases.

Actual authority includes both express and implied authority and usually denotes the authority a principal (1) intentionally confers upon an agent, (2) intentionally allows the agent to believe he possesses, or (3) by want of due care allows the agent to believe he possesses. Here, the Tenants presented no evidence that Quad L.P. authorized Virani or Quad Atrium Realty--orally, in writing, or through a want of due care--to act as its agents. Thus, there is no support for the Tenant's presumption that Quad Atrium Realty or Virani had actual authority to bind Quad L.P.

The essential elements required to establish apparent authority are (1) a reasonable belief in the agent's authority, (2) generated by some holding out or neglect of the principal, and (3) justifiable reliance on the authority. A court may consider only the conduct of the principal leading a third party to believe that the agent has authority in determining whether an agent has apparent authority. The principal must have affirmatively held out the agent as possessing the authority or must have knowingly and voluntarily permitted the agent to act in an unauthorized manner. In this case, the Tenants presented no evidence that Quad L.P. affirmatively represented that Quad Atrium Realty or Virani were its agents, or that Quad L.P. knowingly and voluntarily permitted them to act in an unauthorized manner.

McGraw* v. *Brown Realty Company, 195 S.W.3d 271 (Tex.App.—Dallas 2006, no pet.). McGraw leased a building from Brown. Article 7 of the lease addresses the condition, maintenance, repairs, and alterations of the premises. Pursuant to Article 7.01 Brown represented that on the Commencement Date and for a period of thirty (30) days thereafter the building fixtures and equipment, plumbing and plumbing fixtures, electrical and lighting system, any fire protection sprinkler system, ventilating equipment, heating system, air conditioning equipment, roof, skylights, doors, walk-in cooler and refrigerator, and the interior of the premises in general were in good operating condition. It also gave McGraw a period of thirty (30) days following the Commencement Date in which to inspect the premises and to notify Brown of any defects and maintenance, repairs or replacements required to the above named equipment, fixtures, systems and interior. Within a reasonable period of time after the timely receipt of any such written notice from McGraw, Brown was required to correct the defects and perform the maintenance, repairs and replacements. In Article 7.03A(2) of the lease McGraw waived the benefit of any present or future law that might give him the right to repair the remises at Brown's expense or to terminate the lease because of the condition.

Pursuant to the terms of the lease, McGraw sent Brown a letter advising him of equipment in need of repair or replacement. McGraw also sent Brown a second letter complaining that the roof of the building leaked. The record does not show whether Brown ever responded to these letters. McGraw made timely rent payments from March through October of 2004. However, McGraw's November 2004 rent payment was returned for insufficient funds. Further, McGraw abandoned the premises in early December 2004.

Brown sued McGraw for breach of contract seeking to collect the outstanding and unpaid rent, assess late charges at a rate of five percent for the past due amounts, and accelerate the remaining base rent. The trial court entered summary judgment in favor of Brown Realty on its breach of contract claim.

On appeal, McGraw argued that Brown breached the implied warranty of suitability and the lease fails due to a failure of consideration. Brown responded that McGraw was raising the issue of implied warranty of suitability for the first time on appeal so the claim is not preserved for appeal and McGraw's affirmative defense of failure of consideration was misguided.

Any matter constituting an affirmative defense or avoidance must be "set forth affirmatively." Breach of the implied warranty of suitability may be pleaded as a cause of action, counter-claim, or as an affirmative defense.

McGraw specifically pleaded the affirmative defense of failure of consideration. The affirmative defense portion of McGraw's original answer also stated that the lease agreement required certain actions by both parties and that Brown failed in part to deliver and fulfill its obligations to McGraw upon execution of the lease and also stated that the lease allowed McGraw thirty (30) days to inspect the premises and notify Brown in writing of any defects and maintenance, repairs, etc and within a reasonable period, Brown Realty was to correct the defects and perform the repairs and maintenance at its expenses. Although McGraw did not specifically assert breach of the implied warranty of suitability as an affirmative defense, it was evident to the court that part of the basis of his defense to the suit was Brown's failure to repair latent defects in the leased premises. Brown did not file special exceptions asking for a clearer statement of McGraw's affirmative defenses. In the absence of any special exceptions, the court liberally construed McGraw's pleadings to include the affirmative defense of breach of the implied warranty of suitability.

A tenant's obligation to pay rent and a landlord's implied warranty of suitability are mutually dependent. Breach of the implied warranty of suitability is a complete defense to nonpayment of rent. The implied warranty of suitability covers latent defects in the nature of a physical or structural defect which the landlord has the duty to repair. The evidence must indicate that: (1) latent defects existed in the leased premises at the inception of the lease and (2) such defects were vital to the use of the premises for their intended commercial purpose. Because the implied warranty of suitability may be contractually waived, a court may consider whether the tenant waived the defects.

A complete failure of consideration constitutes a defense to an action on a written agreement. Generally, a failure of consideration occurs when, because of some supervening cause after an agreement is reached, the promised performance fails.

McGraw asserted he had a complete defense to his nonpayment of rent under either the breach of the implied warranty of suitability or the failure of consideration defenses because Brown failed to repair or replace certain items. As evidence, he produced the two letters he had sent to Brown.

The court held that lease explicitly states that McGraw waived his right to terminate the lease because of the condition of the premises. Consequently, McGraw contractually waived his remedy or defenses to the nonpayment of rent. Accordingly, McGraw failed to raise an issue of material fact precluding summary judgment on Brown's breach of contract claim or establish his affirmative defenses as a matter of law.

PSB, Inc.* v. *LIT Industrial Texas Limited Partnership, 216 S.W.3d 429 (Tex.App.—Dallas 2006, no pet. history to date). Forced to move its business, PSB contacted a leasing broker and was shown a new comparable space managed by Crow. Signage on the exterior of the building was important to PSB and it obtained oral assurances from the building's agent that it would be able to have the signage it wanted at the new building. PSB and building owner signed a five-year lease in 1999. The lease prohibited exterior signs without the owner's consent.

After PSB moved in, it asked for permission to put its desired signage on the exterior of the building, but the owner refused to approve the signage. Over the next four years, PSB made more applications to the owner for signs on the building wall with text including the business name and telephone number and larger and illuminated letters. All these requests for signage were rejected. In February 2003, PSB stopped paying rent and, on June 14, 2003, about two weeks before the end of the lease, it vacated the premises. The owner changed the locks and posted notices on the doors relating to the lockout and threatening action for eviction and recovery of rent.

PSB's suit in district court asserted several causes of action, including fraud and business disparagement. The owner filed a counterclaim for breach of the lease seeking actual damages, pre-and post-judgment interest, and attorney's fees. Summary judgment was granted in favor of the owner on all of its claims and against PSB on its.

PSB argued that the trial court erred in granting the owner's motion for summary judgment on its claim that PSB breached the lease because the owner failed to disprove as a matter of law PSB's affirmative defense of fraudulent inducement for PSB to enter into the contract. PSB asserted that the fraud was the representations (1) that PSB could have the same kind of signage it had at the old location, and (2) that PSB could conduct retail sales, but the lease limited sales to wholesale. The owner argued that, even if PSB was fraudulently induced into the lease, PSB ratified the lease by continuing with the lease and not seeking rescission after it learned of the fraud.

A contract procured by fraud is voidable, not void. If a party fraudulently induced to enter into a contract continues to receive benefits under the contract after learning of the fraud or otherwise engages in conduct recognizing the agreement as subsisting and binding, then the party has ratified the agreement and waived any right to assert the fraud as a basis to avoid the agreement. An express ratification is not necessary; any act based upon a recognition of the contract as subsisting or any conduct inconsistent with an intention of avoiding it has the effect of waiving the right of rescission. Here, pretty much all of the evidence showed that PSB knew of any alleged fraud yet decided to remain in the building under the lease. Its conduct was inconsistent with an intention of avoiding the lease, and it ratified the contract.

Marshall* v. *Housing Authority of the City of San Antonio, 198 S.W.3d 782, 49 Tex. Sup. Ct. J. 399 (Tex. 2006). Marshall leased an apartment from a non-profit public facility corporation managed by the Housing Authority of the City of San Antonio for a term beginning on February 1, 2002, and ending on January 31, 2003. Her rent was subsidized by a federal housing assistance program. Following a shooting at her apartment, the Housing Authority gave Marshall notice that it was terminating her right to occupy the apartment, then filed a forcible detainer action seeking possession of the apartment. The trial court entered judgment awarding the Housing Authority possession of the apartment, court costs, and post-judgment interest. Marshall filed a motion seeking suspension of enforcement of the judgment or, in the alternative, setting of a supersedeas bond. In the motion she specified that she intended to appeal. Following a hearing on November 7, 2002, a supersedeas bond amount was set pursuant to Texas Property Code Section 24.007, but Marshall did not post bond. On November 8, 2002, she filed notice of appeal.

The parties agree that a writ of possession was never executed. Marshall does not contest the Housing Authority's assertion that she vacated the apartment.

After her lease term had expired, Marshall filed her brief in the court of appeals praying that the court reverse the trial court's judgment and award her possession of the apartment. She did not claim in her brief or in her later reply brief any contractual or other right to possession.

The court of appeals determined that Marshall's appeal was moot and dismissed the appeal for want of jurisdiction, although it did not vacate the trial court's judgment. The court of appeals reasoned that because Marshall had relinquished possession of the apartment, the court could no longer grant effectual relief.

The only issue in a forcible detainer action is the right to actual possession of the premises. Some courts of appeals have held that if a tenant fails to post a supersedeas bond pursuant to Texas Property Code Section 24.007, the appellate court lacks jurisdiction. Other courts of appeals have concluded that if a tenant vacates the premises, (1) the tenant's appeal is moot because the court can no longer grant effectual relief, or (2) the issue of possession is moot, but the court can still consider issues unrelated to possession. At least one court of appeals has concluded that a tenant's appeal is not moot even though the tenant vacated the premises.

Marshall argued that her failure to post a supersedeas bond pursuant to Texas Property Code Section 24.007 did not prevent her from appealing the trial court's judgment. The Texas Property Code provides that judgment in a forcible detainer action may not be stayed pending appeal unless the appellant timely files a supersedeas bond in the amount set by the trial court. Thus, if a proper supersedeas bond is not filed, the judgment may be enforced, including issuance of a writ of possession evicting the tenant from the premises. However, there is no language in the statute which purports to either impair the appellate rights of a tenant or require a bond be posted to perfect an appeal. Marshall's failure to supersede the judgment did not divest her of her right to appeal.

Marshall argued that because she timely indicated her intent to appeal the trial court's judgment and because she vacated involuntarily to avoid execution of a writ of possession, her relinquishing possession of the apartment should not moot her appeal. The Housing Authority, however, urges that because the record does not include evidence supporting Marshall's assertion that she vacated the apartment involuntarily, her appeal was rendered moot when she vacated. Again, the court agreed with Marshall.

Usually, when a judgment debtor voluntarily satisfies the judgment, the case becomes moot and the debtor waives any right to appeal. The rule is intended to prevent a party who voluntarily satisfies a judgment from later changing his or her mind and appealing. The court has held, however, that payment of a judgment will not moot an appeal from that judgment if the judgment debtor timely and clearly expresses an intent to exercise the right of appeal and if appellate relief is not futile. Marshall timely filed a motion seeking suspension of enforcement of the judgment or, in the alternative, setting of a supersedeas bond. Her motion set out her intent to appeal. She timely filed notice of appeal before she vacated her apartment. In light of her timely and clear expression of intent to appeal, Marshall's action in giving up possession did not moot her appeal so long as appellate relief was not futile; that is, so long as she held and asserted a potentially meritorious claim of right to current, actual possession of the apartment. But, her lease expired on January 31, 2003, and she presented no basis for claiming a right to possession after that date. Thus, there was no live controversy between the parties as to the right of current possession after January 31, 2003, and the issue of possession was moot as of that date.

Persevering, and recognizing the possibility that the possession issue might be moot, Marshall asserted that even if the possession issue is moot, there are three reasons why the merits of her appeal should be determined.

Marshall argues that her case is not moot because if successful on the merits she would be able to recover, in this action, the fair market value of her leasehold interest for the time between the date she vacated the apartment and the date her lease expired. The court disagreed. Marshall, nevertheless, argued that recovery of the fair market value of her lost leasehold interest in this forcible detainer action is authorized by section 34.022 of the Texas Civil Practice and Remedies Code and by Texas Rule of Civil Procedure 752. Neither of these provisions, however, authorize the type of damages that Marshall seeks. Her property was not sold at execution, and the damages she seeks did not arise until after her county court appeal was complete. Thus, even if her appeal were to be heard and found to have merit, Marshall would not be authorized to recover damages in the forcible detainer suit on the bases she references. Consequently, the damage claims do not present a controversy preventing dismissal of the forcible detainer case as moot.

The court next considered Marshall's position that even if a live controversy does not exist, her appeal falls within the "collateral consequences" exception to the requirement that cases without live controversies are to be dismissed as moot. She argued that a favorable appellate ruling reversing the trial court's judgment would ameliorate collateral consequences to her resulting from the judgment. Marshall noted that the judgment for eviction caused loss of her federal rent subsidy and that loss of the subsidy might last for up to five years. She also asserted that the judgment has adverse practical collateral consequences, including the possibility that landlords may be dissuaded from renting an apartment to her. One purpose of vacating the underlying judgment if a case becomes moot during appeal is to prevent prejudice to the rights of parties when appellate review of a judgment on its merits is precluded. Once the judgment is vacated and the case dismissed, the collateral consequences of the judgment are ordinarily negated to the same extent as if the judgment were reversed on the basis of any other procedural error. The collateral consequences exception to the mootness doctrine is invoked only under narrow circumstances when vacating the underlying judgment will not cure the adverse consequences suffered by the party seeking to appeal that judgment. In order to invoke the collateral consequences exception, then, Marshall must show both that a concrete disadvantage resulted from the judgment and that the disadvantage will persist even if the judgment is vacated and the case dismissed as moot. She did not do so.

Mitchell* v. *Citifinancial Mortgage Company, 192 S.W.3d 882 (Tex.App.—Dallas 2006, no pet.).

Mitchell contended that Citifinancial's complaint for forcible entry and detainer did not sufficiently describe the land or premises for which it sought possession.

Under rule 741 of the Texas Rules of Civil Procedure, a complaint for forcible entry and detainer "shall describe the lands, tenements, or premises, the possession of which is claimed, with sufficient certainty to identify the same...." A street address is sufficiently certain to identify the premises made the subject of a detainer action. Citifinancial's complaint described the premises by the following legal description: "Being Lot 35, in Block B of Creek Tree Estates, Phase III-B, an addition to the City of DeSoto, Dallas County, Texas according to the map thereof recorded in Volume 85196, Page 3920 of the map records of Dallas County, Texas." The complaint also identified the "Property" as "more commonly referred to as 909 Hideaway Place, DeSoto Texas 75115." Further, the complaint identified the "Property" as the same location where appellants could be served with process.

Mitchell did not contend that she was misled or confused by the complaint's identifying information. In fact, she offered no argument to support her contention that the identifying information was lacking in some way. The court concluded that both the address and the legal description set forth in the complaint sufficiently identified the premises at issue.

Murphy v. Countrywide Home Loans, Inc., 199 S.W.3d 441 (Tex.App.—Houston [1st Dist.] 2006, no pet.). Murphy borrowed a home loan from Countrywide. After he defaulted, Countrywide posted for foreclosure. Murphy sued to enjoin the foreclosure, but the temporary injunction was denied, so Countrywide foreclosed. It then brought a forcible detainer action to evict Murphy.

Forcible detainer occurs when a person refuses to surrender possession of real property upon a statutorily sufficient demand for possession if that person is: (1) a tenant or subtenant willfully and without force holding over after his right of possession ends, (2) a tenant at will or by sufferance, or (3) a tenant of someone who acquired possession by forcible entry. Generally, an occupant of the property holding over after execution of a deed is considered a permissive tenant whose right to possession is inferior to that of the party holding title. To establish forcible detainer and prevail on its motion for summary judgment, Countrywide had to establish the following as a matter of law: (1) Countrywide was the owner, (2) Murphy was an occupant at the time of foreclosure, (3) the foreclosure was of a lien superior to Murphy's right to possession, (4) Countrywide made a statutorily sufficient written demand for possession, and (5) Murphy refused to leave.

Countrywide alleged that Murphy defaulted on his mortgage payments and failed to make payment even after notices of acceleration and demand notices were served on him. A substitute trustee's sale was held and Countrywide purchased the property and received a substitute trustee's deed. This deed, which transferred title to Countrywide, and an affidavit of mortgage were filed in the Galveston County real property records. Countrywide then gave Murphy written notice to vacate the property. Murphy refused to vacate and unlawfully remained in possession of the property.

As summary judgment evidence for the element of ownership, Countrywide attached its substitute trustee's deed and an affidavit of mortgage. To establish that Murphy was the occupant at the time of foreclosure, Countrywide attached a certified copy of the deed of trust. To establish that it had a lien that was superior to Murphy's right to possession, Countrywide relied on the deed of trust and the substitute trustee's deed. And to establish that it made a demand for possession, Countrywide relied on the notice to vacate. The fact that Murphy refused to surrender possession is uncontested.

Murphy argued that Countrywide's evidence is insufficient because the substitute trustee's deed shows the owner of the property to be Freddie Mac and not Countrywide. Countrywide attached the business records affidavit of Freddy Mac's attorney, to authenticate the notice to vacate. The notice to vacate affirmatively names Countrywide as the authorized servicing agent for Freddy Mac. Murphy offered no evidence to contradict this statement. Murphy did, however, attach exhibits to his response motion. The attachments consisted of a copy of the original promissory note, a cover letter purporting to transfer the original note to First Chicago National Processing Corporation, and Murphy's personal affidavit attesting to the validity of the attached documents. These exhibits do not constitute evidence rebutting the issue of possession.

Finally, Murphy contends that the documents used by Countrywide as summary judgment evidence are "products of a void illegal defective fraudulent procedure" because Countrywide failed to prove it had authority to foreclose. However, rule 746 of the Texas Rules of Civil Procedure does not require Countrywide to prove title. To prevail in a forcible detainer action, Countrywide need only show sufficient evidence of ownership to demonstrate a superior right to immediate possession. Murphy's allegations concerning the propriety of the foreclosure or challenges to Countrywide's deed or title to the property cannot be considered in this action.

PART IX
VENDOR AND PURCHASER

City of Brownsville* v. *Golden Spread Electric Cooperative, Inc., 192 S.W.3d 876 (Tex.App.—Dallas

2006, pet. denied). The electrical generating facility was owned in common by several participants, including the City, TCC, and OMPA. Under the terms of a participation agreement, a co-owner intending to sell its interest in the facility must serve on all other co-owners written notice of its intent to sell at least seven months before consummation of the intended transfer. The notice must include a copy of the written offer from the proposed buyer setting forth the consideration and other terms of the offer. The co-owners then have the option to acquire all or any undivided interest in the ownership interest to be transferred. The participation agreement states that the right of first refusal "shall be exercised by the [co-owners] serving written notice of intention to exercise their option upon the Participant desiring to transfer and on the remaining [co-owners] within three (3) months after service of the written notice of intention to transfer given...."

TCC entered into a contract to sell its interest in the facility to Golden Spread. The agreement stated that TCC's obligation to consummate the transaction was subject to the fulfillment of various conditions, including there being no effective exercise of the right of first refusal held by the facility's co-owners. TCC sent the required notice of intention to transfer to the co-owners. Within the three-month exercise period, the City sent notice to TCC and the other co-owners of its intent to exercise its option to purchase. OMPA also sent a notice of intent to exercise its option, but it is disputed whether a proper notice was sent by OMPA within the three-month exercise period.

The City and TCC executed a contract under which the City agreed to purchase TCC's ownership interest on essentially identical terms to those set forth in TCC's contract with Golden Spread. Golden Spread then filed this suit against TCC, the City, and OMPA claiming that neither the City nor OMPA had validly exercised its right of first refusal. Golden Spread sought a declaratory judgment that its purchase agreement with TCC was valid and enforceable and sought damages for alleged tortious interference with its contract. The trial court granted Golden Spread's motions and held that Golden Spread was entitled to specific performance of its agreement with TCC.

Generally, a right of first refusal or preemptive right to purchase requires the owner of the subject property to offer the property first to the holder of the right on the same terms and conditions offered by a third party. When the property owner gives notice of his intent to sell, the right of first refusal matures or "ripens" into to an enforceable option. The terms of the option are formed by the provisions granting the preferential right to purchase and the terms and conditions of the third-party offer presented to the rightholder. Once the property owner has given the rightholder notice of his intent to sell on the terms contained in the third-party offer, the terms of the option cannot be changed for as long as the option is binding on the property owner.

The rightholder's exercise of the option to purchase must be positive, unconditional, and unequivocal. The rightholder must accept all the terms of the offer or the offer will be considered rejected. In the absence of an agreement otherwise, unequivocal acceptance of the terms of the offer is considered an exercise of the right to purchase. When the rightholder gives notice of his intent to accept the offer and exercise his option, a contract between the rightholder and the property owner is created.

In this case, it is undisputed that the City unequivocally accepted all the terms and conditions set forth in Golden Spread's offer to purchase TCC's interest in the facility. Golden Spread argued, however, that the City was prohibited by the Texas Constitution from accepting the indemnity provisions of the contract and that any purported acceptance of those provisions rendered the contract between TCC and the City void. If the contract were void, Golden Spread contended the City's exercise of its right of first refusal was not effective. Both the City and TCC strongly disputed that the City's acceptance of the indemnity provisions at issue violates the Texas Constitution. The City argued that if the provisions are violative, the severability clause of the purchase agreement operates to sever out those provisions while preserving the remainder of the contract. Severability provisions may serve to preserve contracts so long as the invalidated portions of the contract do not constitute the main or essential purpose of the agreement.

The indemnity provisions of the purchase contract are clearly tangential to the main purpose of the agreement, which is the transfer of the ownership interest. The inclusion of the severability provision in the agreement indicates the parties were willing to sever out such tangential matters to preserve the main agreement. Therefore, the possible invalidity of the indemnity provisions does not render the entire agreement between TCC and the City void.

Golden Spread further argued that, even if the entire agreement is not void, the invalidity of the indemnity provision alone renders the City's exercise of its right of first refusal ineffective because its inability to perform the indemnity provision necessarily makes the City's acceptance of the offer qualified rather than unconditional. This logic would deprive the City of the benefits of the severability provision, however, and would alter the terms and conditions of the contract as applied to the City. Under the severability provision, TCC and Golden Spread agreed the purchase contract would continue to be valid and enforceable even if some provisions of the agreement were later held to be invalid. Accordingly, both parties took the risk that some provisions in the contract would be unenforceable. Once the terms and conditions of the agreement, including the severability provision, were conveyed to the City, neither TCC nor Golden Spread could change the terms of the offer. To conclude that the City's exercise of its right of first refusal was ineffective because one of the tangential provisions of the contract may be invalid or unenforceable against the city would be tantamount to removing the severability clause from the agreement offered to the City. This is not permissible.

Golden Spread's argument was essentially that, to effectively exercise its right of first refusal, the City must not only accept all the terms and conditions of Golden Spread's offer to purchase TCC's interest, but TCC's ability to enforce the contract against the City must be identical to its ability to enforce the contract against Golden Spread. The law does not require equivalent enforceability, however. The law requires only unequivocal acceptance of the terms and conditions of the third-party offer for there to be a sufficient exercise of a right of first refusal.

Mandell* v. *Mandell, 214 S.W.3d 682 (Tex.App.—Houston [14th Dist.] 2007, no pet.). In settling a messy family situation (involving, at one time, David's father murdering his wife), David and the other tenants in common agreed to grant each other a "preferential right of purchase" of the piece of property that was the subject of the dispute. In order to get to the settlement agreement, David had hired a law firm on a contingency basis and was obligated to pay the firm 50% of any recovery.

Right after the settlement agreement was executed, David executed a deed in favor of the law firm for a portion of his undivided interest in the land. He didn't notify the other tenants in common, his mother's estate and Williams, who held the preferential right. Afterward, though, the law firm sent a letter to the estate and Williams, telling them that David was going to convey a portion of the property to it. The other owners complained back to the law firm that the conveyance to the law firm was a breach of the settlement agreement and the preferential purchase right. The law firm told them that the deed had already been recorded.

Three years later, Williams bought out the estate's interest. David filed suit, claiming that he was entitled to his preferential right to purchase the estate's interest. The Estate countered by arguing that by selling a part of his interest in the property within months of signing the settlement agreement, David breached the agreement first, thereby excusing the estate from performance. David claimed he did not breach the settlement agreement because (1) the conveyance of the property did not trigger the preferential purchase right, (2) the estate had notice of the conveyance because it had notice of David's contingent fee agreement with the law firm, and (3) the estate waived its right of first purchase by failing to timely assert it.

A preferential right of purchase is a right granted to a party giving him or her the first opportunity to purchase property if the owner decides to sell it. A preferential purchase right is essentially a dormant option. It requires the property owner, before selling it to another, to offer it to the rightholder on the terms and conditions specified in the contract granting the right. When a sale is made in breach of the right of first purchase, it therefore creates in the rightholder an enforceable option to acquire the property according to the terms of the sale. The option is not perpetual, however, and the rightholder must choose between exercising it or acquiescing in the transfer of the property.

The summary judgment proof showed that David breached the settlement agreement by selling a portion of his interest in the property without first offering William or the estate the first right to purchase the property. Because David failed to give the other owners this opportunity, he breached the contract. The fact that David now called the transfer of the property a "conveyance" instead of a "sale" does not change the nature of the transaction.

David argued that, even if the conveyance is considered a sale, the estate waived its preferential purchase right by failing to timely assert it. David contended that the estate knew of the terms of his agreement with the law firm and was obligated to assert its right at that time. However, the only summary judgment proof regarding David's contingent fee agreement was his deposition testimony in the 1995 lawsuit and his affidavit in support of summary judgment stating that he agreed to give his attorneys 50% of his recovery in the lawsuit. By informing the estate of his contingent fee agreement, David did not express an intention to sell a portion of the property. The only intention expressed by David was that he would pay his attorneys 50% of his recovery in the lawsuit. The estate was not put on notice that David intended to sell the property.

Finally, David argued that the estate received notice of the conveyance in the law firm's letter to it, but waived its preferential purchase right by failing to timely assert it. Acquiescence in a sale that violates one's preferential purchase right constitutes conduct inconsistent with an intention to purchase. Here, the estate did not acquiesce in the conveyance to the law firm. Upon receipt of the letter notifying it of the potential sale, the estate rejected the proposed sale and informed David it would treat the proposed conveyance as a breach of the agreement.

Probus Properties* v. *Kirby, 200 S.W.3d 258 (Tex.App.—Dallas 2006, pet. denied). Kirby leased commercial real property from Probus under a three-year lease. The lease granted Kirby, for a fee, a one-year option to purchase the property for $200,000 under the terms specified in the lease. The lease also permitted Kirby to extend the option for the years 2002 and 2003, by paying an additional annual Option Fee. If Kirby was not in default and the Option Fees were timely paid, Kirby could exercise the option at any time during the option period. If Kirby failed to make any annual payment of Option Fees, he would forfeit any Option Fees previously made. Kirby made the original Option Fee and the first annual Option Fee payments. The next annual option fee was due on or before January 1, 2003. On January 1, Kirby wrote a personal check for $10,000.00 on his account at North Dallas Bank and put the check in the mail slot on Probus's door. Probus deposited the check at its bank on January 2, 2003. On January 6, 2003, Kirby's bank returned the check unpaid with the notation "Drawn Against Uncollected Funds." A few days later, Probus sent Kirby a notice that the option had expired due to non-payment of the option extension fee.

Kirby explained that he had two checking accounts at the time. The day after he delivered the check, January 2, 2003, he became confused as to which bank the check had been drawn on, and mistakenly made his deposits at the wrong bank. Later that day, Kirby looked at his checkbook and realized he had written the check on his North Dallas Bank account, which did not have sufficient funds to pay the check. He drove to North Dallas Bank to make a deposit, but had car trouble and was unable to reach the bank before it closed. The next afternoon, Friday January 3, 2003, Kirby deposited a $10,000 check drawn on his other bank in the North Dallas Bank account. However, because of inactivity in the account and the size of the deposit, North Dallas Bank placed a two-business day hold on the deposit. Kirby testified he was unaware that the bank would put a hold on the deposit. He also testified he did not contact his bank officer about the deposit. The next business day, January 6, 2003, North Dallas Bank returned the check unpaid.

Kirby sued Probus for breach of contract, specific performance of the purchase option, and for a declaratory judgment. Kirby alleged he performed the conditions precedent to extend the option, or, in the alternative, that equity would relieve him of the obligation to satisfy the conditions precedent. The jury found that Kirby had performed the condition precedent in the lease to extend the option for calendar year 2003. It also found in favor of Kirby on his equitable arguments for relief from compliance with the conditions precedent.

Probus argued, among other things, that there was no evidence to support the jury's finding that Kirby performed the condition precedent to extend the option, that equity does not apply to the option.

In a typical option to purchase property, the optionor offers to sell the property on stated terms for a specific period of time and the optionee, for a consideration, is granted the right or option of accepting or not the terms of the offer during the specified time period. In general, options to purchase property must be exercised in strict compliance with the terms of the option agreement. By its very nature, an option is time-sensitive. It has long been held that time is of the essence in an option because it is unilateral and for the benefit of the optionee. Even where the agreement does not expressly state that time is of the essence, time is essential to the option and the holder of the option must comply with the terms of the option within the specified time period. Thus, any failure to exercise an option according to its terms, including untimely or defective acceptance, is simply ineffectual, and legally amounts to nothing more than a rejection.

The lease required Kirby to pay an additional option fee of $10,000 on or before January 1 to extend the option for 2003. The option to purchase could be exercised only if the option fees were "timely paid." Although the lease does not contain an express statement that "time is of the essence," the nature of the option and the language requiring timely payment of the option fees makes time essential to the extension and exercise of the option.

Kirby argues his act of delivering the check on January 1 and depositing funds sufficient to pay the check before it was presented for payment constituted performance of the terms of the option. However, unless otherwise agreed, an uncertified check is merely a conditional payment for an obligation and payment is made absolute when the check is presented and honored. If the check is dishonored, the original obligation remains. The check suspends the obligation until dishonor of the check or until it is paid or certified. Kirby's personal check was merely conditional payment and the condition--payment of the check on presentment--was never fulfilled.

Kirby argues equity will excuse non-performance of the condition precedent. Relying on language in ***Jones* v. *Gibbs***, 133 Tex. 627, 130 S.W.2d 265 (1939), Kirby asserts that equity will excuse non-performance of an option where the failure was the result of an honest and justifiable mistake, any delay was slight, any loss to the optionor was slight, and cancelling the option would result in unconscionable hardship to the optionee. This equitable rule is sometimes referred to as the doctrine of disproportionate forfeiture. Thus, Kirby argues the jury's findings in questions two through ten support the application of equity to relieve him from performance of the condition precedent to extending the option. Probus argues the doctrine of disproportionate forfeiture does not apply to this option.

The court held that ***Jones*** was a different situation. In ***Jones***, the optionee had paid all of the consideration for timber and was required to make relatively small annual payments in order to remove it. At the direction of the optionor in one year, Jones made a payment in a manner different than the option required. He did so again the following year, but the optionor objected to that manner of payment a substantial time after it was made. It really appeared that Jones had performed in accordance with the optionor's instructions, though not technically in accordance with the option agreement, so equity relieved him. This case is completely different. None of the consideration for the property had been paid. The court held that the doctrine of disproportionate forfeiture did not apply.

Startex First Equipment, Ltd. **v.** ***Aelina Enterprises, Inc.***, 208 S.W.3d 596 (Tex.App.—Austin 2006, pet. denied). In 1970, the Wilhelms leased some property to Pioneer Oil Company to operate a gas station on the property. The Lease Agreement granted a right of first refusal to Pioneer. If the right of first refusal was not exercised, the property could be sold to the third party offeror and, the Lease Agreement Stated "such sale shall be subject to the terms of this lease or any renewal thereof."

During the term of the Lease Agreement, the property was sold a couple of times. The last purchaser before this suit was Favoccia in 1987. In 1996, Favoccia entered into a Retail Store Lease/Purchase Contract with Aelina, allowing it to run the convenience store on the property. The Retail Store Lease/Purchase Contract granted Aelina an option to purchase the property.

In 2002, Startex purchased Pioneer's interest in the Lease Agreement and received an express written assignment from Pioneer.

In May 2003, Favoccia and Aelina entered into an earnest money contract for the purchase of the property. Favoccia notified Startex of the contract pursuant to the right of first refusal provision of the Lease Agreement. Startex exercised the right of first refusal and purchased the property from Favoccia. Soon thereafter, Aelina notified Startex that it was attempting to purchase the property from Startex by exercising the purchase option it acquired from Favoccia in its Retail Store Lease/Purchase Contract. Startex disputed Aelina's right to buy the property and has declined to sell the property.

Startex argued that the right of first refusal survived two previous sales of the property. To support its argument, Startex pointed to the language in 14C that reads, "only after the expiration of said seven-day period can lessor proceed to accept the offer and sell the premises to such original bona fide offeror, and then such sale shall be subject to the terms of this lease or any renewal thereof." Startex argued that, because the property was sold "subject to the terms" of the Lease Agreement, and one of the terms of the Lease Agreement was the right of first refusal, the right of first refusal survived the previous sales.

Aelina contended that Startex did not acquire a right of first refusal from Pioneer because Pioneer's right expired when it elected not to exercise its right to purchase the property after receiving notice of two different offers to sell. Aelina argued that, because only its right exists, Startex's deed is void, its superiority argument fails, and its equities argument is irrelevant. Aelina also contended that the Lease Agreement did not expressly provide that Pioneer's right of first refusal was assignable. In the alternative, Aelina argued that if the court fiound that Pioneer's right of first refusal did not expire and that Startex's deed was valid, then Startex took title of the property subject to Aelina's lease and the purchase option therein.

The threshold question is whether the right of first refusal in the Lease Agreement survived the previous sales of the property. Citing ***Comeaux*** **v.** ***Suderman***, Aelina claimed that rights of first refusal expire if they are not exercised. 93 S.W.3d 215, 223 (Tex.App.-Houston [14th Dist.] 2002, no pet.). The court disagreed and said that ***Comeaux*** was not dispositive of the issue here. ***Comeaux*** specifically resolved a question of adequate notice, holding that when a property owner makes a reasonable disclosure to the holder of a right of first refusal of the terms of a proposed sale, the right holder has a duty to undertake a reasonable investigation of any terms unclear to him. The ***Comeaux*** court further held that when the right holder receives notice and is given the opportunity to exercise his right of first refusal, technical deficiencies in the notice cannot revive the right that was declined. While that issue of adequate notice was dispositive in ***Comeaux***, it is not here.

Additionally, the right of first refusal in ***Comeaux*** lacks the disputed language of the provision in the instant case. Rights of first refusal are bargained-for contractual provisions, and their scope must be determined by interpreting the contractual language at issue. The court held that the plain text of the lease created a right of refusal that survives sales of the property. The disputed language of the provision subjects the sale of the property "to the terms of this lease or any renewal thereof." If the property is sold "subject to the terms" of the Lease Agreement, and one of the terms of the Lease Agreement is the right of first refusal, then the right of first refusal survives all sales of the property. This interpretation is bolstered by the placement of this "survival term" in the right of first refusal provision.

As to Aelina's contention that, if the right of first refusal did not expire and Startex's deed is valid, Startex took title to the property subject to Aelina's purchase option, the court disagreed. A purchaser, with notice of a previously given option, takes subject to the rights of the optionee. The right of first refusal invoked by Startex was granted to Pioneer in 1970 and filed of record. Aelina obtained its option twenty-six years later, subject to that right. Although Aelina maintained that it was not aware of the prior right of first refusal until it began negotiations to purchase the property from Favoccia in 2002, any proper inquiry would have disclosed this adverse right. Since the Lease Agreement was recorded and available for inspection, Aelina is charged with constructive notice of its contents.

First Permian, L.L.C.* v. *Graham, 212 S.W.3d 368 (Tex.App.—Amarillo 2006, pet. denied). A long time ago, Graham assigned his interest in various oil and gas leases to Pan American. In consideration for the assignment, Graham received an immediate payment and also reserved a production payment. Upon payment in full of the production payment, Graham's interest in the assigned properties terminated and full title vested in the assignee. The agreement also granted Graham a preferential right of first refusal to buy any of the leases that the assignee agreed to sell to a third party. The production payment was paid in full in 1975.

After the production payment had been fully paid, there were a number of assignments of the leases. In each instance, the owner of the leases notified Graham and offered to sell to him on the same terms, but none of the offers was ever accepted and the leases ultimately became owned by First Permian. When First Permian agreed to sell to Energen, it gave a notice to Graham and Graham acted like he was going to accept and buy the leases; however, Energen's lawyer sent Graham a letter stating that he had concluded that the right of first refusal terminated when Graham received the final production payment. The letter further revoked any purported notice pursuant to the preferential right, so Graham sued.

Graham pointed out that the preferential right paragraph does not contain any provision terminating the preferential right upon completion of the production payment. Further he argued that production payment paragraph contains no clause specifically connecting the preferential right and the production payment. Additionally, Graham pointed to the fact that the assignment contains a provision that the obligations and rights created by the assignment would be binding on and inure to the benefit of the heirs, survivors, and assignees of either party to the assignment. Interpreting these provisions together, Graham contended that the preferential right is a separate and independent covenant that was not terminated by pay out of the production payment.

Considering the assignment as a whole and giving effect to all of its provisions, the interpretation urged by Graham must be rejected. Rather than creating an independent preferential right for Graham's heirs, successors, and assigns to enjoy forever, the preferential right was intended exist only so long as necessary to protect the interest of Grahams, his heirs, successors, or assigns in the full payment for the leases. This is the only construction that gives full meaning to all of the provisions of the assignment.

Having determined that the preferential right was tied to the production payment, the next issue became what effect the completion of the production payment would have on the preferential right according to the assignment. To understand this, the nature of a preferential right must be ascertained. All of the parties agreed that the preferential right involved in this case is a real covenant. As such the preferential "right runs with land" if it touches and concerns the land; relates to a thing in existence or specifically binds the parties and their assigns; is intended by the original parties to run with the land; and when the successor to the burden has notice.

As a real covenant, the preferential right is subject to Texas law governing real covenants. First, a real covenant endures only so long as the interest in land to which it is appended. Second, a real covenant can only be enforced by the owners of the land the covenant was intended to benefit.

Krayem* v. *USRP (PAC), L.P., 194 S.W.3d 91 (Tex.App.—Dallas 2006, pet. denied). Krayem leased a gas station from USRP. The lease included a purchase option which Krayem could exercise by delivering "written irrevocable notice." USRP sold the property to MacArthur. MacArthur sent Krayem a letter notifying him of the change in ownership and requesting new insurance certificates listing MacArthur as the certificate holder. Krayem then sent MacArthur a letter dated July 16, 2003 stating he was exercising his option to purchase the premises and scheduling a closing on or before October 31, 2003. Krayem did not sign the July 16 letter. Krayem sued USRP and MacArthur alleging that, although he properly exercised his option, appellees refused to sell him the property.

Krayem argues his June 16 letter to MacArthur conclusively establishes that he effectively exercised his option to purchase the premises. MacArthur, on the other hand, contends that because the June 16 letter was unsigned, it was not an effective exercise of the purchase option as required by section 2.5 of the lease.

The term "written irrevocable notice," however, is not defined in the lease. MacArthur contends the Texas Statute of Frauds and case law support its position that "written irrevocable notice" necessarily means a written instrument signed or executed by the party to be charged. The court first noted that MacArthur's argument fails because Krayem is not the party against whom enforcement is sought for statute of fraud purposes. Moreover, none of the cases cited by MacArthur support its position that "written irrevocable notice" required Krayem to sign his letter. Absent any lease provision or legal authority requiring Krayem to sign the written notice, Krayem's unsigned June 16 letter conclusively established that he gave proper "written irrevocable notice" of his intent to exercise his purchase option.

To succeed on his claims, however, Krayem was required to do more than just properly exercise his purchase option. He was also required to perform all conditions precedent necessary to close the purchase. Krayem attacks the trial court's findings and conclusions that he failed to perform all conditions precedent to effectively close the option. In particular, Krayem asserts he was not required to tender consideration of the purchase price of the property or demand a deed from appellees to close the purchase because the record established that MacArthur refused to attend the scheduled closing or agree to a new closing date. Alternatively, he argues that his appearance for a closing on October 3, 2003 and attempts to reschedule the closing were sufficient tender of consideration.

One of the elements Krayem had to prove to support his breach of contract claim was that he performed or tendered performance under the contract. In situations where the parties have mutually concurrent contract obligations, such that a deed is required to be delivered upon tender of the purchase price, tender serves two purposes: it invokes the seller's obligation to convey, and it establishes that the buyer is ready, willing, and able to perform all material acts which the contract requires of him. Tender is not a prerequisite, however, when its performance was prevented by the other party or where defendant repudiates the contract.

Krayem testified that he executed a written contract to sell the premises to a third party, Fahd Enterprises, Inc. Krayem and Jamal Aly, a principal in Fahd Enterprises, then presented the transaction to a title company in an attempt to close their transaction simultaneously with the closing of Krayem's purchase option. Krayem further testified the title company prepared and he signed documents in connection with the closing. The transaction, however, did not close because they were unable to get MacArthur to attend the closing. Aly testified that he took a copy of the sales contract and bank loan commitments to the title company. He expected MacArthur to transfer the property to Krayem and then he would purchase the property as stated in the contract. Aly also indicated that, although he had a cashier's check for the downpayment and the loan commitment, he never tendered any money to the title company. Krayem never received any money from Fahd Enterprises. Thus, there was no evidence that Krayem could have completed the purchase transaction with MacArthur without first receiving funding from Fahd Enterprises.

Based on the evidence before the trial court, the court could not conclude that Krayem tendered performance under the contract or that his tender was excused. Krayem's ability to close the purchase option was completely dependent upon an unrelated third-party transaction. That transaction, however, could not be completed until MacArthur transferred the property to Krayem. There is no indication that Krayem could tender the consideration needed to close the purchase until the third-party transaction closed. Likewise, there is nothing in the record to indicate that MacArthur prevented Krayem from performing or that it openly refused to perform its obligations under the contract. The evidence supports the trial court's determination that Krayem did not tender the consideration required to close the purchase. .

Huntley v. Enon Limited Partnership, 197 S.W.3d 844 (Tex.App.—Ft. Worth 2006, no pet.). Huntley entered into a Commercial Contract of Sale with Enon for the purchase of a strip shopping center owned by Enon in Arlington. The contract provided that, if the contract were properly terminated by Huntley, he was entitled to the return of the earnest money deposit. The contract provided for the assumption of the existing loan and further provided that, if the assumption was not approved by the lender, Huntley had the right to terminate. An amendment to the assumption provision extended the time for obtaining approval. A second amendment provided that the lender's approval had to be free of any obligation on Huntley's part for environmental matters and further extended the time for lender approval.

Just before the date for lender approval to be obtained, the lender sent a letter stating that approval had been given. The letter didn't indicate the terms of the assumption and several days later (after the expiration of the assumption approval period), when the commitment letter arrived, it included a requirement that Huntley execute an environmental indemnity. Enon signed the commitment letter, but Huntley did not. A month later, Huntley sent a letter terminating the contract and requesting the return of the earnest money deposit. Two days after the termination letter was received, the lender sent a new commitment letter deleting the environmental indemnity requirement. Again, Enon accepted and signed the document; Huntley did not.

Huntley argues that he had a right to terminate the Contract when Midland required an environmental guaranty. Enon argues that Huntley did not have a right to terminate the Contract and that Huntley's subsequent termination of the Contract constituted a breach of the Contract because Midland approved Huntley's assumption of the loan. Enon's argument, however, is unpersuasive because it ignores the Second

Amendment's requirement that Huntley assume the loan without any liability for environmental issues. Enon must base its approval argument on either the initial approval notice dated September 28, 2001, the October 3, 2001, approval notice, or the approval notice dated November 8, 2001. Although the September 28 approval notice indicates that Midland had approved the loan assumption, it does not indicate any of the terms or conditions upon which the loan assumption had been approved. Conversely, the letter faxed by Midland on October 3 set forth the conditions upon which the loan assumption had been approved, including that Huntley assume liability for environmental issues. The November 8 approval notice waived Huntley's environmental liability guarantee. Because the October 3 letter required Huntley to assume environmental liability and because the November 8 letter expressly waived environmental liability, it is clear that the September 28 letter did not serve as Midland's approval of the loan assumption absent a requirement that Huntley assume liability for environmental issues as required by the Second Amendment, but was, indeed, directly contrary to the express requirement of the Second Amendment that the loan assumption be free of any such assumption of environmental liability. Midland withdrew its requirement that Huntley assume environmental liability in the November 8 letter, but this was more than a month after the September 30 deadline set by the Second Amendment requiring that Midland approve Huntley's assumption of Enon's loan without any environmental liability and two days after Huntley had provided written notice terminating the Contract on November 6, 2001.

Roberts* v. *Clark, 188 S.W.3d 204 (Tex.App.—Tyler 2002, pet. denied). The Sellers agreed to sell 360 acres to the Buyers. The Buyers arranged a loan from the lender. The Buyers and the lender went to the title company for the closing and the Buyers signed all their closing documents. The lender did not fund the loan because it wanted the Sellers to sign and deposit the deed with the title company before funding. The Sellers refused to sign the deed until they were actually paid.

The Sellers filed suit for breach of contract, asking the court to declare the contract terminated because the Buyers did not tender payment on or before May 1, 2000 as required by the contract. The Buyers counterclaimed for specific performance. The Sellers moved for summary judgment, asserting that the Buyers failed to tender the purchase price and, inasmuch as the contract required payment of the purchase price before the Sellers' duty to sign the deed arose, the Sellers were excused from performing under the contract and the Buyers are not entitled to specific performance. The trial judge agreed.

In their first issue, the Buyers assert that the trial court erred in holding as a matter of law that the Buyers breached the contract, the contract terminated, and the Sellers' performance is excused. Among other arguments, they contend there are fact questions regarding whether the contract requires the Buyers to make payment before the Sellers execute the deed and whether tender of a wire transfer satisfied the contract.

Sellers assert the contract clearly requires the Buyers to tender payment on or before May 1, 2000 before the Sellers' duty to execute the deed even arises. In other words, Sellers contend that tender of payment is a condition precedent. Buyers disagree, asserting that it is a covenant.

A condition precedent is an event that must happen or be performed before a right can accrue to enforce a contract. While no particular words are necessary for the existence of a condition, such terms as "if," "provided that," "on condition that," or some other phrase that conditions performance, usually connote an intent for a condition rather than a promise. The contract specifically states in paragraph two that Buyers agree to pay $1.6 million on or before May 1, 2000. Paragraph three states, in pertinent part, that if the Buyers make the payment required in paragraph two, the Sellers shall make, execute, and deliver the deed. Giving this language its plain, grammatical meaning, the parties use of the word "if" in paragraph three indicates their intent to require the Buyers to tender payment before the Sellers' duty to execute the deed would arise. Consequently, tender of payment by the Buyers is a condition precedent to execution of the deed by Sellers and, once payment has been tendered, the Sellers will have a duty to sign the deed. Accordingly, the court must next determine if the Buyers' acts constitute tender of payment on or before May 1, 2000.

A tender is an unconditional offer by a debtor or obligor to pay another a sum not less in amount than that due on a specified debt or obligation. A valid and legal tender of money consists of the actual production of the funds and offer to pay the debt involved. The tenderer must relinquish possession of it for a sufficient time and under such circumstances as to enable the person to whom it is tendered, without special effort on his part, to acquire its possession. Since the lender did not relinquish the funds, no tender was made. As the Sellers have conclusively proven that the Buyers did not comply with the condition in the contract that they make payment on or before May 1, 2000, the Sellers have shown that the Buyers breached the contract. It might be argued that the application of this rule produces a harsh result since the lender was merely attempting to do business as usual and its requested procedure was not unreasonable. However, the Sellers are entitled, reasonably or unreasonably, to rely upon their legal rights under the terms of the contract signed by the parties.

The evidence shows the Sellers were ready, willing and able to comply with the terms of the contract but had a valid excuse for nonperformance under the terms of the contract. When a promise is subject to a condition precedent, there is no liability or obligation on the promissor and there can be no breach of the contract by him until and unless such condition or contingency is performed or occurs.

Fletcher* v. *Minton, 217 S.W.3d 755 (Tex.App.—Dallas 2007, no pet.). Salls owned a 12.56 acre parcel of real property in Hunt County, Texas. In 1984, Salls sold two adjoining tracts from the parcel. Tract I, consisting of 3.675 acres, was sold to Malecek. Tract II, consisting of 3.676 acres was sold to Minton. Both sales occurred pursuant to a contract for deed between Salls and the respective purchasers. Neither contract for deed was recorded, but other than the delivery of the deed, both Minton and Malecek contend that the contracts were fully performed.

In September 1994, Salls sold the property again. This sale involved the entire 12.56 acre parcel, including the two tracts previously conveyed to Minton and Malecek. Cook, the purchaser of the entire parcel, did not record the deed until 1997. In 1999, Cook sold the 12.56 acre parcel to Fletcher. The general warranty deed Fletcher recorded bears the notation "Drafted without Title Examination."

Fletcher filed a lawsuit against Minton seeking to quiet title to tracts 1 and 2. Minton denied Fletcher's allegations of ownership and asserted that he had dispossessed the owner of the Malecek tract by adverse possession, and owned tract II pursuant to his contract for deed with Salls. Malecek intervened in the lawsuit and asserted that she was the owner tract I. Fletcher subsequently amended her petition to assert that if either Malecek or Minton was awarded possession, she was entitled to reimbursement of the property taxes she paid on the property. Although Fletcher did not plead that she was a bona fide purchaser, the issue was tried by consent. The case was tried to the court without a jury. After conclusion of the trial, the trial judge signed a judgment holding: 1) Malecek is the owner of tract I; 2) Minton is the owner of tract II; and 3) Fletcher is entitled to reimbursement from Malecek for ad valorem taxes paid on tract I.

The Texas Property Code provides for the recording of real property transfers and limits the validity of unrecorded instruments. An unrecorded conveyance is binding on those who have knowledge of the conveyance. A person who acquires property in good faith, for value, and without notice of any third-party claim or interest is a bona fide purchaser. Status as a bona fide purchaser is an affirmative defense to a title dispute.

Notice will defeat the protection otherwise afforded a bona fide purchaser. "Notice" is broadly defined as information concerning a fact actually communicated to a person, derived by him from a proper source, or presumed by law to have been acquired. Notice may be actual or constructive. Actual notice results from personal information or knowledge, as well as those facts which reasonable inquiry would have disclosed. Constructive notice is notice the law imputes to a person not having personal information or knowledge.

A purchaser of land is charged with constructive notice of all claims of a party in possession of the property that the purchaser might have discovered had he made proper inquiry. This duty to ascertain the rights of a party in possession of the property arises when the possession is open, visible, exclusive, and unequivocal.

Martin* v. *Birenbaum, 193 S.W.3d 677 (Tex.App.—Dallas 2006, pet. denied). Birenbaum agreed to buy Martin's house for $3.6 million. A contract was signed and earnest money deposited with the title company. While the contract was pending, Birenbaum decided to buy another house, so he sent a letter to the title company and to Martin telling them he was terminating the contract and asking for the return of his earnest money. Martin orally instructed the title company not to return the earnest money, even though the contract required notices to be in writing. The title company did not return the earnest money but continued to hold it.

At first, Martin filed suit for specific performance and breach of contract, but later sold the house to a third party and dropped the specific performance demand. In connection with the sale of the house to the third party, Martin signed an affidavit stating there were no other pending contracts for the property.

Birenbaum's defense was that Martin had waived his claims for damages by preventing the return of the earnest money. Although Martin admitted he acted to prevent the return of the earnest money to Birenbaum because Birenbaum did not perform the contract and did not deserve it, he also testified that he did not want the earnest money, that the earnest money was insufficient, and that he had no choice but to sue Birenbaum because Birenbaum had not performed the contract. In fact, the record shows Martin notified Birenbaum in writing of his intent to pursue specific performance of the contract and, if necessary, a lawsuit for breach of contract. In contrast, nothing shows Martin provided any similar express notice, either oral or written, of an intent to accept the earnest money as liquidated damages. Moreover, after Birenbaum failed to specifically perform the contract as demanded, Martin filed a lawsuit seeking specific performance and damages for breach of contract. The court concluded that there was evidence supporting the jury's determination that Martin had not waived his right to sue for damages.

Having concluded that that there was no waiver, the court also rejected Birenbaum's contention that Martin had contractually elected to accept liquidated damages. Birenbaum claimed that Martin terminated the contract by selling the property to a third party. Although Martin did not physically receive the earnest money, Birenbaum contended he constructively received it by exercising "dominion and control" over it in a manner analogous to a conversion. The court disagreed.

Martin's sale of the property to a third party did not conclusively establish that he terminated the contract. By not closing the transaction, Birenbaum materially breached the contract. Birenbaum's breach excused Martin's further performance. Thus, Martin was free to sell the property to a third party and assure the purchaser that there were no competing contracts on the property. After selling the property, Martin amended his pleadings to drop his request for specific performance, but he continued to pursue damages for breach of contract. Thus, the court could not conclude as a matter of law that Martin terminated the contract within the meaning of paragraph 15.

Likewise, the evidence did not conclusively establish that Martin "received" the earnest money. The contract does not contemplate constructive receipt of the earnest money. Nor does the contract mandate an interpretation that objecting to a demand for the earnest money made outside the normal closing process constitutes an election under paragraph 15. Furthermore, because Martin did not object in writing, the contract authorized the title company to release the earnest money to Birenbaum at any time after thirty days from the issuance of Birenbaum's written demand. The court concluded that the evidence did not conclusively establish Birenbaum's election defense.

In two responsive issues, Birenbaum questions (1) whether the "election-of-remedies clause" of the contract permits an aggrieved seller to sue for damages while also preventing the buyer from retrieving his earnest money and (2) whether such actions waive the seller's right to sue. Because the contract at issue is a standardized Texas Real Estate Commission form, Birenbaum further contends that resolving this case in Martin's favor would adversely impact public policy because aggrieved sellers will henceforth always choose both to withhold the earnest money and to sue for damages.

All three contentions presuppose that Martin withheld the earnest money from him and thus, effectively chose both remedies for default. The record, however, contains more than a mere scintilla of evidence showing that the title company, rather than Martin, chose not to release the earnest money to Birenbaum.

Coldwell Banker Whiteside Associates* v. *Ryan Equity Partners, Ltd., 181 S.W.3d 879 (Tex.App.—Dallas 2006, no pet.). The Parkmont apartment project was built in 1964 when zoning allowed multi-family uses. The sellers bought the property in 1972. In 1978, the property was re-zoned to single family, but allowed multi-family to continue as legal non-conforming. In 1988, the area was rezoned again, making multifamily housing nonconforming. This zoning change went unrecognized until 1994, when residents petitioned the City to shut down various multifamily housing uses. The Dallas City Council then passed an ordinance creating a Planned Development District that included the property. Under the PD, multifamily housing uses larger than six units were prohibited unless they obtained a Special Use Permit. If a property larger than six units failed to obtain a Special Use Permit, then its nonconforming use would be abated by the City's Board of Adjustment on the application of any citizen. "Abatement" of the nonconforming use meant that the nonconforming property would have to become a single-family residence or cease to operate. In 1995, the sellers applied for a Special Use Permit from the City, but their application was denied. However, they continued to operate the Property as a thirty-one-unit apartment complex, and no one applied to abate the nonconforming use while they owned the Property.

In 1998 Ryan Equity started looking for properties in East Dallas to buy and renovate. It contacted Coldwell Banker as a broker, who recommended the Parkmont as a suitable investment. One of the partners in Ryan Equity asked Whiteside about the zoning, and Whiteside said it was a legal nonconforming use but was grandfathered. Ryan Equity made no independent investigation of the zoning, nor did it seek confirmation of Coldwell Banker's representation of the extent to which the property was grandfathered. Ryan Equity did not ask sellers about the zoning, nor did it tell them the intended use of the property. After looking at the property and deciding it could be rehabilitated according to the plan, Ryan Equity offered to purchase the property. The contract for the sale of the property stated that the sellers, were "not aware of ... any material defects to the Property." The sale closed on November 24, 1998. Coldwell Banker received a commission of three percent.

Ryan Equity planned to renovate the property after renovating one of the other properties, but it planned to use the rental income from the Property to maintain it until the renovations could begin. Ryan Equity, however, was soon cited for the property's multiple building code violations, and it hired an attorney to represent it before the City. The attorney discovered the PD ordinance and determined that unless Ryan Equity obtained a Special Use Permit, the property would be forced to cease operation as multifamily housing on the application of any citizen to the Board of Adjustment. Ryan and the attorney held meetings with the neighborhood association to win the neighborhood's support for a Special Use Permit, but the neighborhood refused to support the plan for the property. An application for abatement of the nonconforming multifamily use of the property was filed with the Board of Adjustment. Because the property did not have a legal right to exist as a multifamily-housing use, Ryan Equity was unable to obtain the building permits and financing necessary to repair the major problems with the property. Ryan Equity incurred fines of over $167,000 for building code violations. The City of Dallas brought two suits, one seeking demolition of the buildings on the property for building code violations and the other seeking abatement of the nonconforming use of the Property. In June 2001, Ryan Equity settled the suits with the City by agreeing to tear down the apartments in exchange for the City waiving the fines. Ryan Equity demolished the buildings in August 2001.

Ryan Equity sued the sellers and Coldwell Banker for breach of the duty of good faith and fair dealing, common-law and statutory fraud, and breach of contract. Ryan Equity also sued Coldwell Banker for breach of fiduciary duty. The trial court found the sellers were not liable and found Coldwell Banker liable only for breach of contract.

Ryan Equity challenged the trial court's finding and conclusion that the sellers did not breach the purchase contract. Ryan Equity argued that the sellers breached two provisions in the purchase contract by failing to disclose the status of the zoning, that the operation of the apartment complex was subject to being shut down on the application of any citizen to the Board of Adjustment, and the denial of the sellers' application for a Special Use Permit. Ryan Equity contended that the nondisclosure of the status of the zoning and the denial of the Special Use Permit were nondisclosures of material defects with the property. The trial court concluded, "The status of the Property's zoning does not constitute a 'material defect' under the terms of the Contract."

Whether nonconformance to zoning ordinances constitutes a "material defect" requiring disclosure under a real estate contract is an issue of first impression in Texas. The term "material defect" is not defined in the purchase contract. Nor is it defined in the statutes governing the sale of real property. According to the dictionary, a "defect" is "an irregularity in a surface or a structure that spoils the appearance or causes weakness or failure." Thus, a "defect to the Property" would be some irregularity in "a surface or a structure" of the Property that mars its appearance or causes some aspect of the Property to weaken or fail. The definition addresses tangible aspects of the Property, whether its physical appearance or its physical structure. This definition is in line with the plain understanding and usage of the term: when we call something defective, we mean it is blemished, broken, deficient, or imperfect in some physical sense.

Given this plain understanding of the language at issue, the court concluded that the zoning status of the property was not a material defect to the property within the meaning of the purchase contract. Zoning laws neither cause nor result from physical imperfections or deficiencies in real property itself. The zoning law at issue does not relate to the exact physical condition of the property. Instead, the zoning law regulates the use of the property, giving it a discernible legal status. The denial of sellers' application for a Special Use Permit was a determination of the property's legal status pursuant to the zoning ordinance, not a material defect to the Property.

Finally, having concluded the zoning information related to legal status and not to any defective condition on the Property, the court addressed whether that legal status nonetheless had to be disclosed by the sellers. Ryan Equity contends the sellers had the duty to inform it of the zoning laws and to interpret the effect of those laws for it. Ryan Equity cited no authority for the proposition that a seller of commercial real estate has a duty to identify the applicable zoning laws or explain their effect to a sophisticated, experienced real estate investor who makes no inquiry to the seller of the zoning status and receives no express representation from the seller of the zoning status. Courts presume the parties to a contract knew and took into consideration the laws affecting matters about which they contracted, unless the contrary clearly appears in the terms of the contract.

In its second issue, Ryan Equity contended the trial court erred in concluding the sellers did not commit fraud against it. For common-law fraud, the plaintiff must prove (1) a material misrepresentation; (2) that was false when made; (3) that was known by the speaker to be false when it was made or that was made recklessly as a positive assertion without knowledge of its truth; (4) the speaker made it with the intent that it should be acted upon; (5) the party justifiably relied on the representation; and (6) the party was injured as a result.

To prove statutory fraud in a real estate transaction, a plaintiff must show: (1) a false representation of a past or existing material fact, when the false representation is (A) made to a person for the purpose of inducing the person to enter into a contract and (B) relied on by that person in entering into that contract; or (2) a false promise to do an act, when the false promise is (A) material, (B) made with the intention of not fulfilling it, (C) made to a person for the purpose of inducing that person to enter into a contract, and (D) relied on by that person in entering into that contract. Business and Commerce Code § 27.01(a).

A misrepresentation may consist of the concealment or nondisclosure of a material fact when there is a duty to disclose. The duty to disclose arises when one party knows that the other party is ignorant of the true facts and does not have an equal opportunity to discover the truth.

It is undisputed that the sellers did not discuss the zoning or Special Use Permits with Ryan Equity's principals and made no affirmative representations regarding the zoning. Thus, their liability for fraud depends on their having a duty to disclose those facts. A seller of real estate is under a duty to disclose any material fact that would be not be discoverable by the purchaser's exercise of ordinary care and diligence or which a reasonable investigation would not uncover. Ryan Equity did not explain why the zoning status and denial of the application for the Special Use Permit were not discoverable through the exercise of ordinary care, reasonable diligence, or a reasonable investigation. Ryan Equity's lawyer testified that he discovered the zoning status and the denial of the application for the Special Use Permit through examining the publicly available zoning records at City Hall. No witness testified that these records were not discoverable through a reasonable investigation. The lawyer's testimony did not indicate his investigation that discovered the facts was unreasonable or went beyond the exercise of ordinary care and reasonable diligence. Because the sellers had no duty to disclose the facts, their failure to do so was not fraud.

Warehouse Associates Corporate Center II, Inc. v. Celotex Corporation, 192 S.W.3d 225 (Tex.App.—Houston [14th Dist.] 2006, pet. pending). Celotex Corporation operated an asphalt shingle manufacturing plant on the Property for a number of years until 1998, when Celotex permanently closed the plant. Celotex decided to sell the Property and retained Cushman & Wakefield as its real-estate broker. While Cushman & Wakefield was entertaining bids for the Property, Warehouse Associates asked Cushman & Wakefield for any documents that Celotex had regarding the Property. In response, Celotex forwarded part of a 1996 environmental report prepared for Celotex. The part of this report Celotex produced indicates that there had been asbestos issues relating to the buildings on the Property but indicates nothing about asbestos contamination in the soil or use of asbestos in the manufacturing process on the Property, as opposed to asbestos in building materials in the structures on the Property. Celotex did not give Warehouse Associates the part of the report stating that asbestos previously had been used in the manufacturing process at the plant on the Property.

Celotex entered into a written contract with appellant Warehouse Associates Development, Inc. for the sale of the Property. Under the Contract, Warehouse Associates was allowed to inspect the Property within sixty days from the date Celotex gave notice that it had completed this demolition work. During this sixty-day inspection period, Warehouse Associates had the right to terminate the Contract by written notice if its inspections revealed conditions unsatisfactory to it in its sole discretion. In the Contract, the parties agreed that, other than the warranties of title contained in the deed, Celotex did not make and was specifically disclaiming any representations, warranties, promises, covenants, or guaranties of any kind. The Contract imposed no obligation on Celotex to provide documents or records relating to the Property's condition. Warehouse Associates, however, was entitled to conduct inspections, tests, and investigations as it deemed necessary to determine the suitability of the Property for its intended use.

On the day that the inspection period began, Celotex's contractor was excavating soil on the Property and found what appeared to the contractor to be raw, friable asbestos buried in the ground. The contractor contacted appellee Lecil M. Colburn, Celotex's Director of Environmental Affairs and chairman of a Celotex committee formed to sell various Celotex properties. The contractor asked Colburn what to do and Colburn instructed the contractor to leave that area of the Property alone and to backfill the excavated area, indicating the matter would be addressed at a later date. The contractor had one employee, wearing a respirator, backfill the excavation as quickly as possible.

During the relevant period, HBC Engineering inspected the Property and conducted a Phase I Environmental Site Assessment of the Property. HBC had discussions about the Property with supervisors for Celotex. HBC did not specifically ask them about asbestos, and they said nothing to HBC about asbestos or the recent discovery of suspected asbestos-containing material buried in the ground on the Property. Celotex listed the major raw materials Celotex had used in its shingle-manufacturing process without mentioning asbestos. At the end of his interview with the supervisor, an HBC representative asked if he was aware of any other environmental concerns, and the supervisor said nothing about the suspected asbestos-containing material recently discovered on the Property or about the possibility of asbestos being buried in the soil on the Property. HBC also conducted an environmental site investigation that included analysis of soil and groundwater samples taken from the Property. HBC did not test the soil for the presence of asbestos. In its reports to the buyer, HBC did not mention anything about any contamination of the soil on the Property due to asbestos.

Warehouse Associates did not exercise its right to terminate the Contract during the inspection period and the sale closed. The special warranty deed that contains the same waiver-of-reliance and as-is language as the Contract. A few months later, a contractor demolishing the concrete slabs discovered asbestos-containing material in the soil on the Property. An expert analyzed soil borings and detected more than one percent asbestos in forty-four of seventy soil borings from sites across the Property. This expert concluded that the Property has extensive, widespread asbestos-containing material in the soil to a depth of at least thirteen feet below the ground surface.

Warehouse Associates sued, alleging damage claims for common law fraud, negligent misrepresentation, and statutory fraud under section 27.01 of the Texas Business and Commerce Code. Warehouse Associates also sought the equitable remedy of rescission of the transaction, as well as punitive damages and attorney's fees.

In ***Prudential***, the Texas Supreme Court limited the enforceability of as-is and waiver-of-reliance language to exclude situations in which (1) the buyer was induced to enter into the contract containing that language by a fraudulent representation or concealment of information by the seller or (2) the seller engaged in conduct that impaired, obstructed, or interfered with the buyer's inspection of the property being sold. In ***Schlumberger Tech. Corp.* v. *Swanson***, 959 S.W.2d 171 (Tex.1997), the Supreme Court held that the fraudulent-inducement exception from Prudential does not apply to waiver-of-reliance language (1) that clearly and unequivocally disclaims reliance on the specific representations that are the basis of the claims in question, (2) in a contract whose purpose is to definitively end a dispute in which the contracting parties have been embroiled, (3) in an arm's length transaction between sophisticated parties represented by counsel. This court of appeals held that, because the Contract's purpose was not to definitively end a dispute in which Celotex and Warehouse Associates had been embroiled, this case does not fall within the scope of Schlumberger, and therefore, the two Prudential exceptions provide the legal standard. So the court turned to the two exceptions to Prudential's general rule: fraudulent inducement and interference with inspection.

Looking over the facts, the court concluded that there was a material fact issue relating to fraudulent inducement.

As to the issue of interference with inspection, the court began by examining the language used by the ***Prudential*** court to describe this exception: "[A] buyer is not bound by an "as is" agreement if he is entitled to inspect the condition of what is being sold but is impaired by the seller's conduct. A seller cannot obstruct an inspection for defects in his property and still insist that the buyer take it "as is". The only case that actually analyzes the proper application of this exception is Prudential itself. In ***Prudential***, the buyer asserted the seller had "interfered with his investigation" by withholding plans and specifications the buyer had requested. The ***Prudential*** court stated that withholding such plans and specifications could not have interfered with the buyer's inspection. It noted that the withheld plans and specifications did not mention if an asbestos-containing material was used in the construction of the building and that the only way to determine whether the building contained asbestos was to "inspect the premises." According to the ***Prudential*** court, the buyer did not claim that the seller had interfered with his inspection in any way. By this statement, the ***Prudential*** court recognized a distinction between an inspection of the property and an investigation of that property. The ***Prudential*** court noted that the buyer was asserting that the seller had interfered with its investigation of the property by withholding information about the property but that this assertion was not equivalent to an assertion that the seller had interfered with the buyer's inspection of the property. This distinction is consistent with the plain meaning of these words; "inspect" focuses on a careful physical examination, whereas "investigation" includes a physical examination as well as a gathering of information through research and study. In the absence of further guidance from the Texas Supreme Court, the court concluded that the ***Prudential*** court intended the second ***Prudential*** exception to apply to a seller's conduct that impairs, obstructs, or interferes with a buyer's inspection of the property being sold but not to conduct that impairs, obstructs, or interferes with a buyer's investigation of that property. Therefore, to trigger the impairment-of-inspection exception, the seller, by its conduct, must impair, obstruct, or interfere with the buyer's exercise of its contractual right to carefully view, observe, and physically examine the property. Conduct by the seller that impairs, obstructs, or interferes with the buyer's ability to obtain information regarding the property does not trigger this exception.

Almost all of the evidence cited by Warehouse Associates shows alleged fraudulent misrepresentations or nondisclosures of information by Celotex concerning the condition or prior use of the Property. As discussed above, even presuming the truth of all such evidence, this proof does not raise a fact issue as to Celotex's alleged impairment of Warehouse Associates's inspection of the Property. Warehouse Associates does not assert on appeal that Celotex impaired, obstructed, or interfered with its ability to carefully view, observe, and physically examine the Property. The summary-judgment evidence shows that Warehouse Associates and HBC had access to the Property and were free to take whatever soil and water samples they wanted to take for testing

Henderson* v. *Love, 181 S.W.3d 810 (Tex.App.—Texarkana 2005, no pet.). In 1999, Henderson agreed to purchase from a house in Avinger from Love under an executory contract of sale, also known as a contract for deed. At the time of the contract, neither the contract nor any law required an annual accounting statement by Love. In 2001, changes to Section 5.077 of the Texas Property Code became effective which required Love, beginning in January 2002, to provide Henderson with an annual report, briefing her on certain financial details of the contract and imposing "liquidated damages" of $250.00 per day after January 31 for each year such report was not provided. Apparently, Love failed to provide such a report. In 2004, Henderson sued Love and his co-owner, Sylvia Allison, alleging they were "jointly and severely [sic]" liable for the daily "liquidated damages" because of that failure. The trial court determined that, as applied in this case, the section was unconstitutional. The court of appeals reversed the summary judgment and remand this case for further proceedings holding that Section 5.077 of the Texas Property Code is not unconstitutional as properly applied, given that Chapter 41 of the Texas Civil Practice and Remedies Code also applies, conditioning and limiting the potential recovery under Section 5.077.

Marker* v. *Garcia, 185 S.W.3d 21 (Tex.App.—San Antonio 2005, no pet.). Marker sold the Garcias a 3 acre lot under a contract for deed. Section 5.077 of the Texas Property Code requires the seller under a contract for deed to provide the purchaser with an annual accounting statement containing: (1) the amount paid; (2) the amount owed; (3) the number of payments remaining; (4) the amount paid to taxing authorities on the purchaser's behalf if collected by the seller; (5) the amounts paid to insure the property on the purchaser's behalf if collected by the seller; (6) if the property has been damaged and the seller has received insurance proceeds, an accounting of the proceeds applied to the property; and (7) if the seller has changed insurance coverage, a legible copy of the current policy or binder. Under the terms of the Contract for Deed, the Garcias were responsible for taxes and insurance, so the only information Marker would have been required to provide was the amount paid, amount owed, and number of payments remaining. A seller who fails to provide the annual statement is liable to the purchaser for "liquidated damages in the amount of $250 a day for each day after January 31 that the seller fails to provide the purchaser with the statement" and "reasonable attorneys' fees." In their motion for summary judgment, the Garcias calculated the amount of the liquidated damages to the date of their motion as totaling $584,000.00. The purchase price under the contract for deed was just over $20,000.

Section 5.077 applies to a transaction involving an executory contract for conveyance of real property only if the property is "used or to be used" as the purchaser's residence or as the residence of a person related to the purchaser within the second degree of consanguinity or affinity. Marker asserts that the Garcias were not entitled to recover the liquidated damages because the Property was not used or to be used as the Garcias' residence.

In this case, the Garcias didn't use the land for their residence, but they claimed an intent to use the property as their residence within three years. Although no evidence was presented of any actions taken to further this intent other than the construction of a fence, the Garcias had finished paying for the land only four months before the hearing on the motions for summary judgment.

The statutory phrase "used or to be used" is broad language. By its express terms, the language of the statute encompasses real property which is presently being used as the purchaser's residence as well as real property which will be so used in the future. Thus, the language clearly encompasses executory contracts for the sale of real property which the purchaser may use as a residence in the future.

Reviewing the legislative intent, the court was convinced that this case does not present the type of situation that the Legislature intended to remedy in adopting the statutory provisions relating to executory contracts for deed, including the strict liquidated damages provision contained in section 5.077. Furthermore, given the circumstances presented, the court acknowledged that the Garcias' simple statements of intent may be too weak to convince a jury that they intended to use the property as a residence even under the forward-looking "to be used" standard adopted by the Legislature. In the summary judgment context, however, the court is required to consider the evidence in the light most favorable to the non-movant, so the court held that a genuine issue of material fact has been raised about whether the property was "to be used" as the Garcias' residence.

Sigmar* v. *Anderson, 212 S.W.3d 789 (Tex.App.—Austin 2006, no pet.). This case concerns whether a bankruptcy court's order approving a sale of real property free of claims, together with the subsequent sale by the debtor, precludes later state court litigation to determine ownership of and the right to use a portion of that property. The Sigmars filed this suit against the Andersons asserting ownership of a strip of land between their property and the Andersons' platted lot along the shore of Lake Travis. The Sigmars also requested a declaration that they had the right under an easement to use certain parts of the disputed area for recreational purposes. The Andersons sought summary judgment, contending that a bankruptcy court order approving the sale of a lot out of a bankruptcy estate--including the area in dispute--barred the district court from considering the Sigmars' claims. The Andersons argued that the Sigmars should have litigated any claims to the disputed area in the bankruptcy proceeding in which the bankruptcy court authorized the sale of the property out of the bankruptcy estate free and clear of competing claims and interests. Agreeing that the bankruptcy court order barred the Sigmars' claims in this case, the trial court rendered a take-nothing summary judgment in favor of the Andersons.

Whether the bankruptcy court order and the subsequent sale pursuant to that order stand as a bar to the Sigmars' claims in this case implicates the doctrine of claim preclusion. Claim preclusion is a defense that parties can assert to prevent litigation of a claim or cause of action that has been finally adjudicated, as well as related matters that should have been litigated in a prior suit. The doctrine requires proof of the following elements: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims as were raised or could have been raised in the first action.

There was no dispute over whether the first two elements of claim preclusion are satisfied in this case. The bankruptcy order approving the conveyance to the Andersons was not appealed and is final. The Sigmars and the Andersons had notice of the proceeding in the bankruptcy court, were represented by counsel at the hearing, and put their claims relating to the boundary dispute in issue. The question with regard to claim preclusion in this case is whether this suit is based on the same claims as were or should have been raised in the bankruptcy court.

The Sigmars argue that ownership of the disputed area was not, in fact, at issue in the bankruptcy proceeding because the disputed area was not part of the bankruptcy estate. The Sigmars contend that the debtor had no interest in the disputed area because the Sigmars owned it. The bankruptcy estate consists of "all legal or equitable interest of the debtor in property as of the commencement of the case." Therefore, according to the Sigmars, the area in dispute never became part of the bankruptcy estate nor subject to any bankruptcy proceeding. However, the holder of older title from a common source holds superior title, unless a holder of later title shows that he acquired title as a bona fide purchaser for value and without notice of an earlier existing interest. At the outset of the bankruptcy proceeding, a plat filed in the Travis County records showed that the debtor owned the disputed area. There was no showing that the debtor knew of the dispute when acquiring title. Whether that title was inferior to the Sigmars' title may have been a subject for litigation. The scope of the property included in the bankruptcy estate is broad. After a debtor files a bankruptcy proceeding, the determination of what constitutes property of the estate is a core proceeding over which the bankruptcy court has exclusive jurisdiction. A party who has a rival ownership claim to property and has notice of and participates in the bankruptcy court proceedings leading to the sale of that property must assert its claim during that proceeding or it will waive its right to assert that claim. Here, the Sigmars had notice of the proposed sale of Lot 27, raised the boundary dispute on Lot 27 with the bankruptcy court, and proposed to resolve it. The Sigmars were represented at the hearing during which the sale of Lot 27 free of any claims inconsistent with the replatting of record was approved, but did not object to the sale. Sales approved under subsection (f) are "free and clear of any interest in such property of an entity other than the estate, only if ... such interest is in bona fide dispute...." The Sigmars' ownership claim was in bona fide dispute at the bankruptcy court and thus was extinguished by the bankruptcy court's order approving the sale free of all claims, including the Sigmars' boundary claims, together with the deed conveying the property to the Andersons free of any such claims. Thus, the Sigmars are precluded from bringing their trespass to try title claim in this cause.

Claim preclusion also defeats the Sigmars' assertions of title based on the doctrine of strips and gores and through adverse possession. Under both theories, the Sigmars assert an ownership interest or claim that preceded that of the debtor and the court-ordered sale. Both theories should have been raised in the bankruptcy court when the debtors sought to sell the property and the Sigmars asserted their title to the disputed area. Both claims were extinguished by the sale approved by the bankruptcy court.

The Sigmars also contend that their request for declaratory relief to the effect that they have an easement is not precluded because it was not within the scope of the bankruptcy court order or the sale pursuant to that order. They argue that the easement claim is distinct because, instead of seeking title, they seek a declaration of their right to use a portion of Lot 27 to anchor their boat dock and for other recreational purposes by easement. They contend that bankruptcy court action pursuant to section 363(f) does not extinguish easements. Although the bankruptcy court has the power to authorize a sale free and clear of liens and other interests, at least one bankruptcy court has held such authorization has "no impact on restrictions of record that run with the land" such as easements. However, the record in this case did not require the court to decide whether this is or will remain an accurate statement of federal bankruptcy law. Even if we assume section 363(f) grants the bankruptcy court power to order sales free of interests such as easements, the record contains no indication that the easement issue was ever in dispute in the bankruptcy court, and the warranty deed to the Andersons expressly excepts out and preserves any easements predating the transfer.

PART X
BROKERS

BBQ Blues Texas, Ltd.* v. *Affiliated Business Brokers, Inc., 183 S.W.3d 543 (Tex.App.—Dallas 2006, pet. denied). The parties orally agreed that, if Affiliated found a buyer for BBQ Blues's business in Round Rock, BBQ Blues would pay it a commission equal to ten percent of the sales price. Affiliated introduced BBQ Blues to a group that ultimately purchased the business in for $335,000. As a part of the final purchase and sale agreement, the purchasers assumed the lease on the property where the restaurant was located. BBQ Blues refused to pay the ten percent commission and commenced a declaratory judgment action in Dallas County. BBQ Blues did not contest the fact that there had been an oral commission agreement but rather filed answers and counterclaims alleging that Affiliated's claims were barred by the statute of frauds provision of § 1101.806(c) of the Texas Occupations Code. Specifically, they asserted that the oral commission agreement between the parties included the sale or purchase of real estate.

Affiliated argued that the evidence presented at trial established that the oral commission agreement did not contemplate the transfer of real estate. Affiliated claimed that BBQ Blues and the purchaser of the restaurant worked out a transfer of the lease agreement between themselves and Affiliated had no control over the ultimate structure of that transaction. Affiliated claimed that the oral commission agreement was a finder's fee for bringing a willing buyer together with a willing seller and also observed that the business could have been sold without the transfer of the lease. Finally, they point out that this issue was clearly presented to the jury in Question 2, "Did a part of the agreement you have found include the transfer of the real estate lease for the restaurant in Round Rock, Texas?" To which the jury answered "No."

The court held that there were two separate and distinct contracts in this case: (1) the oral commission agreement between Affiliated and BBQ Blues which called for a ten percent commission to be paid to Affiliated if they found a buyer for the restaurant and (2) the sales contract between the buyer and the seller of the restaurant. Regardless of the terms of the final contract between the buyer and seller of the restaurant, the jury found that BBQ Blues breached the oral commission agreement and that the oral commission agreement did not involve the transfer of the real estate lease in Round Rock, Texas. There is more than a scintilla of evidence to support this finding.

PART XI
TITLE INSURANCE
AND ESCROW AGENTS

Hanson Business Park, L.P.* v. *First National Title Insurance Company, 209 S.W.3d 867 (Tex.App.—Dallas 2006, pet. denied). Hanson purchased three tracts of land in Irving, Texas. First National provided a title insurance policy covering the tracts. Some time after the purchase, Hanson learned that a portion of one of the tracts lies in a flood plain. Hanson made a claim under the title insurance policy. First National denied the claim. Hanson sued First National for breach of the policy, unfair settlement practices, and breach of the duty of good faith. First National filed a summary judgment motion, arguing that Hanson's claims were not covered by the title insurance policy.

A title insurance policy is a contract of indemnity, imposing a duty to indemnify the insured against losses caused by defects in title. The policy governing this case provides coverage for any loss or damage caused by any defect in or lien or encumbrance on the title.

First National argued that the flood-plain designation of a portion of the property is not a matter that "would be shown in the regular transfers of title." See Civil Practice & Remedies Code § 16.021(4) (Vernon 2002) (defining "title" to mean "a regular chain of transfers of real property from or under the sovereignty of the soil"). First National argued that the property's flood-plain status, rather than being a matter affecting title, is a condition of the land that was "created by nature and merely designated by FEMA." Thus, according to First National's motion, the property's status is distinguishable from title defects or encumbrances, which are "created by parties that own a right or interest in the affected property."

Hanson argued that the flood-plain status was indeed a title defect or encumbrance. Hanson relied on cases that link the concepts of defect and marketable title. For example, Hanson cites the case of ***Alling* v. *Vander Stucken***, 194 S.W. 443 (Tex.Civ.App.-San Antonio 1917, writ ref.), which states, in the context of specific performance of a contract for purchase of land: "A title that is open to reasonable doubt, such as would affect the market value, is not a marketable title.... By a marketable title is meant one reasonably free from doubts that would affect the market value of the land; a title which a reasonably prudent man, in the light of all the facts and their legal effect, would accept as being satisfactory."

Hanson read these and similar cases to state that any condition that decreases the price a seller of property can recover amounts to a defect in the property's marketable title. Hanson argued that "any error, omission, or irregularity that affects the value of the land" amounts to a defect in title. A thorough reading of the cases, however, proves Hanson's understanding to be incorrect. The cases' discussions of "marketable title" actually address whether the property can be sold at all, not whether the property will fetch a lesser price because of some condition on the land. The cases cited by Hanson establish that the concept of "title" speaks to ownership of rights in property, not to the condition or value of the property. Thus, a defect in, or encumbrance on, title (such as would trigger coverage under a title insurance policy) must involve a flaw in the ownership rights in the property.

Hanson's argument that "any error, omission, or irregularity that affects the value of the land" amounts to a defect in title is not a correct understanding of Texas law. Thus, the court concluded that the flood-plain status of that property was a defect, if at all, only in the condition of the property. It refused to equate a defect in the condition of the property with a defect in title to the property. Hanson's claim was not covered under the title insurance policy, and First National was entitled to judgment as a matter of law.

Koenig* v. *First American Title Insurance Company of Texas, 209 S.W.3d 870 (Tex.App.—Houston [14th Dist.] 2006, no pet.). The Arnolds filed suit against the Koenigs claiming title by adverse possession to a 40 inch by 45 foot strip of property situated between the Koenigs' garage and the official property line. The Arnolds based their claim on a fence built by the Arnolds' predecessors in title, which the Arnolds claimed fully enclosed the disputed property. After First American denied coverage to defend the Arnolds' claim, the Koenigs hired an attorney at their own expense and successfully defended the claim. The Koenigs then sued First American, alleging breach of contract, breach of warranty, breach of the duty of good faith and fair dealing, violation of the Texas Deceptive Trade Practices Act, and violation of Article 21.21 of the Texas Insurance Code. First American filed a general denial and also alleged an exception to coverage according to the "rights of parties in possession" exception. First American Title then filed a motion for summary judgment, also based on the "rights of parties in possession" exception, which was granted.

The Koenigs argued that First American denied their claim only because the claim was based on adverse possession, and because an adverse possession claim requires facts to be pleaded that the claim is actual, open and hostile, all adverse possession claims fall within the "rights of parties in possession" title policy exception. First American disagreed and contended that it denied the claim because it considered the facts alleged by the Arnolds in their petition.

The "rights of parties in possession" exception is a standard exception from coverage and relates to claims such as adverse possession. Coverage, however, is not determined by the cause of action but by the facts giving rise to the alleged actionable conduct. The insurer is entitled to rely on the plaintiff's allegations in determining whether the facts are within policy coverage. An allegation of adverse possession alone is not sufficient for a claim to fall within the policy exception for "rights of parties in possession;" the petition must contain factual allegations that establish notice of possession by a third party. The rationale for the policy exception for "rights of parties in possession," at least in part, is that possession of land by a third party should put the insured on notice of an adverse interest. An insurer's duty to defend an adverse possession claim is not based on the legal theory behind the cause of action. Rather it is based on the facts pled by the underlying plaintiff giving rise to the actionable conduct.

The "rights of parties in possession" exception applies if the nature of the possession alleged is such that it charges the purchaser with notice of a third party's possession. An insured is on notice if the possession is open, visible, unequivocal, exclusive, hostile, and actual rather than constructive. Here, a fence separated the two residential properties, the Arnolds landscaped the property by planting trees on the disputed property, and the Arnolds' large dogs utilized the property. In addition, the Arnolds and the Koenigs discussed building an actual fence away from the Koenigs' garage, and according to the Arnolds' petition, the Arnolds allowed the Koenigs to install a fence one foot further onto their alleged property. When taking these facts as true, the Arnolds' possession of the disputed strip of property was open and visible, notorious, exclusive, and not merely constructive. The Koenigs had notice of a potential dispute with the Arnolds because the Arnolds were in actual possession of the disputed strip of property.

Holder-McDonald* v. *Chicago Title Insurance Company, 188 S.W.3d 244 (Tex.App.—Dallas 2006, pet. denied). When Barbara and Michael bought their house, Chicago Title acted as escrow agent and as title insurer. Chicago Title prepared a title commitment, including a legal description of the metes and bounds of the property being purchased. The title examiner identified three different tracts as part of the property. Tract 1 was a fee simple tract on which the house and a barn were located. Tracts 2 and 3 were described as easement estates.

Tract 2 was identified as an easement running from the northwest side of tract 1 to a public roadway known as Wimbledon Court. The address of the house was listed as 4 Wimbledon Court, and the tract 2 easement was the only part of the property described in the title commitment that connected the house to Wimbledon Court. There was no driveway or other form of access on the easement, however. Instead, the house was accessed from Wimbledon Court by use of a neighbor's driveway. The McDonalds knew at the time they purchased the property that use of the neighbor's driveway was an at-will courtesy and their purchase of the property did not include any rights to the neighbor's driveway.

Tract 3 was described as an easement running from the southeast side of the property to another neighbor's driveway. This second driveway ran to a different public roadway and was accessible from tract 1 only by crossing a creek or using a narrow footbridge across the creek.

Barbara and Michael refinanced the house three times, each time using the same closer and escrow agent at Chicago Title. Eventually, they ran into financial problems and their lender foreclosed.

Approximately two weeks before the foreclosure, the McDonalds learned there was a problem with the tract 2 easement. It was discovered that the easement had expired by its own terms many years before the McDonalds purchased the property. Because the easement no longer existed, the McDonalds' property did not include a legal right of access to and from Wimbledon Court. The property was sold at the foreclosure sale as scheduled. No deficiency was taken against the McDonalds as a result of the foreclosure. The McDonalds conceded they never discussed the expiration of the easement with Chicago Title before the foreclosure.

After the foreclosure, the lender made a claim against Chicago Title under its mortgagee's title insurance policy based on Chicago Title's mistaken representation that the property included an easement to Wimbledon Court. Chicago Title resolved the lender's claim by purchasing an easement across the neighbor's driveway to Wimbledon Court. Although the McDonalds no longer owned the property, they filed suit against various parties, including Chicago Title, alleging various claims. These included negligent misrepresentation, breach of fiduciary duty, breach of contract, and violations of the Texas Deceptive Trade Practices Act. All of the McDonalds' claims were based on the company's representation that the subject property included an easement to Wimbledon Court. According to the McDonalds, but for that representation, they would not have purchased the property.

The trial court granted a directed verdict to Chicago Title on the claims of breach of fiduciary duty. On the remaining claims, the jury found that Chicago Title had made a negligent misrepresentation but that it had not breached its contract with the McDonalds nor violated the DTPA. The jury awarded the McDonalds $4,658.83 in damages resulting from the misrepresentation. The jury further found, however, that Chicago Title did not act with malice and the misrepresentation did not cause any difference in the value of the property to the McDonalds compared to the price the McDonalds paid for it.

The McDonalds contended the trial court erred in granting a directed verdict on their claim for breach of fiduciary duty. Any fiduciary duties Chicago Title owed to the McDonalds were not owed in its capacity as title insurer. Rather, the fiduciary duties owed by Chicago Title arose solely out of its employee's role as escrow agent and closer for the purchase of the property. An escrow agent owes fiduciary duties to both the buyers and the sellers of the property, including the duty of loyalty, the duty to make full disclosure, and the duty to exercise a high degree of care to conserve the money placed in escrow and pay it only to those persons entitled to receive it. But these duties are strictly limited to the agent's role as escrow agent.

The McDonalds asserted that Chicago Title breached its fiduciary duties to them when it attached an incorrect legal description of the property to the closing documents. The McDonalds argued that attaching an incorrect legal description constituted a breach of fiduciary duty because it violated the mortgage loan closing instructions that defined Chicago Titles' obligations as escrow agent. The McDonalds relied heavily on one portion of the loan closing instructions which required the escrow agent to attach the correct legal description, as ascertained by the title company, to the documents. The court held that the escrow agent's sole responsibility under the subsection is to obtain the correct legal description, as determined by the title company, and attach a legible copy to all the legal documents referencing the description. To conclude otherwise would convert the contractual obligation of the title company to indemnify its insured into a fiduciary duty of the escrow agent. The escrow agent would, in essence, become a second title insurer with unlimited liability.

The McDonalds further contended Chicago Title breached its fiduciary duty as escrow agent by preparing and presenting them with an affidavit signed by the sellers stating that they did not know of any other person claiming any part of the property under any color of title. Attached to the affidavit was a legal description of the property that set out the metes and bounds of the three tracts. Missing from the legal description was the portion stating that only tract 1 was owned in fee simple. The evidence shows the affidavit was prepared by Chicago Title as part of its issuance of the title insurance policy, not as part of its duties as escrow agent at the closing. Accordingly, Chicago Title could not have breached a fiduciary duty to the McDonalds through its preparation of the affidavit.

The remaining claims against Chicago Title were negligent misrepresentation, violations of the DTPA, and breach of contract. Unlike the claim for breach of fiduciary duty, these claims were not directed at Chicago Title's actions as escrow agent. The sole claim upon which the jury found Chicago Title liable to the McDonalds was their claim for negligent misrepresentation. In their second issue on appeal, the McDonalds challenge the jury's award of damages arising from the misrepresentation. The jury instructions gave the jury two measures of damages: the difference, if any, between the value of the property received in the transaction and the purchase price given, and the pecuniary loss, if any, otherwise suffered as a consequence of the McDonalds' reliance on the misrepresentation. In response to the query about the difference in value, the jury answered there was no difference between the value of the property to the McDonalds and the purchase price they paid. The jury further found, however, that the McDonalds suffered $4,658.83 in pecuniary loss as a result of the misrepresentation. The McDonalds moved for a new trial arguing that the jury's findings on misrepresentation damages were insufficient and against the overwhelming weight of the evidence.

At trial, the McDonalds presented the testimony of an appraiser who opined the value of the property without the easement to Wimbledon Court was $200,000 less than what the McDonalds paid for it. Weighing against this evidence, however, was the McDonalds' admission that they never attempted to use the easement during the time they lived on the property. Furthermore, the McDonalds were completely unaware the property did not include the easement until immediately before they lost the property to foreclosure. The absence of the easement did not contribute to either the McDonalds' failure to make their mortgage payments or their inability to sell the property. At the foreclosure, no deficiency resulted from the fact that there was no easement to Wimbledon Court. Because the absence of the easement never impacted the value of the property to the McDonalds, the court concluded the jury's finding of no damages arising from a difference in value is not against the great weight of the evidence.

Finally, the McDonalds complained that there is an irreconcilable conflict between the jury's finding that Chicago Title made a negligent misrepresentation and its failure to find that Chicago Title violated the DTPA. The material fact the McDonalds allege is central to both their negligent misrepresentation claim and their claim for violations of the DTPA is Chicago Title's erroneous statement that the property they purchased included an easement to Wimbledon Court. The jury instruction on negligent representation generally states that a negligent misrepresentation occurs when a party in the course of business supplies false information for the guidance of others and the party did not exercise reasonable care or competence in obtaining or communicating the information. Based on that definition, the jury concluded Chicago Title had made a negligent misrepresentation. The jury question on the DTPA claim asks if Chicago Title engaged in any unfair, false, misleading, or deceptive act or practice.

The agreement between the McDonalds and Chicago Title was the title insurance policy. The services Chicago Title was to render the McDonalds under the policy were title defense and indemnification. Given these instructions, the jury could reasonably conclude that the sole transaction relevant to this question was the McDonalds' purchase of the title insurance policy, not their purchase of the underlying property. There is no evidence in the record that Chicago Title made any misrepresentations about its insurance policy or the services to be provided thereunder. To the extent the erroneous title description formed a part of the insuring agreement, the policy specifically states that the agreement is not intended to be an opinion or report on the title being covered, but is merely a contract of indemnity entitling the insured to payment or other action for a loss resulting from a covered risk. The McDonalds never made a claim under the policy, and when a claim was made by the lender, Chicago Title resolved its obligations under the policy by purchasing an easement from the property to Wimbledon Court.

Home Loan Company* v. *Texas American Title Company, 191 S.W.3d 728 (Tex.App.—Houston [14th Dist.] 2006, no pet.). TATCO acted as settlement agent for the closing of a residential mortgage loan funded by Home Loan. After Home Loan sold the loan in the secondary market, no payments were made on it, and Home Loan was obligated to repurchase it. Home Loan filed suit against TATCO alleging that TATCO breached fiduciary duties it owed Home Loan by failing to inform Home Loan that the seller had requested over half of the seller's proceeds to be paid to the mortgage loan broker, by failing to inform Home Loan that the seller had requested that those proceeds be paid to the principal of the mortgage loan broker and that TATCO would comply with this request; and by failing to accurately disclose on the HUD-1 settlement statement how the proceeds would be or had been disbursed.

TATCO's asserted that its duties to Home Loan were limited to carrying out the terms of the real estate contract and escrow agreement and disclosing any actual knowledge of a scheme to defraud Home Loan. TATCO contends that it therefore had no duty to disclose the seller's funding requests to Home Loan because TATCO was required to remain strictly impartial and not favor the interest of any party to a closing over that of another; because an escrow agent has no obligation to police the affairs of the participants or report suspicious circumstances unless it has actual knowledge of a scheme to defraud; and because the request that payment be sent to Texas State Mortgage Brokers, Inc. and the actual disbursement of the escrow funds to Kruichak occurred after the loan was funded by Home Loan, and, thus, there is no evidence that TATCO's actions caused Home Loan any damage.

Even where, as in this case, no formal escrow agreement has been entered into, a title company that accepts funds for disbursement in a closing transaction for a fee owes the party remitting those funds a duty of loyalty, a duty to make full disclosure, and a duty to exercise a high degree of care to conserve the money and pay it only to those persons who are entitled to receive it.

Ordinarily, a fiduciary duty of full disclosure requires disclosure of all material facts known to the fiduciary that might affect the rights of the person to whom the duty is owed. However, there is variation among the states regarding the extent to which any such disclosure duty applies to escrow agents. Under the Restatement (Second) of Agency § 14 and in at least one state, an escrow holder's duties are limited to the safekeeping of the escrow property and its delivery or return to the appropriate party, as the case may be, in accordance with the agreement; and, thus, entail no duty of disclosure whatever unless specified by the agreement. In at least two other states, an escrow agent has no duty to disclose unless it has actual knowledge of clear evidence of fraud. A further variation followed in at least two other states is that, although not required to investigate, an escrow agent has a duty to disclose facts that a reasonable escrow agent would perceive as evidence of fraud. Finally, at least two other jurisdictions prescribe that an escrow agent owes a duty to disclose all matters coming to the agent's notice or knowledge concerning the subject of the agency that are material for the principal to know for his protection or guidance.

In seeking to establish that Texas law limits its duty of disclosure to facts involving known fraud, TATCO first relied on ***City of Forth Worth* v. *Pippen***, 439 S.W.2d 660 (Tex.1969), in which a settlement agent was found to have breached its fiduciary duties for failing to disclose a fraudulent misapplication of funds. However, because ***Pippen*** involved only a fraudulent misapplication of funds, it gives no express guidance concerning a duty of disclosure in any other context.

TATCO argued that ***Pippen*** must nevertheless be read as limiting the duty of disclosure because it also recognizes a duty of loyalty to each party in the escrow transaction, which, in turn, requires the escrow agent to remain neutral and thereby precludes it from disclosing to one party any information obtained from another if the disclosure could work to the detriment of the party from whom it was obtained. However, the duty of loyalty is mentioned in ***Pippen*** only once without any elaboration, and the opinion contains no indication whatever of any duty of neutrality, loyalty, or otherwise to any party other than the one remitting the settlement funds and paying the settlement agent's fee, much less that the agent's duty of disclosure was in any way affected by any such duties to others.

Neither ***Pippin*** or TATCO's other authorities nor any other Texas decision has directly addressed any limitation on the scope of an escrow or other settlement agent's fiduciary duty of disclosure. Nor would there be any rationale for limiting such an agent's fiduciary duties to only those set forth in a written contract because fiduciary duties arise as a matter of law, not contract, they exist in special relationships in which a high degree of trust warrants that the fiduciary's conduct be measured by higher standards than ordinary contractual dealings between parties and that those standards not be whittled down by exceptions, and contracts between fiduciaries and those to whom they owe a fiduciary duty carry a presumption of unfairness.

Lastly, TATCO urged that subjecting escrow agents to the same duty of disclosure as other fiduciaries would allow participants in failed real estate transactions to shift their losses to title companies for not disclosing information concerning the merits of the underlying transaction (such as market factors affecting the value of property, terms at which financing could have been obtained, and the like) that could have alerted a party to abandon the transaction in time to avoid the loss. However, this contention failed to recognize that a fiduciary's duties do not extend beyond the scope of the fiduciary relationship. To the extent an escrow agent is employed only to close a transaction in accordance with a contract that has already been entered into by the parties, it is not apparent how the agent's duty of disclosure could extend beyond matters affecting the parties' rights in the closing process to those concerning the merits of the underlying transaction.

In summary, contrary to TATCO's position, no Texas court (and particularly not the Texas Supreme Court) has even directly addressed, let alone affirmatively adopted, a limitation on the fiduciary duty of disclosure applicable to an escrow agent. Although courts that have addressed this issue in other states have varied in their approach, none of those decisions is binding on this court, and, regardless which of their reasoning this court might find persuasive, and it is not within this court's province as an intermediate appellate court to select the law our State will follow. Accordingly, because TATCO's motion for summary judgment did not establish that its asserted limitation on an escrow agent's (or other settlement agent's) fiduciary duty of disclosure has been adopted under Texas law, the court sustained Home Loan's challenge to that portion of the summary judgment.

Turning to Home Loan's motion for summary judgment on the fiduciary duty of disclosure, the evidence necessary to support that motion would, at a minimum, have to prove conclusively that a disclosure of the seller's request for payment to the mortgage broker was material to Home Loan's rights in the closing phase of the transaction.

Home Loan contended that, had TATCO advised it of the seller's requests to divert the loan proceeds to the mortgage broker or its principal, Home Loan could have withheld or withdrawn approval and/or funding of the loan and thereby avoided the loss it incurred on the loan's default. TATCO's motion for summary judgment asserted that Home Loan suffered no loss from the disbursement because Home Loan had already funded the loan before TATCO received or complied with the request to disburse the proceeds to Kruichak.

In a formal escrow arrangement, the deposit of funds by Home Loan would have been irrevocable, pending satisfaction of the conditions for disbursement. The parties' summary judgment materials did not address whether an escrow or other settlement agent's payment, at a seller's request, to a third party for the benefit of the seller is the legal equivalent of a payment to the seller, and thus a person entitled to receive payment, such that the payment would have complied with the conditions for disbursement. If such a payment did so comply, and if Home Loan's deposit of the loan funds, and their disbursement, was irrevocable, then Home Loan would have had no recourse to prevent the disbursement. Under those circumstances, it is not apparent how Home Loan's loss would have been caused by TATCO's disbursement of the funds according to the terms Home Loan had agreed to and could not alter after it deposited the funds. Moreover, because the underlying loan transaction was a sham, Home Loan would have suffered the resulting loss on it even if TATCO had disbursed the funds to the seller expressly named in the HUD-1.

However, because the summary judgment materials did not establish any of the foregoing legal or factual considerations, summary judgment could not properly be granted with regard to TATCO's contention of lack of damage. Therefore, the court sustained Home Loan's challenge to that aspect of the summary judgment.

PART XII
ADVERSE POSSESSION

***Tran* v. *Macha*,** 213 S.W.3d 913, 50 Tex. Sup. Ct. J. 186 (Tex. 2006). Neighboring relatives shared the use of a driveway for many years, thinking it belonged to one of them when in fact it belonged to the other.

Under Texas law, adverse possession requires an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person. The statute requires visible appropriation; mistaken beliefs about ownership do not transfer title until someone acts on them. Thus, there must be adverse possession, not just adverse beliefs.

The statute requires that such possession be "inconsistent with" and "hostile to" the claims of all others. Joint use is not enough, because "possession must be of such character as to indicate unmistakably an assertion of a claim of exclusive ownership in the occupant." Here, the neighbors shared use of the strip, so the use by the adverse claimant was not inconsistent with or hostile to the other party's ownership.

The court of appeals had held that "adverse possession need not be intentional, so long as it is visible, open, and notorious." It is true that "hostile" use does not require an intention to dispossess the rightful owner, or even know that there is one. But there must be an intention to claim property as one's own to the exclusion of all others; mere occupancy of land without any intention to appropriate it will not support the statute of limitations.

The Supreme Court concluded with a nod to Robert Frost. "It may seem harsh that adverse possession rewards only those who believe 'good fences make good neighbors,' and not those who are happy to share. But the doctrine itself is a harsh one, taking real estate from a record owner without express consent or compensation. Before taking such a severe step, the law reasonably requires that the parties' intentions be very clear."

Bernal* v. *Chavez, 198 S.W.3d 15 (Tex.App.—El Paso 2006, no pet.). In 1983, Esther and her husband Ricardo moved a mobile home onto a parcel of land in Pecos County. The land was a gift from Ricardo's parents, but no deed was ever executed. Esther and Ricardo established electric service in 1983. In addition to making improvements to the mobile home, they also made improvements to the real property, including fencing and landscaping. When Esther and Ricardo divorced in 1996, Esther was awarded the mobile home and this property that it was situated on. Esther paid the property taxes until 1996 when the statements stopped coming to her. With the exception of a six month period when she lived in Del Rio, Esther and her children lived continuously on the property. Even during that period of time, Esther returned to the property on weekends.

Manuela lived in a nearby house. She had known Esther since 1992 and was aware that she lived on the property. In 1996, Esther's former in-laws, conveyed the property in question to their daughter Adel as a gift.

On January 13, 1998, Adel deeded the property to Manuela and Manuela began paying the property taxes.

Esther lived on the property without objection until 2000, when an attorney sent her a "notice of eviction" letter informing her that Manuela owned the property. The letter demanded that she remove the mobile home and vacate the property within three days. Esther ignored the letter and continued to live on the property. No further action was taken to evict Esther until 2004.

In 2002, Manuela sold the property to the Bernals and entered into a contract for deed. When Maria told Esther sometime in 2002 that she was buying the property, Esther responded that she owned the land. In 2004, Esther filed a trespass to try title suit alleging that she had acquired the property by adverse possession. The court concluded that Esther had lawful title to and possession of the property and that she had met her burden of proof under Texas Civil Practice and Remedies Code § 16.026. Consequently, the court entered judgment awarding Esther title and possession of the property and attorney's fees.

The Bernals contended that the evidence was legally and factually insufficient to establish hostility because Esther's initial entry was permissive and she did not give the record owner notice of the claim until 2000 when she ignored the eviction notice. Adverse possession is "an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person." Texas Civil Practice and Remedies Code § 16.021(1). The test for hostility is whether the acts performed by the claimant on the land and the use made of the land were of such a nature and character as to reasonably notify the true owner of the land that a hostile claim was being asserted to the property.

The Bernals relied on the rule providing that use of another individual's land with the acquiescence of the landowner does not ripen into adverse possession unless the evidence shows that the landowner was given notice of the adverse possession claim. In other words, possession of land by adverse claimants who began their entry upon the disputed land with the acquiescence of the record owner cannot establish adverse possession unless or until they give notice of the hostile nature of their possession.

Esther testified repeatedly that her former father-in-law made a parol gift of the land and she expressly denied that she merely had permissive use of the property. The court found that this was supported by the evidence and upheld the award of title to Esther.

In another issue, the Bernals argued that the trial court erred in awarding attorney's fees to Esther. Attorney's fees are allowed in adverse possession cases "if the prevailing party recovers possession of the property from a person unlawfully in actual possession." To recover attorney's fees, the person seeking possession must give a written demand for that person to vacate the premises at least ten days before filing the claim for recovery of possession. The court held that Section 16.034 was inapplicable here.

Session* v. *Woods, 206 S.W.3d 772 (Tex.App.-Texarkana 2006, pet. denied). The fact that the adverse claimant did not receive personal service of a notice of tax sale did not render the tax sale ineffective as to his claim to the property. The adverse claimant was not a record owner of the property, and the taxing entities were not required to search on ground for trespassers who may have had interest in property.

The adverse claimant was a "defendant" in the tax foreclosure action, for purposes of the statute stating that deed issued to purchaser in tax sale vested perfect title as to any interest owned by the defendant. The adverse claimant was served by posting notice to "unknown owners and adverse claimants," and the judgment listed as defendants those parties served by posting.

PART XIII
EASEMENTS

Murphy* v. *Long, 170 S.W.3d 621 (Tex.App.—El Paso 2005, pet. denied). The Murphys and the Longs were friends. They contemplated buying property together and included a third couple, Rocky Beavers and Whit Watkins, in their plans. In 1997, the three couples purchased adjoining properties located outside of Fort Davis from The Nature Conservancy of Texas. TNC required them to agree to a "Conservation Easement" to ensure that the property would be retained predominantly in its natural and scenic condition. The easement required that roads were to be constructed in such a manner as to cause the least disturbance to the scenic beauty. The three couples also entered into a Reciprocal Easement Agreement for the right to use the road which ran from the highway across all three tracts of land to a common pen area. Initially, they operated the properties jointly and had access to some pens in a common area.

The Longs discussed with the Murphys their need for a road easement from the common pens across the Murphy land to the Longs' future homesite. The Murphys agreed to grant a written easement similar to the Reciprocal Easement Agreement. The couples discussed several potential routes and eventually agreed upon one. They also agreed to share in the cost of building the road and continued maintenance based upon the pro rata use of the road. Based upon the site chosen by the Murphys for their home, their pro rata use of the road would have been 12 percent. The Longs had the 1.03 mile road constructed using native caliche, the same material used to build the Reciprocal Easement road. The Murphys paid 12 percent of the

$10,000 it cost to construct the road based on the planned site of their home. When the Murphys later changed the location of their home site, they utilized a greater percentage of the road but did not pay the Longs any additional money. The Longs specifically relied upon the Murphys' promises to grant them a written easement and to pay their pro rata share of the road costs.

After the road was built, the Longs received written notification from TNC that the road violated the Conservation Easement. TNC's primary objection was the color of the road. Mr. Long notified Mr. Murphy of the objection. A few weeks later, the Longs submitted a written proposal to TNC to resolve the problem by reseeding the roadsides with native grasses and vegetation, and perhaps by coloring the road. The Longs subsequently built up the edges of the road and reseeded the berm edge of the roadway but did not change the color due to the substantial expense. TNC sent a letter to the Longs reflecting that it no longer had any objections to the road given the changes made. Nevertheless, the Murphys sent a letter to the Longs contending that they had agreed to the road easement based on the Longs' promise to obtain TNC approval of the road and that prior approval apparently had not been obtained. Their letter also referenced a dispute between the parties about how costs to maintain the road would be shared.

The disputes could not be resolved and the Longs ultimately filed suit alleging various tort and contract causes of action based on alleged agreements regarding the use of their properties.

The trial court awarded judgment to the Longs. It further declared that the Longs and their heirs, successors, and assigns were entitled to a road easement across the Murphy's land from the reciprocal easement to the Longs' home site.

In Issue One, the Murphys challenge the legal and factual sufficiency of the evidence to support the award of the road easement. The easement by estoppel is based on the jury's finding that the Longs substantially relied on the Murphy's promise to provide a written road easement and that their reliance was reasonably foreseeable.

The Murphys do not complain that the evidence does not support them. Instead, they focus on the absence of two findings which they claim are necessary to support the award, namely, that a written but unsigned easement existed at the time they promised to give the Longs an easement and that a vendor-vendee relationship existed between the parties.

Section 26.01 of the Texas Business and Commerce Code provides that a promise or agreement for the sale of real estate is not enforceable unless the promise or agreement, or a memorandum of it, is in writing and signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him. Likewise, the Statute of Conveyances found in Section 5.021 of the Texas Property Code provides:

A conveyance of an estate of inheritance, a freehold, or an estate for more than one year, in land and tenements, must be in writing and must be subscribed and delivered by the conveyor or by the conveyor's agent authorized in writing. The easement which the Murphys promised to grant is one which attaches to the land itself and passes with it, and thus, is an easement appurtenant to the land. As such, it is an interest in land which requires a writing to create or transfer. The Longs, however, rely on the doctrine of easement by estoppel, or estoppel in pais as it is sometimes called, to avoid the statutes of frauds and conveyances.

More than 125 years ago, the Supreme Court first articulated the rationale for the doctrine of easement by estoppel. ***Harrison & Co.* v. *Boring***, 44 Tex. 255, 267-68, 1875 WL 7685 (1875). The doctrine essentially holds that the owner of the alleged servient estate may be estopped to deny the existence of an easement by making representations that have been acted upon by the owner of the alleged dominant estate. It is grounded on the notion that justice forbids one to gainsay his own acts or assertions. Estoppel arises when one is not permitted to disavow his conduct which induced another to act detrimentally in reliance upon it.

Three elements are necessary to the creation of an easement by estoppel: (1) a representation, communicated, either by word or action, to the promisee; (2) the communication was believed; and (3) the promisee relied on the communication to his detriment.

Citing ***"Moore" Burger, Inc.* v. *Phillips Petroleum Co.***, 492 S.W.2d 934 (Tex.1972), the Murphys maintain that the jury's findings do not support the award of an easement by estoppel because the jury was not asked to--and did not--find that a written easement agreement existed at the time of the promise. Consequently, they argue that the Longs have failed to establish this exception to the statute of frauds. In ***"Moore" Burger*** the Supreme Court held for the plaintiff in finding that a promise to sign an instrument which complied with the statute of frauds allowed recovery under the promissory estoppel doctrine. The Supreme Court followed ***"Moore" Burger*** in ***Nagle* v. *Nagle***, 633 S.W.2d 796 (Tex.1982), holding that the failure to obtain a jury finding that the defendant promised to sign an instrument which complied with the statute of frauds precluded the plaintiff's recovery under the promissory estoppel doctrine. The rule developed in ***"Moore" Burger*** and Nagle has been applied in various contexts, but it has not been applied to a case involving easement by estoppel.

In ***"Moore" Burger***, the agreement at issue had numerous essential elements. In the absence of a written agreement, one or more of those elements would have to be established by parol evidence. Thus, ***"Moore" Burger*** imposed the requirement that the written agreement containing all of these elements be in existence at the time of the promise to sign. An agreement to provide a road easement is distinguishable from the agreements in the cases relied on by the Murphys. If a party agrees to provide another with an easement for a particular purpose, there are no other required elements which would have to be supplied by parol evidence. The Murphys complain that the agreement is incomplete because the parties did not reach an agreement with respect to the width of the easement, but that is not an element which would have to be supplied by parol evidence. It is a well settled rule that where the grant does not state the width of the right-of-way created, the grantee is entitled to a suitable and convenient way sufficient to afford ingress and egress to the owner of the dominant estate. What is suitable depends on the purpose of the easement. If the grant states merely the object for which the easement is granted, dimensions which are reasonably sufficient for that purpose must be inferred.

The Murphys also allege that the Longs were required to prove the existence of a vendor-vendee relationship in order to establish an easement by estoppel. The Austin Court of Appeals has held that a vendor-vendee relationship is required to establish an easement by estoppel. Although the case relied upon by the Austin Court acknowledges that applying the doctrine of easement by estoppel outside of the vendor-vendee relationship is "rare and nebulous," the Austin Court of Appeals is the only court to hold that the doctrine never applies outside of the vendor-vendee relationship. This court refused to follow the Austin rule.

Krohn* v. *Marcus Cable Associates, L.P., 201 S.W.3d 876 (Tex.App.-Waco 2006, pet. denied). The limitations period for a trespass action is two years after the day the cause of action accrues. In most cases, a cause of action accrues when a wrongful act causes a legal injury, regardless of when the plaintiff learns of that injury or if all resulting damages have yet to occur.

A cause of action for a "continuing tort" does not accrue until the defendant's tortious conduct ceases. In determining whether there is a continuing tort, care must be taken to distinguish between (1) repeated injury proximately caused by repetitive wrongful or tortious acts and (2) continuing injury arising from one wrongful act. While the former evinces a continuing tort, the latter does not. Here, the landowners alleged one wrongful act--the placement of the cable line across their property--which has been a source of continuing injury. This type of trespass is not a continuing tort.

The continuing tort doctrine also does not apply in the case of a permanent injury to real property. The presence of the cable line on the landowners' property for more than a decade clearly constituted a permanent trespass as of the time the landowners filed suit. Therefore, because the cable company committed a permanent trespass, the continuing tort doctrine does not apply.

Cleaver* v. *Cundiff, 203 S.W.3d 373 (Tex.App.-Eastland 2006, pet. denied). The doctrine of easement by estoppel, or estoppel in pais, is an exception to the statute of frauds. Under this doctrine, a landowner may be estopped from denying the existence of an easement created by "representations" upon which another has detrimentally relied. These representations may be verbal or nonverbal. Once created, an easement by estoppel is binding upon successors in title if reliance upon the easement continues.

PART XIV
RESTRICTIVE COVENANTS, SUBDIVISIONS, AND CONDOMINIUMS

Sonterra Capital Partners, Ltd.* v. *Sonterra Property Owners Association, Inc., 216 S.W.3d 417 (Tex.App.—San Antonio 2006, pet. denied). The Sonterra Property Owners Association Declaration of Covenants provides for four classes of membership: (a) Class A Members are the owners of lots for single-family residences are to be or have been constructed, (b) Class B Members are the owners of townhouse or condominium dwelling lots or units, (c) Class C Members are the owners of commercial properties, and (d) Class D Members are the owners of unplatted, developable acreage which is, or may be in the future, subjected to the Declaration.

The owners of an apartment building claimed that they were not subject to assessments because the apartment complex was not a commercial property. The owners of commercial buildings in the Sonterra subdivision are required pay their allocated share of the assessments necessary to maintain common areas and provide essential services. The primary issue in this appeal is whether, under the Declaration, an apartment complex is a commercial building because its owner's primary purpose in owning it is to generate profits or a residence because its occupants use their individual apartments for residential purposes.

The apartment owners argued that the apartment complex was not a commercial property because they are used by their occupants as residences. To support their argument to the contrary, the Owners argue the apartment complexes are not " 'commercial,' " which "is commonly defined, in relevant part, to mean 'of or relating to commerce.' " However, "commercial" has several definitions. Another definition of "commercial" is "viewed with regard to profit." In support of this argument, the owners rely exclusively on authority holding that residential use restrictions do not prohibit the construction of apartments, condominiums, and duplexes. But, noted the court, we are not dealing here with permitted uses but mandatory assessments. Holding that multi-family dwellings are residential for purposes of use restrictions does not mandate a holding that they are residential for all purposes. Indeed, in other contexts, multi-family dwellings have been considered commercial property.

Finally, the owners argued that, because the Declarations do not expressly mention multi-family rental properties, Sonterra's developer must not have envisioned this type of multi-family property at the time Sonterra was developed; therefore, the owners argue, it necessarily follows that Class C membership cannot be construed to encompass multi-family properties. But this argument is circular. It depends solely upon the definition of "commercial building." If "commercial building" as used in the Declaration includes a multi-family rental property, that type of property was envisioned.

Schecter* v. *Wildwood Developers, L.L.C., 214 S.W.3d 117 (Tex.App.—2006, no pet.). Schecter lived next door to a project that Wildwood was contemplating which was located on an arroyo. The city planning commission and city engineer approved a proposed subdivision plat for the Wildwood land and it was on its way to the city council when Schecter filed suit against the city, claiming that the proposed plat violated city ordinances, failed to meet city design criteria, and was based on fraudulent statements. Wildwood intervened and filed a plea to the court’s jurisdiction, claiming that Schecter lacked standing to maintain the suit.

For a plaintiff to have standing, a controversy must exist between the parties at every stage of the legal proceedings, including the appeal. Standing is a component of subject matter jurisdiction and is properly raised by a plea to the jurisdiction. As a general rule, standing consists of some interest peculiar to the plaintiff individually rather than as a member of the public. To establish common law standing, a plaintiff must show a distinct injury to the plaintiff and a real controversy between the parties, which will be actually determined by the judicial declaration sought. This general rule applies unless standing has been statutorily conferred upon the plaintiff. When standing has been statutorily conferred, the statute itself serves as the proper framework for analysis. If a statute provides that any citizen or taxpayer may bring an action, the plaintiff need only establish that he or she falls within one of these categories to establish standing; it is not necessary to establish an interest peculiar to the plaintiff.

The purpose of the Uniform Declaratory Judgment Act is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations. The Act does not confer jurisdiction on the trial court; it offers the remedy of a declaratory judgment for a cause of action already within the court's jurisdiction. A declaratory judgment is appropriate only if a justiciable controversy exists as to the rights and status of the parties and the controversy will be resolved by the declaration sought.

Schechter sought a declaratory judgment that (1) the subdivision application is void because it does not meet the city's design criteria; and (2) the commission's approval of the subdivision application is void because it was based on Wildwood’ fraudulent and false statements. Neither of these claims is based upon or related to Schecter's rights, status, or legal relationship under a statute, municipal ordinance, contract or franchise. Consequently, he lacks standing to seek these declarations.

Girsch* v. *St. John, 218 S.W.3d 921 (Tex.App.—Beaumont 2007, no pet.). A mobile home in question was purchased by the Girshes in 1984 and placed on their property on or about that same year. The restrictive covenants on the Girshes’ property, in effect at the time the mobile home was placed on the property stated that “No trailer house or covered trailer shall at any time be erected or placed on any lot or tract for any purpose whatsoever.” So, placement of the mobile home was a violation of the restrictions from the very beginning in 1984.

The Girshes argued that limitations had run on St. John's enforcement suit as a matter of law. St. John invoked the discovery rule, claiming she had not discovered the mobile home until 1997 or 1999 because of an overgrowth of forest or trees. With regard to St. John's invocation of the discovery rule, the Girshes note that St. John failed to establish the rule's applicability because she failed to show that the Girshes' violation was undiscoverable even when exercising reasonable diligence.

The statute of limitations for suits to enforce deed restrictions is four years. An enforcement action accrues upon breach of the restrictive covenant. The record evidence establishes the Girshes breached the restrictive covenant when they moved the mobile home onto their property in 1984.

The Texas Supreme Court noted that it has restricted the use of the discovery rule to "exceptional cases" so as to avoid defeating the purposes behind the limitations statutes. The Supreme Court has articulated two unifying principles that generally apply in discovery rule cases. They are that the nature of the injury must be inherently undiscoverable and that the injury itself must be objectively verifiable. There is no serious dispute that the injury-the Girshes' violation of the restrictive covenant--was objectively verifiable by the presence of the prohibited item (the mobile home) on the Girshes' property. The question to be decided is whether this is the type of injury that generally is discoverable by exercising reasonable diligence.

An injury is inherently undiscoverable if it is, by its nature, unlikely to be discovered within the prescribed limitations period despite due diligence. The type of injury presented in the record is the placing of a full-size mobile home (approximately 12 feet by 46 feet) on a residential lot located in the midst of a populated residential subdivision in violation of a per se prohibition against trailers on residential property for any purpose. The court was unable to hold that such a category of injury is unlikely to be discovered within the four-year limitations period with the exercise of due diligence.

The restrictive covenant in question authorizes any property owner to enforce all provisions contained therein. As an owner of property in Tall Timbers, St. John had some obligation to exercise reasonable diligence in protecting her interests. The record evidence indicates the mobile home was present in the Girshes' back yard openly, and there is no evidence of the use of artificial devices or methods to camouflage or hide it. St. John's request for application of the discovery rule would require the court to hold a full-size mobile home's presence on a residential lot in violation of a restrictive covenant, with said lot located in a highly populated subdivision, is a category of injury inherently undiscoverable even with the exercise of reasonable diligence, because of the presence of indigenous flora spontaneously growing nearby. A decision by the court favorable to St. John would mean that she had established that the category of reasonably diligent property owners would not discover the existence of a full-size mobile home on a residential lot in the midst of a populated subdivision during the four-year limitations period. The court refused to do so.

PART XV
HOMESTEAD

Norris* v. *Thomas, 215 S.W.3d 851, 50 Tex. Sup. Ct. J. 398 (Tex. 2007). In their bankruptcy, the Norrises claimed a 68-foot boat, valued at $399,000, as their homestead. The boat includes four bedrooms, three bathrooms, a galley, and an upper and lower salon. In the bankruptcy, they listed a San Antonio street address, a business postal center, in the bankruptcy petition because they receive their mail there, rather than at the marina in Corpus Christi where his boat is moored. After selling his home in Lake McQueeney, Texas in 2000, Mr. Norris had taken up permanent residence on his boat.

The bankruptcy court denied the Norrises' claim for exemption, holding that the Texas homestead exemption, even broadly construed, does not include boats. The district court agreed that language in the Texas statutes addressing homesteads indicates that the legislature intended homesteads to include only estates in land and improvements affixed to land. That court concluded that structures unattached to land, such as a boat, even if used as a debtor's primary residence, are moveable chattels and do not fall within the definition of homestead under Texas law.

Given this tension between, on the one hand, the above-quoted language in the Texas Constitution and Property Code and in other Texas Supreme Court opinions referring to the homestead estate as an estate in land, and, on the other hand, our duty to construe the Texas homestead exemption broadly and the novelty of the question presented, the Fifth Circuit was reluctant to be the first court to decide this public policy-bound state law issue. It asked Texas Supreme Court address and answer the following certified question:

> "Does a motorized waterborne vessel, used as a primary residence and otherwise fulfilling all of the requirements of a homestead except attachment to land, qualify for the homestead exemption under Article 16, §§ 50 and 51 of the Texas Constitution?"

Neither the Texas Constitution nor the Property Code defines homestead with specificity. Section 50 of article XVI of the Constitution shields homesteads from forced sale, providing generally that "[t]he homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts...." Section 51 of the Constitution, in turn, restricts the maximum size of a protected homestead, limiting rural and urban homesteads by acres of land and including any land-based improvements. The Texas Property Code resembles section 51 and likewise describes a homestead as a home or a home and business with certain acreage limitations with any "improvements thereon." Though neither of these provisions expressly exclude boats from homestead protection, they both discuss homesteads in terms of land and any improvements that sit atop the land. More specifically, when describing the scope of the protection, section 51 and the Property Code state the acreage limitation and then variably say, when describing any attached structures, "with the improvements thereon" or "with any improvements on the land" or "with any improvements thereon."

Texas's strong pro-homestead tradition pre-dates statehood, and the Republic of Texas was determined to protect homesteads from creditors. In 1886, roughly a half-century after Texas homestead laws originated, the Texas Supreme Court opined on their reach and limits. In ***Cullers* v. *James***, 66 Tex. 494, 1 S.W. 314, 315 (1886), it held that a house may be a homestead even if the owner has no proprietary interest in the land on which the house stands.

Cullers established that a house can be a homestead even if the owner has no ownership interest in the land. It also made clear that the term "improvements" as protected by article XVI, section 51 includes the residence itself. In the 121 years since ***Cullers***, the court has defined improvements to real property with greater precision, distinguishing them from mere personalty, and holding that "personalty does not constitute an improvement until it is annexed to realty."

Since ***Cullers***, courts of appeals have issued several homestead-related opinions that bear more directly on this issue, and they share a common thread: homestead protection turns not on who owns the underlying land, but on the degree to which the residence "thereon" or "on the land" is attached to it. The Supreme Court reviewed four of these pertinent cases, refusing the writ in the first and finding no reversible error in the others.

Applying precedents to the instant facts, the court held that the proper test for whether a residence attains homestead status is whether the attachment to land is sufficient to make the personal property a permanent part of the realty. Significantly, both the Constitution and the Property Code use the word "thereon" when describing any protected homestead improvements; the Constitution also stipulates "on the land," which is plainly not the same as "in the water."

Here, although Norris's dock-based connections to utilities and plumbing are like land-based utility, a boat is sufficiently distinct from a mobile home or house trailer to justify a different outcome, particularly given the Constitution's unequivocal requirement that protected improvements be on the land. Norris's boat, unlike a dwelling that is permanently affixed to land, retains its independent, mobile character even when attached to dock-based amenities because it has self-contained utility and plumbing systems and also boasts its own propulsion. Norris, in fact, traveled in the boat extensively prior to filing for bankruptcy, and he moved the boat from Port Aransas to Corpus Christi after the bankruptcy filing. Though Norris took steps to tether the boat to realty, these steps do not sufficiently alter the boat's mobile character or, apparently, prevent Norris from cruising. Thus, the court held that Norris's boat remains a movable chattel; it does not rest "thereon" or "on the land" as Texas homestead law clearly requires; it has not become a permanent part of the real estate; and it has not sufficiently attached to real property to merit homestead protection. In its view, the homestead exemption from creditors found in the Constitution and the Property Code contemplates a requisite degree of physical permanency and attachment to fixed realty--"thereon" and "on the land" constitute the operative language--that is not present in this case.

Unless and until Texas law changes, a boat can be a home, but it cannot be a homestead. Our realty-focused constitution and laws frame a homestead in terms of tracts, parcels, acres, and lots together with any land-based improvements.

In order to qualify as a homestead, a residence must rest on the land and have a requisite degree of physical permanency, immobility, and attachment to fixed realty. A dock-based umbilical cord providing water, electricity, and phone service may help make a boat habitable, but the attachment to land is too slight to warrant homestead protection.

Geldard* v. *Watson, 214 S.W.3d 202 (Tex.App.—Texarkana 2007, no pet.). In January 1976, Geldard married Wanda and moved into her house in Longview, and the two resided together at that residence. The property appears to have been Wanda's separate property and estate. Wanda and Geldard continued to reside together in the residence from their marriage in 1976 until Wanda entered a nursing home in October 2005, despite the fact that, in 1990, Wanda executed a quitclaim deed of the Timberline residence to Watson, her daughter from her earlier marriage. Geldard did not sign the deed or any other instrument to cede any right he had in the home and Geldard continued to reside alone in the house after Wanda entered the nursing home.

On November 15, 2005, Watson posted a "Notice to Vacate" on the property and gave Geldard thirty days to quit his possession of the residence. Geldard refused to leave and, on December 19, 2005, Watson filed her petition for eviction in the justice court. Geldard asserted his spousal homestead right as a defense. Wanda died during the pendency of this action.

Geldard's asserted homestead right in defense of the forcible detainer action raises an interesting question: does a homestead interest go to "the merits of title" so as to defeat jurisdiction over the forcible detainer cause of action in the justice court (and the county court or county court at law on appeal)?

Spousal homestead rights have been constitutionally guaranteed since the first constitution of the State of Texas. The Texas Family Code makes it clear that the requirement of the joining of both spouses to a conveyance of the homestead is mandatory, irrespective of the community or separate property nature of the realty constituting that homestead. For over a century's consistent caselaw, the signature of one spouse to a lien on or a conveyance of the homestead, even if separate property, may not act to the detriment of a nonsigning spouse who would benefit from the homestead right.

One spouse's conveyance of her separate property family homestead, without the joinder of the other spouse, is not void as to the conveying spouse. It is, however, inoperative against the continuing homestead claim of the nonjoining spouse.

Justice courts' limited jurisdiction forecloses its adjudication of "the merits of the title" to real property. The merits of title were called into question in this suit due to Geldard's claim of his nonjoining spouse homestead right. The question, then, is whether the homestead "right" implicates the "merits of the title."

The homestead right constitutes an estate in land. This estate is analogous to a life tenancy, with the holder of the homestead right possessing the rights similar to those of a life tenant for so long as the property retains its homestead character. The homestead estate is a vested interest. So long as a spouse continues to assert his homestead right, a conveyance without his joinder is wholly inoperative as against that nonjoining spouse. The continuing right to the homestead estate does not exist in a legal vacuum. The homestead right is asserted under the title from which it arose: the signing spouse's title to her separate property. Indeed, one court has recognized that the signing spouse retains legal title while the nonjoining spouse exercises the homestead right. On the termination of the homesteading spouse's homestead right, the legal title passes to the grantee and becomes operative. The court thus held that a nonjoining spouse exercising the homestead right to his spouse's conveyance of a separate property homestead exerts a right to possession under the granting spouse's title.

The court concluded that the determination of Watson's right to possession in her forcible detainer action necessarily required an adjudication of the merits of title between Watson (by conveyance from Wanda) and Geldard (as the claimant of a homestead right under Wanda's separate title). Thus, the justice court adjudicated the merits of title in determining Watson's right to possession in her forcible detainer action. The justice court's judgment, and the county court at law judgment on appeal, are void.

Florey v. ***Estate of McConnell***, 212 S.W.3d 439 (Tex.App.-Austin 2006, pet. denied). A lien to secure the payment of attorney's fees is not among the permissible homestead exceptions in the Texas Constitution.

PART XVI
CONSTRUCTION AND MECHANICS' LIENS

Fondren Construction Co., Inc.* v. *Briarcliff Housing Development Associates, Inc., 196 S.W.3d 210 (Tex.App.—Houston [1st Dist.] 2006, no pet.). In January 1999, Westbrook Construction contracted with BHDA to perform services at the Briarcliff Apartments. John Deere, acting as surety, filed a payment bond covering the work to be performed under the contract. Around the same time, Lubkeman contracted with Westbrook, subject to Westbrook's contract with BHDA, to perform supervisory work in an individual capacity and to perform contracting work in his capacity as owner of Fondren Construction Company. Westbrook paid Fondren initially. At some point, Westbrook stopped work, and another contractor completed the work at Briarcliff. At the time, Westbrook owed additional amounts to Fondren. After Westbrook stopped work, Fondren alleges BHDA and DPMC promised full payment of the amounts due under the contracts with Westbrook. Fondren further contends this promise encouraged it to continue work on the property for BHDA and DPMC.

In February 2000, Lubkeman filed liens against the Briarcliff property on behalf of himself and Fondren. Lubkeman testified that none of the work he performed for which he demands payment occurred after he filed the liens. In October 2000, Lubkeman sued BHDA and Westbrook. In August 2003, he amended the petition, removing Westbrook as a party to the suit, adding DPMC and John Deere as parties, and adding a cause of action on the payment bond.

Fondren contends that the payment bond is not a valid defense to either John Deere's motion for summary judgment or DPMC and BHDA's motion for judgment because the bond fails to comply with the requirements of the Property Code.

First, Fondren argues John Deere's bond does not prominently display contact information as Texas Property Code section 53.202(6) requires. John Deere issued the bond in this case in January 1999. The Legislature added subsection 6 to the statute in May 2001, and it did not take effect until September 1, 2001. The statutory contact information requirements did not exist when John Deere filed the bond; thus, no fact issue exists regarding John Deere's compliance with subsection 6.

Second, Fondren relies on section 53.202(1) of the Property Code, which requires that the penal sum of the bond be at least equal to the original contract amount. Because the penal sum sets the financial limits of the surety's obligations, it is the most material aspect of a payment bond. Here, Fondren sued John Deere on a payment bond it executed on January 11, 1999. The bond covers the contract entered into between Westbrook and Briarcliff on January 12, 1999. The original amount of the contract between Westbrook and Briarcliff is $4,224,485.00, and the amount of the payment bond issued by John Deere is $4,224,485.00--exactly equal to the amount of the contract. The contract and the bond are evidence that the bond is in a penal sum equal to the total of the original contract, and Fondren did not offer any controverting evidence. Thus, no fact issue exists regarding compliance with subsection 1 of the statute. The payment bond complied with the Property Code's requirement with respect to section 53.202(1).

As its sole ground for summary judgment, John Deere contends that Fondren cannot recover on the valid payment bond because Fondren failed to bring suit within the one year allowed by the Property Code.

An original contractor who has a written contract with the owner may furnish a bond for the benefit of claimants, such as subcontractors who are not paid for their work. The bond protects anyone with a claim perfected in a manner prescribed for fixing a lien under subchapter C of the Code. Section 53.052 allows a claimant to perfect a claim by filing an affidavit with the county clerk no later than the fifteenth day of the fourth month after the day on which the indebtedness accrues. Indebtedness to a subcontractor accrues on the last day of the last month in which the labor was performed or material furnished. A claimant may sue the surety on a bond "if his claim remains unpaid for 60 days after the claimant perfects the claim." If the bond is recorded at the time the lien is filed, the claimant must sue on the bond within one year following perfection of his claim.

Here, Fondren failed to sue on the bond within the statutorily allowed period. Fondren alleges that the work performed at Briarcliff ended in December 1999, and thus the indebtedness accrued on December 31, 1999. Fondren perfected its claim by filing affidavits with the county clerk on February 24, 2000, within the time allowed for perfection under the statute. John Deere recorded its bond on January 13, 1999; thus, Fondren had one year from February 24, 2000 to file suit on the bond. Fondren did not sue on the bond, or add John Deere as a party to the suit, until August 18, 2003, well after the time limit. Fondren argues that appellees conspired to withhold the existence of the bond despite his repeated request that they produce it. However, the bond was on file in the county records beginning January 13, 1999, before Fondren filed its liens. An instrument that is properly recorded in the proper county is notice to all persons of the existence of the instrument.

Reliance National Indemnity Company, L&T, J.V.* v. *Advance'd Temporaries, Inc., 2007 WL 1650681 (Tex. June 8, 2008). Lamar") agreed to serve as general contractor during construction of the Corpus Christi crosswinds Apartments and obtained a performance bond as its contract with the project's owner required. Thereafter, Lamar subcontracted with Cesar Gonzalez, doing business as Gonzalez Construction, who agreed to frame, drywall, and roof the apartment project. Gonzalez, however, did not have an adequate work force for the job, and therefore sought additional workers from Advance'd Temporaries, Inc.

The agreement between Gonzalez and Advance'd identified these temporary workers and specified a number of other agreements relating to temporary workers' status and benefits. Advance'd recruited and supplied more than 100 workers for Gonzalez, qualified the legal status of each worker, and completed the necessary paper work and insurance requirements. Advance'd also paid the temporary workers and their payroll taxes, invoicing Gonzalez weekly for its services.

This relationship was only a few months old when Lamar abruptly terminated Gonzalez's work. Lamar apparently paid Gonzalez all that was owed for his work, but Gonzalez failed to pay the full amount owed to Advance'd. Advance'd nevertheless took care of the temporary workers, paying them for their labor. Advance'd then gave notice of its claim under the mechanic's lien statute, which Lamar disputed. Advance'd thereupon filed an affidavit claiming a mechanic's lien. Advance'd sued Gonzalez for the balance owed under its contract after it was unable to collect from Gonzalez's or Lamar's surety bond. The Crosswinds Apartments, Lamar, and the surety were also joined in the litigation.

The trial judge held that Advance'd was not entitled to recover against Lamar's surety bond because Advance'd had not furnished labor as the mechanic's statute requires, but had simply extended credit to Gonzalez for its payroll. Advance'd appealed, complaining that it had furnished labor at the Crosswinds project under a contract with a subcontractor and was thus entitled to the benefits of the mechanic's lien statute, including a judgment against the general contractor's bond. The court of appeals agreed, reversed the trial court's judgment, and remanded the case for the trial court to determine the remaining issues regarding the validity and amount of Advance'd's claim.

Lamar and its surety, Reliance, appealed, asserting three errors. First, Reliance argued that, contrary to the court of appeals' analysis, Advance'd did not "furnish labor" on the Crosswinds project and thus was not entitled to a mechanic's lien. In a related issue, Reliance argued that the court of appeals applied an erroneous standard of review by mistakenly viewing the question of whether Advance'd "furnished labor" as a legal question rather than a fact question. Finally, Reliance complains that even if Advance'd might have been entitled to a lien, it did not timely perfect its rights, and the court erroneously failed to consider that as an alternative basis for affirming the trial court's judgment.

Relevant to the first two issues is how one qualifies under the mechanic's lien statute as a person who "furnishes labor." The statute provides, in relevant part, that a person has a lien if the person labors or furnishes labor or materials for construction or repair in this state of a house, building, or improvement and the person labors or furnishes the labor or materials under or by virtue of a contract with the owner or the owner's agent which includes contractors and subcontractors among others." Chapter 53 defines "labor" as "labor used in the direct prosecution of the work" and defines "work" as "any part of construction or repair performed under an original contract." An "original contract" is "an agreement to which an owner is a party either directly or by implication of law." These provisions led the court of appeals to conclude that Chapter 53 protects those who labor in Texas as well as those who furnish labor under contract for the benefit of an owner's construction project.

Reliance argued, however, that Advance'd did not "furnish labor" for the project because it did not control or supervise the temporary workers and was not responsible for the quality of their work. Reliance further argued that the temporary workers were Gonzalez's employees under the borrowed-employee doctrine. Under the borrowed-employee doctrine, an employee ceases to be the employee of his general employer if he becomes the borrowed employee of another.

The Supreme Court agreed with the Court of Appeals that the temporary workers were Advance'd's employees. The contract clearly identifies the temporary workers as Advance'd's employees and makes Advance'd the responsible party. Advance'd was responsible for recruiting and screening these workers. Advance'd was responsible for hiring, firing, paying and insuring them. Advance'd also had the final word on whether these workers could be exposed to certain working conditions.Clearly, Advance'd did not control the details of the work at the construction site, but that does not mean it ceased to be their employer. The borrowed-employee doctrine does not provide otherwise. The borrowed-employee doctrine is a tort doctrine that is concerned with vicarious liability and apportionment of responsibility for employees who have more than one master. The doctrine has no application here because this case is one of contract and the responsibilities are spelled out in the parties' agreement.

The nature of the temporary employment business is that clients of the temporary employment agency will direct and control the work that needs to be done; otherwise, the agency's service would have little value to the client. The contract indicated that the temporary workers were, and continued to be, Advance'd's employees and the responsibility Advance'd assumed for these workers confirms that relationship. Moreover, Advance'd retained a degree of control over these workers, requiring prior notice and agreement for certain hazardous duties, immediate notification of any injury, paid time and one-half for certain holidays, and a minimum work day of four hours per employee. Gonzalez had the right to reject any temporary worker, but he could not dismiss the worker or affect that worker's continuing relationship, if any, with Advance'd. In sum, Advance'd did not merely perform administrative services but rather assumed actual responsibility as the employer of these workers.

Reliance also attacks the court of appeals' decision from a procedural perspective, arguing that the court applied the wrong standard of review. Among the trial court's findings of fact and conclusions of law was the conclusion that Advance'd was not entitled to recover under the surety bond because it "did not perform 'labor' as that term is defined in the mechanic's lien statutes." The court of appeals reviewed this conclusion of law as a legal question, ultimately disagreeing with the trial court.

Reliance argued that the question is actually one of fact that should have been reviewed under a sufficiency of the evidence standard rather than the court of appeals' de novo approach. Appellate courts review legal determinations de novo, whereas factual determinations receive more deferential review based on the sufficiency of the evidence. What might otherwise be a question of fact becomes one of law when the fact is not in dispute or is conclusively established.

The relevant legal question here is whether the mechanic's lien statute applies to this temporary employment agency, but that determination rests on the existence of the factual basis required by the statute; i.e., whether Advance'd furnished labor to a Texas construction project under a contract with the owner or its agent. Reliance contended that some of these facts were at issue and that the court of appeals improperly substituted its view of the evidence for that of the trial court. For example, Reliance claimed that Advance'd's contract was inadequate because it did not identify the Crosswinds project as the workplace for the temporary workers. As a legal matter, the mechanic's lien statute does not require this, but more importantly, the temporary workers undisputedly did labor for the owner's agent, under contract, at the Crosswinds project. Reliance's factual dispute is therefore immaterial. Similarly, Reliance argued that Advance'd did not control the temporary workers at the construction site and thus did not furnish labor.

In the parlance of this procedural attack, Reliance's argument was that this lack of control at the work site is some evidence that Advance'd did not furnish labor. But again the factual dispute is immaterial. Gonzalez's control over the work site did not contradict or supplant the terms of the contract and was not evidence material to the employment question or to the relationship between Advance'd and its employees.

The court of appeals, however, proposed a seven-factor test, gleaned from other jurisdictions, that it submits as a generic aid for determining when a party has "furnished labor." The Supreme Court did not adopt that test. Although these "factors" might be relevant for determining employee status in general, balancing them against one another is not the answer to the legal question posed here. Whether Advance'd "furnished labor" and is therefore entitled to a mechanic's lien depends on its relationship to the workers. Because the evidence conclusively establishes that Advance'd was the employer, and was the party responsible for the worker's pay and related benefits, the court of appeals did not err in its legal conclusion that Advance'd was entitled to a mechanic's lien.

TA Operating Corporation* v. *Solar Applications Engineering, Inc., 191 S.W.3d 173 (Tex.App.—San Antonio 2006, pet. pending). Solar was the contractor building a multi-use truck stop for TA Operating. When everyone agreed that the project was substantially complete, TA sent Solar a punch list of items to be corrected or completed. Solar disputed several items on the list and delivered a response to TA listing the items Solar would correct, and listing the subcontractor responsible for each item. Solar began work on the punch list items and filed a lien affidavit against the project. TA understood the lien affidavit to be a request for final payment.

Shortly thereafter, TA sent notice to Solar that Solar was in default for not completing the punch list items, and for failing to keep the project free of liens. TA stated in the letter that Solar was not entitled to final payment until it completed the remainder of the punch list items and provided documentation that liens filed against the project had been paid. TA ultimately sent Solar a letter of termination citing Solar's failure to complete the punch list items as grounds for termination. In its reply letter, Solar disputed that the termination was for cause. Solar acknowledged at least two items on the punch list had not been completed, and submitted a final application for payment in the amount of the unpaid retainage. TA refused to make final payment, however, contending that Solar had not complied with section 14.07 of the contract, which expressly made submission of an all-bills-paid affidavit a condition precedent to final payment.

Although Solar did not comply with this condition precedent to final payment, Solar sued TA for breach of contract under the theory of substantial performance. Solar did not dispute that the liens existed, nor did it dispute that it was contractually obligated to submit an all-bills-paid affidavit as a condition precedent to final payment.

The first issue on appeal was whether the doctrine of substantial performance excuses the breach of an express condition precedent to final payment that is unrelated to completion of the building. TA acknowledged that Solar substantially performed its work on the project, but contends its duty to pay was not triggered until Solar pleaded or proved it provided TA with documentation of complete and legally effective releases or waivers of all liens filed against the project. TA argued that Solar's failure to plead or prove that it fulfilled this condition precedent to final payment barred its right to recover final payment. TA contended that when the parties have expressly conditioned final payment on submission of an all-bills-paid affidavit, the owner's duty to pay is not triggered until the contractor pleads or proves it complied with the condition precedent.

The issue of whether the doctrine of substantial performance applies in construction contracts when the submission of an all-bills-paid affidavit is an express condition precedent to final payment has not yet been decided by a Texas court.

While the common law did at one time require strict compliance with the terms of a contract, this rule has been modified for building or construction contracts by the doctrine of substantial performance. The rule of substantial performance is an equitable doctrine adopted to allow a contractor who has substantially completed a construction contract to sue on the contract rather than being relegated to a cause of action for quantum meruit.

The doctrine of substantial performance recognizes that the contractor has not completed construction, and therefore is in breach of the contract. Under the doctrine, however, the owner cannot use the contractor's failure to complete the work as an excuse for non-payment. Substantial performance is regarded as a condition precedent to a contractor's right to bring a lawsuit on the contract.

Solar argued that by agreeing substantial performance occurred, TA acknowledged that Solar was in "full compliance" with the contract and any express conditions to final payment did not have to be met. Solar argued that TA may not expressly provide for substantial performance in its contract and also insist on strict compliance with the conditions precedent to final payment.

The court disagreed. While the substantial performance doctrine permits contractors to sue under the contract, it does not ordinarily excuse the non-occurrence of an express condition precedent. The substantial performance doctrine ordinarily applies to constructive conditions precedent and not to express conditions precedent--substantial performance by the builder is a "constructive condition" of the owner's duty to pay.

TA, seeking protection from double liability and title problems, expressly conditioned final payment on Solar's submission of an all-bills-paid affidavit. Solar did not dispute that it was contractually obligated to submit the affidavit as a condition precedent to final payment, and it was undisputed at trial that liens had been filed against the project. Though the doctrine of substantial performance permitted Solar to sue under the contract, Solar did not plead or prove that it complied with the express condition precedent to final payment. Had Solar done so, it would have been proper to award Solar the contract balance minus the cost of remediable defects. While harsh results occasioned from Solar's failure to perform this express condition precedent, the court recognized that parties are free to contract as they choose and may protect themselves from liability by requesting literal performance of their conditions for final payment. The parties agreed to the conditions for final payment, and Solar did not plead or prove it performed the condition precedent of submitting an all-bills-paid affidavit.

PART XVII
AD VALOREM TAXATION

Woodside Assurance, Inc.* v. *N.K. Resources, Inc., 175 S.W.3d 421 (Tex.App.—Houston [1st Dist.] 2005, no pet.). Just before the tax foreclosure, Gibbs sold the property to NKR. At the tax foreclosure, NKR's owner bought the property. The tax foreclosure, held in 2003, generated excess funds, which were held in the court registry. NKR filed a petition to withdraw the funds, based on its status as a former owner of the property.

Woodside also filed a petition to withdraw the funds. To support its entitlement to the excess proceeds, Woodside relied on a deed of trust that it had acquired from J-Hawk Corporation (J-Hawk). J-Hawk had previously received a promissory note from Gibbs that was secured by a deed of trust on the subject property. The promissory note had a final maturity date of March 1, 1995. On October 19, 1994, J-Hawk transferred its interest in the note and deed of trust to Woodside. The trial court awarded the funds to NKR. Woodside argued that the funds should have been paid to it because it had a higher priority than NKR.

Chapter 34 of the Property Tax Code contains the procedures for tax sales and redemptions. Proceeds of a tax sale are applied first to costs, fees and commissions associated with the tax suit and the tax sale, then to taxes, penalties, and interest and other expenses and amounts awarded under the judgment. Excess proceeds are paid to the clerk of the court issuing the warrant or order of sale. The clerk must keep the proceeds for two years. A person may file a petition setting forth a claim to the excess proceeds. The petition must be filed before the second anniversary of the date of the sale of the property. If no claimant establishes entitlement to the proceeds within the period provided by section 34.03(a), that is, two years from the date of the sale, the clerk must distribute the excess proceeds to the taxing units that participated in the sale.

Section 34.04 provides that the trial court must order that the excess proceeds be paid according to the following priorities to each party that establishes its claim to the proceeds:

(1) to the tax sale purchaser if the tax sale has been adjudged to be void and the purchaser has prevailed in an action against the taxing units under Section 34.07(d) by judgment;
(2) to a taxing unit for any taxes, penalties, or interest that have become due or delinquent on the subject property subsequent to the date of the judgment or that were omitted from the judgment by accident or mistake;
(3) to any other lienholder, consensual or otherwise, for the amount due under a lien, in accordance with the priorities established by applicable law;
(4) to a taxing unit for any unpaid taxes, penalties, interest, or other amounts adjudged due under the judgment that were not satisfied from the proceeds from the tax sale; and
(5) to each former owner of the property, as the interest of each may appear.

NKR argued at the trial court and argues on appeal that Woodside's lien, on which it relied to recover the excess proceeds, is void pursuant to section 16.035(d) of the Texas Civil Practice and Remedies Code which states that a person must bring suit for the recovery of real property under a real property lien or the foreclosure of a real property lien not later than four years after the day the cause of action accrues. When there is no recorded renewal or extension, the maturity date stated in the original instrument is conclusive evidence of the maturity date of the debt. Four years from that date, it is conclusively presumed that the lien debt is paid. The effect of such a conclusive presumption of payment, like the effect of actual payment, is to terminate the superior title retained by the vendor and, consequently, to terminate all remedies for the enforcement of such superior title. A bona fide third person is entitled to the statutory presumption that the debt was paid and that the lien became void and ceased to exist.

The deed of trust, on which Woodside relied for its entitlement to the excess proceeds, matured on March 1, 1995. Thus, pursuant to section 16.035(d), the lien on the deed of trust became void on March 1, 1999. Woodside could recover on its real property lien no later than four years after the cause of action accrued. Accordingly, Woodside's lien became void on March 1, 1999. Without a valid lien to support its motion to withdraw, Woodside had no entitlement to the excess proceeds.

Woodside responds that NKR cannot rely on the statute of limitations because NKR was not in privity with the debtor, Gibbs. Woodside reasons that Bhagia bought the property and that only he should have been allowed to collect the excess proceeds according to the Code's priority schemes. The court agreed.

First, NKR was in privity with Gibbs. NKR bought the property from Gibbs prior to the tax foreclosure sale. Second, the tax foreclosure purchaser did not qualify to recover any of the excess proceeds pursuant to the priority rules in the Property Tax Code. Rather, under the present facts, only the former owners of the property--NKR or Gibbs--had the potential right to recover the excess proceeds.

Woodside next argues that the debt is not destroyed; only an action to recover the debt is barred by limitations. Although the debt may not be destroyed, for the creditor to receive payment, the debtor would have to make a new promise. This principle is also known as a moral obligation. Whether NKR may have a moral obligation to repay Woodside, however, is irrelevant to the issue before this Court because the Property Tax Code sets out the procedure for entitlement to excess proceeds. Because Woodside does not have a valid lien, the trial court properly awarded the entirety of the excess proceeds to NKR.

ABN AMRO Mortgage Group v. TCB Farm and Ranch Land Investments, 200 S.W.3d 774 (Tex.App.—Ft. Worth 2006, no pet.). The owners refinanced their house with ABN. By mistake, the ABN deed of trust was not recorded for more than a year after closing. During that year, the owners fell behind in their tax payments. In order to come up with the funds to pay the taxes, the owners borrowed from Genesis Tax Loan Services and, in connection with that loan, executed a deed of trust and an affidavit authorizing transfer of tax lien. The deed of trust was recorded shortly before the ABN deed of trust. The owners defaulted on the tax loan, so Genesis foreclosed on its transferred tax lien. TCB purchased at the foreclosure sale. After the foreclosure sale, ABN sent notice to TCB that it was exercising its right to redeem under Section 32.06 of the Texas Tax Code. TCB and Genesis refused the redemption offer, so ABN sued.

ABN sought to rescind the foreclosure sale deed to TCB and to confirm ABN's right as secured lienholder to redeem the property from TCB pursuant to Section 32.06(i) of the tax code or, alternatively, to declare that ABN holds an equitable and to order sale to foreclose on that lien. TCB asserted a counterclaim to quiet title to the property and to declare it the owner free and clear of ABN's lien.

On January 1 of each year, a tax lien attaches to property to secure the payment of all taxes, penalties, and interest ultimately imposed for the year on the property. An owner of real property may authorize another person (the "transferee") to pay taxes imposed by the taxing unit. When the transferee pays the taxes, the tax collector certifies that the taxes have been paid by the transferee and that the tax lien has been transferred to the transferee. To be enforceable, the transferred tax lien must be recorded. The transferee or any successor in interest is entitled to foreclose on the lien. However, the statute provides the owner and the holder of a first lien with the right to redeem the property from the purchaser at the tax sale.

In its first issue, ABN argues that under a liberal interpretation favoring rights of redemption, as required by Texas law, its lien is the "first lien" under Section 32.06(i) of the tax code even though its lien was not filed of record when the tax lien was transferred to Genesis, and that it thus had the right to redeem the property upon foreclosure. Under TCB's interpretation of the statute, which was accepted by the trial court, the term "first lien" under the statute means first recorded lien so that, when the Genesis's lien was recorded first, it took priority over ABN's lien, making its lien the senior or "first lien," and ABN's lien was relegated to junior lien status with no right of redemption under Section 32.06(i).

Section 32.06(i) does not define the term "first lien." However, when a statute is clear and unambiguous, a court "should give the statute its common meaning." When language in a statute is unambiguous, a court will seek the intent of the legislature as found in the plain and common meaning of the words and terms used.

The court disagreed that ABN's prior lien was required to be recorded first in order to be a "first lien" entitling ABN to exercise the right of redemption under § 32.06(i). Holding that the term "first lien" as used in the statute refers only to a lien recorded prior to filing of the transfer tax lien would obviously require us to insert the word "recorded" not contained in the statute. Moreover, TCB does not explain how the statutory intent would be effectuated by restricting the right of redemption based upon timing of recordation as between the transferee of the tax lien (Genesis, in this instance) and the existing lienholder. TCB next argues that priority is nevertheless determinative because, under established Texas law, ABN's lien became a junior lien once Genesis's lien was recorded first. Under this theory, ABN's lien was extinguished when Genesis foreclosed, thereby still precluding ABN from asserting the rights of a first lienholder to redemption under Section 32.06(i). TCB relies upon the well-established law that, when a senior lienholder forecloses on property subject to its lien, all junior lienholders are divested of title to the property and their liens extinguished, so that the purchaser at the sale takes free of any junior lienholder claims. But those cases and that principle do not address rights of redemption. Priority of liens as between claimants does not affect the applicability of a right of redemption as between an existing lienholder and a purchaser at a tax sale.

Additionally, the principle of lien priority based upon time of filing does not apply to a tax lien. A lien for ad valorem taxes imposed by state, county, or city taxing units in Texas is perfected upon attachment on January 1 of each year without further action by the taxing authority. Therefore, a tax lien for the 2002 ad valorem taxes attached and was perfected on the Fleckensteins' property as of January 1, 2002. Such a tax lien is always senior to and has priority over other liens. This is so regardless of whether it is timely filed by the taxing authorities.

Finally, TCB argues that, because ABN had not recorded its deed of trust when the tax lien was transferred to Genesis, ABN's lien was void as to Genesis because nothing in the record indicates Genesis had notice of ABN's prior lien at that time. TCB relies on Section 13.001(a) of the property code providing an unrecorded deed is "void" as to a subsequent creditor who extends its loan and acquires its lien without notice of the earlier lien. But the record affirmatively establishes the contrary, that Genesis had full knowledge by virtue of the statute and as expressly stated in Genesis's deed of trust that the interest it was acquiring from the Denton County tax authority, in return for its agreement to pay the delinquent taxes, was merely a transfer of the tax lien and was subject to the statutory rights of redemption of the owner and first lienholder. Nor was TCB a bona fide purchaser. ABN had recorded its deed of trust before the foreclosure and sale to TCB, and the notice of sale listed ABN as lienholder. Additionally, a purchaser at a tax sale buys with full knowledge that his title may be defeated by redemption.

Harris County Appraisal District* v. *Pasadena Property LP, 197 S.W.3d 402 (Tex.App.—Eastland 2006, pet. denied). To stay within environmental laws while producing ethylene oxide and ethylene glycol, Pasadena Property installed pollution control equipment at its plant. Prior to tax year 2004, Pasadena Property had a statutory exemption under Section 11.31 of the Tax Code for that property. Tex. Tax Code Ann. § 11.43(c) (Vernon Supp.2005) provides that, once the Section 11.31 exemption is granted, the taxpayer need not claim the exemption in subsequent years; the exemption applies to the property until the ownership of the property changes or the taxpayer's "qualification for the exemption changes."

HCAD's chief appraiser determined that Pasadena Property's qualification for the exemption changed for the year 2004 and canceled the exemption. However, the chief appraiser failed to deliver written notice of the cancellation as required by Section 11.43(h) of the Tax Code. Pasadena Property did receive a tax bill which provided notice that the exemption had been canceled and that HCAD appraised the property at $185,130. Pasadena Property timely filed a notice of protest with the appraisal review board. In its hearing affidavit, Pasadena Property asserted only that the "value for this property is exempt." Pasadena Property was granted a hearing before the appraisal review board on July 20, 2004. The appraisal review board denied the Section 11.31 exemption but lowered the appraised value to $180,000. Pasadena Property timely filed an appeal to the district court.

Under the facts of this case, HCAD had jurisdiction for the chief appraiser to cancel the pollution exemption. The question is the effect of the chief appraiser's failure to send notice of his cancellation to Pasadena Property. Viewing the issue as one of due process, HCAD's argument implicitly assumes that it had jurisdiction to cancel the exemption. HCAD argues that Pasadena Property waived its claim of lack of notice under Section 11.43(h) by filing its Section 41.41(9) protest and voluntarily appearing before the appraisal review board. According to HCAD, Pasadena Property was afforded due process when it contested the removal of the exemption before the appraisal review board in a hearing where it obtained a ruling. HCAD concedes that Pasadena Property exhausted its administrative remedy with the appraisal review board and that the district court had subject matter jurisdiction of its appeal.

A chief appraiser's failure to provide the notice to a taxpayer required by Section 11.43(h) makes his cancellation of the Section 11.31 ad valorem exemption voidable, not void, because a taxpayer must be afforded an opportunity to protest the cancellation. The collection of a tax constitutes a deprivation of property; therefore, a taxing unit must afford a taxpayer due process by giving notice to the taxpayer and a fair opportunity to be heard before that deprivation occurs. The lack of notice did not make the chief appraiser's cancellation a void act. Notice is a procedural requirement that does not affect the appraisal district's jurisdiction. If the cancellation were a void act, then judgments in tax proceedings would be subject to collateral attack years later. Pasadena Property waived its claim of lack of notice under Section 11.43(h) by filing its protest of the loss of the exemption pursuant to Section 41.41(9) and voluntarily appearing before the appraisal review board. Likewise, the notice requirement of Section 11.43(h) of the Tax Code is mandatory, but failure to satisfy it does not deprive courts of subject matter jurisdiction. The key issue is whether a taxpayer is afforded due process so that the taxpayer has an opportunity to protest a cancellation of its ad valorem exemption. If a taxpayer is given an opportunity to be heard before an appraisal board at some state of the proceedings, then the requirements of due process are satisfied.

Citizens Nat. Bank* v. *City of Rhome, 201 S.W.3d 254 (Tex.App.-Fort Worth 2006, no pet.). Fuel dispensers, mounted and installed on concrete islands with the owner's intent that they would remain there permanently, were realty, not personalty, and constituted improvements. They were not subject to sale pursuant to tax warrant regarding delinquent personal property ad valorem taxes.

Reinmiller* v. *County of Dallas, 212 S.W.3d 835 (Tex.App.—Eastland 2006, pet. pending). When Reinmiller made a payment with respect to delinquent taxes, penalties, and interest, he sent a letter instructing the tax collector to apply the payments first to the "base tax" amount (i.e., the taxes as opposed to interest and penalties). Reinmiller testified that he wanted to pay the "base tax" first to "stabilize the interest" and to prevent the interest from increasing. The tax collector didn't do so. The policies and procedures for applying payments to delinquent accounts specify that penalties and interest begin to accrue when an account becomes delinquent and that the percentage of penalty and interest increases as the account remains delinquent. When the taxpayer makes a payment, the penalty and interest is subtracted from the total payment, and the base tax is reduced accordingly. The penalty and interest would then continue to accrue on the unpaid balance. Frier stated that a taxpayer cannot direct that a payment only be applied to the base tax.

Reinmiller argued that the debtor has the right to direct the application of his payments and that the doctrine of accord and satisfaction applies because the tax collector accepted his payments with the designation for application. He cited ***City of Houston* v. *First City***, 827 S.W.2d 462 (Tex.App.-Houston [1st Dist.] 1992, writ denied), as authority, which, indeed, held just as Reinmiller argued. Unfortunately for him, after that case, the legislature enacted Tax Code § 31.073, which provides that "A restriction or condition placed on a check in payment of taxes by the maker that limits the amount of taxes owed to an amount less than that stated in the tax bill is void unless the restriction or condition is authorized by this code." So Reinmiller was not allowed to direct the payment in a way that would limit his tax liability.

PART XVIII
CONDEMNATION

State of Texas* v. *Delaney, 197 S.W.3d 297, 49 Tex. Sup. Ct. J. 557 (Tex. 2006). In this inverse condemnation case, the owner of raw land recovered a judgment for 90 percent of the property's value based on alleged impairment of access. A few months after the court of appeals affirmed, the Supreme Court held in ***County of Bexar* v. *Santikos*** that when a tract has "no businesses, homes, driveways, or other improvements of any kind," an impairment claim cannot be sustained on the basis that "someday a developer might want to build a driveway at the single most difficult and expensive location on the entire property." 144 S.W.3d 455, 460-61 (Tex.2004). Based on that reasoning, the Supreme Court reversed the portion of the court of appeals' judgment that affirmed the impairment claim here.

The Delaneys' land abutted a tract of land known as Parcel 9 that was previously acquired by the State for the purpose of serving I-45 in a number of ways. The landl was undeveloped. Skirting the edge of Parcel 9 was a road, called the Connector Road, which connected to I-45. In 1998, the State demolished the Connector Road for safety reasons. The Delaneys sued the State for inverse condemnation, arguing the removal of the Connector Road resulted in substantial and material impairment of access to their property, a compensable taking under the Texas Constitution.

Texas has long recognized that property abutting a public road has an appurtenant easement of access guaranteeing ingress to and egress from the property. Under the Texas Constitution, a compensable taking has occurred if the State materially and substantially impairs access to such property.

The Delanys first argue their property, abutting the Connector Road, had such an easement guaranteeing access to that specific road. The court disagreed. In Texas, easements of access do not guarantee access to any specific road absent a specific grant. The Delanys next argue the 1965 Petition for Condemnation granted them access to a specific road. Petitions for condemnation can preserve easements of access for the remaining property of those owners whose land has been condemned. The Court held that the condmentation petition did not grant access to a specific road, but that the Delaneys had a general access easement to their land.

Having determined that, the Delaneys would have a compensable claim if the destruction of the Connector Road substantially and materially impaired access to their property. The trial court found the proposed driveways left "the property with an unsuitable means of access to serve its intended purpose or highest and best use." The intended purpose, the trial court found, was unspecified "commercial." But while condemned property may be appraised at its highest and best use, remaining property on which there are no improvements and to which reasonable access remains, is not damaged simply because hypothetical development plans may have to be modified. The Delanys are entitled only to reasonable access, not the most expansive or expensive access their planners might design.

Wells Fargo Bank Minnesota, N.A.* v. *North Central Plaza I, L.L.P., 194 S.W.3d 723 (Tex.App.—Dallas 2006, no pet.). NCPI owned some land and a building on Central Expressway in Dallas. Wells

Fargo held the mortgage on the property. Before NCPI bought the property, a condemnation was commenced for a taking of a part of the property to build the High Five interchange at LBJ and Central in North Dallas. NCPI was joined in the condemnation and filed an objection to the jurisdiction and to the amount of the award.

NCPI defaulted on its loan. Wells Fargo foreclosed and ended up with the property and a sizeable deficiency. It then intervened in the condemnation case to protect its rights to the award. Both NCPI and Wells Fargo claimed the right to the award. The trial court held that NCPI was entitled to the award.

Wells Fargo contends the trial court erred in its determination that NCPI was entitled to the condemnation proceeds. Specifically, Wells Fargo contends that the proceeds were trust property that it acquired through the foreclosure sale. Neither NCPI nor Wells Fargo contend that the deed of trust is ambiguous. The parties disagree over the interpretation of certain provisions contained in the deed of trust.

Pursuant to the definition of the "Trust Property" (i.e., the property covered by the Deed of Trust), if the High Five condemnation of does not result in a decrease in the property's value, then, NCPI retains the award. On the other hand, if the High Five Condemnation results in a decrease in the property's value, then the award is part of the trust property. Upon default under the non-recourse deed of trust note, the lender may sell the property through foreclosure. Pursuant to the terms of the deed of trust, a foreclosure sale operates to "divest all the estate, right, title, interest, claim and demand whatsoever, whether at law or in equity, of Trustor in and to the properties and rights so sold, and shall be a perpetual bar both at law and in equity against Trustor and against any and all persons claiming or who may claim the same, or any part thereof from, through or under Trustor."

NCPI claimed that the condemnation provision in the deed of trust, which provided that condemnation awards would be paid to the borrower, controlled over this definition, but the court noted that the definition applied to the specific High Five condemnation and the condemnation provision applied to other condemnation actions arising after the date of the deed of trust.

NCPI then argued that the court's holding rendered the definitional provision meaningless, since a condemnation would always result in a decrease in the value of the property. The court disagreed. A condemnation does not necessarily result in a decrease in the value of the property. Where a property's value actually increases after a portion of the property has been condemned, the owner is still entitled to an award equal to the market value of the property taken. When only a portion of property is taken, the constitution requires adequate compensation both for the part taken and severance damages, if any, to the remaining property. Because the undisputed evidence showed that the property's value did, in fact, decrease, the trial court erred in its determination that NCPI was entitled to the Condemnation proceeds.

PART XIX
MISCELLANEOUS

Shaw* v. *Palmer, 197 S.W.3d 854 (Tex.App.—Dallas 2006, no pet.). Shaw began working as a legal assistant/paralegal for Palmer, an attorney. Shaw stopped working for Palmer. Shaw claimed she was fired and has filed two claims with the Texas Workforce Commission, both of which were denied, and one of which she appealed to the county court. Thereafter, Shaw filed this suit alleging breach of contract, misrepresentation, perjury and harassment, intentional infliction of emotional distress, and defamation. In her petition, Shaw alleged that Palmer defamed her by making statements to the effect that Shaw was incompetent, crazy, and was attempting to ruin his business. The only statement in question on this appeal was that Palmer had told a former employee that Shaw was "crazy." Following a bench trial, the trial court found that while the term "crazy" is sometimes used in a "benign or joking connotation," its common and ordinary meaning is that a person is mentally unbalanced. After considering the circumstances surrounding the complained-of statement, the trial court found that it was "substantially untrue and injurious" to Shaw's reputation.

Slander is a defamatory statement that is orally communicated or published to a third person without legal excuse. A statement is defamatory if the words tend to injure a person's reputation, exposing the person to public hatred, contempt, ridicule, or financial injury. An essential element of defamation is that the alleged defamatory statement be a statement of fact rather than opinion. Expressions of opinion may be derogatory and disparaging. Nevertheless they are protected by the First Amendment of the United States Constitution and by article I, section 8 of the Texas Constitution. The question of whether a statement is an assertion of fact or opinion is a question of law.

The use of the term "crazy" does not, in its common usage, convey a verifiable fact, but is by its nature indefinite and ambiguous. Rather, it is a loose and figurative term employed as a metaphor or hyperbole. As such, it is an expression of opinion absolutely protected by the First Amendment and article 8, section I.

The court pointed to a line of authority on this matter. See ***Lieberman* v. *Fieger***, 338 F.3d 1076, 1081 (9th Cir.2003) (attorney's comments that psychiatrist was "Looney Tunes," "crazy," "nuts," and "unbalanced" protected under First Amendment as statements of opinion); ***Weyrich* v. *The New Republic, Inc.***, 235 F.3d 617, 624 (D.C.Cir.2001) (statement that plaintiff "suffered from bouts of pessimism and paranoia" was protected opinion because it was employed in its popular, not clinical sense); ***Estate of Martineau* v. *ARCO Chem. Co.***, 203 F.3d 904, 914 (5th Cir.2000) (statement that former employee was "insane, delusional, and irrational" not actionable slander). Because Palmer's statement that Shaw was "crazy" did not imply an assertion of fact, but rather was used in its popular sense, the statement was an expression of opinion, not a statement of fact, and therefore the trial court erred by concluding it was actionable slander.