REAL ESTATE UPDATE

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The case selection for this episode of Real Estate 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 556 S.W.3d and Supreme Court opinions released through March 22, 2018.

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

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

This Real Estate Update and other Case Law Updates dating back to 2009 are posted on my firm's website, cwrolaw.com. Most are also posted on reptl.org as well.

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A. CASE LAW UPDATE

PART I
HOME EQUITY LENDING

Wood* v. *HBC Bank USA, N.A, 504 S.W.3d 542 (Tex. 2016). The Woods borrowed a home equity loan. Nearly 8 years later, the Woods notified the note holder that the loan did not comply with the Texas constitution in several respects, including that the closing fees exceeded 3% of the loan amount. The Woods sued the lender, seeking to quiet title and asserting claims for constitutional violations, breach of contract, fraud, and a declaratory judgment that the lien securing the home-equity loan is void, that all principal and interest paid must be forfeited, and that the Woods have no further obligation to pay.

The Woods moved for summary judgment, arguing that the lien is void because the evidence shows as a matter of law that the closing fees exceeded 3% and the Lenders did not cure after proper notice. The Lenders also moved for summary judgment on traditional and no-evidence grounds, asserting in pertinent part that the lien is voidable, not void, and that the statute of limitations barred all claims. The trial court granted summary judgment in favor of the lender.

On appeal, the only issue raised by the Woods was whether their claims based on constitutional noncompliance, including claims to quiet title and for forfeiture, are subject to a statute of limitations. The court of appeals affirmed, holding that liens securing constitutionally noncompliant home-equity loans are voidable and that the residual four-year statute of limitations applied to the Woods' claims, accruing from the date of closing.

A lien securing a constitutionally noncompliant home-equity loan is not valid before the defect is cured. The Supreme Court therefore conclude that no statute of limitations applies to an action to quiet title on an invalid home-equity lien.

Under the common law, a void act is one which is entirely null, not binding on either party, and not susceptible of ratification. When an instrument is void, a quiet-title action can be brought at any time to set it aside. However, when an instrument is voidable, a four-year statute of limitations applies to actions to cancel it.

A plain reading of the Constitution necessitates a finding that liens securing noncompliant home-equity loans are not valid before the defect is cured. Holding otherwise would contravene section 50(c)'s plain language. Section 50(c) dictates that no lien on a homestead "shall ever be valid" unless it secures a debt that meets section 50(a)(6)'s requirements. Such a lien is made valid by the lender's compliance with a Section 50(a)(6)’s cure provisions. Here, the lender chose not to cure after being given notice, but the starting point is the same: the lien is not valid until the defect in the underlying noncompliant loan is cured.

In any event, the text of the Constitution and our decision in Doody do not support a holding that liens securing constitutionally noncompliant home-equity loans are merely voidable. A voidable lien is presumed valid unless later invalidated, while Section 50 contemplates the exact opposite: noncompliant liens are invalid until made valid. Holding otherwise would essentially permit lenders to ignore the Constitution and foreclose on the homesteads of unwitting borrowers who do not realize that their home-equity loans violate the Constitution.

The Woods did not fare as well in their claim for forfeiture. Relying on ***Garofolo***, 497 SW 3d 474 (Tex. 2016), which held that section 50(a) does not create substantive rights beyond a defense to a foreclosure action on a home- equity lien securing a constitutionally noncompliant loan and that forfeiture is not a constitutional remedy.

Garolfolo* v. *Ocwen Loan Servicing,

L.L.C., 497 SW 3d 474 (Tex. 2016). Garofolo borrowed a home equity loan. After Ocwen became the holder, Garofolo paid off the loan. A release of lien was recorded by Ocwen, but Garofolo did not receive a release of lien in recordable form as required by her loan documents. She notified Ocwen, but still didn't get the release. After sixty days, Garofolo sued for violations of the home equity lending provisions of the Texas Constitution, seeking forfeiture of all principal and interest paid on the loan.

Both the release-of-lien and forfeiture provisions of Garofolo's loan are among the terms and conditions the Texas Constitution requires of foreclosure-eligible home-equity loans. Garofolo therefore argues that Ocwen's failure to deliver the release of lien amounted to a constitutional violation for which a constitutional forfeiture remedy is appropriate. And because the release-of-lien and forfeiture provisions were incorporated into Garofolo's loan, she alternatively argues forfeiture is a remedy available through her breach-of-contract action. Because her constitutional claim "raises an important issue of Texas constitutional law as to which there is no controlling Texas Supreme Court authority, and the authority from the intermediate state appellate courts provides insufficient guidance," the Supreme Court accepted the following two certified questions from the Fifth Circuit:

"(1)Does a lender or holder violate Article XVI, Section 50(a)(6)(Q)(vii) of the Texas Constitution, becoming liable for forfeiture of principal and interest, when the loan agreement incorporates the protections of Section 50(a)(6)(Q)(vii), but the lender or holder fails to return the cancelled note and release of lien upon full payment of the note and within 60 days after the borrower informs the lender or holder of the failure to comply?

"(2)If the answer to Question 1 is "no," then, in the absence of actual damages, does a lender or holder become liable for forfeiture of principal and interest under a breach of contract theory when the loan agreement incorporates the protections of Section 50(a)(6)(Q)(vii), but the lender or holder, although filing a release of lien in the deed records, fails to return the cancelled note and release of lien upon full payment of the note and within 60 days after the borrower informs the lender or holder of the failure to comply?"

Section 50(a) does not constitutionally guarantee a lender's post-origination performance of a loan's terms and conditions. From a constitutional perspective, compliance is measured by the loan as it exists at origination and whether it includes the terms and conditions required to be foreclosure-eligible. Nothing in Section 50 suggests that a loan's compliance is to be determined at any time other than when it is made.

A lender that includes the terms and conditions in the loan at origination but subsequently fails to honor them might have broken its word, but it has not violated the constitution. This is not to say the constitution is unconcerned with a lender's post- origination performance of the loan's terms and conditions. On the contrary, the constitution prescribes a harsh remedy through forfeiture, a remedy previously called "Draconian."

If Ocwen sought to foreclose on Garofolo's homestead after she became delinquent in her payments, she could stand on the constitutional right to freedom from forced sale if her loan failed to include the release-of-lien requirement or forfeiture remedy. But that did not happen. Garofolo made timely payments and satisfied the balance in full. Ocwen never sought to foreclose, and there is no constitutional violation or remedy for failure to deliver a release of lien. Section 50(a) simply has no applicability outside foreclosure.

In bringing a breach-of-contract claim, Garofolo has pleaded an appropriate cause

of action for relief from a lender's post-origination failure to honor the terms and conditions, constitutionally mandated or not, of a home-equity loan. Her loan incorporates both constitutional provisions at issue in this case: the requirement to deliver a release of lien and the forfeiture remedy. Garofolo acknowledges she has not suffered any damages from Ocwen's failure to deliver the release but argues she need not suffer any to access a contracted-for forfeiture remedy that is not contingent on proof of actual damages.

Section 50(a)(6)(Q)(x) provides for forfeiture of principal and interest if the lender fails to comply with its obligations under the extension of credit and fails to correct the failure within 60 days after notice from the borrower and provides six corrective measures the lender can undertake. Ocwen forfeiture is simply inapplicable here because none of the six corrective measures addresses the failure to deliver a release of lien. Garofolo, though, argues that this sixth and final of the measures could have been done. That would be to refund her $1,000 and offer to refinance her loan. But, noted the court, there was nothing to refinance—Garofolo had already paid off her loan-and a $1,000 payment would not buy her a document only Ocwen can provide.

The terms and conditions required to be included in a foreclosure-eligible home-equity loan are not substantive constitutional rights, nor does a constitutional forfeiture remedy exist to enforce them. The constitution guarantees freedom from forced sale of a homestead to satisfy the debt on a home-equity loan that does not include the required terms and provisions-nothing more. Ocwen therefore did not violate the constitution through its post-origination failure to deliver a release of lien to Garofolo. A borrower may seek forfeiture through a breach-of-contract claim when the constitutional forfeiture provision is incorporated into the terms of a home-equity loan, but forfeiture is available only if one of the six specific constitutional corrective measures would actually correct the lender's failure to comply with its obligations under the terms of the loan, and the lender nonetheless fails to timely perform the corrective measure following proper notice from the borrower. If performance of none of the corrective measures would actually correct the underlying deficiency, forfeiture is unavailable to remedy a lender's failure to comply with the loan obligation at issue. Accordingly, the court answered "no" to both certified questions.

The Texas Constitution allows a home-equity lender to foreclose on a homestead only if the underlying loan includes specific terms and conditions. Among them is a requirement that a lender deliver a release of lien to the borrower after a loan is paid off. Another is that lenders that fail to meet their loan obligations may forfeit all principal and interest payments received from the borrower.

Worthing* v. *Deutsche Bank National Trust Company, 545 S.W.3d 127 (Tex.App.—El Paso 2017, no pet.). The Worthings refinanced their home through Argent, executing a home equity note and security instrument in favor of Argent. The note was endorsed several times, and servicing was also changed several times.

The Worthings stopped making payments. The loan was accelerated and Deutsche Bank filed for a judicial foreclosure, which the trial court granted permission for. Two years later, Deutsche Bank appointed a substitute trustee and sold the property at the foreclosure sale. The Worthings, who were still living in the house, sued, claiming that Argent did not qualify as one of the designated type of lenders allowed to make a home equity loan in Texas. Consequently, the Worthings assert that Argent automatically forfeited all principal and interest under the Note, and the ensuing foreclosure was invalid.

The Worthings claim that because Argent was an unlicensed lender at the time the loan was made, the loan was void at its inception and Argent (and any subsequent holder or assignee of the Note) could not foreclose on the property. Because this was a home equity loan involving homestead property, the loan must have conformed to the requirements for such loans as set out in the Texas Constitution.

Constitution art. XVI, § 50 provides that no mortgage, trust deed, or other lien on the homestead shall ever be valid unless it secures a "debt described by this section." One of the constitution's requirements is that only certain entities can make home equity loans. Argent was apparently not such an entity at the time of the loan because it lacked a proper license.

However, when the loan was made in August, 2003, the constitution gave leeway to cure defects. At the time the loan was made, § 50(a)(6)(Q)(x) provided for forfeiture of principal and interest if the lender fails to comply with the requirements within a reasonable time after being notified by the borrower of a defect in the loan. This was substantially changed in September, 2003 and the cure wording for an unlicensed lender was completely removed and replaced with this: [T]he lender or any holder of the note for the extension of credit shall forfeit all principal and interest of the extension of credit if the extension of credit is made by a person other than a person described under Paragraph (P) of this subdivision . . ."

Argent obtained a license in December, 2003. Thus, it cured the problem before the Worthings complained, but after the adoption of the 2003 amendment. The question addressed by the court was whether the 2003 amendment, which eliminates the cure option, apply retroactively. The court held that it does not.

The general rule is that constitutional amendments and statutes operate prospectively unless they expressly provide otherwise. Absent clear intent, retroactive application is disfavored and should occur only where the public policy is so clearly and broadly stated as to be unmistakable. There is a presumption that parties to a contract know and take into consideration the law in effect at the time of contract. Accordingly, courts should be reluctant to change the rights and obligations of parties by retroactively applying a change in the original law.

Alexander* v. *Wilmington Savings Fund Society, FSB, 555 S.W.3d 297 (Tex.App.—Dallas 2018, no pet.). Pamela claimed that Wilmington's home equity lien on the house owned by her and her husband was void because she did not sign the note. On the same day the note was signed, Pamela did sign a Texas Home Equity Security Instrument.

Pamela's argument was based up Texas Constitution art. XVI, § 50(a) (6)(Q)(xi), which says that a lender forfeits all principal and interest of the extension of credit "if the lien was not created under a written agreement with the consent of each owner and each owner's spouse. . ." Unfortunately for Pamela, the constitution's plain language merely requires that each spouse consent to the lien, and she had signed the document creating the lien. Section 50(a) (6)(Q)(xi) does not require an owner's spouse to consent to a home equity note.

PART II
USURY

Leteff v. Roberts, 547 S.W.3d 656 (Tex.App.—Houston [14th Dist.] 2018, no pet.). 555 S.W.3d 133 (Tex.App.—Houston [1st Dist.] 2018, no pet.). Leteff was looking for financing for his business and was introduced to Roberts. They met and struck a deal. At Leteff's suggestion, Roberts would loan Leteff $40,000 that would be repaid in 45 days along with an "interest amount" of $20,000. They repeated this

structure 17 times, 14 of which called for interest. On at least one occasion, Leteff met Roberts at Roberts's house for a loan of over half a million dollars. That amount was counted out in cash, and Leteff took the cash away in grocery bags.

Leteff repaid only four of the 14 interest bearing loans. Roberts sued and Leteff counterclaimed for usury. The trial court entered a conclusion of law that it would not award any interest in transactions to Leteff where Leteff defaulted on the repayment. It then found Roberts liable for usury and awarded Leteff an offset against the money he had not repaid for the usury damages on the four loans that he had repaid. No usury damages or offsets were awarded for the 10 loans that were not repaid. The court also did not award attorneys' fees to either party.

Leteff appealed, claiming that he should have been awarded usury damages on all of the loans, whether or not repaid, and that he should have been awarded attorneys' fees.

A creditor who contracts with an obligor for interest that is greater than the maximum interest allowable by law is liable to the obligor for usury. Finance Code § 305.001(a-1). The creditor then owes the obligor a statutory penalty, which is computed by subtracting the amount of maximum allowable interest from the amount of interest actually contracted for and then trebling that result. Interest need not be expressed as a rate or percentage to be considered usurious. If the creditor agrees to any compensation that constitutes interest, the obligor is considered to have agreed on the rate produced by the amount of that interest, regardless of whether that rate is stated in the agreement. Interest means compensation for the use, forbearance, or detention of money. Finance Code § 301.002(a)(4). Usurious interest' means interest that exceeds the applicable maximum amount allowed by law. Finance Code § 301.002(a)(17).

The unambiguous text of Finance Code § 305.001(a-1) provides that a creditor is liable for usury when the creditor merely contracts for usurious interest on a loan and notwithstanding the obligor's failure to repay that loan. The statute says:

"A creditor who contracts for or receives interest that is greater than the amount authorized by this subtitle in connection with a commercial transaction is liable to the obligor for an amount that is equal to three times the amount computed by subtracting the amount of interest allowed by law from the total amount of interest contracted for or received." Finance Code § 305.001(a-1). Either of the two acts connected by the "or"— (1) contracting for usurious interest or (2) receiving usurious interest— by itself is sufficient to trigger liability. Even if Roberts did not receive any usurious interest on the loans that Leteff did not repay, the statute requires that Roberts be held liable because he contracted for usurious interest.

The law awards an obligor usury damages as a boon or a windfall which he is allowed to receive as a punishment to the usurious lender" A successful claim of usury may allow the borrower to avoid a debt he might otherwise owe. The usury law therefore punishes Roberts for contracting for usurious loans, even if the result is a windfall for Leteff.

Roberts contended that these were not loans but were investments. Generally, investments are not subject to usury law because the law applies to transactions in which the obligor has an absolute obligation to repay the principal. The trial court found that these were loans, and Roberts did not challenge that finding of fact.

Roberts also argued that the interest amounts were Leteff's suggestion. But the test for alleged usury is not concerned with which party might have originated the usurious provisions.

Roberts also argued that equitable

doctrines like unclean hands and unjust enrichment should bar a usury claim. The court held that the action for usury is not subject to these doctrines.

The court went on to award attorneys' fees to Leteff under Finance Code § 305.005. Under the statute's plain language, the only requirement for awarding an obligor reasonable attorneys' fees is that the creditor be found liable for usury. The trial court found Roberts liable for usury under Finance Code § 305.001. Therefore, the trial court should have awarded Leteff the amount that the parties stipulated to for attorneys' fees.

PART III
LEASES

Shields Limited Partnership* v. *Bradberry, 526 S.W.3d 471 (Tex. 2017). Though the tenant frequently defaulted on the lease's rental-payment terms, the landlord regularly accepted the tenant's rental payments when tendered and without protest. The lease provided that the landlord's acceptance of late payments "shall not be a waiver and shall not estop Landlord from enforcing that provision or any other provision of [the] lease in the future." It also provided that all waivers had to be in a writing signed by the waiving party and that forbearance of enforcement would not constitute a waiver.

When the landlord sought to evict the tenant, the tenant contended that the landlord's conduct in accepting late rental payments waived the contractual nonwaiver clause.

The right to possession of the leased premises is governed by the commercial lease between landlord and tenant. The terms of the lease in this case required the tenant to pay rent on time, in full, and without demand. Rent paid more than ten days late is a default under the lease. There was no evidence that the parties ever agreed in writing to waive any lease obligation.

The landlord asserts that a nonwaiver provision may not be waived by engaging in the very act the contract disclaims as constituting waiver, The tenant argues that nonwaiver provisions are "wholly ineffective" and can be waived to the same extent as any other contractual provision.

The court considered the force and effect of a nonwaiver provision in light of Texas's public policy that strongly favors freedom of contract. Given Texas's strong public policy favoring freedom of contract, there can be no doubt that, as a general proposition, nonwaiver provisions are binding and enforceable. Here, however, the question is not whether the nonwaiver clause in the parties' agreement is enforceable, but whether that clause is waivable and, if so, the circumstances under which waiver may occur.

Freedom of contract is a policy of individual self-determination; individuals can control their destiny and structure their business interactions through agreements with other competent adults of equal bargaining power, absent violation of law or public policy. The contractual doctrine of waiver, whether express or implied, rests on a similar conceptual policy of individual self-determination—an idea no more complicated than that any competent adult can abandon a legal right and if he does so then he has lost it forever.

To the extent there has been any doubt up to this time, the court affirmed that a party's rights under a nonwaiver provision may indeed be waived expressly or impliedly. But the mere fact that a nonwaiver provision may be waived does not render the provision wholly ineffective.

The court agreed that a nonwaiver provision absolutely barring waiver in the most general of terms might be wholly ineffective. But it did not agree that a nonwaiver provision is wholly ineffective in

preventing waiver through conduct the parties explicitly agree will never give rise to waiver. Such a contract-enforcement principle would be illogical, since the very conduct which the clause is designed to permit without effecting a waiver would be turned around to constitute waiver of the clause permitting a party to engage in the conduct without effecting a waiver.

While the court couldn't address every possible situation for delineating the circumstances under which a nonwaiver provision could be waived, it could say "with certainty" that accepting late rental payments could not waive the parties' agreement that contractual rights, remedies, and obligations will not be waived on that basis, especially when the lease provides a specific method for obtaining a waiver. The court therefore held that engaging in the very conduct disclaimed as a basis for waiver is insufficient as a matter of law to nullify the nonwaiver provision in the parties' lease agreement.

Wasson Interests, Ltd.* v. *City of Jacksonville 489 S.W.3d 427 (Tex. 2018). The City built Lake Jacksonville in the late 1950s. Over the next several decades, the City developed the surrounding area and began leasing lakefront lots to private parties. In 1996, the Wassons entered into long-term leases of City-owned lakefront lots and constructed a seven-bedroom house. The lease agreements incorporated the City's Rules & Regulations Governing Lake Jacksonville by reference. Those rules provide that all lots outside the City's corporate limits—which include the Wassons' lots—"shall be restricted to residential purposes only," and that no lot may be used to operate a "business or commercial enterprise." The rules also provide that breach of "any of the regulations . . . shall be grounds for cancellation of the lessee's lease."

The Wassons initially lived on the property but later moved and assigned the leases to Wasson Interests, Ltd. Planning to use the property as a bed-and-breakfast and event center, they sought several variances from the Lake Jacksonville Advisory Board and the City Council, although it believed the variances were unnecessary. The Board denied the requests. The Wassons did it anyway, advertising and renting the property for short lease terms. The City decided these uses violated the leases and terminated them.

The City initially sought to evict the Wassons, but the parties worked out a reinstatement and permitted Wasson to rent the property to single families and small groups for short periods of time and only for "residential purposes." Later, the City again terminated the leases, claiming that the Wassons had been using sham leases to circumvent the reinstatement. Wasson sued. The City claimed that governmental immunity barred the Wassons' claim. The trial court and the court of appeals agreed.

Municipal corporations exercise their broad powers through two different roles; proprietary and governmental. This dichotomy recognizes that sovereign immunity protects governmental units from suits based on its performance of a governmental function but not a proprietary function. In an earlier version of this case, the Supreme Court held that the governmental/proprietary dichotomy applies to breach-of-contract claims. ***Wasson Interests, Ltd.* v. *City of Jacksonville*** (Wasson I), 489 S.W.3d 427, 439 (Tex. 2016). After ***Wasson I***, on remand the court of appeals held that the Wassons' claims arose from the City's performance of a governmental function. The Supreme Court in this case held otherwise.

The distinction between a municipality's governmental and proprietary functions seems plain enough, but the rub comes when it is sought to apply the test to a given state of facts. Generally, governmental functions consist of a municipality's activities in the performance of purely governmental matters solely for

the public benefit. Historically, governmental functions have consisted of activities normally performed by governmental units such as police and fire protection. Acts done as a branch of the state—such as when a city exercises powers conferred on it for purposes essentially public—are protected by immunity.

Proprietary functions, by contrast, are those performed by a city, in its discretion, primarily for the benefit of those within the corporate limits of the municipality, and not as an arm of the government. These are usually activities that can be, and often are, provided by private persons. Acts that are proprietary in nature, therefore, are not done as a branch of the state, and thus do not implicate the state's immunity for the simple reason that they are not performed under the authority, or for the benefit, of the sovereign.

Article XI, § 13 of the Texas Constitution authorizes the Legislature to define for all purposes those functions of a municipality that are to be considered governmental and those that are proprietary, including reclassifying a function's classification assigned under prior statute or common law. Exercising that authority, the Legislature, in the Tort Claims Act, has defined and enumerated governmental and proprietary functions for the purposes of determining whether immunity applies to tort claims against a municipality. Civil Practice & Remedies Code § 101.0215.

The Act enumerates thirty-six governmental functions, ranging from police and fire protection and control to animal control. Conversely, the Act defines proprietary functions as those that a municipality may, in its discretion, perform in the interest of the inhabitants of the municipality.

The City asserts that immunity applies because all of its activities constituted governmental functions, including its creation of Lake Jacksonville as a water supply, its decision to lease the property surrounding the lake, its adoption of ordinances and rules governing use of the leased property, and its attempt to enforce those rules against Wasson.

The Wassons, however, argue the only relevant activity is the City's decision to lease the property.

The court agreed with the Wassons. It held that, to determine whether governmental immunity applies to a breach-of-contract claim against a municipality, the proper inquiry is whether the municipality was engaged in a governmental or proprietary function when it entered the contract, not when it allegedly breached that contract. Stated differently, the focus belongs on the nature of the contract, not the nature of the breach. If a municipality contracts in its proprietary capacity but later breaches that contract for governmental reasons, immunity does not apply. Conversely, if a municipality contracts in its governmental capacity but breaches that contract for proprietary reasons, immunity does apply. This approach is most consistent with the purposes of both immunity and the governmental/proprietary dichotomy, and it provides clarity and certainty regarding the contracting parties' rights and liabilities.

It went on to hold that the City acted in its proprietary capacity when it leased the property to the Wassons. In reaching that decision, the court considered whether (1) the City's act of entering into the leases was mandatory or discretionary, (2) the leases were intended to benefit the general public or the City's residents, (3) the City was acting on the State's behalf or its own behalf when it entered the leases, and (4) the City's act of entering into the leases was sufficiently related to a governmental function to render the act governmental even if it would otherwise have been proprietary.

The court held that the City's entering into the leases was discretionary, that the benefit of the leases was for the residents of

the City, not the public at large, that the City was acting on its own behalf, not on behalf of the State, and the act of entering into the leases was not sufficiently related to a governmental function to overcome the proprietary nature of the action.

Smith* v. *El Paso Veterans Transitional Living Center, 556 S.W.3d 361 (Tex.App.—El Paso 2018, pet. pending). VTLC filed suit in justice court to evict Smith. Smith lost at the justice court and the county court. On appeal to the Court of Appeals, Smith claimed that his attorney provided him with inaccurate, inadequate, and ineffective services. He claimed that the Sixth Amendment to the U.S. Constitution guarantied him the right of effective assistance of counsel. The court ruled, however, that the doctrine of ineffective assistance of counsel does not apply in civil cases unless there is a constitutional or statutory right to counsel. A defendant in an eviction case does not have a constitutional or statutory right to counsel.

PART IV
EVICTIONS

Praise Deliverance Church* v. *Jelinis, LLC, 536 S.W.3d 849 (Tex.App.—Houston [1st Dist.] 2017, pet. denied). The Church borrowed a construction loan but later defaulted. The lender foreclosed. Jelinis and HREAL bought at the foreclosure sale. After the sale, they sent eviction notices then filed in the justice court. The justice court ruled for the Church, noting on the Eviction Docket Sheet "Title Issue."

Jelinis and HREAL filed a bond and a notice of appeal to the county court. The county court awarded possession to Jelinis and HREAL. The Church appealed to the court of appeals, but failed to post a supersedeas bond. A writ of possession was executed and Jelinis and HREAL obtained possession of the property.

Both sides claimed the court lacked jurisdiction. Jelinis and HREAL claimed that the case was moot because the Church was no longer in possession and because Property Code § 24.007 prohibits appeal to the court of appeals except in residential evictions.

As to the lack of possession by the Church, the court noted that the Church had filed suits for wrongful foreclosure in both state and federal courts, but then apparently dismissed them without prejudice. The court said that it had no record that the title dispute relating to the property had been resolved definitively against the Church or that it would be barred by limitations.

A successful challenge to the county court's jurisdiction would result in vacating the order of possession. And, even though the Church still would lack possession, it could then bring its own eviction suit against Jelinis and HREAL. Accordingly, the court held that the Church's challenge to the jurisdiction of the trial courts was not moot merely because the church currently lacks possession and failed to post a bond.

Jelinis and HREAL also claimed that Property Code § 24.007 meant that the final judgment of the county court on the issue of possession could not be appealed to the court of appeals. But, said the court, the Church has challenged the trial courts' jurisdiction to enter judgment, thus the issue on appeal is not merely the merits of the disputed issues of possession, but on the issue of jurisdiction. So the court held that it had jurisdiction.

So the court looked at the issue of jurisdiction. First, it held that the justice court's docket notation "Title Issue" did not establish that the justice court made a jurisdictional determination. The docket sheet is not a part of the record – it is just a memorandum for the court's convenience. Second, even if the justice court determined that a title issue precluded its jurisdiction, the appeal to the county court for a trial de novo vacates and annuls the justice court's judgment. Because the county court could

make its own jurisdiction determination durin a de novo trial, the court concluded that the Church's jurisdictional challenge failed.

Reynoso* v. *Dibs US, Inc., 541 S.W.3d 331 (Tex.App.—Houston [14th Dist.] 2017, no pet.). After Reynosa defaulted on her loan, Wells Fargo foreclosed. Dibs bought the property at the foreclosure sale. When Reynoso failed to vacate the house, Dibs filed a forcible detainer action. The justice court ruled in favor of Dibs and Reynoso appealed. In her appeal to the county court, Reynoso filed a motion to dismiss, claiming, among other things, that the provision of her deed of trust that said she had no right to occupy the house after foreclosure violated her constitutional due-process rights (referred to by this court as the "Clause").

Reynoso asserted that, if the justice court did have jurisdiction, this jurisdiction violated substantive and procedural due process under the United States Constitution and substantive and procedural due course of law under the Texas Constitution because jurisdiction is based on the Clause, and (1) the Clause is an "unbargained for" provision that was not disclosed to Reynoso and to which Reynoso did not agree; (2) the Clause deprives Reynoso of her right to litigate possession in the district court, along with her wrongful-foreclosure and other claims; and (3) allowing Dibs to litigate possession and obtain possession of the Property from Reynoso before Reynoso's challenges to the validity of the foreclosure sale are resolved violates due process. She also claimed that Property Code § 24.002, governing forcible-detainer actions, does not provide for determination of issues relating to a homeowner's right to possession of the real property following foreclosure of a lien in the property in a meaningful manner or at a meaningful time.

A violation of substantive due process occurs when the government deprives individuals of constitutionally protected rights by an arbitrary use of power. A plaintiff challenging a statute or state action must shoulder the burden to prove a violation of substantive due process. Similarly, the court presumes a state actor acted in a constitutional manner. When neither a suspect classification nor a fundamental right is involved, the court will review statutes and actions of state actors under the deferential rational-basis test. Under this test, the claimant must prove that it is not at least "fairly debatable" that the statute or conduct rationally relates to a legitimate governmental interest.

The Fourteenth Amendment's Due Process Clause provides that an individual may not be deprived of certain substantive rights— life, liberty, and property— without constitutionally adequate procedures. Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property. If an individual is deprived of a vested property right, the government must afford an appropriate and meaningful opportunity to be heard to comport with procedural due process. Due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner with respect to a decision affecting an individual's property rights.

Reynoso asserted that the Clause violates due process and contract law because it is an "unbargained for" provision that allegedly was not disclosed to her. Due process protections guaranteed by the Fourteenth Amendment do not extend to private conduct abridging individual rights. The Fourteenth Amendment prohibits only such action that fairly may be said to be that of the one of the states. Reynoso's execution of the Deed of Trust and her agreement to its terms does not involve state action, so the Clause, in and of itself, does not violate the Due Process Clause. The use of the provision by the justice court or the county court at law as a basis for jurisdiction over the forcible-detainer action, however, is

state action sufficient to trigger due process protections.

Even presuming that Reynoso did not read the Deed of Trust before placing her signature on it and that nobody pointed out the Clause to Reynoso or explained it to her, as Reynoso suggests on appeal, there is no question that Reynoso signed the Deed of Trust containing the Clause. The law presumes that a party who signs a contract knows its contents. When a party signs an instrument after having an opportunity to read it, the law presumes that the party knows and accepts all of the instrument's terms, even if the party chose not to read the instrument. One who signs an instrument without reading it can avoid this presumption under a narrow "trick or artifice" exception by showing that the signing party was prevented by a fraudulent trick or artifice from reading the instrument or having the instrument read to the signing party. Reynoso did not allege that a fraudulent trick or artifice prevented her from reading the Deed of Trust or from having the Deed of Trust read to her, nor did Reynoso present any evidence supporting such an allegation. Therefore, the court presumed that Reynoso knew and accepted all of the terms of the Deed of Trust, including the Clause. The court also declined to impose a conspicuousness requirement on provisions similar to the Clause.

Reynoso also asserted that the Clause violates her right to litigate possession in the district court, along with her wrongful-foreclosure and other claims. Reynoso claimed that justice courts should not have jurisdiction over forcible-detainer cases when the occupant has asserted a wrongful-foreclosure claim (or other claims) against the lender in district court and those claims are pending. She argued that Texas's statutory scheme allows successful bidders at foreclosure sales, like Dibs, to speedily litigate the right to possession and to eject the homeowner from the property following the foreclosure sale before the homeowner is able to fully litigate challenges to the validity of the foreclosure sale. Reynoso also suggests there should be a procedure to stay the eviction until the foreclosure challenge is resolved.

Reynoso argued that courts should apply strict scrutiny because property ownership is a fundamental right. The court disagreed. Shelter and the right to retain possession of one's home are not fundamental interests protected by the constitution. Since this case implicates neither a suspect classification nor fundamental rights, the court will review the governmental action enforcing the Clause and Property Code § 24.002 using the deferential rational-basis test. Under that test, the court held that the Texas Legislature had a rational basis for structuring a statutory scheme that would allow speedy litigation of the issue of possession of the property in a forcible-detainer action in the justice court, while providing that title, including issues as to the validity of the foreclosure sale, be litigated in district court.

Hernandez* v. *Hernandez, 547 S.W.3d 898 (Tex.App.—El Paso 2018, pet. denied). Alejandro filed an appeal from an eviction brought by the. Bank. He failed to file the required bond, and the Bank, so the Bank executed a writ of possession and took possession of the property on March 13. While the appeal was pending, on February 2, the Bank auctioned the property and Alberto was the winning bidder. The Bank and Alberto entered into a purchase contract which provided that the Bank would deed the property upon satisfaction of certain conditions, including Alberto putting the money into escrow with the title company by a certain date. The Bank prepared and signed a deed on February 17, and sent the deed to its lawyer to hold until closing. The sale transaction closed on March 16, when all of the conditions were satisfied. The deed was recorded on March 21.

On April 13, Alejandro filed an application for writ of reentry, alleging that

Alberto had unlawfully evicted him and locked him out of the property. The justice court denied the application, and the county court, finding that the property was not conveyed to Alberto until March 16, denied the writ as well. Alejandro argued that Alberto acquired the property on the date the deed was signed, which was February 17.

Under Property Code § 92.009, a tenant who has been locked out of leased premises in violation of § 92.0081, may file with the justice court a sworn complaint for reentry. Alejandro's complaint alleged that Alberto became the landlord when the deed was signed.

Conveyance by deed requires delivery of the deed. It has long been the law in Texas that delivery of a deed has two elements: (1) the grantor must place the deed within the control of the grantee (2) with the intention that the instrument become operative as a conveyance. The question of delivery of the deed is controlled by the intent of the grantor, and it is determined by examining all the facts and circumstances preceding, attending, and following the execution of the instrument.

The court of appeals found that the purchase agreement clearly articulated the Bank's intent with regard to the deed and its delivery. The Bank intended for title to the property to convey to Alberto only upon the complete satisfaction of all the closing requirements under the terms of the purchase agreement. The undisputed evidence shows that the closing took place on March 16, and that Alberto satisfied the closing requirements. It was only upon the satisfaction of the closing requirements that the title company released the executed deed for recording and delivery. Consequently, Alberto had no obligation under the Property Code to file a new FED action, to file a new notice to vacate, or to provide any other notice to Appellants prior to execution of the writ of possession on March 13.

In Re *High Pointe Investments, LLC*, 552 S.W.3d 384 (Tex.App.—Waco 2018, no pet.). High Pointe bought commercial property at foreclosure. The property was leased by Margetis. It consisted of storerooms and parking areas and was not being used for residential purposes.

In foreclosure action against Margetis, the county court granted a directed verdict for High Pointe and entered an order of possession and final judgment, which stated that: (1) High Pointe is entitled to possession of the property in question and that possession has been wrongfully withheld from High Pointe by Margetis; (2) High Pointe provided proper notice to Margetis to vacate the property; and (3) the property is not being used for residential purposes only. Accordingly, the trial court ordered that High Pointe recover possession of the property and that the issuance of a writ of possession be issued upon the expiration of ten days from the signing of the order, to be issued on High Pointe's request without further order or notice. The possession order also provided that Margetis could supersede this order by the posting of a supersedeas bond in the amount of $5,000 per month.

High Pointe's requested the issuance of the writ of possession pursuant to the possession order. On the same date, Margetis filed a cash deposit in lieu of supersedeas bond for $5,000. High Pointe's writ of possession was subsequently denied, and High Pointe filed its mandamus.

High Pointe contends that the county court abused its discretion by denying its writ of possession because Property Code § 24.007 does not allow for an appeal when the property in question is not being used for residential purposes only. Section 24.007 states that a final judgment of a county court in an eviction suit may not be appealed on the issue of possession unless the premises in question are being used for residential purposes only. In its possession order, the county court expressly found that the property in question was wrongfully

withheld from High Pointe by Margetis and that the property was not being used for residential purposes only. Therefore, based on the unambiguous language of § 24.007, the issue of possession is not appealable.

PART V
DEEDS AND CONVEYANCES

Davis* v. *Mueller, 528 S.W.3d 97 (Tex. 2017) reversing ***Mueller* v. *Davis***, 485 S.W.3d 622 (Tex.App.-Texarkana 2016). While the Statute of Frauds requires only that certain promises or agreements be in writing and signed by the person to be charged, as applied to real-estate conveyances, the writing must furnish within itself, or by reference to some other existing writing, the means or data by which the land to be conveyed may be identified with reasonable certainty. This rule by which to test the sufficiency of the description of property to be conveyed is so well settled at this point in our judicial history, and by such a long series of decisions by the Supreme Court, as almost to compel repetition by rote.

Cope conveyed her mineral interests in ten vaguely described tracts in Harrison County, Texas to Davis. The conveyance was on a printed form with tiny text. The list of tracts was followed by this sentence: "Grantor agrees to execute any supplemental instrument requested by Grantee for a more complete or accurate description of said land."

Another paragraph, including a Mother Hubbard clause, followed this, saying "The 'Lands' subject to this deed also include all strips, gores, roadways, water bottoms and other lands adjacent to or contiguous with the lands specifically described above and owned or claimed by Grantors. . . . Grantor hereby conveys to Grantee all of the mineral, royalty, and overriding royalty interest owned by Grantor in Harrison County, whether or not same is herein above correctly described."

About the same time, it so happened that Mills conveyed his mineral interests in two tracts, also in Harrison County, also to Davis. The conveyance was on an identical form with a similarly vague description of the tracts followed by the same provisions.

Later, Cope and Mills, independently, deed to Mueller the same interests previously deeded to Davis. Mueller sued to quiet title to the mineral interests.

In this case, the specific property descriptions in Cope's and Mills's deeds to Davis do not satisfy the Statute of Frauds, and Davis does not argue to the contrary. But Texas law has long given effect to a general conveyance of all the grantor's property in a geographic area, such as a county, the state, or even the United States, thereby enlarging an accompanying conveyance of property specifically described.

Mueller argues that the deeds are ambiguous because the general granting clause is in the same paragraph as the Mother Hubbard clause. A Mother Hubbard clause is not effective to convey a significant property interest not adequately described in the deed. The proximity shows, Mueller contends, that the general grant was only of all small pieces of the specifically described tracts in Harrison County, not of other tracts. But if that were true, the general grant would accomplish nothing; the Mother Hubbard clause itself covers small pieces that may have been overlooked or incorrectly described. The general grant's conveyance of "all of the mineral, royalty, and overriding royalty interest owned by Grantor in Harrison County, whether or not same is herein above correctly described" could not be clearer. All means all.

Mueller also argues that a reference to an unidentified portion of a larger, identifiable tract is not sufficient to satisfy the Statute of Frauds. The court agreed with that proposition, of course, but it has no application here. A conveyance of the north

or east part of a tract does not identify specific acreage; neither does a conveyance of a certain number of acres out of a subdivision or survey in which the grantor owns multiple tracts. The rule Mueller cites would apply if Cope and Mills had conveyed part of what they owned in Harrison County, because the parts could not be identified from the deeds. But they conveyed all.

Mueller argues that each grantor's express agreement "to execute any supplemental instrument requested by Grantee for a more complete or accurate description of said land" shows that the parties contemplated that any other tracts would be covered by separate instruments, which would not be necessary if the general grant covered them. But the agreement is consistent with the general grant. It simply provides that if supplemental instruments are required to carry out the specific and general grants, the grantor will supply them.

The court held that the general grants in the deeds are valid and unambiguous, conveying title of Cope's and Mills's Harrison County mineral interests to Davis. Because those conveyances preceded the conveyances of the same interests to Mueller, Davis has superior title.

Cosgrove* v. *Cade, No. 468 SW3d 32 (Tex. 2015). 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.

The trial court ruled that the Cades' claims were time-barred and also denied their deed-reformation and breach-of-contract arguments. Both parties appealed. The court of appeals reversed the grant of summary judgment for Cosgrove, affirmed the denial of summary judgment for the Cades, and held that the discovery rule delayed the accrual of limitations for a deed-reformation claim because a mutual mistake in a deed is a type of injury for which the discovery rule is available.

There is generally a rebuttable presumption that a grantor has immediate knowledge of defects in a deed that result from mutual mistake. Application of the presumption means that the limitations period on a claim to reform an incorrect deed begins to run as soon as the deed is executed because the grantor has actual knowledge that the deed is incorrect.

A plainly evident omission on an unambiguous deed's face is not a type of injury for which the discovery rule is available. While certain circumstances may trigger a rebuttable presumption that a grantor has immediate knowledge of defects in a deed that result from mutual mistake; however, the Supreme Court has never decided a case involving a plain omission in an unambiguous deed. While prior cases reserved the possibility of recognizing a rebuttable presumption in plain-omission cases, but the court never explicitly endorsed it, and declined to do so now. At execution, the grantor is charged with immediate knowledge of an unambiguous deed's material terms.

Parties are charged as a matter of law with knowledge of an unambiguous deed's material omissions from the date of its execution, and the statute of limitations runs from that date. The Cades had actual knowledge of the deed's omission upon execution. They were charged, as a matter of law, with actual knowledge of what the deed included, and excluded, and limitations began to run from the date of execution. An injury involving a complete omission of

mineral interests in an unambiguous deed is inherently discoverable. When a reservation of rights is completely omitted from a deed, the presumption of knowledge becomes irrebuttable because the alleged error is obvious. It is impossible to mistake whether the deed reserves rights when it in fact removes rights. In cases like these which involve an unambiguous deed, the conspicuousness of the mistake shatters any argument to the contrary.

While the Court has recognized that public records can impose an irrebuttable presumption of notice on a grantee to prevent application of the discovery rule, the court has not yet recognized circumstances where Property Code §13.002 imposes constructive notice on a grantor as well. The court did so in this case, to the extent that public records filed under § 13.002 establish as a matter of law a lack of diligence in the discovery of a mistaken omission in an unambiguous deed. The court did not impose an affirmative duty to search the public record; it said only that obvious omissions are not inherently undiscoverable.

Carl M. Archer Trust No. Three* v. *Tregellas, No. 17-0093 (Tex. November 16, 2018). In June 2003, a warranty deed transferred the surface of certain property located in Hansford, County Texas to the Trustees. In a separate agreement entered into at the same time, the Trustees were granted a "Right of First Refusal" to purchase the minerals under the surface. The ROFR specifically provided that it was subordinate to mortgages and other encumbrances. Unfortunately, although the property description in the ROFR was otherwise correct, it contained the incorrect county, listing the county as Ochiltree instead of Hansford. The Archer Trustee's attorney prepared a correction and sent it to the grantors for signature but only two of the many grantors signed and returned the correction. The correction was filed of record in Hansford County in September 2004.

Two of the original grantors, the Farbers, sold their mineral interests on March 28, 2007 to the Tregellases. Before conveying the interests, the Farbers did not notify the Trustees of their intent to sell or of the terms of the deal, and they weren't told of the sale after the fact. The Trustees became aware of the sale in May 2011 and filed suit for specific performance of the ROFR on May 5, 2011.

The Tregellases argued that the Trustees' claim for specific performance of the ROFR was barred by the statute of limitations. The Trustees argued that the ROFR "ripened into" an option to purchase the conveyed interests on the same terms and conditions and that they had timely exercised the option by filing suit. They also argued that the Tregellases purchased the interest with actual or constructive notice of the ROFR and thus, stood in the shoes of the Farbers. They claimed also that the statute of limitations did not bar their claim because the discovery rule and the doctrine of fraudulent concealment tolled the limitations period.

The trial court rendered judgment for the Trustees and granted specific performance. It held that the Tregellases took the interests with knowledge of the ROFR and were not BFPs and that limitations did not bar the claim. The court of appeals reversed, holding that the cause of action accrued when the mineral interests were conveyed. It held that the discovery rule did not apply because the injury is of the type that generally is discoverable by the exercise of reasonable diligence.

A right of first refusal, also known as a preemptive or preferential right, empowers its holder with a preferential right to purchase the subject property on the same terms offered by or to a bona fide purchaser. Generally, a right of first refusal requires the grantor to notify the holder of his intent to sell and to first offer the property to the holder on the same terms and conditions offered by a third party. When the grantor

communicates those terms to the holder, the right ripens into an enforceable option. The holder may then elect to purchase the property according to the terms of the instrument granting the first-refusal right and the third party's offer, or decline to purchase it and allow the owner to sell to the third party.

A grantor's sale of the burdened property to a third party without first offering it to the rightholder on the same terms constitutes a breach of contract. When a right of first refusal relating to real property is breached, rightholders most frequently seek the remedy of specific performance. If the property has already been conveyed to a third party, however, the only remedy available from the grantor is money damages. Nevertheless, specific performance may still be available as a remedy against the third-party purchaser.

To that end, a person who purchases property with actual or constructive notice of a right of first refusal takes the property subject to that right. And courts are in agreement that such a purchaser stands in the shoes of the original seller when specific performance is sought and may be compelled to convey title to the holder of the right of first refusal. This accords with the longstanding jurisprudence regarding executory contracts for the sale of real property, which may be enforced by specific performance when a third party purchases the property with notice of the contract. Pursuant to the trial court's unchallenged findings, the Tregellases purchased the interest with notice of the ROFR and thus stand in the grantor's shoes with respect to the Trustees' request for specific performance. In the Supreme Court, the Tregellases' sole challenge to the trial court's judgment granting specific performance was that the Trustees' claim is barred by the statute of limitations as a matter of law.

The statute of limitations is an affirmative defense that serves to establish a point of repose and to terminate stale claims. The parties do not dispute that the Trustees' contract claim is governed by the four-year statute of limitations, meaning they were required to assert it within four years after the cause of action accrued.

As a general matter, a cause of action accrues and the statute of limitations begins to run when facts come into existence that authorize a party to seek a judicial remedy. Put differently, a cause of action accrues when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred. Texas courts consistently hold that a right of first refusal is breached when property is conveyed to a third party without notice to the rightholder. Applying these principles, the court of appeals in this case held that the Trustees' cause of action accrued when their bargained-for right of first refusal had been dishonored and the agreement breached.

The Supreme Court agreed with the court of appeals that the rules governing the accrual of causes of action point to the date of conveyance as the accrual date for limitations purposes. Again, the ROFR was breached when the Farbers conveyed their mineral interest without notifying the Trustees of the Tregellases' offer. At that point, the Trustees' preemptive right was impaired despite the fact that the Tregellases took the property subject to that right. This is because, even if the Trustees retained the right to purchase the mineral interest (albeit from the Tregellases rather than the Farbers), once they learned of the conveyance, they lost their right to purchase the interest at the time contemplated by the ROFR: before the property was sold to a third party.

In sum, when the Farbers sold the burdened mineral interest to the Tregellases in March 2007 without first giving the Trustees the opportunity to purchase it pursuant to the ROFR, a wrongful act caused a legal injury authorizing the

Trustees to seek a judicial remedy. Thus, the claim is time-barred unless the accrual date is otherwise deferred.

The discovery rule is a limited exception to the general rule that a cause of action accrues when a legal injury is incurred. When applicable, the rule defers accrual until the plaintiff knew or should have known of the facts giving rise to the cause of action. The discovery rule is applied when the nature of the injury is inherently undiscoverable and the evidence of injury is objectively verifiable. These two elements attempt to strike a balance between the policy underlying statutes of limitations (barring stale claims) and the objective of avoiding an unjust result (barring claims that could not be brought within the limitations period). The parties do not dispute that the injury here is objectively verifiable; in contention is discoverability.

An injury is inherently undiscoverable when it is unlikely to be discovered within the prescribed limitations period despite due diligence. The determination of whether an injury is inherently undiscoverable is made on a categorical basis rather than on the facts of the individual case. Here, therefore, the courts look not to whether the Trustees in particular could have discovered their injury with diligence, but whether the Trustees' injury was the type of injury that could be discovered through the exercise of reasonable diligence.

The court of appeals held that the Trustees' injury was not inherently undiscoverable. It noted that a conveyance of real property, including one made in violation of a right of first refusal, is likely to be reflected in a publicly recorded instrument and that knowledge of the conveyance may also be gleaned from other public sources like tax rolls and from commercial sources like abstractors. The court thus concluded that the holder of a first refusal right exercising reasonable diligence to protect its interest (as contracting parties must do) would have discovered the conveyance.

The Supreme Court has held that the discovery rule applies in certain circumstances even though the injury could have been gleaned from reviewing publicly available information. Courts have applied the discovery rule to a property owner's fraudulent-lien claims despite the lien's filing in the property records. Such an injury is nevertheless inherently undiscoverable where the property owner has no reason to believe that any adverse claim has been made on his property, and no reason to be checking regularly to see whether such a filing has been made. This is consistent with the well-settled principle that one who already owns the land is not required to search the records every morning in order to ascertain if something has happened that affects his interests or deprives him of his title.

A right of first refusal has been described as essentially a dormant option. The rightholder has no right to compel or prevent a sale per se; rather, as explained, he has the right to be offered the property at a fixed price or at a price offered by a bona fide purchaser if and when the owner decides to sell. Only when the grantor communicates her intention to sell and discloses the offer does the holder have a duty to act by electing to accept or reject the offer.

In light of the grantor's duty to provide notice of an offer, the corresponding absence of the rightholder's duty to act before receipt of said notice, and the fact that a purchaser takes property subject to a recorded first-refusal right, the court agrees with the Trustees that a rightholder who has been given no notice of the grantor's intent to sell or the existence of a third-party offer generally has no reason to believe that his interest may have been impaired. In turn, we cannot conclude that such a rightholder in the exercise of reasonable diligence would

continually monitor public records for evidence of such an impairment.

The court thus held that a grantor's conveyance of property in breach of a right of first refusal, where the rightholder is given no notice of the grantor's intent to sell or the purchase offer, is inherently undiscoverable and that the discovery rule applies to defer accrual of the holder's cause of action until he knew or should have known of the injury.

Cochran Investments, Inc.* v. *Chicago Title Insurance Company, 550 S.W.3d 196 (Tex.App.—Houston [14th Dist.] 2018, pet. pending). England and Garza owned a duplex, subject to a deed of trust to EMC. England conveyed his interest in the duplex to Garza, but in a later involuntary bankruptcy, the conveyance was set aside as a fraudulent conveyance. EMC foreclosed and Cochran bought the duplex at the foreclosure sale.

Cochran sold property to Ayers and gave a special warranty deed. Chicago Title issued an owners title policy to Ayers. The trustee in the England bankruptcy sued EMC and Cochran, claiming that the foreclosure violated the bankruptcy automatic stay. Ayers was later added to the suit. At that point, Ayers filed a title insurance claim with Chicago Title, which assumed his defense. Chicago settled the suit with the trustee by paying some money, then sued Cochran to recover as subrogee of Ayers under the title policy. The trial court found in favor of Chicago Title and concluded that Chicago Title was subrogated to the rights of Ayers and that Cochran had breached the covenant of seisin implied in the special warranty deed.

On appeal, Cochran asserts that the deed conveying the duplex to Ayers did not imply the covenant of seisin.

A covenant is implied in a real property conveyance if it appears from the express terms of the contract that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it, and therefore they omitted to do so, or it must appear that it is necessary to infer such a covenant in order to effectuate the full purpose of the contract as a whole as gathered from the written instrument. A covenant will not be implied simply to make a contract fair, wise, or just.

The implied covenant of seisin is an assurance to the grantee that the grantor actually owns the property being conveyed, in the quantity and quality which he purports to convey, and it is breached if the grantor does not own the estate that he undertakes to convey. The covenant of seisin operates in the present and is breached by the grantor at the time the instrument is made if he does not own the property that he undertakes to convey.

To determine whether a conveyance implies the covenant of seisin, courts analyze the conveyance's language. A deed implies the covenant of seisin if the grantor includes in the conveyance a representation or claim of ownership.

Here, the deed at issue does not represent or claim ownership on behalf of Cochran. The granting clause used the words "grant" and "convey," but the court held that the use of those words does not imply the covenant of seisin. Property Code section 5.023(a) delineates the two covenants implied by a conveyance's use of these words:

"(a) Unless the conveyance expressly provides otherwise, the use of "grant" or "convey" in a conveyance of an estate of inheritance or fee simple implies only that the grantor and the grantor's heirs covenant to the grantee and the grantee's heirs or assigns:

"1. that prior to the execution of the conveyance the grantor has not conveyed the estate or any interest in the estate to a person other than the grantee; and

"2. that at the time of the execution of the conveyance the estate is free from encumbrances."

Chicago Title does not allege that Cochran conveyed the duplex to a person other than Ayers or that the duplex was subject to encumbrances.

Because the deed that conveyed the duplex to Ayers does not represent or claim that Cochran is the owner of the property, it does not imply the covenant of seisin.

BNSF Railway Company* v. *Chevron Midcontinent, L.P., 528 S.W.3d 124 (Tex.App.-El Paso 2017, no pet.). The deed in question conveyed property to the grantee "for a right of way," and included the right to use wood, water, stone, timber and other materials useful to construct and maintain a railway line. After oil was discovered under the railroad tracks, BNSF sued for trespass to try title, arguing that the deed granted to BNSF's predecessor gave the company not just a right of way easement, but the entire strip of land. The question for the court was whether the deed conveyed a fee estate in the tract or merely an easement.

While use of the phrase "right of way" in a railroad deed may answer the easement versus fee question conclusively in other states, it does not answer the question in Texas. The term "right of way" is not a legal term of art with a set definitive meaning when used in a deed, but rather may be used in two senses. Sometimes it is used to describe a right belonging to a party, a right of passage over any tract; and it is also used to describe that strip of land which railroad companies take upon which to construct their road-bed. Accordingly, use of the term "right of way:" in a deed or other document does not necessarily define or limit the estate conveyed.

The court held that the deed conveyed only a surface easement, based on the following factors: (i) the opening recitals recognized a benefit to the grantor of having a railroad crossing over the described property; (ii) the phrase "right of way" appears in front of the words "that strip of land" which limits the nature of any subsequently described conveyance; (iii) the clauses describing the conveyance reference a line traced by surveyors for the right of way that went over, through and across various tracts of land. The words "over, through and across" suggest that the conveyance was intended to be an easement; and (iv) the provision allowing the use of timber, etc., to construct a railway line would not be necessary in the conveyance of a fee simple estate because those rights would pass with the fee.

PART VI
VENDOR AND PURCHASER

Sommers* v. *Sandcastle Homes, Inc., 521 S.W.3d 749 (Tex. 2017). **[Note: This case has been practically overruled by the 2017 amendments to Property Code § 12.071.]** Pending the outcome of an action involving proper title to, establishing an interest in, or enforcing an encumbrance against real property, the party seeking relief may file a notice of lis pendens in the county's real-property records. A notice of lis pendens broadcasts to the world the existence of ongoing litigation regarding ownership of the property. When the notice is properly filed, even a subsequent purchaser for value does not take the property free and clear.

A lis pendens functions to provide constructive notice, avoid undue alienation of property, and facilitate an end to litigation. Through the years, the courts of appeals have held the same. The latter two purposes are particularly implicated when the court addresses the ability to expunge a notice of lis pendens.

The trial court may expunge a notice of lis pendens if (1) the pleading on which the original order rests does not include a real-

property claim; (2) the claimant does not appropriately establish the probable validity of his real-property claim; or (3) the claimant fails to serve a copy of the record notice on all entitled to receive it. Tex. Prop. Code § 12.0071(c)(1)-(3). Here, Sandcastle obtained the first expunction order because the trial court found Cohen's pleadings did not include a real-property claim, while the second order was based on Cohen's inability to establish the probable validity of his claim.

This case involves one basic question: When a notice of lis pendens is expunged, is all notice--no matter the sort and no matter its source--extinguished with the expunction order?

The court of appeals had rejected what it saw as a narrow view of the statute and instead advanced a bright-line rule that the expunction of notice includes any notice of the claims involved in the underlying suit covered by the lis pendens. But the Supreme Court said that the court of appeals reads the plain text of the statute too broadly. The statute simply doesn't address the circumstance of a purchaser who receives notice of a third-party claim by some means other than a recorded notice of lis pendens.

Property Code section 12.0071(f) provides that a purchaser cannot be charged with record notice, actual or constructive, following a proper expungement. But the extent of that protection is expressly limited to "the notice of lis pendens" and "any information derived from the notice." By negative implication, expunction is given no effect with respect to the universe of other information, not included in the scope of section 12.0071(f), that is neither (a) the 'notice of lis pendens' itself nor (b) 'information derived from the notice' of lis pendens.

To the extent the recorded lis pendens puts a potential buyer on inquiry notice to look to the actual lawsuit before the notice's expunction, that buyer could claim protection under the statute. Any actual awareness obtained by review of the facts referred to in the lis pendens cannot be used to rebut that purchaser's status as a bona-fide purchaser or to continue to burden the property. But that does not mean the expunction statute can be read so far as to eradicate notice arising independently of the recorded instrument expunged. We are confined by a statute's text as written.

Expunction of the lis pendens is a restoration of the chain of title free of the record notice of a potential claim of interest associated with the lis pendens. It is not an adjudication of a later purchaser's status as a bona-fide purchaser under any set of circumstances. Such an overbroad interpretation of the statute risks imbuing an expungement of a notice of lis pendens with the claim-preclusive effect of a full-blown adverse judgment on the merits. That means persons claiming an interest in property may be left in a worse position for having filed a lis pendens that is later expunged than had they not filed one. That result runs counter to longstanding Texas law encouraging the recording of real-property interests, including the filing of a lis pendens.

In Re I-10 Poorman Investments, Inc., In this mandamus action, Poorman challenged the trial court's order denying expungement of a lis pendens filed by Woodcreek.

Poorman was developing a residential subdivision in Katy. In connection with the development, Poorman filed a Declaration of Covenants, Conditions and Restrictions and created Woodcreek as its HOA.

Woodcreek sued Poorman for all sorts of fraud and misrepresentation claims, contending that Poorman had represented and marketed the development as having all sorts of amenities. Woodcreek complained that Poorman had not conveyed certain common area amenities and recreational tracts to it. In connection with the lawsuit,

Woodcreek filed a lis pendens.

Poorman filed a motion to expunge the lis pendens under Section 12.0071(c)(2) of the Property Code, which provides for expunction if "the claimant fails to establish by a preponderance of the evidence the probable validity of the real property claim." The trial court denied the motion to expunge. Poorman filed this mandamus action.

In its motion, Poorman asserted one ground for expunging the lis pendens filed by the Woodcreek: that Woodcreek had failed to establish by a preponderance of the evidence the probable validity of its real property claim. Woodcreek responded, claiming its pleadings indicate it was claiming an interest in real property and its counsel had submitted an affidavit supporting the lis pendens notices. The only evidence attached to Woodcreek's response was its attorney's affidavit and an amended notice of lis pendens.

A lis pendens placed in the property records is notice to third parties of a dispute concerning ownership of the property. Once a lis pendens has been filed, the statute allows removal of the lis pendens either by expunction or cancellation. Property Code § 12.071(c) provides that a court "shall" expunge the notice of lis pendens if: "(1) the pleading on which the notice is based does not contain a real property claim; (2) the claimant fails to establish by a preponderance of the evidence the probable validity of the real property claim; or (3) the person who filed the notice for record did not serve a copy of the notice on each party entitled to a copy under Section 12.007(d)."

Woodcreek admits that no evidence was presented at the hearing, but it argues that no abuse of discretion is shown because the trial court made its determination based on the parties' pleadings, which is allowed under the first prong of § 12.0071(c). Poorman sought expunction based on the "preponderance of the evidence" ground, but Woodcreek nevertheless contends the trial court could have denied expunction on the first statutory ground— the pleading of a real property claim.

Here, Poorman sought to expunge the lien on the second ground of Section 12.0071(c). Because a party may seek expunction of the lis pendens on any of the enumerated grounds, Woodcreek was charged with providing the probable validity of its claim by a preponderance of the evidence.

Because Poorman argued in the trial court that the preponderance of the evidence did not support the probable validity of the lis pendens, the trial court could not deny the motion to expunge unless Woodcreek met its evidentiary burden of proving by a preponderance of the evidence the probable validity of its real property claim.

The court held that Woodcreek failed to meet its evidentiary burden. The only evidence offered by Woodcreekwas the affidavit of its attorney, who stated in his affidavit that Woodcreek's lawsuit was "one involving title to real property" and "[seeking] the establishment of an interest in real property." Although the attorney's affidavit reiterates Woodcreek's claim that Poorman had represented it would convey certain properties to Woodcreek, it does not set forth facts proving the probable validity of its real property claim. Because Woodcreek did not meet its evidentiary burden of proving the probable validity of its real property claim, the trial court abused its discretion in denying Poorman's motion to expunge the lis pendens.

PART VII
ADVERSE POSSESSION AND QUIET TITLE ACTIONS

Roberson* v. *Odom, 529 S.W.3d 498 (Tex. App.—Texarkana 2017, no pet.). The elements of a suit to quiet title are: (1) the plaintiff has an interest in a specific

property; (2) title to the property is affected by the defendant's claim; and (3) the defendant's claim, although facially valid, is invalid or unenforceable. A suit to quiet title is an equitable proceeding, and the principle issue in such suit is the existence of a cloud on the title that equity will remove. The purpose of a suit to quiet title is to remove an encumbrance or defect from a plaintiff's title to the property.

On the other hand, a trespass to try title action is the method for determining title to lands, tenements, or other real property. To maintain an action of trespass to try title, the person bringing the suit must have title to the land sought to be recovered. Unlike a suit to quiet title, a trespass to try title is a purely statutory creation and embraces all character of litigation that affects the title to real estate.

Regardless of the form the action takes or the type of relief sought, when a plaintiff's pleadings and the evidence show that the dispute between the parties involves a question of title, the trespass to try title statute governs the substantive claims. Any suit that involves a dispute over the title to land is, in effect, an action in trespass to try title, whatever its form and regardless of whether legal or equitable relief is sought.

The only substantive issue in this case was whether title to the property belonged to Odom. Thus, the underlying nature of Odom's action as a trespass to try title is not altered by the fact that the parties and the trial court may have referred to it as a suit to quiet title. The reality in this suit is that it involves solely the issue of title. The court concluded, therefore, that the substance of Odom's claims was a trespass to try title action, rather than a suit to quiet title.

Here, Odom sought to recover judgment pursuant to the five-year statute of limitations, which has no requirement that the claimant be in good faith. There is no requirement (such as in one of the twenty-five-year statutes of limitations) that the claimant be in good faith. Because the doctrine of unclean hands does not apply in a suit such as this one, Clemons' defense is not applicable in this case and, thus, the trial court acted within its discretion when it struck that portion of Clemons' pleading.

Hardaway* v. *Nixon, 544 S.W.3d 402 (Tex.App.—San Antonio 2017, pet. pending). Adverse possession requires an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person. The possession must be of such character as to indicate unmistakably an assertion of a claim of exclusive ownership in the occupant.

When the claim of adverse possession is between cotenants, as in this case, the burden of proof imposed on the adverse possessor is more onerous. Cotenants are required to surmount a more stringent requirement because acts of ownership which, if done by a stranger, would per se be a disseizin are not necessarily such when cotenants share an undivided interest. In other words, the burden is more onerous because cotenants have rights to ownership and use of the property a stranger would not have. It is not unusual for one cotenant to have exclusive possession and make beneficial use of lands for rather longer periods of time and ordinarily such use is with the acquiescence of the other cotenants. Thus, a party claiming adverse possession as to a cotenant must not only prove his possession was adverse, but must also prove some sort of ouster— actual or constructive. In other words, a cotenant's possession of property is not adverse until the tenancy has been repudiated and notice of such repudiation brought home to the titleholder.

The supreme court has defined ouster, in the context of cotenancies, as unequivocal, unmistakable, and hostile acts the possessor took to disseize other cotenants. Ouster or repudiation may be constructive. With regard to constructive ouster, notice of such

ouster or repudiation may be established when there has been: (1) long-continued possession under a claim of ownership and (2) nonassertion of claim by the titleholder.

Such notice may be constructive and will be presumed to have been brought home to the cotenant when the adverse occupancy and claim of title to the property is so long-continued, open, notorious, exclusive and inconsistent with the existence of title in others, except the occupant, that the law will raise the inference of notice to the cotenant or owner out of possession, or from which a jury might rightfully presume notice.

PART VIII
RESTRICTIONS

Tarr* v. *Timberwood Park Owners Association, 556 S.W.3d (Tex. 2018). In a case that is of interest to many in the age of Airbnb, a homeowner entered into thirty-one short term rental arrangements which totaled 102 days over five months. The deed restrictions for the Timberwood Park Owners Association provided that homes should be "used solely for residential purposes." The HOA notified Tarr that renting out his home was a commercial use and a violation of the deed restrictions. Tarr filed a declaratory judgment action seeking a declaration that leasing the house was a residential purpose and there was no "durational" requirement in the deed restrictions. Tarr and the HOA both filed motions for Summary Judgment and the trial court granted the HOA's motion. The Court of Appeals affirmed, holding that short-term renters were not residents but "transients, and relying on Property Code § 202.003(a), which requires that "a restrictive covenant be liberally construed to give effect to its purpose and intent." The Supreme Court reversed.

The court first dealt with the conflict between the common law maxim that restrictive covenants are to be strictly construed and Property Code § 202.003(a) which requires certain covenants to be liberally construed. After more than seven pages of learned discussion on the matter, the court basically punted, stating "We have not yet deliberated section 202.003(a)'s effect, if any, on the construction principles we have long employed to interpret restrictive covenants. Nor do we reach that decision today. We don't have to reconcile any potential conflict between section 202.003(a) and the common-law principles—or whether those common-law standards can ever again be appropriately employed—because our conclusion today would be the same regardless of which interpretative standard prevails." The court held that the unambiguous covenants simply did not address the use on the property in this case. "No construction, no matter how liberal, can construe a property restriction into existence when the covenant is silent as to that limitation."

The HOA's arguments were, first, that the rentals violated the restriction that only "single family residences" could be constructed on the property, and, second, that the use violated the restriction that the property be used only for "residential purposes."

The HOA contended that, because Tarr often rented to groups that included members of more than one family, that such a use violated the single-family residence restriction. Its argument was based on reading two provisions together—the one that restricted what could be constructed on the property and one that restricted the use of the property. The court held that "to combine those provisions into one mega-restriction is a bit of a stretch." The court held that the single-family residence restriction merely limits the structure that can properly be erected upon Tarr's tract and not the activities that can permissibly take place in that structure.

The court also held that the use did not violate the residential purposes restriction. The covenants in the Timberwood deeds fail

to address leasing, use as a vacation home, short-term rentals, minimum-occupancy durations, or the like. They do not require owner occupancy or occupancy by a tenant who uses the home as his domicile. Instead, the covenants merely require that the activities on the property comport with a "residential purpose" and not a "business purpose." The court declined to add restrictions to the Timberwood covenants by adopting an overly narrow reading of "residential." The court expressly disapproved of the cases that impose an intent or physical-presence requirement when the covenant's language includes no such specification and remains otherwise silent as to durational requirements. Affording these phrases their general meanings and interpreting the restrictions as a whole, the court held that so long as the occupants to whom Tarr rents his single-family residence use the home for a "residential purpose," no matter how short-lived, neither their on-property use nor Tarr's off-property use violates the restrictive covenants in the Timberwood deeds.

Shack* v. *Property Owners Association of Sunset Bay, 555 S.W.3d 339 (Tex.App.—Corpus Christi 2018, no pet.). This is the first reported case involving VRBO type rentals following the Supreme Court's ruling in ***Tarr* v. *Timberwood Park Owners Association, Inc.***, 556 S.W.3d 274 (Tex. 2018). Here, the owners were renting their house for short term rentals on VRBO. The restrictive covenants included two that the POA claimed were being violated by the short term rentals: First, a Dwelling Restriction that the property was intended for one single family dwelling per lot and their use is restricted to that purpose, and second, that an Occupancy Restriction which provided that occupancy of a lot was limited to one family, which was defined as "any number of persons related by blood, adoption or marriage living with not more than one (1) person who is not so related as a single household unit, or no more than two (2) persons who are not so related living together as a single household unit . . ."

The court first addressed whether the Dwelling Restriction was a structural or use restriction. The court held that the wording of the Dwelling Restriction suggests that it refers only to the types of structures that may be constructed on any given lot in the subdivision. The restriction refers to "one single family dwelling unit per lot. The terms "unit" and "per 'Lot' " clearly orient this restriction to the types of structures that may be erected on a given lot: that the Declaration prohibits the construction of multiple separate dwellings and multi-unit structures that accommodate many families in discrete spaces. It is undisputed that a single-family dwelling structure was erected on the lot. We therefore find no conflict between the use and the Dwelling Restriction.

The court next addressed the Occupancy Restriction. The court focused on the words "living together as a household unit" in the restriction. For its discussion of the phrase "living as a household unit," the court said it was critical to note that the ***Tarr*** court consistently drew parallels between the term "residential purposes" and the term "living." In general, the ***Tarr*** court said, the term "residential purposes" does not specifically forbid short-term rentals because "property is used for 'residential purposes' when those occupying it do so for ordinary living purposes. So long as the renters continue to relax, eat, sleep, bathe, and engage in other incidental activities, they are using the property for residential purposes.

To this court, the parallel drawn by the ***Tarr*** court resolved the matter. Generally speaking, "residential purposes" are equivalent to living purposes, and because the term "residential purposes" does not prohibit short-term rentals, neither does the term "living as a household unit." Like the restrictions discussed in ***Tarr***, the restrictions fail to specifically address leasing, use as a vacation home, short-term rentals, minimum-occupancy durations, or

the like. The Occupancy Restriction does not prohibit short-term rentals, so long as the renters meet the definition of "family."

Finally, the court addressed the restriction that no commercial enterprise could be conducted on the property. In assessing such a restriction, the court looked at whether the covenant's language focuses upon the owner's use of the property or upon the activity that actually takes place on the land. Distinguishing between restrictions concerning off-site uses and on-site uses is helpful when assessing a covenant's tolerance for short-term rentals, because in internet rental arrangements much of the arguably "commercial" activity often occurs off the property.

In this case, the Commercial Enterprise Restriction relates solely to the activity "on any tract," and the focus is therefore what commercial activity actually transpires on the Property. Thus, determining whether the Commercial Enterprise Restriction was violated depends on the degree to which the rental operation had a commercial presence on the Property itself. Here, the trial court had held that the use did not violate the Commercial Enterprise Restriction, and this court held that the evidence was sufficient to support that finding.

C.A.U.S.E.* v. *Village Green Homeowners Association, Inc., 531 S.W.3d 268 (Tex.App.—San Antonio 2017, no pet.). The restrictive covenants required each homeowner to collect and dispose of garbage and trash at its own expense. The residents all contracted with different disposal companies, so there wasn't a single day on which garbage collection occurred and trucks from different companies entered the subdivision on different days to collect trash and recycling. Because of that, the Board voted to select a single garbage collection company, and entered into a garbage collection contract. The homeowners were instructed to make arrangements with the service provider.

After the resolution was passed, members of the Board allegedly engaged in repeated harassment to prevent other waste disposal companies from fulfilling their contracts with other residents in the community. At one point, the Association altered the gate codes in order to prohibit other waste management/recycling companies from entering the subdivision. As a result, some of the homeowners' waste management services became difficult and irregular, and effectively ceased to exist. After that, C.A.U.S.E., an entity created for the purpose of doing so, sued the Association, making all sorts of claims, but essentially seeking a declaration that the Association lacked the legal authority to compel the homeowners to contract with a single provider.

A declaration containing restrictive covenants in a subdivision defines the rights and obligations of property ownership, and the mutual and reciprocal obligation undertaken by all purchasers in a subdivision creates an inherent property interest possessed by each purchaser. Restrictive covenants are subject to the general rules of contract construction. Property Code § 202.003 expressly states that a "restrictive covenant shall be liberally construed to give effect to its purposes and intent."

The court held that the meaning of the plain language of Paragraph 3.20, which said that "All refuse garbage and trash shall be collected or disposed of by Owner, at his expense" is clear and unambiguous. In light of the clear language in this case, the court concluded that individual homeowners are the ones who are to arrange for and pay for trash collection.

The Association claimed it has the authority to compel the residents to use one trash provider because the Declaration grants it the duty to operate, maintain, and manage the common areas of the subdivision, which includes the neighborhood streets. In support, it cited to

provisions of the Declaration and other governing documents, including the Association's articles of incorporation and bylaws, allowing it to promote the health, safety, and welfare of the subdivision. The Association also pointed out that the Declaration permits the Association to make contracts with third parties to provide services to the Association with respect to security and maintenance of the neighborhood. It asserted that in forcing residents to use a single trash collector, it is complying with its duty to manage and maintain the neighborhood streets. The court disagreed. It disagreed that these general provisions render the only covenant pertaining to trash collection superfluous. More specific provisions in a contract prevail over general mandates.

Vance* v. *Popkowski, 534 S.W.3d 474 (Tex.App.—Houston [1st Dist.] 2017, pet. denied). The Popkowskis bought a lot in Cypress Point Estates, a deed restricted subdivision in Harris County. The deed restrictions provided that lots were to be used only for single family residences and that no business could be conducted from any tract. The restrictions also contained a nonwaiver provision.

The Popkowskis were using their lot to operate a business called Modern System Concepts, hiring 18 to 20 employees at the site. The Popkowskis claimed the restrictions had been abandoned.

The Popkowskis admitted they were operating out of residential property, but it was not the only business operating in the subdivision. They described several other businesses they had witnessed in the neighborhood. Other witnesses also testified about various businesses operating in the subdivision. Vance argued that the nonwaiver provision in the restrictions prevented a waiver. At trial, the jury found that the restrictions had been abandoned.

Absent a nonwaiver provision, abandonment of a restrictive covenant can be found when lot owners acquiesce in substantial violations within a restricted area, and that acquiescence can amount to either an abandonment of the covenant or a waiver of the right to enforce it. To establish abandonment, a party must prove that the violations are so great as to lead the mind of the average man reasonably to conclude that the restrictions in question have been abandoned. This determination requires consideration of the number, nature, and severity of the then existing violations, any prior acts of enforcement of the restriction, and whether it is still possible to realize to a substantial degree the benefits intended through the covenant.

The court held that, by its plain language, this nonwaiver provision protects the property owners in the subdivision from claims that the deed restrictions had been abandoned or waived because of a failure to prosecute prior violations.

Given Texas's strong public policy favoring freedom of contract, there can be no doubt that, as a general proposition, nonwaiver provisions are binding and enforceable. Nonwaiver provisions have been enforced in the context of restrictive covenants. Despite the general enforceability of nonwaiver provisions and the self-evident purpose of such provisions, some Texas courts have found that the existence of a nonwaiver provision does not preclude a finding of abandonment or waiver of a specific restrictive covenant as a matter of law.

The purpose of the nonwaiver provision is to prevent claims of waiver and abandonment of restrictive covenants. If a party who had agreed to be bound by the restrictive covenants, including the nonwaiver provision, were able to avoid the provision by simply proving that a particular restrictive covenant had been abandoned or waived, then the nonwaiver provision would be rendered effectively meaningless.

In order to establish that an antiwaiver

clause is not enforceable, the party asserting a waiver must show a clear intent to waive both the clause and the underlying contract provision. In this case, the jury specifically was asked only to determine whether the use restrictions had been abandoned. The jury answered yes to both questions, but it was never asked to determine whether the nonwaiver provision itself had been waived, either standing alone or as a consequence of a complete abandonment of the entire set of restrictions so pervasive that the fundamental character of the neighborhood was destroyed.

Jury findings that specific deed restrictions have been abandoned, standing alone, are insufficient to overcome a nonwaiver provision and establish the affirmative defense of abandonment. In this case, the evidence did not establish conclusively, as a matter of law, that there was a waiver of the nonwaiver provision. Further, the jury did not make any findings with respect to the waiver of the nonwaiver provision.

B. STATUTORY UPDATE

These are a few of the statutes affecting a real estate practice that were passed in the 2017 legislative session. Of course, we are now entering into a new session. There will be a summary of all legislation affecting a real estate practice published by the Real Estate Probate and Trust Law Section at the end of the session.

Senate Bill 1249 Relating to adverse possession of real property by a cotenant heir against other cotenant heirs. Adds Section 16.0265 to Civil Practice and Remedies Code Provides for a 10-year possession period combined with a 5-year "waiting" period after the filing of affidavits, for a total of 15 years. Defines "cotenant heir" as one of two or more persons who simultaneously acquire identical, undivided ownership interests in, and rights to possession of, the same real property by operation of intestate succession laws, or a successor in interest of one of those persons. New Section 16.0265(b) provides that one or more cotenant heirs may acquire, by adverse 5 2981177.6/SPH/15556/1484/070617 possession, the interests of other cotenant heirs if, for a continuous, uninterrupted 10-year period immediately preceding the filing of a two affidavits (an affidavit of heirship and an affidavit of adverse possession and other facts): (1) the possessing cotenant heir or heirs: (A) hold the property in peaceable and exclusive possession; (B) cultivate, use, or enjoy the property; and (C) pay all property taxes on the property not later than two years after the date the taxes become due; and (2) no other cotenant heir has: (A) contributed to the property's taxes or maintenance; (B) challenged a possessing cotenant heir's exclusive possession of the property; (C) asserted any other claim against a possessing cotenant heir in connection with the property, such as the right to rental payments from a possessing cotenant heir; (D) acted to preserve the cotenant heir's interest in the property by filing notice of the cotenant heir's claimed interest in the deed records of the county in which the property is located; or (E) entered into a written agreement with the possessing cotenant heir under which the possessing cotenant heir is allowed to possess the property but the other cotenant heir does not forfeit that heir's ownership interest. Requires cotenant heirs seeking adverse possession to publish a 4 week notice in a general circulation newspaper in the county in which the real estate is located and provide written notice (by certified mail, return receipt requested) of their claim to the last known addresses of all other cotenant heirs. Requires a cotenant heir to file a controverting affidavit or bring suit to recover the cotenant heir's interest in the real property adversely possessed by another cotenant heir not later than the 5th anniversary of the date a right of adverse possession is asserted by the filing of the two aforementioned affidavits. If a controverting affidavit or judgment is not filed before the 5th anniversary of the date,

the affidavits are filed and no notice of any other cotenant heir's claimed interest was filed in the 10-year period preceding the filing of the two aforementioned affidavits, then title vests in the adversely possessing cotenant heir or heirs in the manner provided by Tex. Civ. Prac. & Rem. Section 16.030, precluding all claims by other cotenant heirs. A bona fide lender for value without notice, accepting a voluntary lien against the real property to secure the adversely possessing cotenant heir's indebtedness, or a bona fide purchaser for value without notice, may conclusively rely on the two aforementioned affidavits if: the affidavits have been filed of record for 15 years and a controverting affidavit or judgment has not been filed during those 15 years. Without a title instrument, peaceable and adverse possession is limited to up to 160 acres, including improvements, unless the number of acres actually enclosed exceeds 160 acres, in which case, peaceable and adverse possession extends to the real property actually enclosed, and unless there is a duly registered deed or memorandum that fixes the boundaries of the possessor's claim, in which case, the claim extends to those boundaries.

House Bill 1774 Relating to actions on and liability associated with certain insurance claims. Amends Insurance Code, Sections 541.156(a) and 542.060(a); adds Insurance Code, Chapter 542A (as Sections 542A.001-.007) and Section 542.060(c) Restricts certain consumer actions against any property insurer, except the Texas Windstorm Insurance Association, relating to property damage claims arising from forces of nature. Applies to claims for breach of contract, negligence, misrepresentation, fraud, common law duty, delayed claim payments, and deceptive trade practices (under both DTPA and Insurance Code Chapter 541). Requires claimant to give 60-day pre-suit notice including a statement of the claim, the specific alleged amount of the loss, and the attorney's fees incurred through the date of the notice. Requires dismissal without prejudice of any claims brought against a noticing claimant before the 60-day notice period expires. Gives party receiving notice 30 days to make a written request to inspect the subject property. Allows for a plea in abatement if suit is filed without providing proper notice. Allows insurer to accept agent's potential liability, and prohibits claims against the agent if the insurer makes such an election. Awards the full amount of reasonable and necessary attorney's fees to a claimant awarded a judgment of 80 percent or more of the loss amount alleged in the notice; bars a fee award to the claimant if the judgment is less than 20 percent of the noticed loss; caps fee award for a judgment from 20-80 percent at the same proportion as that of the judgment to the noticed loss. Exempts from the above described fee limits any insurer that elects to assume the agent's potential liability but fails to make the agent available for a noticed deposition. Bars attorney's fees award to claimant if proper pre-suit notice not given, after pleading and proof by the defendant, for any fees incurred after defendant files said pleading. Applies prospectively.

Senate Bill 1955 Relating to expunction of a notice of lis pendens. Amends Property Code, Section 12.0071 Broadens the effect of expunction of a notice of lis pendens to specifically state that after a certified copy of an order expunging a notice of lis pendens has been recorded, the notice of lis pendens and any information contained therein does not give actual or constructive notice of any of the contents or matters relating to the action in connection with which the notice was filed and, upon expunction, an interest in real property may be transferred or encumbered free of (1) all matters asserted or disclosed in the notice of the lis pendens and (2) all matters asserted or disclosed in the litigation related to the notice.

House Bill 3879 Relating to nonlawyer representation in an appeal of an eviction suit. Amends Property Code, Section 24.011. In an appeal of an eviction suit for

nonpayment of rent, permits an owner of a multifamily residential property to be represented by an authorized agent who need not be an attorney, or, if the owner is a corporation or other entity, by an employee, owner, officer, or partner of the landlord who need not be an attorney.

Senate Bill 920 Relating to access to a residence or former residence to retrieve personal property, including access based on danger of family violence. Amends Property Code, Sections 24A.001, 24A.002, 24A.003, 24A.004, 24A.005, and 24A.006; adds Property Code, Section 24A.0021. Broadens an applicant's right to apply to the justice court for an order permitting entry to a former residence to retrieve personal property if the applicant is unable to enter the residence because of a clear and present danger of family violence to the applicant or the applicant's dependent. Expands information that may be retrieved to include copies of electronic records containing legal or financial documents. Permits a justice of the peace to issue a temporary writ (not to exceed five (5) days) to retrieve property at an ex parte hearing if certain statutory conditions for permitting the applicant to access to the premises are satisfied, and if the current occupant poses a clear and present danger of family violence to the applicant or the applicant's dependent, and if the personal harm to be suffered by the applicant or the applicant's dependent will be immediate and irreparable if the application is not granted. Permits the justice of the peace to waive the bond requirements for the temporary writ. Permits the justice of the peace to recess the ex parte hearing in order to call the current occupant and inform the occupant that he or she may attend the hearing or bring the personal property described in the application to the court.

House Bill 1128 Relating to the date and time for the public sale of real property. Amends Civil Practice and Remedies Code, Section 34.041; amends Property Code, Section 51.002; amends Tax Code, Sections 34.01 and 34.07. If the first Tuesday of the month falls on January 1 or July 4, change the date and time for nonjudicial foreclosures to occur between 10 a.m. and 4 p.m. on the first Wednesday of the month. Establishes that dates and times for public sales of real property by court order and for foreclosures of tax liens (unless conducted by online bidding and sale) will be carried out on the same date and time as non-judicial foreclosures (between 10 a.m. and 4 p.m. on the first Tuesday of a month, or if the first Tuesday of a month occurs on January 1 or July 4, between 10 a.m. and 4 p.m. on the first Wednesday of the month). Foreclosures of tax liens that are conducted using online bidding and sale may begin at any time and must conclude by 4 p.m. on the first Tuesday of a month, or if the first Tuesday of a month occurs on January 1 or July 4, then they must conclude by 4 p.m. on the first Wednesday of the month.

House Bill 804 Relating to the entitlement of a lessee of property who is required to pay the ad valorem taxes on the property to receive notice of the appraised value of the property. Amends Tax Code, Section 41.413 Provides that the owner of the property must send to the tenant obligated to pay taxes a notice of appraised value within XV days following receipt of the notice, provided that this notice requirement does not apply if the landlord and tenant have agreed to waive the requirements of this subsection or the tenant has agreed not to protest the appraised value. Upon request of the tenant, the chief appraiser shall send the notice of the value to the tenant, provided that the tenant evidences his contractual obligation to reimburse the property owner for taxes. The chief appraiser's requirement to provide the notice is abated if notice is posted on the appraisal district's website not later than the fifth day after the date the notice is sent to the property owner. Tenant may designate a third party to receive or act as agent for tenant under this amendment.