CASE LAW UPDATE

DAVID A. WEATHERBIE

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Real Estate Discussion Group

DAVID A. WEATHERBIE
Cramer Weatherbie Richardson Walker LLP
Dallas, Texas
dweatherbie@cwrwlaw.com
(214) 369-1170
cwrwlaw.com

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

The case selection for this episode of Case Law Update, like all of them in the past, is very arbitrary. If a case is not mentioned, it is completely the author's fault. Cases are included through 346 S.W.3d 242 and Supreme Court opinions released through November 2, 2011.

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.

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PART I
MORTGAGES AND FORECLOSURES

Hemyari* v. *Stephens, 55 Tex.Sup.Ct.J. 59 (Tex. October 21, 2011). When Murphy threatened to foreclose on the deed of trust, the Stephens Groups sought bankruptcy protection. The bankruptcy court entered an order in which it established a procedure for the Stephens Groups to fulfill its original obligations. The order provided that the Stephens Groups were to make payment of $50,000 to Murphy by June 12, 2000, which they did. The order further provided that, after the initial payment, a conditional lift of the automatic stay would "allow [Murphy] to post the property for foreclosure in July, 2000, for a sale on August 1, 2000." Finally, the order provided that if the Stephens Groups did not pay the remaining $650,000 on or before August 1, Murphy could "proceed with the foreclosure sale on August 1, 2000." Murphy did not schedule the foreclosure sale in July, as allowed by the order, but waited until after the Stephens Groups missed the second payment to schedule the sale for September 5, 2000.

Hemyari purchased the property at the foreclosure sale. Following the foreclosure sale, the proceeds were used to complete the payment to Murphy, and the Stephens Groups moved to dismiss their bankruptcy case, having discharged their debts. Four years later, the Stephens Groups filed this suit in state court. The Stephens Group alleged, among other things, that the September 5 foreclosure sale was void because it violated the express terms of the lift-stay order.

The court of appeals held that the September 5 sale violated the lift-stay, stating its belief that the lift-stay order allowed a sale only on August 1. The Supreme Court disagreed and reversed the court of appeals.

In this case, the order's terms provided for a sale "on August 1, 2000," but as Hemyari points out, that may have been impossible. The Stephens Groups' first scheduled payment was due by noon on June 12, 2000. The $650,000 payment was due "on or before August 1, 2000," but the order did not specify any particular time. Thus, the presumption is that payment could be made at any point before or throughout August 1st. Reading the order as a whole, the court concluded that the Stephens Groups' proposed interpretation would render the entire foreclosure sale provision in the order meaningless. If the foreclosure could not occur until after a failure to pay, but the Stephens Groups could forestall payment until the end of the only day foreclosure was allowed, the Stephens Groups could avoid foreclosure altogether by simply doing nothing. The only way the foreclosure sale could have occurred on August 1st is if the Stephens Groups notified Hemyari ahead of time that payment would not be made. Furthermore, had Murphy actually conducted the foreclosure sale on August 1st as supposedly required by the order, the Stephens Groups could still have brought this suit challenging the sale, though on grounds that they were not given adequate time to make payment under the "unambiguous" terms of the order. The court of appeals recognized the incongruities in the order, but nevertheless concluded the order "unambiguously modified the stay to allow for a sale only on August 1, 2000." The Supreme Court construed the order in a way that avoids such a contradiction.

The Property Code brings this absurdity into further relief. The Property Code sets forth a variety of requirements for foreclosure and foreclosure sales. One particular provision requires that all public foreclosure sales take place between 10 a.m. and 4 p.m. of the first Tuesday of a month. Thus, under the Stephens Groups' interpretation, they had until midnight to pay even though Murphy only had until 4 p.m. to foreclose.

Caress* v. *Lira, 330 S.W.3d 363 (Tex.App.-San Antonio 2010, pet. denied). Gares bought three lots with a loan from the

Bank. When Gares defaulted, the Bank posted the three lots for foreclosure. The day after the posting, Gares sold one of the lots to Lira. Lira received a payoff letter from the bank and paid the amount requested by the bank. However, the lien on the Lira lot was not released and the foreclosure took place, with the substitute trustee conveying all three lots to Caress. Lira filed a trespass to try title suit against the Bank and Caress.

To recover in her trespass to try title suit, Lira bore the burden to prove her title to the disputed property by: (1) proving a regular chain of conveyances from the sovereign, (2) establishing superior title out of a common source, (3) proving title by limitations, or (4) proving title by prior possession coupled with proof that possession was not abandoned.

In this case, there is no dispute Lira and appellants claim title from a common source; thus, Lira had only to prove she held superior title. In her motion for summary judgment, Lira argued she held superior title because the trustee's sale of the lot to appellants was void on the grounds that the bank agreed to release the lot from the lien in exchange for Lira paying to the bank the agreed payoff amount on the lot. Lira requested and received a payoff amount as it applied to the lot, and although she paid that amount to the bank, the bank did not execute an instrument evidencing the bank's release of the lot. The bank then allowed the same lot to be sold at a foreclosure sale.

In their response, Caress and the Bank countered that the foreclosure sale was not void because the Gares deed of trust does not contemplate or authorize a partial payment of the debt owed by Gares. Instead, according to appellants, the Gares deed of trust requires that the entire debt secured by the deed be paid before any lien is released. Therefore, they argued, because Lira only made a partial payment toward Gares' debt as to the one lot, the lien on the one lot could not be released.

The court declined to construe the full payment clause as precluding the bank from releasing its lien on a lot-by-lot basis. While the Gares deed of trust does not contain a separate clause expressly entitled as an agreement between the bank and Gares allowing Gares to sell off the property lot-by-lot and obtain a release of lien as to the sold lots, two clauses in the deed of trust evidence an intent to allow for such an occurrence under certain circumstances. One clause indicates that Gares could sell part of the mortgaged property with the Bank's consent. Another allows the Bank to release any part of the mortgaged property without affecting its lien on the balance. The court held that these clauses evidence an intent by the parties that the bank may release its lien on a lot-by-lot basis.

After examining the plain language of this unambiguous deed and construing the deed in its entirety, the court concluded it was the intent of the parties that the bank could release its lien as to any part of the mortgaged property without first requiring that the entire indebtedness be paid in full. Lira's summary judgment evidence establishes that the bank admitted the payoff check was sufficient for the Bank to execute a partial release of lien releasing the lot and the Bank no longer had a lien against the property. However, despite these admissions, the bank never executed a document evidencing its release of its lien. Nevertheless, under the circumstances presented here, the court did not believe the failure to execute a written release invalidates the sale to Lira. A lien is usually extinguished upon payment of the indebtedness that it was created to secure.

Therefore, because the lien on the lot purchased by Lira was extinguished prior to the foreclosure sale, there was no lien as to that lot to foreclose, and the trustee had no power to transfer title to the lot to appellants.

Bank of America* v. *Babu, 340 S.W.3d

917 (Tex.App.-Dallas 2011, no pet.). The Johns bought property from George that was also financed by George. The deed retained a vendor's lien and the Johns also executed a deed of trust, both securing the purchase money note. George later assigned the note and deed of trust to First Western until First Western received 31 monthly payments, at which time the note and deed of trust reverted to George. After that, George gave First Western another assignment, this time of the next 36 monthly payments.

In March 2004, George released his liens against the property, after which the Johns conveyed the property to George, taking back a note, a vendor's lien, and a deed of trust. George then borrowed some money from B of A, secured by a deed of trust on the property. George then defaulted on the note to the Johns, so the Johns foreclosed. Babu bought the property at the foreclosure sale.

B of A sued seeking a declaratory judgment that the March 2004 release was void because the lien had been assigned to First Western and claiming that B of A was subrogated to First Western's lien because it had paid off First Western.

The trial court found that Babu was a good faith purchaser of the property at foreclosure because no documents appeared of record at the time of the foreclosure that would give actual or constructive notice of a lien that was superior to the Johns's lien.

Status as a bona fide purchaser is an affirmative defense to a title dispute. A bona fide purchaser is not subject to certain claims or defenses. To receive this special protection, one must acquire property in good faith, for value, and without notice of any third-party claim or interest. Notice may be constructive or actual. Actual notice rests on personal information or knowledge. Constructive notice is notice the law imputes to a person not having personal information or knowledge.

A party has constructive notice of instruments properly recorded in the proper county. A party claiming title through principles of equity has the burden of proving that a subsequent purchaser was not a good faith purchaser.

The second assignment was filed in the Dallas County real property records well before the foreclosure sale. Under the terms of that assignment, George assigned to First Western all of his right, title, and interest in and to his deed of trust for a period lasting until First Western has received certain payments. Attached to the second assignment was an "Exhibit 'A'" that listed the due dates of the payments, with the first being "10/15/2003" and the last being "9/15/2006." Thus, under the express terms of the second assignment, First Western was assigned the rights under the George deed of trust until September 15, 2006. The March 16, 2004 release was executed only by George. The release did not identify or mention the second assignment. Accordingly, as a matter of record, the lien rights assigned to First Western under the terms of the second assignment were unreleased on the date of the foreclosure sale.

The court also held in favor of B of A on its subrogation claim. Equitable subrogation "is a legal fiction" whereby "an obligation, extinguished by a payment made by a third person, is treated as still subsisting for the benefit of this third person, so that by means of it one creditor is substituted to the rights, remedies, and securities of another." It essentially allows a subsequent lienholder to take the lien-priority status of a prior lienholder. Texas courts are particularly hospitable to the doctrine of equitable subrogation.

The general purpose of equitable subrogation is to prevent the unjust enrichment of the debtor who owed the debt that is paid. The trial court stated that B of A failed to establish that Babu would be unjustly enriched if equitable subrogation

was not allowed. Babu argued the trial court's focus on unjust enrichment as to him, rather than the debtor, was correct because the analysis of the unjust enrichment aspect must focus solely on the parties whose interests are affected by whether or not the court grants a party's claim of equitable subrogation. Babu cited ***Med Center Bank* v. *Fleetwood***, 854 S.W.2d 278 (Tex. App.—Austin 1993, writ denied) for its proposition, but ***Med Center*** did not extend the analysis beyond the debtor, so this court wasn't going to do so either.

Babu further argued that the case law supports rejecting the application of equitable subrogation against non-debtors. The court was not persuaded by the cases Babu relied upon.

The court then addressed the trial court's "balancing of the equities." The trial court apparently balanced those equities taking into account the circumstances as of the foreclosure. The court of appeals said that the determination is made, not as of the foreclosure date, but as of the time of the transaction supporting subrogation, which was when the debtor's obligation was repaid by B of A. The consequences of subsequent transaction or events are not relevant to the inquiry. The trial court should have considered only whether equitable subrogation would have prejudiced interests existing at the time Bank paid off the Johns's debt to First Western.

Finally, the trial court had stated that B of A was negligent in failing to file any documents in the real property records evidencing its "alleged lien" on the property. The court held that B of A had no duty to file anything, so there could be no negligence.

Noble Mortgage & Investments, LLC* v. *D&M Vision Investments, LLC, 340 S.W.3d 65 (Tex.App.-Houston [1st Dist.] 2011, no pet.). Noble made a loan in October 2007 which paid off three prior loans. Unbeknownst to Noble, FHI had obtained a default judgment against Banks, the immediately prior owner of the property, a year earlier. FHI did not obtain and file an abstract of judgment. It did, however obtain an execution and sale of the property in September 2007, a month or so before Noble's deed of trust was recorded. The sale was documented in the litigation records of the court by the constable's filing of a return of execution. After the Noble deed of trust was recorded, the constable prepared a deed transferring the property to Whitfield, the purchaser at the execution sale. The filing of that deed was the first time any document appeared in the real property records relating to the judgment lien or the execution sale. Whitfield deeded the property to D&M and in the meantime, Noble foreclosed on its lien. After Whitfield posted a no trespassing sign on the property, the parties figured out they had competing claims to the same property.

D&M filed a trespass to try title suit against Noble seeking to quiet title based on the execution sale. Noble counterclaimed and, alternatively, asked to be subrogated to the rights of the lienholders it had paid with the proceeds of its loan. D&M argued that Noble knew or should have known of the judgment and the execution sale because the underlying judgment, though unrecorded in the real property records, was nonetheless of public record in the civil court records. The trial court held in favor of D&M on the title issue and in favor of Noble on the subrogation claim.

Noble appealed, claiming that the recording statute, Property Code § 13.001, made Noble a bona fide mortgagee. A bona fide purchaser is one who acquires property in good faith, for value, and without notice, constructive or actual, of any third party claim or interest. In Texas, a bona fide purchaser prevails over a holder of a prior unrecorded deed or other unrecorded interest in the same property. A bona fide mortgagee is entitled to the same protections as a bona fide purchaser.

Under section 13.001, a lender can be a bona fide mortgagee, if the lender takes a lien in good faith, for valuable consideration, and without actual or constructive notice of outstanding claims. Notice sufficient to defeat bona fide purchaser status may be actual or constructive. Actual notice rests on personal information or knowledge. Constructive notice is notice the law imputes to a person not having personal information or knowledge. Constructive notice creates an irrebuttable presumption of actual notice in some circumstances.

An instrument that is properly recorded in the proper county is notice to all persons of the existence of the instrument. Although a deed outside the chain of title does not impute constructive knowledge, a person may be charged with the duty to make a reasonable diligent inquiry using the facts at hand in the recorded deed. Thus, every purchaser of land is charged with knowledge of all facts appearing in the chain of title through which he claims that would place a reasonably prudent person on inquiry as to the rights of other parties in the property conveyed.

Texas law does not provide a definitive explanation for what constitutes “good faith” sufficient to make one a bona fide purchaser" in the sale of real property context. This court has analyzed good faith in terms of whether a subsequent purchaser is aware of circumstances independent of the chain of title that would put it on notice of an unrecorded claim. Whether Noble is a bona fide mortgagee or purchaser turns largely on the issue of whether recording of a sale on an execution docket in compliance with Rule 656 of the Texas Rules of Civil Procedure is a "recording" for the purpose of putting subsequent creditors and purchasers on constructive notice under sections 13.001 and 13.002 of the Texas Property Code. This presents an issue of first impression in Texas. The trial court held that a Rule 656 filing satisfied the recording statutes. The court of appeals disagreed.

Recording under Rule 656 is not a recording for purposes of imputing constructive knowledge to defeat a claim of bona fide purchaser. Section 13.001 of the Texas Property Code provides that a real property mortgage or deed is "void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless the instrument has been . . . filed for record as required by law." While Rule 656 states that execution recorded on the execution docket under that rule "shall be taken and deemed to be a record," it would be inconsistent with the overall recording scheme long embodied in the Texas Property Code to hold that because a document is a "record" under Rule 656, that instrument is "filed for record" under section 13.001.

Texas law has long favored the purpose of recording acts, which make land title information available to interested persons. The intention of the recording acts is to compel every person receiving conveyances of real property to place such an instrument of record, not only that he may thereby protect his own rights, but also those of all others who may afterwards seek to acquire an interest in the same property. To be effectively recorded, an instrument relating to real property must be recorded in the public records in the county in which a part of the property is located. The recording laws in Texas were meant to protect innocent purchasers and creditors without notice of the prior transfer from being injured or prejudiced by their lack of knowledge of the competing claim.

Whittle Development Inc. **v.** ***Branch Banking & Trust Co.***, No. 10-37084-HDH-11 (Bkrtcy. N. Dist. Texas, July 27, 2011). The US Bankruptcy Court for the Northern District of Texas denied the lender's motion to dismiss and held that a debtor can avoid a prepetition foreclosure as a preference. The lender who foreclosed on a debtor's property prepetition by purchasing it through a credit bid for less than its alleged market value.

Under section 547(b) of the Bankruptcy Code, a trustee can avoid a transfer of a debtor's property as a preference if the transfer (1) was to or for the benefit of a creditor, (2) was for or on account of an antecedent debt owed by the debtor before the transfer was made, (3) was made while the debtor was insolvent, (4) was made within 90 days before the filing of the petition (or within one year, if made to an insider), and (5) enabled the creditor to receive more than if the bankruptcy case was governed by Chapter 7 of the Bankruptcy Code and the transfer had not been made.

The lender argued that this foreclosure should not be subject to section 547(b) because the US Supreme Court held in ***BFP v. Resolution Trust Corp.***, 511 U.S. 531, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994) that the price paid at a non-collusive foreclosure sale conducted in accordance with state law was, as a matter of law, "reasonably equivalent value." In other words, the last condition of section 547(b) cannot be satisfied because the price determined by bid at the foreclosure sale is the fair market value of the property and the lender would recover the same amount in a Chapter 7 liquidation.

However, the bankruptcy court distinguished the Supreme Court's reasoning, which analyzed what "reasonably equivalent value" meant in connection with fraudulent transfers under section 548(a)(2)(A) of the Bankruptcy Code, from the case at hand. Rather, it held that section 547(b) does not present any similar legal issues because the operative question is whether the creditor did in fact receive more than it would have received under a Chapter 7 liquidation and if the transfer had not been made. Because a Chapter 7 trustee has the time and incentive to promote a competitive auction in a Chapter 7 liquidation, a trustee can hypothetically generate a higher price for the property than the price a foreclosing creditor may pay at a foreclosure sale. Therefore, it is possible to avoid a prepetition foreclosure sale as a preference, even if the foreclosure complied with state law and was non-collusive.

Wind Mountain Ranch* v. *City of Temple, 333 S.W.3d 580 (Tex. 2010). Texas Civil Practice & Remedies Code § 16.035(a) requires a foreclosure to be held within four years after the cause of action accrues. Section 16.036 permits the parties to suspend the four-year limitations by executing, acknowledging, and filing an agreement extending the maturity of the loan. An extension agreement is ineffective as to BFPs, lienholders, and lessees who are without actual notice before the agreement is filed.

In this case, the note was set to mature in 1993. In a complicated series of events, a bankruptcy was filed and a reorganization plan was approved extending the maturity to 1999. The bankruptcy order extending the maturity was not recorded.

Meanwhile, the City of Temple obtained a judgment against the owner of the property and filed an abstract of judgment in 2003. A month after the AJ was filed, Wind Mountain acquired the note and deed of trust on the property and subsequently foreclosed. The City sought a declaration that, because the foreclosure occurred after the four-year period of limitations, it was invalid. The City contended that the bankruptcy court's extension was not filed as required by the Civil Practice & Remedies Code and was therefore void as to the City.

The trial court ruled in favor of the City and the court of appeals affirmed. The Supreme Court reversed. The Supreme Court agreed that § 16,036 requires an extension agreement to be recorded; however, the plain language of the statute imposes no such requirement on a bankruptcy court order. And the court would not say that an order issued by the bankruptcy court amounts to an agreement between the parties. It necessarily follows

that a bankruptcy court order need not be recorded to effectively extend a note's maturity date. The Civil Practice & Remedies Code requirements for recording an extension agreement are clear and unambiguous and the court declined to look beyond the statute's plain language. As such, the maturity date of the note was effectively extended to 1999. Wind Mountain foreclosed on the property before the statute of limitations lapsed, and its interest is superior to the City's.

Green Tree Servicing, LLC* v. *1997 Circle N Ranch Limited, 325 S.W.3d 869 (Tex.App.-Austin 2010, no pet.). Seven manufactured houses were situated on land owned by Circle N. The houses were owned by separate owners, each of which leased the land. Each house was purchased with financing from Green Tree and secured by a lien on the house. Ultimately, each owner defaulted on his or her loan obligations and ceased to occupy the home. Pursuant to the security instruments and the UCC, Green Tree sold each of the seven manufactured homes "as is and where is" to third-party purchasers. Thereafter, some of the manufactured homes remained on Circle N's property, with no lot rentals being paid, for what in some instances proved to be weeks, months, or even years before their third-party purchasers eventually removed them. Circle N sued Green Tree to recover unpaid rentals on the lots.

The legislature has addressed the respective rights of creditors and property owners under such cir-cumstance in chapter 347, subchapter I of the Finance Code. Finance Code § 347.401, sets forth a general rule that "[e]xcept as provided by this subchapter, a lien or charge against a manufactured home for unpaid rental of the real property on which the manufactured home is or has been located is subordinate to the rights of a creditor with a security interest or lien that is: (1) perfected under this chapter; and (2) recorded on the document of title issued with the manufactured home." However, Finance Code § 347.402, titled "Possessory Lien," creates the following exception to section 347.401:

"(a) The owner of the real property on which a manufactured home is or has been located and for which rental charges have not been paid has a possessory lien that is not subject to Section 347.401 to secure rental charges if:

> (1) the creditor described by Section 347.401 repossesses the manufactured home when the charges have not been paid; and
>
> (2) the owner of the real property has mailed to the creditor by certified mail, return receipt requested, written notice of the unpaid charges.

There is no question that Green Tree was a creditor and Circle N a property owner with respect to the seven houses. It was also undisputed the Circle N sent Green Tree the required notices of unpaid charges. The dispute was whether subchapter I made Green Tree personally liable for the unpaid rental charges, as Circle N claimed. Green Tree argued that subchapter I gave Circle N only a possessory lien in each manufactured home to secure the amount of unpaid rentals determined under subsections (b) and (c) of section 347.402, but did not make Green Tree personally liable for the unpaid rental amounts secured by the liens. Because it had previously sold each of the homes to third parties, Green Tree insisted, Circle N's remedies, if any, lay against those other parties, or whoever might possess the homes now, rather than Green Tree.

The cornerstone of subchapter I's remedies for property owners is section 347.402. Reflecting section 347.402's focus is its title: "Possessory Lien." On its face, section 347.402 purports only to create a "possessory lien" in favor of the property owner when the conditions of subsection (a) are met. A "possessory lien" is a type of claim or security interest in specific property

that permits a creditor to take and retain possession of the property until a debt or obligation is satisfied. While creating a "possessory lien" against specific property—the manufactured home—section 347.402 does not purport to create a cause of action against or impose liability upon the creditor or any other specific person for the unpaid rental amounts secured by the lien.

In contending that subchapter I creates a cause of action imposing personal liability on the creditor for the rental charges determined under section 347.402(b) and (c), Circle N urges that section 347.403, when read in conjunction with section 347.402, evidences legislative intent to create a cause of action whereby property owners can recover rental charges from creditors. Circle N further asserts, subchapter I must create a cause of action against creditors for unpaid rentals because if it were otherwise, it would provide no protection for the property owner's interests despite the legislature's obvious concern for those interests.

The court ultimately held that the legislature did not create a cause of action in subchapter I through which Circle N could recover personally from Green Tree for unpaid rental amounts. Circle N emphasizes various perceived inequities and practical difficulties it faced in enforcing its possessory liens where, as here, the creditor sells the manufactured homes in place to third-party purchasers. Circle N complains that it had no practicable means to determine that Green Tree had sold the homes, who the third-party purchasers were, or that the purchasers would be removing the homes from Circle N's property. Circle N further insinuates that Green Tree opted to sell the manufactured homes in place in a calculated attempt to avoid Circle N's possessory lien, an allegation Green Tree denies. Whatever merit these complaints might have, the court was constrained, first, by the narrowness of Circle N's claim for relief. Both in the district court and on appeal, Circle N has relied exclusively on a purported cause of action under subchapter I whereby Green Tree is made personally liable for the unpaid rentals. The court expressed no opinion regarding whether Circle N might have had any other statutory or common-law remedies against Green Tree or other parties in regard to the seven manufactured homes at issue, as that question was not before the court. More importantly, the court was further constrained by the words the legislature has chosen in subchapter I, and any remedy from the consequences of the legislature's choices must lie in that governmental branch rather than this one.

Schlichting* v. *Lehman Brothers Bank FSB, 346 S.W.3d 196 (Tex.App.-Dallas 2011, pet. pending). Lehman foreclosed on Schlichting, making him, according to his deed of trust, a tenant at sufferance. Lehman sent a 3-day notice to vacate and filed a forcible detainer action to evict him. The justice court awarded possession to Lehman and Schlichting appealed to the county court, where he lost again. He then appealed to the Court of Appeals.

At trial, Schlichting had introduced evidence of a "senior deed" showing that Lehman had no valid title or interest in the property. According to Schlichting, an earlier foreclosure of this "senior deed" voided Lehman's lien interest. Therefore, the trustee's deed Lehman had obtained at foreclosure was void. The court didn't buy his argument.

Any defects in the foreclosure process or with the purchaser's title to the property may not be considered in a forcible detainer action. Such defects must be pursued, if at all, in a separate suit for wrongful foreclosure or to set aside the substitute trustee's deed. Where a foreclosure pursuant to a deed of trust establishes a landlord and tenant-at-sufferance relationship between the parties, the trial court has an independent basis to determine the issue of immediate possession without resolving the issue of title to the property. In this case, the foreclosure pursuant to the deed of trust

created a landlord and tenant-at-sufferance relationship between appellant and Lehman. Thus, it was not necessary for the trial court to resolve the title dispute to determine the right of immediate possession.

PART II
PROMISSORY NOTES, LOAN COMMITMENTS, LOAN AGREEMENTS

Pineridge Associates, L.P.* v. *Ridgepine LLC, 337 S.W.3d 461 (Tex.App.-Fort Worth 2011, no pet.). Pineridge signed a typical non-recourse promissory note which included typical "carve-outs." Among the carve-outs was one which made Pineridge personally liable for the full amount of the loan if there were mechanics' liens not released within 30 days after the date of creation. Mechanics' liens of close to $130,000 were filed against the property that were not released. The lender foreclosed because of payment defaults, not raising the issue of mechanics' liens before foreclosure. The foreclosure wiped out the mechanics' liens.

The lender brought suit based on the mechanics' lien carve-out and the trial court awarded it damages in the amount of almost $150,000 as a deficiency following the foreclosure.

Pineridge argued that the effect of foreclosure, i.e., wiping out the mechanics' liens, was the same as releasing them of record. The court disagreed.

There was no dispute between the parties or disagreement from the court that all of the mechanics' liens were wiped out. Still, the court held that extinguishing the liens by foreclosure was not the same as releasing them of record.

Property Code § 53.157 lists six ways that a mechanics' lien may be discharged of record. One way is to file a release. Four others require filing a bond of some type. The sixth way is by not foreclosing the mechanics' lien within the period of limitations. Pineridge argued, to no avail, that extinguishment by foreclosure is analogous to the lien lapsing by limitations, the court stuck with the wording of the statute and would not extend section 53.157 to extinguishment by foreclosure. "Of record" means "recorded in the appropriate records" to denote that a document has been made a part of the public record by filing the document in the appropriate place. The foreclosure extinguishment didn't do anything "of record" to these mechanics' liens.

Pineridge raised the argument that the mechanics' lien issue was not raised during the existence of an event of default under the loan. The lender knew about the mechanics' liens when it bought the loan from Freddie Mac but did not originally seek personal liability because of them. Pineridge argued that the lender could have invoked the liens as an event of default before the foreclosure but did not, so the issue of mechanics' liens was no longer an event of default because the liens had been extinguished. The court stuck to its literalist reading of the provision and said that "released of record" means what it says. It is undisputed that lien releases were never filed. Because lien releases were never filed, the failure to release the mechanic's liens of record means the mechanic's liens continued to qualify as an event of default.

Pineridge then tried to attack the calculation of the deficiency. Among the items included in coming up with the deficiency was the lender's proration of taxes for the current year. The deed of trust permitted the lender to add taxes to the indebtedness if they were paid by the lender because they weren't paid by the borrower when due. In this case, the lender hadn't paid the taxes because they weren't yet due and payable. However, the loan documents required Pineridge to make escrow deposits for taxes and it hadn't done so, meaning that the lender did not have sufficient funds to

pay the taxes when they did become due. So the court held that the failure to maintain the escrow was tantamount to not paying taxes when they were due, so that was enough to allow the lender to include the prorated taxes in its deficiency calculation.

Basic Capital Management, Inc.* v. *Dynex Commercial, Inc., 54 Tex.Sup.Ct.J. 781 (Tex. 2011). BCM managed publicly traded REITs. ART and TCI held investment property through various single asset, bankruptcy-remote entities. Dynex was in the business of providing financing for real estate investors.

Dynex agreed to lend money to three TCI owned SPE's if BCM agreed to propose other acceptable SPE borrowers to borrow from Dynex over a two-year period. While the written agreements said the loans were to be to three SPE borrowers, TCI accepted the agreement as the "Borrower," even though it is not an SPE.

Dynex made the loans to acquire the TCI properties and to fund one loan presented by BCM, but when the market went south, Dynex quit funding the redevelopment of the three TCI properties and refused to make any additional loans under its commitment.

TCI and BCM sued Dynex for breach of the commitment, alleging that as a result, transactions that would have qualified for funding were financed elsewhere at higher rates or not at all. TCI and BCM claimed damages for interest paid in excess of what would have been charged under the Commitment and for lost profits from investments for which financing could not be found.

Dynex claimed that TCI lacked standing under the commitment because the obligation was to make loans to SPE's, not to TCI, and that TCI was not a party to nor a third party beneficiary of the commitment. The Court of Appeals agreed, holding that TCI was not third-party beneficiaries of the commitment or the agreements relating to the three loans. The commitment and agreements were made for the benefit of the SPE's that TCI was to create as occasion arose and any benefit to TCI was at most indirect and unrecoverable.

The law governing third-party beneficiaries is relatively settled. The fact that a person might receive an incidental benefit from a contract to which he is not a party does not give that person a right of action to enforce the contract. A third party may recover on a contract made between other parties only if the parties intended to secure some benefit to that third party, and only if the contracting parties entered into the contract directly for the third party's benefit.

In determining whether a third party can enforce a contract, the intention of the contracting parties is controlling. A court will not create a third party beneficiary contract by implication. The intention to contract or confer a direct benefit to a third party must be clearly and fully spelled out or enforcement by the third party must be denied. Consequently, a presumption exists that parties contracted for themselves unless it clearly appears that they intended a third party to benefit from the contract.

Dynex knew that the purpose of the commitment was to secure future financing for TCI, real estate investment trusts that BCM managed and in which it held an ownership interest. Basic was never to be the borrower. On the contrary, the Commitment expressly required that the borrowers be SPE's acceptable to Dynex. Nor was BSM to own the SPE's. Dynex knew that BCM's business was to manage the investment trusts that created and owned the SPE's as part of their investment portfolio. The requirement that all borrowers be SPE's was for Dynex's benefit, to provide more certain recourse to the collateral in the event of default.

As a practical matter, the parties knew

that it would likely not be an SPE that would enforce the commitment. By its very nature as a single-asset entity, an SPE would not be created until an investment opportunity presented itself, and without financing, there would be no investment. It would be unreasonable to require TCI to have created SPE's for no business purpose, merely in order that those otherwise inert entities could sue Dynex.

The court then turned to the issue of whether BCM is precluded from recovering lost profits as consequential damages for breach of the commitment because Dynex could not reasonably foresee them. Foreseeability is a fundamental prerequisite to the recovery of consequential damages for breach of contract. Dynex contends that when it issued the commitment, it could not have foreseen that its breach would cause BCM to suffer lost profits because it had no idea what specific investments Basic would propose or that alternative financing for them would be unavailable. The court of appeals agreed, concluding that Dynex could not be liable for BCM's lost profits unless it knew, at the time it entered into the commitment that the contracted financing was for a specific venture and that in the event of its breach the borrower probably would be unable to obtain other financing in a manner that would permit the borrower to carry out that venture.

The Supreme Court disagreed. Certainly, a general knowledge of a prospective borrower's business does not give a lender reason to foresee the probable results of its refusal to make the loan. But Dynex cites no authority for the proposition that the consequences of a lender's breach of a loan commitment are not reasonably foreseeable unless the lender knew, at the time the commitment was made, not only the nature of the borrower's intended use of the money, but the specific venture in which the borrower intended to engage. The court held that, to be liable for the consequential damages resulting from a breach of a loan commitment, the lender must have known, at the time the commitment was made, the nature of the borrower's intended use of the loan proceeds but not the details of the intended venture.

There is no question Dynex knew that BCM's purpose in arranging the commitment. Dynex certainly knew that if market conditions changed and interest rates rose, its refusal to honor the Commitment would leave BSM having to arrange less favorable financing. Because that is in fact what happened, Dynex argues that it had no reason to expect that BSM's increased financing costs would price some investments beyond reach, resulting in opportunities lost altogether. But the court could not infer from BSM's ability to arrange for alternate financing in a few instances that it could always do so, and nothing in the record supports such a counterintuitive proposition. Certain that its breach would increase BSM's costs, Dynex cannot profess blindness to the foreseeability that its breach would also cost BSM business.

ECF North Ridge Associates, L.P.* v. *Orix Capital Markets, L.L.C., 336 S.W.3d 400 (Tex.App.-Dallas 2011, pet. denied). ECF and TCI owned property in Texas and California. Their lender's servicer was Orix who was responsible for collecting monthly payments of principal and interest, monitoring whether the property was properly insured, and addressing any issues of default under the loan documents.

The loan documents required specified insurance on the properties, including "all-risk" insurance. At the time the loan was made, all-risk insurance did not exclude for acts of terrorism, but after 9-11, insurance companies began excluding terrorism coverage from all-risk policies. So Orix began requiring terrorism insurance. ECF and TCI objected, primarily because the cost purportedly ran too high (although evidence later showed it wouldn't have been that high).

When ECF and TCI refused to obtain the insurance Orix declared defaults under the loan documents. ECF and TCI responded by filing suit for breach of contract and declaratory judgment and Orix counterclaimed for default interest and attorneys' fees. Orix prevailed at trial.

The first issue raised in the appeal was Orix's standing to sue. Orix claimed that its pooling and servicing agreement conferred standing to sue. Standing is a component of subject matter jurisdiction. Whether a trial court has subject matter jurisdiction is a matter of law, which the court of appeals reviews de novo.

No Texas case directly addresses the standing question in this case. However, Orix cited ***ORIX Capital Markets, LLC* v. *La Villita Motor Inns, J.V.***, 329 S.W.3d 30, 39-42 (Tex.App.-San Antonio 2010, pet. denied), where that court concluded the record contained sufficient evidence ORIX Capital Markets had proven its right to enforce a note as the current "special servicer" and pursuant to a servicing agreement containing language similar to the PSA in this case. Recently, a federal appeals court addressed the very issue of whether a mortgage servicer had standing to pursue claims against a borrower for an alleged default under a mortgage loan to which the servicer was not a party. See ***CWCapital Asset Mgmt., LLC* v. *Chicago Props., LLC***, 610 F.3d 497 (7th Cir.2010).

In ***CWCapital***, the court addressed whether a mortgage servicer, CWCapital, was entitled to bring suit against the commercial landlord (the borrower) and its former tenant for money the former tenant paid the landlord in settlement of a separate dispute. Examining the servicer's role in administering a mortgage-backed security, the court explained how a "servicer must balance impartially the interests of the different tranches as determined by their contractual entitlements." The court turned to the language of CWCapital's PSA with its trustee, stating the servicer is the trust's collection agent because it "shall ... have full power and authority, acting alone, to do or cause to be done any and all things in connection with such servicing and administration which it may deem necessary or desirable," thus making the delegation of the trustee's rights to the servicer "comprehensive." According to the ***CWCapital*** court: "There is no doubt about Article III standing in this case [of a servicer bringing suit]; though the plaintiff may not be an assignee, it has a personal stake in the outcome of the lawsuit because it receives a percentage of the proceeds of a defaulted loan that it services."

The ***CWCapital*** case ultimately held that it is thus the servicer, under the agreement, who has the whip hand; he is the lawyer and the client, and the trustee's duty, when the servicer is carrying out his delegated duties, is to provide support. The securitization trust holds merely the bare legal title; the Pooling and Servicing Agreement delegates what is effectively equitable ownership of the claim (albeit for eventual distribution of the proceeds to the owners of the tranches of the mortgage-backed security in accordance with their priorities) to the servicer. For remember that in deciding what action to take with regard to a defaulted loan, the servicer has to consider the competing interests of the owners of different tranches of the security.

Having concluded ORIX had standing to bring suit, the court turned to the question of whether ECF and TCI were contractually obligated to procure terrorism insurance. In response to ECF's and TCI's challenge to the legal and factual sufficiency of evidence to support the trial court's judgment, ORIX contends that terrorism insurance is required under two separate provisions of the relevant loan documents— " other insurance" and " all-risk insurance."

In the "other insurance" provision of the loan agreements, ECF and TCI were required to have "Such other insurance on the Property or on any replacements or

substitutions thereof or additions thereto as may from time to time be required by Mortgagee against other insurable hazards or casualties which at the time are commonly insured against in the case of property similarly situated, due regard being given to the height and type of buildings, their construction, location, use and occupancy."

The court held that the language of these contracts is clear: ORIX as servicer may require ECF and TCI to obtain certain insurance coverage— such as certified terrorism insurance— if such perils are commonly insured against for similar properties. The court reviewed the evidence and found that there was sufficient evidence to support the requirement that the terrorism peril was commonly insured against for similar properties.

Guniganti* v. *Kalvakuntla, 346 S.W.3d 242 (Tex.App.-Houston [14th Dist.] 2011, no pet.). The original principal amount of the note was $2,948,523.45 "or so much thereof as is advanced and outstanding from time to time . . . ." The Note also provided, "NOT ALL of the principal amount of this Note has been advanced on the date hereof. Additional advances will be made in accordance with the terms and conditions of the Loan Agreement, reference to same being here made for all purposes." The note was later modified pursuant to a modification agreement which recited that the principal balance remaining was $1,439,491.21 and the final maturity date was December 12, 2002. The modification provided that the terms of the note remained unchanged except as modified and said that "If any inconsistency exists between this [Modification] and the terms of the Note and/or Security Documents, this [Modification] shall control and the Note and Security Documents shall be construed accordingly."

The note went into default. In November 2007, Guniganti (who had acquired an interest in the note) brought suit for damages and judicial foreclosure of the property securing it. The maker of the note claimed enforcement of the note and lien were barred by the four year statute of limitations. Civil Practice & Remedies Code § 16.004(a)(3), which is the statute of limitations for debts. Guniganti argued that the UCC § 3.118(a) six-year limitations period for negotiable instruments was applicable.

The negotiability of an instrument is a question of law. As defined in UCC § 3.104, "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order.

A promise or order is unconditional unless it states (i) an express condition to payment, (ii) that the promise or order is subject to or governed by another record, or (iii) that rights or obligations with respect to the promise or order are stated in another record. A promissory note is not a negotiable instrument if it contains a statement indicating that the rights and obligations of the parties with respect to the note are stated in another agreement. The rationale for precluding reference to other documents is that the holder of a negotiable instrument should not be required to examine another document to determine rights with respect to payment. However, a mere reference to another record does not of itself make the promise or order conditional.

Here, the modification, which the court said must be read together with the note, made references to the deed of trust, a guaranty, and the loan agreement. The court assumed, without deciding, that those references in the modification were to statements of rights, and do not defeat negotiability.

The note also referred to the loan agreement and here the court held that the note's reference to the loan agreement rendered the note non-negotiable. The

problem was that the note said advances were to be made in accordance with the loan agreement and that any default under the loan agreement was a default under the note. This was more than a "mere statement" referring to the loan agreement. This language burdened the note with the conditions of the loan agreement. The modification brought this wording forward by saying that the unmodified terms of the note remained unchanged.

PART III
USURY

Threlkeld* v. *Urech, 329 S.W.3d 84 (Tex.App.-Dallas 2010, pet. dism'd). Threlkeld signed a promissory note payable to Urech. The note provided that interest would accrue at 100% per annum. Principal and interest were due and payable in one year.

Although Threlkeld made sporadic payments under the note, he never paid the full amount owed. After Threlkeld defaulted, Urech contacted an attorney to discuss his legal rights of recovery. On December 17, 2003, based on his attorney's advice, Urech sent a "correction letter" under section 305.103 of the Finance Code informing Threlkeld that the note, as executed, violated Texas usury law. Urech also informed Threlkeld that the letter was intended to correct the violation and "the stated interest rate of 100% per annum in the Note [was] reduced, from the inception of the loan until payment [was] finally made, to the maximum lawful rate of interest not to exceed 18% per annum."

On October 5, 2007, Urech filed suit to recover the amounts he alleged were still due under the note. Threlkeld answered and sent Urech a letter under chapter 302 of the Finance Code stating his position that the 18% interest rate specified in the purported correction letter was usurious. Threlkeld advised Urech he had 61 days to modify the note again. Urech refused to modify the note any further, and Threlkeld filed a counterclaim for usury.

Threlkeld claimed Urech that the correction letter was not sent timely and the maximum amount of allowable interest that could be applied to the note was 10%, not 18%.

Threlkeld argued Urech knew at the time the note was signed that the stated interest rate was usurious and, therefore, the correction letter was not sent within 60 days after Urech discovered the usury violation as required by section 305.103 of the Finance Code. The court disagreed. The summary judgment evidence regarding Urech's knowledge consists solely of the affidavits made by the parties. Urech testified in his affidavit that he was unaware of the usury violation until he consulted with an attorney and that he sent the correction letter fifty-three days later. This testimony establishes that the correction letter was sent within the sixty-day window provided for in section 305.103.

Threlkeld contends the maximum amount of interest that can be applied to the note is 10% under section 302.001(b) of the Finance Code. Threlkeld cites no authority to support his contention that the maximum interest rate to which a usurious note may be corrected is 10%. Threlkeld argues only that an 18% annual rate of interest is usurious and there is no language in the note that would support the 18% rate. To support his argument that the 18% interest rate is usurious, Threlkeld relies on the portion of section 302.001(b) that states "[a] greater rate of interest than 10 percent a year is usurious unless otherwise provided by law." Threlkeld's reliance on this language is misplaced because Texas law provides for a greater rate of interest in section 303.009 of the finance code. Section 303.009 establishes an alternative interest rate ceiling with a "minimum ceiling" of 18% a year. This 18% minimum rate ceiling is applicable to written contracts through Section 303.002. Accordingly, Texas law authorizes

an interest rate of at least 18% to be applied to a written contract such as the one at issue here, and the rate is not usurious.

PART IV
DEEDS AND CONVEYANCE DOCUMENTS

Morris* v. *Wells Fargo Bank, N.A., 334 S.W.3d 838 (Tex.App.-Dallas 2011, no pet.). Morris owned a house in East Dallas. Two deeds purporting to be signed by Morris were filed in Dallas County. One was a General Warranty deed purporting to convey all of the property but a two foot strip to EDPC. That deed was notarized by Taulease Bailey, sister of Curtis Bailey, the owner of EDPC. The signature appeared as "Cyndia A. Morris." The second deed was entitled "Correction General Warranty Deed," and it purported to convey EDPC all of the property. It was notarized by Franklin Brown. The signature on the second deed was "Cyndia A. Morris as Independent Executrix." EDPC sold the property to Jordan, who borrowed a loan secured by the property from Wells Fargo. Wells Fargo foreclosed after Jordan defaulted. Morris sued Bailey and Wells Fargo seeking a declaratory judgment that the deeds were null and void because of forgery.

The trial court found that the first deed was not forged, but that the second deed was a forgery. It held that Wells Fargo was a bona fide mortgagee and was vested with title after its foreclosure.

A void instrument passes no title, and the fact that the grantee-mortgagee is an innocent purchaser makes no difference. A forged deed is void *ab initio*. However, deeds obtained by fraud are voidable rather than void, and remain effective until set aside.

A certificate of acknowledgment is prima facie evidence that the grantor appeared before the notary and executed the deed in question for the purposes and consideration therein expressed. Clear and unmistakable proof that either the grantor did not appear before the notary or that the notary practiced some fraud or imposition upon the grantor is necessary to overcome the validity of a certificate of acknowledgment.

The court reviewed all of the evidence and held that it was factually and legally sufficient to support the trial court's finding that Morris's signature on the first deed was genuine.

Smith-Gilbard* v. *Perry, 332 S.W.3d 709 (Tex.App.-Dallas 2011, no pet.). Perry owned a piece of property along West Grove Street in Kaufman. While looking for some land for a medical facility, Raymond, who worked for the Kaufman Economical Development Corporation at the time, asked Perry if she would be interested in selling the vacant lot west of the fence located on her property. Perry informed Smith-Gilbard and her husband, Dr. Lewis, that Perry was interested in selling the lot west of the fence line. Perry and Smith-Gilbard later entered into a contract and closed the sale. Perry told Smith-Gilbard that she did not see any reason to incur the additional expense of having a new survey made because there had been no changes to the property described in the deed she received when she purchased it. That deed described the property as a parcel of land situated in the County of Kaufman, State of Texas, a part of the C.A. Lovejoy Survey, Abstract Number 303. They used that description in the contract, along with a statement that the property measured 113' x 200'.

When the property was conveyed, the property was described by metes and bounds in terms that were identical to the 1965 warranty deed that Perry had provided in lieu of a survey. The metes and bounds descriptions of the property, however, included an additional 1,881 square feet of the lot that extended east beyond the fence line. At trial, it was undisputed that the "Lot 125" of the "C.A. Lovejoy Addition"

referred to in the contract between the parties was the same piece of property described in both the 1965 and 2002 warranty deeds as part of the "C.A. Lovejoy Survey." Perry did not tell Smith–Gilbard she did not intend to convey all of the property described in both the 1965 warranty and 2002 deeds as the "C.A. Lovejoy Survey."

Perry sued Smith–Gilbard in September 2004, seeking reformation of the deed based on an alleged mutual mistake of the parties. The petition acknowledged that Perry executed and delivered the 2002 warranty deed to Smith–Gilbard. Perry argued, however, that it was the specific intent of the parties to sell the property described in the deed "up to but not including" the portion of the lot that extended east beyond the fence line. Specifically, she alleged that, principally through the title company assisting in the closing, the premises were erroneously described.

Perry also alleged that she made repeated requests to Smith–Gilbard to reform the deed, to no avail. The trial court concluded Perry was entitled to reformation of the warranty deed because there was an agreement among the parties that was not reflected in the deed, and that the deed should thus be reformed to describe the eastern boundary of the property sold by Perry to Smith–Gilbard as ending at "the existing fence line."

A mutual mistake of fact occurs when the parties to an agreement have a common intention, but the written contract does not reflect the intention of the parties due to a mutual mistake. When a party alleges that, by reason of mutual mistake, an agreement does not express the real intentions of the parties, extrinsic evidence is admissible to show the real agreement.

To prove a mutual mistake, the evidence must show that both parties were acting under the same misunderstanding of the same material fact. A mutual mistake regarding a material fact is grounds for avoiding a contract, but the mistake must be mutual rather than unilateral. A unilateral mistake does not provide grounds for relief even though it results in inequity to one of the parties.

When seeking relief from a mutual mistake, the party seeking reformation must also prove what the true agreement was, but its case is not made by proof that there was an agreement which is at variance with the writing. It must go further and establish that the terms or provisions of the writing that differ from the true agreement made were placed in the instrument by mutual mistake. The doctrine of mutual mistake must not routinely be available to avoid the result of an unhappy bargain.

In this case, the evidence at trial indicates that the parties intended to rely on the metes and bounds description in the 1965 warranty deed that was incorporated into the 2002 warranty deed to accurately describe the property. Smith–Gilbard testified that she relied on the metes and bounds description of the property that was found in the 1965 and 2002 warranty deeds, and Perry provided Smith–Gilbard the 1965 warranty deed as a description of the property in lieu of preparing a new survey. According to Smith–Gilbard, Perry told her that she had owned "the property for a very long time, nothing had changed, nothing was different on it," so there was no reason to incur the additional cost of a new survey. Perry testified that she provided the 1965 warranty deed because "[Smith–Gilbard] wanted a description of the property." There is no indication in the record that Perry ever told Smith–Gilbard that she did not intend to convey all of the property described in the deeds, or that she was only interested in selling a parcel measuring "113 x 200" feet. Moreover, it is well-known that specific descriptions by metes and bounds prevail over more general descriptions.

Escondido Services, LLC* v. *VKM Holdings, LP, 321 S.W.3d 102 (Tex.App.-

Eastland 2010, no pet.). As far back as 1862, the Texas Supreme Court in ***Mitchell* v. *Bass***, 26 Tex. 372 (Tex.1862), adopted a general rule where a grantor conveyed an easement or right-of-way for a public road and retained the underlying fee, including the minerals. The established doctrine of the common law is that a conveyance of land bounded on a public highway carries with it the fee to the center of the road. That is the legal construction of the grant unless the inference that it was so intended is rebutted by the express terms of the grant. The owners of the land on each side go to the center of the road, and they have the exclusive right to the soil, subject to the right of passage in the public.

Many courts have referred to two doctrines as justification for the general rule: (1) the appurtenance doctrine and (2) the strip and gore doctrine. The appurtenance doctrine is based on the presumption that a conveyance reflects an intention to carry with it the appurtenant easements and incidents belonging to the property at the time of the conveyance.

The strip and gore doctrine is essentially a presumption that, when a grantor conveys land he owns adjacent to a narrow strip that thereby ceases to be of benefit or importance to him, he also conveys the narrow strip unless he plainly and specifically reserves the strip for himself in the deed by plain and specific language. The presumption is intended to apply to relatively narrow strips of land that are small in size and value in comparison to the adjoining tract conveyed by the grantor.

PART V
LIS PENDENS

In re *Cohen*, 340 S.W.3d 889 (Tex.App.-Houston [1st Dist.] 2011, no pet.). During the pendency of an action involving title to real property, the establishment of an interest in real property, or the enforcement of an encumbrance against real property, a party seeking affirmative relief may file a lis pendens in the real property records of the county where the property is located. Property Code § 12.007. The notice must contain certain information, including the style and cause number of the proceedings, the court where it is pending, the names of the parties, identification of the kind of proceedings, and a description of the property affected. A properly filed lis pendens is not itself a lien, but rather it operates as constructive notice "to the world of its contents."

To challenge notices of lis pendens that, as here, were filed after September 1, 2009, a party may file an application to have a lis pendens expunged. Property Code § 12.0071. The court must grant the motion if (1) the pleading on which the notice is based does not contain a real property claim, or (2) the claimant fails to establish by a preponderance of the evidence the probable validity of the real property claim. This is because the property against which the lis pendens is filed must be the subject matter of the underlying lawsuit. If the suit seeks a property interest only to secure the recovery of damages or other relief that the plaintiff may be awarded, it is not an action involving: (1) title to real property, (2) the establishment of an interest in real property, or (3) the enforcement of an encumbrance against real property as required by section 12.007 to render a notice of lis pendens proper.

Before section 12.0071 was enacted, there was a split in authority about whether the classification of a claim as direct or collateral should be made solely by reference to the pleadings or by examining the evidence. The new section 12.0071 resolves that split, expressly providing avenues for both by allowing expungement based on the (1) failure to adequate plead "a real property claim," or (2) failure to demonstrate by a preponderance of the evidence "the probable validity of the real property claim."

In evaluating whether a plaintiff has sufficiently pleaded a real property claim for purposes of supporting a notice of lis pendens, this court has consistently held that a pleading requesting the restoration of a prior ownership interest in a particularly identified property—through actual title or a constructive trust—is sufficient. It has also upheld the validity of a notice of lis pendens filed on specifically identified property alleged to have been purchased with "the fruits" of the defendant's fraud on the plaintiff.

In contrast, in cases in which the plaintiff requests title to the property, or a constructive trust, only to satisfy a money judgment against the defendant, courts have found cancellation of lis pendens proper because those claims do not involve a sufficient direct interest in real property.

Cohen does not seek a judgment lien, but instead requests that real property liens and title transfers be set aside, and that a constructive trust be placed on properties he alleges were fraudulently transferred. These are real property claims sufficient to support a notice of lis pendens.

PART VI
LEASES

Italian Cowboy Partners, Ltd.* v. *Prudential Insurance Company of America, 341 S.W.3d 323 (Tex. 2011). The Secchis wanted to expand their restaurant business. In late 1999 and early 2000, with the help of their real estate broker, the Secchis began to look for additional restaurant property. Hudson's Grill was a restaurant located in a building at Keystone Park Shopping Center. Keystone Park, as well as the Hudson's Grill building, was owned by Prudential. The Secchis' broker told them that Hudson's Grill was probably going to close and that the restaurant site might be coming up for lease. The Secchis met with the property manager and discussed the Hudson's Grill building. They entered into a letter of intent to lease the property and began negotiating the lease. Negotiations continued for about five months. At least seven different drafts of the lease were circulated. During this period of time, the Secchis visited the site on several occasions.

After the parties executed the lease, Italian Cowboy began remodeling the property. While it was remodeling the building, several different persons told Italian Cowboy that there had been a sewer gas odor problem in the restaurant when it was operated by Hudson's Grill. One of the owners also personally noticed the odor. He told the property manager about it about the problem but continued to remodel. After Italian Cowboy was operational and opened for business, the sewer gas odor problem continued. Although Prudential attempted to solve the problem, the transient sewer gas odor remained the same. Eventually, the restaurant closed. Italian Cowboy then sued Prudential.

The lease with Italian Cowboy contained the following relevant provisions:

> 14.18 Representations. Tenant acknowledges that neither Landlord nor Landlord's agents, employees or contractors have made any representations or promises with respect to the Site, the Shopping Center or this Lease except as expressly set forth herein.
>
> 14.21 Entire Agreement. This lease constitutes the entire agreement between the parties hereto with respect to the subject matter hereof, and no subsequent amendment or agreement shall be binding upon either party unless it is signed by each party....

The court first turned to the question whether the lease contract effectively disclaims reliance on representations made by Prudential, negating an element of Italian Cowboy's fraud claim and concluded that it

does not. First, a plain reading of the contract language at issue indicates that the parties' intent was merely to include the substance of a standard merger clause, which does not disclaim reliance. Moreover, even if the parties had intended to disclaim reliance, the contract provisions do not do so by clear and unequivocal language. For these reasons, the court held, as a matter of law, that the language contained in the lease agreement at issue does not negate the reliance element of Italian Cowboy's fraud claim.

A contract is subject to avoidance on the ground of fraudulent inducement. For more than fifty years, it has been the rule that a written contract even containing a merger clause can nevertheless be avoided for antecedent fraud or fraud in its inducement and that the parol evidence rule does not stand in the way of proof of such fraud.

The court has recognized an exception to this rule in ***Schlumberger Technology Corp.*** **v.** ***Swanson***, 959 S.W.2d 171 (Tex.1997), and held that when sophisticated parties represented by counsel disclaim reliance on representations about a specific matter in dispute, such a disclaimer may be binding, conclusively negating the element of reliance in a suit for fraudulent inducement. In other words, fraudulent inducement is almost always grounds to set aside a contract despite a merger clause, but in certain circumstances, it may be possible for a contract's terms to preclude a claim for fraudulent inducement by a clear and specific disclaimer-of-reliance clause. In ***Schlumberger***, the court stated that it had a clear desire to protect parties from unintentionally waiving a claim for fraud, but also identified a competing concern—the ability of parties to fully and finally resolve disputes between them.

Here, the parties dispute whether a disclaimer of reliance exists, or whether the lease provisions simply amount to a merger clause, which would not disclaim reliance. The question of whether an adequate disclaimer of reliance exists is a matter of law. The analysis of the parties' intent in this case begins with the typical rules of contract construction.

Prudential focuses on section 14.18 of the lease contract, suggesting that Italian Cowboy's fraud claim is barred by its agreement that Prudential did not make any representations outside the agreement, i.e., that Italian Cowboy impliedly agreed not to rely on any external representations by agreeing that no external representations were made. Standard merger clauses, however, often contain language indicating that no representations were made other than those contained in the contract, without speaking to reliance at all. Such language achieves the purpose of ensuring that the contract at issue invalidates or supersedes any previous agreements, as well as negating the apparent authority of an agent to later modify the contract's terms. The court disagreed and held that the only reasonable interpretation of the contract language at issue here is that the parties to this lease intended nothing more than the provisions of a standard merger clause, and did not intend to include a disclaimer of reliance on representations. Pure merger clauses, without an expressed clear and unequivocal intent to disclaim reliance or waive claims for fraudulent inducement, have never had the effect of precluding claims for fraudulent inducement.

To disclaim reliance, parties must use clear and unequivocal language. This elevated requirement of precise language helps ensure that parties to a contract—even sophisticated parties represented by able attorneys—understand that the contract's terms disclaim reliance, such that the contract may be binding even if it was induced by fraud. Here, the contract language was not clear or unequivocal about disclaiming reliance. For instance, the term "rely" does not appear in any form, either in terms of relying on the other party's representations, or in relying solely on one's own judgment.

The court then discussed Italian Cowboy's fraud claims, which the Court of Appeals did not deal with and, holding that the actions of the property manager were actionable as fraud, remanded the fraud claims to the Court of Appeals for further consideration.

The court then dealt with the claims of breach of the implied warranty of suitability. In a commercial lease, the lessor makes an implied warranty that the premises are suitable for the intended commercial purposes. Specifically, a lessor impliedly warrants that at the inception of the lease, no latent defects exist that are vital to the use of the premises for their intended commercial purpose. Moreover, a lessor is responsible for ensuring that essential facilities will remain in a suitable condition. However, if the parties to a lease expressly agree that the tenant will repair certain defects, then the provisions of the lease will control.

Here, Italian Cowboy did not expressly waive the implied warranty of suitability. However, it did accept responsibility to make certain repairs that might otherwise have run to Prudential as a result of the implied warranty of suitability. The parties dispute whether Italian Cowboy's responsibilities under the lease included repairs to the particular defect in the premises—the sewer gas odor, or its cause. While Italian Cowboy characterizes the defect as the presence of the odor itself, the court said that the proper analysis of the defect in this particular case must inquire into the cause of the odor because this is the condition of the premises covered by the duty to repair. Italian Cowboy offered uncontroverted evidence that a grease trap had been improperly installed, causing raw sewage to back up from the sewer lines. The court looked to the lease to see which party had the responsibility for repairing that defect.

The lease provided that the landlord was responsible for repairs to the common area and for structural repairs. At various points, the lease assigned repair obligations in different ways to both parties. With respect to plumbing matters, however, the court noted that while Italian Cowboy may have assumed at least some duty to repair, it was at the same time expressly precluded from making alterations to utility lines or systems without consent. Although the court of appeals did not discuss it, the trial court credited this distinction, finding the fact that "structural components and ... utility lines or systems serving and within the Premises ... ultimately had to be altered (not just repaired) to arrest the sewer gas odor. Because, as the court noted, the ultimate cure for the odor problem was an alteration of the sewer lines, and because Italian Cowboy was prohibited from making alterations, the obligation was Prudential's and this was covered to the implied warranty.

The court also noted Prudential's obligation to maintain the common areas, which included sanitary sewer lines. Thus, Prudential was not relieved by the contract from liability for breach of the implied warranty of suitability as to a latent defect in facilities that were vital to Italian Cowboy's use of the premises as a restaurant.

Prudential asserts that even if rescission might have been proper at some point, Italian Cowboy ratified the lease by continuing in the lease for a period of time after having knowledge of the defect. However, even if ratification were a defense to breach of the implied warranty of suitability, Italian Cowboy's actions in this case could not give rise to ratification. Texas law requires only that one rescind within a reasonable time from discovering the grounds for rescission. The court reviewed the facts and determined that Prudential failed to establish ratification. It was in no way injured or suffered unjust consequences by Italian Cowboy's temporary efforts alongside Prudential to remedy the odor. Moreover, Prudential has not established that Italian Cowboy waited an unreasonable

length of time to terminate the lease. The latent defect was not yet remedied—indeed, the underlying causes of the odor remained unknown—when Italian Cowboy closed and stopped paying rent, only a few weeks after the persistent odor materialized

Hoppenstein Properties, Inc.* v. *McLennan County Appraisal District, 341 S.W.3d 16 (Tex.App.-Waco 2010, pet. denied). Hoppenstein leased space to MCAD. The lease required Hoppenstein to construct some improvements and make repairs. The lease was to commence after completion of the work. The parties got into a number of disputes about the work and eventually, MCAD abandoned the leased premises. Hoppenstein then sued, claiming, among other things, future damages.

MCAD claims immunity from future damages. Hoppenstein contends that: (1) MCAD's immunity from suit has been waived by Local Government Code § 271.152 because the lease constitutes a contract for the provision of services to MCAD; and (2) the waiver of immunity provided by section 271.152 applies on a "contract-by-contract basis" rather than a "promise-by-promise basis."

Local Government Code § 271.152 waives the immunity from suit of certain local governmental entities for breach-of-contract claims arising from written contracts that state "the essential terms of the agreement for providing goods or services to the local governmental entity." The relevant inquiry is whether the lease entails "the provision of 'goods or services'" to MCAD. The term "services" is broad enough to encompass a wide variety of activities. The services provided need not be the primary purpose of the agreement, but they must be provided directly to the local governmental entity.

The construction addendum requires Hoppenstein to renovate the premises according to a floor plan agreed to by MCAD. Thus, the lease entails the provision of services to MCAD within the meaning of the statute. ***Kirby Lake Development, Ltd.* v. *Clear Lake City Water Authority***, 320 S.W.3d 829 (Tex. 2010).

Hoppenstein contends in its second issue that the waiver of immunity provided by section 271.152 applies on a "contract-by-contract basis" rather than a "promise-by-promise basis." Thus, Hoppenstein argues that MCAD's immunity is waived not only for damages flowing from any breach of the "services provisions" of the lease but also from any breach of the remainder of the lease terms. The court agreed with Hoppenstein. Here, the lost rentals Hoppenstein seeks to recover are those rentals which it would have received under the lease with MCAD, not from some other contract. These are direct damages.

Jones & Gonzalez, P.C.* v. *Trinh, 340 S.W.3d 830 (Tex.App.-San Antonio 2011, no pet.). To be liable for bad faith retention of a security deposit, a landlord must have failed to return the tenant's security deposit and a written list of itemized deductions, if any, for any portion of the security deposit that the landlord retains. Property Code § 93.005. The landlord must send to the tenant the remaining security deposit and the list of itemized deductions within sixty days of the tenant's surrendering possession of the premises. However, the sixty-day period does not start until after the tenant provides the landlord with a written statement of a forwarding address for the purpose of returning the security deposit. Given the penal nature of the statutory remedy, this requirement is strictly construed.

At trial, Trinh presented no evidence that the Tenant sent the Landlord a written notification of a forwarding address to where the Tenant's security deposit and list of itemized deductions should be sent. Because this requirement is strictly construed, it does not matter whether or not the Landlord had actual knowledge of an address where the Tenant could be

contacted. Thus, because the Landlord had no obligation to send the security deposit to the Tenant, the Landlord was not liable for bad faith retention of the Tenant's security deposit.

Mesquite Elks Lodge #2404 v. Shaikh, 334 S.W.3d 319 (Tex.App.-Dallas 2010, no pet.). The Lodge leased space in a shopping center. It gave a security deposit of $4,250 to the landlord. The lease was for a year ending April 30, 2005. In May of 2005, Shaikh bought the center from the original landlord. The Lodge had held over and ultimately give Shaikh notice that it intended to vacate in November of 2005. The Lodge moved out in December and asked for its security deposit. In January, Shaikh responded with a letter stating that damages to the property exceeded the deposit and demanding payment for the damages. After some time, the Lodge responded with a request for an accounting or a refund. Shaikh responded by re-sending the January letter and again demanding payment.

Shaikh filed suit for breach of the lease and damages. The trial court found in his favor and awarded damages. The court of appeals found that there was not sufficient evidence to support the damages awarded to Shaikh. When the injury to realty is reparable, the proper measure of damages is the reasonable cost of repairs necessary to restore the property to its prior condition. In question was the portion of damages related to replacing some steel doors. During the course of his testimony, Shaikh admitted replacing the doors would actually constitute an improvement of the space, rather than bringing it back to the same condition as when it was rented to the Lodge.

Five Star International Holdings Incorporated* v. *Thomson, Incorporated, 324 S.W.3d 160 (Tex.App.-El Paso 2010, pet. denied). Thomson leased 950,000 square feet of commercial and industrial space from Five Star. Thomson was to pay base rent and "additional rent" comprised of CAM, taxes, and insurance. Five Star was required to submit annual statements of additional rent and Thomson was to pay based on estimates during each year, subject to an adjustment at the end of each year. If payments were less than actual expenses, Thomson would pay the landlord the shortfall and if payments were more than actual, Thomson would get a refund. Between 1998 and 2005 Thomson paid approximately 2.3 million dollars for CAM, over 3 million dollars in taxes, and approximately $226,000 for insurance.

Thomson filed suit against Five Star alleging Thomson had been overcharged for common area expenses. In its third amended petition, Thomson also alleged that Five Star had breached the lease agreement by consistently overcharging Thomson for property taxes and common area expenses and by refusing to refund the overpayments. Thomson claimed that it was overcharged for property taxes because Five Star did not pass on the benefit of tax abatements and exemptions which the landlord received from local taxing authorities. At trial, Thomson also claimed that Five Star failed to segregate the property taxes due on the leased property from the taxes due on the larger tract, and was therefore billing Thomson for taxes owed on property beyond the acreage covered by the lease.

The lease also required Thomson to sign estoppel certificates from time to time certifying, among other things, that there were no defaults on the part of the landlord. The lease provided that, if Thomson failed to provide the estoppels, its failure was conclusive that: (1) the lease was in full force and effect; (2) there were no uncured defaults in the landlord's performance; (3) not more than one month's rent and charges had been paid in advance; and (4) the lease had not been modified. F–Star made two estoppel certificate requests which were not timely answered by Thomson; one in 2003, and another in 2005.

The jury found in favor of Thomson and also found that Thomson had not waived its

right to recover the overpayment.

Five Star challenged the jury's finding that Thomson had not waived its right to a refund. Waiver is an affirmative defense for which Five Star bore the burden of proof at trial. When a party attacks the factual sufficiency of an adverse finding on an issue on which it has the burden of proof, it must demonstrate that the finding is against the great weight and preponderance of the evidence. While the lease provisions relating to estoppel certificates and the related certificate requests may serve as evidence contradicting the jury's finding, a court may not consider such evidence in a "matter of law" legal sufficiency review unless it first determines there is no evidence in the record to support the finding. The court noted that at the time the estoppel certificates were requested, the parties were already involved in litigation. The evidence of Thomson's actions in pursuit of its claims supports the jury's determination that the company did not intend to surrender its right to recovery. As this constitutes some evidence in support of the verdict, the court may not consider evidence to the contrary in its review. Therefore, the evidence is legally sufficient to support the jury's verdict regarding the estoppel certificates.

Hoppenstein Properties, Inc.* v. *Schober, 329 S.W.3d 846 (Tex.App.-Fort Worth 2010, no pet.). A tenant's assertion that a landlord failed to mitigate damages is an affirmative defense. Thus, the tenant properly bears the burden of proof to demonstrate that the landlord has failed to mitigate damages and the amount by which the landlord could have reduced its damages. A defendant is not entitled to any reduction in the amount of damages if it does not prove the amount of damages that could have been avoided.

Here, the jury awarded the landlord only the amount of the past due rental that had accrued before the tenant vacated the premises. The jury did not award any amounts—rental, late fees, cost of improvements to the premises (all authorized by the lease agreement in the event of a tenant default)—for any time after the tenant vacated the premises. But the tenant failed to prove that the landlord could have immediately rented the premises and therefore avoided all damages. Accordingly, the court held that the evidence was factually insufficient to support the jury's finding that the landlord sustained no post-abandonment damages because of the tenant's breach.

GKG Net, Inc.* v. *Mitchell Rudder Propertyies, L.P., 330 S.W.3d 426 (Tex.App.-Houston [14th Dist.] 2010, no pet.). Traditionally, Texas courts have regarded the landlord whose tenant has abandoned the lease before the end of its term as having four options. First, the landlord can maintain the lease and sue for rent as it becomes due. Second, the landlord can treat the breach as an anticipatory repudiation, repossess, and sue for the present value of future rentals reduced by the reasonable cash market value of the property for the remainder of the lease term. Third, the landlord can treat the breach as anticipatory, repossess, release the property, and sue the tenant for the difference between the contractual rent and the amount received from the new tenant. Fourth, the landlord can declare the lease forfeited (if the lease so provides), and relieve the tenant of liability of future rent. If the landlord re-lets the premises for only a portion of the unexpired term, as here, then the measure of damages has two components: (1) the measure of damages for the period of re-letting is the contractual rent provided in the original lease less the amount realized from the re-letting, and (2) the measure of damages for that portion or period of the lease term as to which there has been no re-letting is the difference between the present value of the rent contracted for in the lease and the reasonable cash market value of the lease for its unexpired term.

Moncada* v. *Navar, 334 S.W.3d 339 (Tex.App.-El Paso 2011, no pet.). Navar

bought the Moncadas' home at a foreclosure sale. When they refused to vacate, Navar brough an action to evict them. The JP ruled in Navar's favor and the Moncadas filed a notice of appeal and pauper's affidavit.

At the trial de novo in county court, Navar testified that he did not want the Moncadas as tenants and that there had never been a rental contract between him and the Moncadas. Juana Moncada testified the same; that she and her husband had never entered into any kind of agreement to rent the property from Navar. At the conclusion of the trial, the judge announced that the Moncadas had not properly perfected their appeal because they failed to pay rent into the court's registry. She signed an order of dismissal, which states that the Moncadas "failed to perfect the appeal as required by Texas Rules of Civil Procedure 749(b)." The Moncadas appealed the dismissal to the court of appeals.

Within five days after a justice of the peace signs a judgment in a forcible entry and detainer case, a party may appeal to a county court by filing either a bond or a pauper's affidavit. If the appellant files a pauper's affidavit, the appellee has five days to contest the affidavit. If the appellee does not contest the affidavit, it will be considered approved. When an appeal bond has been timely filed in conformity with Rule 749 or a pauper's affidavit approved in conformity with Rule 749a, the appeal is perfected.

The court of appeals held that the county court mistakenly relied on Rule 749b, which states that the tenant has to timely pay rent into the registry of the court in a nonpayment of rent case. By its terms, Rule 749a applies only if a suit for rent has been joined with the suit for forcible detainer. In this case, the complaint did not allege that the Moncadas failed to pay rent.

Navar alleged that he had sent a letter to the Moncadas requesting they pay rent into the court registry every month until resolution of the appeal. The court said that Navar's letter did not establish an agreement to pay rent. At most, the letter is an offer to enter into a rental agreement.

Furthermore, even if Rule 749b applied to this case, it would have no effect on the Moncadas's perfection of their appeal to the county court. In focusing on Rule 749b, Navar, like the county court, ignores Rule 749c, which expressly defines when an appeal is perfected. In the case of an indigent appellant, all that Rule 749c requires is the approval of a pauper's affidavit.

Rule 749b simply provides a procedure by which an indigent appellant may remain on the premises during the appeal: an appellant who appeals by filing a pauper's affidavit "shall be entitled to stay in possession of the premises during the pendency of the appeal" by complying with the procedures set forth in the rule. One of the rule's procedures is that the appellant "must pay into the justice court registry one rental period's rent." Isolating the word "must," Navar argues that paying rent is mandatory whenever an appellant appeals with a pauper's affidavit. Read in context, however, it is clear that paying rent is mandatory only if the appellant wishes to stay on the premises during the appeal.

Thus, the court held that the county court erred in concluding that the Moncadas' failure to pay rent into the court registry precluded them from perfecting an appeal.

PART VII
VENDOR AND PURCHASER

Barham* v. *McGraw, 342 S.W.3d 716 (Tex.App.-Amarillo 2011, no pet.). The case begins with these two quotes: "Blood may be thicker than water, but money beats everything." Lizzy. And "He that is greedy of gain troubleth his own house." Proverbs 15:27. It goes on to detail a battle between brother and sister over the settlement of their

father's estate.

When father died, the real property became the corpus of a trust to benefit his widow, Margie. After her death, it was to be distributed to father's descendants, including his children Bobby and Patricia.

At some point, Margie, as trustee of the trust for her benefit, had the power to convey the property, so she did so by conveying some to Bobby and Patricia. Bobby thought the conveyances were unfair and resulted in Patricia getting more than he did. He came to this conclusion based upon a writing between him, Patricia, and Margie that had "partitioned" the property. He claimed the actual conveyances varied from the agreement.

Because Bobby had been praying for guidance and felt very comfortable with proposals that were made and was so sure that the way his sister convinced Margie to make the conveyances was so unfair to him and his family that he could not let the matter go unchallenged, he sued his sister and sought the specific performance of the so-called partition agreement.

To be entitled to specific performance, an agreement must be valid and enforceable. But, a deed or conveyance that does not sufficiently describe the land to be conveyed is not of such ilk. The agreement merely mentioned the properties by common names, like Sheppard Place and Rutledge Place. When the essential elements of a property's description are left to inference or to development by parol, the description is insufficient to support a suit for specific performance irrespective of whether the parties themselves understood what land formed the subject matter of the conveyance.

Bobby, however, argues that there need not be an adequate description in the letter since the document merely evinced a partition of lands. Authority does exist indicating that a partition is not subject to the statute of frauds. Nonetheless, Bobby's argument rests upon a false premise. The document at issue cannot be construed as a partition. The latter serves to divide property owned by co-tenants and concerns possession, not title. Neither Patricia nor Bobby had a right to possession of any realty held in the trust. Right to possession resided in Margie, the trustee. This agreement was not a partition.

Ganim* v. *Alattar, 54 Tex.Sup.Ct.J. 1260 (Tex. 2011). Ganim and Alattar were friends who began looking for properties to invest in together. They visited a 3,800 acre tract in Washington County that was for sale. Two days later Alattar, while accompanied by Ganim, executed an agreement as "Frank Alattar, Trustee" to purchase the Property.

In the days following Alattar's execution of the purchase agreement, Alattar, Ganim and their lawyers exchanged documents culminating in Alattar and Ganim executing an Agreement of Limited Partnership. Despite Ganim and Alattar each signing the LP Agreement, they later disputed whether it correctly reflected the terms of their agreement. Because of the disagreement, Alattar notified Ganim that he would not enter into a partnership and denied that Ganim had, or would have, any interest in the Property. Ganim subsequently sued Alattar. While suit was pending the sellers conveyed the Property by special warranty deed to "Farouk Alattar, Trustee." Neither the purchase agreement nor the deed identified a trust or named any trust beneficiaries.

Ganim's position at trial was that he and Alattar agreed to purchase the Property as partners and six documents, taken collectively, established that Alattar acquired the Property on behalf of the Partnership. Alattar contended he had no agreement with Ganim to acquire the Property as partners. He insisted that he had purchased the property for himself and his family. The trial court ruled in favor of

Ganim, with the jury finding that the Property had been acquired by Alattar for the benefit of the Partnership.

The court of appeals reversed, concluding that the agreement was one for the sale of real estate and subject to the statute of frauds. The court of appeals held that the parties' agreement, alleged by Ganim to exist by reading six different documents together, did not comply with the statute of frauds because no single document contained the terms of the deal or the signature of the party to be charged. In addition, the six documents couldn't be read together because the later documents did not refer to each other.

Ganim argues that Alattar purchased the Property for their mutual benefit. Thus, Ganim contends, this was an agreement for the joint acquisition of real property, not a land purchase agreement, and it is not subject to the statute of frauds.

Alattar argues that Ganim has shifted positions on appeal: in the trial court he argued Alattar agreed to convey the Property to the partnership, but he now contends Alattar agreed to purchase the Property for the partnership and a second conveyance was not required. Alattar further contends that both of Ganim's positions fail because each requires Alattar to have purchased the Property as trustee for benefit of the partnership and such an agreement would be an express parol trust in land, which the Texas Trust Code makes unenforceable.

The court concluded that neither the statute of frauds nor the Texas Trust Code bar the enforcement of the agreement.

Business & Commerce Code § § 26.01(a), (b)(4) provides that a contract for the sale of real estate must be in writing. But the Supreme Court has long held that an agreement between two or more persons for the joint acquisition of land is not a contract for the sale of land and is not required by our statute of frauds to be in writing. ***Gardner* v. *Randell***, 70 Tex. 453, 7 S.W. 781, 782 (Tex. 1888); ***Reid* v. *Howard***, 71 Tex. 204, 9 S.W. 109, 110 (Tex. 1888); ***James* v. *Fulcrod***, 5 Tex. 512 (1851).

The agreement found by the jury was that Alattar purchased the Property for the Partnership. It was not an agreement for the sale of real estate nor did it create an express trust. Thus, it was not required to comply with the provisions of either Business & Commerce Code § 26.01 or the Trust Code provisions in Property Code § 112.004.

Fitzgerald* v. *Shroeder Ventures II, LLC, 345 S.W.3d 624 (Tex.App.-San Antonio 2011, no pet.). The earnest money contract contained a provision for attorneys' fees that said the "prevailing party" in any legal proceeding would be entitled to recover reasonable attorneys' fees. After the sale, Schroeder, the buyer, sued the seller, Fitzgerald, for fraud and other things. The jury found in favor of Fitzgerald on all of the liability questions. The jury also awarded Fitzgerald attorneys fees for the trial and appeal to the court of appeals.

Schroeder claimed that under the Supreme Court's recent ruling in ***Intercontinental Group Partnership* v. *KB Home Lone Star, L.P.***, 295 S.W.3d 650 (Tex. 2009), because they were not "prevailing parties" as defined in that case. The trial court agreed and did not award the attorneys' fees. Fitzgerald sued.

Generally, a trial court's award of attorney's fees is reviewed for an abuse of discretion. The trial court has discretion to fix the amount of attorney's fees, but it does not have discretion to deny attorney's fees entirely if they are proper.

In ***Intercontinental***, KB Homes sued Intercontinental for breach of contract, and sought money damages for lost profits. The jury found in favor of KB Homes on its breach of contract claim, but awarded no damages. Intercontinental counterclaimed against KB Homes for breach of contract,

but the jury found no breach of contract by KB Homes. In its opinion, the Texas Supreme court concluded KB Homes was not entitled to an award of attorney's fees under the contract because even though it had obtained a breach of contract finding in its favor, it had not obtained any damages. Because KB's goal in the litigation was recovery damages, the Texas Supreme Court concluded KB Homes had not prevailed in any meaningful sense. In announcing its holding, the Supreme Court stated that, to prevail, a claimant must obtain actual and meaningful relief, something that materially alters the parties' legal relationship. A plaintiff must prove compensable injury and secure an enforceable judgment.

Here the court said that the ***Intercontinental*** decision illustrates what a plaintiff must accomplish; it does not answer the question of what a defendant must do to be a prevailing party. Because ***Intercontinental*** is tailored to what a plaintiff must do, it is not provide a reason for denying attorneys' fees in this case. The court pointed out that the ***Intercontinental*** case did not deal with the defendant's right to attorneys' fees because the defendant in that case did not preserve the issue on appeal.

Epps* v. *Fowler, 54 Tex.Sup.Ct.J. 1759 (Tex. 2011). A defendant is not a prevailing party when the plaintiff nonsuits a claim without prejudice unless the court determines, on the defendant's motion, that the plaintiff took the nonsuit in order to avoid an unfavorable judgment. Because a nonsuit with prejudice immediately alters the legal relationship between the parties by its res judicata effect, a defendant prevails when the plaintiff nonsuits with prejudice.

SP Terrace, L.P.* v. *Meritage Homes of Texas, LLC, 334 S.W.3d 275 (Tex.App.-Houston [1st Dist.] 2010, no pet.). SP Terrace entered into an earnest money contract with Meritage to develop and sell ninety-six lots in a proposed Harris County subdivision. The development plan required small and narrow lots, and Meritage was one of a few builders who could construct houses to fit the particular lot sizes. The contract terms required SP Terrace to improve the overall subdivision. In particular, it required SP Terrace to file a subdivision plat with Harris County by a December 31, 2005 substantial completion deadline. After substantial completion, Meritage would then purchase the lots in a series of transactions. If SP Terrace did not achieve substantial completion by December 31, 2005, Meritage could terminate the contract and recover its earnest money deposit. But, if Meritage delayed SP Terrace's performance of its contractual obligations, the substantial completion deadline would be extended to the extent of any such delay.

On November 30, representatives from Meritage and SP Terrace met to discuss the project. At this point, SP Terrace was ready to file the subdivision plat. Meritage asked for changes to the plat, and it requested that SP Terrace postpone filing the plat to accommodate those changes. SP Terrace agreed, but informed Meritage that a six-month extension of the substantial completion deadline would be necessary to address these and any future changes to the development. The parties orally agreed to extend the substantial completion deadline, and the representatives of Meritage agreed to sign a written extension memorializing the oral modification. SP Terrace mailed a written agreement to Meritage before December 31, 2005, but never received a response.

The parties continued to work together to make changes and improvements to the development into early February 2006. But on February 3, Meritage informed SP Terrace that, due to SP Terrace's failure to meet the substantial completion deadline, Meritage was terminating the contract and demanding the return of its earnest money deposit.

SP Terrace first contends that an oral

modification to the contract exists and thus it is not liable for any breach associated with missing the December 31 deadline. Under the statute of frauds, a contract for the sale of real estate must be in writing and signed by the party charged with compliance with its terms. Generally, if a contract falls within the statute of frauds, then a party cannot enforce any subsequent oral material modification to the contract.

Usually, an oral modification extending performance would not ordinarily materially alter the underlying written contract and would be enforceable. However, in ***Dracopoulas* v. *Rachal***, 411 S.W.2d 719 (Tex.1967), the Texas Supreme Court held unenforceable an oral modification that extended the time for performance indefinitely. The court reasoned that the termination date of the contract was the hinge upon which still other contractual rights and duties turn, and extending the termination date indefinitely would destroy other contractual provisions that depended on the termination date to become operative. This case presents one of those circumstances. Even if the oral modification extending performance would not ordinarily materially alter the underlying written contract, when a party relies on the modification to assert that the other party is in material breach to excuse further performance, the modification then becomes material and unenforceable unless in writing.

Williams* v. *Dardenne, 345 S.W.3d 118 (Tex.App.-Houston [1st Dist.] 2011, no pet.). The Dardennes bought a house from the Williams. They used a TREC form. The form contained a line that said "Buyer accepts Property in its present condition; provided that Seller, at Seller's expense, shall complete the following specific repairs and treatments: _____. In the blank space, the parties typed in "Termite if necessary." The contract does not contain a merger clause or disclaimer of reliance on oral representations.

The Seller's Disclosure Statement asked the Williamses to list all inspection reports they had received in the last four years. They listed three, but did not list one they had received by didn't keep a copy of. Section 5.008 does not mandate the disclosure of prior reports. Two of the listed reports address the foundation, one saying that there were some issues, but said they were cosmetic and that the foundation was within an acceptable range given its age. The other saying that the foundation was not functioning and needed repair. The Dardenne's didn't remember seeing the second report, but admitted they had access to it.

The report not listed by the Williamses was the Knight Engineering Report, which more resembled a bid for repairs, but listed some of the same issues raised by the other reports. The Williamses did not retain Knight for the repairs so they couldn't give a copy to the Dardennes.

Before the closing, the Dardennes had the property inspected by their independently selected inspector. Before the inspection, the Dardennes told the inspector about the reports. Their inspector did not indicate that repairs were needed and said the foundation appeared to be working. The parties extended closing and provided for some repairs to the property, but did not provide for repairs to the foundation.

About six months after they purchased the property, the Dardennes noticed large cracks in the walls and that doors would not close. That was when they discovered the Knight Engineering Report and the bid for repairs. They then sued the Williamses for DTPA violations, fraud and negligent misrepresentation based on the failure to disclose the Knight Engineering Report. The jury found in favor of the Dardennes.

The Williamses contend that the "Acceptance of Property Condition" provision in the TREC form constitutes an "as is" clause. The Dardennes did not

disagree with that contention but claimed that it was fraudulently induced.

Fraudulent inducement is a particular species of fraud that arises only in the context of a contract and requires the existence of a contract as part of its proof. That is, with a fraudulent inducement claim, the elements of fraud must be established as they relate to an agreement between the parties. The elements of fraud are that a material representation was made, the representation was false, the speaker knew the statement was false when made, the statement was made to induce reliance, it did induce reliance, the reliance was justifiable, and the relying party suffered injury as a result.

Under certain circumstances, a buyer's independent inspection of the property may conclusively defeat two elements of a fraud claim: causation and reliance. Although the courts of appeals have articulated different tests for when a buyer's independent inspection will defeat causation and reliance as a matter of law, the courts have consistently applied these tests such that a buyer's independent inspection precludes a showing of causation and reliance if it reveals to the buyer the same information that the seller allegedly failed to disclose. This is consistent with the principle that a party who has actual knowledge of specific facts cannot have relied on a misrepresentation of the same facts.

The issue, then, is whether the Dardennes presented any evidence of reliance to support their claim for fraudulent inducement. In the context of fraudulent inducement, this requires evidence that the claimant would not have entered into the contract but for the alleged misrepresentation or fraudulent nondisclosure. The court said there is also evidence in the record that the Dardennes would have read the Knight Engineering letter if it had been listed in the seller's disclosure. The Dardennes did not review the second report, which was listed in the disclosure.

The court said that the absence of reliance evidence is particularly troublesome in this case, because the information contained in the undisclosed report was the same information contained in the reports that were disclosed. Because there is no evidence that the Dardennes would not have entered into the contract to purchase the property if the Williamses had listed the Knight Engineering letter in their disclosure, the trial court erred in failing to grant the Williamses' motion for judgment notwithstanding the verdict on the Dardennes' fraudulent inducement claim.

PART VIII
ADVERSE POSSESSION, TRESPASS TO TRY TITLE, AND QUIET TITLE ACTIONS

Dyer* v. *Cotton, 333 S.W.3d 703 (Tx.App-Houston [1st Dist.] 2010, no pet.). A co-tenant may not adversely possess against another co-tenant unless it clearly appears he has repudiated the title of his co-tenant and is holding adversely to it. Whether there has been a repudiation of a non-possessory co-tenant's title generally is a question of fact, but when the pertinent facts are undisputed, repudiation may be established as a matter of law.

Dyer received a deed to the property in question which purported to convey the entire fee simple estate to him, not the actual 1/7th interest owned by Baker. Dyer contends that, by claiming title in a conveyance that purported to convey the entire title to him—a conveyance that went unchallenged for the length of the statutory period—the co-tenancy relationship ceased to exist, and he was entitled to take actual title through adverse possession. Relying on ***Evans* v. *Covington,*** 795 S.W.2d 806 (Tex.App.-Texarkana 1990, no writ) and ***Easterling* v. *Williamson***, 279 S.W.2d 907 (Tex.Civ.App.-Dallas 1955, no writ).

The court disagreed. The two cases did not support Dyer's contention. Furthermore, co-tenants are not agents; a co-tenant may not convey more than his interest in the shared property. A deed by one co-tenant purporting to convey the entire interest in a part of the commonly owned land conveys such interest, and only such interest, in the land as the maker of the deed possesses. The mere recording of a deed to a claimant who initially entered into possession as a permissive user is no evidence of an adverse holding or the repudiation of the tenancy.

Also, a deed puts co-tenants on constructive notice of an adverse claim only if it is on record before they acquire their interests. The recordation of a deed after the other co-tenants have already acquired their property interests does not put those co-tenants on constructive notice that their co-tenant claimed an adverse interest. Record notice goes forward, not backwards

Gully* v. *Davis, 321 S.W.3d 213 (Tex.App.-Houston [1st Dist.] 2010, pet. denied). When adverse possession commences before a severance of the mineral estate, the adverse possession includes both the surface and mineral estate. Adverse possession commenced prior to limitations will extend to the mineral estate even if the titleholder severs the mineral estate before the limitations period has fully run. In contrast, possession of the surface estate that commences after a severance of the mineral estate is not sufficient to constitute adverse possession of the mineral estate. Thus, in this case involving adverse possession of the mineral estate in the 52–acre tract, William and Rosia Moore's adverse possession must have commenced before Camilla Davis severed the mineral estate by reserving it to herself in 1904.

In 1892, William and Rosia Moore began living on the 52 acres as husband and wife. At that time, and for at least 20 years preceding that time, George Moore, William's father, was George Davis's tenant on the land at issue in this appeal. In the 1879 deed, George Moore specifically stated he was George Davis's tenant on the property and would surrender possession of the property to George Davis on demand. Similarly, in 1889, the Prussia Harney lawsuit was filed and the judgment in that suit in 1898 stated George Moore was George Davis's "tenant in possession" of the property.

Because William and Rosia Moore's possession of the lands within the League was joint possession with George Davis, their adverse possession claim is limited to lands actually enclosed. But the record contains no summary judgment evidence showing the 52–acre tract was actually enclosed.

PART IX
EASEMENTS

Severance* v. *Patterson, 345 S.W.3d 18 (Tex. 2010, rehearing pending). This case answers certified questions from the United States Court of Appeals for the Fifth Circuit.

1. Does Texas recognize a "rolling" public beach-front access easement, i.e., an easement in favor of the public that allows access to and use of the beaches on the Gulf of Mexico, the boundary of which easement migrates solely according to naturally caused changes in the location of the vegetation line, without proof of prescription, dedication or customary rights in the property so occupied?

2. If Texas recognizes such an easement, is it derived from common law doctrines or from a construction of the Open Beaches Act?

3. To what extent, if any, would a landowner be entitled to receive compensation (other than the amount already offered for removal of the houses) under Texas's law or Constitution for the limitations on use of her property effected by the landward migration of a rolling

easement onto property on which no public easement has been found by dedication, prescription, or custom?

The central issue is whether private beachfront properties on Galveston Island's West Beach are impressed with a right of public use under Texas law without proof of an easement.

In April 2005, Severance purchased three properties on Galveston Island's West Beach. "West Beach" extends from the western edge of Galveston's seawall along the beachfront to the western tip of the island. One of the properties, the Kennedy Drive property, is at issue in this case. A rental home occupies the property. A public easement for use of a privately owned parcel seaward of Severance's Kennedy Drive property pre-existed her purchase.

Five months after Severance's purchase, Hurricane Rita devastated the property subject to the easement and moved the line of vegetation landward. The entirety of the house on Severance's property is now seaward of the vegetation line. The State claimed a portion of her property was located on a public beachfront easement and a portion of her house interfered with the public's use of the dry beach. When the State sought to enforce an easement on her private property pursuant to the OBA, Severance sued several State officials in federal district court. She argued that the State, in attempting to enforce a public easement, without proving its existence, on property not previously encumbered by an easement, infringed her federal constitutional rights and constituted (1) an unreasonable seizure under the Fourth Amendment, (2) an unconstitutional taking under the Fifth and Fourteenth Amendments, and (3) a violation of her substantive due process rights under the Fourteenth Amendment.

Texas has a history of public use of Texas beaches, including on Galveston Island's West Beach. These rights of use were proven in courtrooms with evidence of public enjoyment of the beaches dating to the nineteenth century Republic of Texas. But that history does not extend to use of West Beach properties, recently moved landward of the vegetation line by a dramatic event, that before and after the event have been owned by private property owners and were not impressed with pre-existing public easements. On one hand, the public has an important interest in the enjoyment of Texas's public beaches. But on the other hand, the right to exclude others from privately owned realty is among the most valuable and fundamental of rights possessed by private property owners.

The Open Beaches Act states the policy of the State of Texas for enjoyment of public beaches along the Gulf of Mexico. The OBA declares the State's public policy to be "free and unrestricted right of ingress and egress" to State-owned beaches and to private beach property to which the public "has acquired" an easement or other right of use to that property. Privately owned beaches may be included in the definition of public beaches. The Legislature defined public beach by two criteria: physical location and right of use. A public beach under the OBA must border on the Gulf of Mexico. Along the Gulf, public beaches are located on the ocean shore from the line of mean low tide to the line of vegetation, subject to the second statutory requirement that the public must have a right to use the beach. This right may be "acquired" through a "right of use or easement" or it may be "retained" in the public by virtue of continuous "right in the public since time immemorial."

The area from mean low tide to mean high tide is called the "wet beach," because it is under the tidal waters some time during each day. The area from mean high tide to the vegetation line is known as the "dry beach." The wet beaches are all owned by the State of Texas. However, the dry beach often is privately owned and the right to use it is not presumed under the OBA. The

Legislature recognized that the existence of a public right to an easement in privately owned dry beach area of West Beach is "dependant" [sic] on the government's establishing an easement in the dry beach or the public's right to use of the beach. Accordingly, where the dry beach is privately owned, it is part of the "public beach" if a right to public use has been established on it. The question is did the easement on the property seaward of Severance's property "roll" onto Severance's property?

The court reviewed the history of land ownership along the beaches of Galveston since the days of the Republic and eventually held that the State had divested its entire property interest in the dry beaches. It thus held that a public beachfront easement in West Beach, although dynamic, does not roll. The public loses that interest in privately owned dry beach when the land to which it is attached becomes submerged underwater. While these boundaries are somewhat dynamic to accommodate the beach's everyday movement and imperceptible erosion and accretion, the State cannot declare a public right so expansive as to always adhere to the dry beach even when the land the easement originally attached to is eroded. This could divest private owners of significant rights without compensation because the right to exclude is one of the most valuable and fundamental rights possessed by property owners. Texas does not recognize a "rolling" easement on Galveston's West Beach. Easements for public use of private dry beach property do change along with gradual and imperceptible changes to the coastal landscape. But, avulsive events such as storms and hurricanes that drastically alter pre-existing littoral boundaries do not have the effect of allowing a public use easement to migrate onto previously unencumbered property. This holding shall not be applied to use the avulsion doctrine to upset the long-standing boundary between public and private ownership at the mean high tide line. That result would be unworkable, leaving ownership boundaries to mere guesswork. The division between public and private ownership remains at the mean high tide line in the wake of naturally occurring changes, even when boundaries seem to change suddenly.

Land patents from the Republic of Texas in 1840, affirmed by legislation in the new State, conveyed the State's title in West Galveston Island to private parties and reserved no ownership interests or rights to public use in Galveston's West Beach. Accordingly, there are no inherent limitations on title or continuous rights in the public since time immemorial that serve as a basis for engrafting public easements for use of private West Beach property. Although existing public easements in the dry beach of Galveston's West Beach are dynamic, as natural forces cause the vegetation and the mean high tide lines to move gradually and imperceptibly, these easements does not migrate or roll landward to encumber other parts of the parcel or new parcels as a result of avulsive events. New public easements on the adjoining private properties may be established if proven pursuant to the Open Beach Act or the common law.

Brookshire Katy Drainage District* v. *Lily Gardens, LLC, 333 S.W.3d 301 (Tex.App.-Houston [1st Dist.], 2010 pet. pending). The District had an easement for a drainage canal across two tracts of land. It constructed a drainage ditch across both tracts and installed a concrete bridge across the ditch. Lily gardens acquired the two tracts. After buying them, Lily Gardens undertook to beautify the property for use as an outdoor event venue. Among other things, Lily Gardens added a picturesque covering to the cement bridge. Lily Gardens intended to use the bridge to transport visitors from a reception facility at the front of the property to a gazebo at the back. Lily Gardens left all existing structures in place and merely affixed the bridge covering to the existing bridge at ground level. It did not touch culverts or pipes beneath the

bridge.

The District sent Lily Gardens a letter demanding that it remove the covering, claiming that the structure was attached to the District's culverts, which interfered with the drainage plans and violated the easement. Lily Gardens refused to remove the covering. The District filed suit. The trial court found that the bridge covering did not encroach on the District's easement and that Lily Gardens was not required to remove it.

An easement does not convey title to property. Instead, an easement is a nonpossessory interest in another's property that authorizes its holder to use that property for a particular purpose. The contracting parties' intentions as expressed in the grant determine the scope of the interest conveyed. In determining the scope of an easement, a court may only imply those rights reasonably necessary to the fair enjoyment of the easement with as little burden as possible to the servient owner. If a particular purpose is not provided for in the grant, a use pursuing that purpose is not allowed.

Here, the easement's stated purposes was for "constructing, maintaining, operating, repairing, and re-constructing a drainage canal, including drains, ditches, laterals and levees." The bridge covering added by the Defendants is affixed to the preexisting cement bridge above the drainage canal, as distinguishable from construction in or obstructing the canal. It is undisputed that the cement bridge was built around the time the District built the drainage canal. The pictures attached as summary judgment evidence by the District show that the bridge covering was attached to this preexisting bridge. The District does not provide any evidence showing that the structure was actually built onto or extended into the drainage canal.

Boerschig* v. *Southwestern Holdings, Inc., 322 S.W.3d 752 (Tex.App.-El Paso 2010, no pet.). Boerschig sued SHI, alleging, among other things, that SHI violated the express "ranch road" easement by using it for its invitees to access a resort rather than a ranch, and to access nonappurtenant properties.

When considering the terms of an express easement, a court applies basic principles of contract construction and interpretation. The contracting parties' intentions, as expressed in the grant, determine the scope of the interest conveyed. Any doubts about the parties' intent are resolved against the grantor, or servient, estate, and the court adopts the interpretation that is the least onerous to the grantee, or dominant, estate in order to confer on the grantee the greatest estate permissible under the instrument.

Citing ***Marcus Cable Assocs.* v. *Krohn***, 90 S.W.3d 697 (Tex. 2002), Boerschig asserts that the easement may only be used as contemplated by the parties at the time the easement was entered into, that is, to access a ranch, not a commercial resort. In ***Marcus Cable***, the Supreme Court construed an easement that granted an electrical utility permission to construct and maintain "an electric transmission or distribution line or system" over private real property. Marcus Cable obtained permission from the electrical utility to attach cable lines and wiring to the utility's poles. The private property owners sued, claiming that the cable company did not have a valid easement and that they had not consented to the placement of the cable lines across their property. After determining that settled law had interpreted the terms "electric transmission" and "electric distribution" as referring exclusively to conveyances of electricity, the Supreme Court, relying on the specific language in the grant, held that the grant expressed in the easement encompassed only an "electric transmission or distribution line or system," not a use for cable television transmission. Thus, the Supreme Court concluded that the utility easement was limited to the purpose of

conveying electricity and declined to permit a use by Marcus Cable that went beyond conveying electricity.

Boerschig asserts that since the easement refers to the "McCracken Tinaja China Ranch," the "Cibolo Creek–Cienega Ranch," and the road as a "ranch road," the easement may only be used to access ranches, that is, a farm or establishment for rearing cattle and other stock, not to access commercial resorts. The court disagreed. The easement provides for a general right of ingress and egress. It does not provide that either party may only use the easement to access property that may only be used for those ranching purposes as claimed by Boerschig. Indeed, simply because the word "ranch" is contained in the title of a property does not mean that property is limited to such a use.

Further, although the properties may be labeled ranches or the road a "ranch road," those names are not sufficient by themselves to limit the easement's use to access only ranch properties, that is, to limit what the owners of the respective estates can do with their property. Indeed, an easement granted for general purposes of ingress and egress includes not only the use required at the time of the grant, but also the right to use the easement for any purpose connected to the use of the property. Absent any expressed language limiting or negating what the owners may do on their properties, the court declined to hold that simply labeling the properties ranches or the road a ranch road is sufficient by itself to limit the properties to ranching operations only.

Finally, the court noted that Boerschig was aware at the time the easement was granted that SHI was intending to operate a resort on its ranch.

Lambright* v. *Trahan, 322 S.W.3d 424 (Tex.App.-Texarkana 2010, pet. denied). Dedication of a roadway may occur as a result of either an express grant or dedication or by implication. Generally, an express dedication is accomplished by deed or written instrument. In order to complete the creation of a public easement by an express dedication of property, as here, there must be acceptance of the dedication by or on behalf of the public. This does not require a formal or express acceptance of a dedication by the public; rather, an implied acceptance by the public is sufficient. That is, by general and customary use, the public can accept a dedication.

In this case, the County has never provided any maintenance for any part of any of the roadways at issue. Rather, the property owners who use the roads have maintained those roads. There was no proffer of any evidence of a formal acceptance of the dedication by the County Commissioners' Court.

There was testimony that the "general public" uses the road. Specifically, census takers, ambulance drivers, and police were said to have regularly used the road. The use of a roadway by law enforcement officers, ambulance drivers, and census takers is not conclusive as to the intent of those members of the public to accept a dedication of a roadway as a public roadway. In similar fashion, such officials might use a hallway in an apartment building for access to an apartment within it without any thought that the hallways have been dedicated to public use. The trier of fact must infer the intent of the members of the public from its actions. Apparently, the trial court here did not infer that the public's use of these roads in these circumstances as described by the evidence sufficiently showed the intention of the public to accept them as public roads. Given the paucity of evidence on the issue of public acceptance and the fact that the burden to prove their acceptance lay with the proponents, the court believed a "reasonable and fair-minded" fact-finder could conclude that the proof of acceptance of the roadways by public use failed to meet the required burden.

Reaves* v. *Lindsay, 326 S.W.3d 276 (Tex.App.-Houston [1st Dist.] 2010, no pet.). The express easement involved in this case said it was for the "purpose of maintaining and keeping in repair a roadway and for the use, liberty, privilege and easement of passing and repassing in common with the grantor and others. When the Reagans sought to fence their property with a gate abutting the farm to market road and to install gates and cattle guards, the Lindsays sued, claiming that the easement entitled them to access the FM.

The intent expressed in the grant by the contracting parties determines the scope of the easement. The easement does not specifically address the use of gates or cattle guards. Instead, the Lindsays argue that the terms "liberty" and "roadway" in the easement grant them the right to the easement without gates, cattle guards, and other obstructions.

The grant's terms are not specifically defined so the court must give them their plain, ordinary, and generally accepted meaning. Liberty is defined as the "freedom from arbitrary or undue external restraint, esp. by a government." Liberty is also defined as "the state of being free within society from oppressive restrictions imposed by authority on one's way of life, behavior, or political views." These definitions suggest that liberty is a person's right or freedom to act without arbitrary or oppressive restraint. It is not a right to act without any restraint whatsoever.

The court said that it cannot hold that liberty, as a matter of law, means the right to ingress and egress free of gates, cattle guards, or other obstructions as suggested by the Lindsays. The Lindsays' interpretation extends beyond the plain and ordinary meaning of the term. Furthermore, there is no evidence in the summary judgment record that suggests that installing gates or cattle guards would be arbitrary or oppressive.

The Lindsays also claim that the term "roadway" in the easement grant supports a conclusion that the easement, as a matter of law, must be open and unobstructed. The Lindsays argue that the inclusion of the word "other" in the easement's grant of the right to pass and repass "in common with Grantor, his heirs and assigns, and others" suggests that the road was meant to be open to the public and, accordingly, free from obstructions. The court did not agree with the Lindsays that the use of the word "other" in the easement in this case compels the same conclusion as the use of the words to be "kept open as a pass-way for the traveling public." It read the language of the easement to acknowledge that people other than the actual property owners may occasionally use the road. To argue that all roads that are not used exclusively by their owners are public roads would eviscerate the concept of private roads.

The court held that the language of the easement does not address the issue of whether gates and cattle guards can be installed on the easement. This does not end the inquiry, however. When an express easement is stated in general terms, the easement implies a grant of unlimited reasonable use such as is reasonably necessary and convenient and as little burdensome as possible to the servient owner. No interest in real property passes by implication as incidental to a grant except what is reasonably necessary to the fair enjoyment of the property. This is a balancing test involving the question whether the Lindsays' claim to a right to a roadway without any gates or cattle guards is reasonably necessary and convenient and whether this claimed right puts as little burden as possible on the Reaveses.

Neither of the parties presented much evidence relevant to this balancing test in their motions for summary judgment. The Lindsays correctly argue that they have the right to use the entire easement as a roadway. The Reaveses state that they intend to use their land to raise cattle, but do

not explain why it would be too great of a burden to build a fence and gate alongside the easement tract rather than across the easement considering that their right to use the portion of land subject to the easement for raising cattle is secondary to the Lindsays' right to use it as a roadway.

The court thus held that the record was underdeveloped on the issue of whether an easement without gates or cattle guards is reasonably necessary and convenient for the Lindsays while putting as little burden as possible on the Reaveses. Accordingly, this could not have been a basis for summary judgment for either party.

PART X
HOMESTEAD

London* v. *London, 342 S.W.3d 768 (Tex.App.-Houston [14th Dist.] 2011, no pet.). Jeffrey and Leticia are divorced, but still arguing over money. After Jeffrey was awarded a judgment against Leticia, he learned that Leticia was about to sell her homestead and had instructed the title company to pay various creditors from the proceeds of the sale. Before the closing, Jeffrey asked the court to appoint a receiver and order Leticia to deliver the proceeds of any sale to the receiver. The court signed an order appointing a receiver to collect the sales proceeds from the homestead and pay them to Jeffrey.

In "partial compliance" with the court's order, Leticia delivered a portion of the sales proceeds to the receiver, and appealed the trial court's order. When some of Leticia's creditors were paid from the sales proceeds, the trial court requested (but did not order) that the funds be returned.

Receivership is a drastic remedy, to be used sparingly in the context of private litigation. Nevertheless, it is a matter committed to the trial court's discretion, and will not be disturbed absent a clear abuse of discretion.

The "turnover" statute is a procedural device used by judgment creditors to reach a debtor's non-exempt assets that otherwise would be difficult to reach by attachment or levy through ordinary legal process. Civil Practice & Remedies Code § 31.002. Under the turnover statute, the trial court can appoint a receiver to take possession of the debtor's non-exempt assets, sell them, and pay the debtor's creditors with the proceeds. But assets that are exempt from attachment, execution, or seizure are not subject to the turnover statute.

With certain exceptions inapplicable here, a homestead is exempt from seizure to satisfy creditors' claims. And if a homestead claimant sells her home, the sales proceeds similarly are exempt from seizure for six months.

On its face, then, the final judgment demonstrates that the trial court violated the turnover statute by appointing a receiver to hold the proceeds of the homestead's planned sale and by ordering Leticia to turn over the sales proceeds to the receiver. Because these actions violated the turnover statute, the trial court abused its discretion in issuing such an order.

Jeffrey contends that the statutory exemption applies only to those proceeds the debtor intends to apply toward the purchase of a new homestead within six months of the original homestead's sale. He therefore maintains that because Leticia expressed an intention to use some of the sale proceeds to pay for debts and living expenses rather than to buy a new homestead, she waived the exemption over that portion of the proceeds. Jeffrey argues that in issuing the turnover over, the trial court balanced Leticia's right to protect the homestead-sale proceeds from turnover for six months against Jeffrey's present right to preserve the homestead proceeds for distribution to him conditioned upon Leticia's failure to purchase a substitute homestead within the statutory six (6) month period. He additionally argues

that within the six months after the sale, Leticia is not free to use these proceeds to pay other creditors.

Each of these assertions is incorrect. Jeffrey did not have the right to preserve Leticia's homestead-sale proceeds, and Leticia did have right to use the proceeds to pay other creditors. In arguing to the contrary, Jeffrey relies on federal bankruptcy cases that he contends support his position that Leticia waived the exemption. But, unlike the federal cases on which Jeffrey bases his argument, this is not a bankruptcy case, and this is not a case involving an attempt to defraud a creditor. When a debtor files for bankruptcy protection, federal bankruptcy law limits a debtor's asset-management and debt-payment choices, but those limitations are inapplicable here. Instead, this is a case concerned with the validity of a turnover order. In the cases on which Jeffrey relies, no court held that a judgment creditor without a secured interest in the property could use the turnover statute to sequester exempt homestead-sale proceeds.

Jeffrey argued that certain dicta in his cases supported the "replacement homestead" requirement, but the court noted that the homestead statutes do not place any such limit on proceeds from a homestead sale. The statutory exemption for homesteadsale proceeds instead provides in its entirety, "The homestead claimant's proceeds of a sale of a homestead are not subject to seizure for a creditor's claim for six months after the date of sale." Property Code § 41.001(c). Thus, the statute limits the options available to creditors, not the options available to homestead claimants.

Finally, the court agreed to extend the beginning of the exemption period until the later of the issuance of the court's opinion or the release of funds to Leticia. Here, an unsecured creditor has caused the homestead-sale proceeds to be wrongfully withheld from the judgment debtor in an attempt to accomplish the very thing the statute forbids—payment of his debt from homestead-sale proceeds. Thus, it was quite appropriate to extend the beginning of the exemption period.

PART XI
BROKERS

Romo* v. *Payne, 334 S.W.3d 364 (Tex.App.-El Paso 2011, no pet.). Romo is a licensed mortgage broker who operated several businesses in El Paso. Romo's businesses focused on obtaining refinancing for homeowners facing foreclosure. In May 2004, the State of Texas and the Commissioner of the State sued Romo, alleging that he violated the Texas Mortgage Broker License Act and the DTPA. The State asserted that Romo employed loan officers from September 2002 to May 2004.

The central issue in this case is whether the Broker Act required loan officers to be licensed between the years of 2002 and 2004, which is when Romo employed Simpson and Blanchet. If licenses were not required, Romo could not have violated the Broker Act by allowing unlicensed loan officers to work for him and there would be no basis for requiring him to disgorge the profits he earned by reason of her employment.

The Broker Act is §§ 156.001-.508 of the Texas Finance Code. It was enacted in 1999 and has been amended several times. There are no prior cases construing its scope.

Romo cites two of the Broker Act's provisions—Section 156.201(b) and Section 156.204(c) of the Finance Code—to establish that licenses were not required. Between the years 2002 and 2004, Section 156.201(b) stated: An individual may not act or attempt to act as a loan officer unless the individual at the time is (1) licensed under the Broker Act, (2) sponsored by a licensed mortgage broker and acting for the licensed broker, or (3) exempt. Although

the plain meaning of Sections 156.201(b)(2) and 156.204(c)(4) indicates that a person did not need a license to work as a loan officer if she was sponsored by a mortgage broker, the State argues that this interpretation cannot be correct when the statutes are read in conjunction with Section 156.406. Section 156.406 provides: "A person who is not exempt under this chapter and who acts as a . . . loan officer without first obtaining a license required under this chapter commits an offense. However, the plain language of Section 156.201(b)(2) effectively provided an exemption for persons who were sponsored by a mortgage broker.

In short, the statutory language is plain, and the State has provided no compelling reason to deviate from it. The court focused on the statutory language because ordinary citizens should be able to rely on the plain language of a statute to mean what it says.

Clouse* v. *Levin, 339 S.W.3d 766 (Tex.App.-Houston[14th Dist.] 2011, no pet). Levin was an agent/independent contractor with Coldwell Banker. The Clouses were interested in buying a house and contacted Levin. Before making an offer on behalf of the Clouses, an agreement was signed by the Clouses and by Levin on behalf of Coldwell Banker. Levin individually was not a party to the agreement. The agreement specified that Coldwell Banker was the Clouses' "exclusive agent" from November 11, 2007 until May 11, 2008. The agreement also contained a provision indicating that Coldwell Banker would receive a three-percent commission on any real estate purchased by the Clouses in the market area. Before the end of November, the Clouses' offer on the house was rejected and they were no longer actively working with Levin to find a house.

In late December, the Clouses purchased a house in Katy through a different real-estate broker and agent. Coldwell Banker assigned its rights to commissions in the Clouse agreement to Levin and he sued the Clouses for breach of the agreement.

The Clouses argue there is no written contract between the Clouses and Levin as required under Occupations Code § 1101.806(c) and no proof Levin or Coldwell Banker were licensed in Texas as required under Occupations Code §1101.806(b). The court agreed with the Clouses. Although the agreement on which Levin based his action was in writing and signed by the Clouses, Coldwell Banker, not Levin, was the other party to the agreement. An agent cannot maintain action for commission when he was not a party to buyer-representation agreement. The court acknowledged that Levin pleaded and presented evidence that he had a right to recover under the agreement because Coldwell Banker assigned to Levin its right to collect commissions under the agreement. However, this theory of recovery was neither submitted to the jury nor proved as a matter of law.

S&I Management, Inc.* v. *Choi, 331 S.W.3d 849 (Tex.App.-Dallas 2011, no pet.). When Lee was looking to buy some property for a gas station, he met with Choi, who said he worked for The Michael Group real estate brokerage. They found a site and Lee agreed to buy it. Before the purchase, Lee and Choi were looking at other businesses in the neighborhood when Lee asked Choi about a nearby property with a defunct gas station. Choi told Lee that no one would move into that space because the gas station there was decrepit and old. After the purchase, Quiktrip opened a gas station on the lot with the defunct gas station, taking business away from Lee and reducing the value of his property. Lee sued Choi and The Michael Group for fraud and DTPA violations. The claims against The Michael Group were based on theories of vicarious liability under the doctrine of respondeat superior.

Under the doctrine of respondeat superior, an employer is vicariously liable for the negligence of an agent or employee

acting within the scope of his agency or employment even though the principal or employer has not personally committed a wrong. The justification for imposing this liability is that the principal or employer has the right to control the means and methods of the agent or employee's work. An employer is not vicariously liable for the torts of an independent contractor it hires because an independent contractor has sole control over the means and methods of the work. A contract between the parties that establishes an independent contractor relationship is determinative of the parties' relationship in the absence of extrinsic evidence indicating that the contract was a "sham or cloak" designed to conceal the true legal relationship of the parties or that despite the contract terms, the true agreement vested the right of control in the principal.

The Michael Group attached a form contract to its motion for summary judgment. The Independent Contractor Agreement provided that Choi was an independent contractor but that The Michael Group was "legally accountable" for Choi's activities. Nothing in the contract gave The Michael Group the right to control the means and methods of Choi's work.

Lee argues that the Agreement was insufficient to establish Choi's independent-contractor status as a matter of law because it does not identify the contractor and it is not signed by the alleged contractor. Under the statute of frauds, certain contracts are not enforceable unless they are in writing and signed by the person against whom enforcement of the contract is sought. However, The Michael Group was not seeking to enforce the Agreement against Choi or anyone else; it attached the Agreement to show the terms of the agreement between it and Choi.

Lee also points to the statement in the contract that "Contractor understands that Broker is legally accountable for the activities of Contractor." However, whether The Michael Group is vicariously liable to third parties under the doctrine of respondeat superior for Choi's torts depends on whether it had sole control over the means and methods of Choi's work. Nothing in the contract, and no other evidence presented by Lee, purports to give it that authority. The statement that "Contractor understands that Broker is legally accountable for the activities of Contractor" did not give The Michael Group sole control over the manner and means used by Choi to sell real estate.

The Independent Contractor Agreement established Choi's independent-contractor relationship with The Michael Group. Accordingly, the court concluded the trial court did not err in granting The Michael Group's traditional motion for summary judgment.

Neary* v. *Mikob Properties, Inc., 340 S.W.3d 578 (Tex.App.-Dallas 2011, no pet.). The brokers brought suit to recover commissions when the sale of eight apartment complexes to Comunidad. The purchase contract did not contain a provision for broker fees. The brokers claimed that a "Term Sheet" along with several e-mails exchanged around the time the contract was entered into constituted a contract for broker fees. Comunidad argued that the Term Sheet and other correspondence did not satisfy the requirements of Occupations Code § 1101.806(c).

The Term Sheet is signed by the parties; however, in handwriting above the signature lines appears the sentence, "This term sheet is a guideline only, and is not binding." The Term Sheet identifies the "Purchaser" as "A Texas limited liability company to be formed with 100% of the membership interest being owned by Comunidad Corporation, a Texas non-profit corporation (IRS 501 C-3)." Although the term "Seller" is used in the Term Sheet, no seller is identified. The "Property" is defined as "Those particular Apartment Communities commonly known as Harbortree, Balboa, Capital Estates, Wisteria Gardens, Oaks of

Brittany, Kensington Club I & II, Stonehaven at the Galleria, and Fondren Court. A separate LLC shall be formed for the purchase of each property." The Term Sheet also includes a paragraph entitled "Brokerage Fee."

A person may not maintain an action in this state to recover a commission for the sale or purchase of real estate unless the promise or agreement on which the action is based, or a memorandum, is in writing and signed by the party against whom the action is brought or by a person authorized by that party to sign the document. The brokers concede this provision applies to their claim for a commission, but contend that the statutory requirements have been met by reading together the Term Sheet and the e-mail messages.

To comply with Occupations Code § 1101.806(c), an agreement or memorandum must (1) be in writing and must be signed by the person to be charged with the commission; (2) promise that a definite commission will be paid, or must refer to a written commission schedule; (3) state the name of the broker to whom the commission is to be paid; and (4) either itself or by reference to some other existing writing, identify with reasonable certainty the land to be conveyed. The court held that the Term Sheet and e-mails did not amount to a written agreement to pay a commission.

First, the Term Sheet said it was "a guideline only and not binding." "Not binding" in this case means exactly that, not binding. Second, the Term Sheet provides that the "Seller" will pay the commission. The Term Sheet, however, never identifies the "Seller." Further, as to the requirements of a definite commission and the name of the broker to be paid, the Term Sheet provides that SJH and two others will receive a commission "equal to a total of 2.0% of the Purchase Price," and includes terms for payment. Neary, however, is not identified as a "broker to whom the commission is to be paid." Finally, as to the requirement that the agreement identify the property with reasonable certainty, the court pointed out that only the names of various apartment complexes were given. No further location or address is given, and no reference is made to any other existing writing that further describes or identifies the property. While a metes and bounds description is not necessary, the writing must furnish the data to identify the property with reasonable certainty. Parol evidence may be used to explain or clarify the written agreement, but not to supply the essential terms.

The court went on to hold that the Term Sheet was not rescued by the exchange of e-mails. Even when the Term Sheet and e-mail messages are read together, however, they indicate at most an effort to negotiate an agreement on the terms upon which a commission would be paid. The documents do not constitute a signed, written memorandum setting forth the essential terms of an agreement as required for strict compliance with the Occupations Code.

SJW Property Commerce, Inc.* v. *Southwest Pinnacle Properties, Inc., 328 S.W.3d 121 (Tex.App.-Corpus Christi-Edinburg 2010, pet. pending). At the tail end of a very long case dealing with fraud, tortious interference, and the like, the court dealt with a broker's claim for its brokerage fee. The seller argued that the listing agreement in question was unenforceable because it did not contain an adequate property description. The court said that it had reviewed Occupations Code § 11001.806(c) and found "that the statute merely requires that an agreement to sell or purchase real estate be in writing and signed by the party against whom an action is brought, which does not appear to support the seller's argument that the listing agreement is unenforceable. "We therefore reject the Palmer companies' argument that the Listing Agreement was unenforceable because it lacked an adequate property description."

This would certainly be news to the Texas Supreme Court, which has consistently held that § 11001.806(c) requires an adequate property description. The sufficiency of the description is determined by the test that is used in cases arising under the Statute of Frauds and the Statute of Conveyances. See ***Owen* v. *Hendricks***, 433 S.W.2d 164, 166 (Tex.1968), ***Texas Builders* v. *Keller***, 928 S.W.2d 479 (Tex.1996), and a whole lot of other cases.

PART XII
CONSTRUCTION AND MECHANICS' LIENS

Solar Applications Engineering, Inc.* v. *T.A. Operating Corporation, 327 S.W.3d 104, 54 Tex.Sup.Ct.J. 238 (Tex. 2010). After the contractor, Solar, substantially completed the project, disputes arose regarding the completion of certain remaining work and the attachment of liens on the property by subcontractors and Solar. TA eventually terminated the contract and refused to make final payment to Solar. TA argued that because Solar did not provide a lien-release affidavit, which TA argues was a condition precedent to final payment under the contract, Solar cannot recover for breach of contract. The Court of Appeals agreed with TA and held that the lien release provision was a condition precedent and that Solar failed to prove it complied with the lien-release provision.

The issue before the Supreme Court is whether the lien-release provision is a condition precedent to Solar's recovery for breach of contract and whether failure to provide it is a bar to recovery. TA reasonably argues that an owner who has paid the contract amount to the general contractor is entitled to a building free of subcontractor's liens. Solar contends, also reasonably, that it is entitled to the balance remaining under the contract for completing the project offset by the cost to remedy defects and omissions. Under normal circumstances, Solar might have provided a conditional lien-release affidavit to allow Solar to fulfill its obligation under the contract, to allow TA to be assured that it will not be double-billed for work on the project, and to allow the parties to resolve their dispute regarding the scope of the work. But the standard operating procedure broke down here, and the court of appeals ultimately ruled that TA was entitled to a windfall, even though the issue of breach or satisfaction of conditions precedent was not tried to the jury.

Whether Solar is barred from receiving the contract balance depends on whether the lien-release provision is a condition precedent to Solar's recovery for breach of contract. A condition precedent is an event that must happen or be performed before a right can accrue to enforce an obligation. Breach of a covenant may give rise to a cause of action for damages, but does not affect the enforceability of the remaining provisions of the contract unless the breach is a material or total breach. Conversely, if an express condition is not satisfied, then the party whose performance is conditioned is excused from any obligation to perform.

Solar claims that the court of appeals erred in concluding that the lien-release provision is a condition precedent because it lacks conditional language normally associated with express conditions. When the lien-release provision is read in context, Solar contends it constitutes a "hoop" or step that the general contractor must follow in order to collect final payment, not a condition precedent to sue and recover under the contract. Because a different and reasonable interpretation of the contract is possible, Solar argues the Court should construe the provision to prevent a forfeiture. Further, the lien-release provision should not be applied as a condition precedent because its purpose—to protect TA from the possibility of having to pay twice—was accomplished by the trial court's severance of the subcontractors' claims against the project and order that the

sums awarded to Solar be held in trust to pay outstanding subcontractor liens.

In order to determine whether a condition precedent exists, the intention of the parties must be ascertained; and that can be done only by looking at the entire contract. In order to make performance specifically conditional, a term such as "if", "provided that," "on condition that," or some similar phrase of conditional language must normally be included. While there is no requirement that such phrases be utilized, their absence is probative of the parties intention that a promise be made, rather than a condition imposed.

The contract provided that final application for payment "shall be accompanied" by lien releases. The operative language does not contain language that is traditionally associated with a condition precedent. The language preceding the lien-release provision does not make performance conditional. In the absence of any conditional language, a reasonable reading of the lien-release provision is that it is a promise or covenant by Solar to provide a lien-release affidavit in exchange for receiving final payment. This interpretation avoids forfeiture and completes the contract: Solar is paid for the work it completed, and TA receives an unencumbered building. TA correctly noted in its motion for rehearing at the court of appeals that Solar's breach results in "a delay in payment to Solar until the liens are released." The court of appeals' contrary interpretation results in a forfeiture to Solar and a windfall to TA.

In re *Purported Liens or Claims against Samshi Homes, L.L.C.*, 321 S.W.3d 665 (Tex.App.-Houston [14th Dist.] 2010, no pet.). De Leon filed with the Harris County Clerk's office claims of liens against five properties in Harris County. In each instrument, De Leon stated that "in accordance with a contract with Vinay Karna," De Leon "furnished labor and materials for improvements to the ... property" owned by Karna. De Leon further stated in the instruments that "$4633.00 ... remains unpaid and is due and owing under said contract. [De Leon] asserts a lien on said improvements and premises to secure the payment of the amount claimed."

Samshi Homes filed its motion, alleging that it, and not Karna, was the owner of the five properties on which De Leon had filed the lien claims. The motion further states that Karna never entered into any agreement with De Leon. The motion concludes that the instruments in question are fraudulent as defined by Government Code § 51.901(c)(2), and that the documentation or instruments should therefore not be accorded lien status.

Government Code § 51.901(c)(2) authorizes a person or entity that owns real property, and has reason to believe that another has filed a document purporting to create a lien against that property, to file a motion with the district clerk alleging that the instrument in question is fraudulent, as defined by § 51.901(c), and therefore should not be accorded lien status. Section 51.903(c) authorizes a district judge with jurisdiction to rule on the motion. In doing so, the judge may make his or her determination based on a review of the instrument itself, without the benefit of testimonial evidence.

Section 51.901(c)(2) provides that an instrument filed for recording in the property records is presumed to be fraudulent if, among other things the document or instrument purports to create a lien or assert a claim against real or personal property or an interest in real or personal property and is not a document or instrument provided for by the constitution or laws of this state or of the United States.

Samshi Homes acknowledges that the instruments in question are attempts to create mechanic's liens under Property Code § 53.054, but argues that the instruments did not meet the requirements of that section, for

various reasons. All of Samshi Homes' contentions, however, go beyond the scope of sections 51.901 and 51.903 of the Government Code. In a proceeding pursuant to those sections, a trial court is limited to determining whether a particular instrument, or instruments, is fraudulent as defined in the statutes. It may not rule on the validity of the underlying lien itself or other claims between the parties.

As Samshi Homes acknowledges, the instruments De Leon filed are in the form of mechanic's liens, and, as such, are instruments provided for by the laws of this state and therefore not presumed to be fraudulent under section 51.901(c)(2)(A).

Gray* v. *Entis Mechanical Services, 343 S.W.3d 527 (Tex.App.-Houston [14th Dist.] 2011, no pet.). Gray was a subcontractor for Entis on the Tomball Property and four other properties. When he wasn't paid, he had his lawyer send a notice of intent to file a mechanic's lien on the Tomball property as well as the other properties. When he still wasn't paid, he filed a lien affidavit and sent a notice to Entis. He filed suit to collect.

Entis mailed a check for less than the amount owed, with a "paid in full" notation. Gray did not cash the check and refused to release his lien. So Entis filed its own lawsuit against Gray, alleging that Gray had violated Civil Practice & Remedies Code § 12.002 by filing a fraudulent lien. Entis moved for summary judgment and the trial court awarded it $10,000 plus attorneys' fees and entered an order discharging Gray's lien.

Entis, as the party asserting that appellant's lien was fraudulent, had the burden to prove the requisite elements of the statute. In order to establish a fraudulent-lien in this case, Entis's summary judgment evidence had to conclusively prove as a matter of law that Gray (1) made, presented, or used a document with knowledge that it was a fraudulent lien; (2) intended the document be given legal effect; and (3) intended to cause Entis financial injury. The court focused only on the third element, i.e., the intent to cause financial injury.

Entis's argument for Gray's intent to cause it financial injury was based on extrapolating that intent from the fact that Gray had filed lien affidavits on several properties and refusing to release them, making it appear that Entis did not pay its contractors or suppliers. (Oddly, the wording of Entis's affidavit was that "None of these liens have not been released." The court declined to address what, if any effect the use of a double negative might have had on this case.) Entis contended that this evidence established Gray's intent. The court disagreed.

First, the court could not see how liens filed on other properties had any relevance to the dispute in this case. Second, the court could not see how Gray's refusal to accept a "paid in full" check for a disputed amount established intent to cause financial harm as a matter of law. At most, the evidence creates a genuine issue of material fact for a jury to consider.

The concurring opinion pointed out reasons why the court should have considered the effect of the double negative in the affidavit.

Choy* v. *Graziano Roofing of Texas, Inc., 322 S.W.3d 276 (Tex.App.-Houston [1st Dist.] 2009, no pet.). Choy was the president of Windwater, which was owned by Tan Yu. Windwater hired Graziano to install roofs on new houses it was building. To pay for the work, Windwater had construction loans from Citibank and Frost. Graziano invoiced for the work and when it wasn't paid, it sued Windwater, later adding claims against Choy individually. Graziano alleged that, instead of paying Graziano with the construction loan proceeds, Choy had made the decision to misapply or had actually misapplied the funds received for that purpose by Windwater.

In typical order, draw requests were sent to the banks, the banks would approve the draw requests and send funds to Windwater. Choy testified that Tan Yu "possibly" took some of the funds received from these draw requests overseas. He did not authorize the construction loan proceeds going overseas, but he knew the loan construction proceeds owed to Graziano were taken overseas. Choy issued check and wire transfers from Windwater's operating accounts to Tan Yu when Yu directed him to do so. Choy stated that he did not have a choice as to whether to send money to Tan Yu rather than to contractors because Tan Yu was the owner of the company, and, if he had refused to comply, he would have been fired. Choy admitted he knew that Graziano and other contractors did not get paid for work they had completed. Choy also admitted that bank interest and some payrolls were not paid. Tan Yu also knew the contractors were not being paid for their work. Approximately $4.723 million was wired from Windwater to Tan Yu.

The Texas Supreme Court has indicated that the Act should be construed liberally in favor of laborers and materialmen. The Act was specifically enacted to serve as a special protection for subcontractors and materialmen, when contractors refuse to pay the subcontractor or materialman for labor and materials.

Choy also argues that the evidence is legally and factually insufficient to show that he was a trustee and that Graziano was a beneficiary of trust funds. Property Code § 162.002, entitled, "Contractors as Trustees," provides, "A contractor, subcontractor, or owner or an officer, director, or agent of a contractor, subcontractor, or owner, who receives trust funds or who has control or direction of trust funds, is a trustee of the trust funds." Choy testified that he was the President of Windwater and that he had control over the funds received from Frost and Citibank. Furthermore, he Vice–President of Graziano, testified that he received checks from Windwater and that the checks were signed by Choy. Choy produced no contrary evidence. Based on this evidence, the court concluded that Choy was a trustee of construction trust funds.

Likewise, Graziano was properly classified as a beneficiary of trust funds. A subcontractor who furnishes labor or material for the construction or repair of an improvement on specific real property in this state is a beneficiary of any trust funds paid or received in connection with the improvement.

Choy contends, however, that, as a trustee under the Act, he had no duty to pay out trust funds to a subcontractor who furnished labor or materials for the construction or repair of specific real property unless and until certain events occur in a particular sequence. Specifically, Choy contends that Graziano had to submit evidence that the labor and/or materials were provided prior to the receipt of trust funds and that the payment obligation arising therefrom is due and payable within 30 days of receipt of the trust funds. He contends that section 162.031 of the Act, entitled "Misapplication of Trust Funds," "permits a recipient of loan proceeds to use such proceeds for any purposes whatsoever provided they do not have at the time such loan proceeds are received any outstanding current or past due obligations as defined under Property Code Section 162.005(2)." He further contends that Graziano ignored the definition of current or past due obligations in section 162.005(2) and that there is a complete absence of any evidence that complies with Act's definition of 'current and past due obligations. Choy states that the term "due and payable" is limited to "no later than 30 days following receipt of the trust funds." He contends that "[i]f an obligation is not due and payable within 30 days of receiving the trust funds then those funds are not trust funds under the definitions of the Trust Fund Act." Finally, Choy claims that "there is no evidence in the record to prove" that Windwater was obligated to Graziano for

labor or materials furnished in the direct prosecution of work under a construction contract prior to the receipt of trust funds and that "such obligations were due and payable 30 days from the receipt of trust funds."

Any construction of the statute such as that Choy urges would be absurd. First, it would remove from the definition of "current and past due obligations" all past due obligations, rendering the statutory definition of "past due obligations" meaningless. Second, it would mean that borrowers like Windwater could request construction loan funds on the basis of an invoice for completed work, as here, and not have to pay the beneficiary whose invoice supported the borrower's draw request because the beneficiary invoiced the borrower before it requested the funds and did not specify that it required payment within 30 days after the borrower received the funds that were released by the bank to the borrower on the basis of the invoice. The court held that, by the plain language of the Act, the words "due and payable ... no later than 30 days" after a trustee's receipt of construction trust funds include invoices already due and payable at the time trust funds are requested by a trustee.

PART XIII
CONDEMNATION

In re *State of Texas*, 54 Tex.Sup.Ct.J. 1754 (Tex. 2011). After the State sought to condemn a tract of land, the owners subdivided the property into eight separate parcels. After the subdivision, the State added the owners as parties claiming an interest in the Acquisition, but the State nonetheless continued to proceed against the Acquisition as a single plot of land. The State's appraisal expert testified at the hearing that because of the lack of significant retail and commercial development in the area, the property should be appraised as a single unit and that its best and highest use was to hold the frontage for future commercial use. On this basis, the State appraised the land at $0.65 per square foot and valued the whole property, including the drainage easement, at $1,155,693.

The property owners' appraiser, however, appraised each of the eight subdivided tracts separately. He determined that the best and highest use of each of the tracts was as highway frontage commercial property. On this basis, he recommended total compensation of $4,145,000.

The special commission split the baby in half and awarded $2,487.991, apportioning it among the eight tracts. The property owners and the State both objected to the award and the case was transferred to the County Court.

The County Court then severed the case into eight different proceedings. The State contends that the severance was improper, and it sought a writ of mandamus requiring the trial court to vacate the order.

Courts permit severance principally to avoid prejudice, do justice, and increase convenience. The court has previously numerated several requirements for proper severance: (1) the controversy must involve multiple causes of action, (2) the severed claim would be the proper subject of a lawsuit if independently asserted, and (3) the severed claim must not be so interwoven with the remaining action that they involve the same facts and issues.

Assuming the validity of the conveyances, the court focused particularly on the issue of interrelatedness. The owners have sought to have one trial separated into eight, but in each case, the legal and factual issues would be much the same. The legal issues raised in the eight trials would be essentially identical, and, because the land was all originally part of a single plot, the factual valuation testimony would likely be very similar, even if the value of the different parcels varied somewhat. Both the

owners and the State would thus pay the same lawyers to argue, and same experts to testify, in eight separate cases, an issue that could be tried once. Such duplication is inconvenient, and, worse, prejudicial to the State, which has a right to offer evidence that the entire property being taken should be valued as a single economic unit.

Because of this, and because of the waste involved in having valuation experts give testimony eight times that they could give once, the court held that the trial court abused its discretion by ordering a severance that, by breaking up a deeply interrelated set of legal and factual issues, prejudices the parties and causes great inconvenience.

City of Edinburg* v. *A.P.I. Pipe & Supply, LLC, 328 S.W.3d 82 (Tex.App.-Corpus Christi-Edinburg 2010, pet. pending). The City condemned property, originally obtaining fee simple title to 9.869 acres of land. Later, it entered a Judgment Nunc Pro Tunc, replacing the original condemnation with a judgment taking a right-of-way easement over the property. The judgment was recorded in the real property records. The later judgment, however, was void because it was issued after the trial court's power had expired and because it purported to change the original judgment.

The owner of the 9.869 acres, White, then sold some property to API, which included the easement condemned by the City. The City then granted TxDoT an easement across the 9.869 acres to construct a drainage easement. TxDoT started removing dirt from the drainage channel and API sued claiming inverse condemnation.

In an earlier proceeding, TxDoT and the City argued that they were immune from a suit for inverse condemnation because API/Paisano did not have an interest in the property. They argued that, because the Nunc Pro Tunc judgment was void, the earlier judgment granting the City fee simple title was in effect, API had no ownership interest that could be inversely condemned and thus the court had no jurisdiction in this matter. The court disagreed and the case went to trial. TxDoT and the City filed a second plea to the court's jurisdiction.

In the second plea, TxDoT and the City argued that the first judgment was recorded in the official records of Hidalgo County, Texas on April 28, 2004. TxDoT and the City attached a certified copy of the first judgment showing its recording information.—before API's purchase of the property. Thus API, according to TxDoT and the City, could not be a BFP.

The City and TxDot further claimed that API's suit was not just for inverse condemnation but for trespass to try title, and they are immune from such a suit. The City and TxDot concede that the Texas Constitution waives sovereign immunity for inverse condemnation claims. They argue, however, that a proper inverse condemnation claim necessarily requires a showing that the claimant had a compensable interest in the property.

Property Code § 13.001(a) says "A conveyance of real property or an interest in real property or a mortgage or deed of trust is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved and filed for record as required by law." It is undisputed that both the first and second judgments were filed in the official property records prior to API's purchase. Additionally, the City and TxDoT do not dispute that they agreed to the second judgment and took steps to have it filed in the property records. The only dispute relates to the legal effect of these actions.

The City and TxDoT dispute that API can be a good faith purchaser for value. First, the City and TxDoT argue that API cannot rely on equitable doctrines, such as the good faith purchaser for value doctrine or estoppel, to take title away from a

governmental entity. However, the "good faith purchaser for value" doctrine is not merely an equitable doctrine—it is statutorily mandated, and no exception is made in the statute for governmental entities. In fact, other courts have applied the good faith purchaser for value doctrine as against a governmental entity.

The question remains, however, whether API had either constructive or actual notice of the City and TxDoT's claim to the property in fee simple. API does not dispute that it had notice or actual knowledge of both the first and second judgments, which were filed of record. The question is whether API should have known that, after the fact, the City and TxDoT would claim that the second judgment, to which they agreed and which they caused to be filed, was void. The court held that API was not required to inquire as to the effect or validity of the second judgment and was entitled to rely on the second judgment, filed in the official property records.

The City and TxDoT next argue that API's suit is really for trespass to try title and negligence, and they have sovereign immunity from these claims. TxDoT and the City's argument that this suit is one for trespass to try title is not supported by the law. A takings claim is not the functional equivalent of a trespass to try title claim or a suit to quiet title. The remedy for an inverse condemnation claim is just compensation for the taking, while a successful tres-pass to try title claim requires immediate transfer of possession of the property.

Circle X Land and Cattle Company, Ltd.* v. *Mumford Independent School District, 325 S.W.3d 859 (Tex.App.-Houston [14th Dist.] 2010, pet. denied). In 2002, the School District and Robertson County expressed their desire to acquire thirty acres of land to develop a sports and recreation complex. When the county decided to withdraw from the deal, the school district did not proceed with the acquisition. But the school district revisited the idea three years later, and on August 11, 2005, its board of trustees voted to start condemnation proceedings. A panel of three special commissioners reviewed the district's petition and approved the condemnation of thirty acres of Circle X's land. Circle X sued in district court claiming the school district had acted arbitrarily and capriciously in deciding to condemn the land.

Circle X contends the school district failed to conclusively establish that its governing body determined that Circle X's land was being taken for school purposes and that it was necessary. Specifically, Circle X contends that the only viable evidence the school district presented about the condemnation proceeding was the minutes reflecting the board of trustees' decision to condemn the property. The minutes reflect that "the Board approved to start condemnation procedures (eminent domain) on 30 acres of land presently owned by Holmes Estate." Circle X argues these minutes are vague and state no purpose for the condemnation.

Although the minutes do not expressly state the condemnation's purpose or necessity, the trial court properly considered all the evidence, including the affidavits, in concluding that the district in fact determined that the condemnation was for school purposes and a necessity.

City of Houston* v. *Guthrie, 332 S.W.3d 578 (Tex.App.-Houston [1st Dist.] 2010, pet. denied). The Fireworks Operators own and operate fireworks stands outside the Houston city limits. The Property Owners own the land that is leased to the Fireworks Operators. Both the Fireworks Operators and the Property Owners sued the City challenging its use of certain strategic partnership agreements and the Houston City Fire Code to ban the sale of fireworks outside the city limits.

The Fireworks Operators and the Property Owners claim the City's actions

constitute an unconstitutional taking, as well as an unconstitutional exercise of police power. They allege claims under the Texas Private Real Property Rights Preservation Act ("PRPRPA") for unlawful government taking of property and proprietary rights without just and due compensation. Government Code §§ 2007.001 et seq.

The City argues that the Fireworks Operators and Property Owners have failed to plead facts establishing (1) they have standing to bring any claims under PRPRPA and (2) any actions by either the City or the MUDs that would come within PRPRPA's waiver of immunity. PRPRPA waives sovereign immunity for certain governmental entities, so long as the other requirements of the statute can be satisfied. The statute unquestionably vests district courts with subject-matter jurisdiction to hear claims brought under the statute. However, PRPRPA limits the categories of persons who may bring suit under the statute. In addition, PRPRPA's waiver of immunity only applies to a limited scope of governmental actions.

To have standing to bring a claim under PRPRPA, plaintiffs must be "owners" who allege a "taking"—defined as either (1) a governmental taking under the United States Constitution or the Texas Constitution or (2) a governmental action reducing the market value of property by at least 25 percent. "Owner" is defined as "a person with legal or equitable title to affected private real property at the time a taking occurs."

The Fireworks Operators argue their position as leaseholders gives them sufficient interest in the real property to assert a claim under PRPRPA. While leaseholders may have some interest in real property sufficient—in some cases—to assert a constitutional takings claim, PRPRPA's use of the term "title" in the definition of "Owner" indicates title to a real property interest—whether surface, water, mineral or some combination thereof—must be held before a party has standing to sue under the act. Because their pleadings affirmative allege they are mere lessees, and actual title to the land is held by Property Owners, the trial court erred by denying the pleas to the jurisdiction as to Fireworks Operators' claims against the City.

Nevertheless, the Fireworks Operators argue they have standing to assert claims under PRPRPA because their leasehold interest is the equivalent of having "equitable title" in real property. The court disagreed. "Equitable title" is a right, enforceable in equity, to have the legal title to real estate transferred to the owner of the right upon the performance of specified conditions. In this case, Fireworks Operators do not allege they have a right to have legal title of the real property upon which their businesses are located transferred to them. Accordingly, under the facts as alleged, Fireworks Operators' leasehold interests do not constitute "equitable title" under PRPRPA. Therefore, they lack standing to asset any claims under this statute.

Garcia* v. *State of Texas, 327 S.W.3d 243 (Tex.App.-San Antonio 2010, no pet.). Garcia was charged with possession of marijuana in a drug free zone in an amount more than two ounces but less than four ounces. At the time of the arrest, Sergeant Cleghorn then went into the vehicle and saw a three-pound Folgers coffee can on the passenger side floorboard. Cleghorn knew that people who traffic narcotics like to use items like coffee and mustard to mask the odor of marijuana. Sergeant Cleghorn opened the can, which had a plastic lid on it but did not have a seal. Sergeant Cleghorn then pushed his finger down into the coffee, felt a plastic bag, and pulled it out. The plastic bag contained marijuana.

Garcia argues that by placing his bare hand in the coffee, the police officer destroyed consumable property in violation of the Takings Clause of the Fifth Amendment to the Constitution. Nice try, but when property has been seized pursuant

to the criminal laws or subjected to in rem forfeiture proceedings, such deprivations are not 'takings' for which the owner is entitled to compensation.

PART XIV
LAND USE PLANNING, ZONING, AND RESTRICTIONS

Lesley v. Veterans Land Board, 54 Tex.Sup.Ct.J. 1705 (Tex. 2011). The right to lease minerals — the executive right — is one "stick" in the bundle of five real property rights that comprise a mineral estate. The Supreme Court held long ago that the executive owes other owners of the mineral interest a duty of "utmost fair dealing," has seldom had occasion to elaborate. In this case, a land developer, who also owned part of the mineral estate and all of the executive right, imposed restrictive covenants on a subdivision, limiting oil and gas development in order to protect lot owners from intrusive exploratory, drilling, and production activities. The non-participating mineral interest owners complain that the developer, as the executive, breached its duty to them. The court of appeals held that the developer, never having undertaken to lease the minerals, had not exercised the executive right and therefore owed no duty to the other mineral interest owners. The court disagreed.

The Developer owned 4.100 acres southwest of Fort Worth. Lesley and others had conveyed the land to the Developer, retaining part of the minerals. The developer acquired the "full, complete and sole right to execute oil, gas and mineral leases covering all the oil, gas and other minerals in the following described land."

The Developer recorded restrictive covenants which, among other things, prohibited commercial oil drilling, development, refining, quarrying, or mining. The lots were sold to over 1,700 different owners, and in each case, the Developer conveyed the minerals, subject to the restrictive covenants and the previously reserved mineral interests. The deeds to the owners did not mention executive rights.

As the land was being developed, so was the Barnett Shale, which underlay a part of the subdivision. It was estimated that the subdivision sits on top of $610 million worth of minerals that cannot be reached outside the subdivision.

Lesley sued the Developer and the lot owners, one of which is the Veterans Land Board. The trial court held that the Developer had not conveyed the executive right and remained the exclusive owner of the executive right. The trial court also held that the Developer had breached its duty Lesley by imposing restrictive covenants limiting oil and gas development and by failing to lease the minerals. The trial court also held that the Developer also breached a requirement in the Lesley deeds by failing to give notice of its filing of the restrictive covenants. For these reasons, the trial court held that the restrictive covenants are unenforceable. The court of appeals reversed the trial courts holdings. It held that, because the Developer did not expressly reserve the executive right, it passed to the individual lot owners. It also held that the owner of an executive right owes a mineral interest owner no duty until the right is exercised by leasing the minerals, and then its duty is only to acquire for the mineral interest owner every benefit it acquires for itself. An executive has no duty to lease minerals. Because the Developer never exercised the executive right, it had no duty to Lesley. The Developer was not bound by the notice requirement in the Lesley deeds because the Developer was not in privity with Lesley and the requirement did not run with the land. The Supreme Court disagreed.

Everyone agreed that the Developer owned the executive right to all of the 4,100 acre mineral estate when it implemented the restrictive covenants. The dispute is

whether the deeds to the individual owners included the executive right. As noted, the deeds themselves did not mention the executive right. The Supreme Court has earlier held that, when a mineral interest is conveyed, the executive right incident to that interest passes to the grantee unless specifically reserved. That would mean that the individual deeds to lot owners conveyed the executive right. However, Lesley argued that the exception in each deed for the restrictive covenant limiting development of the minerals effectively reserved the executive right to the Developer because the covenant prohibited the lot owners from developing the minerals, and thus from leasing them. The court noted that this overlooks the provisions of the restrictions that allow the owners to modify the restrictions. The exception did not withdraw the executive right from the conveyances in the lot owners' deeds but merely subjected the exercise of the right to the covenant's limitations. Thus restricted, the right was conveyed by each lot owner's deed.

The court then turned to the principal issue in the case, i.e., the nature of the duty that the owner of the executive right owes the non-executive interest owner and whether that duty has been breached.

"The executive right is the right to make decisions affecting the exploration and development of the mineral estate", but it is "most commonly exercised . . . by executing oil and gas leases." Executive rights are frequently severed from other incidents of mineral ownership, as they were from the mineral interests reserved to Hedrick and Leslie. The non-executive mineral interest owner owns the minerals in place but does not have the right to lease them. The non-executive royalty interest owner owns an interest in the royalty when the executive leases the minerals. Non-executive interests may be perpetual or only for a term. They are created for many different reasons, among them the simple convenience of reserving the power to make leasing decisions in one person. And because executive and non-executive interests are real rather than personal, they survive the parties who created them and persist long after circumstances have changed. The executive right was conveyed decades before anyone contemplated developing a residential subdivision on the property or producing natural gas from the Barnett Shale beneath it.

For most mineral interest owners, revenue comes through leasing. If the exclusive right to lease the minerals could be exercised arbitrarily or to the non-executive's detriment, the executive power could destroy all value in the non-executive interest, appropriating its benefits for himself or others. The law has never left non-executive interest owners wholly at the mercy of the executive. But the variety of non-executive interests and the reasons for their creation, and the effects of changing circumstances, make it difficult to determine precisely what duty the executive owes the non-executive interest. The Supreme Court has held that the owner of the executive right has a duty of "utmost fair dealing."

The executive's duty of utmost fair dealing is fiduciary in nature, so that the discovery rule is invoked in determining when a claim against the executive accrues. The Developer and owners in this case were arguing that the Supreme Court's earlier decisions meant that the executive owner could not breach his duty until the executive power is actually exercised; the Lesley claimants argued that those cases held that the executive could be liable for failure to lease, even if not requested to do so. The court took a middle ground.

It may be that an executive cannot be liable to the non-executive for failing to lease minerals when never requested to do so, but an executive's refusal to lease must be examined more carefully. If the refusal is arbitrary or motivated by self-interest to the non-executive's detriment, the executive may have breached his duty. But the court said it need not decide here whether as a

general rule an executive is liable to a nonexecutive for refusing to lease minerals, if indeed a general rule can be stated, given the widely differing circumstances in which the issue arises. The Developer here did not simply refuse to lease the minerals in the 4,100 acres; it exercised its executive right to limit future leasing by imposing restrictive covenants on the subdivision. This was, said the court, an exercise of the executive right, and the court held that the Developer had breached its duty.

The remedy, said the court, was cancellation of the restrictive covenants. It recognized that the Developer, as a land developer, acquired the executive right for the specific purpose of protecting the subdivision from intrusive and potentially disruptive activities related to developing the minerals. But the common law provides appropriate protection to the surface owner through the accommodation doctrine.

PART XV
AD VALOREM TAXATION

F-Star Socorro, L.P.* v. *El Paso Central Appraisal District, 324 S.W.3d 172 (Tex.App.-El Paso 2010, no pet.). A taxpayer's protest with respect to amount of property taxes it was required to pay, whether categorized as a challenge to a tax "exemption," or a challenge to a tax "abatement," fell within catch-all category of action that the taxpayer was entitled to protest before appraisal district, such as to vest appraisal district with authority to review taxpayer's claim, and, thus, taxpayer's failure to pursue an administrative protest with appraisal district deprived trial court of jurisdiction over taxpayer's suit against appraisal district seeking a declaratory judgment that appraisal district had misapplied abatement agreements taxpayer had entered into with various entities when purchasing property in its annual property appraisals of taxpayer's property**.**

Genesis Tax Loan Services, Inc.* v. *Kothmann, 339 S.W.3d 104 (Tex. 2011). The Kothmanns have a vendors' lien on each of four tracts of land. Each lien is secured by a duly recorded deed of trust. At the purchaser's request, Genesis paid one year's ad valorem taxes on the tracts and claims a tax lien on each tract by transfer from the county tax collector. Each transfer is on a one-page form with two parts. The top part is entitled "Affidavit Authorizing Transfer of Tax Lien", signed by the owner, authorizing Genesis's payment of the taxes and the tax collector's transfer of the tax lien to Genesis. The bottom part is entitled "Tax Collector's Certification/Transfer of Tax Lien," signed on behalf of the tax collector, certifying Genesis's payment of the taxes, and transferring the tax lien to Genesis. Both the authorization and the certification bear notarized acknowledgments, including notarial seals. The certification did not bear the tax collector's seal of office because the office did not have one. Receipts issued to Genesis by the tax collector less than a month after the certifications were executed mistakenly showed the Kothmanns to be the owners of the tracts. The tax collector did not keep a record of the transfers.

The original tax lien transfers were never recorded. Instead, Genesis recorded a photocopy of each, attached to an affidavit by Genesis's president, stating that the original had been mailed to the county clerk but had been lost either in the mail or at the courthouse. Each affidavit stated that the attached lien transfer was a true and correct copy of the original.

Neither the Kothmanns nor Genesis was paid. The Kothmanns foreclosed their vendor's liens and purchased the tracts at the sale. When Genesis attempted to foreclose its liens, the Kothmanns sued to have their liens declared superior to Genesis's. The trial court ruled in favor of Genesis, but the Court of Appeals reversed, holding that Genesis had not pled the superiority of its lien as an affirmative defense but only as a general denial. The Court of Appeals also

held that for a tax lien to be enforceable, the original, not a photocopy, of the taxpayer's authorization and the tax collector's transfer must be recorded. That court said the appropriate remedy was to obtain replacement originals or to prove up the contents of the lost documents in a judicial proceeding.

The Supreme Court reversed and remanded.

The Court of Appeals' holding that a defendant must raise by affirmative defense a claim of lien superiority that competes with the plaintiff's claim is flawed in its premise: that all the plaintiff must do to establish a prima facie case is prove that its lien is senior. Seniority does not always establish superiority. A tax lien on real property is made superior by statute to many other liens on the property irrespective of when the liens were perfected. The Kothmanns' proof of when their liens were created and recorded was insufficient to establish the superiority of their liens. Given the statutory priority of tax liens, the Kothmanns were required to prove the invalidity of Genesis's tax liens in order to obtain judgment.

Even when the only issue in a lien-priority case is seniority, a plaintiff must do more to prevail than simply offer evidence of the date of its own lien and rest. The plaintiff must also prove that the defendant's competing lien is junior. The general denial of the plaintiff's claim puts the entire matter at issue.

With respect to the recording of affidavits and copies of the transfers instead of the original transfers, the court first noted that the statute does not expressly require that only original documents be recorded. The Court of Appeals held that originals were required in order to prevent fraud, but the Supreme Court said this concern is fully met by allowing a challenge to authenticity. And, while the court noted that a judicial proceeding was a viable means of proving up lost documents, it wasn't the exclusive means of doing so. However, looking to Rule 1003 of the Texas Rules of Evidence, the court noted that duplicates are admissible in court to the same extent as originals unless there is a question as to authenticity or the circumstances would render it unfair to admit the duplicate. The court saw this as an instructive way of dealing with the enforceability of tax lien transfers. "Decades since the invention of xerography and the manufacture of the photocopier, the only legitimate basis for refusing to consider a photocopy as conclusive evidence of an original document is that reason exists to think the photocopy is not an exact duplicate, because of alteration or in some other way." The court held that the tax liens are enforceable because verified copies were recorded in lieu of originals.

The Kothmanns also argued that the lien transfers were unenforceable because the tax collector had not attached the collector's seal of office. The collector didn't have a seal and didn't get one until a year later. The court held that the acknowledgment by a notary (with a seal) was sufficient. The court said that, if these transfers were unenforceable, then every other lien transfer before the collector bought his seal would be unenforceable as well, and the court wasn't willing to go there.

The Kothmanns also raised issues of enforceability because of the collector's failure to keep a record of all transfers and failure to issue receipts. The court held that these failures by the collector were irrelevant to the enforceability of Genesis's liens.

Gonzales* v. *Razi, 338 S.W.3d 167 (Tex.App.-Houston [1st Dist.] 2011, pet. pending). The Gonzalezes owned certain property that was foreclosed upon on May 1, 2007, due to outstanding taxes owed. The property was purchased by Razi. Razi recorded the sale in the county records on July 13, 2007.

Claiming the residence was their homestead, the Gonzalezes attempted to redeem their property. The Gonzalezes sent a letter to Razi at the address listed on the deed requesting an itemization of costs incurred by Razi. The address on the deed, however, was incorrect, and Razi never received the letter.

The Gonzalezes subsequently submitted affidavits to the county tax assessor-collector representing that they had made a diligent search for Razi in the county in which the property was located; that Razi was not believed to be a resident of the county; that they attempted to contact Razi multiple times to no avail; and that Razi, by avoiding contact with them, refused to give them a quitclaim deed to the property. They also delivered $16,757.29 to the county tax assessor-collector as the amount believed to be owed for redemption of the property. The county tax assessor-collector gave a receipt for redemption to the Gonzalezes.

One month later, Razi filed suit against the Gonzalezes seeking a declaratory judgment that the property was not their homestead and that they had not properly exercised their right to redeem the property.

Razi testified that the property was not listed as a homestead in the notice he received of the foreclosure sale. He visited the property once before the foreclosure sale and several times after the foreclosure sale. Razi never saw the Gonzalezes on the property. Razi also testified that the residence was uninhabitable at the time of his visits. The trial court held that the property was not the Gozalezes' homestead, so they appealed.

The court of appeals first had to determine who had the burden of proof as to the homestead issue. The party who brings an action for declaratory judgment is not necessarily the party that carries the burden of proof at trial. Ordinarily, the burden of proof is not imposed on the plaintiff merely because he files his petition first but because he asks for action on his behalf from the court, either preventive or in the nature of redress. The other party is usually content with the status quo. Both logic and fairness demand that the plaintiff shoulder the responsibility of convincing the court that action should be taken.

The parties' dispute concerns the application of Tax Code § 34.21 as it applied when the Gonzalezes took steps to redeem their property. The issue to be resolved is the position of the parties relative to the property when the suit was commenced. If an act of redemption under the section is presumptively effective, then the Gonzalezes held legal title to the property and Razi bore the burden of proof to obtain affirmative relief in undoing the redemption. If, instead, an act of redemption under the section is not presumptively effective, then title remained with Razi and the Gonzalezes bore the burden of proof to obtain affirmative relief in effectuating the redemption.

A reading of section 34.21 shows that an act of redemption by the original owner of the property is presumptively effective and whatever title was held at the time prior to redemption automatically reverts to the original owner. Furthermore, it has been the practice in Texas since at least 1909 to liberally construe redemption statutes in favor of redemption. Here, the court held that, based on the language of section 34.21, an act of redemption under the section is presumptively effective. Title to the property reverted to the Gonzalezes prior to trial, and Razi, by filing his action for declaratory judgment, was seeking affirmative relief. Accordingly, Razi bore the burden of proof at trial to overcome the presumption that the redemption.

The court then turned to the determination whether the property was homestead. Under section 34.21, if the property was their residence homestead, then the Gonzalezes had two years to redeem the property from the date the

purchaser's deed was filed for record. If the property was not their residence homestead, then the Gonzalezes had 180 days to redeem the property from the date the purchaser's deed was filed for record. It is undisputed that the Gonzalezes sought redemption of the property outside of the 180-day period but within the two-year period.

Razi bore the burden of proof as to the homestead issue. The Gonzalezes testified that they had owned the property since 1993. Jose Gonzalez testified that they had lived there since 1993, while Esperanza Gonzalez testified that they had a water well and septic tank installed in 1994 and they moved onto the property in 1995. The Gonzalezes both testified that they lived on the property continuously since 1993 or 1995 and that the property was their primary residence. Esperanza Gonzalez testified that their younger children attended school in the area and the address for the property was the address registered with the school.

The only other evidence concerning the status of the property as a residence homestead came from the testimony of Razi, based on his visits to the property, when he did not see the Gonzalezes in possession. That did not end the inquiry, however. Tax Code § 11.13 provides that a qualified residential structure does not lose its character as a residence homestead if the owner stops occupying the residence as a principal residence for a period of less than two years as long as the owner intends to return to the property as the principal residence and does not establish a different principal residence during the absence. Razi did not prove that the Gonzalezes hadn't lived in the house for more than two years.

Razi further argues that, because the home was uninhabitable, it was not "designed or adapted for human residence," a required element for property to qualify as a residence homestead. The court disagreed. A residential home and a mobile home are "designed for human residence." To hold otherwise would mean that any property with a residential home that suffers a natural disaster would automatically cause the owner to lose the residential homestead protections. The court would not read the statute so narrowly. Thus, the court held that Razi had failed to meet his burden of proof that the property was not homestead.

Razi then claimed that the Gonzalezes had not complied with the redemption statute. His argument was that they had failed to pay the proper amount for redemption. Razi had paid the taxes and had also removed a mobile home from the property and evicted a resident. He claimed to be entitled to receive reimbursement for the removal and eviction, but the court held that the statute does not require that. While he was entitled to be reimbursed for amounts spent to maintenance, preservation, or safekeeping of the property, the mobile home removal and eviction were not those things.

The court held that the Gonzalezes were required to pay $16, 930.01 for redemption. They actually paid $16,757.29, or 98.98% of what they were required to pay. The court held that this was substantial compliance with the redemption statute.

PART XV
MISCELLANEOUS

Barth* v. *Bank of America, N.A., 54 Tex.Sup.Ct.J. 1771 (Tex. 2011). Barth sued "Bank of America Corporation." Bank of America, N.A. answered, asserting that it had been, in its words, "incorrectly named." At trial, the witnesses referred simply to "Bank of America", with one exception: Bank of America, N.A.'s corporate representative testified, in response to a question by Bank of America, N.A.'s counsel regarding the actual entity involved in the dispute that it was "Bank of America National Association." Bank of America Corporation was not mentioned in the evidence. During the jury charge conference after the close of the evidence, the trial court

granted Barth a trial amendment to correct the misnomer, but the liability questions submitted to the jury and answered in Barth's favor all referred to Bank of America Corporation. The trial court rendered judgment against Bank of America, N.A. on the verdict. The court of appeals reversed and rendered, holding that the verdict does not support the judgment.

Bank of America, N.A. argues that this is a case of misidentification, not misnomer. The argument, contrary to Bank of America, N.A.'s own answer in the trial court, is clearly wrong.

A misnomer differs from a misidentification. Misidentification, the consequences of which are generally harsh, arises when two separate legal entities exist and a plaintiff mistakenly sues an entity with a name similar to that of the correct entity. A misnomer occurs when a party misnames itself or another party, but the correct parties are involved. Courts generally allow parties to correct a misnomer so long as it is not misleading.

Bank of America, N.A. agrees that it has not been misled. This is a clear case of misnomer.

Bank of America, N.A. also argues that the jury findings of Bank of America Corporation's liability support a judgment only against Bank of America Corporation. But there was no evidence at trial that Bank of America, Bank of America, N.A., and Bank of America Corporation were different entities, and Bank of America, N.A.'s representative testified that Bank of America, N.A. was the entity involved in the dispute. Nothing in the record suggests that the jury could possibly have been confused, and its answers must be taken to be applicable to Bank of America, N.A.