CASE LAW UPDATE

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The case selection for this episode of Case Law Update, like all of them in the past, is very arbitrary. If a case is not mentioned, it is completely the author's fault. Cases are included through 565 S.W.3d and Supreme Court opinions released through May 17, 2018.

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

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

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

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PART I
MORTGAGES AND FORECLOSURES

Hinton* v. *Nationstar Mortgage LLC, 533 S.W.3d 44 (Tex.App.—San Antonio 2017, no pet.). The Hintons borrowed a loan to refinance their house. The original lender was TBW. TBW assigned its interest in the loan to Cenlar, and Cenlar later sold its interest in the loan to Ocwen.

The Hintons defaulted. In January 2010, Ocwen sent them a notice of intention to accelerate. The Hintons didn't cure their default, and Ocwen accelerated in May, 2010 and sought a judicial foreclosure in June 2010. After filing the foreclosure suit, Ocwen assigned the loan to Nationstar, and in March, 2014, Nationstar rescinded the acceleration of the debt.

Nationstar then promptly accelerated the debt again and sought to intervene in Ocwen's suit. Nationstar claimed to be the current servicer of the loan, with the authority to foreclose.

The Hintons claimed that Nationstar lacked standing and capacity to intervene in the suit. They claimed that when Nationstar intervened, the right to enforce the note belonged to someone else. They also claimed that Nationstar couldn't seek a judicial foreclosure because it wasn't a holder in due course of their note.

For a trial court to have subject matter jurisdiction, the plaintiff must have standing at the time it files suit. Generally, a plaintiff has standing when it is personally aggrieved. When, as here, the plaintiff's lack of standing is raised for the first time on appeal, the court must construe the petition in favor of the party, and if necessary, review the entire record to determine if any evidence supports standing.

Nationstar argues it had standing when it filed its original petition in intervention on May 1, 2014, because it received the right to enforce the note and security instrument through an assignment before intervening. The evidence showed that Nationstar was the assignee of the loan as of September, 2013, well before it intervened in the lawsuit. So the court found it had standing to intervene.

The Hintons also claimed that Nationstar lacked standing because it was not a holder in due course. However, standing to sue can be predicated upon either statutory or common-law authority. Because the court had already held that Nationstar had standing under common-law authority, it need not determine whether it had standing under statutory authority.

The Hintons then claimed that limitations barred Nationstar from intervening. They argued that Nationstar did not record the transfer of lien until July, 2014, two months after limitations had run. The applicable limitations statute required suit to be brought within four years after accrual of the cause of action. When, as here, a note contains an optional debt-acceleration clause, a cause of action for judicial foreclosure accrues when the note holder actually exercises its option to accelerate. It is undisputed that after the Hintons went into default, Ocwen exercised its option to accelerate the debt on May 2, 2010. It is also undisputed that Nationstar filed its original petition in intervention on May 1, 2014, within four years of Ocwen's acceleration.

The Hintons' arguments suggest Nationstar did not effectively bring suit for limitations purposes until July 1, 2014, when Nationstar recorded the transfer of the lien. The Hintons consequently assume Nationstar could have brought suit within the four-year limitations period only if Nationstar's March 27, 2014 rescission of Ocwen's acceleration was effective. As previously noted, Nationstar was assigned TBW's rights under the note and security instrument on September 17, 2013, before Nationstar intervened. Moreover, it is undisputed that Ocwen accelerated the debt

on May 2, 2010, and Nationstar filed its original petition in intervention on May 1, 2014. Because Nationstar's May 1, 2014 filing was not later than four years after Ocwen's May 2, 2010 acceleration of the debt, the statute of limitations did not bar Nationstar's suit for foreclosure, regardless of whether Nationstar's rescission of Ocwen's acceleration was effective.

Edwards* v. *Federal National Mortgage Association, 545 S.W.3d 169 (Tex.App.—El Paso 2017, pet. denied). To quote the opening paragraph of this case: "Like some cases of this type, the relatively straightforward contract issues blur because of the inaccuracies in mass produced loan documents and foreclosure paperwork."

James inherited a house from his mother. Sometime after her death, Bank of America, successor to Countrywide Home Loans Servicing LP, filed suit to foreclose. The suit claimed that a home equity loan secured by the house was in arrears.

The loan documents were all over the place. The Note is dated March 15, 2007, in the amount of $156,500, and refers to a Deed of Trust of the same date.

The Deed of Trust is dated March 6, 2007 on the first page, but was signed on March 15, 2007. The Deed of Trust refers to a Note dated March 6, 2007, in the amount of $158,400. The Deed of Trust further describes the note as a renewal and extension of a previous 2003 note, but expressly disclaims that the note is a home equity loan. An affidavit presented by Fannie Mae, however, referred to a Home Equity Note signed on or about March 15, 2005 in the amount of $156,500.

James pointed out all of these discrepancies and concluded that the Note referred to in the Deed of Trust couldn't be the same note attached to Fannie Mae's motion for summary judgment. He claimed that Fannie Mae hadn't produced the note tied to its Deed of Trust and therefore, the Deed of Trust is unenforceable.

The question before the court is whether the discrepancies create a genuine issue of material fact as to the existence of another note. In response to that argument, Fannie Mae contends these discrepancies are nothing more than typographical errors.

As long as scriveners have plied their trade, there have undoubtedly been typographical errors. While sometimes nothing more a mere annoyance, occasionally those errors have blossomed into legal disputes. Typographical errors have also reared their ugly head in the legal description of property— a potentially dangerous occurrence given that a party cannot foreclose a lien when the deed does not describe the land conveyed. Yet a debtor cannot forestall foreclosure based on a "trivial" discrepancy that "deceived no one." Similarly, discrepancies between a judgment and abstract of the judgment of a minor nature, including a date off by a few days, do not affect a judgment lien.

The date discrepancy between the Note and Deed of Trust similarly falls into this immaterial category. The documents contain enough other connections that we can say they unquestionably reference each other. The maker and borrower referred to in both documents is the same. The final installment payment date referred to in both documents is also the same. The documents were both executed at the same time. And both documents reference the exact same piece of property.

The complaint regarding the erroneous date of the promissory note in the assumption clause unquestionably has reference to the original promissory note. If the instrument containing the reference has enough information to enable one, by pursuing an inquiry based upon the information contained therein, to identify the particular properly to the exclusion of all others, the reference and description are sufficient.

Moreover, documents executed by the same parties on the same date which refer to the same real property, and refer to each other, are generally construed together. Both the Note and Deed of Trust were executed on March 15, 2007, and each identify the same parties, the same real property, and the same final payment date for the loan. Therefore, the court concluded the discrepancy in date does not create a genuine issue of material fact as to the existence of a second note.

PART II
HOME EQUITY LENDING

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

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

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

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

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

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

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

Accordingly, courts should be reluctant to change the rights and obligations of parties by retroactively applying a change in the original law.

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

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

Paull & Partners Investments, LLC* v. *Berry, 558 S.W.3d 802 (Tex.App.—Houston [14th Dist.] 2018, no pet.). In order to borrow a loan from Paull, the Berrys formed an LLC and conveyed their homestead to it. The LLC then borrowed the loan, executing a note and deed of trust. The Berrys continued to live in the house. After some difficulties in making payments, the LLC obtained an additional advance from Paull, which required a deed in lieu of foreclosure as security.

The Berrys defaulted on the loan, and when Paull matured the loan and gave notice of its intention to foreclose, the Berrys responded that the loan was void as an illegal loan on homestead. Paull filed the deed in lieu and the Berrys then filed suit.

Though still strongly protected by the Texas Constitution, homestead rights may be lost through death, abandonment or alienation. The Berrys argued that they never abandoned their homestead because they remained in the home after the conveyance to the LLC. But given the undisputed conveyance, to obtain summary judgment the Berrys also had to prove conclusively that they did not lose their homestead rights through alienation. Homeowners may lawfully convey their homestead to a corporation, even if they remain in the home after the sale, for the purpose of obtaining a loan.

The Constitution declares void, however, pretended sales involving any condition of defeasance. A pretended sale is one in which the parties do not intend title to vest in the purchaser, but rather that title will be divested within a certain amount time by paying the specified amount. To show a pretended sale involving a condition of defeasance prohibited by the Constitution, there must be proof that: (1) the seller did not intend title to vest in the purchaser; and (2) the transfer involves a condition allowing the seller to reclaim title to the property after the loan is repaid.

The evidence recited by the Berrys does not conclusively prove they did not intend title to vest in the LLC. Instead, genuine issues of material fact exist as to their intent regarding title to the property. For example, the Berrys executed a warranty deed and delivered it to the title company, which later recorded it. Evidence that a deed has been signed, delivered, and recorded gives rise to a presumption that the grantor intended the deed to become operative as a conveyance. This presumption may be overcome by showing, for example, that the grantor had no intention of divesting himself of title. In such cases, the grantor's intent is a question of fact determined by examining all the facts and circumstances preceding, attending, and following execution of the deed.

The Berrys also failed to establish a condition of defeasance, the second requirement of a void pretended sale. A

condition of defeasance is a condition that permits the seller to reclaim title to the property after the debt is paid. The condition need not be expressly stated in the instrument of conveyance. For example, a condition of defeasance may be implied from other language in the conveyance, such as that it was made to secure the payment of a debt; or stated in a contemporaneous document, such as an option to repurchase on particular terms after the debt is paid.

Here, the deed does not contain an express condition of defeasance or other language from which such a condition could be implied. Nor does the record contain any evidence of other statements of intent to reconvey the property on certain terms after the debt is paid. In any event, whether to imply a condition of defeasance is ordinarily a question of fact.

Because the Berrys did not conclusively establish the two requirements of a pretended sale, the trial court erred in granting summary judgment declaring the conveyance from the Berrys to the LLC void.

The Berrys also sought forfeiture under Article XVI, Section 50(a)(6)(Q)(x). Section 50(a)(6). Based on the Supreme Court's decision in ***Garofolo* v. *Ocwen Loan Servicing, L.L.C.***, 497 S.W.3d 474 (Tex. 2016), the court held that section 50(a)(6)(Q)(x) does not provide an independent cause of action for forfeiture of principal and interest owed on a loan.

PART III
USURY

Leteff v. Roberts, 555 S.W.3d 133(Tex.App.—Houston [1st Dist.] 2018, no pet.). Leteff was looking for financing for his business and was introduced to Roberts. They met and struck a deal. At Leteff's suggestion, Roberts would loan Leteff $40,000 that would be repaid in 45 days along with an "interest amount" of $20,000. They repeated this structure 17 times, 14 of which called for interest. On at least one occasion, Leteff met Roberts at Roberts's house for a loan of over half a million dollars. That amount was counted out in cash, and Leteff took the cash away in grocery bags.

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

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

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

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

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

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

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

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

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

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

PART IV
GUARANTIES

Norris* v. *Texas Development Company, 547 S.W.3d 656 (Tex.App.—Houston [14th Dist.] 2018, no pet.). To prevail on summary judgment on a claim for breach of a guaranty, the plaintiff must establish (1) the existence and ownership of the guaranty, (2) the terms of the underlying contract, (3) the occurrence of the condition on which liability is based, and (4) the guarantor's failure or refusal to perform the promise.

Norris signed a guaranty agreement guaranteeing ARC Designs deferred rental payments to TDC, in the amount of $337,944, to be paid in twelve monthly installments. When ARC Designs defaulted in making the payments, TDC demanded Norris pay the amounts owing under the Guaranty. And, when Norris failed to pay, TDC brought suit against ARC Designs to recover the rental payments and against Norris to recover on the Guaranty. The trial court granted summary judgment against ARC Designs for the unpaid rent and against Norris on his guaranty.

Norris claims that the trial court erred in granting the summary judgment because

Norris and Texas Development Company never formed a valid contract. According to Norris, after he signed the Guaranty, TDC made a counteroffer. Norris contends that the Guaranty is not binding because it was part of the counteroffer and became void as a matter of law upon the making of the counteroffer. According to Norris, because there was no deferred-base-rent agreement between TDC and ARC Designs, there was nothing for Norris to guarantee.

The Guaranty states that Norris "hereby guarantees ... the payment of the deferred base rent described in the Deferred Base Rent Agreement attached hereto." The Guaranty states that by signing the document, Norris guaranteed the payment of the deferred base rent described in the attached "Deferred Base Rent Agreement." Norris then delivered the Guaranty to TDC. Norris does not deny signing the Guaranty or sending the Guaranty to TDC, but he asserts that the Guaranty became void when TDC rejected the proposed deferred-base-rent agreement attached to the Guaranty.

The Guaranty states that it is an "irrevocable, absolute, complete, and continuing guaranty of payment and not a guaranty of collection." Although the Guaranty was attached to the agreement, the Guaranty contains its own terms and is not part of the deferred-base-rent agreement under negotiation. Nothing in the Guaranty makes Norris's guaranty obligation contingent on the acceptance and validity of the Deferred Base Rent Agreement.

The Guaranty states, "FOR VALUE RECEIVED, and in consideration for, and as an inducement to THE TEXAS DEVELOPMENT COMPANY to enter into the attached Deferred Base Rent Agreement, Josh Norris hereby guarantees ..." but this reference to the guaranty as being to induce Texas Development Company to enter into the "Deferred Base Rent Agreement" is insufficient to invalidate the Guaranty for lack of consideration. (holding guaranty agreement did not fail for lack of consideration because agreement stated "for value received"). The Guaranty is complete. TDC owned the Guaranty, and nothing in the Guaranty stated that the Guaranty would become void if the parties did not enter into a deferred-base-rent agreement.

The Guaranty states that the amount guaranteed is $337,944.00 and the Guaranty provides that the $337,944.00 is to be paid in twelve monthly installments of $28,162.00 per month for the months of January through December 2016. The Guaranty further provides that in the event that the actual amount of deferred base rent is less than $337,944.00, then the agreement shall be adjusted accordingly. The Guaranty identifies the amount guaranteed and the terms of payment. The Guaranty is not conditioned upon the parties' acceptance of the specifics of the "Deferred Base Rent Agreement."

Duarte-Viera* v. *Fannie Mae, 560 S.W.3d 258 (Tex.App.—Amarillo 2016, no pet.). The Fannie Mae deed of trust signed by the borrower included provisions addressing determinations of fair market value for purposes of Property Code § 51.003, which provides for a determination of fair market value to reduce a post-foreclosure deficiency. The provisions required, among other things, that evidence of value be provided by expert opinion testimony only from a licensed appraiser with at least five years' experience in appraising similar property in the locale. At trial, the Guarantors sought an offset based on § 51.003. Their evidence of fair market value was a declaration by one of the Guarantors and a certified copy of a tax appraisal document. Fannie Mae objected to that evidence on the ground that allowing them into evidence would constitute a violation of the borrower's deed of trust. The trial court ruled the evidence was inadmissible.

The Guarantors argued that they were not parties to the deed of trust and that the deed of trust provisions were not included in

the guaranty. So, the question was whether the Guarantors were bound by the deed of trust provisions.

The note, guaranty, and deed of trust were each made on the same day. The guaranty recites the Guarantors had an economic interest in the borrower, the guaranty was a required condition for the loan, and the guaranty was given in consideration for the loan. According to the guaranty's merger clause, the guaranty and the other loan documents represent the final agreement between the parties. Similarly, a clause in the deed of trust states that, the note and other loan documents represent the final agreement between the parties. The definition of loan documents includes all guaranties. Agreements executed at the same time, with the same purpose, and as part of the same transaction, are construed together.

Under the guaranty's language, the primary item guaranteed was the entire Indebtedness. The term "Indebtedness" was not defined in the guaranty but in the deed of trust, which defined the Indebtedness to mean the principal of, interest on, and all other amounts due at any time under the note, the deed of trust or any other loan document. The amounts due at any time under the note and deed of trust would include a deficiency remaining after foreclosure.

The Guarantors argue that calculation of the Indebtedness does not include the offset against a deficiency provided under § 51.003. Determining the Indebtedness and applying the statutory offset, the Guarantors argue, have nothing to do with one another. Accordingly, they reason, their guarantee of the Indebtedness bears no relation to the terms of the deed of trust affecting the manner in which fair market value, and the resulting offset, are to be determined.

The court disagreed. By the Guarantors' reasoning, the offset to which the Guarantors would be entitled is to be determined by § 51.003, unaffected by the evidentiary requirements of the deed of trust, while the offset available to the borrower would be determined by § 51.003, as affected by those requirements. If that's the case, the amounts owed by the guarantor and borrower could be quite different. The court did not see how that result would accomplish the guarantee of the entire indebtedness required by the guaranty. Construing the documents together, and applying the express terms of the guaranty, the court held the provisions of the deed of trust applicable to the Guarantors.

Orr* v. *Broussard, 565 S.W.3d 415 (Tex.App.—Houston [14th Dist.] 2018, no pet.). Co-guarantors generally are required to bear equally the loss resulting from the principal debtor's default. Thus, a co-obligor who discharges more than his share of the common obligation may seek equitable contribution from his co-obligors. The elements of a claim for equitable contribution are that (a) the plaintiff and the defendant share a common obligation or burden, and (b) the plaintiff has made a compulsory payment or other discharge of more than its fair share of the common obligation or burden.

Godoy* v. *Wells Fargo Bank, N.A., No. 18-0071 (Tex. May 10, 2019). Godoy guarantied a loan made to GDG. The guaranty included a number of waivers of defenses. Among those, the guaranty included a waiver of "any statute of limitations, if at any time any action or suit brought by Lender against Guarantor is commenced, there is outstanding indebtedness of Borrower to Lender which is not barred by any applicable statute of limitations."

GDG defaulted, Wells Fargo foreclosed and there was a resulting deficiency. Wells Fargo sued Godoy on his guaranty, and Godoy responded that the two-year statute of limitations in Property Code § 51.003 barred the action. In response, Wells Fargo claimed that Godoy waived the two-year

statute. The trial court ruled in favor of Wells Fargo.

On appeal, Godoy argued that a statute of limitations defense can only be waived if the language in the waiver is specific and for a defined period of time. Godoy claimed that the waiver he agreed to was indefinite and thus void as against public policy because, he contended, it allowed Wells Fargo to bring suit at any time in the future. Fargo argued that, by signing a broad waiver of all defenses, a party such as Godoy can waive all limitations defenses indefinitely. The court of appeals held, based upon the Supreme Court's holding in ***Moayedi* v. *Interstate 35/Chisam Road, L.*P.**, 438 S.W.3d 1 (Tex. 2014), that Godoy's agreement to waive all rights or defenses arising by reason of any anti-deficiency law was sufficient to waive section 51.003(a)'s two-year statute of limitations. The court of appeals did not consider Godoy's argument that his contractual waiver of the limitations period was void as against public policy.

Although it did not consider Godoy's public policy arguments against enforcement of the waivers, the court of appeals did not decide whether the guaranty agreement's waiver provision was sufficient to waive all Godoy's possible limitations defenses. Because Wells Fargo sued within the four-year limitations period applying generically to suits to collect debts, the court of appeals concluded that its suit was timely even if Godoy could not contractually waive all limitations defenses. The court of appeals decided only that Godoy waived the two-year statute of limitations and that Wells Fargo's suit—filed three-and-a-half years after the foreclosure sale—was not barred by the four year limitations period that would apply in the absence of the two-year period.

At the Supreme Court, Godoy contends that his contractual waiver of limitations defenses is void as against public policy. In ***Simpson* v. *McDonald***, 179 S.W.2d 239, 243 (Tex. 1944), the Supreme Court stated "It appears to be well settled that an agreement in advance to waive or not plead the statutes of limitation is void as against public policy." Since ***Simpson*** was decided, courts of appeals have built upon its holding to require that a waiver of a statute of limitations is void unless the waiver is specific and for a reasonable time. The courts of appeals have never understood ***Simpson*** as Godoy does, as an absolute bar on contractual waivers of statutes of limitation. Instead, from even before ***Simpson*** was decided, the general rule has been that such waivers must be specific and for a reasonable time. Blanket pre-dispute waivers of all statutes of limitation are unenforceable, but waivers of a particular limitations period for a defined and reasonable amount of time may be enforced.

The court said this holding did not conflict with ***Moayedi*** which held that a general waiver in a guaranty was sufficient to waive the right of offset under Property Code § 51.003. ***Moayedi*** did not consider statutes of limitations, which the court found significant because a limitations bar differs materially from a debtor's or guarantor's rights to valuation and offset under chapter 51.

While in general, parties may waive statutory and even constitutional rights, a statute of limitations is not solely a right belonging to the party asserting it. It protects defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise. In addition to affording comfort and repose to the defendant, statutes of limitation protect the courts and the public from the perils of adjudicating stale claims.

In examining whether whether Godoy's contractual waiver of the two-year limitations period is enforceable, the court looked at the waiver provisions of the guaranty. Section (E) of the waivers states that the guarantor "waives any and all rights

or defenses arising by reason of . . . any statute of limitations, if at any time any action or suit brought by Lender against Guarantor is commenced, there is outstanding indebtedness of Borrower to Lender which is not barred by any applicable statute of limitations." Section (F) purports to waive "any defenses given to guarantors at law or in equity other than actual payment and performance of the Indebtedness." The court held that both of those waivers were unenforceable with respect to statutes of limitation because they purport to completely waive all limitations periods. Neither section is "specific" to a particular limitations period, and neither section has a "reasonable time" period limiting the waiver.

Section A of the waivers provides that "Guarantor also waives any and all rights or defenses arising by reason of (A) any "one action" or "anti-deficiency" law or any other law which may prevent Lender from bringing any action, including a claim for deficiency, against Guarantor, before or after Lender's commencement or completion of any foreclosure action, either judicially or by exercise of a power of sale. . ." Unlike sections (E) and (F), section (A) is both "specific" and "for a reasonable time." As for specificity, section (A) waives a particular, identifiable statute of limitations—the two-year period provided by section 51.003. It does so by waiving all "defenses" arising from any "antideficiency" law. Section 51.003 is Texas's "anti-deficiency law.

Section (A) also satisfies the "for a reasonable time" requirement. It does not state a substitute limitations period or provide a specific end-date for the waiver, defects which might make other such agreements unenforceable. In this instance, however, the law provides a reasonable four-year limitations period as a backstop. Once section 51.003(a)'s two-year statute of limitations is waived by operation of section (A), the four-year statute of limitations applying to suits to collect debts found in section 16.004(a)(3) of the Civil Practice and Remedies Code becomes applicable.

PART V
LEASES

***Rohrmoos Venture* v. *UTSW DVA Healthcare, LLP*,** No. 16-0006 (Tex. April 26, 2019). Rohrmoos leased a building to UTSW for a dialysis clinic. At some point UTSW began experiencing water penetration in the building's concrete foundation and installed ceramic floor tiles because of the moisture problems. Because UTSW viewed the commercial building as unsuitable for its intended commercial purpose, UTSW terminated its lease early, vacated the premises, and relocated, while still allegedly owing approximately $250,000 in unpaid rent.

UTSW then sued Rohrmoos and the joint-venturers behind it for breach of contract and breach of the implied warranty of suitability. Rohrmoos answered with various affirmative defenses and counterclaimed for negligence and breach of contract. The case was submitted to a jury. The jury found that UTSW and Rohrmoos both failed to comply with the lease, that Rohrmoos failed to comply first, and that Rohrmoos breached the implied warranty of suitability. The court of appeals affirmed.

Rohrmoos argues that the court of appeals incorrectly assumed that a material breach of a commercial lease can justify termination, resulting in a holding that is contrary to our decision in ***Davidow***. There was a question whether this issue was properly preserved on appeal, and the Supreme Court held that it was. The availability of termination as a remedy did not become an issue until the trial court entered judgment authorizing termination. When that happened, Rohrmoos promptly filed a motion to reform the judgment or, alternatively, for a new trial. In that motion, Rohrmoos asserted that under Texas law, a tenant claiming material breach of lease is not entitled to terminate the lease unless the

lease expressly provides for that remedy. This gave the trial court notice of Rohrmoos's complaint that the verdict and judgment were at least partially based on a theory of recovery that Rohrmoos contends did not support termination as a matter of law. Furthermore, whether a tenant can terminate a commercial lease under ***Davidow*** for material breach is a question of law for the court to decide, and it is not one which must be resolved before the jury can properly perform its fact-finding role.

Rohrmoos's position is that ***Davidow*** expressly prohibits termination as a remedy for material breach of a commercial lease. However, the court said that ***Davidow*** merely held that there was an implied warranty of suitability in commercial leases, and what the implied warranty means, i.e., that that at the inception of the lease there are no latent defects in the facilities that are vital to the use of the premises for their intended commercial purpose and that these essential facilities will remain in a suitable condition. The court said that ***Davidow*** did not, as Rohrmoos contends, make an absolute statement that a material breach of a commercial lease will never justify termination. In fact, if anything, the holding in ***Davidow*** leans the other way.

In ***Davidow***, the Supreme Court addressed the implications of independent covenants in Texas property law, concluding that they were antiquated and unworkable in the modern lease setting. The opinion begins with the observation that "[a]t common law, the lease was traditionally regarded as a conveyance of an interest in land, subject to the doctrine of caveat emptor." Once the landlord delivered the right of possession to the tenant, the tenant had a duty to pay rent as long as he was in possession. All lease covenants at common law were thus considered independent because the tenant, being in possession of everything he was entitled to under the lease, had to pay rent no matter what lease covenant the landlord breached. This outdated common law concept, ***Davidow*** noted, "is no longer indicative of the contemporary relationship between the tenant and landlord." The ***Davidow*** court held that the tenant's obligation to pay rent and the landlord's implied warranty of suitability are therefore mutually dependent.

The Supreme Court said that, although the last sentence refers to the tenant's obligation to pay rent as being dependent on the landlord's implied warranty of suitability, there is no reason to conclude that the court in ***Davidow*** did not intend to extend that same dependency to the landlord's obligations under the lease. Rohrmoos cites no authority that has interpreted ***Davidow*** to mean that a tenant cannot terminate a commercial lease for material breach of the contract. This is because there is none, and the court saw no reason to hold otherwise.

To be clear, said the court, ***Davidow*** stands for the proposition that in a commercial lease, a landlord warrants that the property is suitable for the tenant's intended commercial purpose. This implied warranty exists separately and apart from any obligation the landlord may have under the lease. As a matter of law, the implied warranty is limited only by specific terms in the parties' commercial lease whereby a tenant expressly agrees to repair certain defects. Parties are also free to contract out of the implied warranty by expressly waiving it in their contract. Termination is available as a remedy for breach of the implied warranty of suitability. The same holds true for a landlord's material breach of the commercial lease.

Wasson Interests, Ltd. **v.** ***City of Jacksonville***, 559 S.W.3d 142 (Tex. 2018). The City built Lake Jacksonville in the late 1950s. Over the next several decades, the City developed the surrounding area and began leasing lakefront lots to private parties. In 1996, the Wassons entered into long-term leases of City-owned lakefront lots and constructed a seven-bedroom house. The lease agreements incorporated the

City's Rules & Regulations Governing Lake Jacksonville by reference. Those rules provide that all lots outside the City's corporate limits—which include the Wassons' lots—"shall be restricted to residential purposes only," and that no lot may be used to operate a "business or commercial enterprise." The rules also provide that breach of "any of the regulations . . . shall be grounds for cancellation of the lessee's lease."

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

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

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

The distinction between a municipality's governmental and proprietary functions seems plain enough, but the rub comes when it is sought to apply the test to a given state of facts. Generally, governmental functions consist of a municipality's activities in the performance of purely governmental matters solely for the public benefit. Historically, governmental functions have consisted of activities normally performed by governmental units such as police and fire protection. Acts done as a branch of the state—such as when a city exercises powers conferred on it for purposes essentially public—are protected by immunity.

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

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

Practice & Remedies Code § 101.0215.

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

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

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

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

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

The court held that the City's entering into the leases was discretionary, that the benefit of the leases was for the residents of the City, not the public at large, that the City was acting on its own behalf, not on behalf of the State, and the act of entering into the leases was not sufficiently related to a governmental function to overcome the proprietary nature of the action.

El Paso Education Initiative, Inc.* v. *Amex Properties, LLC, 564 S.W.3d 228 (Tex.App.--El Paso 2018, pet. denied). EPEI, doing business as Burnham Wood Charter School District, wanted to lease a site from Amex to construct a building. EPEI operates open-enrollment charter schools chartered by the Texas Education Agency.

A lease was signed by EPEI and Amex. The Lease Agreement contained a recital stating that the document was executed as of 17 April 2008 and included Martinez's signature as manager of Amex as the landlord and Burnham's signature as president EPEI as the tenant. Unaware that the lease had been signed, the attorneys for EPEI and Amex continued to negotiate the terms. A few weeks later, EPEI's attorney sent Amex a notice unequivocally rejecting the Lease Agreement and that it no longer desired to lease any property from Amex.

Amex sued EPEI claiming anticipatory breach of the lease. EPEI filed a plea to the jurisdiction claiming governmental immunity which the trial court denied as to the breach of contract claims and claims for

consequential damages. This court affirmed that denial in an earlier case. EPEI filed two additional pleas to the jurisdiction.

Sovereign immunity protects the State and its agencies from lawsuits for money damages. Political subdivisions of the state are entitled to such immunity— referred to by the term governmental immunity— unless such immunity has been waived. . Sovereign immunity encompasses immunity from suit, which bars a suit unless the state has consented, and immunity from liability, which protects the state from judgments even if it has consented to the suit. Immunity from suit implicates a court's subject matter jurisdiction and is properly asserted in a plea to the jurisdiction. Texas open-enrollment charter schools are governmental entities entitled to immunity from suit to the same extent as public-school districts.

By entering into a contract, a governmental entity necessarily waives immunity from liability, voluntarily binding itself like any other party to the terms of the agreement, but it does not itself waive immunity from suit. Immunity from suit may only be waived by the Legislature to protect its policymaking function. To ensure that legislative control is not easily disturbed, a waiver of immunity must be clear and unambiguous.

The issue raised here is whether EPEI waived its immunity from suit pursuant to the waiver provided by Local Government Code § 271.152, which provides that a local governmental entity that is authorized to enter into contracts waives immunity from suit when it enters into a contract subject to Chapter 271. When it does so, immunity from suit is waived.

Because EPEI is an open-enrollment charter school, it is deemed a local governmental entity for purposes of Section 271.152. In addition, no one disputes that EPEI is authorized to enter into contracts. The sole question was whether EPEI entered into a contract subject to Chapter 271.

To qualify as a contract subject to Section 271.152's waiver of immunity, a contract must: (1) be in writing, (2) state the essential terms of the agreement, (3) provide for goods or services, (4) to the local governmental entity, and (5) be properly executed on behalf of the local governmental entity. EPEI claimed the lease was not “properly” executed on behalf of EPEI. Section 271.151(2) does not define the phrase "properly executed.” The common meaning of the term "properly" is suitably, fitly, rightly, or correctly. Likewise, the common meaning of the term "execute," when used in the context of a legal instrument, is to complete or perform what is required to give validity to (as by signing and perhaps sealing and delivering). The common meaning of the phrase "on behalf of" is in the interest of, as the representative of, or for the benefit of. As related to a contract, these terms together convey the meaning that a contract is "properly executed on behalf of" to mean that a contract is signed by a representative in accordance with the requirements for making it valid.

Section 271.151(2)(A) does not state that the contract must be properly executed by the local governmental entity; but instead, it requires that a written agreement be "properly executed on behalf of the local governmental entity.” Based on the plain text, the court construed the phrase "properly executed" as referring to the discrete requirements or procedures which are outlined in the relevant statutes, ordinances, charters, or other documents governing the entity and allowing it to enter into contractual agreements. It further construed the phrase "on behalf of" to indicate that the local governmental entity will act through its authorized representative.

In sum, viewed in the light most favorable to Amex, the record shows that (1) EPEI's charter authorizes contracts, such as

a lease; (2) the board's minutes purport to indicate that Burnham had at least some authority to enter into the Lease and that the board members were aware of Burnham's discussions with Amex; and (3) Amex delivered the Lease to EPEI in satisfaction of the contract's terms to finalize the agreement. Given the jurisdictional evidence presented by the parties, he court concluded that the resolution of whether the Lease was "properly executed on behalf of" EPEI is an issue for the fact finder on remand, that EPEI did not satisfy its burden in negating the trial court's jurisdiction over the case, and that the trial court correctly denied EPEI's plea to the jurisdiction.

Schneider* v. *Whatley, 535 S.W.3d 236 (Tex.App.—El Paso 2017, no pet.). Property Code §§ 92.103 provide that a landlord is required to refund a security deposit to the tenant on or before the 30th day after the date the tenant surrenders the premises, provided the tenant has given the landlord a written statement of their forwarding address for purposes of refunding the security deposit. With limited exceptions, if the landlord retains any part of the security deposit, she must give the tenant a written description and an itemized list of all deductions along with the balance of the deposit. When a tenant brings a cause of action to recover a wrongfully held security deposit, the landlord has the burden of proving that the retention of any portion of the security deposit was reasonable. When there are no permanent damages to the premises, the landlord is entitled to the reasonable cost of repairs as the proper measure of damages if she waits until after the term of the lease has expired to seek damages. However, the landlord is not permitted to retain any portion of a security deposit to cover normal wear and tear. Wear and tear is defined as deterioration that results from the intended use of a dwelling including breakage or malfunction due to age or deteriorated condition, but does not include deterioration that results from negligence, carelessness, accident, or abuse of the premises.

The Property Code further provides that a landlord who in bad faith retains a security deposit in violation of this subchapter is liable for an amount equal to the sum of $100, three times the portion of the deposit wrongfully withheld, and the tenant's reasonable attorney's fees. A landlord is is presumed to have acted in bad faith if she fails either to return a security deposit or to provide a written description and itemization of deductions on or before the 30th day after the date a tenant surrenders possession.

Most cases brought for bad-faith retention involve circumstances in which a presumption of bad faith exists. The statutory presumption of bad faith does not apply here because the evidence established that the landlord provided a written description and itemization of deductions to the tenant on or before the 30th day after the date they surrendered possession of the house. Because no presumption of bad faith exists, it is an element of the cause of action that the tenant was required to establish at trial.

A residential landlord acts in bad faith if she either "acts in dishonest disregard of the tenant's rights or intends to deprive the tenant of a lawfully due refund. A landlord's mere intentional retention of the security deposit beyond the thirty day statutory period does not establish the landlord's dishonest intent to deprive the tenant of the deposit.

In its findings of fact, the trial court found that the landlord could properly deduct from the security deposit for repair to the roof, to remove television cables, for repairs to the kitchen, and for repairs to the office, thus implicitly finding these expenses to be reasonable. The trial court also found that the landlord had wrongfully withheld the balance of the security deposit. Among its conclusions of law, the trial court declared that the tenant had performed all conditions of the lease and had performed all requirements necessary to be entitled to a

refund of the security deposit, including efforts to clean, repair, and restore the property to the same or better condition.

As fact finder, the trial court was permitted to consider all the facts and surrounding circumstances in connection with the testimony of each witness, and to accept or reject all or any part of the testimony. This evidence, in part or in whole, supports a determination that the landlord acted in dishonest disregard of the tenant's rights or intended to deprive the tenant of a lawfully due refund, and therefore supports the deemed finding of bad faith.

Green* v. *Grocers Supply Co., Inc., 533 S.W.3d 376 (Tex.App.—Houston [14th Dist.] 2015, no pet.). The lease agreement required Green to maintain general liability insurance and obtain a certificate of insurance showing Grocers Supply to be an insured party in addition to Green. Green also was required to provide the certificate of such insurance to Grocers Supply. Grocers Supply sent Green a letter on July 16, 2013 requesting a certificate of insurance in compliance with the lease agreement. The lease provided that if Green failed to comply with any covenant or provision in the lease within 30 days, Green would be in default. Grocers Supply sent a notice demanding a certificate be delivered within 15 days.

Green sent a certificate that did not show Grocers supply as an additional insured. He also became delinquent in paying rent. After being locked out of the premises, Green sent a corrected certificate of insurance and got back into the premises, but shortly after that, Grocers Supply sent Green a notice to vacate and began an eviction proceeding.

Green claimed that Grocers Supply should have given him 30 days instead of 15 days to comply and also claimed that he had cured any default. However, the county court held that Green did not provide a certificate that complied with the lease within the 30 day period. The court agreed with the county court. Under the plain language of the lease agreement as expressed in the county court's findings, if Green failed to comply with any provision of the lease agreement and did not cure such failure within 30 days of receiving notice, he would be in default of the lease, and Grocers Supply could terminate the lease.

Encinas* v. *Jackson, 553 S.W.3d 723 (Tex.App.—El Paso 2018, no pet.). Pursuant to the terms of the written lease that superseded an oral agreement, Encinas, the tenant, agreed to make Jackson's (the landlord's) loan payments and to be responsible for taxes. There had been an agreement that Encinas would buy the property from Jackson, but that had fallen through.

Jackson learned that Encinas had failed to pay either the loan payments or taxes, so he paid them. Encinas and Jackson entered into an agreement for Encinas to repay him, but she failed to do so. Jackson found a buyer for the property and sold it, and Encinas moved out. After the sale, Jackson sued Encinas to recover the loan payments and taxes that she had failed to pay.

Encinas claimed that the delinquent payments had been satisfied when Jackson sold the property and that he would be unjustly enriched if he recovered the missing payments from her. As she put it, Jackson would be able to "have his cake and eat it too." She also claimed that she was buying the property and business and that, by his sale of the property, Jackson had converted "loan equity" that she had built up The court disagreed.

Conversion is the wrongful exercise of dominion or control over another's property in denial of, or inconsistent with, the other's rights. Money is subject to conversion only when it can be identified as a specific chattel and where there is an obligation to deliver the specific money in question or otherwise

particularly treat the specific money. The trial court had held that, although Encinas had tried to purchase the property, the agreements she had made to assume Jackson's loan and pay taxes were done as a tenant under a lease agreement.

Under the terms of the lease agreement, Encinas was to pay the bank directly for Jackson's business loan and was to pay property taxes. She testified that she understood that she was purchasing the laundry business under owner financing and acknowledged that she did not buy the business when she failed to obtain financing, but Encinas also admitted that after her financing failed, she had agreed but failed to make business loan payments as required by the on-going lease. Encinas also acknowledged that she knew, as stated in the lease agreement, that the business was for sale. Encinas never testified that she was entitled to recover any funds from Jackson's sale of the business to its purchaser, nor presented any other evidence in support of a conversion cause of action for alleged "loan equity." Jackson paid the amounts Encinas failed to pay under the terms of the lease and Encinas failed to show that as an owner, Jackson's subsequent sale of the business, even at a profit, inured any benefit to her as his tenant.

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

Williamson* v. *Howard, 554 S.W.3d 59 (Tex.App.—El Paso 2018, no pet.). A constructive eviction occurs when the tenant leaves the leased premises due to conduct by the landlord which materially interferes with the tenant's beneficial use of the premises. Constructive eviction essentially terminates mutuality of obligation as to the lease terms, because the fundamental reason for the lease's existence has been destroyed by the landlord's conduct. The general requirements for constructive eviction are: (1) an intention on the part of the landlord that the tenant shall no longer use or enjoy the premises; (2) a material act or omission by the landlord that substantially interferes with the use and enjoyment of the premises; (3) the act must permanently deprive the tenant of the use and enjoyment of the premises; and (4) the tenant must abandon the premises within a reasonable time after the commission of the act.

The first element requires that the landlord act with the intent to deprive the tenant from the use or enjoyment of the property, although the landlord's intent can be inferred from the circumstances. The second element requires that the landlord commit a material act or omission that substantially interferes with the use and enjoyment of the premises. Here, at some point, utilities were cut off to the trailer park where Williamson had her trailer. Here, Williamson did not cite any statute, rule, or case law in support of the proposition that failing to pay utilities with the subsequent cessation of utilities, in the residential context results in an intentional omission and substantial interference with the use and enjoyment of the premises. In addition, there was only her speculative testimony that it was the landlord's failure to pay the utility bill that resulted in the termination of utilities. There was no evidence of the landlord's intent to deprive her of the use of the premises.

PART VI
EVICTIONS

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

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

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

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

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

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

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

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

Reynoso asserted that, if the justice court did have jurisdiction, this jurisdiction violated substantive and procedural due process under the United States Constitution and substantive and procedural due course of law under the Texas Constitution because

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

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

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

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

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

such an allegation. Therefore, the court presumed that Reynoso knew and accepted all of the terms of the Deed of Trust, including the Clause. The court also declined to impose a conspicuousness requirement on provisions similar to the Clause.

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

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

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

On April 13, Alejandro filed an application for writ of reentry, alleging that Alberto had unlawfully evicted him and locked him out of the property. The justice court denied the application, and the county court, finding that the property was not conveyed to Alberto until March 16, denied the writ as well. Alejandro argued that Alberto acquired the property on the date the deed was signed, which was February 17.

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

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

circumstances preceding, attending, and following the execution of the instrument.

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

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

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

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

Isaac* v. *CitiMortgage, Inc., 563 S.W.3d 305 (Tex.App.--Houston [1st Dist.] 2018, pet. denied). The Isaacs' argued that defects in the chain of title deprived the trial court of jurisdiction in the forcible detainer action. However, the only issue to be adjudicated in a forcible detainer action is the right to actual possession, and the Isaacs have presented no evidence that the right to immediate possession necessarily requires the resolution of a title dispute. As long as CitiMortgage provided evidence of the existence of a landlord-tenant relationship between itself, as the purchaser at foreclosure, and the Isaacs, the current possessors of the property, such a relationship provides a basis for the trial court to determine the right to immediate possession, even if the possessor questions the validity of a foreclosure sale and the quality of the buyer's title.

Jelinis, LLC* v. *Hiran, 557 S.W.3d 159 (Tex.App.—Houston [14th Dist.] 2018, pet. denied). When there are issues concerning both title and possession, the issues may be litigated in separate proceedings in different courts with appropriate jurisdiction. But when a forcible detainer action presents a

genuine issue of title so intertwined with the issue of possession that a trial court would be required to determine title before awarding possession, then a justice court lacks jurisdiction to resolve the matter. Thus, a justice court is not deprived of jurisdiction merely by the existence of a title dispute; it is deprived of jurisdiction only if resolution of a title dispute is a prerequisite to determination of the right to immediate possession.

A forcible detainer action requires proof of a landlord-tenant relationship. Although such a relationship is not a prerequisite to jurisdiction, the lack of such a relationship indicates that the case may present a title issue.

Here the deed of trust contained a tenant-at-sufferance clause. Tenant-at-sufferance clauses separate the issue of possession from the issue of title. Under these provisions, a foreclosure sale transforms the borrower into a tenant at sufferance who must immediately relinquish possession to the foreclosure-sale purchaser. In essence, a tenancy-at-sufferance clause creates a landlord-tenant relationship when the property is foreclosed.

Segoviano* v. *Guerra, 557 S.W.3d 610 (Tex.App.—El Paso 2017, pet. denied). Segoviano and his wife purchased a manufactured home and executed a promissory note for the purchase price. They later entered into a contract with Guerra to sell the mobile home to her and for her to assume the promissory note. Title to the mobile home would not transfer to Guerra until all of the note payments had been made.

Guerra stopped making payments and the Segovianos filed an eviction proceeding. The trial court dismissed the action for lack of jurisdiction.

On appeal, Guerra argued that a forcible detainer is not the appropriate cause of action because the mobile home is personal property, not real property. A forcible detainer is only available to recover possession of real property. The evidence shows that the structure at issue in this case is a manufactured home.

Occupations Code § 1201.207 provides that a manufactured home is personal property unless a statement of ownership for the home reflects that the owner has elected to treat the home as real property, and a certified copy of the statement of ownership and location has been filed in the real property records in the county in which the home is located. If the mobile home is personal property, the proper cause of action to recover possession is not a forcible detainer, it is a trial of the right of property. A trial of the right of property must be tried in a court with jurisdiction of the amount in controversy.

PART VII
DEEDS AND CONVEYANCES

ConocoPhillips Company* v. *Koopmann*,** 547 S.W.3d 858 (Tex. 2018)***. Strieber's deed conveyed to the Koopmanns fee-simple title to the tract, and reserved a fifteen-year, one-half non-participating royalty interest, which could be extended "as long thereafter as there is production in paying or commercial quantities" under an oil and gas lease. In the event there was no production after the fifteen-year term, the reservation included a savings clause. Thus, if on December 27, 2011, there was no production in paying quantities and the savings clause was not satisfied, the non-participating royalty interest would transfer to the Koopmanns. There was no production on December 27, 2011. Burlington, the lessee of the minerals, claimed that the Koopmanns' future interest in the royalty interest violates the Rule Against Perpetuities and is, therefore, void. According to Burlington, the "as long thereafter" language Strieber used in her reservation created in the Koopmanns a springing executory interest, which is not certain to vest, if at all, within the period

required by the Rule: twenty-one years after the death of some life or lives in being at the time of the conveyance.

The Koopmanns characterize their future interest created by Strieber's deed as a "vested possibility of reverter," which vested at its creation for purposes of the Rule, and thus, is valid. There is a decided difference, according to the Koopmanns, between vesting in interest and vesting in possession, and if two constructions are possible, Texas courts favor the construction that saves the validity of an instrument.

The Texas Constitution prohibits perpetuities: "Perpetuities ... are contrary to the genius of free government, and shall never be allowed." Constitution, art. I § 26. The interpretative commentary states both that "perpetuity" as applied to property means an "everlasting property interest" and that, for purposes of this section, a perpetuity is a restraint or restriction of the power of alienation beyond the period required by the Rule, and as such would not be constitutionally allowed.

To enforce this prohibition, the court has adopted the common law version of the Rule to govern conveyances of real property, which provides that no interest is valid unless it must vest, if at all, within twenty-one years after the death of some life or lives in being at the time of the conveyance. The Rule requires that a challenged conveyance be viewed as of the date the instrument is executed, and the interest is void if by any possible contingency the grant or devise could violate the Rule. When an instrument is equally open to two constructions, the construction that renders it valid rather than void will be accepted, assuming that the grantor intended to create a legal instrument. The court has held that the typical oil and gas lease in Texas, which grants a lessee the right to explore and develop for a fixed term of years and as long thereafter as minerals are produced, creates in the lessee a fee simple determinable in the mineral estate that does not violate the Rule.

The word "vest" in regards to the Rule refers to an immediate, fixed right of present or future enjoyment of the interest. The Rule does not apply to present or future interests that vest at their creation. An executory interest is a future interest, held by a third person, that either cuts off another's interest or begins after the natural termination of a preceding estate. A springing executory interest is one that operates to end an interest left in the transferor. This interest does not vest at the execution of the deed, rather executory interests vest an estate in the holder of the interest upon the happening of a condition or event. Until such happening, they are non-vested future interests" and are subject to the Rule. In contrast, a possibility of reverter is a future interest held by the grantor and is not subject to the Rule because it vests at the moment of creation. A possibility of reverter is the grantor's right to fee ownership in the real property reverting to him if the condition terminating the determinable fee occurs. This interest is properly viewed as a claim to property that the grantor never gave away.

Under the common law Rule, with respect to the interest in question, the deed created in Strieber a fee simple subject to executory limitation and in the Koopmanns an executory interest. The Koopmanns received a future interest created in someone other than the grantor that would become possessory by the divesting of Strieber's prior freehold estate, i.e., an executory interest. Strieber's present interest would continue "as long thereafter as" there is production of minerals in paying or commercial quantities— an indeterminable length of time. Thus, at the time it was created, it was uncertain whether the Koopmanns' future interest would vest within the period required by the Rule. The Koopmanns' argument that their future right "vested in interest" immediately upon execution of the deed is simply not the law: springing executory interests do not vest, by definition, until the condition terminating

the grantor's present possessory interest is met. Thus, because at the time of the grant the executory limitation on Strieber's interest— lack of production in paying quantities— might not happen within twenty-one years after the death of some life or lives in being, the Koopmanns' springing executory interest violated the Rule.

When an interest violates the Rule because it is uncertain to vest, if at all, within the required time period, the court has traditionally held that those provisions of the conveying instrument creating the interest are void. But the court was hesitant to apply the Rule to invalidate this future interest when, as the Koopmanns point out, such a holding would not serve the purpose of the Rule. This court strictly adheres to the rule of construction that an instrument equally open to two constructions should be construed as valid rather than void, and the Legislature has required courts to reform an interest that violates the Rule to effect the ascertainable general intent of the creator of the interest. Property Code § 5.043(a).

The purpose of the Rule is to prevent landowners from using remote contingencies to preclude alienability of land for generations. But restraint on alienability and promoting the productivity of land is not at issue in the oil and gas context. The court said "We believe that defeasible term interests serve a useful social purpose, whether reserved or granted. The term interest, as compared with a perpetual interest, tends to remove title complications when the land is no longer productive of oil or gas. This simplification of title promotes alienability of land, which is one purpose served by the Rule [A]gainst Perpetuities. We believe, therefore, that the courts should simply exempt interests following granted or reserved defeasible term interests from the Rule, on the straight-forward basis that they serve social and commercial convenience and do not offend the policy of the Rule Against Perpetuities."

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

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

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

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

A right of first refusal, also known as a preemptive or preferential right, empowers its holder with a preferential right to purchase the subject property on the same terms offered by or to a bona fide purchaser. Generally, a right of first refusal requires the grantor to notify the holder of his intent to sell and to first offer the property to the holder on the same terms and conditions offered by a third party. When the grantor communicates those terms to the holder, the right ripens into an enforceable option. The holder may then elect to purchase the property according to the terms of the instrument granting the first-refusal right and the third party's offer, or decline to purchase it and allow the owner to sell to the third party.

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

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

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

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

The Supreme Court agreed with the court of appeals that the rules governing the accrual of causes of action point to the date

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

In sum, when the Farbers sold the burdened mineral interest to the Tregellases in March 2007 without first giving the Trustees the opportunity to purchase it pursuant to the ROFR, a wrongful act caused a legal injury authorizing the Trustees to seek a judicial remedy. Thus, the claim is time-barred unless the accrual date is otherwise deferred.

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

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

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

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

A right of first refusal has been described as essentially a dormant option. The rightholder has no right to compel or prevent a sale per se; rather, as explained, he has the right to be offered the property at a

fixed price or at a price offered by a bona fide purchaser if and when the owner decides to sell. Only when the grantor communicates her intention to sell and discloses the offer does the holder have a duty to act by electing to accept or reject the offer.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ConocoPhillips Company* v. *Ramirez, 534 S.W.3d 490 (Tex.App.—San Antonio 2017, no pet.). In her will, Leonor conveyed a life estate in "all of my right, title, and interest in and to Ranch Las Piedras" to her son. The question in this suit was whether that conveyed all of the property, including the mineral interests, or just the surface.

ConocoPhillips claimed that the devise was of just the surface, based upon the "surface-only" will construction theory. The plaintiffs argued that everything, including minerals, were conveyed.

Leonor's will did not define or describe "Ranch Las Piedras." It argued that the court should look to extrinsic evidence to determine whether or not that included the mineral estate. The court disagreed, holding that the will plainly conveyed a life estate in "all of my right, title, and interest" in the Ranch. There is no need to go outside the four corners of the will. The phrase "all my interest" is plain and clear.

There was no express reservation of the mineral estate from the devise. Generally, absent an express reservation, a conveyance of land includes both the surface and the underlying minerals.

Jarzombek* v. *Ramsey, 534 S.W.3d 534 (Tex.App.—San Antonio 2017, pet. denied). The contract provided that the Sellers would retain 1/2 the mineral and royalty interest for 20 years and for as long after that that there was production. At the closing, the Sellers signed a deed (prepared by their lawyer) reserving an undivided 1/32 royalty interest for the same 20-year plus period. The closing was in 2006. In 2013, the Sellers sued to reform the deed. The Purchaser raised limitations as a defense. The Sellers claimed that the discovery rule tolled the statute of limitations.

In ***Cosgrove* v. *Cade***, 468 S.W.3d 32 (Tex. 2015), the Supreme Court held that a grantor is charged with immediate knowledge of an unambiguous deed's terms and that the discovery rule did not apply.

Here, the court applied ***Cosgrove*** to hold that the mistake in the deed was plainly evident on its face, so limitations began to run on the date the deed was executed.

The Sellers tried, in vain, to distinguish ***Cosgrove***. First, they claimed that the ***Cosgrove*** deed omitted any reference to minerals, while here the deed included an erroneous reservation. The court was not persuaded by this distinction without much of a difference. Second, they claimed that

deed conveyed two tracts of land and the mineral reservation was correct as to one of them. That made no difference to the court, since the mistake as to the second tract was plain and conspicuous on its face, and knowing that the reservation was different for each tract made the mistake even more conspicuous.

Finally, the Sellers argued that the distinction between minerals and royalties is not obvious to an ordinary person. The court noted that the contract made reference to the distinction by including both minerals and royalties in the reservation, and that showed the Sellers' awareness of it. In addition, even if the Sellers were not aware of the distinction between minerals and royalties, the difference between 1/32 and 1/2 is unmistakable.

Knopf* v. *Gray, 545 S.W.3d 542 (Tex. 2018). Vada's will named Bobby as executor and made a few specific bequests. At the end, Vada said, "NOW BOBBY, I leave the rest to you, everything, certificates of deposit, land, cattle and machinery. Understand the land is not to be sold but passed on down to your children, ANNETTE KNOPF, ALLISON KILWAY, AND STANLEY GRAY, TAKE CARE OF IT AND TRY TO BE HAPPY."

Bobby individually and as executor transferred portions of the land to Polasek Farms. Bobby's children sued Bobby, seeking a declaratory judgment that the will gave Bobby only a life estate in the land so that he could not convey fee simple title to Polasek Farms. The trial court ruled that the will contained a disabling restraint, which is void as a matter of law, that Bobby had fee simple title to the land, and that the children did not receive any interest in the land. The court of appeals agreed.

An estate in land that is conveyed or devised is a fee simple unless the estate is limited by express words or unless a lesser estate is conveyed or devised by construction or operation of law, but the law does not require any specific words or formalities to create a life estate. With respect to the creation of a life estate, no particular words are needed to create a life estate, but the words used must clearly express the testator's intent to create a life estate. A life estate is generally defined as an "estate held only for the duration of a specified person's life. Thus, a will creates a life estate "where the language of the instrument manifests an intention on the part of the grantor or testator to pass to a grantee or devisee a right to possess, use, or enjoy property during the period of the grantee's life.

Beginning with the contested provision itself, the parties focus largely on the meaning of the specific phrase "passed on down." However, this line of semantic argument misses the analytical forest for the trees. The provision's meaning depends on its overall intent, so narrow concentration on the possible meanings of three words is a diversion. One need only read the provision as a whole to see a layperson's clearly expressed intent to create what the law calls a life estate. Reading all three clauses together, Allen grants the land to Bobby subject to the limitations that he not sell it, that he take care of it, and that it be passed down to his children This represents the essence of a life estate; a life tenant's interest in the property is limited by the general requirement that he preserve the remainder interest unless otherwise authorized in the will.

Gutierrez* v. *Stewart Title Company, 550 S.W.3d 304 (Tex.App.—Houston [14th Dist.] 2018, no pet.). Enedina had five surviving children at the time of her death. Enedina's will devised the Church Street Property and Winnie Street Property to two of her children, Jose Angel and Jose Esteban "in equal shares." The will also included this "no sale" provision: "None of the real property is to be sold or mortgaged, all property is to be kept in the Gutierrez family. When one of my children dies, that individual's property is to be divided equally

among the survivors. When the last of my children is the only one remaining, then the property can be sold or do whatever that individual desires, without restrictions."

Jose Angel and Jose Esteban conveyed (1) the Church Street Property to Armando Orellana and (2) the Winnie Street Property to Don and Judy Lorenz. Stewart Title Company was the title company for both transactions. Jose Angel died in 2011.

Sister Olga was the exectutrix of Enedina's estate, and sued Orellana, the Lorenzes, and Stewart Title, claiming that Jose Angel and Jose Esteban had no authority to sell the property under the "no sale" provision of the will.

A devise of real property conveys a fee simple estate— i.e., an absolute estate— unless the estate is expressly limited or unless a lesser estate is conveyed or devised by construction or operation of law. An estate may be limited, for example, if the devise is made subject to an executory limitation that, if and when it occurs, will automatically divest the grantee of the property. The grantee's interest in this situation is referred to as a defeasible or determinable fee interest subject to an executory limitation.

A will may also create a life estate. A life estate is generally defined as an estate held only for the duration of a specified person's life. Thus, a will creates a life estate where the language of the instrument manifests an intention on the part of the grantor or testator to pass to a grantee or devisee a right to possess, use, or enjoy property during the period of the grantee's life. No particular language is required to make a life estate. Unless otherwise authorized in the will, a life tenant must preserve the remainder interest and cannot alienate the property.

So, did Enedina's will devise to Jose Angel and Jose Esteban a fee simple, a determinable fee subject to an executory limitation, or a life estate? The court looked to the Supreme Court's holding in ***Knopf* v. *Gray***, 545 S.W.3d 542 (Tex. 2018). Read as a whole, Enedina's will granted Jose Angel and Jose Esteban each an equal interest in the properties, subject to the limitations that they not sell or mortgage the properties and that their respective interests in the properties pass to their surviving siblings upon their deaths. As the Supreme Court stated in Knopf, "This represents the essence of a life estate." As was the case in Knopf, Enedina's will indicates an intent to keep her property in her family. Nowhere is that intent made clearer than the statement that "all property is to be kept in the Gutierrez family." Therefore, the Court concluded that Enedina's will granted to Jose Angel and Jose Esteban a life estate, not a fee simple interest, in the properties. Olga, the surviving sister, thus possessed a remainder interest in the properties.

Stewart Title argues against any interpretation of Enedina's will that grants less than a fee simple estate. Specifically, Stewart Title contends that the directive that none of the real property is to be sold is an invalid disabling restraint on sale., that the court must strike the clause without voiding the effect of the will's other provisions (i.e., the devises to Jose Angel and Jose Esteban); and that the result is the grant of an unrestricted fee-simple estate. But the Supreme Court rejected a similar argument in Knopf as one improperly viewing will terms in isolation: to "pluck a fragment out of context, construe it in isolation, strike it, and then return to the remaining text ... inverts the analytical process and defies our rules of will construction." Rather, the prohibition against sale is inherent in the nature of a life estate and is an integral part of Enedina's expression of intent to create a life estate.

Lance* v. *Robinson, 543 S.W.3d 723 (Tex. 2018). This case opens with one of the best paragraphs I've seen in years. "So stupendous is the conception, so vast the scale of actual accomplishment in the

construction of the Medina Dam Project that thousands of its nearest neighbors have positively no conception of the immensity of this undertaking. Yet, by a strange twist of Fate's perversity, this everlasting monument to man's mastery over the greatest forces of nature has achieved a deserved fame in the four corners of the earth, until not only the kings of finance, but royalty itself has leaned forward from its gilded throne and hearkened to the resistless lure of this giant among enterprises." The footnote to the paragraph leads you to a 1920s sightseeing brochure, http://www.edwardsaquifer.net/medina.html.

In this case, three families (all referred to as the "Robinsons") who own lots on a peninsula at Medina Lake filed suit after their new neighbors denied them access to an open-space area the community has long considered public space for recreation and access to the lake. The new neighbors claim they own the open-space area and that the community members have no easements or other rights to use it. The plaintiffs contend that a local water district owns the land, and alternatively, that they have an easement right to use it regardless of who owns it. The trial court and court of appeals agreed with the plaintiffs.

The land at issue in this case is on a narrow peninsula at Medina Lake known as Redus Point, which was originally part of the 728 acres partitioned to Mathilda Spettle Redus. The Robinsons own lots 1, 2, and 3. The peninsula generally runs from north to south, and the lots sit along the western edge, atop an incline or cliff as high as fifty feet above the water when the lake is full. Although it is possible to access the water below the cliff from these lots, the steep, rocky incline makes it difficult and at least to some degree, unsafe. Because of this, the Robinsons and other Redus Point lot owners have regularly accessed the water along the peninsula's gently sloping eastern side. Since at least the 1970s, the Robinsons and other lot owners have constructed improvements in this open space, including walkways, a dock, a boat ramp, and a deck. Although the open space has long been surrounded by a low post-and-cable fence, the community members have freely used the open space as a place for recreation and easy access to the water.

The Lances purchased lot 8 on Redus Point, which is across the road from the open-space area. Within a few months, they began replacing existing the old fences around the area with new fences and posting No Trespassing signs. The Lances sent a letter to the Robinsons asking them to remove a wood deck from "out property." When the Robinsons objected, the Lances pulled out the deeds to their lot which they claimed to include the open-space area. The Robinsons sued. The trial court ruled the Lances deeds did not convey any ownership in the disputed area because their grantors had no interest in that area to convey. It also held that the land was owned by the water district and that the Robinsons and the Lances had easements to use the disputed area. After the Lances filed a motion for rehearing, the trial court struck through the ruling that the water district owned the land. The final order from the trial court held that the Lances did not own the land but didn't say who did own it. The court of appeals affirmed.

The Lances argued that the Robinsons' suit, which was a declaratory judgment action, was the wrong vehicle to determine title to the disputed area. They argued that the proper action was trespass to try title and that the Robinsons had to plead and prove claims for trespass to try title.

The Texas Property Code states that a "trespass to try title action is the method of determining title to lands, tenements, or other real property." Property Code § 22.001(a). To prevail in a trespass-to-try-title action, a plaintiff must usually (1) prove a regular chain of conveyances from the sovereign, (2) establish superior title out of a common source, (3) prove title by limitations, or (4) prove title by prior

possession coupled with proof that possession was not abandoned. The trespass-to-try-title statute, however, only applies when the claimant is seeking to establish or obtain the claimant's ownership or possessory right in the land at issue. The trespass-to-try-title statute does not apply to a claimant who seeks to establish an easement, because such a claimant does not have such a possessory right. An easement is a nonpossessory interest that authorizes its holder to use the property for only particular purposes. The court held that the Robinsons were not required to file a trespass-to-try title action to assert their alleged easement.

The trial court had held that the Lances' deed constituted a cloud on the Robinsons' easement rights. Among their arguments was that a party can't sue to quiet title by removing a cloud on title unless the party owns the allegedly clouded title. Because the Robinsons don't claim ownership of the disputed area, the Lances argued that the weren't entitled to any declaration quieting title.

A suit to quiet title and a trespass-to-try-title claim are both actions to recover possession of land unlawfully withheld, though a quiet-title suit is an equitable remedy whereas a trespass-to-try-title suit is a legal remedy afforded by statute. The plaintiff in a quiet-title suit must prove, as a matter of law, that he has a right of ownership and that the adverse claim is a cloud on the title that equity will remove.

The court noted that most of the decisions supported the Lances contention that quiet title is available only to those who claim ownership of the property in question. But the court declined to decide the issue here. If the trial court properly declared that the Lances deed conveyed no ownership interest to the Lances or that the Robinsons enjoy an easement over the disputed area regardless of who owns it, the declaration that the Lances created an invalid cloud and burden on the easement is irrelevant.

Ferrara* v. *Nutt, 555 S.W.3d 227 (Tex.App.—Houston [1st Dist.] 2018, no pet.). In 2011, Ferrara and Nutt entered into a Contract for the Lease and Mandatory Purchase of Real Estate - essentially a contract for deed. The lease term was for 13 years, and required Ferrara to purchase the property at the end of the term. The property was a house. The Contract was not recorded.

Ferrara leased the house to Rodriguez. In 2013, Nutt sold the house to Dalu, and after that sale, Rodriguez paid her rent to Dalu instead of Ferrara. Ferrara sued Nutt and Dalu. The trial court held that Property Code Section 5, Subchapter D, which relate generally to executory contracts for the conveyance of residential real property, did not apply to the Contract because the Property was not "used or to be used as the purchaser's residence or as the residence of a person related to the purchaser within the second degree by consanguinity or affinity."

It is undisputed that Ferrara was not living on the property at the time Nutt sold the property to Dalu in June 2013; instead, Ferrara had rented the property to Rodriguez beginning in early 2012, and he and his family lived on another property nearby. Ferrara claimed that he had always intended to live in the house. He argued that the fact that he rented the property to Rodriguez does not mean that he abandoned his intent to make the property his permanent residence. However, the record contains no evidence concerning Ferrara's plans to move back onto the property. He offered no timeframe of how long he had intended to rent the property to Rodriguez or of when he planned to move onto the property beyond his testimony that he rented the property to recover what he had invested in repairs to the property. He presented no evidence of definite plans or preparations to return to the property. Viewing the evidence in the light most favorable to the trial court's findings, as we must, we conclude that the trial court reasonably could have inferred from the evidence presented that the property was not

going to be used as a residence by Ferrara and that this finding was therefore not against the great weight and preponderance of the evidence.

The trial court had also denied Ferrara's suit to quiet title. A suit to quiet title relies on the invalidity of the defendant's claim to the property and exists to enable the holder of the feeblest equity to remove from his way to legal title any unlawful hindrance having the appearance of better right.

In its conclusions of law, the trial court concluded that, because the Contract does not comply with Property Code Section 5, Subchapter D, the suit to quiet title should be denied. The court of appeals disagreed with that conclusion. Subchapter D applies to a particular type of executory contract, but does not apply to every contract for deed; however, it does not follow that because Subchapter D does not apply, these contracts for deed are invalid or that purchasers under these contracts cannot prevail on suits to quiet title. It agreed with Ferrara that the trial court erred to the extent that it dismissed Ferrara's suit to quiet title against Dalu solely because Subchapter D did not apply to the Contract. However, the court when on to look at whether Ferrara established his quiet title claim.

Upon execution of the contract for deed, the purchaser acquires an equitable right to make payments on the property and to receive a deed and legal title when he completes the payments. While the purchaser under a contract for deed obtains an immediate right to possession of the property, the seller retains legal title and has no obligation to transfer it unless and until the purchaser finishes paying the full purchase price, which is typically done in installments over several years.

As the plaintiff in the suit to quiet title, Ferrara bore the burden to establish his superior equity and right to relief. Unfortunately, Ferrara failed to show that he had made the payments required to establish equitable or legal title.

The trial court also dismissed Ferrara's fraud and DTPA claims. Ferrara argued that the trial court erred in dismissing his fraud and DTPA causes of action against Dalu because the record unequivocally demonstrates that Dalu knew that Nutt was not free to convey the Property to him free from any encumbrances. Dalu's knowledge concerning the contractual relationship between Ferrara and Nutt, however, has no bearing on the merits of Ferrara's fraud claims. To prevail on both his common law fraud and fraud in a real estate transaction claims, Ferrara was required to establish that a material misrepresentation was made to him, and, in the context of his fraud in a real estate transaction claims, he was required to establish that the misrepresentation was made to him for the purpose of inducing him to enter into a contract. There is no evidence that Nutt or Dalu made any misrepresentations to Ferrara at that time to induce him into entering into the Contract. Indeed, Ferrara can point to no evidence in the record of any misrepresentations made to him at any relevant point in time, nor can he point to any evidence in the record that Nutt entered into the Contract with no intention to perform the Contract.

Heredia* v. *Zimprich, 559 S.W.3d 223 (Tex.App.—El Paso 2018, no pet.). In the process of splitting two tracts of property between Luevano and the Heredias, the deed into the Heredias described a 0.3209 acre tract. Based on the description in the deed, the front property line is 117.52 feet and the back line is 120 feet. This varies from the plat, which showed the front and back lines are 109.45. When the Heredias went to the city to get a permit for utilities, they were told that they needed a survey of the property and had to "do a lot split" with the city. They agreed to a plat. About the same time, Luevano presented the Heredias with a Correction Deed, telling them that it was for the lot split.

The Correction Deed changed the description of the 0.3209 acre tract to a 0.2941 acre tract. There were some other issues with the Correction Deed that raised questions of fraud.

Zimprich bought Luevano's property and about the same time, the Heredias built a rock wall in a portion of the property that was described in the original deed, but not in the Correction Deed description. Zimprich sued, alleging trespass to try title and seeking to have the wall removed.

The trial court determined that Zimprich is the owner of the parcel in question and the wall constructed by the Heredias is on the Zimprich property.

On appeal, the Heredias challenge the validity of the Correction Deed. They assert that the Heredia Correction Deed is invalid because there were no facial imperfections in the original warranty deed or in the Heredias' chain of title (Issues One and Six), the Heredias did not agree to the Heredia Correction Deed (Issue Two), there was no mutual mistake which caused a defect or imperfection in the original warranty deed (Issue Three), and a correction deed cannot be used to convey an additional, separate parcel of land not conveyed in the original deed.

The Heredias' arguments are based on ***Myrad Properties, Inc.* v. *LaSalle Bank National Association***, 300 S.W.3d 746 (Tex. 2009). In ***Myrad Properties***, the Supreme Court acknowledged the longstanding rule that a correction deed could be used to correct a defective description of a single property when a deed recites inaccurate metes and bounds. It held, however, that a correction deed could not be used to substantively change an unambiguous conveyance of real property to include an additional parcel of land not described in the original deed, as that would undermine the purpose of record notice.

The Texas Legislature responded to ***Myrad Properties*** in 2011 by enacting statutes which permit the use of correction deeds under specified circumstances to make both material and nonmaterial corrections to a deed. Property Code § 5.027-31.

Under Property Code §§ 5.028 and 5.029, the parties to the original transaction or the parties' heirs, successors, or assigns, may execute a correction instrument to make both nonmaterial and material corrections to the recorded original instrument of conveyance. Pertinent to this case, a correction deed may be utilized to add or remove land to a conveyance that correctly conveys other land. The statutes pertaining to correction deeds do not limit the use of correction deeds to correct facial imperfections in the original warranty deed or in the chain of title, nor is there a requirement that there be a mutual mistake which caused a defect or imperfection in the original warranty deed. While the Heredias assert that they did not agree to the Correction Deed, the evidence supports the trial court's determination that the Heredias signed the Correction Deed, and they acquiesced to the change in the metes and bounds by signing a Subdivision Plat on August 1, 2007 and a Deed of Trust in 2015 containing the same metes and bounds of their property as the Heredia Correction Deed.

PART VIII
VENDOR AND PURCHASER

International Business Machines Corporation* v. *Lufkin Industries, LLC, No. 17-0666 (Tex. March 15, 2019). Fraudulent inducement is a species of common-law fraud that arises only in the context of a contract. A fraudulent-inducement claim requires proof that: (1) the defendant made a material misrepresentation; (2) the defendant knew at the time that the representation was false or lacked knowledge of its truth; (3) the defendant intended that the plaintiff should rely or act on the misrepresentation;

(4) the plaintiff relied on the misrepresentation; and (5) the plaintiff's reliance on the misrepresentation caused injury. In a fraudulent-inducement claim, the misrepresentation occurs when the defendant falsely promises to perform a future act while having no present intent to perform it. The plaintiff's reliance on the false promise induces the plaintiff to agree to a contract the plaintiff would not have agreed to if the defendant had not made the false promise.

The software system contract entered into between Lufkin and IBM contained a disclaimer of reliance "upon any representation made by or on behalf of IBM that is not specified" in the contract. The contract also contained a merger clause that said the contract was the entire agreement that replaces any prior oral or written communications.

It turned out that a lot of the oral representations made by IBM during the sales and training process were incorrect and Lufkin had some big problems with the software. It sued IBM claiming, among other things, that it was fraudulently induced into the contract.

A merger clause, standing alone, does not prevent a party from suing for fraudulent inducement. Similarly, a clause that merely recites that the parties have not made any representations other than those contained within the written contract is not effective to bar a fraudulent-inducement claim. But a clause that clearly and unequivocally expresses the party's intent to disclaim reliance on the specific misrepresentations at issue can preclude a fraudulent-inducement claim.

Not every such disclaimer is effective, and courts must always examine the contract itself and the totality of the surrounding circumstances when determining if a waiver-of-reliance provision is binding. 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.

Hogan* v. *Goldsmith, 533 S.W.3d 921 (Tex.App.—Eastland 2017, no pet.). Billie Bob Hogan and Goldsmith entered into a lease-purchase agreement for 836.05 acres of Billie Bob's real property in Callahan County. Pursuant to the agreement, Goldsmith was to make annual payments to Billie Bob for ten years in exchange for Goldsmith's right to use the property. The agreement also provided that Goldsmith had an option to purchase the property at any time during the term. In order to exercise this option, Goldsmith had to pay Billie Bob an amount in cash, minus any payments Goldsmith had made to Billie Bob during the term of the agreement.

Billie Bob died, at which point her son Michael inherited an undivided interest in the property and became the independent executor Billie Bob's estate. Goldsmith sent a written notice to Hogan in which Goldsmith stated that he was exercising the option under the agreement to purchase the property. Hogan agreed to convey the property's surface estate to Goldsmith, but not the mineral estate. Goldsmith believed that he was entitled to the surface estate and the mineral estate, and he filed suit against Hogan and requested specific performance, in which Goldsmith pled that he had performed all conditions precedent in the exercise of his option. Hogan then agreed to convey both the surface and mineral estates to Goldsmith and to proceed with the closing.

Hogan appeared for the closing, but Goldsmith, on his attorney's advice, did not appear. A short while later, Hogan filed an answer to Goldsmith's specific performance suit, denying that Goldsmith had performed all conditions precedent in the exercise of his option. Goldsmith argued that he properly exercised the option to purchase the property and was ready, willing, and able to

pay the purchase price, but that Hogan refused to close the sale of the property. Hogan filed a response to Goldsmith's motion, and argued, among other things, that Goldsmith did not have the funds available to close as a cash sale. The trial court granted Goldsmith's motion for partial summary judgment.

Hogan argued on appeal that the trial court erred when it granted Goldsmith summary judgment because Goldsmith was not ready, willing, and able to perform his obligation to exercise the option under the agreement. Specific performance is the remedy of requiring exact performance of a contract in the specific form in which it was made. A party who seeks specific performance must plead and prove (1) compliance with the contract, including tender of performance, unless excused by the defendant's breach or repudiation and (2) the readiness, willingness, and ability to perform at relevant times. Therefore, the analysis turned on whether Goldsmith pleaded and provided sufficient evidence to establish that he tendered performance or, if his performance was excused, whether he was ready, willing, and able to perform his obligations under the option to purchase for which an award for specific performance is appropriate.

Goldsmith argued on appeal that he pleaded that all conditions precedent had been performed by him to the exercise of the option and that Hogan did not specifically deny that Goldsmith failed in any particular concerning the exercise of the option to purchase or any tender of payment or that Goldsmith was not ready, willing, and able to conclude the purchase of the property in question.

A condition precedent may be either a condition to the formation of a contract or a condition to an obligation to perform under an existing contract. A condition precedent to an obligation to perform under a contract is an act or event that occurs subsequent to the formation of a contract and must occur before there is a right to immediate performance and there is a breach of contractual duty. A party that seeks to recover under a contract bears the burden to prove that all conditions precedent have been satisfied. The court construed Goldsmith's tender of cash as a condition precedent to Hogan's requirement to convey the property to Goldsmith. Goldsmith had to prove that he tendered performance— that he tried to provide cash to Hogan— in order to obtain specific performance. Even if Goldsmith was excused from performance under these circumstances, Goldsmith would still have to plead and prove that he was ready, willing, and able to perform.

In his pleadings, Goldsmith neither pleaded nor proved that he tendered a cash payment to Hogan. Goldsmith argued on appeal that his performance was excused because Hogan repudiated the contract when he failed to close within the contractually stipulated sixty-day period. Even if we assume, without deciding, that Goldsmith was excused from performance when Hogan did not close within sixty days of Goldsmith's exercise of the purchase option, Goldsmith would still be required to plead and prove that he was ready, willing, and able to pay Hogan the sum he owed Hogan in cash. However, Goldsmith never produced any evidence that he ever had the money he owed Hogan in cash to exercise the purchase option.

MJR Oil & Gas 2001 LLC* v. *AriesOne, LP, GFP Texas, Inc., 558 S.W.3d 692 (Tex.App.--Texarkana 2018, no pet.). In Texas, a real property covenant runs with the land when it touches and concerns the land, it relates to a thing in existence or specifically binds the parties and their assigns, it is intended by the parties to run with the land, and the successor to the burden has notice. In addition, there must be privity of estate, which means there must be a mutual or successive relationship to the same rights of property. For a covenant to run with the land, the parties creating the covenant must intend for it to do so.

MJR was given a right of first refusal that was created in an unrecorded Settlement Agreement between Energy and MJR. The Settlement Agreement initially provides for certain conveyances of oil and gas leases and other property between the parties, including the conveyance by Energy of certain ORRI to MJR. The Settlement Agreement then addresses certain continuing obligations of Energy, including its obligation to give MJR a ROFR as to any planned assignment, farmout, sale, or transfer of any lease in which MJR has an interest. The Settlement Agreement went on to provide that it was binding upon and benefited the parties and all of their respective assigns and successors.

AriesOne, a successor to Energy, argued that because the "assigns and successors" provision did not say that the ROFR ran with the land, it didn't.

While the use of such terminology is helpful in determining intent, it is not dispositive, and an obligation intended to run with the land can be created without such language. The Settlement Agreement contains language that indicates the parties intended the ROFR to be a continuing obligation of both Energy and its assigns. First, the paragraph granting the ROFR provides that any transferee of any of the leases must agree to be bound by all the obligations in the Settlement Agreement. Since this refers to transferees of the leases, which were owned by Energy, this refers to the assigns and successors of Energy and evidences the intent of the parties that the ROFR would be a continuing obligation of these assigns and successors. This conclusion is strengthened by the placement of this clause within the paragraph granting MJR its ROFR. In addition, the Settlement Agreement specifically provides that it is binding on the parties and their assigns and successors. While not dispositive, this is yet another indication that the parties to the grant of the ROFR intended that it would be a covenant running with the land. So the court held that the parties intended the ROFR to run with the land.

To be a covenant running with the land, there must also be privity of estate between the parties when the covenant was established. There must also be privity of estate between the parties to the grant of the covenant and those against whom the covenant is sought to be enforced. The covenant must be contained in a grant of land or in a grant of some property interest in the land. An option to purchase land creates an interest in land. Thus, the court held there was privity of estate.

There must also be privity of estate between the parties to the grant of the covenant and those against whom the covenant is sought to be enforced. To the extent an unbroken chain of title has been established between Energy and AriesOne, there is privity of estate between these parties.

A covenant touches and concerns the land when it affects the nature, quality, or value of what is conveyed, or if it either renders the grantor's interest in the land less valuable or renders the grantee's interest more valuable. The option to purchase all of Energy's interest in the leases undoubtedly increased the value of MJR's interests, so the court held that the ROFR touches and concerns the land. Further, the covenant must relate to a thing in existence to be a covenant running with the land. The burdened interests existed at the time the ROFR was granted, so the ROFR related to a thing in existence.

Finally, the successor in interest must have notice of the covenant running with the land. The ROFR was granted in the unrecorded Settlement Agreement, but the Settlement Agreement was referred to in the assignment of MJR's interests. The rule in Texas is that a purchaser is bound by every recital, reference and reservation contained in or fairly disclosed by any instrument which forms an essential link in the chain of

title under which he claims. Thus, the assignees of the interests were on notice of the ROFR contained in the Settlement Agreement.

PART IX
BROKERS

In re *Rescue Concepts, Inc.*, 556 S.W.3d 331 (Tex.App.—Houston [1st Dist.] 2017, no pet.). Rescue Concepts and Smith executed a letter of engagement for legal representation related to the negotiation and sale of property owned by Rescue Concepts. Rescue Concepts agreed to pay a contingency of 3% of the gross sales price. Rescue Concepts entered into a contract for the sale of the property to HouReal. In the provision of the contract relating to brokers, Smith's firm was designated as the Principal Broker and Smith was listed as its agent.

The sale never closed. HouReal sued Rescue Concepts for breach of contract. In the course of the litigation, the HouReal's broker, JLL, sought discovery of communications between Smith and Rescue Concepts. Rescue Concepts claimed attorney-client privilege. JLL argued that the requested communications were not privileged because they were made while Smith was performing services as a real estate broker, not as a lawyer. The trial court found that none of the communications were privileged. Rescue Concepts filed this mandamus petition.

In its sole issue raised in its petition for writ of mandamus, Rescue Concepts asserts that the trial court abused its discretion in ruling that email correspondence between it and Smith was not privileged and ordering all emails produced without redactions. The question was whether Smith was an attorney or a broker.

Smith claimed that she was a lawyer, not a broker. Smith claimed that she negotiated the terms of a contract for sale of the property, that she "regularly communicated with her client regarding the legal implications of the ongoing negotiations, and that she provided legal analysis of certain provisions or conditions being negotiated.

JLL argues that it produced at least conflicting evidence, if not conclusive evidence, that no attorney-client relationship existed between Smith and Rescue Concepts, and thus, the decision of the trial court as to whether the privilege applied must be deemed conclusive. JLL argues that Smith's emails regarding the negotiation and the sale of the property did not constitute the rendition of professional legal services when no actual legal advice is given.

The court held that, contrary to its assertion, JLL has failed to identify any evidence controverting the existence of an attorney-client relationship between Smith and Rescue Concepts. It has presented no evidence that Smith acted only as a real estate broker. It presented no evidence rebutting the statements of both Smith and Rescue Concepts' representatives that they had formed an attorney client relationship. Rather, JLL points to statements within Smith's engagement letter indicating that the scope of employment included the negotiation of a sale in exchange for a fee of 3% of the gross sales price, arguing that brokers may negotiate the sale of property. JLL also points to language in the engagement contract indicating Smith was hired as an exclusive listing agent for the subject real property, not as an attorney.

These arguments by JLL ignore the nature of the services that Smith provided to Rescue Concepts. Specifically, they ignore the distinction between an attorney— who is authorized as a licensed attorney to perform virtually all of the services a broker can perform— and a real estate broker— who may not perform any of the services that require a licensed attorney. Smith provided advice regarding contract terms and matters related to litigation that fall within the scope of professional duties of attorneys but

outside the scope of work that brokers are authorized to perform.

The authorized activities of a real estate broker are those set out in the Real Estate License Act, Chapter 1101 of the Occupations Code. An attorney licensed in this state may act as a broker without obtaining a separate real estate license. While an attorney is authorized to act as a broker without obtaining a separate real estate license, a real estate broker cannot provide attorney services to his clients, such as providing legal advice requiring the use of legal skill or knowledge; advising a person regarding the validity or legal sufficiency of an instrument of the validity of title to real property; or drafting documents from a non-approved form.

The services provided to Rescue Concepts by Smith in this case were clearly those of an attorney acting in part as an attorney/broker, but going far beyond that. By its plain language, Rescue Concepts' engagement letter addressed legal representation related to the negotiation and sale of property owned by Rescue Concepts. The engagement letter set out the scope of Smith's employment as providing legal representation regarding the negotiation and sale of Rescue Concepts' Property, and it contained multiple references to Smith's duties as an attorney. Construing the plain language of the engagement contract as a whole, it clearly evinces an intent to form an attorney-client relationship between Smith and Rescue Concepts related to the negotiation and sale of the Property.

The services Smith performed that a broker could also have performed were authorized by the exclusion for attorneys from the strictures in the Real Estate License Act. In addition, Smith engaged in numerous activities that a broker could not have performed, such as providing legal advice to her client regarding contract terms, advising Rescue Concepts regarding re-platting the property, pipeline right-of-way issues, and tax implications, and negotiating for and drafting special contract provisions to effectuate the sale of the Property. A non-attorney broker is expressly barred by the Real Estate License Act from performing such services.

Looking to the nature of the relationship between Smith and Rescue Concepts as set out in their engagement contract, the parties' explicit statements, and objective standards of what the parties said and did, the court concluded that the evidence establishes, as a matter of law, that an attorney-client relationship existed between Smith and Rescue Concepts.

PART X
LIS PENDENS

In Re I-10 Poorman Investments, Inc., 549 S.W.3d 614 (Tex.App.—Houston [1st Dist.] 2017, no pet.). In this mandamus action, Poorman challenged the trial court's order denying expungement of a lis pendens filed by Woodcreek.

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

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

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

action.

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

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

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

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

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

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

PART XI
EASEMENTS

Teal Trading and Development, LP* v. *Champee Springs Ranches Property Owners Association, 534 S.W.3d 558 (Tex.App.—San Antonio 2017, pet. pending). This appeal concerns the validity and enforceability of a property restriction—specifically a one-foot reserve strip as a Non-Access easement—that if valid precludes ingress and egress across the strip. This court previously reviewed this dispute, holding that neither side was entitled to summary judgment and remanding to the trial court for further proceedings. 432 S.W.3d 381 (Tex.App.—San Antonio 2014).

Cop owned a big chunk land in Kendall

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

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

Champee Springs's petition sought a declaratory judgment that Teal Trading was bound by the non-access restriction and estopped to deny its force, validity, and effect, and because they were so bound, the restriction was enforceable against them. Teal Trading's petition-in-intervention denied that it was bound by the restriction, and it sought a declaratory judgment that the non-access restriction was void as an unreasonable restraint against alienation and that Champee Springs had waived the right to enforce the non-access restriction and was thus estopped from enforcing the restriction. On appeal the first time, this court held Champee Springs failed to establish as a matter of law that Teal Trading was estopped by deed from challenging the Non-Access Easement's validity and enforceability because none of the deeds within the chain of title from Cop to Teal Trading acknowledge the validity and enforceability of the non-access restriction.

On remand, Champee Springs amended its petition to seek a declaration that the non-access easement was valid and binding and is enforceable as a covenant running with the land. Teal Trading, on the other hand, sought a declaration that the easement was void, among other reasons, for being an unreasonable restraint on alienation. The trial court ruled that the non-access easement was valid and enforceable.

As to the claim that the non-access easement was an unreasonable restraint on alienation, Champee Springs asserted that there was no evidence that the easement (1) is the type of restraint prohibited by the supreme court, or (2) restrains the alienation of the Privilege Creek Tract, which is the only portion of Teal Trading's property burdened by the Non-Access Easement.

To constitute an unreasonable restraint on alienation, it is axiomatic that a restraint must first exist. Only then will the court determine whether the restraint is unreasonable. The Restatement of Property, which Texas has adopted, defines the types of restraints on alienation: (1) disabling restraint— attempt by an otherwise effective conveyance or contract to cause a later conveyance to be void; (2) promissory restraint— attempt to cause a later conveyance to impose contractual liability on the one who makes the later conveyance when such liability results from a breach of an agreement not to convey, and; (3) forfeiture restraint— attempt to terminate or subject to termination all or part of the property interest conveyed. To date, these are the only restraints on alienation recognized by the Texas courts.

Although in its brief Teal Trading recognizes the three categories, it does not argue, nor did it present any evidence, that the non-access easement falls within any of these categories. Teal Trading did not present any evidence the non-access easement prevents it from transferring or in any way conveying all or part of the property. The court also noted that, in its review of the CCRs, the easement doesn't prohibit anyone from selling part of its

property. Thus, on its face, the non-access easement is not as a matter of law a restraint on alienation.

The evidence presented by Teal Trading shows, at best, an indirect restraint on alienation, i.e., the non-access easement does not prevent Teal Trading from conveying any portion of the Privilege Creek Tract, but its existence may make potential buyers less eager due to inconvenience. Although indirect restraints are recognized, the Texas Supreme Court has held that before such restraints are stricken, they must bear some relationship to the evil which the rules governing undesirable restraints are designed to prevent. In addition, the supreme court has held we should not mechanically apply restraint on alienation rules to indirect restraints because it could inhibit the use of desirable contract provisions and unnecessarily limit the freedom to contract. Moreover, Teal Trading never asserted indirect restraint on alienation as a defense, nor did it present any evidence the creation of the non-access easement lacked a rational justification.

Teal Trading also claims the Non-Access Easement is a prohibition on use of the Privilege Creek Tract so as to render the easement void. In its no evidence motion for summary judgment, Champee Springs asserted there is no evidence the non-access easement so severely limits Teal Trading's use of the Privilege Creek Tract that it renders the tract valueless. Based on the structure of the argument in its brief, it appears Teal Trading is relying on the same evidence to raise a fact issue on prohibition on use as it did for unreasonable restraint on alienation.

As the court reasoned with regard to the unreasonable restraint on alienation defense, although the non-access easement may make property within the Privilege Creek Tract less attractive to potential buyers, it does not prohibit Teal Trading from using the property as intended. Thus, the portion of the trial court's summary judgment in favor of Champee Springs with regard to the affirmative defense of prohibition of use was proper.

Next, Teal Trading contends the trial court erred in granting Champee Springs's partial motion for summary judgment as to the affirmative defense of termination by merger. With regard to this affirmative defense, Teal Trading argues the non-access easement was extinguished when it became the owner of the land on both sides of the easement and the easement property. Champee Springs asserted there was no evidence that all of the burdened and benefitted properties subject to the Non-Access Easement came back into the ownership of a single entity, as required for termination by merger.

R2 Restaurants, Inc.* v. *Mineola Community Bank, SSB, 561 S.W.3d 642 (Tex.App.--Tyler 2018, pet. denied). An easement is a nonpossessory interest that authorizes a holder's use of property for only a particular purpose. Ordinarily, intent to abandon an easement must be established by clear and satisfactory evidence, and abandonment of an easement will not result from nonuse alone; instead, the circumstances must disclose some definite act showing an intention to abandon and terminate the right possessed by the easement owner.

PART XII
ADVERSE POSSESSION AND QUIET TITLE ACTIONS

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

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

The supreme court has defined ouster, in the context of cotenancies, as unequivocal, unmistakable, and hostile acts the possessor took to disseize other cotenants. Ouster or repudiation may be constructive. With regard to constructive ouster, notice of such ouster or repudiation may be established when there has been: (1) long-continued possession under a claim of ownership and (2) nonassertion of claim by the titleholder.

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

Pierce* v. *Blalack, 535 S.W.3d 35 (Tex.App.—-Texarkana 2017, no pet.). Felicia's trespass to try title suit against Debbie was dismissed with prejudice for failure to comply with court orders requiring her to amend her pleadings to join necessary parties. Rule 39(a) of the Rules of Civil Procedure require joinder of a party if "(1) (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest." If the party is not joined, the court must order that he be joined. Rule 39 applies to trespass to try title lawsuits. Further, the Declaratory Judgment Act also mandates the joinder of persons whose interests would be affected by the judgment.

Pierce asserted claims for declaratory relief, which, though inartfully pled, sought to set aside the deed by Hart to King and the subsequent judgment in favor of King, the predecessor in interest to all of the defendants, and to declare subsequent transactions by King void. And, while a declaratory judgment is not binding on and does not prejudice the rights of a person who is not a party to the proceeding, the trial court may refuse to render a declaratory judgment if it would not terminate the uncertainty or controversy giving rise to the proceeding.

Pierce's petitions sought title to realty in fee simple. Her twelfth amended petition identified 172 parties as defendants, including surface estate owners, mineral estate owners, royalty owners, lessees of the mineral estate, and working interest owners, but did not include entities holding approximately 104 pipeline easements on the property. With respect to these parties, the trial court determined that a judgment in favor of Plaintiff would adversely affect

both those claiming an interest in the surface estate of the 366.7 acres in question, as well as those persons claiming under a 1930 oil and gas lease severing the mineral estate. Though not binding on those not a party to this suit, a judgment in Pierce's favor would unsettle title reaching back almost 100 years, and would cast a cloud on the title for both surface owners and mineral owners. Surface owners will be hindered in their efforts to sell their property, and oil and gas producers will cease paying royalty owners for fear of exposure to multiple claims. To obtain a complete resolution of title, the remaining defendants would ultimately need to be brought into subsequent litigation, with a real possibility of inconsistent results creating further confusion of title.

Heredia* v. *Zimprich, 559 S.W.3d 223 (Tex.App.—El Paso 2018, no pet.). To prevail in a trespass-to-try-title action, a plaintiff must ordinarily (1) prove a regular chain of conveyances from the sovereign, (2) establish superior title out of a common source, (3) prove title by limitations, or (4) prove title by prior possession coupled with proof that possession was not abandoned. A trespass to try title action has strict pleading and proof requirements. The plaintiff must prove that he has superior title to the property.

The Heredias assert that Zimprich failed to meet these strict proof requirements because he failed to prove that he has superior title. When the sole dispute between the parties involves a boundary's location, as in this case, the dispute may be tried as a statutory trespass to try title action, but the formal proof requirements are relaxed. In such a case, a recorded deed is sufficient to show an interest in the disputed property without having to prove a formal chain of superior title.

M&M Resources, Inc.* v. *DSTJ, LLP, 564 S.W.3d 446 (Tex.App.—Beaumont 2018, no pet.). Whether a claimant must seek relief related to property interests through a trespass to try title action, as opposed to a suit under the Declaratory Judgments Act, has been a source of confusion. Generally, a trespass to try title claim is the exclusive method in Texas for adjudicating disputed claims of title to real property.

Civil Practice & Remedies Code § 37.004(a) states a "person interested under a deed ... or whose rights, status, or other legal relations are affected by a ... contract ... may have determined any question of construction or validity arising under the instrument ... and obtain a declaration of rights, status, or other legal relations thereunder." Even so, the Property Code § 22.001(a) provides a "trespass to try title action is the method of determining title to lands, tenements, or other real property.

In this case, because the underlying dispute involves ownership of the possessory interest in the mineral estates at issue, the court held that the proper and mandatory vehicle for resolving those claims is a trespass to try title action.

PART XIII
CONDEMNATION

State of Texas* v. *Luby's Fuddruckers Restaurants, LLC, 531 S.W.3d 810 (Tex.App.—Corpus Christi 2017, no pet.). The State condemned a strip of Luby's parking lot to widen US 290. The taking rendered Luby's incapable of operating in its current form, both because the available parking did not meet code and because it was inadequate to meet customer demand or to comply with restrictive covenants. The State agreed. The dispute in this case involved the amount of compensation. The special commissioners returned a condemnation award of $1,795,853, and both parties objected.

Before trial, the State moved to dismiss for want of jurisdiction. According to its motion, Luby's had asked for lost profits, and the State argued that no recovery for lost profits is allowed under state law.

Luby’s presented evidence that this location had net profits of $40,000 per month. Luby's also presented evidence that it had begun preparation for the twelve-month process of demolition and construction, during which the cafeteria would be closed and unavailable to generate income. Luby's asked the jury to award $480,000 to compensate for lost profits during this process.

The State argued that in light of the main condemnation award, any award for lost profits was an impermissible double recovery. The State also argued that in partial takings cases, the general rule forbids any independent claim for lost profits. The State's argument is supported by a rule that when only a part of the land has been taken, evidence relating to lost profits is admissible, not as a separate item of damage, but as a means of demonstrating the taking's effect on the market value of the remaining land and improvements.

Luby’s argued that another rule provides that recovery of lost profits is allowed when a taking causes material and substantial impairment of access to the property. Luby’s contended that, since the cafeteria must be destroyed, that qualified as a substantial impairment of access. Luby’s relied on ***State of Texas* v. *Whataburger***, 60 S.W.3d 256 (Tex.App.—Houston [14th Dist.] 2001, pet. denied), where Whataburger was awarded damages for lost profits in a similar case.

However, the court noted that the award of loss profits in ***Whataburger*** would not constitute a double recovery so long as the profitability of Whataburger's property was not a factor in arriving at its market value. The ***Whataburger*** court correctly observed that in general, the cost approach to compensation does not take account of the property's ability to generate profits in estimating the value of the property. This approach accounts for the cost of replacing the taken property. Since the experts for both parties relied exclusively on the cost approach, the court concluded that profitability was not reflected in the market-value award for the condemnation claim, and there was no double recovery.

Here, the State placed great emphasis on the sales comparison and income approaches, and took little account of the cost approach. As the ***Whataburger*** court recognized, the sales comparison and the income approach both take account of the property's ability to generate profits. Under the income approach, the value of a property is a direct derivation of the property's ability to generate profit. And according to the ***Whataburger*** court, a property's ability to foster profit is an inherent factor in comparable sales approach because a willing buyer will normally pay more for a tract containing a profitable enterprise than for a similar tract containing an unprofitable enterprise. Thus, the ability of a business to make a profit is reflected in its market value.

City of Galveston* v. *Murphy, 533 S.W.3d 355 (Tex.App.—Houston [14th Dist.] 2015, pet. denied). Galtex owned property subject to a mortgage in favor of Murphy. The property is a 14-unit apartment located in a Historical District zoned for single family dwellings. Under the zoning laws in Galveston, the property was grandfathered as a multifamily use.

Hurrican Ike hit Galveston and flooded the first floor of the building. Just after repairs commenced, the City advised Galtex that the property was unfit for human habitation and had been condemned. The tenants evacuated. Galtex and the City went back and forth on renovations and permits. Because the back and forth took so long, the City informed the owners that, because the property had been vacant for more than six months, they had lost their grandfather status and would be required to obtain a Specific Use Permit to continue as a multifamily use. The owners prepared and submitted an SUP application. Again, there was back and forth regarding the

application. Ultimately, the City Council denied the SUP. Murphy foreclosed on the property.

The property owners sued the City, alleging that the SUP denial and its invocation of the six-month vacancy used to then require the SUP constituted an inverse condemnation.

When a governmental entity intentionally takes private property for public use without adequately compensating the landowner, the owner may recover damages for inverse condemnation. To assert inverse condemnation, a claimant must plead: (1) the governmental unit intentionally performed an act (2) that resulted in the taking, damaging, or destruction of the claimant's property (3) for public use. Takings can be classified as either physical or regulatory. While all property is held subject to the valid exercise of the police power, a regulatory action may, under some circumstances, constitute a taking requiring compensation.

Here, the Property Owners allege a regulatory taking that denied all economically beneficial or productive use of the property or, in the alternative, unreasonably interfered with the use and enjoyment of the property.

The court first held that the property owners claims were not ripe. Here, the complaint was that the City denied their SUP application as a means of impermissibly requiring a reduction in density. However, even presuming that one basis for denial of the SUP permit was a preference for a reduced number of units, the City Council expressly advanced distinct safety concerns related to the outstanding code violations on the property, as well as the still-outstanding engineer's letter. And although the property owners insist the parking requirement was only a subterfuge to achieve a reduction in density, the property owners never applied for a variance with the Zoning Board. The record therefore reflects that the property owners never isolated the essential question of density for the City's reconsideration. In other words, there was no reasonable degree of certainty that the City only would grant a SUP if the property owners agreed to remove some apartments.

Even after holding that the claims were not ripe, the court went on to consider whether the revocation of the property's permitted non-conforming use status was a taking. The City claimed that the property owners waived their right to raise a takings claim by filing the SUP application and failing to pursue an appeal with the Zoning Board as to the non-conforming use. The court noted that the City informed the property owners of the loss of their non-conforming use status, but failed to inform them regarding any potential for appeal of the revocation, insisting that an SUP would be required. The court held that the City did not meet its burden to establish that its revocation decision was not final.

PART XIV
LAND USE PLANNING, ZONING, AND RESTRICTIONS

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

and relying on Property Code § 202.003(a), which requires that "a restrictive covenant be liberally construed to give effect to its purpose and intent." The Supreme Court reversed.

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

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

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

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

Schack* v. *Property Owners Association of Sunset Bay, 555 S.W.3d 339 (Tex.App.—Corpus Christi 2018, no pet.). This is the first reported case involving VRBO type rentals following the Supreme Court's ruling in ***Tarr* v. *Timberwood Park Owners Association, Inc.***, 556 S.W.3d 274 (Tex. 2018). Here, the owners were renting their house for short term rentals on VRBO. The restrictive covenants included two that the POA claimed were being violated by the short term rentals: First, a Dwelling Restriction that the property was intended

for one single family dwelling per lot and their use is restricted to that purpose, and second, that an Occupancy Restriction which provided that occupancy of a lot was limited to one family, which was defined as "any number of persons related by blood, adoption or marriage living with not more than one (1) person who is not so related as a single household unit, or no more than two (2) persons who are not so related living together as a single household unit . . ."

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

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

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

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

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

C.A.U.S.E.* v. *Village Green Homeowners Association, Inc., 531 S.W.3d 268 (Tex.App.—San Antonio 2017, no pet.). The restrictive covenants required each homeowner to collect and dispose of garbage and trash at its own expense. The residents all contracted with different disposal companies, so there wasn't a single

day on which garbage collection occurred and trucks from different companies entered the subdivision on different days to collect trash and recycling. Because of that, the Board voted to select a single garbage collection company, and entered into a garbage collection contract. The homeowners were instructed to make arrangements with the service provider.

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

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

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

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

Twin Creeks Golf Group, L.P.* v. *Sunset Ridge Owners Association, Inc., 537 S.W.3d 535 (Tex.App.—Austin 2017). Twin Creeks filed a restrictive covenant which included a provision requiring all residential owners to acquire and maintain a "Community Membership" in the country club. A few years later, a condo declaration was filed for Sunset Ridge Condominiums. Operation of the country club was transferred to Twin Creeks Operating Co., and as a part of the transfer, an Amended and Restated Restrictive Covenant was filed that, in part, confirmed that the transfer of operations wouldn’t affect the obligation of any owner to maintain membership in the country club.

Sunset Ridge sued Twin Creeks seeking a declaration that the amended restriction was invalid as to the condominium due to

the failure to renew the covenant after the ninth anniversary pursuant to the Uniform Condominium Act, Property Code § 82.0675(a). Section 82.0675(a) dictates that a provision of a declaration or recorded contract that requires condominium owners to maintain a membership in a private club is not valid after the tenth anniversary of the date the provision is recorded or renewed unless it is renewed after the ninth anniversary of that date in the manner provided by the declaration or recorded contract. The trial court held that § 82.0675(a) applied and, since the restriction wasn't renewed after the ninth anniversary, any provision in the restriction requiring condo owners to maintain club membership was invalid.

Twin Creeks claimed that § 82.0675(a) applies only to condominiums and not to other types of property ownership, such as the single family residences also subject to the amended restriction. It further argued that § 82.0675(a) did not apply to restrictions that are applicable to both condo and other types of real property. Further, it argued that the single family residence owners have a property interest in the mutual and reciprocal obligation among all property owners in the Community to pay club dues and that application of § 82.0675 to the amended restriction would lead to an unjust and unreasonable result because the single family residence owners would have to pay increased dues while the condominium owners would continue to reap many of the benefits of the Community without paying club dues.

The court agreed that by its express language, § 82.0675 has effect on condominium owners; however, it contains no exception for membership requirements applicable to condominium owners that also apply to owners of other types of real property. If the legislature had intended to exempt club membership requirements applying to both condominiums and other types of real property from § 82.0675, it could have done so expressly. Further, the non-condominium owners' rights are not affected by the trial court's declaration that the club membership requirement is invalid as applied to the condominium owners, such that it renders the application of § 82.0675 to the condo owners unjust or unreasonable.

Here, the issue is the application of a statutory provision that, under certain circumstances, invalidates the requirement that condominium owners pay club membership dues, and Sunset Ridge did not seek a declaration as to the rights and interests of the non-condominium owners. Consequently, the non-condominium homeowners' property interests arising from the mutual restrictive covenants are not implicated here. Further, § 82.0675(a) provides for the continuation of a membership requirement through renewal after the ninth anniversary in the manner provided in the declaration or recorded contract. Twin Creeks could have foreclosed the result it now seeks to avoid by renewing the membership provision after the ninth anniversary.

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

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

The Popkowskis admitted they were operating out of residential property, but it was not the only business operating in the subdivision. They described several other businesses they had witnessed in the neighborhood. Other witnesses also testified about various businesses operating in the

subdivision. Vance argued that the nonwaiver provision in the restrictions prevented a waiver. At trial, the jury found that the restrictions had been abandoned.

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

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

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

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

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

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

Severs* v. *Mira Vista Homeowners Association, Inc., 559 S.W.3d 684 (Tex.App.--Fort Worth 2018, pet. denied). The Severses' breach-of-contract claim ultimately turns on the scope of the architectural control committee's authority to vary or waive its standards and procedures for approving the Gaudins' second-story addition and whether the HOA thus violated the CCRs and Design Guidelines. Section 2.1 of the Guidelines requires a minimum fifteen-foot side setback for each home, and section 5 requires a design-and-construction approval process that includes, in part, the submission of building plans to the ACC prior to the commencement of construction.

Section 5.15 of the Guidelines states, in part, "The Architectural Control Committee reserves the right to waive or vary any of the procedures or standards set forth herein at its discretion for good cause shown." The court noted that section 5.15 of the Guidelines distinguishes between the ACC's right to waive or vary. This matters because the remainder of section 5.15 concerns the requirements for granting variances, which the remainder of section 5.15 requires to be requested in writing and there was no writing. The court thought that didn't matter. Even though it was undisputed that no written variance was requested or issued for the second-story addition, the ACC would still have discretion under the Guidelines to waive any procedure or standard should it apply. The ACC had the right to waive any procedures or standards. The 15-foot setback requirement that upset the Severses was held by the court to be a "standard," which the ACC could waive. Similarly, any procedure for approval of construction could be waived, and that included the setback requirement.

PART XV
TAXATION

Sorrell v. Estate of Benjamin Carlton, No. 16-0874 (Tex. May 3, 2019). For decades, the lower courts have held that substantial compliance with statutory requirements is sufficient for redemption from a tax foreclosure. In this case, the Supreme Court held that, in light of its longstanding practice of favoring redemption over forfeiture in this property rights context, a party's timely substantial compliance with the redemption statute's requirement to pay certain amounts may satisfy the redemption statute's requirement.

Bosque Disposal Systems, LLC* v. *Parker County Appraisal District, 555 S.W.3d 92 (Tex. 2018). The plaintiffs are taxpayers who own land in Parker County. Each tract at issue in this case contains a saltwater disposal well, in which wastewater from oil and gas operations can be injected and permanently stored underground. When valuing these tracts for property tax purposes, PCAD assigned one appraised value to the wells (creating distinct appraisal accounts for "saltwater disposal facilities" apart from the existing appraisal accounts for the surface land) and another appraised value to the land itself. PCAD estimated the wells' market value based on the income generated from their commercial operation.

The taxpayers contend that separate appraisal of the wells and the land amounts to illegal double taxation of the wells as a matter of law. The trial court rendered summary judgment for the taxpayers, but the court of appeals reversed.

The parties do not dispute that the taxpayers own taxable land in the district. Nor do the parties dispute that the taxpayers' land contains functioning saltwater disposal wells that have significant market value. Importantly, the taxpayers do not claim that land containing a valuable saltwater disposal well has the same market value as a comparably sized tract of land with no such well on it. Instead, the taxpayers complain that PCAD appraised the wells as separate units of real property apart from the land. This, the taxpayers contend, violated the Tax Code's definition of "real property" and amounted to double taxation of the wells in violation of the Texas Constitution. According to the taxpayers, the wells themselves do not fit within any of the categories of "real property" listed in the Tax Code, and appraising the wells separately from the land effectively appraises (and taxes) the wells twice—once on the value of the land, and once on the separate value of the wells. The taxpayers rely heavily on the fact that the wells have never been severed from the surface land and remain part of the taxpayers' fee simple ownership of these properties.

PCAD responded that it appraised the surface land in one account based on comparable tracts of raw land, and it

appraised the wells in another account based on the income method of appraisal. According to PCAD, its appraisal of the land did not take into account the value of the wells, and that the sum of the two appraisals approximates the market value of the entire property, wells and all. In the District's view, the Tax Code requires it to appraise these properties based on their market value, and splitting each property into two accounts—one for the land and one for the well—was one lawful way of estimating the properties' overall market value.

The court found nothing legally improper in PCAD's decision to separately assign and appraise the surface and the disposal wells. The Tax Code expressly contemplates that taxing districts may separately appraise "separately taxable estates or interests in real property." Tax Code § 25.02(a)(3). Generally, a tract of land and its improvements are appraised together and assigned a single value. But appraisal districts are permitted to divide a tract and its improvements into separate components, each with its own tax account number, and appraise them individually.

Further, the Tax Code does not prohibit the use of different appraisal methods for different components of a property. In fact, the Code suggests otherwise, requiring the chief appraiser to consider each method and to select "the most appropriate method" when "determining the market value of property." Tax Code § 23.0101.

The taxpayers offered several objections to this result, but the court found none of them persuasive. The taxpayers contended that a separately appraisable "estate or interest" under the Tax Code arises only from "transfers, conveyances, and reservations." They argued that the "estate or interest" taxed here "simply does not exist" because it has not been severed from the surface land. But the court has held that different "aspects of real property can be taxed separately" and that "[t]his rule does not depend on whether each aspect is separately owned." ***Matagorda County Appraisal District* v. *Coastal Liquids Partners, L.P.***, 165 S.W.3d 329 at 332 (Tex. 2005).

The taxpayers also argued that the wells cannot be taxed because they are "intangible" and "permit dependent," and amount to nothing more than a "right to inject." Intangible property, such as a legal right, generally is not taxable. But any suggestion that the disposal wells are non-taxable intangibles ignores the wells' physical existence. The Tax Code defines "intangible personal property" as "a claim, interest (other than an interest in tangible property), right, or other thing that has value but cannot be seen, felt, weighed, measured, or otherwise perceived by the senses, although its existence may be evidenced by a document." Tax Code § 1.04(6). The injection facilities are hardly incorporeal; they consist of physical, underground rock and stored liquids, a well bore, down-hole tubing, and surface equipment. They are as tangible as any taxable mineral estate. The Code's definition of "intangible" does not describe these wells.

The taxpayers pointed out that they need a permit to operate the wells. But to accept that argument would have to ignore economic realities and a plain reading of the statute to conclude that the facilities at issue here, despite all their substantial physical aspects, are in reality intangibles because a permit may be required to operate them. By this reasoning a refinery would be a non-taxable intangible, as would valuable mineral estates, because permits are required to operate refineries and extract minerals.

Hegar* v. *EBS Solutions, Inc., 549 S.W.3d 849 (Tex.App.—Austin 2018, pet. pending). The Comptroller assessed franchise taxes against EBS. Although EBS paid some of the taxes that were due, EBS did not pay the full amount before filing a suit seeking to recover the amount of taxes paid and seeking injunctive relief. In response, the Comptroller filed a plea to the

jurisdiction asserting that the suit should be dismissed because EBS did not comply with "the statutory jurisdictional requirements" before filing suit. The district court denied the plea to the jurisdiction.

Under common law, there was no right to sue to protest revenue laws. By enacting various provisions of the Tax Code, the legislature waived sovereign immunity for three types of taxpayer suits: protest suits: Protest suits, suits seeking injunctive relief, and refund suits. Only the first two are pertinent to this case.

For tax-protest suits, "a person who is required to pay a tax" but wants to challenge the assessed tax must "pay the amount claimed by the state" and submit a written protest with the payment. Tax Code § 112.051. In addition to tax-protest suits, a taxpayer may seek a restraining order or an injunction prohibiting "the assessment or collection of a tax." Tax Code § 112.101(a). However, before a taxpayer may seek an injunction, he must comply with certain statutory criteria. Of significance here, the taxpayer must either pay all taxes, fees, and penalties then due" or file a bond "in an amount equal to twice the amount of the taxes, fees, and penalties then due and that may reasonably be expected to become due during the period the order or injunction is in effect.

In the portion of the Tax Code governing injunctive suits, the legislature also chose to include § 112.108, which stated when it was first enacted that with the exception of the restraining order or injunction discussed above, "a court may not issue a restraining order, injunction, declaratory judgment, writ of mandamus or prohibition, order requiring the payment of taxes or fees into the registry or custody of the court, or other similar legal or equitable relief against the state or a state agency relating to the applicability, assessment, collection, or constitutionality of a tax or fee covered by this subchapter or the amount of the tax or fee due." After its enactment, the Supreme Court held the provision to be unconstitutional because the requirement of prepayment of taxes violated the open courts mandate of the Texas Bill of Rights. Section 112.108 was then amended, but that amendment was also held to be unconstitutional for requiring the prepayment of taxes as a condition for judicial review. After nearly two decades, § 112.108 has not been amended after this determination.

Here, EBS received a tax bill for $298,520. It made two payments of $75,000 each then sued the Comptroller alleging that it had made payments under protest, invoking Tax Code §§ 112.051-060, and also sought to enjoin the Comptroller from further collection actions. As part of its suit, EBS also filed an oath of inability to pay under authority of the amended version of section 112.108, asserting that it was unable to pay the full amount owed before challenging the assessment and that requiring EBS to pay the full amount would constitute an unreasonable restraint on its right to access the courts. The district court concluded that prepayment of the franchise taxes, penalties, and interest would constitute an unreasonable restraint of EBS's right of access to the courts.

In response to EBS's suit, the Comptroller filed a plea to the jurisdiction, arguing that the suit should be dismissed for lack of subject-matter jurisdiction because EBS did not meet the statutory prepayment requirements for filing a protest suit and for seeking injunctive relief under the Tax Code. In addition, the Comptroller urged that EBS's attempt to avoid the prepayment obligations by filing an oath of inability to pay under § 112.108 was ineffective because the entirety of § 112.108 has been declared unconstitutional. The district court denied the Comptroller’s plea to the jurisdiction.

On appeal, the Comptroller contends that the district court's order denying the plea to the jurisdiction should be reversed. When attacking the district court's ruling,

the Comptroller argues that the Tax Code requires the taxpayer prepay the assessed tax in its entirety or post a bond for twice that amount before filing a protest suit or seeking injunctive relief, that EBS's partial payment is not sufficient to constitute compliance with the prepayment requirements, and that there is no valid exception for a taxpayer who files an oath of inability to pay.

The Court of Appeals held that the district court did not have jurisdiction because EBS did not comply with the statutory prerequisites for pursuing a protest or injunction. The invalidation of § 112.108 left the taxpayer with the same options that were available before § 112.108 was enacted – it allows the taxpayer to pursue a declaratory judgment action that would not otherwise be barred by sovereign immunity and that any violation of the open-courts provision stemming from requiring taxpayers to comply with the statutory prerequisites before pursuing a protest suit or seeking injunctive relief was cured by the invalidation of § 112.108. Thus, requiring EBS to comply with prepayment obligations before pursuing a protest suit or injunction did not violate EBS's constitutional rights because EBS had another avenue available to it that did not involve prepayment obligations. EBS could have pursued declaratory relief.

PART XVI
CONSTRUCTION

Dudley Construction, Ltd.* v. *ACT Pipe and Supply, Inc., 545 S.W.3d 532 (Tex. 2018). Neither the trust-fund act (Property Code §§ 162.001-.003) nor Civil Practice & Remedies Code § 38.001 allow for attorneys' fees for a successful trust-fund-act claim. The Supreme Court said "Our reasoning is simple: neither statute says so." Section 38.001 makes attorneys' fees recoverable for a variety of claims that might factually form the basis of a trust-fund-act claim - a "trustee" under the act might misapply trust funds at the expense of a beneficiary who has "rendered services," "performed labor," "furnished material," or who was a party to "an oral or written contract." But this does not merge the statutes for attorney's-fees purposes. Certainly, a pipe supplier might recover attorney's fees under section 38.001 for work performed, materials provided, or for breach of contract. But this does not open the door to attorney's fees for violations of separate statutory provisions simply because the claim is based on the same dispute or because the recovery sought is the same.

The trust-fund act is a stand-alone, comprehensive statutory scheme defining whether "construction payments" and "loan receipts" constitute trust funds, determining who are "beneficiaries" of trust funds, providing for when trust funds are "misapplied," and providing for penalties, The legislature could have provided for attorney's fees in this scheme. It did not. And neither would the court.