CASE LAW UPDATE

DAVID A. WEATHERBIE, *Dallas*
Cramer Weatherbie Richardson Walker
dweatherbie@cwrwlaw.com

State Bar of Texas
26th ANNUAL
ADVANCED REAL ESTATE DRAFTING COURSE
March 26-27, 2015
Houston

CHAPTER 20

DAVID A. WEATHERBIE
CRAMER WEATHERBIE RICHARDSON WALKER LLP

EDUCATION:

B.A., Southern Methodist University - 1971
Juris Doctor, *cum laude*, Southern Methodist University - 1976
Order of the Coif
Research Editor, Southwestern Law Journal

PROFESSIONAL ACTIVITIES:

Licensed to practice in the State of Texas
Partner - Cramer Weatherbie Richardson Walker LLP, Dallas, Texas, a U.S News & World Report Best Law Firm – Tier 1 - Real Estate

ACADEMIC APPOINTMENTS, PROFESSIONAL ACTIVITIES, AND HONORS

Past Chair, Real Estate, Probate & Trust Law Section, State Bar of Texas
Chair, Real Estate, Probate & Trust Law Section, State Bar of Texas 2010-2011
Vice Chair, Real Estate, Probate & Trust Law Section, State Bar of Texas 2009-2010
Treasurer, Real Estate, Probate & Trust Law Section, State Bar of Texas 2008-2009
Council Member, Real Estate, Probate & Trust Section, State Bar of Texas 2003-2007
Adjunct Professor of Law, Southern Methodist University School of Law / Real Estate Transactions - 1986 to 1995 and 2014
Fellow, American College of Real Estate Lawyers
Life Fellow, Texas Bar Foundation
Listed *Texas Monthly* "Super Lawyer" each year since 2003
Listed in *Best Lawyers in America* and *Who's Who Legal*
Namesake and first recipient of the Weatherbie Work Horse Award given annually by the State Bar Advanced Real Estate Law Course
Recipient of the Standing Ovation Award for 2008 given by TexasBarCLE for extraordinary commitment to State Bar continuing legal education programs.
Finalist – Texas Lawyer "Go-To Lawyer" for 2012

LAW RELATED PUBLICATIONS AND PRESENTATIONS:

Course Director for the State Bar of Texas, Advanced Real Estate Law Course and for the University of Texas at Austin - Mortgage Lending Institute
Author/Speaker for the State Bar of Texas, Advanced Real Estate Law Course - 1987 to present
Author/Speaker for the University of Texas at Austin - Mortgage Lending Institute - 1992 to present
Author/Speaker for Texas Land Title Institute - 1992 to present
Author/Speaker for the State Bar of Texas, Advanced Real Estate Drafting Course
Panel Member for State Bar of Texas, Advanced Real Estate Strategies Course – 2007 and 2008
Author of "Annual Survey of Texas Law -- Real Estate," 51 SMU L. Rev. 1321 (1998) and 52 SMU L. Rev. 1393 (1999)

CASE LAW UPDATE

DAVID A. WEATHERBIE
CRAMER WEATHERBIE RICHARDSON WALKER LLP
DALLAS, TEXAS

The case selection for this episode of Case Law Update, like all of them in the past, is very arbitrary. If a case is not mentioned, it is completely the author's fault. Cases are included through 437 S.W.3d and Supreme Court opinions released through January 30, 2015.

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

A number of other terms, such as Bankruptcy Code, UCC, DTPA, and the like, should have a meaning that is intuitively understood by the reader, but, in any case, again refer to the statutes or cases as presented in the cases in which they arise.

TABLE OF CONTENTS

PART I MORTGAGES AND FORECLOSURES 1

PART II HOME EQUITY LENDING 1

PART III PROMISSORY NOTES, LOAN COMMITMENTS, LOAN AGREEMENTS 4

PART IV GUARANTIES 5

PART V LEASES 7

PART VI DEEDS AND CONVEYANCES 10

PART VII VENDOR AND PURCHASER 14

PART VIII HOMESTEAD 15

PART IX TITLE INSURANCE AND ESCROW AGENTS 16

PART X CONSTRUCTION AND MECHANICS' LIENS 17

PART XI LAND USE PLANNING, ZONING, AND RESTRICTIONS 19

CASE LAW UPDATE

PART I MORTGAGES AND FORECLOSURES

Kimzey Wash, LLC* v. *LG Auto Laundry, LP, 418 S.W.3d 291 (Tex.App.-Dallas 2013, no pet.). LG sold some land to Shammy Man Auto Wash. Shammy Man purchased the premises in part with a loan from the Bank that was secured by a deed of trust. On the same day, LG and Shammy Man also signed a ground lease granting LG possession of a .0625-acre portion of the tract containing a cellular tower and acknowledging the cellular tower as LG's property for the term of the lease. The ground lease further provided it would be subject and subordinate to any of Shammy Man's mortgages and deeds of trust encumbering the premises but also subject to any subordination, non-disturbance and attornment agreement executed by a mortgage holder "which will state, among other things, if any deed of trust or mortgage is foreclosed, ... this lease shall not terminate or be terminable by the purchaser at foreclosure ... and TENANT shall attorn to the purchaser at such foreclosure sale." LG and the Bank signed an SNDA providing, among other things, that in the event proceedings to foreclose the deed of trust were instituted, LG's possession of the leased premises would not be disturbed. The SNDA had an effective date of February 8, 2007 which was the date stated for LG's execution, but the Bank's execution was dated April 11, 2007 and the SNDA was not recorded in the Collin County real property records.

Shammy Man defaulted on its loan with the Bank, and the property was posted for a foreclosure sale pursuant to the Bank's deed of trust. Before the foreclosure sale occurred, however, the FDIC took over the Bank and transferred its assets, including Shammy Man's loan and deed of trust, to State Bank of Texas. State Bank held the posted foreclosure sale and ultimately acquired title to the property by substitute trustee's deed. Kimzey purchased the property from State Bank by warranty deed about four months later. Kimzey filed this lawsuit asserting, among other things, State Bank's foreclosure of the deed of trust extinguished the LG's ground lease. The trial court ruled in favor of LG.

The general rule is that a valid foreclosure of a lien terminates any leases entered into subject to that lien. Here, the ground lease specifically states that it was subordinate to the deed of trust. Consequently, foreclosure of the deed of trust necessarily extinguished LG's ground lease by the express terms in the ground lease itself. The question for the court is whether the SNDA may be used to support LG's position that the ground lease survived the foreclosure of the deed of trust. The SNDA, while acknowledging the superiority of deed of trust, provides that the ground lease will survive, and LG's possession of the lease tract would not be disturbed, by the foreclosure of the deed of trust. Kimzey claimed it was a bona fide purchaser and that the SNDA was unenforceable against it pursuant to the D'Oench, Dhume doctrine and 12 U.S.C. § 1823(e).

Generally, the D'Oench, Duhme doctrine and its federal codification provide that no agreement which tends to diminish or defeat the interest of the FDIC in any asset acquired as security for a loan, or by purchase, or as a receiver of any insured bank, shall be valid against the FDIC and its assigns unless it is in writing, executed by the bank contemporaneously with the bank's acquisition of the asset, approved by the bank's board of directors or loan committee which approval shall be reflected in the minutes of the board or committee, and has been from its execution an official record of the bank. The essence of the doctrine is that the FDIC is entitled to rely on, to the exclusion of extraneous matters, the official bank records setting forth the rights and obligations of the bank and those to whom the bank lends money.

LG argued that the D'Oench, Duhme doctrine does not prevent its enforcement because LG was neither a borrower nor guarantor of a debt and this matter does not involve a claim by or against the FDIC. The court disagreed. LG also argued that D'Oench, Duhme and its subsequent codification do not apply here because the SNDA did not diminish the FDIC's interest in the Bank's mortgage or deed of trust. It contends the SNDA is merely a contract intended to protect LG's right to occupy the strip of land containing the cellular tower and does not alter the relationship between the original lender and borrower. Again, the court was unpersuaded. On its face, the SNDA in part relinquishes the Bank's lien priority to the extent it provided that any foreclosure of the deed of trust would not disturb LG's possession of the lease tract. Absent the SDNA, any foreclosure of the deed of trust would have necessarily extinguished LG's ground lease. Because enforcement of the SNDA tends to diminish the FDICs interest in the assets at issue, the court concluded that the D'Oench, Duhme doctrine applies here as a matter of law.

PART II HOME EQUITY LENDING

Sims* v. *Carrington Mortgage Services, L.L.C., No. 13-0638 (Tex. May 16, 2014). The Simses borrowed a home equity loan. The original loan documents required them to pay principal, interest, and late charges, as well as taxes, assessments, and insurance premiums. The documents gave the lender the right to "do and pay for whatever is reasonable or appropriate" to protect its interest in the property and its rights under the agreement and provided that any amount the lender disbursed to that end "shall become additional debt of Borrower secured by this Security Instrument."

The Simses later got behind on their home equity mortgage payments. They entered into a loan modification agreement with CMS. Pursuant to the agreement, past-due interest was capitalized as well as other charges, including fees, unpaid taxes and insurance premiums. The interest rate was lowered, along with the monthly payment amount.

Two years later, the Simses were again behind, and this time CMS sought foreclosure. The Simses resisted, asserting that the 2009 restructuring violated constitutional requirements for home equity loans. A second loan modification was entered into, again reducing interest rate and payments. Neither of the modification agreements otherwise affected the borrowers' basic obligations or the lenders basic rights mentioned above.

Two months after the second modification, the Simses brought this case as a class action against CMS in the United States District Court. That court certified four questions to the Texas Supreme Court.

1. After an initial extension of credit, if a home equity lender enters into a new agreement with the borrower that capitalizes past-due interest, fees, property taxes, or insurance premiums into the principal of the loan but neither satisfies nor replaces the original note, is the transaction a modification or a refinance for purposes of Section 50 of Article XVI of the Texas Constitution?

If the transaction is a modification rather than a refinance, the following questions also arise:

2. Does the capitalization of past-due interest, fees, property taxes, or insurance premiums constitute an impermissible "advance of additional funds" under Section 153.14(2)(B) of the Texas Administrative Code?
3. Must such a modification comply with the requirements of Section 50(a)(6), including subsection (B), which mandates that a home equity loan have a maximum loan-to-value ratio of 80%?
4. Do repeated modifications like those in this case convert a home equity loan into an open-end account that must comply with Section 50(t)?

The certified questions assume a distinction between a loan modification and a refinancing that, if understood in financial circles,12 is not clear in the text of Section 50. While both words are used several times, neither concept is defined in Section 50. The court essentially said that the question posed by the District Court (i.e., whether this was a modification or refinance) was not the correct question. The real question for purposes of the home equity statutes is whether this was a "new extension of credit." And, while the statutes, again, don't provide a definition of "extension of credit," the court said the meaning was clear. "Credit is simply the ability to assume a debt repayable over time, and an extension of credit affords the right to do so in a particular situation."

The Simses argued that any increase in the principal amount of a loan is a new extension of credit. The court disagreed. Section 50(a)(6)(E) refers to principal as a component of an extension of credit. The Simses argue that in restructuring a loan to capitalize past-due amounts, the lender is actually advancing additional funds to itself (past-due interest) or others (past-due taxes and insurance) to pay those amounts for the borrower, and that this constitutes a new extension of credit. But the borrower's obligation for such amounts, and the lender's right to pay them to protect its security, were all terms of the original extension of credit.

CMS argues that restructuring a loan does not involve a new extension of credit so long as the borrower's note is not satisfied or replaced and no new money is extended. The court agreed that these two conditions are necessary, but could not say with assurance that they are sufficient. For example, a restructuring to make the homestead lien security for another indebtedness, such as the borrower's consumer or credit card debt, would certainly be a new extension of credit. The test should be whether the secured obligations are those incurred under the terms of the original loan. The Simses object that this test provides no effective limit on the size or frequency of additions to principal. But, said the court, the terms of the original loan supply the limit.

The Simses argued that it didn't matter that the restructuring here lowered their interest rate and payments. They argued that lenders have only two options for loans in default: foreclose or forbear. The court thought this was at odds with the fundamental purpose of the home equity statutes, which is to protect homesteads.

So, after having re-written the first of the certified questions, the court answered that the restructuring of a home equity loan that involves capitalization of past-due amounts owed under the terms of the initial loan and a lowering of the interest rate and the amount of installment payments, but does not involve the satisfaction or replacement of the original note, an advancement of new funds, or an increase in the obligations created by the original note, is not a new extension of credit that must meet the requirements of Section 50.

That answer dictated the answers to the other three questions. (1) Capitalization of past-due interest, taxes, insurance premiums, and fees is not and advance of additional funds if those amounts were among the

obligations assumed by the borrower under the terms of the original loan. (2) A restructuring like the Simses' need not comply with Section 50(a)(6) because it does not involve a new extension of credit. And (3) repeated restructuring of a home equity loan does not convert the loan into an open-end account subject to Section 50(t). Section 50(t) describes an open end account as one that may be debited from time to time, under which credit may be extended from time to time and under which the borrower requests advances, repays money, and reborrows money. "This description does not remotely resemble a loan with a stated principal that is to be repaid as scheduled from the outset but must be restructured to avoid foreclosure."

Finance Commission of Texas* v. *Norwood, 418 S.W.3d 566 (Tex. 2013). Most of this case is devoted to constitutional issues of separation of powers. The court concludes that the Finance Commission's interpretations of Section 50 of the Texas Constitution dealing with home equity lending are subject to judicial review. It also determined that the homeowners challenging the Commission's interpretations had standing to sue. It then turned to the substantive issues regarding those interpretations.

First, Section 50(a)(6)(E) provides that a home equity borrower may not be required to pay, "in addition to any interest, fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service the extension of credit that exceed, in the aggregate, three percent of the original principal amount of the extension of credit." The Commission used the Finance Code definition of interest, i.e., compensation for the use, forbearance, or detention of money. That definition is used in the Finance Code in the context of determining whether a loan is usurious. However, said the court, the functions of "interest" in applying the constitutional fee cap for home equity loans and in prohibiting usury are inversely related. If the word is given the same meaning in both contexts, then including lender-charged fees in "interest" strengthens usury laws and weakens the fee cap, though both are designed to protect consumers. That this was the intent of the framers and ratifiers of Section 50(a)(6)(E) is simply implausible. "Interest" for purposes of Section 50(a)(6)(E) means the amount determined by multiplying the loan principal by the interest rate.

Second, Section 50(a)(6)(N) provides that a loan may be "closed only at the office of the lender, an attorney at law, or a title company." This provision was intended to prohibit the coercive closing of an equity loan at the home of the owner. Nevertheless, the Commissions' interpretations allow a borrower to mail the required signed consent under Section 50(a)(6)(A) to the lender and to close through an attorney-in-fact. Both these interpretations permit coercion in obtaining the required consent and a power of attorney at the borrower's home, allowing the final closing to occur later at one of the prescribed locations, thereby defeating the purpose of the provision. Closing a loan is a process. It would clearly be unreasonable to interpret Section 50(a)(6)(N) to allow all the loan papers to be signed at the borrower's house and then taken to the lender's office, where funding was finally authorized. Closing is not merely the final action, and in this context, to afford the intended protection, it must include the initial action. Executing the required consent or a power of attorney are part of the closing process and must occur only at one of the locations allowed by the constitutional provision. The court held that the Commission's interpretations were invalid because they contradict the purpose and text of the provision.

Finally, Section 50(g) requires that a loan not be closed before the 12th day after the lender provides the borrower the prescribed notice. The Commission determined there is a rebuttable presumption that notice is received three days after it is mailed. The homeowners in the case argued that the lenders had to establish actual receipt of notice in each case. The Court held that the Commissions' interpretation does not impair the constitutional requirement; it merely relieves a lender of proving receipt unless receipt is challenged. It agreed with the court of appeals that the interpretation is but a reasonable procedure for establishing compliance with Section 50(g).

In a supplemental opinion, the court clarified a few things. Section 50(a)(6)(E) of the Texas Constitution caps "fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service" a home equity loan, not including "any interest," at 3% of principal. For purposes of Section 50(a)(6)(E), "interest" does not mean compensation for the use, forbearance, or detention of money, as in the usury context, but "the amount determined by multiplying the loan principal by the interest rate." This narrower definition of interest does not limit the amount a lender can charge for a loan; it limits only what part of the total charge can be paid in front-end fees rather than interest paid over time.

The court also held that Section 50(a)(6)(N), which provides that a loan may be "closed only at the office of the lender, an attorney at law, or a title company", precludes a borrower from closing the loan through an attorney-in-fact under a power of attorney not itself executed at one of the three prescribed locations. Executing a power of attorney is part of the closing process, and that not to restrict the use of a power of attorney would impair the undisputed purpose of the provision, which is 'to prohibit the coercive closing of an equity loan at the home of the owner.

Several amici objected that closing is an event, not a process, and that to consider closing as beginning

with the execution of a power of attorney leads to absurd results and problems in applying deadlines prescribed by the constitutional provisions. By "process", the court said, it did not intend something temporally protracted, though it agreed that confusion is understandable. It agreed that the closing is the occurrence that consummates the transaction. But a power of attorney must be part of the closing to show the attorney-in-fact's authority to act. Section 50(a)(6)(N) does not suggest that the timing of the power of attorney is important, or that it cannot be used to close a home equity loan if executed before the borrower applied for the loan. But the court believed that the provision requires a formality to the closing that prevents coercive practices.

The amici argued that requiring a power of attorney, like other closing documents, to be executed "at the office of the lender, an attorney at law, or a title company" works a hardship on borrowers for whom such locations are not readily accessible, such as military persons stationed overseas, others employed in other countries, the elderly, and the infirm. For the military, the Judge Advocate General Corps provides lawyers here and abroad. While JAG lawyers may not be as accessible to military personnel as civilian lawyers are to most people owning homes in Texas, soldiers and sailors in harm's way are no less susceptible to being pressured to borrow money and jeopardizing their homes than people in more secure circumstances.

PART III PROMISSORY NOTES, LOAN COMMITMENTS, LOAN AGREEMENTS

Village Place, Ltd.* v. *VP Shopping, LLC, 404 S.W.3d 115 (Tex.App.-Houston [1st Dist.] 2013 no pet.). Village Place bought the shopping center with a typical non-recourse loan from VP. When Village Place defaulted, FP foreclosed. After applying the foreclosure proceeds to the debt, the remaining unpaid principal and interest on the loan was about $380,000. VP did not sue for that deficiency because the loan was non-recourse; however, it sought and obtained a judgment against Village Place for failure to comply with two of the bad-boy provisions – its out-of-pocket expenses and about half a million dollars for the reduction in value of the collateral because of Village Place's failure to maintain the property.

Village Place argued on appeal that the trial court erroneously awarded a windfall of about $300,000 over the unpaid loan balance. It claimed that the indebtedness that was converted from non-recourse to recourse was limited or capped at the amount of the loan balance and that it was entitled to an offset for the fair market value of the property, per Property Code § 51.003.

The court held that the non-recourse claim for out-of-pockets was not capped. The loan documents obligate the borrower to pay expenses and those are separate and apart from the obligation to pay principal and interest.

The court did hold that the claim for personal liability for reduction in value of the collateral was limited to the unpaid loan balance. First, the loan documents tie the carve-out liability to a loss or damage "suffered or incurred" by VP, and VP did not suffer an additional loss from the reduction in the shopping center's value over the unpaid loan balance. VP did not pay for the repairs and did not incur any liability as a result of Village Place's failure to repair the property or enroll in the program. VP might have sustained a loss due to Village Place's breach of these obligations, insofar as the property's impaired condition reduced the amount of foreclosure proceeds available to pay off the loan balance. But if the property had sold at foreclosure for more than the loan balance, VP would have been required to pay the excess to Village Place; it was not VP's to keep. Here the pledged property sold for less than the loan balance, but VP's loss is not the reduction in value of the property, which it did not own before the foreclosure. Its loss is the damages it suffered as a result of Village Place's breach: the unpaid loan balance and its other out-of-pocket expenses covered by the carve-out-liabilities provisions. In other words, the carve-out-liabilities provisions do not eliminate the necessity that VP suffer damages for Village Place's breach of its contractual obligations, and the damages suffered by VP function as a cap on Village Place's liability. To the extent that the pledged property's reduction in value from inadequate maintenance exceeds the amount of the unpaid loan and covered expenses, VP was not damaged. In other words, the loss VP "suffered or incurred" is the unpaid loan balance plus its other covered expenses less the property's fair market value, and to that extent, and only to that extent, Village Place's liability is reinstated.

The court also held that Village Place was entitled to the § 51.003 offset. Section 51.003 allows the offset against a "deficiency." VP argued that its non-recourse carve-out claims were not a "deficiency" but were breach of contract claims. The court disagreed. The nature of VP's claims was for a deficiency. As noted by the court, the carve-out-liabilities provisions do not impose additional liability for Village Place. Rather, they conditionally restore personal liability on Village Place for breach of the obligations created by the loan documents – such as the obligations to pay principal and interest, taxes and insurance. Village Place would have no personal liability for these obligations but for the carve-out-liabilities provisions. Village Place's restored liability is limited by the unpaid loan balance and VP's other covered expenses.

Karam* v. *Brown, 407 S.W.3d 464 (Tex.App.-El

Paso 2013, no pet.). To lawfully exercise an option to accelerate upon default provided by a note or deed of trust, the lender must give the borrower both notice of intent to accelerate and notice of acceleration, and in the proper sequence. Both notices must be clear and unequivocal. The lender must give the notice of intent to accelerate first. This notice must afford the borrower an opportunity to cure the default and apprise him or her that failure to cure will result in acceleration of the note and foreclosure under the power of sale. If the default has not been cured by the deadline established in the notice, the lender must then give notice of acceleration. Ordinarily, a lender gives notice of acceleration by expressly declaring the entire debt due. However, a lender may give notice of acceleration by taking some other unequivocal action indicating the debt is accelerated. So long as it is preceded by the required notice of intent to accelerate, notice of a trustee's sale constitutes unequivocal action indicating the debt is accelerated.

Graves* v. *Logan, 404 S.W.3d 582 (Tex.App.-Houston [1st Dist.] 2010, no pet.). Logan sued Graves, asking for a declaration specifying the total amount of principal and accrued interest due on the promissory note. Logan also sought damages under a breach of contract theory, contending that, under the lien, Graves, as the note holder, had an implied duty to cooperate with Logan in determining the amount of unpaid principal and accrued interest on a given installment date. Logan claimed that Graves's breach of that implied term caused Logan to incur damages from a planned sale of the property she lost as a result of her inability to convey clear title before the expiration of the earnest money contract.

The essential elements in a suit for breach of contract are: (1) the existence of a valid contract; (2) the plaintiff performed or tendered performance; (3) the defendant breached the contract; and (4) the plaintiff was damaged as a result of the breach. Neither party contests the validity of the promissory note and deed of trust, which do not contain an express provision that requires Graves to provide the payoff figure. At issue in this case is whether Graves had an obligation, implied by Texas law, to provide Logan with a payoff figure within a "reasonable" amount of time after Logan's request, and if so, the existence and amount of damages incurred by Logan as a result of the breach of that obligation. The trial court ruled in favor of Logan based primarily on Logan's argument that the recognized and established, though unwritten, procedure in the State of Texas to consummate a sale of real property against which there is a deed of trust lien is for the title insurance company which will be issuing an owner's policy of title insurance to the purchaser of the property to (i) request from the lender or lien holder a statement of the outstanding principal balance and unpaid accrued interest owning on the promissory note as of the closing date and (ii) obtain from such lender or lien holder the pay-off. Logan argued that the foregoing procedure is so well established in the State of Texas that its inclusion in the documents between the lender and the borrower (i.e. the promissory note and the deed of trust) is not necessary.

Graves contended that the trial court erred in finding a duty to provide a pay-off because the loan documents did not require her to do so. Graves thought her only duty was to release the lien after full performance and payment.

The court said that Logan was correct in asserting that there is a duty to cooperate implied in every contract in which cooperation is necessary for performance of the contract. If applicable, this implied duty requires that a party to a contract may not hinder, prevent, or interfere with another party's ability to perform its duties under the contract. Graves did not, however, interfere with Logan's ability to perform Logan's duties under the deed of trust and promissory note. At most, Graves arguably interfered with Logan's pursuit of benefits incidental to the full execution of her obligations under the promissory note.

The dissent thought the majority's ruling was based on too narrow grounds. Justice Sharp said that, whenever a contract recites that a party has a right to an early payoff, there is an implied contractual duty to provide a payoff statement because failure to do so (and do so in a timely fashion) nullifies (breaches) that provision of the contract.

PART IV GUARANTIES

Interstate 35/Chisam Road, L.P. v. Moayedi, 438 SW 3d 1 (Tex. 2014). Villages borrowed a loan secured by real property in Denton County. Moayedi executed a guaranty. The guaranty included two provisions dealt with in this case. First, in paragraph 7 of the guaranty, it provided that the guaranty would not be discharged, impaired, or affected by any defense that the guarantor might have, Second, in paragraph 13 of the guaranty, it provided that the guarantor waived and relinquished "all rights and remedies of surety."

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

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

The trial court held in favor of the guarantor. The court of appeals reversed, holding that the guarantor had waived his right to apply § 51.003. The court of appeals held that the offset is an affirmative defense. It concluded that the use of "any," "each," and "every" in the agreement encompassed all possible defenses and conveyed an intent that the guaranty would not be subject to any defense other than payment. It further concluded that at least three other provisions in the agreement indicated the same intent, including the guarantor's agreement that I-35 could enforce the guaranty without first resorting to or exhausting any security or collateral. According to the court of appeals, then, because the guarantor waived all defenses, he waived the right to avail himself of section 51.003's offset provision.

The Supreme Court affirmed the court of appeals.

Texans have long embraced the principle of freedom of contract. And the Supreme Court's decisions respect the strong public policy of respecting parties' freedom to design agreements according to their wishes.

The first thing the court did was to address whether § 51.003 can be waived. This had not been argued by the parties, but the court had never ruled on this question. It held that § 51.003 can be waived.

The next thing was to address whether the guarantor had waived § 51.003. Here, the court agreed with the court of appeals that the general waiver provision waives the application of § 51.003.

To be effective, a waiver must be clear and specific. Until now, this court has not addressed the level of specificity required to waive § 51.003. Most cases in which courts have concluded § 51.003 was waived involved language with more specificity than the language at issue here. The guarantor argued that ***Shumway* v. *Horizon Credit Corp.***, 801 S.W.2d 890 (Tex. 1991) should apply. In that case, the court held that a borrower's waiver of the requirement that a lender provide clear and unequivocal notice that it intends to accelerate a debt and that it has accelerated must also be clear and unequivocal. In that case, the court required specific enumeration of the matters being waived. The supreme court said, essentially, that ***Shumway*** didn't really apply here.

The court's decision really rested on this question: What did the guarantor think he was waiving when he waived "any," "each," and "every" defense? As the court of appeals concluded, the plain meaning of "any," "each," and "every" used in paragraph 7 results in a broad waiver of all possible defenses. Just because the waiver is all encompassing does not mean that it is unclear or vague. To waive all possible defenses seems to very clearly indicate what defenses are included: all of them.

The same waiver issue was dealt with the same way in ***Compass Bank* v. *Goodman***, 416 S.W.3d 715 (Tex.App.-Dallas 2013, pet. pending). See also ***Grace Interests, LLC* v. *Wallis State Bank***, 431 S.W.3d 110 (Tex.App.-Houston [14th Dist. 2013 pet. pending).

Also, take a look at ***U.S. Bank* v. *Kobernick***, 402 S.W.3d 748 (Tex.App.-Houston [1st Dist.] 2012, pet. dism'd), which deals with various procedural issues under Property Code § 51.005.

Sowell* v. *International Interests, L.P., 416 S.W.3d 593 (Tex.App.-Houston [14th Dist.] 2013 no pet.). The Guarantor claimed that the Lender's claim on the guaranty is barred by the four-year statute of limitations and because the Lender breached its duty to mitigate its damages by delaying foreclosure, that is, if there had been a prompt foreclosure, there would have been no deficiency.

The loan matured in November 2004. The Lender foreclosed on February 6, 2007. Almost two years later, on February 4, 2009, the Lender sued the Guarantor for a deficiency.

The Lender claimed that Property Code § 51.003 gave it an independent claim against the Guarantor that accrued on the date of foreclosure. Section 51.003(a) provides that any action brought to recover the deficiency must be brought within two years of the foreclosure sale and is governed by that section. Based on the unambiguous language of section 51.003, the Legislature did not create a claim or other basis upon which a person may be liable for a deficiency. Any such liability arises from a different source, for example, a person's liability under a promissory note or a guaranty agreement. In section 51.003, the Legislature addressed the statute of limitations for such an action and a potential offset and credit; the Legislature did not address the source of the liability itself. Thus, the court held that § 51.003 does not create a right to sue for a deficiency, but merely regulates a right that arises from a different source.

The Guarantor then argued that the Lender couldn't recover the deficiency because the claim was barred by the four year statute in Civil Practice & Remedies Code § 16.004. The Guarantor argued that the claim on his guaranty accrued when the note matured and was not paid, back in 2004. In the guaranty, the Guarantor waived any requirement that the creditor make demand for payment on him. Under

this type of guaranty, the Lender's claim against the Guarantor accrues if the debt reaches maturity and the Borrower defaults by not paying it. The court agreed that, under the typical rule for determining accrual of a cause of action, facts had come into existence as of 2004 that authorized the creditor to seek a judicial remedy against the Guarantor.

Still, what statute applies? No courts have dealt with this before.

The court noted that, if a creditor sues a guarantor under a guaranty agreement and obtains a judgment before the creditor conducts a nonjudicial foreclosure sale, then there is no conflict and the suit on the guaranty is governed by the four-year statute of limitations under § 16.004. Likewise, if a creditor sues a guarantor under a guaranty agreement and the suit is still pending when the creditor conducts a nonjudicial foreclosure sale, then there is no conflict and the suit on the guaranty is governed by the four-year statute of limitations under section 16.004.

But, in the fact pattern in this case there is an irreconcilable conflict between section 51.003(a) and the limitations period in section 16.004. Under the unambiguous language of section 51.003(a), this statute applies, and the Lender's suit is timely because it filed it within two years of the foreclosure sale. Under the unambiguous language of § 16.004, this statute applies and the Lender's suit is time-barred because the Lender filed it more than four years after the day the claim accrued.

Applying Government Code § 311.026, the court held that § 51.003 prevails as an exception to the general provision of § 16.004. In this situation, if a deficiency remains after a nonjudicial foreclosure sale under section 51.002 conducted before the creditor files suit against a guarantor, then the effect of section 51.003 is to extend the limitations period under section 16.004 so that it ends two years after the date of the foreclosure sale.

The Guarantor's argument that the Lender's claims were barred because it had failed to mitigate its damages by delaying foreclosure. If there had been a prompt foreclosure, there wouldn't have been any damages, claimed the Guarantor. The court noted provisions in the guaranty that waived the right to assert this kind of defense. Also, the Guarantor's public policy arguments were not supported by case law.

Wells Fargo Bank, N.A.* v. *Smuck, 407 S.W.3d 830 (Tex.App.-Houston [14th Dist.] 2013, no pet.). The borrower got a typical non-recourse CMBS loan, in conjunction with which Smuck executed a document entitled Non-recourse Indemnification Agreement which said, in all caps and bold: "Indemnitor [Smuck] hereby assumes liability for and agrees to pay, protect, indemnify, defend and hold harmless lender (and any assignee or purchaser of all or any interest in the note and the security instrument) from and against any and all liabilities, obligations, losses, damages, costs and expenses (including attorneys' fees), causes of action, suits, claims, demands and judgments which at any time may be imposed upon, incurred by or awarded against lender and for which borrower at any time may be personally liable pursuant to the nonrecourse exceptions (as defined in paragraph 12 of the note)." The borrower defaulted and the lender sued, seeking, among other things, damages because of waste and unpermitted liens on the property that violated the non-recourse carve-outs. After obtaining judgment against the borrower, the lender sued Smuck on his Indemnification Agreement.

Smuck argued that its agreement to indemnify the lender applied only when the borrower is liable to the lender for third-party claims under the carve-outs, not when the borrower itself is liable. In other words, Smuck thought that the lender was incorrectly characterizing the Indemnification Agreement as a guaranty. Smuck contended that the terms "indemnify" and "indemnity" refer to an agreement to hold the Indemnitee harmless against claims by third parties.

The court would not buy that argument. The express wording of the document clearly encompasses any of the lender's own losses in connection with the non-recourse carve-outs. So, contrary to Smuck's argument, the court held, the agreement was, in essence, a guaranty.

PART V LEASES

Coinmach Corp.* v. *Aspenwood Apartment Corp., 417 S.W.3d 909 (Tex. 2013). Anyone who has dealt with apartment complexes knows Coinmach. It installs laundry rooms and operates its machines in those rooms.

In 1980, Coinmach entered into a lease at Aspenwood Apartments. Its lease was expressly made subordinate to any mortgage or deed of trust on the premises. The term was ultimately extended to 1999. In 1994, a lender foreclosed on the project. Ultimately, Aspenwood acquired the property.

Aspenwood gave notice to Coinmach to vacate the laundry rooms, claiming that the foreclosure terminated the lease. Coinmach refused to vacate. A long back-and-forth legal battle ensued. Aspenwood would file an FED; Coinmach would somehow get a writ of reentry. Even after the expiration date of the lease, Coinmach stayed at the property and refused to leave.

This suit was filed in 1998, shortly after Aspenwood filed its second FED action. The trial court ruled, as a matter of law, that the 1994 foreclosure sale had terminated Coinmach's lease. The jury found in favor of Aspenwood and awarded $1.5 million in damages, consisting of actual damages,

DTPA treble damages, exemplary damages, attorneys' fees, and prejudgment interest. In the spring of 2000, after judgment was entered, Coinmach vacated the property.

Coinmach moved for a new trial. In 2007, the trial court again ruled that the foreclosure sale terminated the lease and that Coinmach became a tenant at sufferance. The trial court also struck all of Aspenwood's breach of contract claims. Ultimately, the trial court ruled that Aspenwood was not a consumer under the DTPA, that Coinmach had a possessory interest in the property from the time of foreclosure until it vacated the premises in 2000, and concluding that the effect of its legal rulings was to preclude Aspenwood's remaining claims as a matter of law. The court thus entered judgment that Aspenwood take nothing on its claims.

The court of appeals affirmed the dismissal of Aspenwood's breach of contract claims, holding that, because Aspenwood never consented to Coinmach's remaining on the premises, no actual or implied contractual relationship existed between the parties. But the court reversed and remanded Aspenwood's claims for trespass, trespass to try title, tortious interference, and declaratory judgment, concluding that Coinmach, as a tenant at sufferance, had no possessory interest in the property. The court of appeals also agreed with the trial court that Aspenwood was not a consumer for DTPA purposes.

Generally, a valid foreclosure of an owner's interest in property terminates any agreement through which the owner has leased the property to another. This is particularly true when, as here, the lease agreement is expressly subordinate to a mortgage or deed of trust affecting the leased premises.

Upon termination of the lease, Coinmach became a "tenant at sufferance." The parties agreed about that, but not about the effect of being a tenant at sufferance. A tenant who continues to occupy leased premises after expiration or termination of its lease is a "holdover tenant." The status and rights of a holdover tenant, however, differ depending on whether the tenant becomes a "tenant at will" or a "tenant at sufferance."

A tenant at will is a holdover tenant who "holds possession with the landlord's consent but without fixed terms (as to duration or rent)." Because tenants at will remain in possession with their landlords' consent, their possession is lawful, but it is for no fixed term, and the landlords can put them out of possession at any time. By contrast, a tenant at sufferance is a tenant who has been in lawful possession of property and wrongfully remains as a holdover after the tenant's interest has expired. The defining characteristic of a tenancy at sufferance is the lack of the landlord's consent to the tenant's continued possession of the premises. With the owner's consent, the holdover tenant becomes a tenant at will; without it, a tenant at sufferance.

A lease agreement may provide that its terms continue to apply to a holdover tenant. But if, as here, the lease does not address the issue, and if the parties do not enter into a new lease agreement, the parties' conduct will determine whether the holdover tenant becomes a tenant at will or a tenant at sufferance. Under the common law holdover rule, a landlord may elect to treat a tenant holding over as either a trespasser – that is, a tenant at sufferance – or as a tenant at will. Thus, an implied agreement to create a new lease using the terms of the prior lease may arise if both parties engage in conduct that manifests such intent. If the tenant remains in possession and continues to pay rent, and the landlord, having knowledge of the tenant's possession, continues to accept the rent without objection to the continued possession, the tenant is a tenant at will, and the terms of the prior lease will continue to govern the new arrangement absent an agreement to the contrary. The mere fact that the tenant remains in possession, however, is not sufficient to create a tenancy at will; unless the parties' conduct demonstrates the landlord's consent to the continued possession, the tenant is a tenant at sufferance.

The court held that Aspenwood's conduct demonstrated that it never consented to Coinmach's continued possession of the property. Immediately after purchasing the complex, Aspenwood gave Coinmach written notice to vacate the laundry rooms and it continued to pursue eviction. It never cashed any checks from Coinmach.

So, Aspenwood claimed that, as a tenant at sufferance, Coinmach was liable both for breach of contract and for tortious conduct. Coinmach claimed it wasn't liable for either.

As to the breach of contract claims, the court held that the parties reached no agreements after the lease terminated. Aspenwood did not enter into a lease agreement with Coinmach and did not expressly or by its conduct consent to Coinmach's continued presence. Coinmach thus became a tenant at sufferance, and there existed no express or implied contract or agreement between the parties. Coinmach cannot be liable for breaching a contract that did not exist.

As to the trespass claims, Coinmach contends that, even though it was a tenant at sufferance, it was not a "trespasser" and cannot be liable on any tort-based theories. Coinmach contends that the Texas Legislature has relieved a tenant at sufferance of any trespasser status by providing a "grace period" during which the tenant is permitted to remain in possession pending statutory eviction proceedings. According to Coinmach, a tenant at sufferance does not become a trespasser unless and until the tenant refuses to leave after the landlord has finally prevailed in the statutory eviction process.

The Court ultimately held that Coinmach could be liable for trespass damages. Under the common law a tenant at sufferance has no legal title or right to possession, and is thus a “trespasser” who possesses the property “wrongfully.” The question that Coinmach raises is whether the Legislature has altered the common law through the statute governing FED actions. The Legislature has itself answered that question, expressly providing in section 24.008 that a suit for eviction under the FED statute “does not bar a suit for trespass, damages, waste, rent, or mesne profits.” The court has long held that the remedies against a holdover tenant include a forcible detainer action for possession and an action for recovery of damages, including trespass damages.

Chapter 24’s procedural protections do not grant to tenants at sufferance any legal interests in or possessory rights to the property at issue; rather, the statute provides procedural protections that apply once the tenant has lost, or allegedly lost, all legal interests and possessory rights. Although the landlord must comply with the statute’s procedural requirements to evict the tenant at sufferance, eviction is allowed only if the tenant has no remaining legal or possessory interest, which makes the tenant a tenant at sufferance.

Curtis* v. *AGF Spring Creek/Coit II, Ltd., 410 S.W.3d 511 (Tex.App.-Dallas 2013, no pet.). The Landlord entered into a lease with Atrium Executive Business Centers Richardson LLC as Tenant. Curtis signed as president of Atrium. The lease was modified three times. Turns out, though, that Atrium was never formed. Curtis did form an entity named AEBC that operated out of the premises, but all of the correspondence and all of the lease modifications were in the name of Atrium.

Curtis sent Landlord an email stating that business wasn’t working out. She returned the keys and left. No rent was paid after she moved out.

The Landlord sued Curtis individually for breach of the lease, alleging that Atrium never existed and Curtis was individually liable. The trial court held in favor of the Landlord and awarded over $200,000 in damages.

Curtis claimed on appeal that the trial court should have found there was a lease by conduct with AEBC and that she should not have been held liable.

A lease may be created by words or other conduct expressing consent to the lessee's possession. The conduct expressing consent may consist merely in a failure to object to the presence of one who has entered without the lessor's consent but not adversely to him. Curtis points to evidence developed at trial that reimbursement of the tenant's move-in expenses, as well as the tenant's rent payments, fax transmissions, insurance policy, sales and use tax permit, and service agreements with its clients were all made in the name of AEBC rather than Atrium, and that Landlord was aware of these documents. But, said the court, the object of the lease, i.e., to provide commercial space to the tenant, could be accomplished without applying the lease by conduct doctrine to substitute AEBC. The lease expressly identified the tenant as Atrium. The lease also provided that it "shall not be altered, waived, amended or extended, except by a written agreement signed by the parties hereto...." The parties signed three subsequent modifications to the lease identifying Atrium as the tenant. Instead of conforming the terms of the lease to the parties' original intent, application of the lease by conduct doctrine would alter a material term of the contract, the identity of one of the contracting parties.

Curtis also argued that an entity unformed at the time a lease is made can adopt the lease after the entity is formed. But here, the entity was never formed, and thus could not "subsequently adopt" the lease. Curtis argues that the only difference between the unformed entity and the corporation she did form was the name. If Landlord had sought to recover for breach of the lease against AEBC, however, AEBC could defend the suit on the ground that it was not a party to the lease, and could not become a party without the written modification required by the lease.

Philadelphia Indemnity Insurance Company* v. *White, 421 S.W.3d 252 (Tex.App.-San Antonio 2013, pet. pending). White’s clothes dryer in her apartment caught fire and destroyed her apartment and belongings as well as several adjacent apartments. She had signed the TAA lease which said the tenant was obligated to pay for any damage for any cause not due to the landlord’s negligence or fault. Despite a jury finding that White was not negligent, the landlord took the position that she was still contractually liable pursuant to the TAA lease provision. White argued that the provision violated public policy because it makes a tenant liable for damage to the entire apartment project for accidental losses, acts of God, criminal acts of another or something unassociated with the tenant or the apartment complex. The court agreed.

The court paid homage to the strong public policy in favor of freedom of contract, but then focused on certain provisions of Chapter 92 the Property Code. Chapter 92 permits the parties to contract over who will pay for repairs when the tenant causes damage. Under section 92.052, "[u]nless the condition was caused by normal wear and tear, the landlord does not have a duty . . . to repair or remedy a condition caused by: (1) the tenant; (2) a lawful occupant in the tenant's dwelling; (3) a member of the tenant's family; or (4) a guest or invitee of the tenant."

The Property Code also specifically authorizes the parties to shift by contract costs of repairs for “certain damages” from the landlord to the tenant irrespective of whether the damage was caused by the tenant. But, these "certain damages" are limited. Under section

92.006(f), a landlord and tenant "may agree that, except for those conditions caused by the negligence of the landlord, the tenant has the duty to pay for repair of the following conditions that may occur during the lease term or a renewal or extension: (1) damage from wastewater stoppages caused by foreign or improper objects in lines that exclusively serve the tenant's dwelling; (2) damage to doors, windows, or screens; and (3) damage from windows or doors left open." By adding subsection (f), the Legislature permitted landlords and tenants to bargain over who would bear the cost of repairing these three specific conditions, typically tenant-caused, without requiring landlords to show that they were tenant-caused.

The court said that the public policy of Texas, as expressed in the Property Code, is that tenants may be held responsible for damages they, their cotenants, or their guests cause, and a landlord and tenant have the freedom to contractually agree a tenant will pay for specific kinds of repair without a showing that the tenant caused the damage. Absent from this legislatively-expressed public policy is the imposition of contractual liability on a tenant for any and all damages to the apartment complex whenever the damages are not caused by the landlord. In this case, all that is required to impose liability on a tenant is that the damage not be caused by the landlord. Here, the jury determined White's negligence did not proximately cause damages to the landord. However, under the TAA lease provision, White is required to pay for any damages to the apartment complex as long as the apartment complex was not at fault. The court concludes that the broad imposition of liability on a tenant for damage not caused by the landlord is void because it violates public policy as expressed in the Property Code.

PART VI DEEDS AND CONVEYANCES

Cade* v. *Cosgrove, 430 S.W.3d 488 (Tex.App.-Fort Worth 2014, pet. pending). In 2006, the Cades and Cosgrove executed a contract for the sale of the Cades' property. The property was subject to an oil, gas, and mineral lease between the Cades and Dale Resources. The sales contract stated that the Cades were to retain all mineral rights. The warranty deed, however, failed to include the mineral reservation. Nevertheless, mineral lessee kept sending royalties to the Cades. In 2010, Cosgrove woke up to the fact that they weren't getting the royalty checks. In 2011, the Cades filed a declaratory judgment action and sought reformation of the deed to include the mineral reservation.

Among other defenses, Cosgrove raised limitations and the trial court granted summary judgment in favor of Cosgrove.

The four-year statute applies, but the statute starts running on the accrual of the cause of action. Generally, a cause of action accrues, and therefore the limitation period begins to run, when a wrongful act causes a legal injury. But when determining how long a grantor has to bring an action to reform a deed, a court must take into consideration the presumption of the grantor's immediate knowledge (the presumption). A grantor is presumed to know the contents of the deed immediately upon executing it. Application of the presumption means that the limitation period on a claim to reform an incorrect deed begins to run as soon as the deed is executed because, as soon as the deed is executed, the grantor has actual knowledge that the deed is incorrect. This rule has not been strictly applied in the past, however, and courts have noted numerous exceptions over the years.

The rule can be rebutted in several ways. Among those exceptions is subsequent conduct of the parties as though the deed had not contained the error." Thus, when the actions of both parties after execution of the deed show that the parties believed and behaved as though there was no error in the deed, the limitation period begins when the mistake was or should have been discovered.

Having held that the presumption may be rebutted, a court must start with the proposition that execution of the deed is not enough to irrefutably establish a grantor's knowledge as a matter of law so that a grantor will always be prohibited from introducing evidence of when the grantor actually learned of the deed's true contents. Nor can execution of the deed absolutely establish when the grantor should have known of the deed's contents such that the trial court would be prohibited from considering evidence of when the grantor should have known.

Cosgrove argues that Property Code §13.002 dictates that the Cades had notice of the existence of the instrument because the deed was recorded in the public records of the property county. The recording of an instrument does not work to create notice as a matter of law in every circumstance. The Cades are not third parties to the deed and are not a person interested in an estate admitted to probate--persons charged with knowledge as a matter of law with instruments filed in the public records. The Cades were perfectly aware of the deed's existence, and they had no reason after conveying the property to search the public records to examine the deed, absent some circumstance to put them on notice of a problem.

The evidence recited by the court was also sufficient to raise a fact issue about when the Cades should have known of the deed's contents. No evidence suggested that Cosgrove disputed the Cades' ownership of the mineral rights until she received forms from Chesapeake or that she did anything to create a question about who owned the minerals. Chesapeake continued to treat the Cades as the mineral owners for years after execution of the deed, and no evidence

shows that any circumstance that occurred before December 2010 should have put the Cades on inquiry about whether they had retained the mineral rights. The court held that the trial court should not have granted summary judgment for Cosgrove on the reformation claim based on limitation.

Tipton* v. *Brock, 431 S.W.3d 673 (Tex.App.-El Paso 2014, pet. pending). In 1999, the Tiptons entered into a contract to buy some property. The contract provided that the seller, Brock, would retain the minerals. The title company prepared the deed and sent it around for review. It did not contain the mineral reservation in favor of the seller, but instead contained an exception for minerals previously reserved. Nobody complained and it was executed and recorded. In 2000, a "correction deed" was filed that included the mineral reservation in favor of Brock. The Tiptons claimed the correction deed was forged. In 2006, Brock sued the Tiptons for reformation of the deed based on mutual mistake. The Tiptons argued, among other things, that the lawsuit was barred by limitations.

A suit for reformation is subject to the four-year statute of limitations. In general, the statute of limitations begins to run when a particular cause of action accrues.

Ordinarily, a grantor is charged with knowledge of all defects in a deed, although the presumption of immediate knowledge is rebuttable under certain circumstances. The statute of limitations with regard to a reformation claim begins to run on the date the deed is executed. However, the Supreme Court of Texas recognizes two exceptions, the discovery rule and the doctrine of fraudulent concealment, which may extend the statute of limitations.

The discovery rule is a limited exception to the general principle that a statute of limitations begins to run when an injury occurs, regardless of when the plaintiff learns of the injury. The discovery rule defers accrual of a cause of action until the claimant knows or, by exercising reasonable due diligence, should know of the facts giving rise to the claim. The discovery rule applies when the injury is both inherently undiscoverable and objectively verifiable. An injury is inherently undiscoverable if it is the type of injury that is not generally discoverable by the exercise of reasonable diligence. The requirement of inherent undiscoverability recognizes that the discovery rule exception should be permitted only in circumstances where it is difficult for the injured party to learn of the negligent act or omission. The court decides whether the nature of a plaintiff's injury is inherently undiscoverable, on a categorical basis rather than a case-specific basis.

The Tiptons argue that Brock failed to meet the two requirements of the discovery rule. They assert that the sales contract clearly states that the seller is to retain all mineral rights, that it is equally apparent that the 1999 deed does not contain any language reserving mineral rights, that Brock's testimony is that none of them read the 1999 deed before they executed the deed, and that whoever prepared the 2000 correction deed understood that the 1999 deed language did not reserve any of Brock's mineral rights. As such, the Tiptons contend that the 1999 deed is not ambiguous on its face and that Brock's failure to reserve any minerals was not inherently undiscoverable as a matter of law.

Trahan* v. *Mettlen, 428 S.W.3d 905 (Tex.App.-Texarkana 2014, no pet.). The Mettlens and the Trahans entered into a written contract memorializing the terms of their agreement regarding the sale and purchase of the Property. There is no mention of a reservation of mineral rights in that contract. The warranty deed transferring title to the Property from the Mettlens to the Trahans, however, is a different story. That deed recorded in Nacogdoches County, Texas on April 21, 2006, includes a clear reservation of mineral rights by the Mettlen.

Mr. Trahan testified that he was not given a copy of the deed when he purchased the property and that he first obtained a copy of the deed in September 2010. He acknowledged being present at the closing where the deed was executed but testified that he did not read the deed and that it was not physically delivered to him at that time. The Trahans contend that they were unaware of the reservation of mineral interests contained in the warranty deed until 2010, when they discovered oil and gas company vehicles on their property. They argue that the statute of limitations did not begin to run until that time.

In an effort to establish tolling of the applicable four-year limitations period, the Trahans rely heavily on the written contract, which states that the Trahans are purchasing the Property "with all rights, privileges and appurtenances pertaining thereto, including but not limited to: water rights, claims, permits, strips and gores, easements, and cooperative or association memberships . . . ." The Trahans contend that the omission of even a reference to a reservation of mineral rights by the Mettlens in the written sales contract, which is a memorialization of the parties' intentions, establishes that such a term was not a part of the bargained-for exchange. Consequently, the Trahans argue that, under the terms of the written agreement, they were entitled to a conveyance of the entirety of the ownership interest held by the Mettlens at the time the agreement was executed, including any mineral rights.

The Trahans testified via deposition that they believed they were purchasing both the surface and mineral interests in the Property and that they believed all such rights had been transferred to them through this transaction; however, they also admitted that the parties did not discuss ownership of mineral interests

prior to executing the contract, including whether the Mettlens even owned any mineral interest that could be conveyed. Finally, the Trahans claim that the reservation of mineral rights was included in the warranty deed as the result of a mutual mistake and that, consequently, they are entitled to reformation of the deed to reflect the parties' original agreement.

A mutual mistake occurs when contracting parties have a common intention, but, due to a mutually-held mistake regarding a material fact, the written contract does not accurately reflect that intention. The elements of mutual mistake are thus (1) a mistake of fact, (2) held mutually by the parties, and (3) which materially affects the agreed-upon exchange. The facts of this case do not establish the elements of mutual mistake in the traditional sense. However, the Supreme Court has held that unilateral mistake by one party and knowledge of that mistake by the other party, is equivalent to mutual mistake.

Here, the evidence is undisputed that the original contract to purchase the Property contained no reservation of mineral rights. Mrs. Mettlen testified that she called someone at the title company office and instructed them to include a reservation of mineral rights in the deed. The Trahans' testimony is that they did not know about Mrs. Mettlen's telephone call, that they were not aware of the reservation in the deed until 2010, and that the Mettlens never disclosed the reservation to them. Under these circumstances, the court will assume that this evidence is sufficient to establish the equivalent of a mutual mistake, that is, that the Trahans entered into the written real estate contract operating under a unilateral mistake regarding a material term of the agreement and that the Mettlens were aware of that mistake. Based on this assumption, reformation of the contract is a potentially appropriate remedy. However, whether that remedy has been invoked in a timely manner is actually the dispositive issue in this case.

There is no dispute that, under the applicable statute of limitations, the Trahans had four years from the date their cause of action accrued to file suit. Likewise, there is no dispute that this suit was filed more than four years after the deed was executed. The Trahans contend, however, that the statute of limitations was tolled under the facts of this case because they did not discover the facts giving rise to their cause of action until 2010, almost four years after the real estate transaction at issue was completed.

The first step in analyzing this issue is determining when the Trahans' cause of action accrued. Generally, purchasers of real property are immediately charged with knowledge of all defects in the deed conveying title to the purchased property, though this presumption of immediate knowledge is rebuttable.

If the mistake is plainly evident or clearly disclosed on the face of the deed, such as when the parties unquestionably agreed to a reservation of mineral interests by the seller but that reservation was omitted from the deed, all parties are chargeable with knowledge of the contents of the deed. The statute of limitations begins to run from either the date the deed was executed by the grantor or the date it was delivered to the grantee. On the other hand, if the mutual mistake is not plainly evident on the face of the deed, but, instead, relates to the legal effect of a material term of the parties' agreement, the statute of limitations begins to run when the mistake was, or in the exercise of diligence should have been, discovered.

Finally, the subsequent conduct of the parties may rebut the presumption that all parties are charged with immediate knowledge of the mistake. In that event, the discovery rule delays the accrual date or tolls the running of the statute of limitations until the mistake is, or in the exercise of reasonable diligence should have been, discovered.

The court assumed that the evidence establishes a unilateral mistake on the part of the Trahans coupled with inequitable conduct--the failure to disclose the reservation of mineral rights prior to or even at the closing--by the Mettlens. This is the equivalent of a mutual mistake and allows the court to consider reformation. However, the statute of limitations must be complied with as well. The difficulty with the Trahans' position is that the deed unequivocally discloses the Mettlens' reservation of oil, gas and other minerals. The reservation is set out immediately after the property description and is clear and obvious. It does not require interpretation as to its legal effect. There is no evidence that, after the execution of the deed, the Mettlens misled the Trahans or lulled them into a false sense of security that the mineral rights were conveyed in the deed or that the Mettlens attempted to hinder the Trahans from reading the plain provisions of the deed. There was no claim that the reservation was ambiguous or could be interpreted in different ways--it is an express written reservation of all mineral rights. The alleged mistaken term is clearly evident and disclosed in the deed; the parties are charged with the knowledge of the terms. Consequently, the statute of limitations begins to run from the date of execution of the deed by the grantor and the date of delivery to the grantee. The discovery rule is inapplicable.

The Trahans further allege that the Mettlens fraudulently concealed from them the fact that their reservation of mineral rights was included in the deed. They further allege they had no knowledge of the reservation until mineral exploration began on their property. They contend that the Mettlens' fraudulent concealment invoked the discovery rule, which, in turn, tolled the running of the statute of limitations until they actually discovered the reservation. But the warranty deed conveying title to the Trahans contains a

clear and unambiguous reservation of mineral rights. The discovery rule for fraudulent concealment tolls the running of the statute of limitations only until the plaintiff discovers the fraud or could have discovered the fraud through the exercise of reasonable diligence. There is no evidence to suggest that, following their execution of the deed, the Mettlens engaged in any conduct designed to mislead the Trahans or prevent them from reviewing the warranty deed. More importantly, however, even assuming that the evidence showed fraudulent concealment by the Mettlens, the Trahans could have immediately discovered such fraudulent conduct by the exercise of reasonable diligence (reading their deed). However, the record reflects that the Trahans, who were present when the warranty deed was executed, failed to discover this mineral reservation even though it is clearly disclosed in the deed. Consequently, whether the discovery rule applied under the theory of fraudulent concealment or not, it did not operate to toll the running of the statute of limitations on the Trahans' cause of action.

Teal Trading And Development, LP* v. *Champee Springs Ranches Property Owners Association, 432 S.W.3d 381 (Tex.App.-San Antonio 2014, pet. pending). This case is also discussed in Land Use Planning and Restrictions.

Cop owned a big chunk land in Kendall and Kerr Counties. He recorded a Declaration of Covenants, Conditions, and Restrictions. As part of CCRs was a statement that the Declarant reserved a one-foot easement around the perimeter of the property for the purpose of precluding access to roadways by adjacent landowners. Cop then began selling lots out of the property. He sold a 600 acre parcel known as the Privilege Creek tract that ultimately ended up being owned by Teal Trading. All of the deeds in the chain of title from Cop to Teal Trading said, in one way or another, that the conveyance was made “subject to” the CCRs.

At one point, Teal Trading’s predecessor began developing the Privilege Creek tract, and in the process connected to the roadways across the one-foot easement, in apparent violation of the CCRs. Champee Springs sued to enforce the restriction, then Teal Trading acquired the Privilege Creek tract and intervened in the lawsuit.

Champee Springs's petition sought a declaratory judgment that Teal Trading was bound by the non-access restriction and estopped to deny its force, validity, and effect, and because they were so bound, the restriction was enforceable against them. Teal Trading's petition-in-intervention denied that it was bound by the restriction, and it sought a declaratory judgment that the non-access restriction was void as an unreasonable restraint against alienation and that Champee Springs had waived the right to enforce the non-access restriction and was thus estopped from enforcing the restriction.

The doctrine of estoppel by deed precludes parties to a deed from denying the truth of any material fact asserted in the deed. Estoppel by deed is founded upon the theory that the parties have contracted upon the basis of the recited facts. Thus, although estoppel by deed figuratively closes the mouths of the parties to a deed and their privies from challenging the truth of the recited facts in a deed, it does not validate something that is otherwise invalid and cannot bind or benefit strangers to the deed.

The court held that, because the CCRs were neither a conveyance or a lease, it could not be an effective or enforceable reservation. In addition, each subsequent deed's recitation that the conveyance is subject to the Declaration is not a clear intention to reserve or except an interest from the conveyance" of that deed. Champee Springs takes the position that, when a grantee takes property "subject to" certain deed restrictions of record, the grantee has acknowledged the validity and enforceability of the restrictions, and thus is estopped by deed from denying their validity and enforceability. The court disagreed. Those words mean "subordinate to," "subservient to," or "limited by." They are words of qualification and not of contract. They are notice to and an acknowledgment that such restrictions are of record, but they are not in fact an acknowledgment of the validity of the restrictions.

In fact, a “subject to" clause may simply protect a grantor on its warranty. When property is conveyed by warranty deeds, it is in the interest of the grantors that the conveyance be made subject to every restriction or encumbrance which not only does apply to such property but also may apply. The inclusion of restrictions in the "subject to" clause may thus express a wise precaution on the part of the grantor. It would indeed be foolhardy for a grantor who is delivering a warranty deed to fail to refer to a restriction which may at some time in the future be held to apply to his property, merely to avoid the criticism of excess wordiness. Thus, it is not unusual for conveyances to be made subject to all recorded covenants, easements and restrictions, without specific enumeration, and it would be inappropriate, to say the least, to infer restrictions because it may subsequently turn out that none then applied to the property.

Having recognized that the meaning of a "subject to" clause is somewhat contextual, the court examined the "subject to" clauses contained in Teal Trading's chain of title. The clauses in some of the deeds in the chain stated they were subject to exceptions listed on an attached exhibit, to the extent they were valid and existing and affect the property.

Because none of the deeds within the chain of title from Cop to Teal Trading acknowledge the validity and enforceability of the non-access restriction,

Champee Springs did not show as a matter of law that Teal Trading is estopped by deed from challenging the non-access restriction's validity and enforceability. The trial court erred by granting Champee Springs's motion for summary judgment.

PART VII VENDOR AND PURCHASER

Winston Acquisition Corp.* v. *Blue Valley Apartments, Inc., 436 S.W.3d 423 (Tex.App.-Dallas 2014, no pet.). Winston and Blue Valley entered into a contract for Winston to buy the apartments. The contract included a free look and inspection period. It also provided a list of due diligence items to be provided by the seller, which included an EPA lead-based paint disclosure. An exhibit said that Winston had received the disclosure, but it had not, in fact, been delivered. The seller, Blue Valley delivered an earlier Phase I to Winston that disclosed that lead-based paint had been used during the initial construction of the apartments and recommended an O&M plan for the property.

The contract provided that Winston could notify Blue Valley of its disapproval of inspection matters. The only notice given by Winston had to do with the title commitment. When Winston wanted to extend the closing date without paying a required extension fee, Blue Valley refused. Winston then sent a letter stating that it was rescinding and revoking the contract because Blue Valley had failed to provide the EPA Pamphlet. Blue Valley responded, saying that Winston couldn't complain about not getting the EPA Pamphlet because it hadn't raised that during the inspection period.

Each party filed suit separately. The suits were consolidated and the trial court entered judgment in favor of Blue Valley.

The parties devoted considerable argument to the merits of whether Blue Valley was or was not required to provide the EPA Pamphlet in conjunction with exhibit I, and whether the EPA Pamphlet was or was not material to the contract. But the court said it need not reach these issues, nor did it need to consider whether Blue Valley's failure to provide the EPA Pamphlet was excused. The contract specified the time period in which Winston was to object to any deficiencies, and further specified the date the contract was to close. The record reflects that Winston failed to comply with both provisions.

Having waived its right to complain about the lack of an EPA Pamphlet, Winston was obligated to close on December 15, 2010. Winston failed to do so. Therefore, the trial court did not err in concluding Winston breached the Contract by failing to close at the appointed time.

G.D. Holdings, Inc.* v. *H.D.H. Land & Timber, L.P., 407 S.W.3d 856 (Tex.App.-Tyler 2013, no pet.). GD and HDH were negotiating a contract for HDH to sell some land to GD. HDH signed a contract form that included a provision requiring GD to pay for dozer work and cleanup if the sale didn't close. GD struck that provision when the contract got to it. When HDH found out about that it refused to agree. GD had put up $30,000 earnest money, but eventually failed to obtain financing and did not purchase the property. GD sued to get its earnest money back. HDH claimed that GD had breached a valid written contract and that HDH was entitled to the earnest money. The trial court found in favor of HDH.

GD contends that the trial court erred in awarding damages because there was no contract. The elements of an enforceable contract are (1) an offer; (2) an acceptance in strict compliance with the terms of the offer; (3) a meeting of the minds; (4) a communication that each party consented to the terms of the contract; (5) execution and delivery of the contract with an intent that it become mutual and binding on both parties; and (6) consideration. For a contract to be formed, the minds of the parties must meet with respect to the subject matter of the agreement and all its essential terms.

The material terms of the contract must be agreed upon before a court can enforce the contract. An acceptance must not change the terms of an offer; if it does, the offer is rejected. Acceptance must be identical to the offer in order to make a binding contract. A material change in a proposed contract constitutes a counteroffer, which must be accepted by the other party. A contractual provision dealing with payment is always an essential element or a material term.

Here, there is no dispute between the parties that they had not agreed in writing about what would happen to the earnest money if the sale did not close. Thus, the parties did not have a meeting of the minds on an essential term of the contract. Further, when GD struck out the term describing its responsibility to pay for clearing the nine acres, HDH's offer was rejected. Because GD's change regarded the earnest money, a material or essential term of the contract, HDH must have accepted the change for a contract to be formed.

Magill* v. *Watson, 409 S.W.3d 673 (Tex.App.-Houston [1st Dist.] 2013, no pet.). The earnest money contract provided that a party who wrongfully fails or refuses to sign a release of the earnest money would be liable for liquidated damages in an amount equal to the sum of (i) three times the amount of the earnest money; (ii) the earnest money; (iii) reasonable attorney's fees; and (iv) all costs of suit.

A court will enforce a liquidated damages clause if (1) the harm caused by the breach is incapable or difficult of estimation, and (2) the amount of liquidated damages is a reasonable forecast of just compensation. An assertion that a liquidated damages provision constitutes an unenforceable penalty is an affirmative

defense, and the party asserting penalty bears the burden of proof. Generally, that party must prove the amount of actual damages, if any, to demonstrate that the actual loss was not an approximation of the stipulated sum. If the amount stipulated in the liquidated damages clause is shown to be disproportionate to actual damages, a court should declare that the clause is a penalty and limit recovery to actual damages. Whether a liquidated damages clause is an unenforceable penalty is a question of law for the court, but sometimes factual issues must be resolved before the court can decide the legal question.

Here, the court held that the liquidated damages provision was void on its face. The liquidated damage provision makes no attempt to quantify the actual damages that would be caused by a failure to release the earnest money. Instead, the provision merely assumes that the earnest money, which the parties have agreed will constitute actual damages for breach of the agreement in general, should be trebled and added to the earnest money in the event that the obligation to release the earnest money is breached.

The court concluded that because the contract provision simply takes the value of the earnest money, which the parties have agreed represents the actual damages caused by the breach of the agreement, and multiplies it times three if there is an additional breach of the obligation to turn over the earnest money, the provision is an unlawful penalty and does not attempt to forecast actual damages. “We are not holding, however, that a contract can never provide liquidated damages for the failure to release earnest money. We hold only that the clause in this case, on its face, did not attempt to reasonably forecast a just compensation for a breach of the agreement to release the earnest money.”

PART VIII HOMESTEAD

Thomas* v. *Graham Mortgage Corporation, 408 S.W.3d 581 (Tex.App.-Austin 2013, no pet.). Thomas borrowed a loan from the Lender secured by a ranch. A few weeks before the loan, the title company identified a 200 acre portion of the ranch as homestead, based on a homestead designation filed by Thomas a few years earlier. Thomas argued that it wasn’t homestead – that he had moved off the land some time ago. At the closing, Thomas signed a Non-Homestead Affidavit.

Thomas defaulted and the bank posted for foreclosure. Thomas sued. In that suit, Thomas maintained that the 200 acres was his homestead and that the bank’s lien violated the homestead laws. The Lender foreclosed and the trial court ultimately granted it summary judgment in favor of the Lender.

One of the grounds upon which the Lender moved for summary judgment was abandonment. Specifically, the Lender argued that, to the extent the property was ever Thomas's homestead property, the undisputed evidence conclusively established that Thomas had abandoned the Property as a homestead at the time the loan agreement was executed and the deed of trust lien was acquired.

A property owner does not necessarily abandon homestead property by changing residence. Even the temporary renting of the homestead does not change the homestead character of the property, when no other homestead has been established. Rather, evidence establishing abandonment of a homestead must be undeniably clear and show beyond almost the shadow, at least of all reasonable ground of dispute, that there has been a total abandonment with an intention not to return and claim the exemption. That is, it must be clear that there has been a discontinuance of the use of the property coupled with an intention not to use it as a homestead again.

Though a change of residence does not necessarily equate to abandonment, a change in residence coupled with a disclaimer of the homestead may form the basis of a claim of abandonment by estoppel. Estoppel is a doctrine recognized and applied in a variety of contexts, but generally prevents a party from asserting rights, claims, and matters of fact that are inconsistent with those previously asserted by the party. Applying estoppel principles in the context of homestead disclaimers, Texas courts have sought to balance the importance of constitutional homestead protection with policy considerations which abhor the perpetration of fraud on creditors.

As a result, it is well established that when physical facts open to observation lead to a conclusion that the property is not the homestead of the mortgagor, and its use is not inconsistent with the declarations made that the property is disclaimed as a homestead, and these declarations were intended to be and were actually relied upon by the lender, then the owner is estopped from asserting a homestead claim. On the other hand, if the circumstances are such that a lender should have known or suspected that a homestead disclaimer was false – such as when a property owner is in actual possession of a piece of property, occupying and using the property –then courts will not enforce the disclaimer against the debtor.

In support of its motion for summary judgment, the Lender attached the affidavit of Castelhano, vice president of the Bank and loan officer for the Thomas loan. Castelhano stated that during their initial conversation, Thomas informed Castelhano that he was a doctor in Van Horn, that the Property was currently for sale, and that he wanted to borrow against the Property so that he could buy a ranch in New Mexico. Further, Castelhano explained in his affidavit that he had conducted a visual inspection of the Property with Thomas's real estate agent in the month before the

closing. Castlehano stated that during this inspection, he did not observe any dwellings or living structures on the subject property except a cabin and that the real estate agent told Castelhano that employees who worked on the Property lived there and, for that reason, he could not inspect it." The agent also informed Castelhano that Thomas had not lived on the Property. Thomas did not dispute these facts. Under these circumstances, the Bank was justified in relying on Thomas's representation that he was disclaiming any constitutional homestead rights in the Property.

PART IX TITLE INSURANCE AND ESCROW AGENTS

McGonagle* v. *Stewart Title Guaranty Company, 432 S.W.3d 535 (Tex.App.-Dallas 2014, pet. pending). The McGonagles' purchased of a piece of property in downtown Granbury. The property was subject to a dedication instrument requiring the property owner to move a bungalow currently on-site to a location within the Historic Overlay and requiring the owner to obtain all necessary approvals through the City of Granbury prior to beginning any new construction. The dedication instrument said that it ran with the land.

Mr. McGonagle testified that he was aware of the dedication instrument before purchasing the property and that he tried to have it removed before closing on the purchase. McGonagle also stated he told the seller that he would not close on the purchase unless the dedication instrument was removed. According to McGonagle, the seller told him that he would "take care of" the dedication instrument and, shortly before the closing, the seller stated that the instrument had been "taken care of."

Despite these alleged representations by the seller, the sales contract signed by the McGonagles specifically stated that the Granbury Historical Society Agreement" was included in the purchase and would belong to the buyer. A copy of the dedication instrument was attached to the sales contract.

At the closing, the McGonagles also purchased a title insurance policy issued by Stewart Title. The policy contained several exclusions from coverage including defects, liens, encumbrances, adverse claims or other matters created, suffered, assumed or agreed to by the insured. Also excluded was the refusal of any person to purchase, lease or lend money on the estate or interest because of Unmarketable Title." Schedule B Item 1, Restrictions, was deleted. McGonagle, he interpreted the deletion of the first exception from coverage in Schedule B to mean that the dedication instrument had been removed and no longer applied to the property. McGonagle stated that he believed the deleted provision confirmed the seller's statement to him that the instrument had been "taken care of."

Sometime after purchasing the property, the McGonagles attempted to resell it. They allege they were unable to do so because the property was still subject to the dedication instrument. The McGonagles brought suit against the seller for misrepresentation. They then brought this separate suit against Stewart for breach of contract, negligence, gross negligence, and violations of the Texas Insurance Code and DTPA. Stewart filed motions for traditional summary judgment contending the McGonagles' claims failed as a matter of law because there was no coverage under the title policy for losses allegedly caused by the dedication instrument and neither company made any misrepresentations about the property or the title policy.

A title insurance policy is a contract of indemnity that imposes a duty on the insurance company to indemnify the insured against losses caused by defects in title. The alleged defect must involve a flaw in the ownership rights of the property to trigger coverage. An irregularity that merely affects the value of the land, but not the ownership rights, is not a defect in title.

The McGonagles contend the dedication instrument falls within the scope of coverage because it is a covenant, creating an encumbrance, which affects title. The court disagreed. An encumbrance is a tax, assessment, or lien on real property. The dedication instrument neither involves nor creates a tax, assessment, or lien. Although a few cases have noted that it is possible for a covenant to cloud title, the covenant must pertain to the ownership interest. The McGonagles failed to show how any of the requirements set forth in the dedication instrument impact their fee simple ownership interest in the property.

The McGonagles argue at length that the dedication instrument affects their ability to sell the property and, therefore, amounts to a defect in title. The court again disagreed. The concept of title speaks to ownership of rights in property, not the condition or value of the property. The term "marketable title" goes to whether the property interest can be sold at all, not whether it will fetch a lesser price because of some condition limiting its use. In this case, although the dedication instrument imposes certain burdens on the land owners that may lessen the market value of the property, it does not vest any ownership interests in the property in any other party that would affect the McGonagles' title. Accordingly, the dedication instrument does not fall within the title policy's covered risks.

Even if the dedication instrument could be considered a defect in title, it is a defect that the McGonagles assumed when they signed the purchase contract and is, therefore, excluded from coverage under the terms of the title policy. The purchase contract specifically stated that the dedication instrument was included in the The title policy

excludes all defects or other matters assumed or agreed to by the insured.

The McGonagles contend that the deletion of the first exception to coverage under Schedule B constituted a misrepresentation of both the state of the title to the property and the extent of coverage provided by the policy. The McGonagles rely heavily on the Texas Supreme Court opinion of First Title Co. of Waco v. Garrett, 860 S.W.2d 74 (Tex. 1993). In Garrett, the Supreme Court held that a title company made an actionable, affirmative representation to its insured when it inserted the phrase "none of record" in the space provided for itemizing restrictive covenants of record rather than deleting the provision. The court concluded that the phrase "none of record" was clearly a representation " that there were no restrictive covenants in the county deed records." The McGonagles attempt to equate the word "deleted" used in their policy with the phrase "none of record" used in the Garrett policy. The word "deleted," however, refers solely to the fact that the exception was deleted pursuant to the instructions in the standard form document and cannot be construed to mean anything else. It conveys no information about the existence or non-existence of restrictive covenants. Although the McGonagles may have assumed the provision was deleted because the dedication instrument had been removed, they point to no statements by Stewart that the exception was deleted for this reason. The deletion represents only that restrictive covenants of record affecting the title, if any, were not excepted from coverage.

The McGonagles next argue that the removal of the exception for restrictive covenants constituted an affirmative representation that the dedication instrument would be a covered risk. But the deleted provision makes no reference to any specific covenant and the exception only impacts restrictive covenants that otherwise fall within the scope of coverage. As discussed above, the dedication instrument at issue does not fall within the scope of coverage because it does not affect the McGonagle's fee simple interest or, alternatively, because the " defect" was assumed. The removal of the exception cannot create coverage that is not otherwise provided by the policy. Neither can the removal of an exception from coverage mislead the insured that coverage exists when the remainder of the policy indicates otherwise.

The McGonagles suggest that Stewart was required to inform them that the dedication instrument was still attached to the property. The only duty of a title insurer is to indemnify the insured against losses caused by a defect in title. Although an insurer cannot misrepresent the state of the title or mislead the insured, it has no duty to point out any outstanding encumbrances.

PART X CONSTRUCTION AND MECHANICS' LIENS

Lyda Swinerton Builders, Inc.* v. *Cathay Bank, 409 S.W.3d 221 (Tex.App.-Houston [14th Dist.] 2013, no pet.). This case is also discussed under Taxation. The Builder agreed to improve the Developer's property, but the project never progressed very much. The property consisted of Parcels A and B. The Builder began work in February 2007, completing dirt and utility work. After the Builder began work, the Bank made two loans to the Developer, one for $800,000 secured by a deed of trust on Parcel B only and one for $500,000 secured by a deed of trust covering both parcels. In October 2007, work stopped due to "payment issues" and was never resumed. That month the Builder filed a lien affidavit as to parcel A for about $3.2 million. The court noted that, generally, mechanic's liens like this one relate back to the start of work for priority purposes, regardless of when the mechanic files its lien affidavit. Thus, although the Builder filed its affidavit after the Bank had obtained its deed of trust liens, the Builder's lien nonetheless had priority because it related back to the start of work in February 2007.

Later on that October, the Bank made another loan of about $1.9 million to the Developer, secured by a deed of trust covering both parcels. The Builder was paid $1.5 million and filed a release of lien which recited the amount received and purported to release the entire $3.2 million lien.

On the same day as the Builder's release, the Bank used a portion of the loan to satisfy outstanding tax liens on the property. It did not comply with the tax lien transfer statutes in doing so.

In November, the Builder filed an amended lien affidavit reciting a debt of approximately $2.9 million. This sum included both the unpaid portion of the Developer's pre-release debt (approximately $1.7 million) and amounts for post-release expenses that the Builder had since incurred. Like the first lien affidavit, this covered only Parcel A. Although the Builder stated in its lien affidavit that it had incurred post-release expenses, no post-release work had occurred on the property. The Builder contends that even though it had stopped working, it remained on the site at the Developer's request. The post-release expenses reflected in the affidavit were administrative and equipment rental costs related to maintaining the site at an estimated $200,000 per month. Over the ensuing months, the Developer made at least one partial payment, but none of the Developer's payments kept up with the Builder's accruing expenses. The Builder sent demand letters and threatened to leave the site, but never did. Eventually, the Builder filed this suit, in which the Bank intervened, claiming a superior interest in the property. The trial court severed the lien priority suit from the Builder's action against the Developer.

While the suit was pending, the Builder filed another lien affidavit in January 2009, over a year after the last work on the project, six months after its termination letter, and three months after filing the lawsuit.

The Builder finally left the property in March 2010. The Bank foreclosed on its deed of trust The Bank purchased the property and contends that it was foreclosing on the senior tax lien and that that foreclosure wiped out all junior liens, including the Builder's.

The trial court held in favor of the Bank and the Builder appealed.

First, the court of appeals dealt with the Builder's release of lien. Boiled down, the release simply said that, in consideration of $1.5 million, the Builder "does hereby release and discharge the property from this lien." The parties present multiple alternative interpretations of the simple release. The Builder argued that, that notwithstanding the release, it could "re-file" a lien for the unpaid portion of the same debt against the same parcel of land. The court disagreed because allowing the Builder to do so would render the release meaningless. The release extinguished the Builder's initial lien and prevented it from reasserting the same lien against Parcel A for the unpaid portion of the pre-release debt.

The Bank argued that the release did other things, but the document in front of us does not mention them. For example, the Bank argued that the release not only released the lien, but also forgave the unpaid portion of the initial debt. The release doesn't say that. The Bank also argued that the release prevented the Builder from filing liens for subsequent expenses. The release does not say that either. Finally, the Bank contended that the release prevented the Builder from securing the unpaid portion of its initial debt with a lien on Parcel B. The release also does not say that – in only mentions Parcel A. The court discussed these conclusions at length.

The court then turned to whether the Builder's post-release lien affidavits were for "materials" as defined in the statutes. The Bank claimed that, even if the Builder's release did not preclude it from filing subsequent affidavits, those affidavits were nonetheless ineffective because (1) they were not timely and (2) the expenses referred to in them were not for materials furnished for construction, as required by the mechanic's lien statute.

The court discussed the timeliness issue at length, ultimately concluding that fact questions remained, so summary judgment on the issue was not appropriate. It sent that issue back to the trial court.

As to whether the post-release expenses were for "material furnished for construction" the court did basically the same thing. Mechanic's liens secure payment for, among other things, the labor done or material furnished for the construction or repair. There was no contention that the Builder did any labor, so the entire question was whether its services after construction ceased were "material furnished." The court said it couldn't determine from the summary judgment evidence the extent to which the Builder's expenses were for equipment or services delivered to prosecute the work. Standing alone, the fact that no work ultimately occurred does not answer the question. Moreover, to obtain a mechanic's lien for rental expenses, the equipment must be not only "delivered for use," but also "reasonably required" for use in the direct prosecution of the work. In this case, the Builder continued to incur rental expenses for several months after work had ceased even though the Developer already owed over $1.7 million and the project had no apparent prospect of adequate financing. At some point, continuing to incur these expenses may have become unreasonable, regardless of the parties' intent. Whether and at exactly what point these expenses stopped being "reasonably required" are questions of fact that cannot be answered conclusively on this record. Back to the trial court.

Sanchez* v. *Shroeck, 406 S.W.3d 307 (Tex.App.-San Antonio 2013, no pet.). Cope borrowed a construction loan from Stock Loan. The loan agreement stated that no construction or delivery of materials was allowed to occur before the deed of trust was recorded. Cope signed an affidavit stating that construction had not begun and no materials had been delivered before the date of the loan agreement. Sanchez filed a mechanics' lien affidavit about six months after the loan agreement was signed. Cope later defaulted on the construction loan and the lender foreclosed. It acquired the property at the foreclosure and later sold it to Shroeck.

Sanchez sued Shroeck and the trial court held that Sanchez had a valid lien and ordered foreclosure. That order was set aside, however, and the trial court later held that the mechanics' lien was extinguished by the foreclosure of the construction deed of trust.

A valid foreclosure on a senior lien (sometimes referred to as a "superior" lien) extinguishes a junior lien (sometimes referred to as "inferior" or "subordinate") if there are not sufficient excess proceeds from the foreclosure sale to satisfy the junior lien. For the purpose of determining whether a mechanic's lien is superior, as a general rule, a properly perfected mechanic's lien relates back to a time referred to as the inception of the lien for the purpose of determining lien priorities. In general, mechanic's liens whose inception is subsequent to the date of a deed-of-trust lien will be subordinate to the deed-of-trust lien.

However, if there is a general contract regarding the construction of improvements to the property, courts apply the relation-back doctrine to determine the

time of a mechanic's lien's inception. Under this doctrine, the inception date of subsequently perfected mechanic's liens will relate back to the date of a general contract for a building or other improvement between the owner of the land and a contractor for the construction of which the mechanic contributed.

Sanchez argued that, although her work was done after the deed of trust was recorded, the inception of her lien relates back to a construction contract in existence before the deed of trust was recorded. The court agreed that this argument raised a material fact question precluding summary judgment in favor of Shroeck.

Addison Urban Development Partners, LLC* v. *Alan Ritchey Materials Company, LC, 437 S.W.3d 597 (Tex.App.-Dallas 2014, no pet.). Ritchy filed a lien affidavit related to concrete sand. The affidavit claimed a lien for "concrete sand and related freight charges (including applicable fuel charges). Addison claimed the contends the lien improperly included freight and fuel surcharges because these items are not "materials" under the Property Code. Property Code § 53.001 defines " material" as all or part of:

> (A) the material, machinery, fixtures or tools incorporated into the work, consumed in the direct prosecution of the work, or ordered and delivered for incorporation or consumption . . .
>
> (C) power, water, fuel, and lubricants consumed or ordered and delivered for consumption in the direct prosecution of the work.

Ritchey asserts that the freight or delivery was factored into the price of the materials sold, and it was therefore entitled to the lien price of the "material ordered and delivered for consumption" and "fuel consumed" in connection with the Project. The court agreed.

Ritchey charged by the ton for the materials delivered to the Project. The invoices show the components of the final price -- material, freight, and fuel surcharge. These components comprise the total cost per ton. The final price of the materials is based on the weight of the material, not the delivery distance. The weight is multiplied by the estimated material and freight components of the delivered price of the material during the bid process. The fuel charge is expressed as a percentage, and calculated from the freight component of the delivered price. The fuel surcharge is acquired from an index and is based on the variable rate of diesel fuel from the time the bid is placed to the time the material is ordered.

Ritchey demonstrated that all three components (materials, freight, and fuel surcharge) are added together to arrive at the final invoiced price of the material. The price charged is calculated by multiplying the tons of material delivered by the component rates for that material and freight. An additional percentage is then applied to the freight portion to obtain the fuel surcharge. The material and freight components are broken out on the invoices so that customers can track the proper application of the fuel surcharge. Ritchey does not categorize the freight value as a shipping charge, nor is it based on mileage. This evidence establishes the components of that which was consumed in the direct prosecution of the work, or ordered and delivered for incorporation or consumption. Thus, the evidence shows that the component items of the final price were properly included in the lien price.

PART XI LAND USE PLANNING, ZONING, AND RESTRICTIONS

In re *Hai Quang La*, 415 S.W.3d 561 (Tex.App.-Fort Worth 2013, pet. denied). La and Nguyen, homeowners in the subdivision filed a motion under Government Code § 51.903 seeking a determination that restrictive covenants filed in the Tarrant County records were a fraudulent lien or claim and should not be accorded any status. They alleged that the restrictive covenants were not signed by the true owner of the property and because the document laced a notary's signature, the document was fraudulent.

The Government Code provides an expedited proceeding for challenging a fraudulent lien or claim against real or personal property, the foundation of which is found in section 51.903. That section, which is largely a suggested form motion and order, allows a purported debtor or obligor or a person who owns an interest in real or personal property to ask for a judicial determination of the legitimacy of a filed or recorded document or instrument purporting to create a lien or interest in real or personal property.

For purposes of a § 51.903 action, a document or instrument is presumed to be fraudulent if it purports to create a lien or assert a claim against real or personal property and if it meets a few other criteria. Based on the plain language of the statute, a proceeding under § 51.903 must first involve a document or instrument that purports to create a lien or assert a claim against real or personal property or an interest in real or personal property. The court said that restrictive covenants are not liens or claims against real property, and therefore, are not subject to a § 51.903 proceeding. A lien is a legal right or interest that a creditor has in another's property, lasting usually until a debt or duty that it secures is satisfied. A restrictive covenant, on the other hand, is defined in the Property Code as any covenant, condition, or restriction contained in a dedicatory instrument, whether mandatory, prohibitive, permissive or administrative. Although restrictive covenants restrict or otherwise limit permissible uses

of the land, they do not create or purport to create a "lien or a claim" on the owner's property within the meaning of § 51.903.

Wasson Interests, Ltd. **v.** ***Adams***, 405 S.W.3d 971 (Tex.App.-Tyler 2013, no pet.). Wasson is the owner of a 3.014 acre tract burdened by restriction limiting its use to "residential development only." In 1983, the City conveyed the 3.014 acre subject tract to M.G. Moore by a general warranty deed that contained the "residential development only" covenant. Wasson became the successor in interest to the subject tract on April 21, 2010.

The area where the subject tract is located is rural in character. In the past, the property contained a pecan orchard and a peach orchard. There is no evidence of a residence on the property until January 2009 when Wasson moved a mobile home there. Wasson removed the mobile home when he received complaints that it violated the restrictions on the property. Thereafter, Wasson began putting hogs, goats, and other livestock on the property. He also placed an inoperable 1957 Chevrolet and an old dump truck near the road. At one point Wasson kept sixteen pigs, seven goats, three sheep, two horses, thirty chickens, five guinea fowl, and two peacocks on the 3 .014 acres. The result of this concentration was not only unsightly but evil smelling.

The Adamses sued to enforce the "residential development only" restriction. Wasson contends that the Adams lack standing to enforce the restriction burdening the 3.014 acres.

In order for a party to enforce a covenant burdening land against a successor to the party with whom he covenanted, the covenant must run with the land. For a covenant to run with the land, the covenant must be made between parties who are in privity of estate at the time the covenant was made, and must be contained in a grant of land or in a grant of some property interest in the land. Privity of estate between covenanting parties means a mutual or successive relationship exists to the same rights in property. A restrictive covenant is ordinarily enforceable only by the contracting parties and those in direct privity of estate with the contracting parties.

When the City (the covenantee) granted the subject 3.014 acres to M.G. Moore (the covenantor), there was a mutual relationship to the same rights in the property described in the grant. Hence they were in privity of estate as to the 3.014 acres. As successor covenantor to the interest of M.G. Moore, Wasson succeeded to the burden imposed by the covenant and is in privity of estate with the City.

The Adams' predecessor, who held the leasehold in 1983, was not a party to the grant to M.G. Moore or the covenant therein created. When the covenant was made in 1983 burdening the 3.014 acres, there was no mutuality of interest in the tract between the then current lessee of the Adams' subdivision lot and M.G. Moore. Therefore, the Adams have not succeeded to the interest of the City as covenantee in the estate created in 1983 grant containing the restrictive covenant.

The Adams argue that since they and Wasson both derive title from the City, they are in privity of estate. But privity of estate requires more than a common source of title. As successors to Bill Canino, the covenantor in the covenants created in 1962 in the original grant by the City of their subdivision lot, they are successor as covenantors to the burdens he assumed in the 1962 covenant. Hence, they are in privity of estate with the City under the 1962 covenant. But they are not successor covenantees to the rights of the City, the original covenantee, in the covenant created in the City's 1983 grant to M.G. Moore. Therefore, there is no privity of estate between the Adams and Wasson. The Adams lack standing to enforce the covenants restricting the use of Wasson's 3.014 acre tract.

Teal Trading And Development, LP **v.** ***Champee Springs Ranches Property Owners Association***, 432 S.W.3d 381 (Tex.App.-San Antonio 2014, pet. pending). This case is also discussed in Deeds and Conveyances.

Cop owned a big chunk land in Kendall and Kerr Counties. He recorded a Declaration of Covenants, Conditions, and Restrictions. As part of CCRs was a statement that the Declarant reserved a one-foot easement around the perimeter of the property for the purpose of precluding access to roadways by adjacent landowners. Cop then began selling lots out of the property. He sold a 600 acre parcel known as the Privilege Creek tract that ultimately ended up being owned by Teal Trading. All of the deeds in the chain of title from Cop to Teal Trading said, in one way or another, that the conveyance was made "subject to" the CCRs.

At one point, Teal Trading's predecessor began developing the Privilege Creek tract, and in the process connected to the roadways across the one-foot easement, in apparent violation of the CCRs. Champee Springs sued to enforce the restriction, then Teal Trading acquired the Privilege Creek tract and intervened in the lawsuit.

Champee Springs's petition sought a declaratory judgment that Teal Trading was bound by the non-access restriction and estopped to deny its force, validity, and effect, and because they were so bound, the restriction was enforceable against them. Teal Trading's petition-in-intervention denied that it was bound by the restriction, and it sought a declaratory judgment that the non-access restriction was void as an unreasonable restraint against alienation and that Champee Springs had waived the right to enforce the non-access restriction and was thus estopped from enforcing the restriction.

Teal Trading argues the non-access restriction is not a valid easement in fact or law because an easement is the right to use a servient estate by a dominant estate, and because Cop only purported to retain the right to prohibit use, there is no valid easement. That argument overlooks the well-established nature of negative reciprocal easements, restrictive covenants, or equitable servitudes restricting the use of property. A restrictive covenant is a negative covenant that limits permissible uses of land. A negative easement is a restrictive covenant. Teal Trading did not meet its summary judgment burden to show the restriction was not a valid easement.

Teal Trading then argues that, because Cop already owned the entire tract when he purported to create an easement, any purported easement would therefore merge into the fee simple estate. If any valid and enforceable negative reciprocal easement or restrictive covenant arose from the non-access restriction, it happened when Cop sold the first tract of the burdened property, not when he filed the Declaration. Termination by merger could only happen thereafter if all the burdened and benefitted properties came back into the ownership of a single entity. There is no evidence that such an event occurred in this case.

Teal Trading did not meet its summary judgment burden to show the restriction, if it was a valid easement, was terminated by merger.

Teal Trading then argues the non-access restriction is void because it is against public policy. Texas law recognizes the right of parties to contract with relation to property as they see fit, provided they do not contravene public policy and their contracts are not otherwise illegal. Teal Trading contends that the subdivision regulations of Kerr County and Kendall County are a source of public policy and that the non-access restriction violates them. The court assumed that a property restriction created in violation of a county's subdivision regulations may be void as against public policy. But the court held that there was no violation of the subdivision regulations. Again, Teal Trading did not meet its summary judgment burden.

Teal Trading then argues the non-access restriction is void as an unreasonable restraint against alienation. The Texas Supreme Court has used the definitions from the First Restatement of Property to identify whether an instrument contains a restraint on alienation. Under the First Restatement, a restraint on alienatio is an attempt by an otherwise effective conveyance to cause a later conveyance: (i) to be void (a disabling restraint); (ii) to impose contractual liability on the one who makes the later conveyance when such liability results from a breach of an agreement not to convey (a promissory restraint); or (iii) to terminate or subject to termination all or a part of the property interest conveyed (a forfeiture restraint).

Although Teal Trading identifies the three categories of restraints against alienation accepted by the Texas Supreme Court, it does not argue that the restriction falls within any of the categories. It simply states that the restriction entirely prohibits Teal Trading from selling a parcel of its property that straddles the imaginary line. The restriction does not purport to prohibit Teal from selling any part of the Privilege Creek Tract, and the court held that the restriction does not, on its face, fall within any of the recognized categories of restraints on alienation.

To the extent that the non-access restriction may operate as a restraint on alienation, it does so as an indirect restraint. Texas law does not favor declaring indirect restraints on alienation as unreasonable and against public policy. Teal Trading did not meet its summary judgment burden to show the restriction was an unreasonable restraint on alienation.

Finally, Teal Trading argues that the non-access restriction is an unreasonable restraint on its use of the Privilege Creek tract. Restrictions that amount to a prohibition of the use of property are void. Of course, public policy also recognizes that parties may contract with regard to their property as they see fit. The restriction, if valid and enforceable, does not prohibit Teal Trading's use of the Privilege Creek tract, but only limits how it may use it. Teal Trading did not present evidence showing that the restriction so severely limited its use of the property that the property was rendered valueless. Teal Trading did not meet its summary judgment burden to show the restriction was an unreasonable restraint on use.