CASE LAW UPDATE

Presented by

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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

CASE UPDATE

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PART I
MORTGAGES AND FORECLOSURES

Myrad Properties, Inc.* v. *LaSalle Bank National Association, 252 S.W.3d 605 (Tex.App.—Austin 2008, pet. pending). Myrad financed two apartment complexes in Killeen with a loan.. The deed of trust contained two property descriptions, one for each parcel of land. The deed of trust also covered improvements, fixtures, personal property, and various other rights and interests related to the land. LaSalle acquired the loan.

Myrad subsequently defaulted. LaSalle's lawyer sent Myrad a notice of default, demand for immediate cure and notice of intent to accelerate the indebtedness due under the note. This document referenced the correct book, page number and date of the recorded deed of trust, covering the real and personal property more particularly described therein and referenced the two apartment complexes by name and noting the street addresses of each apartment complex. Myrad admitted that it received this notice of default and was aware that it referenced both parcels. Later, the lawyer sent Myrad a notice of acceleration of the indebtedness due under the note. As with the notice of default, this document referenced the correct book, page number and date of the recorded Deed of Trust and the names and street addresses of the two complexes Myrad admitted receiving this document and was aware that it referenced both parcels.

LaSalle then filed an Appointment of Substitute Trustees and Notice of Substitute Trustee's Sale and mailed a copy to Myrad. The documents referenced the correct recording information and stated that the property covered by the documents was "The real property described on Exhibit A attached hereto and made a part hereof for all purposes, together with all improvements and personal property described in the Deed of Trust. Unfortunately, the Exhibit A attached to the Appointment and the Notice of Substitute Trustee's Sale included a legal description of only one of the apartment complexes.

The substitute trustee attended and foreclosed the properties. At the sale, he read the notice and the recording information on the deed of trust, but read out loud only the metes and bounds of the one property described in the Notice. LaSalle was the only bidder and it bid its entire indebtedness. The substitute trustee executed a Substitute Trustee's Deed, that purported to convey the "Property," again defined as "[t]he real property described on Exhibit A attached hereto and made a part hereof for all purposes, together with all improvements and personal property described in the Deed of Trust." As with the Notice of Substitute Trustee's Sale, Exhibit A to the Substitute Trustee's Deed contained only a legal description of the one parcel. This deed was recorded on the same day.

Myrad took the position that the sale covered only the one parcel, that the bid extinguished the entire debt, and that it continued to own the other parcel free and clear. LaSalle filed a Correction Substitute Trustee's Deed, this time attaching both property descriptions.

A notice of a foreclosure sale must provide a description or other identification of the property to be sold. Myrad's position was that the Notice of Substitute Trustee's Sale gave no notice complying with the Deed of Trust and Property Code § 51.002 that the second parcel would be sold. But the Notice of Substitute Trustee's Sale also included the following statement: "The Deed of Trust may encumber

both real and personal property. Notice is hereby given of Holder's election to proceed against and sell both the real property and any personal property described in the Deed of Trust in accordance with the Holder's rights and remedies under the Deed of Trust and Section 9.604 of the Texas Business and Commerce Code." According to the court, these statements unequivocally notify the reader that LaSalle would be proceeding against and selling the real property and any personal property described in the Deed of Trust. The real and personal property described in the Deed of Trust included both apartment complexes, and any improvements, fixtures, personal property, and various other rights and interests related to them. Other portions of the Notice of Substitute Trustee's Sale provide detailed information regarding the Deed of Trust, including where it was recorded. These components of the Notice of Substitute Trustee's Sale provide notice sufficient under the Deed of Trust and section 51.002 that both parcels would be sold.

Myrad insists that any reader put on inquiry notice by the notice's cross-references to the Deed of Trust would review that instrument and ascertain that it permits LaSalle to sell for cash or upon credit the Property (defined therein as both apartments complexes) or any part thereof at one or more sales, as an entity or in parcels. From this, Myrad suggests, a reasonable person would conclude that LaSalle was foreclosing on only the described parcel. However, the fact that LaSalle had the right to partially foreclose that Property-or to foreclose on all of that Property, for that matter-would imply nothing about which of these remedies it had elected. That information would instead come from the notice itself, which advised the reader that LaSalle would sell the real property and any personal property described in the Deed of Trust.

The problem with the Notice of Substitute Trustee's Sale, in other words, is not the absence of any notice that both the apartments would be sold, but that the notice is internally inconsistent regarding what property would be sold. Texas courts have not regarded similar inconsistencies in foreclosure sale property descriptions to be fatal.

A foreclosure sale may also be rendered invalid based on affirmative acts by the mortgagee that deter or "chill" bidding and adversely affect the sale price. Myrad appears to assert such a theory, contending that erroneous property description would have confused or deterred any prospective bidders interested in purchasing both the apartments. At least one court has held that, under Texas law, a similar under-inclusion of property in a notice of foreclosure sale could be actionable under such a theory. But, while the court concludes that the inconsistent property description incorporated into the Notice of Substitute Trustee's Sale is the sort of irregularity in the foreclosure process that could potentially have some propensity to confuse or deter potential bidders interested in purchasing both the apartments, for the substitute trustee's sale of both parcels to be invalid under a "chilled bidding" theory, however, Myrad also had the burden of proving that (1) the price or consideration received in the sale was grossly inadequate, and (2) such inadequacy was caused by the complained-of irregularity. It had not done so.

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

Based on these allegations, Lewis asked

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

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

Lewis argues that the insurance proceeds were not properly used because the house was not repaired or restored. She alleges Wells Fargo simply built another house on the property that in many important respects is inferior to the original one. The court held that this issue is a part of Lewis' contractual cause of action that was severed; it does not affect the ownership of the property. The parties' contract authorized the lender to determine whether to credit the note or repair or restore the property. The lender did restore the house that burned; whether Lewis is entitled to recover based on her allegations that it was not properly restored is a matter to be resolved in the remaining case.

Kyle* v. *Countrywide Home Loans, Inc., 232 S.W.3d 355 (Tex.App.—Dallas 2007, pet. denied). The Kyles argued that summary judgment against them for foreclosure of the mortgage on their house was improper because the promissory note referred to in the deed of trust was not included among the summary judgment evidence. In order to recover on a promissory note, the note must be introduced into evidence. However, Countrywide did not seek to recover on a promissory note. Instead, it moved for summary judgment seeking to quiet title and a "declaratory judgment for judicial foreclosure" "taking all right, title, interest, and possession of the Property pursuant to paragraph 22 of the Deed of Trust." In support of its motion, Countrywide submitted a self-authenticated copy of that deed of trust and a sworn affidavit of its Foreclosure Specialist and custodian of records stating that the Kyles stopped making payments on their mortgage. The express terms of the deed of trust gave Countrywide the right to seek judicial foreclosure in the event of a default. The trial court granted Countrywide's motion, ordering judicial foreclosure on the deed of trust and removing any clouds on the title to the property. Under the facts of this case, the deed of trust and the testimony about the Kyle's default was sufficient summary judgment evidence to entitle Countrywide to judgment as a matter of law on its claims against the Kyles.

Burney I Citigroup Global Markets Realty Corp., 244 S.W.3d 900 (Tex.App.—Dallas 2008, no pet. history to date). Burney executed a home equity note dated March 15, 1999 payable to Long Beach Mortgage Company in the principal amount of $42,250. The note was secured by a deed of trust. On March 24, 1999, Long Beach Mortgage assigned the note to Norwest Bank Minnesota, N.A. Burney did not pay any of her monthly installments. Norwest sent a default notice. Burney did not cure the default.

On April 5, 2000, Norwest Bank filed an application for expedited foreclosure proceeding. In the application, Norwest Bank sought a court order to sell the property under the deed of trust. This application was subsequently dismissed for want of prosecution. On October 21, 2004, Citigroup, as subsequent assignee of the loan, sent notice to Burney that it had accelerated the maturity of the debt. On November 15, 2004, Citigroup filed a home equity foreclosure application. Burney filed her lawsuit on April 14, 2005 seeking a declaratory judgment that the statute of limitations had run on any attempted foreclosure on her property. In light of Burney's lawsuit, Citigroup's

foreclosure application was dismissed. Citigroup filed a counterclaim for foreclosure. Both sides moved for summary judgment. The trial court granted Citigroup's motion for summary judgment and ordered that Citigroup be permitted to proceed with foreclosure of Burney's property. This appeal followed.

A four-year statute of limitations applies to a suit to recover real property under a real property lien or foreclose on a real property lien. Acceleration of a note requires both a notice of intent to accelerate and notice of acceleration. The property code provides that before a lender may post a notice of sale of real property under a contract lien, it must provide a notice of default and give the borrower at least twenty days to cure the default. The parties' home equity security instrument provides that lender must provide borrower with notice of default and allow at least thirty days to cure the default. It also provides that failure to cure the default by the designated date "will result in acceleration of the sums secured by this Security Instrument and sale of the Property."

Both Burney and Citigroup agree that the October 18, 1999 letter from Norwest Bank to Burney constituted notice of intent to accelerate the note. They disagree, however, as to notice of acceleration. Burney contends that Norwest Bank provided notice of acceleration when it filed the expedited application for foreclosure on April 5, 2000. Citigroup counters that document failed to provide the requisite unequivocal notice of acceleration. Instead, Citigroup contends that it first provided the notice of acceleration on October 21, 2004 with a letter stating that it had accelerated the maturity of the debt.

Under the facts and circumstances of this case, notice of filing an expedited application for foreclosure after the requisite notice of intent to accelerate is sufficient to constitute notice of acceleration. Burney acknowledged that she received both the October 18, 1999 letter and notice of the filing of Norwest Bank's application for expedited foreclosure in the mail. The October letter constituted notice of intent to accelerate. Notice of the filing of the April 5, 2000 application for expedited foreclosure constituted notice of acceleration. Thus, the payment of the loan amount was accelerated on April 5, 2000, thereby triggering the running of the four-year statute of limitations.

Reynolds* v. *Wells Fargo Bank, N.A., 245 S.W.3d 57 (Tex.App.—El Paso 2008, no pet. history to date). Wells Fargo foreclosed on Reynolds's loan. Wells Fargo subsequently sent a notice to vacate to Reynolds, demanding that he and any other occupants vacate the property within three days. After Reynolds refused to leave, Wells Fargo brought a forcible entry and detainer action in Justice of the Peace Court. Both parties appeared at the proceeding. The Justice Court found that Reynolds had been duly served with process and ordered that Wells Fargo recover possession of the property. Reynolds appealed the Justice Court decision to the County Court. At trial, Shirley Reynolds argued that she and her husband did not receive notice of the foreclosure sale.

On appeal, Reynolds argues cryptically that the trial court made an "error of law" because he did not receive proper notice and because Wells Fargo did not list the proper address for the property.

To the extent that Reynolds is arguing that notice of foreclosure was not proper, the issue is beyond the scope of the proceedings below. The only issue in a forcible detainer action is the right to actual possession. The merits of title are not to be adjudicated.

Wells Fargo established (1) that it is the owner of the property by virtue of a deed from the substitute trustee following the foreclosure sale, (2) that a landlord-tenant relationship was created between it and Reynolds by virtue of the deed of trust, and (3) that Reynolds was a tenant at sufferance. Accordingly, the trial court could determine the issue of immediate possession, and the court properly refused to consider any evidence concerning the notice of foreclosure. A claim for wrongful foreclosure may be brought in district court and is independent of county court's determination in a forcible

detainer proceeding.

PART II
HOME EQUITY LOANS

LaSalle Bank National Association* v. *White, 246 S.W.3d 616, 51 Tex. Sup. Ct. J. 259 (Tex. 2007). 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.

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." 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."

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 met 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 of appeals disagreed, saying that the home equity loan in this case is not simply a "contract" but only exists by means of a constitutional amendment. The court of appeals said 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.

The Supreme Court reversed. Texas has long recognized a lienholder's common law right to equitable subrogation. The doctrine allows a third party who discharges a lien upon the property of another to step into the original lienholder's shoes and assume the lienholder's right to the security interest against the debtor. The doctrine of equitable subrogation has been repeatedly applied to preserve lien rights on homestead property. If applied in this case, LaSalle's payment of the balance of the purchase-money mortgage and the accrued taxes on White's property would entitle it to assume those lienholders' security interests in the homestead.

The home equity provisions contain no language that would indicate displacement of equitable common law remedies was intended, and the court declined to engraft such a prohibition onto the constitutional language. LaSalle's equitable subrogation claim does not derive from its contractually refinanced debt and accompanying lien, for which section 50(e) of the Constitution mandates forfeiture. Instead, LaSalle's claim arises in equity from its prior discharge of constitutionally valid purchase-money and tax liens. By definition, equitable remedies apply only when there is no remedy at law, and the legal forfeiture that article 50(e) imposes does not destroy the well-established principle of equitable subrogation. The Supreme Court has often honored equitable subrogation claims against homestead property when a refinance, even though unconstitutional, was used to pay off valid liens.

Fix* v. *Flagstar Bank, FSB, 242 S.W.3d 147 (Tex.App.—Ft. Worth 2007, pet. pending). In March 2002, the Fixes obtained a $288,000 home equity loan from Liberty Lending, LLC, which was later assigned to Flagstar. Less than one year later, in January 2003, the Fixes refinanced the first loan with a conventional loan through Flagstar in a transaction closed by First American Title. It is undisputed, however, that the second loan violated two provisions of the Texas constitution. First, it was executed within less than one year's time after the first loan was executed. Second, it was in the form of a conventional loan, with provisions allowing for personal liability against the Fixes and nonjudicial foreclosure.

Several months after the second loan was executed, in December 2003, Mr. Fix and the vice president of Flagstar had a phone conversation about the legality of the second loan. Mr. Fix alleges that he told the vice president that the loan violated the two provisions of the Texas constitution discussed above.

About three weeks later, after a slew of correspondence between the parties and the title company, Flagstar sent a letter to Mr. Fix offering to cure the constitutional violations via a new home equity loan reclosed at a rate equal to or better than the rate of the second loan at no cost to the Fixes and to pay the Fixes $1,000. The letter also stated that First American would draft the new loan instrument and close the transaction for free. The Fixes refused, in writing, Flagstar's and First American's offer to cure and instead asked Flagstar to forfeit the entire amount of the second loan, the principal of which was approximately $287,000, in addition to all interest.

Flagstar and First American declined the Fixes' offer, and the Fixes brought suit to compel forfeiture. The Fixes also claimed that Flagstar and First American violated the DTPA. The trial court granted Flagstar and First

American's motions for summary judgment.

The court first had to determine which version of the constitution applied. When the second loan was made, the constitution provided that the lender would forfeit principal and interest if it failed to cure defects in the loan within a reasonable time after being notified by the borrower. This provision did not set out any specific means for the lender to accomplish its cure. Later, the constitution was amended to provide specific ways by which a lender or holder could cure a home equity loan's constitutional violations, and the amendment changed the "reasonable time" period standard to require curing action within a more specific, sixty-day time period.

After examining the amendments and the legislative history, the court determined that the version in effect at the time the second loan was made applied. Generally, constitutional amendments and statutes operate prospectively. They may operate retroactively, however, when it is apparent that the makers and adopters intended retroactive application of the amendment, provided retroactive application does not impair vested rights. Without such clear intent, retroactive application is commonly regarded with disfavor and should occur only where the public policy is so clearly and broadly stated as to be unmistakable.

It is well-established that laws in effect at the time a contract is entered into should govern the fulfillment of the contract. This doctrine is based on the presumption that the parties to a contract knew and took into consideration the law in effect at the time of contract. herefore, courts are reluctant to change the rights and obligations of parties from those originally agreed to by retroactively applying a change in the original law.

In determining whether retroactive application of the 2003 amendment is appropriate in the case at bar, the court will first look at the literal language of the amendment. The face of the amendment nowhere indicates that the makers and adopters intended retroactive application. Furthermore, the legislative history of the constitutional amendment in this case indicates that the makers meant it as nothing more than a clarification of the cure process. Furthermore, there is no overriding social policy in favor of retroactive application. Therefore, retroactive application of the 2003 amendment is not warranted, and instead, the court applied the version of the constitution in force at the time the Fixes and Flagstar entered into the second loan.

As noted, the Texas constitution in effect at the time the Fixes and Flagstar executed the loan agreement mandated that a lender forfeit the principal and interest of a home equity loan that contained constitutional defects if the borrower notified the lender of the lender's failure to comply with its obligations under the constitution, and the lender did not correct the defects within a reasonable time. The Texas Supreme Court analyzed the pre-2003 amendment version in ***Doody* v. *Ameriquest Mortgage Co.***, 49 S.W.3d 342 (Tex.2001). In that case, the court, answering certified questions from the United States Court of Appeals for the Fifth Circuit, evaluated a home equity loan entered into in January 1998. Approximately three months after the parties executed the loan, the lender discovered that it had violated a provision of the Texas constitution by charging too much in closing costs. To cure this error, the lender refunded the excess amount to the borrower.

Assuming that the December phone call between Fix and the vice president of Flagstar constituted sufficient notice of the loan's constitutional violations, Flagstar and First American responded within, at the latest, approximately three months of receiving notice, that is, within the same three-month time period in which the lender in ***Doody*** acted to cure the Doody's home equity loan defect. The Supreme Court determined that the lender in ***Doody*** had cured within a reasonable time. Same here.

Meador* v. *EMC Mortgage Corporation, 236 S.W.3d 451 (Tex.App.—Amarillo 2007, pet. denied). The Meadors tried to get an unsecured loan from EMC. As a condition to getting the unsecured loan, EMC

required the Meadors to refinance their home loan with a home equity loan. The two loans were separately documented, with separate loan applications for each. They were not cross defaulted. After the loans were made, the unsecured loan was sold to another lender.

The Meadors sought to have the principal and interest on the unsecured loan owned forfeited because the loan transaction failed to comply with the homestead lien provisions in the Texas Constitution.

Under the Texas Constitution, a refinance of debt secured by a homestead that includes the advance of additional funds may not be secured by a valid lien against the homestead unless the refinance of the debt is a qualified home equity loan or the advance of all the additional funds is for reasonable costs necessary to refinance the debt. The Meadors contended that the unsecured loan was an advance of additional funds with respect to the refinance of their homestead loan, even though the advance was unsecured, and was not permitted by the Constitutional provisions. The court disagreed.

The plain language of the Constitutional provisions talks about the "refinance of debt secured by a homestead and ... that includes the advance of additional funds...." The court said it was required to construe the phrase "the advance of additional funds" to be a subset of the overall debt being refinanced and secured. In other words, "additional funds" are monies obtained in excess of the pre-existing debt being refinanced, and when the two are combined, the repayment of the total is to be secured by a lien on the homestead. This interpretation is not only reasonable and logical but finds support in the history and purpose of article XVI, § 50 of the Constitution. Through the latter, the Texas populace sought means to protect one's homestead against loss due to an inability to pay debt. Thus, the homestead could be encumbered only for limited purposes. That historical concept remains the focus of § 50, the concept being the regulation and limitation of liens against the homestead.

In this instance, two separate loan applications were submitted, and two separate loans were made. Only one loan was secured by a lien on the homestead. The mere fact that the lender required that both be obtained from it does not, as the Meadors contend, render the two loans inseparable. So, the court could not but conclude that the phrase "advance of additional funds" contemplates additional funds the repayment of which is secured through a lien contemplated by the Constitution.

Curry* v. *Bank of America, N.A., 232 S.W.3d 345 (Tex.App.—Dallas 2007, no pet.). The home equity loan provisions of the Texas Constitution detail the terms and conditions of a home equity loan and the rights and obligations of the borrower and lender. Relevant to this case on appeal, these provisions require the loan to be closed at the office of the lender, an attorney, or a title company and forbid pre-payment penalty and certain acceleration clauses. Additionally, these provisions require the lender to provide the borrower a copy of all loan documents signed by the borrower. Under these provisions, a loan must comply with all the requirements set forth in the constitution to be a valid home equity loan and create a valid homestead lien.

However, the home equity loan provisions allow a lender to "resurrect" an invalid loan by correcting the failure to comply. Constitution article XVI, § 50(a)(6)(A)-(Q)(x). Under the "cure" provision, a lender has sixty days from the date the borrower notifies it of the non-compliance to correct the defect in the manner described. If the lender fails to cure the defect within the sixty-day period, it forfeits the principal and interest of the loan.

The Currys closed on the loan at issue on October 21, 2003 at Michael Curry's place of business. Four weeks later, in a letter dated November 24, 2003, counsel for the Currys informed the Bank that he had been unsuccessful in trying to obtain a copy of the Currys' file from the closing agent and that the Currys were missing four of the documents made a part of the loan. Without specifying facts, counsel also informed the Bank that his "preliminary

determination," from a review of the loan documents in the Currys' possession, was that the loan was invalid because it failed to comply with the "Texas Constitution.

The Currys filed suit. Like the letters, the suit alleged generally that the loan and resulting lien did not comply with the home equity loan provisions of the constitution but did not specify how. The trial court entered summary judgment in favor of the Bank.

Based on the home equity loan provisions, to be entitled to a declaration that their home equity loan is invalid and entitled to summary judgment as a matter of law, the Currys had to conclusively establish the loan failed to comply with the constitutional requirements, they noticed the Bank, and the Bank failed to timely cure upon being noticed.

No dispute exists that the loan failed to comply with at least one requirement-that it be closed at the office of the lender, an attorney, or a title company-nor that the Bank offered to cure this defect, as well as any other defect, on June 16, 2004, but did not tender the cure. As such, whether the Currys met their burden turns on whether they provided the Bank notice, and if they did, whether the Bank's offer to cure fulfilled its obligation to cure.

The court held that the Currys failed to meet their burden because they did not conclusively establish they noticed the Bank. The letter informed the Bank that it was the Curry's counsel's "preliminary determination that the lien ... does not comply with the Texas Constitution." The letter, however, did not contain any factual basis or details in support of this "preliminary determination." Although the home equity loan provisions are silent as to the extent of notice the borrower must give, the court concluded the Currys needed to do more than make a general allegation and had to describe how the loan is non-compliant. The court found support for its conclusion in the cure provision itself which specifies how certain defects are to be cured.

To determine how to cure its non-compliance, the lender must be aware of what that non-compliance is. Although a lender could certainly comb through the loan documents and the home equity loan provisions to determine the defect, it would defeat and render meaningless the requirement that the borrower notify the lender of defects if the borrower needed to merely state, without detail, that the loan was infirm.

PART III
PROMISSORY NOTES, LOAN COMMITMENTS, LOAN AGREEMENTS

Deep Nines, Inc.* v. *McAfee, Inc., 246 S.W.3d 842 (Tex.App.—Dallas 2008, no pet.). After a lawsuit was filed by McAfee for failure to pay royalties on an oil and gas lease, the parties entered into a settlement agreement. Deep Nines agreed to pay $345,000 in seven installments. The agreement provided that McAfee would give notice if a payment was late and Deep Nines had three days to cure. The agreement did not expressly state that time was of the essence.

When Deep Nines was late, McAfee gave written notice. On the last day of the cure period, Deep Nines delivered a check. The check was returned NSF, apparently by mistake on the part of the bank. Some period of time after that, when Deep Nines learned that the check had bounced, it e-mailed McAfee, asking it to resubmit the check. Instead of doing that, McAfee insisted on modifying the settlement agreement to provide stricter terms or else it would declare a default and seek its remedies under the settlement agreement. Deep Nines refused to make the modifications McAfee requested. Approximately two weeks later, McAfee brought this suit alleging claims based on breach of the settlement agreement, anticipatory repudiation, and the dishonored check. McAfee sought actual damages and liquidated damages as well as attorney's fees. Summary judgment was awarded to McAfee.

Deep Nines contends the trial court erred in granting summary judgment in favor of McAfee because there are genuine issues of

material fact regarding which party materially breached the contract first. Deep Nines argues there is nothing in the contract that makes time of the essence with respect to the monthly payments. Accordingly, Deep Nines contends its late payment was not a material breach.

For timely performance to be a material term of the contract, the contract must expressly make time of the essence or there must be something in the nature or purpose of the contract and the circumstances surrounding it making it apparent that the parties intended that time be of the essence. Ordinarily, time is not of the essence and, unless the contract expressly makes timely performance a material term, the issue of whether time is of the essence is a fact question for the jury.

Deep Nines argues that because the settlement agreement does not contain an express provision stating that "time is of the essence," the issue of whether timely performance is a material term of the agreement is a fact question for a jury. The court disagreed. Although the agreement does not use the phrase "time is of the essence," courts do not construe contracts or decide cases based on the inclusion or omission of "magic words."

The agreement in this case states specific dates and times for performance as well as provides a cure period if payment is not received when due. While a stated date of performance does not by itself make time of the essence, the settlement agreement does more than set forth a date of performance. In addition to providing a specific cure period if payment is not made when due, the agreement states that if payment is not received within the cure period, Deep Nines will be considered in default. To construe the agreement in a manner that does not make timely payment a material term would render the cure period and default provisions meaningless. The language of the contract clearly makes time of the essence, and Deep Nines's failure to pay in a timely manner was a material breach.

Deep Nines contends it did not breach the agreement or, in the alternative, whether it breached the agreement is a question of fact because the late payment was due to a mistake by a third-party rather than any fault of Deep Nines. Deep Nines argues the bank mistakenly dishonored the check because the check was processed before its account deposits were credited. However, the court held that even if the check was dishonored in error such a mistake does not excuse Deep Nines's failure to perform under the agreement.

By itself, an uncertified check is merely a conditional payment for an obligation owed to the payee. Tendering an uncertified check discharges an obligation to pay on a timely basis only if the check is subsequently honored by the bank. Where a party makes its payment by uncertified check, that party takes the risk that the check will not be honored and the payment obligation will not be fulfilled. This is true regardless of whether the paying party endeavors to have funds in the account sufficient to cover the check at the time payment is due.

Garner* v. *Fidelity Bank, N.A., 244 S.W.3d 855 (Tex.App.—Dallas 2008, no pet.). Garner signed a promissory note for a loan from Fidelity, and also signed a Notice of Final Agreement which stated that there were no other agreements between the parties. When Garner failed to pay the note when due, Fidelity tried to get him to sign an extension note, but Garner refused, so Fidelity filed suit.

Garner claimed, among other things, that the parties had agreed to terms other than what was stated in the note.

When, as here, the parties have concluded a valid integrated agreement, the parol evidence rule precludes enforcement of a prior or contemporaneous inconsistent agreement. Evidence that violates the rule is incompetent and without probative force, and cannot properly be given legal effect. The statements made before the note was signed were inadmissible parol evidence.

With regard to statements made after the note was signed, the court recognized that the parol evidence rule does not bar evidence of a

collateral agreement. A collateral agreement is one the parties might naturally make separately, i.e. one not ordinarily expected to be embodied in, or integrated with the written agreement and not so clearly connected with the principal transaction as to be part and parcel of it. This exception, however, does not permit parol evidence that varies or contradicts the express or implied terms of the written agreement. A written agreement will be enforced as written and cannot be added to, varied, or contradicted by parol testimony. This is particularly true where the written contract contains a recital that it contains the entire agreement between the parties or a similarly-worded merger provision. Because the evidence Garner sought to admit contradicted the express terms of the written agreement, the trial court did not err in excluding it.

PART IV
GUARANTIES

Smith* v. *Patrick W.Y. Tam Trust, 235 S.W.3d 819 (Tex.App.—Dallas 2007, pet. pending). The guaranties stated that they were "given by" Lauri and Howard. The signature lines were blanks to be filled in, the first indicated "By:"; the second indicated "Name"; the third indicated "Title". Lauri signed hers, printed her name, and in the "Title" line wrote "sec./treasurer." Howard left the "Title" line blank.

When they were sued on their guaranties, Lauri and Howard argued that the guaranties were corporate, rather than personal guaranties. First, they pointed out first that the guaranties did not say they were personal guaranties. Second, they noted that paragraph 10 of the guaranty began "If the Guarantor is a corporation or partnership" and goes on to state various representations and warranties of corporate or partnership authority. Howard also stated that he signed guaranties "Howard Smith" when they were corporate guaranties (to distinguish him from his son) and that he signs Michael Smith when they were personal guaranties. Lauri stated that she added her corporate titles because she was sure she was signing a corporate guaranty.

The court noted that the evidence shows the Smiths signed the documents using their names and not the name of the corporation. Each document stated the guaranty was given by the individual to the landlord, and the lease agreement defined each individual as a guarantor. Although Lauri wrote her title below her name, Howard did not. The guaranty language included a conditional paragraph setting forth additional obligations that would arise only if the guarantor were a corporation. Thus, there is more than a scintilla of evidence that the Smiths were individual guarantors. The court also noted that, to conclude the Smiths signed the guaranties in their corporate capacity would render the guaranty meaningless. Because the obligation being guarantied was the obligation of the corporation, holding that the corporation was the guarantor would be a holding that there was not a guaranty obligation at all.

Beal Bank, SSB* v. *Biggers, 227 S.W.3d 187 (Tex.App- Houston [1st Dist.] 2007, no pet.). Glenda Biggers was the sole shareholder and corporate secretary and Alton Biggers was the president of Clark Warehouses. Clark Warehouses executed a note to the SBA. The note was signed by Glenda and Alton in their capacities as president and secretary of the corporation. Glenda and Alton also executed a Small Business Administration Guaranty as guarantors of the note. Among other things, the Guaranty provided that the noteholder could modify any of the terms of the note, except that it could not increase the principal amount.

Later, the Biggerses executed a modification of the note increasing the principal amount considerably. The Biggerses each signed the note in two places, once in their capacity as officers and once as "Borrowers." Beneath these signatures, the modification stated: "The undersigned endorsers, guarantors, and/or sureties on the above described Note hereby join in and consent to the above Modification Agreement." The signature lines under this statement were left blank.

Clark Warehouses filed bankruptcy and

the SBA sold the note and guaranties to a third party to a third party, with Beal Bank acting as servicer.

Beal Bank sued to collect on the guaranties. The trial court held that the Biggerses had consented to the modification that increased the amount of the note but had not agreed to increase their liability on their guaranties, so it entered judgment against the Biggereses in the amount of the original note.

Beal Bank contended that, by seeking and consenting to the modification of the note and by signing the modification twice, the Biggerses became personally obligated as guarantors for the increased principal of the loan. Beal Bank argued that, to escape liability, the Biggerses must prove that they did not consent to the increased amount. The Bank's argument centered on the Biggerses affirmative defense of material alteration. A material alteration that lacks the consent of the guarantor and harms the guarantor renders a guaranty void. However, the trial court's judgment was not rendered on the material-alteration defense. Rather, the trial court concluded that the Biggerses liability was determined by the guaranty contract.

The Biggerses contended that their consent to the modification did not effect an increase in their personal liability, as demonstrated by the fact that they did not sign the modification as guarantors. They also pointed out that the guaranties they signed for the original note specify that the lender was not granted the power to increase the principal amount of the note, thus creating a specific, rather than a continuing, guaranty.

Texas case law recognizes that a guaranty may be continuing or specific. A continuing guaranty contemplates a future course of dealing between the lender and debtor, and the guaranty applies to other liabilities as they accrue. A specific guaranty applies only to the liability specified in the guaranty contract. A guarantor may require that the terms of his guaranty be followed strictly, and the guaranty agreement may not be extended beyond its precise terms by construction or implication.

The guaranties granted to the lender the power to modify or change the terms of the note or the interest rate on the loan. However, the guaranties specifically excluded the power "to increase the principal amount of the note of the Debtor to Lender." The guaranties contained no language that contemplated a future course of dealing between the debtor and the lender. Thus, these were specific guaranties.

Although the Biggerses later sought to increase the principal amount of the loan, agreed and consented to that amount, and signed the note twice-once in their corporate capacities and once as "Borrower"-they did not sign in the spaces provided for "endorsers, guarantors, and/or sureties on the above described Note." Their consent to the increased amount could not be construed or implied to be a guaranty of the additional sum.

PART V
USURY

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

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

loans and increasing the effective interest rate above the maximum lawful rate of 18%, and resulting in a contract for usurious interest.

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

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

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

PART VI
DEEDS AND CONVEYANCE DOCUMENTS

AIC Management* v. *Crews, 246 S.W.3d 640, 51 Tex. Sup. Ct. J. 362 (Tex. 2008). To be valid, a conveyance of real property must contain a sufficient description of the property to be conveyed. A property description is sufficient if the writing furnishes within itself, or by reference to some other existing writing, the means or data by which the particular land to be conveyed may be identified with reasonable certainty. Like any other conveyance of property, a judgment for foreclosure of a tax lien upon real estate which fails to describe a definite tract of land is void. A tax judgment's property description must be sufficiently particular to allow a party to locate the specific land being identified.

In this case, the court of appeals held that a heightened standard applies when gauging the sufficiency of property descriptions contained in constables' or sheriffs' deeds made by virtue of execution sales. However, that distinction has not been the law in Texas for more than a century.

Texas law does not require courts to scrutinize the proceedings of a judicial sale with a view to defeat them; instead, every reasonable intendment will be made in their favor, so as to secure, if it can be done consistent with legal rules, the object they were intended to accomplish. Both voluntary and involuntary conveyances of land require a property description that would allow an individual to locate the conveyed property with reasonable certainty.

PART VII
LEASES

Cole Chemical & Distributing, Inc.* v. *Gowing, 228 S.W.3d 684 (Tex.App.—Houston [14th Dist.] 2005, no pet.). The tenant became delinquent in his rent payments. After finding out that the tenant had moved out of its space, the landlord changed the locks on the space. There were disputes about the rent payments and the landlord sued the tenant.

Four and a half months after the lockout, the parties reached an agreement to mitigate damages that allowed the tenant to reoccupy the leased space for the remainder of the contract term. The landlord maintained its suit to recover unpaid rent and late fees in addition to attorneys' fees. The trial court found that the tenant had breached the lease, but awarded only the part of what the landlord claimed in damages based on its finding that the Landlord had failed to make reasonable efforts to re-let the space during the lockout period and therefore failed to mitigate its damages.

Section 91.006(a) of the Property Code provides that "[a] landlord has a duty to mitigate damages if a tenant abandons the leased premises in violation of the lease." Though it is the landlord's duty to mitigate damages, the tenant has the burden of proving that the landlord has mitigated or failed to mitigate damages and the amount by which the landlord reduced or could have reduced its damages. The landlord challenged the trial court's finding that the landlord's duty to mitigate commenced on the date of the lockout and that the landlord failed to exercise reasonable efforts to mitigate its damages during the lockout period by making reasonable efforts to find a new tenant.

The court held that it did not need to determine whether or not the landlord had used reasonable efforts to mitigate because, even assuming the landlord's efforts were inadequate, the tenant failed to prove the amount of damages that could have been avoided if the landlord had mitigated. A tenant's proof that the landlord failed to use objectively reasonable efforts to fill the premises, standing alone, is not a bar to recovery. Rather, the landlord's recovery is barred only to the extent that damages reasonably could have been avoided. Thus, where a defendant proves failure to mitigate but not the amount of damages that could have been avoided, it is not entitled to any reduction in damages.

After the trial court found that the landlord had not made reasonable efforts to mitigate, it deducted the full contract rental amount for the entire lockout period. Though it may have been reasonable to use the contract price in calculating the amount of damages that could have been avoided, there is no evidence to support the trial court's implicit finding that the full amount of rent accrued during the lockout period could have been avoided. Even if the landlord had made every mitigation effort identified by the tenant, there is no evidence that such efforts would have been successful at all, much less immediately, or of how much such efforts would have cost.

Landry's Seafood House-Addison, Inc.* v. *Snadon, 233 S.W.3d 430 (Tex.App.—Dallas 2007, pet. denied). A landlord has a duty to make reasonable efforts to mitigate damages when the tenant breaches the lease and abandons the property. However, the landlord is not required to simply fill the premises with any willing tenant; the replacement tenant must be suitable under the circumstances. The landlord's failure to use reasonable efforts to mitigate damages bars the landlord's recovery against the breaching tenant only to the extent that damages reasonably could have been avoided. The tenant properly bears the burden of proof to demonstrate that the landlord has mitigated or failed to mitigate damages and the amount by which the landlord reduced or could have reduced its damages.

There was evidence that the market during the time after Landry's vacated the premises was "soft" meaning it would be difficult to find a new tenant. There was evidence that both Steinmann and Park submitted lease proposals. Although Park's proposed rent was slightly higher than Steinmann's, her proposal was "bare-boned."

However, Steinmann intended to spend up to $1 million to refurbish the premises. Snadon considered Steinmann's the better offer, as did Landry's realtor and Carl Cheaney, Landry's then-senior real estate manager. In addition, there was evidence that Snadon granted Steinmann free rent between November 2003 and August 2004 in lieu of Snadon paying anything for premise improvements. Sandon testified, "I got the best deal I could get at the time, in the current market conditions." This was enough to support the court's conclusion that the landlord had adequately mitigated his damages.

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

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

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

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

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

The lease contained a provision if

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

If LaSalle decided to purchase Leasco, then the closing had to occur within 60 days of the parent's delivery of notice of the transfer. If the parties could not agree on the fair market value of the parent's interest in Leasco, the issue was to be submitted to binding arbitration, which "to the maximum extent practicable" was to be concluded within ninety days of filing the arbitration claim. If there was a change in control of Leasco other the Permitted Transfer, LaSalle had the right to terminate the lease on thirty days' notice and evict Leasco.

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

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

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

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

Most of the issues in this case concern the interpretation and application of the provision of the lease concerning the parties' rights when Leasco is about to undergo a change in ownership. LaSalle argues that the provision permitted it to terminate the lease when a transfer that is part of the sale of substantially all of Leasco's parent's hotel-management businesses fails to comply. Therefore, according to LaSalle, it was entitled to terminate the lease when Leasco refused to close the transaction and surrender the premises as required. The court agreed with LaSalle's interpretation of the contract. The lease provision contained a two-part definition of "permitted transfer." The first part is the requirement that the transfer be a part of the sale of all of the parent company's hotel-management businesses. The second part is that the transfer "shall be made only upon the

following terms and conditions," paragraphs (a) through (f). If a "permitted transfer" can be made "only upon" certain conditions, then the failure to meet those conditions results in the transfer not qualifying as a "permitted transfer" under the lease.

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

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

Leasco and Meridien also argue that the purchase price had to be determined before closing could occur because paragraph (f) of section 22.22 provides, "unless and until the Fair Market Value of the respective interests in Tenant have been fully determined, Landlord shall have no obligation to complete the Purchase." Leasco and Meridien argue paragraph (f) gave LaSalle the right to decide not to complete the purchase if it was dissatisfied with the fair market value as determined by the arbitrator. Thus, they argue, if the closing and Leasco's surrender of the premises could be required before determination of the purchase price, then "LaSalle could essentially kick Meridien out of the Hotel, participate in the arbitration but then pull out if it did not like where the arbitration price was headed. This interpretation of paragraph (f), which is the basis of their argument, is incorrect. Paragraph (f) gave LaSalle the right to delay the closing until after determination of Leasco's fair market value. Paragraph (f) did not permit LaSalle to force the closing and then not pay the arbitrated price. Nor does it permit LaSalle to avoid either purchasing Leasco or paying the price set by the arbitrator.

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

Airport Garage, L.L.C.* v. *Dollar Rent A Car Systems, Inc., 245 S.W.3d 488 (Tex.App.—Houston [14th Dist.] 2007, no pet. history to date). Dollar operates a car rental agency and three-story parking garage near Hobby Airport. The lease required the landlord to maintain and repair the foundation, exterior walls, and the roof, but did not require the landlord to repair any damages caused by the tenant. The lease required the tenant to make all other repairs. The facts of the case are quite complex, but, in a nutshell, there were some expansion joints at the garage that were in need of replacement. At some point before this lawsuit was filed, the building was being sold to 7979, and in response to a request by the purchaser, Dollar signed an estoppel certificate that said, among other things, that the landlord was not in default under the lease. At the time the estoppel was signed, Dollar was aware of and had been dealing with the landlord about the defective expansion joints.

The building was sold to 7979. Afterwards, Dollar began asking 7979 when it was going to repair the expansion joints. It did some work itself and asked to be reimbursed for the costs. It filed a lawsuit for breach of contract and breach of warranty relating to the expansion joints. After the suit was filed, 7979 had the work done and paid for it, but it refused to reimburse Dollar for any amounts it had expended. At trial, judgment was rendered in

favor of Dollar and 7979 appealed.

According to 7979, the lease unambiguously requires 7979 to make repairs only to the foundation, exterior walls, and roof, and requires Dollar to make all other repairs or replacements. Here, the purpose the parties intended to accomplish is set forth in the Lease itself: the landlord is required to construct, and the tenant is required to operate, a three-story "first-class parking facility." Specifically, the landlord is required to construct a three-story parking garage of approximately 293,000 square feet, insure the building against loss or damage for its full replacement value, and lease it to the tenant for fifteen years. The tenant is permitted to use 2,200 square feet to operate a car rental business, and must "operate the remainder of the Garage as a first-class parking facility...." The tenant is required to "maintain the highest standards in the operation of the Garage so that the Parking Facility shall be operated in a fashion comparable to other first-class parking facilities in similar type buildings in the Houston area." The tenant is also required to "provide all materials, supplies and equipment needed for the proper and efficient use and operation of the Garage" and "use its best efforts to maintain and develop the Garage and to increase the volume of business for the same, and not to divert or cause to be diverted any business from the Garage to other parking facilities...."

As part of its obligation to operate a first-class parking facility, the tenant is required to provide, maintain and operate at least four shuttle vehicles to carry parking customers between the Garage and Hobby Airport Terminal, and to "operate such vehicles at all times necessary to provide prompt service." The tenant is required to pay the landlord the first $28,000.00 of net parking revenue, and any amounts due for guaranties, marketing expenses, taxes, or insurance. The tenant is then required to pay the landlord forty percent of the next $22,0000.00 of net parking revenue, and fifty percent of any remaining net parking revenue.

Reading the Lease as a whole, the court disagreed with 7979's contention that the repair provisions of the lease unambiguously restrict the landlord's repair obligations to the foundation, exterior walls, and roof, and require Dollar to bear the cost of any other repair or replacement, regardless of its nature. 7979's interpretation would permit the lessor to construct the outer shell of the building and leave the second and third floors in an incomplete or defective state, thereby transferring the cost of properly completing construction to the tenant. Thus, this interpretation would contradict the allocation of responsibilities expressly provided for in the Lease. 7979's interpretation is also inconsistent with the parties' allocation of the risk of loss as shown in the Lease's insurance requirements. The tenant is required to insure its own property, the property of its customers, and its public liability, but is not required to insure any part of the Garage. The landlord is required to maintain insurance "for the full replacement value of the Garage" in the event of its loss or damage-even though, under 7979's interpretation of the Lease, the tenant is required to repair or replace essentially the entire interior of the building. Finally, 7979's interpretation effectively exempts the second and third floors of the Garage from the implied warranty of suitability without express language to that effect. This interpretation is contrary to Texas law, which provides that a tenant waives latent defects only if he takes the premises "as is" or expressly assumes the obligation to repair. The only reasonable interpretation of the relevant language is that the landlord must make structural repairs to the Garage, and must repair the foundation, exterior walls, and roof, even if the damage to these areas is not physical or structural (for example, if the damage is merely cosmetic).

7979's third issue challenges the legal and factual sufficiency of the evidence supporting the jury's finding that 7979 breached the implied warranty of suitability. In its fourth issue, 7979 makes the related argument that any breach of the implied warranty occurred prior to 7979's ownership of the property. In support of this argument, 7979 relies on paragraph 42 of the Lease, which states: "Lessee shall look solely to the then owner of the Leased Premises at the time of the breach or default for the

satisfaction of any remedies of Lessee.

The implied warranty of suitability 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. A latent defect is one not discoverable by a reasonably prudent inspection of the premises at the inception of the lease. By its terms, the Lease became effective when the Garage was "substantially complete"; therefore, the problem with the expansion joints was a latent defect only if the joints were defective, and the defect was undiscoverable by a reasonably prudent inspection when the Garage was substantially complete. There is no evidence that the defect was discovered before 1998, and no evidence that problems with the expansion joints rendered any part of the Garage unsuitable for its intended operations until after 7979 assumed the Lease.

7979 argues that Dollar is estopped from asserting claims against it because Dollar's estoppel certificate recites that the prior owner is not in default, and Dollar did not attach the Moore Report to the estoppel certificate. To prevail on its affirmative defense that Dollar is equitably estopped from asserting its claims, 7979 was required to produce evidence of the following: (1) a false representation or concealment of material facts, (2) made with actual or constructive knowledge of those facts, (3) with the intention that the representation should be acted on, (4) the representation was made to a party who was without knowledge or means of obtaining knowledge of the real facts, and (5) the party to whom the representation was made detrimentally relied on the representations. At the time Dollar signed the estoppel certificate on June 19, 2001, the landlord had not failed to make repairs that were requested and required either by the condition of the premises or the Moore Report. Accordingly, Dollar's statement that there were no "uncured defaults" on June 19, 2001 did not constitute a false representation or a concealment of material fact made with actual or constructive knowledge of the true conditions.

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

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

Generally, a lessor has no duty to tenants or their invitees for dangerous conditions on the leased premises. This rule originates from the notion that a lessor relinquishes possession or occupancy of the premises to the lessee. One exception to this general rule is that a lessor may be liable for injuries resulting from a defect on a portion of the premises that remains under the lessor's control. Daitch argues Mid-America retained control of the air conditioning unit because Mid-America installed

and maintained the unit and it was located in the bathroom ceiling. However, although the air conditioning unit was installed in the bathroom ceiling, there is no evidence Mid-America retained physical possession of the air conditioner or that Daitch used it in common with others. A contractual right of re-entry by the lessor to make repairs or improvements is not a reservation of control over a portion of the premises subjecting the lessor to liability.

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

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

PART VIII
VENDOR AND PURCHASER

Sefzik* v. *Mady Development, L.P., 231 S.W.3d 456 (Tex.App.-Dallas 2007, no pet.). A 130 and 110 acre tract were subject to an agricultural exemption. Mady agreed to buy 47 acres located within the two tracts from Sefzik. After the sale, Sefzik retained 10 acres out of the 110 acre tract. The contract contained a typical proration provision as well as a provision relating to roll-back taxes which said: "If this sale or Buyer's use of the Property after closing results in additional assessments for periods before closing, the assessments will be the obligation of Buyer." At closing, the taxes on the 47 acres were prorated based on the agricultural exemption amounts. After closing, the appraisal district issued a notice of change of use and rollback taxes were assessed on the fair market value of both the 130 acre and 110 acre tracts. Mady sent Sefzik a letter demanding that Sefzik pay its proportionate share of the taxes. Sefzik refused to pay Mady for that share.

Sefzik claimed that Mady was responsible as a matter of law for all of the taxes on the property that resulted from the revocation of the agricultural exemption because the real estate contract between the parties provided that the buyer was responsible for additional taxes caused by the buyer's change of use. Mady argued that the provision in the contract relied upon by Sefzik is limited to rollback taxes and Mady was not looking to Sefzik for reimbursement of any paid rollback taxes. Rather, Mady only sought reimbursement from Sefzik for his pro rata share of the taxes paid by Mady for the tax year of the sale and for taxes paid on those portions of the tract that were owned by Sefzik and incorrectly included in the tax bill sent to Mady.

Sefzik interpreted the provision in the contract as placing the burden for the additional taxes on Mady because it was the party responsible for the change of use and thus the change in tax valuation. He claimed the text of the agreement provides that the buyer, not the seller, is responsible for additional taxes caused by the buyer's change of use and that the additional taxes were imposed on the property because Mady, the buyer, changed the use of the property. Although the heading of the paragraph "Rollback taxes," the text of the provision is broader than the heading and applies to "additional assessments" resulting from the sale or the buyer's use, not just "rollback taxes" as

that phrase is interpreted by Mady.

The court agreed with Sefzik. Mady's position rested on the assumption that the term "rollback taxes" as used in the agreement has the same meaning as applied in the Tax Code and the Comptroller's Agricultural Appraisal Manual. There was, however, nothing in the agreement to suggest the parties intended to adopt the Comptroller's understanding.

Furthermore, even if it were appropriate to look outside the agreement to interpret the term "rollback taxes," the text of the provision controls. Texas courts attach greater weight to the operative clauses of a contract than the captions or titles.

In this case, the text of the contract states that "additional assessments" resulting from the sale of or buyer's use of the property after closing, not just "rollback taxes" as that term is advanced by Mady, are the responsibility of the buyer. There was an "additional assessment" in that property taxes for the tax year 2002 greater than those prorated and initially paid by the parties were imposed on the property in 2003 because of the loss of the agricultural exemption on the property. Mady acknowledged that the additional taxes resulted from its use of the property, i.e., an intent to discontinue agricultural activities. Under the plain language of the agreement, Mady was therefore responsible for the 2002 market value taxes caused by the loss of the agricultural exemption.

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

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

Gnerer* v. *Johnson, 227 S.W.3d 385 (Tex.App—Texarkana 2007, no pet.). By a contract for deed dated the Gnerers as sellers and the Johnsons as buyers entered into an agreement for the sale and purchase of some land and a house. The contract amount was $35,000.00, of which $2,000.00 was paid at the time the contract was entered, with the balance of $33,000.00 bearing interest at ten percent per annum, payable in twenty-three equal monthly installments of $354.64 each, with a balloon final installment equal to the then-remaining principal and interest due on the obligation. When the balloon installment under the written contract became due, the Johnsons were unable pay the entire sum and continued to pay monthly installments through July 2005. The Gnerers contended that the failure of the Johnsons to pay the remaining balance of $30,849.31 due on the twenty-fourth installment constituted a default and that the Johnsons were thereafter in possession only as tenants at will. The Gnerers maintained, further, that all payments paid by the Johnsons after the timely twenty-third installment were only rent.

The Johnsons pleaded that there had been a novation of the original contract by an oral agreement between them with the Gnerers to simply continue the monthly installments which had previously been made until full satisfaction of the debt, that they had made valuable improvements to the realty and maintained possession of the property.

At trial, the Johnsons testified that, when the time for payment of the balloon installment drew near, it became apparent that they were going to be unable to obtain financing from other sources to satisfy the remainder of

the obligation because the value of the property would not support such a loan. In telephone conversations between the parties, the Gnerers had indicated that the Johnsons should continue to make monthly installments and that the Gnerers would have an attorney draft an addendum to the agreement to evidence the change. Although the Johnsons had been informed by the Gnerers that an addendum had, indeed, been drafted and awaited the Johnsons' signatures at the Gnerers' attorney's office, the Johnsons had refused to go to the Gnerers' attorney's office to sign it or get it. Even without the addendum having been signed, the Johnsons continued to send monthly installments of approximately the same amount as set out in the contract for deed, with adjustments for late payments, increased taxes, and increased hazard insurance, and the Gnerers continued to accept the payments. During the Johnsons' stay on the property, they made valuable improvements to the property, some of which were made after the maturity date of the written contract and after the date which Dawn had directed Kaye to continue the monthly installments.

The trial court entered an order which included findings that there was a written contract entered into between the Johnsons and the Gnerers for the purchase and sale of the land in controversy, that there had been substantial compliance with the contract by the Johnsons, that there was an agreement between the parties to extend the time for performance under the original contract, that there was $5,000.00 still due and owing from the Johnsons to the Gnerers under the contract, that this sum had already been deposited into the registry of the court by the Johnsons and, thus, that the Johnsons had fully complied with their obligation under the agreements for the purchase of the real estate.

To the court of appeals the evidence was clear that the provisions of the original written contract were not satisfied by the Johnsons because they failed to pay the final installment prescribed in it. The evidence was also undisputed that the Johnsons continued to make a substantial number of monthly installments for a period of about seven years after the date that the balloon payment was due to have been paid. In addition, it was shown that the Johnsons were in possession of the property and made substantial improvements to it, some of which were made before the balloon payment was due and some of which were made thereafter. The area of dispute lay with the characterization of the monthly installments which were made by the Johnsons to the Gnerers after the balloon payment was due.

Section 26.01 of the Texas Business and Commerce Code is Texas's statutory embodiment of what is known as the statute of frauds, requiring certain contracts (including a contract for the sale of real estate) to be in writing. However, some exceptions exist to the general application of the statute of frauds. Texas has long recognized that some situations exist where the nonenforcement of the contract-or the enforcement of the statute-would, itself, plainly amount to a fraud. Very narrowly applied, the exception requires the existence of three indispensable fact circumstances in order to relieve a parol sale of land from the operation of the statute of frauds: (1) payment of the consideration; (2) possession by the vendee; and (3) the making by the vendee of valuable and permanent improvements upon the land with the consent of the vendor; or, without such improvements, the presence of such facts as would make the transaction a fraud upon the purchaser if it were not enforced.

As to the application of the statute of limitations to the controversy, the Gnerers correctly point out that the original contract was breached more than four years before suit was instituted and that subsection (a) requires that, "An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued." However, Section 2.725(b) specifies, "A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." The Johnsons' cause of action did not accrue until the Gnerers refused to honor the parol agreement to convey the property. This refusal happened long after the "balloon" installment had become due and occurred well within the four-year period before the suit was filed.

Kupchynsky* v. *Nardiello, 230 S.W.3d 685 (Tex.App—Dallas 2007, pet. pending). In a construction defects case, the homebuilder/seller argued that it was not liable for the defects because the contract contained an "as-is" provision. In arguments based on ***Prudential***, the homebuilder/seller argued that the as-is provision negated causation, as a matter of law.

The court noted that various aspects of the transaction may make an as-is provision unenforceable. In particular, the court noted that a buyer would not be bound by an agreement to purchase something "as is" that he was induced to make because of a fraudulent representation or concealment of information by the seller. The nature of the transaction and totality of the circumstances surrounding the agreement must also be considered. Where the "as is" clause is an important part of the basis of the bargain, not an incidental or "boiler plate" provision, and is entered into by parties of relatively equal bargaining position, a buyer's affirmation and agreement that he is not buying on representations of the seller should be given effect.

Here, the provision relied on by the homebuilder/seller was distinctly different from that in ***Prudential***. The provision in ***Prudential*** was contained in a contract submitted by the buyer and contained specific language that the buyer took the property as is with all latent and patent defects. In contrast, the provision here is contained in a standard, preprinted form. The provision was neither discussed nor negotiated. The clause was never discussed with the buyers and was not a part of the original negotiations or renegotiations. Rather, the clause was part of the boilerplate language in the contract. Even if the parties were in equal bargaining position, the court could not conclude in light of all circumstances that the clause was an "important basis of the bargain" that negated causation as a matter of law.

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

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

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

A valid as-is agreement prevents a buyer from holding a seller liable if the thing sold turns out to be worth less than the price paid because it is impossible for the buyer's injury on account of this disparity to have been caused by the seller. By agreeing to purchase something "as is," a buyer agrees to make his own appraisal of the bargain and to accept the risk that he may be wrong." Thus, a buyer's own evaluation constitutes a new and independent basis for the

purchase, one that disavows any reliance upon representations made by the seller. However, an as-is agreement may not have this determinative effect in every circumstance. A buyer is not bound by an agreement to purchase something "as is" that he is induced to make because of a fraudulent representation or concealment of information by the seller.

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

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

Chambers* v. *Pruitt, 241 S.W.3d 679 (Tex.App.—Dallas 2007, no pet.). The Pruitts sold Chambers a mobile home. She was supposed to remove it to another location, but didn't. The parties talked about Chambers buying the land where the mobile home was located, and Chambers even gave Pruitt a down payment; however, no contract was ever signed. Pruitt brought an action to evict Chambers and were given a writ of possession. Chambers sued to enjoin the eviction, stating that the judge in the eviction suit "made an error of law in stating that all real estate transactions must be in writing. An oral contract is enforceable & apparently the ... judge did not know this." No injunction or TRO was issued. Chambers also brought a breach of contract claim based on the oral contract of sale. As may be obvious, all of these actions, including this appeal, were handled pro se by both Chambers and Pruitt.

A contract for the conveyance of real property must comply with the statute of frauds to be enforceable. To comply with the statute of frauds, a contract must be in writing and signed by the person to be charged with the agreement. Under the partial performance exception to the statute of frauds, contracts that do not meet the requirements of the statute of frauds but have been partially performed may be enforced in equity if denial of enforcement would amount to a virtual fraud. When the oral agreement at issue involves the sale of real property, a well-established three-prong test is applied to determine partial performance. The elements necessary to relieve a parol sale of land from the operation of the statute of frauds include: (1) the payment of the consideration; (2) surrender of possession; and (3) the making of valuable and permanent improvements on the land with the owner's consent, or without such improvements, other facts are shown that would make the transaction a fraud on the purchaser if the oral contract was not enforced.

Although Chambers made a down payment on the land, there is no evidence she paid the full purchase price. In fact, according to Chambers's testimony, the purchase price kept changing, so there is no clear evidence the parties even agreed on a purchase price. The Pruitts did not surrender possession-Chambers was evicted from the land when it became apparent the sale would not be consummated. Because Chambers failed to prove the essential elements, the trial court did not err when it concluded the partial performance exception to the statute of frauds did not apply.

Chambers also appears to argue the trial court erred because it failed to award specific performance. Before a court will order specific

performance of a contract for the sale of land, there must be a written agreement expressing the essential terms of the contract with reasonable certainty. Here, there was no written contract to enforce, so the trial court did not err in its refusal to award a remedy for breach.

PART IX
BROKERS

Gray & Co. Realtors, Inc.* v. *Atlantic Housing Foundation, Inc., 228 S.W.3d 431 (Tex.App.—Dallas 2007, no pet.). The broker had a commission agreement that entitled it to payment upon consummation of the sale of a number of properties to the Foundation. In order to attempt to qualify for some tax advantages, the seller transferred title to the properties to the Foundation without receiving payment. A few months later, when the transaction died, the Foundation transferred title back to the seller. The broker sued for the commission, claiming it was due upon the transfer of title to the Foundation in the first instance.

The crux of the broker's argument was that the temporary transfer of nominal title to the properties was sufficient to "consummate" the transaction, as that undefined term is used in the brokerage agreement, and thus triggered the Foundation's obligation to pay broker's commission. The court disagreed. Significantly, the language of the brokerage agreement itself expressly dictated that no broker's commission was owed under these circumstances. The agreement required payment on "consummation" of the transaction. "Consummation" means "completed" or "fully accomplished." This transaction was not consummated because the Foundation never performed its obligations under the sales contract.

In another paragraph, the brokerage agreement said the commission would be payable when the transaction closed. The word "closing" is a term of art commonly used in real-estate transactions and is defined as the final meeting between the parties to a transaction, at which the transaction is consummated,, the final transaction between the buyer and seller, whereby the conveyancing documents are concluded and the money and property transferred. Again, this had not occurred.

Potcinske* v. *McDonald Property Investments, Ltd., 245 S.W.3d 526 (Tex.App.—Houston [1st Dist.] 2007, no pet.). Potcinske made a written offer to buy McDonald's property by signing and delivering to their broker an earnest money contract form entitled "Unimproved Property Commercial Contract." Under the heading of "financing," the contract form listed three financing options: (1) third-party financing, (2) assumption, and (3) seller-financing. Potcinske initialed the seller-financing option, indicating that the sales price for the property would be financed by McDonald, according to a seller-financing addendum. When Potcinske sent the contract to the broker, the addendum wasn't attached. When McDonald got the contract, it attached a seller-financing addendum and made some changes regarding delivery of the survey.

The broker sent the revised contract back to Potcinske, noting the change to the survey and the addition of the addendum. Potcinske did not approve the change and did not sign the addendum as had been requested. A few weeks later, McDonald left a message with its broker stating that the deal was dead. Potcinske then sued for specific performance.

At trial, McDonald contended that no contract existed between it and Potcinske. McDonald asserted that there had been no "meeting of the minds" because the parties had not agreed on all material terms of the contract, specifically the seller-finance and survey terms. In contrast, Potcinske asserted that neither the survey term nor the seller-financing terms were "material" to the formation of the contract. According to Potcinske, McDonald accepted his initial written offer when McDonald signed the contract form. The court ruled in favor of McDonald.

On appeal Potcinske asserts that the trial court erred by finding that no contract was formed. To support this contention, Potcinske first challenges the trial court's conclusion of

law that the seller-financing term is a material term of the contract.

Parties form a binding contract when the following elements are present: (1) an offer, (2) an acceptance in strict compliance with the terms of the offer, (3) a meeting of the minds, (4) each party's consent to the terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding. "Meeting of the minds" describes the mutual understanding and assent to the agreement regarding the subject matter and the essential terms of the contract. Mutual assent, concerning material, essential terms, is a prerequisite to formation of a binding, enforceable contract.

Here, Potcinske does not dispute that he and McDonald failed to have a meeting of the minds regarding the seller-financing term. Rather, he contends that such failure does not preclude enforcement of the contract because the seller-financing term was not a material term on which mutual assent was required to form an enforceable contract. After reviewing the relevant case law, the court held that the seller-financing term was a material and important term, as manifested by the parties' focus on that provision during negotiations. In his written offer, Potcinske initialed the seller-financing option and only that option. When responding to the offer, McDonald included the financing addendum and requested Potcinske to sign it. In turn, Potcinske responded by refusing to sign the addendum until he could determine which type of financing would "be most beneficial" to him. Based on the facts of this case, the court held that the trial court properly concluded that the seller-financing term was a material term.

PART X
ADVERSE POSSESSION AND QUIET TITLE ACTIONS

Ford* v. *ExxonMobil Chemical Company, 235 S.W.3d 615, 50 Tex. Sup. Ct. J. 1191 (Tex. 2007). "This suit involves one pipeline, two litigants, three tracts, and four deeds." In the fourth and final deed, Ford granted a pipeline easement across three tracts of land, but now claims he did so based on misrepresentations about the three previous deeds. The court of appeals unanimously held his fraud claim barred by limitations, but in a divided opinion ordered the easement cancelled and the pipeline removed anyway because no statute of limitations applied to an equitable action to quiet title.

In 1998, Mobil Chemical Company (predecessor of ExxonMobil) bought a 12-inch-wide easement for a propylene pipeline. The recorded deed included a map showing the pipeline crossing three tracts of land, but the text of the easement described the servient estate by referring to another deed that described only one tract. In an amended easement signed three months later granting temporary access for operations, the original easement was described as crossing all three tracts. Two days after the amendment, Ford bought all three tracts by special warranty deed expressly subject to Mobil's easements. Four months later, Ford signed another amendment (in return for $20,000) relocating the pipeline's route across all three of his tracts. Ford claims he signed this amendment only because Mobil falsely represented that the original easement covered all three tracts, when in fact it covered only one.

Five years after signing the last amendment, Ford sued for real estate fraud under Texas Business & Commerce Code §27.01. The trial court granted summary judgment for Ford, awarding him damages and ordering the pipeline removed. The court of appeals reversed the damage award (holding limitations barred Ford's fraud claim) but affirmed the removal order (holding quiet title actions have no statute of limitations).

Ford argues the court of appeals erred in holding his fraud claim barred by limitations. The parties agree this claim had to be brought within four years of when the fraud should have been discovered by reasonable diligence. While not all public records establish an irrebuttable presumption of notice, the recorded instruments in a grantee's chain of title generally do. The instruments here necessarily do so, as Ford's fraud claim stems entirely from a discrepancy among them concerning the servient estate, a

discrepancy he admits learning by simply reading them. The Supreme Court upheld the holding that limitations barred the fraud claim.

But the court agreed with ExxonMobil that the court of appeals erred in holding Ford's demand for removal of the pipeline was not barred too. The court of appeals stated two reasons limitations did not apply: (1) ExxonMobil's motion did not assert limitations as to Ford's quiet title claim, and (2) an action to quiet title is never time-barred.

As to the first reason, ExxonMobil did not have to assert limitations separately as to quiet title because Ford's pleadings, construed liberally, did not plead it as an independent cause of action. Quiet title is not mentioned among the facts or claims in Ford's petition, appearing instead only in an introductory section and the prayer as part of a list of items (like a mandatory injunction and attorney's fees) that are merely forms of relief. Having asserted limitations against Ford's fraud claim, ExxonMobil did not have to assert limitations against each item of legal or equitable relief that stemmed from it.

As to the second reason, limitations would have barred an action to quiet title here even if it had been pleaded as an independent cause of action. Granted, an equitable action to remove cloud on title is not subject to limitations if a deed is void or has expired by its own terms. Deeds obtained by fraud are voidable rather than void, and remain effective until set aside. Texas law is well settled that once limitations has expired for setting aside a deed for fraud, that bar cannot be evaded by simply asserting the claim in equity. If the rule were otherwise, limitations would rarely apply in real estate cases, as virtually every case could be recast as an action to remove cloud on title. Because Ford's legal claim for fraud was untimely, he cannot challenge ExxonMobil's facially valid deed by simply pleading it in equity.

Kilpatrick* v. *McKenzie, 230 S.W.3d 207 (Tex.App.—Houston [14 Dist.] 2006, no pet.). The plaintiff in a trespass to try title action may recover (1) by proving a regular chain of conveyances from the sovereign, (2) by proving a superior title out of a common source, (3) by proving title by limitations, or (4) by proving prior possession and that the possession has not been abandoned. When, as in this case, the defendant is shown to be in possession of the land in controversy and the plaintiffs fail to establish their prima facie right to title, judgment must be entered in the defendant's favor. This is true even though the defendant may have pled a title that he failed to establish, because under this well-settled and unforgiving law, plaintiffs are not entitled to recover unless their own title has been affirmatively proven. Although this rule is a harsh one, it has been the law in Texas for more than a century.

Martin* v. *McDonnold, 247 S.W.3d 224 (Tex.App.—El Paso 2006, no pet.). In 2002, Kyle McDonnold purchased a 999.25 acre tract in Jeff Davis County, which contained a 343.29 acre tract of land out of Survey 24, the property in dispute. Martin owns a 2,232 acre tract to the south and east of Survey 24, which she acquired by general warranty deed from her maternal uncle David Harper Medley in 1991. The disputed Survey 24 land is enclosed within fences with Mrs. Martin's land.

Later in 2002, Martin had the gate to the disputed land locked. In 2004, McDonnald obtained a deed without warranty for the disputed land. The 2004 deed noted that it "shall not supplant that General Warranty Deed dated August 19, 2002, from Grantor to Grantee ... to the extent it covers land conveyed by said General Warranty Deed." Then McDonnold filed this trespass to try title suit.

McDonnald filed a summary judgment motion, in which he asserted title to the disputed land, as a matter of law, by a regular chain of conveyances from sovereignty, by superior title from a common source, and by prior possession. He also argued that the summary judgment evidence affirmatively negated more than one of the essential elements of Martin's adverse possession defense and counterclaims. With regard to the no-evidence motion, McDonnald asserted that Martin lacked evidence on more than one of the essential elements of her

affirmative defense of limitation as listed in the motion and no evidence as to essential elements of lease repudiation and notice thereof with respect to a 1977 surface lease involving the disputed land between their respective predecessors in title. The trial court granted summary judgment in favor of McDonnald.

A trespass to try title action is a procedure by which claims to title or the right of possession may be adjudicated. The plaintiff in a trespass to try title action must recover, if at all, on the strength of its own title and not on the weakness of the defendant's title. The plaintiff has the burden to establish superior title by showing it has: (1) title emanating from the sovereignty of the soil; (2) a superior title in itself emanating from a common source to which the defendant claims; (3) title by adverse possession; or (4) title by earlier possession coupled with proof that possession has not been abandoned.

Martin argued that McDonnald's summary judgment motion failed to comply with Rule 166a(c) of the Rules of Civil Procedure because it did not state under which of the four methods their trespass to try title claim was proven as a matter of law. The court found that McDonnald's motion clearly identifies his cause of action and the four methods by which they could prove title to their land. Further, McDonnald stated that he had uncontroverted summary judgment evidence that established title from sovereignty, namely the certified documents in its abstract of title, and in addition, evidence that established title from a common source, title through prior possession, and title under the tenancy exception by the same documents. There is no question that the summary judgment motion gave Martin fair notice of the specific grounds on which McDonnald asserted his claim was established as a matter of law.

Next, the court examined the issue of whether McDonnald carried his burden in establishing his trespass to try title claim as a matter of law. The summary judgment evidence presented by McDonnald in his abstract of title clearly shows that he proved a regular chain of title from sovereignty. Specifically, uncontroverted evidence showed that the disputed 242.32 acres is included within the 424.6-acre tract, Survey 24-B, owned by McDonnold's remote predecessors in title.

Martin claimed title to the disputed land by adverse possession. To support an adverse possession claim, a claimant must prove: (1) actual possession of the disputed property; (2) under a claim of right; and (3) that it is adverse or hostile to the claim of the owner and was consistently and continuously so for the duration of the statutory period.

The test of hostility is whether acts performed by the claimant on the land, and the use made of the land, was 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. Possession must not only be actual, but also visible, continuous, notorious, distinct, hostile (i.e., adverse), and of such a character as to indicate unmistakably an assertion of a claim of exclusive ownership in the occupant.

At most, the evidence showed that Martin and her predecessors in title have used the disputed land enclosed within the fences of their ranch for cattle ranching and related chores, and have done so over the years without any knowledge that some of their claimed ranch land may have belonged to someone else. A claimant's subjective belief that the property claimed adversely belonged to him, standing alone, fails to raise a fact issue.

There was also uncontroverted evidence that neither Martin nor her father knew who had put up the fences that enclosed the portion of Survey 24 that was not in the family's deeds. Moreover, Martin's parents had no knowledge of ever having constructed new exterior fences on the ranch. Under Texas law, use of land for grazing cattle along with other related use, is insufficient to establish title by adverse possession where the disputed property was incidentally enclosed by casual fences.

Moore* v. *Stone, 255 S.W.3d 284

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

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

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

PART XI
EASEMENTS

Brownlow* v. *State of Texas, 251 S.W.3d 756 (Tex.App.—Houston [14th Dist.] 2008, no pet. history to date). The State sought to condemn Brownlow's 12.146 acres of land for the opening, construction and maintenance of a rainwater detention facility. The parties eventually settled the condemnation suit with an agreement for an easement on the property "for the purpose of opening, constructing, and maintaining a detention/mitigation facility in, over, and across the tract of land for the purpose of making additions to, improvements on, and repairs to said detention facility or an part thereof."

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

A fee simple absolute title to land gives the owner the right to use the land in any way not hurtful to others. By contrast, an easement is a nonpossessory interest, though it authorizes its holder to use the property for a particular purpose. While establishment of an easement, in general terms, implies a grant of unlimited reasonable use as is reasonably necessary and convenient, the fee owner retains title to the land and all that is ordinarily considered part of that land.

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

The State responds that when it possess an easement over and upon property to build and

maintain a detention facility, it has, by implication, the right to remove the soil necessary to that purpose and the right to use that soil elsewhere without the permission of, or compensation to, the fee owner of the estate.

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

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

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

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

SouthTex 66 Pipeline Company, Ltd.* v. *Spoor, 238 S.W.3d 538 (Tex.App.—Houston [14th Dist.] 2007, pet. denied). Spoor argued that a pipeline easement originally acquired by WesTTex through condemnation could not be assigned to SouthTex.

Pipeline easements are assignable in Texas. With respect to partial assignments of such an easement, the more modern view in commercial easements is that such an easement is partially alienable when it does not burden the underlying land beyond what was contemplated in the original easement grant. Although easements "in gross" are personal to the grantee only, and are generally not assignable or transferable, the parties may create an assignable easement in gross through an express assignment provision. Thus, without something specific in the record to show that this easement could not be assigned, Texas law would allow it. The court did not find any evidence or fact in the record to make the easement unassignable. In fact, it found just the opposite.

Not only are commercial easements generally assignable, this specific easement was assignable. The order of the court granting a Writ of Possession to WesTTex incorporated by reference the Statement submitted by WesTTex in the condemnation proceeding. The Statement provided that the easement and Pipeline would

be "utilized by WesTTex, and its successors and assigns, as a common carrier pipeline...." Thus, the order by the court granting the easement incorporated language making the easement assignable by WesTTex, as long as the Pipeline is utilized as a common carrier pipeline.

Whaley* v. *Central Church of Christ of Pearland, 227 S.W.3d 228 (Tex.App.—Houston [1st Dist.] 2007, no pet.). In 1976, the Whaleys purchased a landlocked tract from the Church's predecessor in title. An easement for a driveway was expressly granted so that the Whaleys could access the landlocked tract. In addition to the easement for the driveway, the earnest money contract between the Whaleys and the seller stated that the Whaleys would be allowed "to erect a sign at a designated location." In 1977, the Whaleys opened an automotive repair shop on their tract and erected a sign on the seller's property. The sign was metal, two feet wide by three feet long, and mounted on a three-foot pole. The sign's location did not abut on either the Whaleys' land or the driveway easement. Eight years later, that sign was replaced by a sign 12 feet wide by eight feet high, which sat on the premises for 12 years until it was damaged in a storm. After the sign was damaged, it was replaced in 1997 by a sign that was metal, approximately eight feet long, and on top of a brick base that was two feet deep and eight feet wide. The sign and base together were approximately six feet in height.

In 2002, the Church purchased the tract burdened with the driveway and sign easements. The Church removed the Whaleys' sign because they did not have an easement that expressly allowed the sign. The Whaleys sued the Church for removing the sign, and a temporary injunction was issued to prohibit the Church from interfering with the Whaleys' easement. The Whaleys replaced the sign taken down by the Church with a sign that was similar in size to the 1997 sign.

In an earlier appeal, this court held held that the Whaleys have a sign easement by estoppel at the location on which the sign is and has been erected and remanded the cause for the determination of a legal description of the sign easement and for entry of judgment. The trial court held a hearing on the issue. The trial court's judgment granted an easement of a four-foot by 10-foot area (40 square feet) for the easement, describing it by metes and bounds.

The Whaleys asserted that the evidence was legally and factually insufficient to support the trial court's judgment limiting the easement to 40 square feet, calling the court's decision arbitrary and capricious.

Every easement carries with it the right to do whatever is reasonably necessary for full enjoyment of the rights granted. In determining the scope of an easement, a court may imply only those rights reasonably necessary to the fair enjoyment of the easement with as little burden as possible to the servient owner. Nothing passes by implication as incidental to a grant of an easement except what is reasonably necessary to its fair enjoyment.

The evidence showed that the sign currently in place was eight feet long and sat on top of a brick base that was two feet deep and eight feet wide, which amounts to a 16-square-foot area. Although the trial court did not grant the Whaleys their requested 100 square feet for the easement for the sign, the trial court gave them more than twice the area of square feet that the base of the sign currently occupies. The Whaleys' rights are limited to only those which are necessary to effectuate the purpose of the easement, which is the erection of a sign.

PART XII
CONDOMINIUMS AND OWNERS ASSOCIATIONS

Plano Parkway Office Condominiums* v. *Bever Properties, LLC, 246 S.W.3d 188 (Tex.App.—Dallas 2007, pet. pending). Huffman Builders purchased property in Plano to develop an office condominium. It Huffman Builders filed a declaration pursuant to sections 82.051 and 82.055 of the Texas Property Code. Huffman Builders sold three units in the development, the third being sold to Bever Properties in April 2004. In August 2004, Huffman Builders filed articles of incorporation

for Plano Parkway Office Condominiums. After a series of disputes with the condo association, Bever Properties and its tenant filed a lawsuit seeking a declaration that the condo association, "is not cognizable as a condominium association under Texas law" because, contrary to the requirements of Texas law, the secretary of state had not issued a certificate of incorporation for that association before the condominium units were conveyed and the articles of incorporation provide that the association has no members.

Bever Properties moved for partial summary judgment against the association on two grounds: (1) the association failed to meet the statutory mandates of the Uniform Condominium Act and therefore did not "even exist," and (2) since there is no condominium association under Texas law, the property owned by Bever Properties cannot be subject to its regime (whether by way of the Condominium Declaration, the Articles of Incorporation, the Bylaws or otherwise). It argued that because Huffman Builders conveyed all three units and later incorporated the association as a non-profit corporation with no members, the association "is simply not cognizable under Texas law" and Bever Properties is not subject to any rules contained in the Condominium Declaration or bylaws of the association. It also contended that the association lacked standing and capacity to assert any claims against Bever Properties in the lawsuit. In support of its argument, Bever Properties cited section 82.101 of the Texas Property Code, which requires a certificate of incorporation to be issued, either for a for-profit or non-profit corporation with members, before any units are conveyed.

The trial court granted Bever Properties' motion for summary judgment against the association, stating in its order that the association does not legally exist, and therefore has no standing to assert claims in this matter.

A condominium is managed by an association consisting of its unit owners, who vote according to the provisions of the declaration and the Texas Property Code. The powers of the unit owners' association are governed by section 82.102 of the Texas Property Code, "unless otherwise provided by the declaration." For example, section 82.102 gives the unit owners' association the power to (1) "adopt and amend bylaws;" (2) "adopt and amend rules regulating the use, occupancy, leasing or sale, maintenance, repair, modification, and appearance of units and common elements;" (3) adopt a budget and assess fees for common expenses; (4) impose penalties on, and suspend voting privileges of, owners who are delinquent in paying assessed fees; and (5) "exercise any other powers necessary and proper for the government and operation of the association."

Section 82.102 states that a unit owners' association must be organized as a profit or nonprofit corporation and that the declarant may not convey a unit until the secretary of state has issued a certificate of incorporation under the TBCA or the Texas Non-Profit Corporation Act. The association asks whether, based on the following language from the Texas Property Code, Bever Properties is excused from the condominium regime because PPOC's certificate of incorporation was issued after the condominium units were conveyed. Bever Properties contends that instead of condominium ownership governed by statute, the unit owners' property rights are governed by common law and that "the joint management matters of the unit owners will be governed by centuries of jurisprudence, just like thousands of other Texas duplexes, triplexes, quadruplexes and other jointly owned properties which do not have duplex, triplex, quadruplex or other property associations." Bever Properties contends that all of the owners will have to unanimously agree on how the property is managed and that the Condominium Declaration, articles of incorporation, and bylaws have no effect on that management.

Although that section states that "the declarant may not convey a unit until the secretary of state has issued a certificate of incorporation" for the unit owners' association, it does not state any consequences for conveying a unit before the certificate of incorporation is issued. The absence of that language suggests that the "may not convey" requirement of

section 82.101 is directory rather than mandatory. Bever Properties argues that this provision is mandatory and that by ignoring the Certificate Before Conveyance Mandate the developer/declarant can retain unfettered dominion and control over the legal structure of the condominium association, and thus the property rights of Bever Properties, after Bever Properties had paid Huffman for its property. But Bever Properties does not explain how any of the purposes for the Act would be furthered by construing the "may not convey" language in section 82.101 to mean that, if units are conveyed before the certificate of incorporation is issued, the units conveyed are not subject to a condominium regime at all. In fact, adopting Bever Properties' interpretation could create uncertainty and undermine the very unit owners' rights that the Act was intended to protect. Consequently, the court concluded that Bever Properties' interpretation does not further the purposes of the Act.

Finally, if the language in section 82.101 is mandatory, and a developer/declarant nevertheless conveyed condominium units before the certificate of incorporation was issued, one possible consequence would be that the developer was not able to convey title to any units and the unit owners' titles are void. However, this consequence would not be consistent with one of the purposes of the Uniform Condominium Act, which is to protect consumers who buy a condominium subject to a properly filed declaration. Significantly, Bever Properties does not contend that conveyance of the unit before the certificate of incorporation was issued affects its title. Instead, Bever Properties contends that the consequence for conveying a unit before the certificate was issued is that it is not subject to the condominium regime at all and that the unit owners hold property interests governed by common law. But the declaration creates the condominium interests, and the declaration and statutes govern how the declaration and condominium interests can be terminated. The court concluded that the legislature did not intend that the consequence of conveying a unit before the certificate of incorporation is issued but after the declaration is filed is that the units conveyed are not subject to the condominium regime.

If, on the other hand, section 82.101 is interpreted as directory, a unit owner would still obtain title to a condominium unit but could sue to force incorporation when a unit is conveyed before the certificate of incorporation is issued. This interpretation would be consistent with the last sentence of comment 2 to section 2-103 of the Uniform Condominium Act, which states that even though defects in instruments other than the declaration do not affect title, they do entitle unit owners "to appropriate relief under section 4-117.

In its second issue, the association asks whether Bever Properties is excused from the condominium regime because the association's articles of incorporation state that it will have no members. Bever Properties contends that those articles violate section 82.101, which states "[t]he members of the association at all times consists exclusively of all unit owners." The association states that it was a technical error, to designate it as a corporation with no members but argues that this error does not excuse Bever Properties from the condominium regime. The court agreed.

The language used in section 82.101 makes clear that all unit owners-and only unit owners-are members of the owners' association. And incorporating an association with no members, with less than all unit owners as members, or with non-unit-owners as members would not comply with section 82.101. But the statute does not state any consequence for noncompliance. Instead, it concluded that the legislature's intent was that the consequence of a defect in the articles of incorporation is to allow the owner to pursue "appropriate relief" under section 82.161 (e.g., suing to force the developer/declarant to incorporate), not to defeat the entire condominium regime.

Landing Council of Co-Owners* v. *Durham, 244 S.W.3d 462 (Tex.App.—Houston [14th Dist.] 2007, no pet.). The Council governs a condominium complex known as "The Landing" through a written Condominium

Declaration. The Durhams own several units in the complex. In 1993, they purchased unit number 338, which is the subject of this suit. Before the purchase, the Durhams learned of a structural problem with the floor of this unit. The Council made repairs before the purchase was completed. In February 2003, the Durhams' long-time lessees vacated the unit. While preparing to relet, the Durhams discovered several large cracks in a concrete patch in the area of the floor that was repaired before they purchased the unit.

Under the Declaration, responsibilities for various aspects of maintenance are divided between the Council and a unit owner. The Council is responsible for maintaining the structural elements of a unit. According to the Durhams, under this provision, the Council was obligated to repair their floor. However, the Council informed the Durhams the repair was their responsibility because there was no "structural" defect in their floor.

Eventually, the Durhams sued the Council for breach of contract, negligence, breach of fiduciary duty, and DTPA violation. Subsequently, in an effort to resolve the matter, the Council offered to repair the floor, while still denying any obligation to do so. The Durhams did not accept the offer and the floor remained unrepaired.

A jury found in the Durhams' favor on the three theories of liability submitted in the charge: breach of contract, breach of fiduciary duty, and DTPA violation. With respect to the DTPA claim, the jury found the Durhams were "a consumer," the Council committed "a false, misleading, or deceptive act or practice," and it "knowingly" represented that the Declaration "confers or involves rights that it did not have or involve." The Council appealed, claiming that it had not knowingly engaged in a false, misleading, or deceptive act or practice and also argued that it made no representation that the Declaration confers or involves rights that it did not have or involve.

Despite their limited communication before suit was filed, the Council effectively represented that the repair was the Durhams' responsibility because there was no structural defect. The Council contends that its conduct constituted, at most, a breach of the Declaration-not a false, misleading, or deceptive act or practice actionable under the DTPA. Rather, the Council contends the parties agreed the Council is obligated to repair only structural defects, but they disagreed on whether the Durhams' floor problem was structural. The evidence reflects both parties interpreted the Declaration as urged by the Council: it is obligated to repair structural defects while a unit owner is responsible for cosmetic repairs.

Viewed in the light most favorable to the jury's verdict, the evidence shows the Durhams' floor defect and proposed repair were indeed structural, as opposed to a "bad patch job" merely requiring repouring of concrete. Accordingly, the Council misrepresented that there was no structural defect to be repaired. However, such an erroneous representation concerned the nature of the defect and the extent of the needed repair-not the terms of the Declaration. This erroneous representation simply did not constitute a representation the Declaration "confers or involves rights that it did not have or involve."

Phan* v. *Addison Spectrum, L.P., 244 S.W.3d 892 (Tex.App.—Dallas 2008, no pet.). Phan decided to buy a unit in the Aventura Condominiums. She executed a condominium purchase contract and tendered a deposit. Phan was assisted by the Realtors whose agent, Jim Hair, officed at the Complex to show prospective buyers different units. Under the terms of her condominium purchase contract, she became a member of the Aventura Condominium Association. Five days before Phan took possession of her unit, the ACA filed suit against the builder of the condos and others for construction defects and fraudulent marketing. A year and a half after suit was filed, the ACA and the builder entered into a settlement agreement pursuant to which the builder paid a large sum to the ACA and the ACA executed a full release of claims against the builder.

A month before settlement of the ACA Suit, Phan sued the builder and the realtors on her own. As to the builder, Phan's petition alleges breach of express and implied warranties relating to the condition of her unit. She asserts claims of fraud, fraud in a real estate transaction and violations of the DTPA against both the builder and realtors, and a claim for breach of fiduciary duty against the realtors.

After settling the ACA Suit, the builder moved for summary judgment against Phan on its affirmative defense of release. The trial court granted the builder's motion for summary judgment, and, thereafter, dismissed all of Phan's claims against the builder. Her case against the realtors proceeded to a two-day bench trial and the trial court entered judgment that Phan take nothing on her claims.

Phan argued on appeal that the trial court erred in ruling that her claims are covered in, and barred by, the ACA Release. Phan does not dispute her membership in the ACA or that the organization could settle claims related to the Complex's common areas. Instead, she argues that the language of the ACA Release does not cover her individual claims. The quoted portions of the ACA Release, however, clearly show that the parties who signed that document intended to cover claims arising from defects in the common area and the individual units. The recitals also indicate that the ACA thought it had the capacity to settle the claims of its members "whether known or unknown" and its disbursement of settlement proceeds to its members, including Phan, evidences its efforts to remedy the claims of individual unit owners.

A release is effective both against named parties and parties that are described in the release with such descriptive particularity that their identity is not in doubt. By virtue of her ownership of her unit, Phan is a member of the ACA. Under Texas Property Code § 82.102, she therefore consented to allow the ACA to bring and settle the ACA Suit in its own name and on her behalf.

Goddard* v. *Northhampton Home-owners Association, Inc., 229 S.W.3d 353 (Tex.App.—Amarillo 2007, no pet.). The homeowners association's bylaws, which allowed the association's board to establish, levy, and collect annual assessments from homeowners, were filed in county property records, and as such became part of the dedicatory instruments that had also been filed in the property records, allowing the association to impose assessments against the homeowner in an amount determined by the association's board, even though the amount exceeded the maximum assessment figure set forth in the association's declaration of covenants, where the declaration of covenants established the maximum assessment for a specific period of time, and the bylaws controlled after such time expired.

PART XIII
HOMESTEAD

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

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

A homestead may be either urban or rural. Section 41.002. An urban homestead can be no more than ten acres of land in one or more contiguous lots. Section 41.002(a). A rural homestead can be no more than 200 acres for a family or 100 acres for a single adult and may be located in one or more parcels. Section 41.002(b). A homestead is considered urban if

the property is (1) located within the limits of a municipality or its extraterritorial jurisdiction or a platted subdivision and (2) served by police protection, paid or volunteer fire protection, and at least three of the following services provided by a municipality or under contract to a municipality: electric, natural gas, sewer, storm sewer, and water. Section 41.002(c).

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

Cadle Co.* v. *Ortiz, 227 S.W.3d 831 (Tex.App.—Corpus Christi 2007, pet. denied). The Ortizes were married. During the marriage, Mrs. Ortiz bought a house in her own name, keeping Mr. Ortiz's name off the title to protect against creditors. A few years later, they borrowed a home improvement loan. Mrs. Ortiz signed all the documents, again omitting any reference to her husband. In getting the loan, she marked the "unmarried" block on the HUD forms. The loan was acquired by Cadle and the Ortizes defaulted. Cadle foreclosed and the Ortizes sued to set the foreclosure aside, claiming that the lien was invalid because the property was homestead and Mr. Ortiz had not joined.

Cadle agreed that the property was homestead, but argued that the Ortizes had waived their homestead rights by committing a fraudulent misrepresentation intended to deceive creditors.

Under the existing homestead law, Cadle's lien on the Ortiz home must be found invalid because it depends upon three documents-the assumption deed, the note, and the trust deed-that are not signed by both Mr. and Ms. Ortiz as the Texas Constitution explicitly requires. Cadle attempted to overcome the two-spouse signature requirement with an affirmative defense: Cadle argued that Ms. Ortiz misrepresented her marital status by omitting Mr. Ortiz's name from the lien documents, and thus a finding that the Ortizes did not waive their homestead rights by deliberately misrepresenting creditors is against the great weight and preponderance of the evidence. The court disagreed.

Texas law recognizes that homestead protection can dissolve if the owners deliberately misrepresent their marital status in order to defeat the rights of an innocent party who, in good faith, without notice, for valuable consideration, has acquired valid liens. Such an assertion of misrepresentation is an affirmative defense upon which the defendant bears the burden of proof. If an individual affirmatively misrepresents himself or herself on documents as single when he or she is married, a question arises concerning whether the couple's homestead rights have been waived.

The home was purchased during the marriage and that the Ortizes occupied the home as their homestead. Rather than represent herself as "unmarried" or "single" on any of the documents Cadle relied upon, Ms. Ortiz merely signed her name and made no mention of her husband. This is different than, for example, the affirmative misrepresentation of the married man in Brown who falsely signed his name "Vincent Brown, a single man." Moreover, because a person may hold a homestead interest in his or her spouse's separate property, it is not necessary to have one's name on real property documents in order to maintain a homestead interest in the property. Thus, the fact that Mr. Ortiz's name was not on the assumption deed, note, or trust deed does not mean that he lacked a homestead interest in the Ortiz household. Regardless of Cadle's ability to defeat Ms. Ortiz's homestead exemption, it has shown nothing to defeat Mr. Ortiz's homestead

exemption.

Wilcox* v. *Marriott, 230 S.W.3d 266 (Tex.App.—Beaumont 2007, pet. denied). Wilcox and obtained a judgment against the Rascom in 1999 and filed an abstract of judgment soon after. Substantial changes were made to the homestead laws on January 1, 2000, including an expansion of the maximum size of an urban homestead from one acre to ten acres. Roscom sold the approximately 1-½ acre property on which he and his wife lived to Marriott after the effective date of the amendments. The jury found that Roscom intended to claim the property as his homestead when he sold it to the Marriotts. The trial court ruled the entire parcel is included in the homestead exemption from forced sale, and that the judgment lien did not attach to the property.

The primary issue in this appeal concerns the effect of the 1999 amendments to the homestead provisions in the Texas Constitution and the Texas Property Code. In integrating the constitutional amendment into the Property Code, the Legislature provided that the changes in the law dealing with the size of the homestead, designation of homestead, and excess acreage apply to execution under a writ of execution issued on or after January 1, 2000, and that a lien on real property acquired before January 1, 2000, is governed by the law in effect on the date the lien was acquired.

Wilcox contends the change in the law can have no effect on the judgment lien perfected by abstract of judgment, so execution should issue according to prior law. To reach this construction, Wilcox must ignore the unequivocal language that the new law applies to execution under a writ of execution issued on or after January 1, 2000.

The Marriotts contend the judgment lien did not attach to Roscom's homestead, which extended to the entire property as of January 1, 2000. Because Wilcox did not determine and seize the excess while one existed, the Marriotts contend the entire tract is exempt. To reach this construction, the Marriotts must ignore the unequivocal language that the change in the law does not affect the validity of a lien acquired before January 1, 2000.

The trial court resolved the issue by applying the rule that homestead laws are to be liberally construed to effectuate their beneficent purpose. Because the purpose of the law is to protect homesteads from seizure, the trial court's ruling effectuates the purpose of the statute.

Nonetheless, the Legislature expressed its intention to continue the prior law for liens perfected before the effective date of the constitutional amendment. Generally, when the property has not become a homestead at the execution of the mortgage, deed of trust or other lien, the homestead protections have no application even if the property later becomes a homestead. In this case, the property was always Roscom's homestead; it is the homestead protections that did not apply to the entire parcel when Wilcox filed the abstract of judgment.

The execution on a money judgment may be had only upon property of the judgment debtor which is subject to execution by law.

Effective January 1, 2000, Roscom's homestead rights expanded to the entire parcel and the new law governed any writ of execution issued in 2000. Thus, regardless of the validity of the judgment lien, the entire property was exempt from execution effective January 1, 2000. As of January 1, 2000, what had been property in excess of the one acre homestead exemption became property within the ten acre homestead exemption and was no longer subject to execution.

Whether the change in the law disencumbered the property from the pre-existing lien is another matter. The statutory construction applied by the trial court determined the validity of the lien based upon the homestead law in effect on the date the writ of execution issued. A judgment lien attaches to the non-exempt real property of the judgment debtor when an abstract of judgment is filed and indexed in the county where the property is located.

Assuming the filed abstract was properly indexed prior to January 1, 2000, the lien attached to any non-exempt property before the effective date of the amendments. A literal reading of the 1999 Property Code amendments gives Wilcox a lien on Roscom's excess acreage; however, Wilcox cannot have execution because no writ of execution issued before the homestead exemption expanded to include the entire tract.

PART XIV
CONSTRUCTION AND MECHANICS' LIENS

Lamar Homes, Inc.* v. *Mid-Continent Casualty Company, 242 S.W.3d 1 (Tex. 2007). This case comes to the Texas Supreme Court on certified questions from the Fifth Circuit asking whether an insurer under a commercial general liability policy has a duty to defend its insured, a homebuilder, against a homebuyer's claims of defective construction. The Fifth Circuit certified three questions for consideration:

1. When a homebuyer sues his general contractor for construction defects and alleges only damage to or loss of use of the home itself, do such allegations allege an "accident" or "occurrence" sufficient to trigger the duty to defend or indemnify under a CGL policy?

2. When a homebuyer sues his general contractor for construction defects and alleges only damage to or loss of use of the home itself, do such allegations allege "property damage" sufficient to trigger the duty to defend or indemnify under a CGL policy?

3. If the answers to certified questions 1 and 2 are answered in the affirmative, does Article 21.55 of the Texas Insurance Code apply to a CGL insurer's breach of the duty to defend?

The court concluded that allegations of unintended construction defects may constitute an "accident" or "occurrence" under the CGL policy and that allegations of damage to or loss of use of the home itself may also constitute "property damage" sufficient to trigger the duty to defend under a CGL policy. Accordingly, as to the duty to defend, it answered the first two questions "yes." It further concluded that former article 21.55 (recodified as sections 542.051-.061 of the Texas Insurance Code) does apply to an insurer's breach of the duty to defend and accordingly answer the third question "yes."

TA Operating Corporation* v. *Solar Applications Engineering, Inc., 191 S.W.3d 173 (Tex.App.—San Antonio 2006, pet. granted). 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 XV
AD VALOREM TAXATION

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

Section 11.1825(x)(3)(A) allows the governing body of the taxing unit to deny the requested exemption if it determines that the taxing unit cannot afford the loss of ad valorem tax revenue that would result from approving the exemption. DISD denied the exemption on this basis.

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

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

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

Panther Creek Ventures, Ltd.* v. *Collin Central Appraisal District, 234 S.W.3d 809 (Tex.App.—Dallas 2007, pet. denied). Panther Creek and other landowners acquired multiple parcels of undeveloped real property in Collin County for the purpose of developing them into residential subdivisions. At the time the landowners acquired the properties, the land qualified as open-space agricultural land pursuant to section 23.52 of the Texas Tax Code and was taxed on that basis. After obtaining permit approvals, the landowners began developing the properties for residential use.

At all relevant times, the appraisal district was on an annual reappraisal program. During the time the residential subdivisions at issue were being developed, however, the district did not physically inspect some of the properties because of difficulty accessing them. For those properties, it relied upon development plats filed in the public records. After the appraisal district became aware there had been a change of use, it notified the landowners that it was changing the tax classification of the properties from agricultural to residential. The notices also informed the landowners they were being assessed rollback tax penalties as provided by Texas Tax Code § 23.55.

The property in the change of use determination included land used for streets and alleys that were constructed by the landowners incident to the development of the properties as residential subdivisions in accordance with, and as required by, the ordinances and regulations of the cities in which the subdivisions were being built. The landowners asserted that the imposition of rollback taxes on the portions of the land developed as streets and alleys violated Texas law prohibiting the taxation of land dedicated to public use. The appraisal district responds that, because the land used for the

streets and alleys was not dedicated to public use until after the date of the change of use, the landowners are liable for rollback tax penalties on that land.

Dedication is the setting apart of land by the owner for some public use together with the actual or implied acceptance of the land for that use by or on behalf of the public. The elements of dedication are: (1) intention to dedicate; (2) manifestation and communication of intention to dedicate; and (3) acceptance of the dedication. Land that is dedicated to the state or a political subdivision of the state to be used for public purposes is exempt from taxation. Furthermore, rollback tax penalties will not be imposed on a landowner if a change of use of the land occurs as a result of a transfer of the property to the state or a political subdivision to be used for a public purpose. If, however, the chief appraiser determines that a change of use of the land occurred before the land was dedicated to public use, the landowner is liable for all taxes owed until the date of the dedication, including rollback tax penalties.

The landowners contend the numerous rules and regulations dictating the development of the subdivisions on the properties at issue show that the land set aside for streets and alleys was dedicated to public use at the time the change of use occurred. The landowners point to specific regulations requiring them to identify proposed streets and alleys on plats submitted for approval as well as the requirement that they submit a signed certificate of dedication to obtain approval of the final plat. Because the landowners did not begin construction until after the final plat was approved, they argue the change of use could not have occurred until after the land was dedicated and, therefore, the land could not be subject to the rollback tax penalties.

Although the rules and regulations relied upon by the landowners dictate that developers manifest and communicate a clear intent to dedicate the land to be used for streets and alleys and other public places before they can obtain approval to begin development, this communication of intent is only part of the dedication process. There must also be acceptance of the dedication. The recording or approval of a plat does not, by itself, constitute acceptance of the dedicated land.

As noted by the landowners, even after the final plat is approved, they can submit an amended plat for approval changing the dedicated areas. In this case, based on the stipulated facts presented, acceptance of the dedicated land did not occur until the city issued its final acceptance certificates stating that the public improvements and dedications were accepted. Where the final acceptance certificates were signed after the date of the change of use, the property was not finally dedicated at the time the change of use occurred. Accordingly, rollback tax penalties were properly assessed against the landowners for the land at issue because they owned the land at the time the change of use occurred.

Benson Chevrolet, Inc.* v. *Bexar Appraisal District, 242 S.W.3d 54 (Tex.App.—San Antonio 2007, no pet.). At the beginning of each year, appraisal districts appraise the value of real and personal property located within the district's jurisdiction. After appraising the property, the appraisal districts issue notices of appraised value to property owners. If no protest or challenge is filed by the property owner regarding the appraised value established by the appraisal district, the appraisal district certifies the value to the tax assessor-collector and the tax assessor-collector issues tax statements and collects taxes.

When a property owner disagrees with an appraised value, he or she may challenge the valuation to the Appraisal Review Board pursuant to two provisions of the Tax Code: sections 41.41 and 25.25. Section 41.41 gives the taxpayer thirty days to protest valuation on various grounds. If the property owner fails to meet the deadlines for a section 41.41 protest, he or she may still file a motion to correct certain types of errors in the appraisal roll under section 25.25 of the Tax Code. Section 25.25(c) gives a property owner up to five years to request that the ARB change the appraisal roll to correct: (1) clerical errors; (2) multiple appraisals; or (3) the inclusion of property that does not exist in the

form or at the location described in the appraisal roll.

Also, under section 25.25(d), a property owner may, at any time before the date the taxes on the property become delinquent, file a motion "to change the appraisal roll to correct an error that resulted in an incorrect appraised value for the owner's property." The property owner, however, must show the error "resulted in an appraised value that exceeds by more than one-third the correct appraised value" to be entitled to relief under this subsection. Property owners who are dissatisfied with the outcome of their ARB proceeding may seek judicial review of the ARB's decision.

The Property Owners are various owners of personal property located in Bexar County, Texas. In May 2003, the District issued notices of appraised value to the Property Owners advising them of the determined appraised value of each of their properties and the associated tax due. The Property Owners did not protest the appraisal values published in the District's notices. In July 2003, the District approved and certified the appraisal roll, and the tax assessor-collector issued tax statements to the Property Owners in October 2003. The Property Owners paid their 2003 property taxes shortly thereafter.

The District subsequently sent letters to the Property Owners advising them of a recent "amnesty" amendment to the Tax Code, which would allow them to submit tangible personal property for taxation that was previously omitted from the appraisal roll without retroactive taxation. Upon receipt of the District's letters, the Property Owners filed amnesty renditions with the appraisal district. After receiving the Property Owners' renditions, the District determined its original 2003 appraisal values did not include the value of personal property disclosed in the amnesty renditions. The District later prepared supplemental appraisal records and issued new 2003 appraisal notices to the Property Owners, which reflected increased property appraisals due to the District's consideration of the previously omitted property. The Property Owners paid their taxes upon receiving the District's appraisal notices and allowed the deadline to pass to file protests of their appraised value under section 41.41(a) of the Tax Code.

After the deadline for filing a section 41.41(a) protest had passed, the Property Owners filed challenges relating to the District's reappraisals under section 25.25(d) of the Tax Code. The Property Owners claimed the appraisal district erroneously considered their amnesty renditions and encouraged the District to correct the appraisal roll since the appraisal district's error resulted in incorrect appraised values that exceeded by more than one-third the correct appraised values of the properties. The District denied each of the Property Owners' challenges.

The plain language of sections 25.25 and 41.41 indicates that a property owner's ability to change a tax appraisal roll is limited. Property owners who file a protest under section 41.41 soon after receiving their notice of appraised value have the widest latitude regarding what may be challenged. By contrast, property owners who wait until after the deadlines for filing a section 41.41 protest to file a challenge under section 25.25 are more limited with respect to what may be challenged. The purpose of section 25.25(c) "is to allow late changes to otherwise finalized appraisal records only in situations where 'the decision to make the change is based on an objective, factual determination and the payment of taxes based on the uncorrected records would be fundamentally unfair. Although sections 41.41 and 25.25 may limit a property owner's ability to challenge an appraisal roll, it is clear from the language of these provisions that both authorize a property owner to raise an excessive appraisal claim administratively with the appraisal district.

Given the fact that the Property Owners timely filed section 25.25(d) challenges with the District claiming their properties were at least one-third over-appraised as a result of an error by the appraisal district, the court must decide whether a property owner raising an excessive appraisal challenge under section 25.25(d) instead of section 41.41(a) may seek judicial

relief in the district court under section 42.25.

Section 42.25 provides: "[i]f the court determines that the appraised value of property according to the appraisal roll exceeds the appraised value required by law, the property owner is entitled to a reduction of the appraised value on the appraisal roll to the appraised value determined by the court." No language within this statutory provision limits its application to only section 41.41(a) excessive appraisal challenges. Because no such limitation exists within section 42.25, the court could see no reason why property owners filing administrative challenges under section 25.25(d) are precluded from seeking relief under section 42.25 in district court.

PART XVI
CONDEMNATION

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

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

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

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

The billboard site in this case, in a very busy location in North Dallas, generated a significant amount of income from advertisers. Viacom received this income by entering into "advertisement contracts." The contracts were location specific and required Viacom to do little more than post and maintain signs on the billboard structure. The value of the physical billboard structure itself was insignificant to the value of the billboard site and would have little or no value without real property. The amount paid for the advertising was thus largely (if not completely) based on the location of the billboard site, not the skills and activities of Viacom or the structure of the sign. The court concluded that income generated from such advertising is generated by the real property upon which the billboard structure is located.

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

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

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

Rischon Development Corp.* v. *City of Keller, 242 S.W.3d 161 (Tex.App.—Ft. Worth 2007, pet denied). The property in question comprises 19.37 acres, all within the City. The land includes heavily wooded areas, hills, and a creek flowing through a ten-foot-deep ravine along the only access road, Davis Boulevard. As a result, the land remained undeveloped from the time the City annexed it in the 1960s. Prior to Rischon's efforts to develop the property, it was zoned for residential use with lots a minimum of 36,000 square feet.

In 1998-before it purchased the property-Rischon met with the City's development staff to discuss the general features of Rischon's proposed development. In December 1998, Rischon applied for rezoning of the property as a planned development-in other words, it sought zoning that would take into account the unique features of the property with some freedom to propose variances from the usual ordinance requirements. Rischon asked the City to approve a planned development zoning ordinance with particular features.

The City's Planning and Zoning Commission considered Rischon's proposal and, based on objections by some citizens and fire department input, made various recommendations for changes to Rischon's proposal, including water and sewer extensions, fencing, sidewalks, and fire sprinkler systems, all of which were consented to by Rischon. With those modifications, the City Council approved Rischon's application and rezoned the property with some additional restrictions. Rischon did not object to any of those new restrictions. Rischon then purchased the property.

Rischon submitted its preliminary plat. The city staff proposed a number of changes including a six-foot-high fence along Davis Boulevard, and Rischon did not object to the changes. The plat was approved with the changes.

After that, Rischon's decided it wanted changes to the zoning ordinance. It applied for rezoning. The city staff recommended against it

and the City Council denied the rezoning. It filed a second rezoning request and again it was denied. Rischon sued the City, alleging that the water and sewer extensions, fencing, sidewalks, and fire sprinkler systems required by the February 1999 zoning ordinance constituted a taking under the Texas constitution. Rischon argues that, as a matter of law, the requirements imposed by the City were compensable takings in the form of exactions.

The takings clause of the Texas constitution prohibits the State from taking private land for public use without compensation or consent. Several different general categories of takings claims exist. A distinct category of takings occurs when the government conditions the approval of permits on an exaction from the approval-seeking landowner. Any requirement that a developer provide or do something as a condition to receiving municipal approval is an exaction.

A landowner may consent to property being taken or damaged without payment of any compensation. Consent is an act of the will; it need not be written, but may be spoken, acted, or implied. A landowner who objects to city-imposed requirements at every opportunity and administrative level does not consent to a taking by exaction even if the landowner waits until after receiving permit approval and after performing the complained-of requirements. Here, though, Rischon did not object at "every opportunity" and "every administrative level" to the requirements it now identifies as exactions. To the contrary: Rischon raised no objections to the requirements of which it now complains until after the city approved the plat and after Rischon and the city entered into the Developer's Agreement.

The court held that by proposing, adopting without objection, or agreeing in the developer agreements without objection to all of the "requirements," Rischon consented to those requirements.

PART XVII
LAND USE PLANNING, ZONING, AND RESTRICTIONS

City of Helotes* v. *Miller, 243 S.W.3d 704 (Tex.App.—San Antonio 2007, no pet.). Miller owns approximately thirty-one acres in Bexar County. The land is located outside the municipal limits of the City of Helotes. In September 2004, Miller contracted to sell approximately twenty-eight acres of the land to Wal-Mart for a commercial/retail development. The sale was contingent upon Wal-Mart being able to develop the property for a retail store. Miller retained the remaining land to develop compatible commercial sites. Miller designated Wal-Mart as his agent to act on his behalf in connection with the development of the property, and Wal-Mart applied for licenses and permits and entered into services contracts. Subsequently, Wal-Mart obtained a permit to construct access driveway facilities, a utility services agreement with the San Antonio Water System, and permits issued by the City for development of the property.

At some point in early 2005, the City initiated annexation proceedings on the property and passed interim development controls. In August 2005, the City passed a resolution opposing "the development of a Wal-Mart, or other 'big box' department store within the municipal corporate limits or the extraterritorial jurisdiction" of the City. The resolution also stated that the City could take action to prevent the location of a Wal-Mart or other 'big box' department store within the city limits or ETJ.

Miller filed an original petition for declaratory relief and asked the court to declare that his land use rights vested as of October 24, 2004 and that the City may not abridge those vested rights to inhibit, impede, or preclude the commercial development of the property.

In December 2005, Wal-Mart opted out of the deal. The City then moved to dismiss the declaratory judgment action because, since Wal-Mart was no longer considering the property, the issue of vested rights was moot.

A declaratory judgment is appropriate only if there is a justiciable controversy about the rights and status of the parties and the

declaration will resolve the controversy. Ripeness and mootness are threshold issues that implicate subject-matter jurisdiction. The constitutional roots of justiciability doctrines, such as ripeness and mootness, lie in the prohibition on advisory opinions. Ripeness emphasizes the need for a concrete injury for a justiciable claim to be presented. At the time a lawsuit is filed, ripeness asks whether the facts have developed sufficiently so that an injury has occurred or is likely to occur, rather than being contingent or remote. A case becomes moot if a controversy ceases to exist or the parties lack a legally cognizable interest in the outcome.

Miller originally filed his declaratory judgment action to determine his rights while the Wal-Mart project was still on-going. On appeal, Miller contends Wal-Mart's decision to abandon its plans did not render his claim moot because there still remains a development project for which a determination of his rights is necessary. He asserts he is entitled to develop the property free of the City's zoning regulations because he initiated the development prior to the City obtaining regulatory control over the property via annexation. Thus, according to Miller, a declaratory judgment action will resolve his dispute with the City by establishing the development controls under which he must proceed. The City asserts Miller's claim is moot because Wal-Mart terminated its real estate contract with Miller, and Miller is not continuing with the Wal-Mart project. The City argues Miller's claim is not ripe because the Local Government Code requires that permits be issued or denied for a controversy to be ripe for adjudication and no permits have been issued to Miller or denied.

The court disagreed with the City. The Texas Legislature has created a system under which property developers may rely on land-use regulations in effect at the time the original application for a permit is filed. Local Government Code § 245.002(a).

Miller, though his agent Wal-Mart, filed an original application for a permit, driveway permits were obtained, a contract with SAWS was executed, the City's fire department reviewed the property, and multiple preliminary plats had been filed with the City. The fact that Miller's anchor tenant withdrew from the commercial development project does not automatically moot the question of what regulations control the development of the property. The question then becomes whether the "project" remains the same. Miller argues he intends to develop the property with another large retail store, such as Wal-Mart, as the anchor tenant. This is sufficient to at least raise a fact issue on whether Miller's current intended development of the property is the same as the land use contemplated when Miller, through his agent, filed the original application in late 2004. Because a fact issue exists on whether the project remains the same after Wal-Mart's withdrawal as anchor tenant, it would have been improper for the trial court to grant the plea to the jurisdiction at this time.

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

The Association and Rakowski challenge the summary judgment that held that the restrictions apply to the Park, on the grounds that, among other things, the Park is not included within the platted boundaries of the Subdivision. In support of their contention that the Park is not included in the Subdivision boundaries, they rely on ***Sills* v. *Excel Servs., Inc.***, 617 S.W.2d 280, 284 (Tex.Civ.App.-Tyler 1981, no writ). There, homeowners in a subdivision sought to enjoin the construction of an apartment complex by enforcing a restrictive covenant that allowed lots to be used only for single family residences. The court in that case held that the restrictive covenants did not apply

to the tract in question because: (1) the tract was not within the dark line delineating the subdivision's outer boundaries; (2) inclusion of the tract in the subdivision would have required flood plain data to be submitted, which was not done; and (3) the restrictions referred only to the subdivision lots and failed to show any scheme or plan of development imposing the restrictions on property not encompassed within the subdivision's boundaries.

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

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

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

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

Hawkins* v. *Walker, 233 S.W.3d 380 (Tex.App.—Ft. Worth 2007, no pet.). The Walkers bought a lot in the Sapphire Enclave subdivision in Colleyville from Rischon. The Sapphire Enclave consisted of thirty-two lots, which Rischon was developing. Hawkins was Rischon's president. At the time of the purchase, Ron Walker owned Ron Walker Custom Homes, Inc. He had been in the custom home building business for over twenty years and had built between 300 and 400 houses. The Walkers planned to construct a "spec house" on the lot that they would live in while the home was on the market.

Ron was impressed by the brochure advertising the subdivision, which stated that it was to be a gated community. Later, Ron received a copy of the Sapphire Enclave building restrictions and homeowner's association covenants, which Hawkins had drafted. Before the Walkers purchased their lot, Ron and Hawkins talked often about the subdivision and Hawkins's plans for it. According to Ron, Hawkins made numerous representations to him, both before and after the Walkers purchased their lot and began building their house. Ron testified that he relied on these representations in deciding to purchase the Walkers' lot and in building a 5000-plus square-foot house that was valued (preconstruction) at $896,000.

After closing on their lot, the Walkers began construction on their house. A month or six weeks later, no other homes were under

construction, and no other lots had been sold. Hawkins told Ron that he was considering selling the remaining lots in the Sapphire Enclave to Pulte Homes and letting Pulte finish the subdivision. Ron was concerned that the Walkers' home would be too expensive to be competitive with the lower-priced homes that Pulte would build. He was also concerned because the promised gate and perimeter fence had not been constructed and the subdivision was overgrown with weeds three to four feet tall. Consequently, the Walkers decided to delay finishing their house until they could see what type and price ranges of houses would be built around theirs.

Later, Rischon revoked the Covenants and sold the remaining thirty-one lots in the Sapphire Enclave to Pulte. Pulte cleaned up the subdivision and began building other homes. Pulte put up a sign advertising the homes as starting at $300,000 to $400,000. The Walkers eventually sold their house for substantially less than the $896,000 they had originally planned for.

The Walkers sued Rischon and Hawkins, alleging causes of action for statutory fraud under business and commerce code section 27.01, common law fraud, and negligent misrepresentations. The Walkers also sought declaratory relief and statutory damages from Rischon for its alleged invalid revocation of the Covenants under Texas Property Code § 202.004. The trial court granted the Walkers summary judgment on their claim that Rischon's revocation of the Covenants was invalid. The remainder of the case was tried to a jury. The jury found that Richon and Hawkins had not committed common law fraud, but had committed statutory fraud and negligent misrepresentations.

Rischon and Hawkins argued that the trial court improperly rendered judgment awarding the Walkers damages from Rischon under property code section 202.004 based on Rischon's invalid revocation of the Covenants, because the Walkers, as private landowners, are not entitled to relief under this statute. Texas Property Code § 202.004, which is entitled "Enforcement of Restrictive Covenants," provides that "[a] property owners' association or other representative designated by an owner of real property may initiate, defend, or intervene in litigation ... affecting the enforcement of a restrictive covenant or the protection, preservation, or operation of the property covered by the dedicatory instrument." The court agreed with Rischon and Walker. The exclusive language in the statute evidences a legislative intent that only property owners' associations or the designated representative of a property owner may sue for civil damages under the statute. Individual property owners are not identified in the statute as persons or entities who are authorized to bring suit under the statute. In this case, the Walkers are not, and do not purport to be, a property owners' association as that term is statutorily defined. Nor is there any evidence in the record showing that they are designated representatives of the property owners in the Sapphire Enclave.

PART XVIII
MISCELLANEOUS

Perez* v. *Hung Kien Luu, 244 S.W.3d 444 (Tex.App.—Eastland 2007, no pet.). MicroCache was a computer-related business. It maintained a website that listed computer parts, including hard drives, for sale. Perez was a refinery operator for Shell Oil Refinery and repaired computers as a side business. The night of July 15, he was looking for hard drives on the internet and went to MicroCache's website. He noticed that Seagate 146GB hard drives were listed for $1 each. Perez ordered 100 hard drives, paid MicroCache $228.25, and received a confirmation e-mail. The following day, he received an e-mail from Luu, a MicroCache officer, advising him that there was a system error and that his payment was being refunded. Perez e-mailed a response advising Luu that he did not want a refund but wanted the 100 hard drives and that he expected delivery within ten days. Perez checked MicroCache's website again and saw that the hard drive's price was now $1,195 each.

MicroCache refused to sell the hard

drives for $1, and Perez filed a DTPA suit against Luu and MicroCache. The trial court ruled in favor of MicroCache.

The DTPA contains four laundry list items specifically referring to advertising representations, Section 17.46(b)(9), (10), (17), and (18). Subsections (17) and (18) have limited applicability. Subsection (17) forbids advertising a sale by fraudulently representing that a business is going out of business. Subsection (18) forbids certain advertisements in connection with a prescription drug identification card. Subsections (9) and (10), conversely, are broadly phrased, apply to all advertising, and are generally implicated by price representations.

Subsection (9) prohibits advertising goods or services with intent not to sell them as advertised, and subsection (10) prohibits advertising goods or services with intent not to supply a reasonable expectable public demand unless the advertisement discloses a limitation of quantity. This type of conduct has been referred to as "bait and switch" advertising. Both subsections require proof of intent and, in fact, are the only two laundry list items to use the word "intent."

Because the legislature assigned a higher burden of proof to the two laundry list items based upon general advertising representations and because the legislature worded those two items in a way that typically implicates price representations, the court held that the legislature did not intend to impose strict liability for advertising mistakes such as the one before us.

There was considerable evidence that the $1 price was a mistake. Luu testified that the website was new and that his programmer used a $1 purchase price to test it. The price was then mistakenly left at $1. Perez refused to concede the price was a mistake but did describe it as "a damn good deal." In fact, it was such a good deal that, even though he had only sold ten computers in the last five years, he ordered 100 hard drives when he saw the price. Because Perez was required to prove intent to establish an advertising misrepresentation under the DTPA and because the trial court found that the advertised price was a mistake, its take-nothing judgment is consistent with its findings.