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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 403 S.W.3d and Supreme Court opinions released through November 15, 2013.

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 and past Case Law Updates are available at our website cwrwlaw.com.

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PART I
MORTGAGES AND FORECLOSURES

Jarvis* v. *K&E RE One, LLC, 390 S.W.3d 631 (Tex.App.-Dallas 2012, no pet.). Lofton bought an apartment complex. At the time of the purchase, Lofton used the services of NAC to obtain financing. NAC obtained financing for the complex from the Jarvises and from that point on Lofton used NAC as the servicer. She would pay NAC, who would forward payments to the Jarvises. The loan documents named the Jarvises as the beneficiaries of the deed of trust and gave their address as "c/o" NAC.

Lofton transferred the property to her entity, CAS and continued to make payments to the Jarvises via NAC. In 2008, CAS agreed to sell the property to K&E. Stewart Title handled the closing. Stewart obtained a payoff letter from NAC and at closing funds were wired to NAC to pay off the loan.

NAC didn't forward the payoff to the Jarvises. Instead, NAC continued to send monthly checks to the Jarvises, purporting to be payments on the Lofton/CAS loan. After a while, the monthly payments stopped. The Jarvises contacted Lofton and learned of the sale of the property and the payoff to NAC. They promptly sent NAC a letter terminating it as servicer. They posted the property for foreclosure.

K&E filed suit, seeking a declaratory judgment that the deed of trust had been discharged and seeking an injunction against foreclosure. The trial court entered judgment in favor of K&E. The trial court declared the loan had been fully paid and the deed of trust had been discharged and no longer constitutes a valid and subsisting lien on the property. It also enjoined the Jarvises from foreclosing, or attempting to foreclose, or from otherwise interfering, or attempting to interfere, with K&E's possession and use of the property.

The Jarvises argue the loan documents reviewed by Stewart identified the Jarvises as the beneficiaries, the lender, or the secured parties, did not identify NAC as the "servicer," and unambiguously required Stewart to forward payment to the Jarvises in care of NAC. However, the documents reviewed by Stewart stated that all contact with the Jarvises was to be " c/o" NAC. Further, other documents relating to the loan, although not reviewed by Stewart, refer to NAC as the "servicer" on the loan.

The Jarvises argued that the trial court erred in admitting testimony about NAC's authority to act as servicer. The loan documents clearly indicated NAC had authority to act on behalf of the Jarvises. However, although the loan documents established that NAC had authority to accept payments on behalf of the Jarvises, the documents did not define the extent of NAC's duties and authority under the term "servicer" or in relation to the term "c/o." Evidence of a collateral agreement between NAC and the Jarvises regarding the scope of NAC's authority under either of the undefined terms "servicer" or " c/o" did not vary or contradict any of the express or implied terms or obligations set out in the documents relating to the Lofton loan. Accordingly, the parol evidence rule did not bar evidence of the Jarvises' and NAC's conduct on other loans, and the trial court did not err by overruling the Jarvises' motion to exclude evidence.

The Jarvises also argued that NAC did not have authority to act as their agent and, even if it had some authority, it exceeded that authority when it accepted the payoff.

The question of agency is usually a fact issue. Because an agency relationship cannot be presumed, the party who alleges agency has the burden of proving it. K&E alleged NAC was the Jarvises' agent and, therefore, had the burden of proof on the issue.

An agent's authority to act on behalf of a principal depends on some communication by the principal either to the agent (actual or express authority) or to the third party (apparent or implied authority). Actual authority is authority a principal (1) intentionally confers upon on the agent (2) intentionally allows the agent to believe he possesses, or (3) by want of due care allows the agent to believe he possesses. Apparent authority is created by written or spoken words or conduct by the principal to third parties, not to the agent. Apparent authority is based on estoppel, arising either from a principal knowingly permitting an agent to hold himself out as having authority or by a principal's actions which lack such ordinary care as to clothe an agent with the indicia of authority, thus leading a reasonably prudent person to believe that the agent has the authority he purports to exercise.

Payment to an authorized agent of the obligee constitutes payment to the principal. The court looked first to whether there is sufficient evidence to support the trial court's finding NAC had actual authority to accept the loan payoff funds. The Jarvises assert that, after a loan closed, NAC was authorized to act only as a contact point to forward loan payments and did not have authority to accept the payoff funds on the loan for the Jarvises. However, it was undisputed that NAC had authority to perform a number of functions for lenders, including the Jarvises, after a loan closed. Not only did NAC collect and forward loan payments to lenders, it calculated when a late penalty was due and contacted the borrower about the penalty. It held construction funds in escrow while the property was being rehabilitated. When necessary, it was involved in retaining counsel to foreclose on a piece of property or to represent the lender if a borrower filed for bankruptcy. Further, after discovering the property had been sold, the Jarvises terminated NAC's authority to act on their behalf. The evidence established that NAC had some actual authority to act for the Jarvises following the closing of the Lofton loan. The issue is whether NAC's authority included the ability to accept loan payoff funds on behalf of the Jarvises.

In this case, it seems there were three loans which Jarvises participated with NAC, including the Lofton loan, that were paid off. In the two loans paid off prior to the Lofton loan, NAC provided a loan payoff amount to the closing company. The closing company forwarded payment to NAC, and NAC paid the Jarvises and other lenders the proceeds by check written on NAC's operating account. The Jarvises accepted these payments without protesting that NAC was not authorized to receive loan payoffs on their behalf. That provided the court with more than a scintilla of evidence of NAC's implied actual authority to accept the payoff.

Givens* v. *Midland Mortgage Company, 393 S.W.3d 876 (Tex.App.-Dallas 2012, no pet.). Givens defaulted on his loan and Midland prepared for foreclosure. It had its lawyers send a notice of substitute trustee's sale to Givens, post the notice at the courthouse, and file a copy with the County Clerk. Midland foreclosed and Givens sued claiming all sorts of things, including DTPA violations, theft liability, fraud, etc. The trial court granted summary judgment in favor of Midland on all issues.

Givens appealed making various arguments about irregularities in the foreclosure notice.

First, Givens noted that the deed of trust required that foreclosure notices were to be sent by the trustee or the lender. Here, the notice was sent by Midland's lawyers and was a notice of substitute trustee's sale. He tried to convince the court to take the wording of the deed of trust literally and require the notice be from the original trustee or the lender. The court did not buy this argument. Property Code § 51.0025 provides that that a mortgage servicer may administer the foreclosure of property under section 51.002 on behalf of a mortgagee if the mortgage servicer and the mortgagee have entered into an agreement granting the current mortgage servicer authority to service the mortgage and if the notices required under Section 51.002(b) disclose that the mortgage servicer is representing the mortgagee under a servicing agreement with the mortgagee. The court was "unpersuaded" by Given's arguments in this regard.

Second, Givens complained that the foreclosure notice had not been recorded in the deed records. The court noted that there is no requirement to record the notice in the deed records. Property Code § 51.002(b)(2) requires the notice to be filed with the County Clerk. The plain wording of the statute makes it clear that there is no requirement to record the notice in the deed records.

Mosby* v. *Post Oak Bank, 401 S.W.3d 183 (Tex.App.-Houston [14th Dist.] 2011, **). The Bank had a deed of trust lien on the property. After the deed of trust was recorded, Morrell got a judgment against the property owners. The property was sold to Mosby at an execution sale. After a default on the Bank's loan, it send foreclosure notices to the parties obligated on the debt. The Bank acquired the property at its foreclosure sale.

The Bank then filed suit to remove the cloud on title caused by the execution sale. The Bank asserted that at the time of the execution sale it held a perfected lien on the Property by virtue of its deed of trust and that neither the Morrell Judgment nor the execution sale could impair the Bank's prior perfected lien. According to the Bank, whatever interest Mosby may have acquired in the Property at the execution sale was subject to the Bank's prior perfected lien. The Bank asserted that the Foreclosure terminated Mosby's inferior interest in the Property and that the Execution Deed created a cloud on the Bank's title to the Property, which the Bank sought to remove.

Mosby countered that the Bank had unlawfully dispossessed her and that Mosby was entitled to notice of the foreclosure. Mosby sought to establish title via a trespass-to-try-title claim.

The first question dealt with by the court was whether application of Property Code § 5.004 meant that Mosby held title to the property. Section 5.004 states:

"(a) A conveyance of real property by an officer legally authorized to sell the property under a judgment of a court within the state passes absolute title to the property to the purchaser.

"(b) This section does not affect the rights of a person who is not or who does not claim under a party to the conveyance or judgment."

The court was addressing a case of first impression regarding § 5.004. Notably, the Bank is asserting its rights as purchaser at the Foreclosure. The Bank is not a party to any conveyance in the Execution Deed, nor does the Bank claim under a party to any such conveyance. Likewise, the Bank is not a party to the Morrell Judgment, nor does the Bank claim under a party to this judgment. Therefore, the court concluded that, under § 5.004(b), § 5.004(a) does not affect the Bank's rights.

Next the court dealt with whether the Bank's deed of trust required the Bank to give notice of the foreclosure to Mosby. Mosby's argument was based upon the "successors and assigns" provision of the deed of trust, which stated that the covenants and agreements inured to the benefit of and were binding on each party's successors and assigns. Without any discussion, the court held that this provision did not require the bank to give notice of the foreclosure to Mosby.

Then Mosby argued that equity required the Bank to provide notice of foreclosure. The evidence showed that the Bank followed the requirements of Property Code 51.002. Mosby cited no authority that would require the Bank to give her notice.

Wells Fargo Bank, N.A.* v. *Robinson, 391 S.W.3d 590 (Tex.App.-Dallas 2012, no pet.). Robinson borrowed a home equity loan. He defaulted and Wells Fargo accelerated the note. Robinson continued to live at the home for three years, without making any payments on the note.

Wells Fargo filed an application for an expedited foreclosure. Robinson didn't contest the right to foreclose, but requested additional time to sell his home. The parties entered into an agreement and the court entered an order stating that Wells Fargo was authorized to proceed with the foreclosure and was to post in April for a May foreclosure. Contrary to the order, Wells Fargo did not post until May and foreclosed at a June foreclosure sale.

About two months after the foreclosure, Robinson sued, claiming that Wells Fargo was not authorized to foreclose because it did not comply with the agreed court order. The trial court found that Wells Fargo was not authorized to sell at the June foreclosure because it did not have an order authorizing a sale on that date. Damages and attorneys' fees were awarded to Robinson.

On appeal, Wells Fargo argued that there is no evidence of a causal connection between the alleged wrongful foreclosure or the alleged breach of the deed of trust and the monetary damages asserted by Robinson. According to Wells Fargo, Robinson suffered neither prejudice nor harm as a result of the delay in the foreclosure sale. Robinson responds that he is entitled to damages based solely on the fact that the sale was conducted in violation of both the deed of trust and the Texas Constitution. The court disagreed with Robinson.

Article 16, Section 50(a)(6) of the Texas Constitution sets forth the requirements for an extension of credit secured by a lien on the borrower's homestead. Among these is the requirement that the lien may be foreclosed upon only by a court order. The court order in this case authorized Wells Fargo to foreclose on the property only on May 6, 2008. Because the foreclosure sale was conducted on a different date, it was not authorized by a court order and, therefore, violated the constitutional requirement set forth in the deed of trust.

A foreclosure sale not conducted in accordance with the terms of the deed of trust gives rise to a cause of action to set aside the sale and the resulting trustee's deed. The trial court did not set aside the trustee's deed however, but instead awarded damages. For a party to recover damages for wrongful foreclosure and breach of the deed of trust, he must show that he has suffered a loss or material injury as the result of an irregularity in the foreclosure sale. In general, this is shown where the actions of the lender or note holder have caused the property to be sold for a grossly inadequate price. In such a case, the damages are measured by the difference between the market value of the land and the remaining balance on the outstanding mortgage debt.

The recovery of damages is not appropriate, however, where title to the property has not passed to a third party and the borrower's possession of the property has not been materially disturbed. Where the note holder obtains title to the property at the foreclosure sale and the borrower retains possession, the proper remedy is to set aside the trustee's deed and to restore the borrower's title, subject to the note holder's right to establish the debt owed and foreclose its lien. If the borrower's possession has not been disturbed and no third party rights to the property have been created, the borrower has suffered no compensable injury.

McCray* v. *Hoag, 372 S.W.3d 237 (Tex.App.-Dallas 2012, no pet.). The Federal Truth in Lending Act, 15 U.S.C. § 1603(3), applies to credit transactions in which a security interest is or will be acquired in real property used or expected to be used as the principal dwelling of the consumer. A borrower has certain rescission rights under the TILA. If those rights are available, they are exercisable by notifying the creditor of the rescission "by mail, telegram or other means of written communication." 12 C.F.R. § 226.23(a)(2); 15 U.S.C. § 1635(a). Once the borrower exercises the right of rescission, the creditor has twenty calendar days after receipt of a notice of rescission to return the money or property given and take any action necessary to reflect the termination of the security interest.

In this case, the Hoags' rescission rights, if any, were exercisable under the TILA by notifying McCray, the lender, of the rescission "by mail, telegram or other means of written communication." The Hoags claim they exercised a right of rescission by directing their attorney to send certified mail letter. The summary-judgment evidence shows the unopened envelope associated with the Hoags' rescission letter was marked "RETURN TO SENDER," "UNCLAIMED," "UNABLE TO FORWARD."

McCray contends that because the Hoags sent their rescission letter by certified mail, the notice was sent by "other means of written communication" under the statute. He argues the Hoags had to show the notice was actually delivered because the clear intent of the TILA is to make sure the creditor gets notice of the intent to rescind.

The court concluded, under the plain language of the statute, that "mail" as used in 12 C.F.R. § 226.23(a)(2) is not equivalent to certified mail and that rescission notice requires actual notice. Accordingly, the Hoags failed to show they exercised any rescission remedy under the TILA because their summary-judgment evidence negates actual receipt by McCray.

The statute provides that notice of rescission is presumed given "when mailed." If sent by "other means," notice is considered given "when delivered."

In the present case, any distinction between "mail" as used in the statute and certified mail makes no difference, because the summary-judgment record shows McCray did not receive the notice sent by certified mail. It was returned marked "unclaimed." Yet a fundamental difference exists generally between mail and certified mail. Specifically, regular United States mail does not require a delivery notice or receipt; it is placed in the mail receptacle at the posted address. Certified mail, sent return receipt requested as here, is returned to the sender if not signed for. Common sense thus dictates that regular mail is presumed delivered and certified mail enjoys no presumption unless the receipt is returned bearing an appropriate notation.

Comiskey* v. *FH Partners, LLC, 373 S.W.3d 620 (Tex.App.-Houston [14th Dist.] 2012, no pet.). This case discusses whether a renewal and modification agreement relating to a loan that was cross-collateralized with another loan did away with the cross-collateralization. After an extensive discussion of the evidence, the court held that it did not and that the cross-collateralization provision was still in effect. Wording to the effect that the borrower "extends said liens on said property until said indebtedness and note as so renewed, modified and extended has been fully paid" does not indicate that the parties intended to nullify the cross-collateralization clause. The wording, rather, indicates that the terms of the existing lien, which included cross-collateralization, were extended as written.

PART II
HOME EQUITY LENDING

Wells Fargo Bank, N.A.* v. *Robinson, 391 S.W.3d 590 (Tex.App.-Dallas 2012, no pet.). The facts of this case are summarized in the Mortgages section. In this case involving a home equity loan, Robinson, the borrower, claimed that the trial court erred in not awarding forfeiture of principal and interest collected on the note because of a wrongful foreclosure by Wells Fargo.

Robinson bases his argument on Article 16, section 50(a)(6)(Q)(x) of the Texas Constitution that states if a lender fails to comply with the requirements for an extension of credit found in section 50(a)(6), the lender forfeits all principal and interest of the loan. But, as this court has held, so long as the loan agreement originally entered into by the parties complies with the constitutional requirements, forfeiture is not an appropriate remedy. A borrower's recourse for a lender's failure to abide by the terms of his loan agreement is to assert traditional tort and breach of contract causes of action, not constitutionally mandated forfeiture.

As stated above, section 50(a)(6)(D) requires that a home equity note be secured by a lien that may only be foreclosed upon by court order. The deed of trust at issue here required a court order for foreclosure. Because the loan agreement entered into by the parties complied with the constitutional requirements, the trial court did not err in denying forfeiture.

PART III PROMISSORY NOTES, LOAN COMMITMENTS, LOAN AGREEMENTS

Mathis* v. *DCR Mortgage III Sub I, L.L.C., 389 S.W.3d 494 (Tex.App.-El Paso 2012, no pet.). The Note Mathis signed contained the following waiver provision: "Each of Makers, each guarantor of any of the Indebtedness, and each person who grants any lien or security interest to secure payment of any of the Indebtedness, (i) except as expressly provided herein, waives all notices (including, without limitation, notice of intent to accelerate, notice of acceleration and notice of dishonor), demands for payment, presentment, protest and diligence in bringing suit and in the handling of any security. . . ."

The holder of a note must ordinarily give notice to the maker of the holder's intent to accelerate the time for payment as well as notice of acceleration. It is also well settled that the maker may waive his right to notice of intent to accelerate and notice of acceleration. Such waivers are effective if they are contained in either a note or a deed of trust. The reasoning behind this rule is that to require that every instrument executed in conjunction with a promissory note contain the necessary language would be "unnecessarily duplicative." Regardless of whether the waiver appears in the note or the deed of trust, the waiver must be "clear and unequivocal."

Mathis claims that the trial court erred in finding that Mathis waived all notices, including, notice of intent to accelerate and notice of acceleration." Mathis recognizes the quoted waiver provision in the Note is sufficient to show a clear and unequivocal intent to waive both notice of intent to accelerate and notice of acceleration. But he argues that when read together as a single instrument, the note and the deed of trust do not demonstrate a clear and unequivocal waiver of the maker's right to receive notice of the holder's intent to accelerate maturity of the note. In support of his argument he relies on the following provision from the deed of trust: "If Grantor defaults on the note or fails to perform any of Grantor's obligations or if default occurs on a prior lien note or other instrument, and the default continues after Beneficiary gives Grantor notice of the default and the time within which it must be cured, as may be required by law or by written agreement, then Beneficiary may [accelerate the Note]."

Mathis contends that when this provision is construed along with the Note, it renders the waiver provision of the Note ineffective.

Here, the note and the deed of trust must be construed together because they were executed by the same parties on the same day, they pertain to the same real property, each document references the other, and the deed of trust is identified as the security for the note. Under the Supreme Court's holding in ***Shumway* v. *Horizon Credit*** Corp., 80 S.W.2d 890 (Tex. 1991), the waiver language in the note would be considered a "clear and unequivocal" waiver of both notice of intent to accelerate and notice of acceleration. If the deed of trust were silent on the issue, the waiver would be valid and enforceable. But the deed of trust is not silent. Acceleration is not favored in the law. In fact, under Texas law, we apply strict scrutiny to acceleration provisions, and if any reasonable doubt exists as to the parties' intent, we resolve such doubt against acceleration.

The court held that the deed of trust creates a reasonable doubt as to whether the parties clearly and unequivocally intended to waive notice of default and time to cure, which amounts to notice of intent to accelerate. It is undisputed that there was no notice of intent to accelerate and time to cure. Because there was not an effective waiver of notice, of intent to accelerate, acceleration was void as a matter of law.

Chance* v. *CitiMortgage, Inc., 395 S.W.3d 311 (Tex.App.-Dallas 2013, pet. denied). Chance borrowed and then defaulted on a home equity loan. When CitiMortgage, the loan servicer, sought a court order allowing it to foreclose on the loan, Chance raised various arguments, mostly of a spurious nature.

The note was stamped "Void" across a blank indorsement block. Chance argued that the stamp made the entire note void. But, noted the court, the stamp appears nowhere else on the note. In fact, on the following page of the note was an allonge that indorsed the note to CitiMortgage. While UCC § 3.604(a)(1) provides that a note may be discharged by cancellation or renunciation by an intentional voluntary act, such as surrender of the instrument to the party obligated to pay it, or the destruction, mutilation, or cancellation of the instrument, the cancellation or striking out the party's signature, or the addition of words to the instrument indicating discharge, there is nothing in the record to suggest the void stamp over the blank indorsement block was intended to discharge, cancel, or otherwise renounce Chance's obligations under the note. Moreover, UCC § 3.604(b) states that the cancellation or striking out of an indorsement pursuant to subsection (a) does not affect the status and rights of a party derived from the indorsement, suggesting that cancellation or voiding of an indorsement is distinct from the discharge or cancellation of the underlying instrument.

In his next argument, Chance attempted to make a point out of the fact that CitiMortgage did not produce the original note. He made various allegations questioning the authenticity of the copy. The court noted that CitiMortgage was not suing on the note, but was seeking a foreclosure. The deed of trust gave CitiMortgage, as assignee of the holder of the note, the right to seek a foreclosure in the event of a default under the note. Introduction of the original of the note is not necessary. In any event, said the court, a photocopy of an original promissory note, authenticated by an otherwise proper affidavit showing that the photocopy is a true and correct copy of the original, may suffice, in lieu of the original, as proper summary judgment evidence of the note.

Finally, Chance argued that there was a fact issue as to CitiMortgage's ownership of the note. Specifically, Chance argues that because CitiMortgage presented no summary judgment evidence of the transaction that led to its purported ownership, it cannot enforce the note. As explained above, CitiMortgage did not seek enforcement of the note. And the affidavit of CitiMortgage's officer stated that CitiMortgage was in possession of the note.

This evidence was uncontroverted and establishes an unbroken chain of title to the note from the original holder to CitiMortgage.

Dorsett* v. *Hispanic Housing and Education Corporation, 389 S.W.3d 609 (Tex.App.-Houston [14 Dist.] 2012, no pet.). Melanie Foster loaned $79,000 HHEC. HHEC's president and secretary executed a promissory note setting forth the terms of the five-year loan. HHEC defaulted in payment of the loan. After Foster's death, her daughter Melanie Dorsett, the executor of Foster's estate sued HHEC to recover on the note.

To recover on a promissory note, the plaintiff must prove: (1) the note in question; (2) the party sued signed the note; (3) the plaintiff is the owner or holder of the note, and (4) a certain balance is due and owing on the note. HHEC stated in its motion that Dorsett had no evidence that HHEC (1) had a duty to pay the Promissory Note, (2) had a duty to pay late fees and accrued interest under the Note, (3) defaulted in paying the Note, (4) breached the contract, (5) failed to pay, or (6) caused the Estate damages.

HHEC's assertion that there was no evidence that it had a duty to pay the Note was, in effect, an assertion that there was no evidence that it had signed the note. Similarly, by representing that there was no evidence that it failed to pay, HHEC was asserting that there was no evidence that a balance was due. HHEC did not challenge the existence or ownership of the note, and did not contend that that a particular amount of the unspecified outstanding balance lacked support.

In response, Dorsett relied on her own affidavit and a document prepared on HHEC's letterhead and titled, "Promissory Note." Dorsett authenticated the note, and HHEC neither disputed that the signatures identified as those of HHEC's president and secretary were in fact the signatures of those individuals, nor denied that they were authorized to bind HHEC; thus, Dorsett's summary-judgment evidence was sufficient to defeat HHEC's argument that it had no duty to pay the Note.

This leaves only HHEC's assertion that there was no evidence that it failed to pay, but this basis for summary judgment was rebutted by Dorsett's affidavit. There, she attested that HHEC made periodic payments for a period of time on the note. However, HHEC missed numerous payments, was late with payment many times and in June 2007, ceased paying on the note altogether. The effect of the late payments and non-payments was to extend the duration of the note significantly. This evidence is sufficient to raise a question of fact as to the existence of an outstanding balance under the Note. Because a question of fact was raised, summary judgment for Dorsett was improper, so the case was remanded.

PART IV
GUARANTIES

Interstate 35/Chisam Road, L.P.* v. *Moayedi, 377 S.W.3d 791 (Tex.App.-Dallas 2012, pet. pending). Villages borrowed a loan secured by real property in Denton County. Moayedi executed a guaranty. The guaranty included two provisions dealt with in this case. First, in paragraph 7 of the guaranty, it provided that the guaranty would not be discharged, impaired, or affected by any defense that the guarantor might have, Second, in paragraph 13 of the guaranty, it provided that the guarantor waived and relinquished "all rights and remedies of surety."

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

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

The guarantor argued that the broad, vague language of the waiver provisions of the guaranty was not a waiver of any rights, much less the § 51.003 right to offset." The guarantor reasoned paragraph seven's language purporting to waive any defense to any undertakings, liabilities, and obligations did not encompass his right to offset because the offset right is not a defense to actual payment, but a claim for proper calculation of the deficiency. He contended paragraph thirteen's language stating he waived "all rights and remedies of surety" did not encompass his section 51.003 right to offset because by its own terms it applied to sureties. He also argued that the waivers in paragraphs seven and thirteen are too broad and general to waive his specific statutory right to offset. If the general language in the guaranty at issue were construed to waive a specific statutory right, that result would frustrate the stated purpose of § 51.003. The lender argued that the broad waiver language was enforceable as to any § 51.003 rights.

The court pointed out that the Texas Constitution protects the freedom to contract, and the Texas Supreme Court has long recognized a strong public policy in favor of preserving the freedom of contract. Absent a statute or fundamental public policy precluding waiver, a party may contractually waive even constitutional or statutory rights, whether present or future. In examining an agreement to determine if it is contrary to public policy, a court looks to whether the agreement has a tendency to injure the public good and considers the development and policies underlying any applicable statutes. Unless the agreement contravenes some positive statute or some well-established rule of law, a court should refrain from characterizing the agreement as unenforceable and void as against public policy

Section 51.003 was designed to protect borrowers and guarantors in deficiency suits brought following the non-judicial foreclosure on realty. Further, § 51.003 provides for a judicial determination of the fair market value of the property and allows an offset against the deficiency in the amount by which the fair market value exceeds the sale price. However, in passing the bill into law, the legislature did not make the offset right non-waivable.

Based on the legislature's failure to preclude waiver of the offset right, the Fifth Circuit Court of Appeals, ***in LaSalle Bank N.A.*** **v.** ***Sleutel***, 289 F.3d 837, 842 (5th Cir.2003), and the Houston First District Court of Appeals in ***Segal*** **v.** ***Emmes Capital, L.L.C.***, 155 S.W.3d 267 (Tex.App.-Houston [1st Dist.] 2004, pet. dism'd) have concluded waiver of the offset right provided in section 51.003 is not void as against public policy.

Applying the law to the facts, the court refused to agree with the guarantor that § 51.003 was not a defense but a direction on how to calculate the true deficiency. The court said it was a defense because, if given effect, it would negate the lender's deficiency claim by the § 51.003 allowed offset.

The court also rejected the guarantor's argument that the waivers were too broad and vague and that the waivers needed to specifically express that § 51.003 or the right of offset was waived. It said that ***LaSalle*** and ***Segal*** did not stand for those propositions. Reaching for the dictionary, the court examined the meaning of "any," "each," and "every" and concluded that that just about covered it. In the context of paragraph seven of the guaranty, the use of the words “any,” “each,” and “every” encompass not just “some” or “certain” defenses, but all possible defenses that might exist. Paragraph seven is broad, inclusive, and conveys an intent that the guaranty would not be subject to any defense other than payment. That includes section 51.003's right of offset. Giving the words used their ordinary and generally accepted meanings, and considering the entire writing, the court concluded paragraph seven waives all defenses, statutory or otherwise, other than full payment of the debt.

Finally, the court rejected the guarantor’s argument that the public policy embodied in § 51.003, is to prevent lenders from recovering more than their due at the guarantor’s expense. The court noted that the ***Segal*** court did point that out, but that that court ultimately held that the statute could be waived. Again, the court cited the strong public policy in favor of freedom of contract.

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

White* v. *Harrison, 390 S.W.3d 666 (Tex.App.-Dallas 2012, no pet.). VSC leased the premises from Harrison. White guarantied the lease. He signed the lease as a principal of VSC the same day he signed the guaranty “as personal guarantor.” The first paragraph of the guaranty said that he was executing the guaranty in order to induce Harrison to enter into the lease with VSC. It described the lease and the leased premises. It referred to the property as being 2000 California Crossing in Dallas, while the lease referred to it as 2160 California Crossing, although both the lease and the guaranty went further by describing the property by the recording information of the city lot and block.

White claimed that he wasn’t liable on the guaranty because of the difference in the two addresses. The court tossed this out pretty quickly The legal description in the lease and the guaranty, rather than the street address, controls. At best, White pointed out a mutual mistake in the address. The court held that the documents evidence a clear intent that White be personally liable on the lease.

84 Lumber Company, L.P.* v. *Powers, 393 S.W.3d 299 (Tex.App.-Houston [1st Dist.] 2012, pet. denied). Powers’s company applied for credit with the lumber company. The credit application contained a printed provision in all caps that said “I do unconditionally and irrevocably personally guarantee this credit account. . .” Powers signed the application with an asterisk by his name and “as officer” hand-written beside it. In the “Print Name” line was handwritten “President David Powers.”

When the credit account became delinquent, 84 Lumber sued the company and Powers individually. 84 Lumber claimed Powers was liable on the personal guaranty. 84 Lumber argues that Powers's signature immediately below the unambiguous recital that he was to "unconditionally and irrevocably personally guarantee the credit account” binds Powers as a matter of law.

Powers counters that the credit application was signed only in a representative capacity and thus does not bind him individually and is ambiguous. The construction of an unambiguous contract is a question of law for the court. If a written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, it is not ambiguous and the reviewing court will construe it as a matter of law. A contract is ambiguous only when its meaning is uncertain and doubtful or it is reasonably susceptible to more than one meaning.

Here, the application specifically states that, by his execution of the application, Powers certified that he was the owner, general partner, or president of his company and that he unconditionally and irrevocably personally guaranteed the credit account. Powers's signature creates not only a corporate liability, but individual liability for the debt of the corporation. And, noted the court, this is the company president securing credit for his own business. It concluded that a president of the corporation is liable for the credit his company received by means of his personal guaranty of his own company's debts.

Also, take a look at ***Williams* v. *Bell***, 402 S.W.3d 28 (Tex.App.-Houston [14 Dist.] 2013, **), where the note was clearly signed in a representative capacity rather than individually.

PART V
DEEDS AND CONVEYANCE DOCUMENTS

Farm & Ranch Investors, Ltd.* v. *Titan Operating, L.L.C., 369 S.W.3d 679 (Tex.App.-Fort Worth 2012, pet. denied). Caldwell's Creek, Ltd. was the owner of roughly sixty acres of land in Colleyville known as the Caldwell's Creek Addition. In 1994, Caldwell's Creek, Ltd. recorded a dedication and restrictions for the land in the deed records. One of the restrictions stated, "No oil drilling, oil development operations, oil refining, quarrying or mining operations of any kind shall be permitted upon or on any lot. All mineral rights shall belong and shall continue to belong to the limited partnership of Caldwell's Creek, LTD."

After the restrictive covenants were recorded, Caldwell's Creek, Ltd. divided the land into lots and sold the lots to individual owners. Caldwell's Creek, Ltd. executed the first of the nine deeds at issue in 1994 and the last in 1999. The warranty deeds that conveyed the property to the individual owners stated, "This conveyance is made subject to any and all easements, restrictions, and mineral reservations affecting said property that are filed for record in the office of the County Clerk of Tarrant County, Texas." The deeds did not contain a separate reservation of the mineral interest. In October 2005, Caldwell's Creek, Ltd. purported to convey all of the oil, gas, and mineral rights to Farm & Ranch by special mineral deed. Caldwell's Creek, Ltd. believed it had retained the mineral rights to the Caldwell's Creek Addition based on the recorded restrictions and the statement in the lot owners' deeds that conveyed the property subject to any recorded restrictions.

When Farm & Ranch tried to lease the minerals to Titan, it was unable to do so because Titan had decided that the individual lot owners owned the minerals. Titan leased from them and then filed suit for a declaratory judgment that it controlled the minerals through its leases with the individual owners.

Farm & Ranch argues that the deed restrictions reserved the mineral rights to Caldwell's Creek, Ltd. and that the statement in the lot owners' deeds that conveyed the property subject to any recorded restrictions means that Caldwell's Creek, Ltd. conveyed only the surface estate to the lot owners.

At the time that Caldwell's Creek, Ltd. filed the restrictions, it owned both the mineral and surface rights to the Caldwell's Creek land. An owner cannot reserve to himself an interest in property that he already owns, and the restrictions did not convey any surface or mineral estates to another party. Thus, the trial court held that the restrictions were not a reservation of the mineral rights by Caldwell's Creek, Ltd. Farm & Ranch does not directly challenge the trial court's finding but instead argues that the restrictions and the deeds must be read as an integrated instrument of conveyance. Farm & Ranch argues that the "subject to" language in the individual deeds imports the language of the restrictions into the deed and is constructive notice of the restrictions. The court disagreed. If the lot owners had looked back to the restrictions, they would only have found an affirmative statement that Caldwell's Creek, Ltd. did indeed own the mineral rights in fee simple and were thus able to convey them to the lot owners.

Farm & Ranch argues that the phrase "shall continue to belong" serves as a clear reservation of mineral rights. This argument first neglects both that the restrictions are neither a lease nor an instrument of conveyance, and thus, cannot reserve an interest, and that an owner cannot reserve to himself an interest that he already owns. A reservation must be made at the time of the conveyance or lease. Also, the court did not believe that the phrase "shall continue to belong" can only be interpreted as a future reservation. The trial court correctly interpreted it to mean that nothing in the restrictions and reservations deprived Caldwell's Creek, Ltd. of its ownership of the mineral rights in the property. Thus, Caldwell's Creek, Ltd. continued to possess the mineral rights and was therefore able to convey them in future deeds.

Singer* v. *State of Texas, 391 S.W.3d 627 (Tex.App.-El Paso 2012, pet. denied). The Singers executed two donation deeds to the State for highway purposes. Each of the deeds stated: "In the event the land herein described is not used for public highway purposes, which includes construction contract letting, on S.H. 121 (Lewisville Bypass) on or before January 1, 2000, then all or that portion of the land not so used, as the case may be, will revert to and be revested in the Grantor named herein or their successors in interest[s]." The highway construction was done in two stages. The contract for the second stage was not let until 2003. The Singers alleged that because the State had not used portions of the land for public highway purposes and had not let a construction contract as defined in the deeds as of January 1, 2000, the unused portions of the deeded land reverted to them.

Further, the Singers asserted that the State's continued dominion over and construction on the unused portions of land after January 1, 2000, constituted an inverse condemnation. A required element to prove inverse condemnation is ownership of the property. The Singers argued that the donation deeds meant that ownership reverted to them when the State failed to let the second contract before January 2000. The State contended that the language of the deeds creates a condition subsequent which, having been satisfied, cannot have resulted in the automatic reversion and revestment of title in the Singers.

In interpreting the language of deeds, the court must ascertain the intent of the parties as set forth within the four corners of the document and attempt to harmonize all portions of the deeds. In ambiguous cases, the Texas Supreme Court has held that where language in a deed creates doubt as to whether the grantor intended a limitation or a condition subsequent, the language should be construed as a condition subsequent because a condition subsequent is less onerous than a limitation upon the grantee as the estate would not terminate automatically, but would continue until the grantor acts to terminate the estate. Moreover, when there is doubt in the construction of a deed's language, the doubt is resolved against the grantor.

The court held that the language of the deeds' conditions is ambiguous. It is unclear whether the Singers intended to create a condition subsequent or a possibility of reverter as the deeds contain language that is generally used to create both. First, the granting clause of the donation deeds includes the words Grant, Give and Convey. The habendum clause uses the words "to have and hold the premises herein described and herein conveyed ... unto the State of Texas and its assigns forever," which indicate an intent to convey a fee simple absolute. Second, the language "[i]n the event the land ... is not used for public highway purposes ... on or before January 1, 2000," creates a condition that the State must satisfy. Third, the words "revert to and be revested" express a reverter in the Singers.

The court thought that the deeds, when viewed and construed in their entirety, create a fee simple subject to a condition subsequent. Because it found the language of the deeds is unclear as to whether a condition subsequent or possibility of reverter was created, it resolved that doubt in favor of a condition subsequent.

Buckingham* v. *McAfee, 393 S.W.3d 372 (Tex.App.-Amarillo 2012, pet. pending). This case involves the question of ownership of a riverbed along the Red River. Property was deeded to the Buckinghams. It encompasses all land lying south of the south bank and north of the north bank of the North Fork of the Red River found in the tract of land in question. The conveyance excepted ninety acres "reserved for river bed."

To support their claim for ownership of the riverbed, the Buckinghams invoked the doctrine of riparian rights, i.e., the rights of the owners of land on the banks of watercourses, relating to water, its use, and ownership of soil under the stream or river. Per the theory, a riparian proprietor owns the bed of the stream. In other words, when a private party makes a conveyance of land bordering on a stream, the grantor purportedly conveys title to the one-half of the stream bed abutting his land. The court agreed with the argument and held that when a private person (including corporations, etc.) conveys title to lands owned by him abutting a stream -- whether navigable or not -- such conveyance passes to the grantee (unless the conveyance clearly shows a contrary intention), title to the one-half of such stream bed abutting his land, subject, of course, to whatever rights the state may have in the stream bed.

As previously mentioned, the operative deed contained the following language: "except ninety (90) acres reserved for river bed." While that passage mentions no metes or bounds, it nonetheless reveals a clear intent on the part of the grantor to exclude "riverbed" from the conveyance. The Buckinghams cited no authority that the "contrary intention" mentioned above could be satisfied only through a valid legal description of the excepted riverbed.

PART VI
USURY

***Lagow* v. *Hamon*,** 384 S.W.3d 411 (Tex.App.-Dallas 2012, no pet.). Hamon sued Lagow alleging claims for payment of promissory notes, breach of contract, money had and received, unjust enrichment, and restitution. The Lagows counterclaimed alleging usury. Hamon answered Lagow's counterclaim, generally denying the allegation, and requested an abatement that would allow her to correct any alleged usury violation as permitted by section 305.006 of the Texas Finance Code.

Section 305.006(d) of the Texas Finance Code provides that when a debtor files a counterclaim alleging usurious interest in an original action by the creditor, the debtor shall provide notice at the time of filing the counterclaim and, on application of the creditor to the trial court, the action is subject to abatement for a period of sixty days. During the abatement period, the creditor may correct a violation. A creditor who corrects a violation is not liable to the debtor for the violation, but must offer to pay the obligor's reasonable attorney's fees incurred "with regard to the alleged violation before the abatement."

The trial court granted Hamon's plea in abatement. During the abatement, Hamon sent Lagow a usury correction letter, a partial release, and offered to pay her reasonable attorney's fees in accordance with section 305.006 of the Texas Finance Code. After the trial, the court awarded damages and attorneys' fees to Hamon. It also awarded attorneys' fees to Lagow related to the usury cure and then ordered that those fees be offset against the damage award to Hamon.

Lagow appealed, claiming that the trial court erred by abating the trial to permit the usury cure. She argued that Hamon waived her right to correct the usury violation by failing to exercise the right in a timely fashion. Brenda Lagow contends that section 305.006 of the Texas Finance Code has a similar abatement provision as the Texas Deceptive Trade Practices-Consumer Protection Act. As a result, she claims this Court should follow the Texas Supreme Court's ruling in ***Hines* v. *Hash***, 843 S.W.2d 464 (Tex.1992) which required a defendant in a DTPA case to "request abatement with the filing of an answer or very soon thereafter" and conclude that Hamon waived her right to an abatement to correct the alleged usury violation because she did not seek abatement until she filed her motions for summary judgment.

Generally, a plea in abatement must be raised in a timely manner, or it is waived. However, unlike the DTPA that requires a plea in abatement be filed at the time the suit is answered or very "soon thereafter," the plain language of section 305.006(d), which addresses usury violations alleged in a counterclaim, is silent as to any time by which a creditor must seek an abatement to correct a violation of the usury law alleged in a counterclaim. Further, unlike the DTPA, the usury statutes are considered penal in nature. The court concluded that requiring Hamon to request abatement with the filing of an answer or very soon thereafter, like in a DTPA action, is inconsistent with the legislature's purpose as expressed in section 305.006(d) of the Texas Finance Code and as interpreted by the case law.

PART VII
LEASES

White* v. *Harrison, 390 S.W.3d 666 (Tex.App.-Dallas 2012, no pet.). VSC leased the premises from Harrison. About a year after signing the lease and moving into the space, VSC asked Harrison for permission, as required by the lease, to assign the lease to Davis. Harrison denied permission, but VSC "transitioned control" of the premises to Davis. For almost two years, Harrison accepted payments from Davis. Then payment became spotty. Harrison demanded payment from VSC, but VSC didn't respond to Harrison's letters.

Harrison instituted an eviction proceeding. In the meantime Davis and Harrison met and entered into an agreement concerning back rent and forbearance of the forcible detainer. The agreement stated that it was not creating a landlord-tenant relationship with Davis and that he was essentially a tenant at the sufferance of VSC. VSC wasn't a party to the Davis agreement.

Davis paid the back rent, but eventually stopped paying current rent. Harrison then demanded rent from both Davis and VSC. Eventually, Davis moved out. Harrison sued VSC for unpaid rent and reimbursement for taxes paid and expenses on the property. The trial court found in favor of Harrison.

VSC raised a number of affirmative defenses, including ratification, repudiation, waiver, modification, novation, and failure to mitigate damages. Because these are affirmative defenses, the burden is on the defendant, VSC, to prove each one.

The elements of ratification are: (1) approval by act, word, or conduct; (2) with full knowledge of the facts of the earlier act; and (3) with the intention of giving validity to the earlier act. A party ratifies an agreement when, after learning all of the material facts, he confirms or adopts an earlier act that did not then legally bind him and that he could have repudiated. To establish a ratification, VSC was required to prove that Harrison confirmed Davis as his new tenant, replacing VSC, under the Lease. But the evidence was completely to the contrary. The Davis agreement stated that Harrison would allow Davis to occupy the premises, at VSC's "sufferance," because VSC remained the tenant under the Lease. The Davis agreement specifically stated that Davis was not now the tenant and that VSC, as tenant, remained responsible under the Lease. Moreover, Harrison continued to look to VSC and its guarantor for rent pursuant to the Lease.

A repudiation is accomplished by a contracting party's words or actions that indicate he is not going to perform his contract in the future. VSC contended that by accepting rent from Davis, and allowing him to conduct business on the leased premises, Harrison expressed his fixed intention not to perform his contractual obligations under the Lease. The contractual obligation that appellants contend Harrison was refusing to perform was his warranty of their quiet enjoyment of the premises. VSC argued that Harrison deprived them of the use of the premises, but the evidence is to the contrary. VSC left the premises and " transitioned" the property to Davis. But Harrison specifically acknowledged in the Davis Agreement that Davis possessed the premises only at the pleasure of VSC.

The affirmative defense of waiver can be asserted against a party who intentionally relinquishes a known right or engages in intentional conduct inconsistent with claiming that right. Specifically, VSC alleged that Harrison indicated, expressly and through his conduct, that he did not intend to claim the right to enforce the Lease and Guaranty. Again, this was completely contrary to the evidence. The Davis agreement makes clear that there was no new lease between Harrison and Davis and that appellants remained liable on the lease. Furthermore, Harrison's actions were consistent with the acknowledgments in the Davis agreement. Harrison consistently sent rent demands to VSC, regardless of who was occupying the premises, whenever rent was overdue. In each correspondence, Harrison indicated he intended to hold VSC to its obligations under the lease.

VSC then contended that the lease was modified when Harrison and Davis created a "new lease" for the same property. A valid contract modification must include a meeting of the minds supported by consideration. And importantly, an oral modification of a written contract is enforceable under the Statute of Frauds only if the modification does not materially alter the obligations imposed by the underlying agreement. Here VSC was relying on purported oral releases to support their argument for modification. The trial court had rejected that evidence. Even if they had bought the argument, the lease was subject to the Statute of Frauds and could only be modified in writing. The Davis agreement could not be a "new lease," as VSC claimed, when its own terms say it is not creating a landlord-tenant relationship and when it specifically said that the lease was not affected by the Davis agreement.

A novation, the next affirmative defense argued by VSC, requires a mutual agreement to substitute a new obligation for an existing one or to substitute a new party for an existing party. A novation requires a mutual agreement to make the substitution. There is no evidence that Harrison intended to create a new lease when he entered into the Davis agreement. On the contrary, that agreement expressly states that it does not create a landlord-tenant relationship between Harrison and Davis, and it expressly affirms that the Lease between Harrison and VSC remains in full force and effect.

In its final issue, VSC claimed that Harrison had failed to mitigate damages. A landlord has a duty to mitigate damages if a tenant abandons the leased premises in violation of the lease. The landlord's duty to mitigate requires him to use objectively reasonable efforts to re-lease the premises to a tenant suitable under the circumstances. The tenant bears the burden of proof to demonstrate that the landlord has failed to mitigate damages and the amount by which the landlord could have reduced his damages. VSC first argued that Harrison could have mitigated by allowing Davis to stay at the premises; however, the evidence showed that Davis wasn't paying rent, so the court rejected that argument. What the evidence did show was that Harrison fixed up the place and found a temporary tenant, crediting VSC with the $20,000 received from that tenant. He ultimately re-leased the premises to another tenant four years before the VSC lease would have expired. That looked like mitigation to this court.

Cheung-Loon, LLC* v. *Cergon, Inc., 392 S.W.3d 738 (Tex.App.-Dallas 2012, no pet.). Primo's leased a parking lot from Cheung-Loon. It also executed an SNDA with Cheung-Loon's lender. The lease required Primo's to give Cheung-Loon 30-days' notice and an opportunity to cure any defaults before pursuing any remedies. The SNDA also required Primo's to give the lender 30-days' notice and an opportunity to cure the landlord's defaults. The lease also contained a provision that, if required, Primo's would obtain a certificate of occupancy for the lot.

The disputes in this case come from both directions. First, other tenants of Cheung-Loon's properties began using the parking lot, with the effect that Primo's customers had no place to park. Primo's made a number of oral complaints about the problem, but Cheung-Loon did nothing about it. Second, Cheung-Loon sent Primo's a notice stating that the City required a certificate of occupancy for the lot, which would require a number of improvements to it. Primo's did not do anything about getting the CO.

Cheung-Loon sent Primo's a default notice. After that, Primo's sent Cheung-Loon a letter stating that Primo's was rescinding the lease. A few weeks after that letter was sent, Primo's quit paying rent. Cheung-Loon responded by sending a letter rejecting Primo's "unilateral rescission" of the lease and demanding that Primo's continue paying rent and obtain the CO. Primo's took no action. Later, Cheung-Loon sent another default notice and again, Primo's did nothing. Cheung-Loon sued for breach of contract. Primo's answered and pled a number of affirmative defenses. It also brought counterclaims for fraud and breach of contract based on Cheung-Loon's violation of Primo's right to exclusive use of the parking lot.

The trial court granted summary judgment in favor of Primo's, declaring that: (1) Primo's possessed a contractual right to the exclusive use of the parking lot; (2) Cheung-Loon's actions undermined and rendered the lease between the parties useless and valueless; and (3) Primo's rightfully and properly rescinded and terminated the leasing arrangement.

Cheung-Loon argued that Primo's failure to provide 30-days' notice of default to it and to its lender meant that Cheung-Loon was not in default. The court agreed. The lease provision and the SNDA provision required 30-days' written notice. Except for the letter sent by Primo's rescinding the lease, all of its complaints about the parking lot were oral, and none were sent to the lender. The default notices were a condition precedent to bringing an action for breach of contract, so Primo's had no right to do so.

Primo's claimed that it was unnecessary for Primo's to provide notice of default because any such notice would have been futile and the law does not require a party to perform a futile act. But Primo's failed to provide any evidence of futility. The only evidence was that Cheung-Loon didn't do anything to fix the problem after the oral notifications.

The court then looked to Cheung-Loon's claims to determine whether it had met its burden to show it was entitled to summary judgment on its breach of contract claims. Cheung-Loon contended Primo's breached the lease in two different ways: by failing to obtain a certificate of occupancy and by improperly terminating the lease.

Primo’s had submitted an affidavit stating that it was not able to verify with the City that a certificate of occupancy was required for the lot. The lease required a CO before the lot was to be used, but Primo’s had been using the lot for a year after the City allegedly required the CO. The court said this was enough to raise a fact question as to whether Primo’s had breached the lease by not obtaining a CO.

Cheung-Loon also argued that the unilateral rescission of the lease by Primo’s was a breach of the lease. The improper termination of a contract is a breach of contract as a matter of law. No one disputed the fact that Primo’s had terminated the lease and quit paying rent. Primo’s argued, though, that its termination was proper because Cheung-Loon had breached its obligations regarding the parking lot. However, the court again pointed out that Primo’s had failed to provide the default notices to Cheung-Loon and its lender, so Cheung-Loon could not be held to have breached the lease in a way that justified termination of the lease by Primo’s.

Jesperson* v. *Sweetwater Ranch Apartments, 390 S.W.3d 644 (Tex.App.-Dallas 2012, no pet.). Part of the multi-faceted dispute between the parties that involved claims of discrimination, breaches of the lease, and the like, the tenant, Jesperson, claimed that she had been wrongfully locked out of her apartment in violation of Property Code § 92.0081. That statute prohibits a landlord from intentionally preventing a tenant from entering the leased premises except by judicial process unless the exclusion results from (1) bona fide repairs, construction, or an emergency, (2) removing the contents of premises abandoned by a tenant, or (3) changing the door locks of a tenant who is delinquent in paying at least part of the rent. If the landlord changes the lock of a tenant who is delinquent in paying the rent, the landlord must place a written notice on the tenant's front door containing information about where the tenant can get a key, that the landlord must provide the new key, and the amount of rent or other charges for which the tenant is delinquent. If a landlord violates section 92.0081, the tenant may either recover possession of the premises or terminate the lease and recover statutory penalties, actual damages, court costs, and reasonable attorney's fees.

Jespersen moved almost all of her belongings out of the apartment prior to the date the landlord changed the locks. About a week before the locks were changed, the landlord was notified that Jespersen's check for the current rent had been returned due to insufficient funds. The property managers entered Jespersen's apartment and, in their opinion, believed Jespersen had moved her belongings out of the apartment. The lease required the landlord to post a notice on the inside of any apartment that it believed had been abandoned by the tenant. The property manager posted this notice. Pursuant to the lease, Jespersen had two days to dispute whether she had abandoned the apartment. Jespersen failed to do so. Accordingly, under the lease, Jespersen abandoned the apartment prior to the date the landlord changed the locks and no longer had any right of possession to the apartment.

The party protected by § 92.0081 is a “tenant,” which Property Code § 92.001(6) defines as “a person who is authorized by a lease to occupy a dwelling to the exclusion of others . . .” On the date the landlord changed the locks, Jespersen was not authorized by a lease to occupy her apartment and, therefore, was not a tenant for purposes of section 92.0081. Thus, summary judgment in favor of the landlord was appropriate.

McGehee* v. *Hagan, 367 S.W.3d 848 (Tex.App.-Houston [14th Dist.] 2012, pet. denied). Hagan and McGehee, as co-lessees, entered into a lease with the landlord, Hansen. After signing the lease, there were substantial delays in the landlord delivering the premises and a good deal of wavering by both Hagan and McGehee. When the space wasn't completed four months after it was supposed to be delivered, McGehee decided to remain in his space and asked Hansen for his security deposit back. Hagan entered into a new lease with the landlord, then sued McGehee for breach of contract. The trial court ruled in favor of Hagan and awarded damages.

Hagan pled that McGehee owed a contractual duty to him under the joint lease. The lease provided that the co-lessees were obligated to pay rent and perform obligations in favor of the landlord; however, there was nothing in the lease providing that the co-lessees owed each other any duties. Nevertheless, Hagan argues that McGehee owed contractual duties to him simply because they were co-lessees. McGehee contends co-lessees do not inherently owe each other contractual duties.

Citing cases relating to co-obligors on notes that hold that co-obligors do not owe each other any duties arising from the note, the court held that a similar reasoning should apply in the present case. Under the joint lease, McGehee didn't promise Hagan that he would refrain from repudiating the lease. Thus the court concluded that the evidence is legally insufficient to support the trial court's finding that McGehee owed a contractual duty to Hagan under the joint lease. Consequently, the trial court erred by awarding benefit-of-the-bargain damages and damages for unreleased obligations under the joint lease against McGehee.

Assuming the trial court's award of damages for unreleased lease obligations was based on a theory of equitable contribution instead of on breach of express contract, the court also held that Hagan was not entitled to such award. Under the equitable theory of contribution, when two or more co-obligors share a common obligation, a co-obligor who makes compulsory payment of more than its fair share of the common obligation may seek contribution from the other co-obligors. As part of this issue, McGehee argues that Hagan did not establish entitlement to contribution because it is undisputed Hagan has never made any rental payment to, or received any demands for payment from, Lessor under the joint lease. The general rule is that there can be no recovery of contribution until after payment by the party seeking contribution.

Parkway Dental Associates, P.A.* v. *Ho & Huang Properties, LP, 391 S.W.3d 596 (Tex.App.-Houston [14th Dist.] 2012, no pet.). Parkway Dental leased space from H&H. The lease contained an exclusive use provision which stated that H&H would not lease space to a competing general dentist business. H&H conveyed a portion of the land where the office building was located. In selling the portion of the land, H&H did not require the purchaser to agree to the exclusive use restriction. The purchaser of the portion of the land then entered into a lease with Aquarium Dental for the purpose of operating a dental clinic.

Parkway Dental complained to H&H and was told there was nothing H&H could do because the land had been sold to a third party. Parkway Dental sued H&H, the purchaser/owner of the adjacent tract, and Aquarium Dental, seeking injunctive and monetary relief. In the meantime, while trying to negotiate a settlement of the case, Parkway Dental's lease term ended, so it closed that office.

The trial court found that Parkway had failed to produce evidence supporting its claims and entered summary judgment in favor of H&H, dismissing Parkway Dental's claims. It awarded H&H attorneys' fees.

Part of the trial court's judgment was that Parkway Dental had failed to produce evidence that H&H had breached the exclusive use provision. The court of appeals took a look at the lease. The covenant stated that H&H would not permit any portion of the "Project" to be used for a competitive business. The "Project" was defined as the building or complex where the premises were located, the common areas, as well as the parking areas in the shopping center. The Aquarium Dental offices were built on part of the parking areas that had been sold to the third party purchaser.

The court held that, under the unambiguous language of the Parkway Dental ease, (1) the parties placed no contractual restriction on H&H's ability to convey the Tract and (2) the Parkway Dental lease does not impose an obligation on H&H to have any party to whom it might convey the tract agree to be bound by the Covenant or to make a similar promise. Nonetheless, under the unambiguous language of the lease, H&H Landlord breaches the Covenant if, during the term of that lease, any portion of the Project is used for a business involving the practice of general dentistry. Thus, under the Parkway Dental lease, if H&H exercises its right to convey a part of the Project to a third party without having the third party agree to be bound by the covenant or without taking other measures to prevent the use of any portion of the Project for a business involving the practice of general dentistry, then H&H runs the risk of breaching the covenant.

Dragon Fish, LLC* v. *Santikos Legacy, Ltd., 383 S.W.3d 175 (Tex.App.-San Antonio 2012, no pet.). The court held that a disclaimer provision that was written to comply with the guidelines set out in the ***Italian Cowboy*** case was enforceable. ***Italian Cowboy Partners, Ltd.* v. *Prudential Ins. Co. of America***, 341 S.W.3d 323 (Tex.2011). It reads as follows: LANDLORD AND TENANT HEREBY ACKNOWLEDGE THAT THEY ARE NOT RELYING UPON ANY BROCHURE, RENDERING, INFORMATION, REPRESENTATION OR PROMISE OF THE OTHER, OR AN AGENT OR BROKER, IF ANY, EXCEPT AS MAY BE EXPRESSLY SET FORTH IN THIS LEASE. The court made an additional point that bears noting. A lease agreement, as here, which is the initiation of a business relationship, should be all the more clear and unequivocal in effectively disclaiming reliance and precluding a claim for fraudulent inducement, lest we forgive intentional lies regardless of context.

Breof BNK Texas, L.P.* v. *D.H. Hill Advisors, Inc., 370 S.W.3d 58 (Tex.App.-Houston [14th Dist.] 2012, no pet.). In connection with the renewal of a lease, the renewal agreement provided that the landlord would construct an ADA compliant restroom and complete the installation before November 1. November 1 came and went without any work being started on the restroom. Ultimately, the contractor told the landlord that it was impossible to build the restroom at the designated location. Ultimately the tenant, Hill, moved out. The landlord, Breof, sued and Hill countersued. The trial court awarded damages to Hill.

Breof appealed. It argued that the November 1 completion date was not a material term of the lease, so Hill was not released from its duties under the lease when Breof failed to build the restroom by that date. For timely performance to be a material term in a contract, the parties must expressly state that time is of the essence or there must be something in the nature or purpose of the contract and the circumstances surrounding it making it apparent that the parties intended that time be of the essence. Unless the contract expressly makes time of the essence, the issue is a fact question. When it is clear the parties intend that time is of the essence to a contract, untimely performance is a material breach discharging the duties of the non-breaching party.

Exhibit C of the lease provides that Breof "shall use commercially reasonable efforts to cause [all the contemplated improvements, including the bathroom, repainting, and installation of new flooring] to be completed prior to November 1, 2008." However, the lease does not go further to explicitly make time of the essence. This makes the parties' intent a fact issue. The trier of fact, the trial court, had found that November 1 was a material performance date based upon the history of negotiating the renewal. Because the November 1 date was material and because Breof failed to timely perform, it was a material breach by Breof, excusing Hill's performance.

Fontaine* v. *Deutsche Bank Nat. Trust Co., 372 S.W.3d 257 (Tex.App.-Dallas 2012, no pet.). The Protecting Tenants from Foreclosure Act of 2009 (Pub.L. No. 111-22, § 702, 123 Stat. 1632, 1660-61; 12 U.S.C. § 5220 note.) provides two different types of protection to "bona fide tenants" of residential property after a foreclosure sale. First, "the successor in interest in such property pursuant to the foreclosure" must provide a bona fide tenant ninety days' notice before requiring the tenant to vacate. Second, if a "bona fide lease" was entered into before the notice of foreclosure, then the lease is not terminated, and the successor in interest takes the property subject to the tenant's rights under the lease to occupy the premises until the end of the remaining term of the lease. The only exception is if the successor in interest sells the property to a purchaser who will occupy the premises as his primary residence. In that situation, the successor in interest may terminate the lease on the day of the sale but must still provide the tenant ninety days' notice to vacate. If there is a bona fide tenant but there is no lease or the lease is terminable at will, then the successor in interest may take possession of the property after giving the tenant ninety days' notice to vacate.

The PTFA defines " bona fide lease or tenancy" as one where (1) the tenant is not the mortgagor or the mortgagor's spouse, parent, or child; (2) the lease was entered into in an arm's-length transaction; and (3) the rent required by the lease or tenancy is not substantially less than fair market rent for the property, or the unit's rent is reduced or subsidized due to a federal, state, or local subsidy.

The bank argues that under Texas law, the lease was terminated at the foreclosure. Thus, the bank argues, if Fontaine was a bona fide tenant under the PTFA, then the only protection provided by the Act was the right to ninety days' notice to vacate, which appellant received.

The PTFA provides that the successor in interest due to the foreclosure shall assume such interest subject to the rights of any bona fide tenant, as of the date of such notice of foreclosure. Thus, it is the tenant's rights as of the date of the foreclosure notice, not as of the date of foreclosure, that limit the interest of the successor in interest. The Bank does not dispute that as of the date of such notice of foreclosure, Fontaine's lease was in effect, so the 90-day notice provision did not apply.

Stevenson* v. *Housing Authority of the City of Austin, 385 S.W.3d 684 (Tex.App.-El Paso 2012, no pet.). Stevenson's lease expired in October 2008. Stevenson has not resided in the apartment since his eviction in May 2009, and HACA has leased the apartment at issue to another tenant. Because Stevenson's lease expired and because he presents no basis for claiming a current, actual right to possession of the premises, the issue of possession is moot.

R.J. Suarez Enterprises Inc.* v. *PNYX L.P., 380 S.W.3d 238 (Tex.App.-Dallas 2012, no pet.). Suarez Enterprises owned and operated a sandwich shop, leasing the premises where the shop was located. PNYX was the landlord. Suarez Enterprises notified PNYX that it did not intend to renew its lease. As a result, PNYX identified a new tenant, Sam Kim and Wha Kim d/b/a Super Sub and Smoothie+, who planned to open a sandwich shop on the premises.

Before the lease expired, Suarez Enterprises and PNYX disagreed over the ownership of a walk-in cooler, walk-in freezer, sandwich unit, beverage cooler, and ice machine. Each believed that under the terms of the lease it owned the disputed property. PNYX took control of the disputed property and turned it over to Sam Kim.

Suarez Enterprises filed suit against PYNX and Sam Kim alleging claims for conversion. The trial court found in favor of Suarez Enterprises on its claim for conversion, but ordered that it take nothing on its claim because it failed to present evidence of the fair market value of the property.

A plaintiff who establishes conversion is entitled to either (1) the return of the property and damages for its loss of use during the time of its detention, or (2) the value of the property. Generally, the measure of damages for conversion is the fair market value of the property at the time and place of the conversion. Even when there is evidence supporting a finding of conversion, there must be evidence of the fair market value of the converted property to support a damages award.

Here, the evidence presented by Suarez Enterprises was its replacement costs. Suarez Enterprises maintained that the fair market value and replacement value were identical. The court held that Suarez Enterprises had not shown that the values were identical. It was required to prove fair market value and failed to do so.

PART VIII
VENDOR AND PURCHASER

Morton* v. *Nguyen, No. 12-0539 (Tex. August 23, 2013). Morton sold the Nguyens a house under a contract for deed. The contract required a down payment and monthly payments for 35 years. The interest rate escalated by a point each year until it reached 12.875% per annum. The Nguyens made payments for almost three years. Morton provided annual statements showing the amount of interest paid, but he did not provide all of the information required by Property Code § 5.077.

After a few years, the Nguyens notified Morton that they were exercising their right to rescind the contract. They stopped making payments. They demanded the return of all of the monthly payments they had made, the down payment, and the taxes and insurance premiums they had paid. Morton ordered them out of the house. He also started harassing the Nguyens with profane emails demanding payment, placing unauthorized queries on their credit reports, and putting notices of the dispute in the Nguyens' neighbors mailboxes. Morton sued, and the Nguyens counterclaimed seeking rescission of the contract and damages for violation of Property Code §§ 5.069, 5.070, 5.072, and 5.085. The trial court awarded the Nguyens well over $200,000 in damages. The court of appeals reversed the liability on the statutory penalty but awarded the Nguyens rescission and restitution, attorneys' fees, and mental anguish damages.

Morton appealed, claiming, among other things, claiming that the court of appeals erred by denying him mutual restitution upon cancelling and rescinding the contract. Morton argued in his opening brief that if the Nguyens were entitled to rescission and restitution, then he was entitled to a setoff for the value the Nguyens received for their occupancy of the house.

A contract for deed, unlike a typical secured transaction involving a deed of trust, is a financing arrangement that allows the seller to maintain title to the property until the buyer has paid for the property in full. Various sections of the Property Code entitle the buyer to cancel and rescind the contract and receive a full refund of all payments made if the seller fails to provide all information required in annual information statements.

Morton argues that Subchapter D's

cancellation-and-rescission remedy incorporates the common law principle of mutual restitution, which requires buyers under a contract for deed to restore the benefits they received under the rescinded contract. The Nguyens, on the other hand, argue that the Legislature did not intend to codify in Subchapter D the common law principle of the equitable remedy of rescission. The court agreed with Morton.

The cancellation-and-rescission remedy is not intended to be punitive—it merely provides the buyer the option of unwinding the transaction. Allowing a buyer to recover all benefits bestowed upon the seller upon rescission without also requiring the buyer to surrender the benefits that he received under the contract would result in a windfall inconsistent with the general nature of the cancellation-and-rescission remedy. Rescission is not a one-way street. Rather, rescission requires a mutual restoration and accounting, in which each party restores property received from the other. A seller's wrongdoing does not excuse the buyers from counterrestitution under the circumstances of this case. The buyer must return what it received under the contract for deed at that time—the occupation of the property. While the buyer remains entitled to "a full refund of all payments made to the seller," cancellation and rescission of a contract also requires that the buyer restore to the seller the value of the buyer's occupation of the property.

Sewing **v.** ***Bowman***, 371 S.W.3d 321 (Tex.App.-Houston [1st Dist.] 2012, pet. dismissed). Bowman sued Sewing, seeking redemption of a partnership interest and damages for breach of contract, unjust enrichment, and breach of fiduciary duty. Bowman and Sewing entered into a partnership for the purpose of acquiring and rehabilitating real property. They were to each own half of the properties. Bowman contributed money and it was put into the Sewings' checking account.

Sewing argued that Bowman's partnership claim was "wholly derivative" of an agreement for the transfer in the interest of land and, thus, whether or not the partnership agreement technically included a transfer in the interest of land, enforcing the agreement would still be barred by the statute of frauds. Though couched in terms of a partnership agreement," Bowman's partnership redemption claim is nothing more than a claim for a one-half interest in the partnership's properties.

An agreement to share in the profits of contemplated speculative deals in real estate simply does not involve the transfer of real estate, or an interest in real estate, within the meaning of the Statute of Frauds. Thus, Bowman's claim for redemption of his partnership interest may include an interest in the proceeds from the sale of the two properties without resulting in a transfer of interest in the two properties. Merely because a partnership agreement contemplates transactions in real estate does not transform the partnership itself into a transaction for the sale of real estate, bringing it under the statute of frauds.

Richmond **v.** ***Wells***, 395 S.W.3d 262 (Tex.App.-Eastland 2012, no pet.). In a dispute over the ownership of minerals, the question arose whether the Wellses, who had purchased the land previously owned by Richmond, were bona fide purchasers of the mineral interests in question.

The Wellses are not bona fide purchasers if they did not purchase the property in good faith, for valuable consideration, and without notice of the Richmonds' claim. The only one of those elements attacked in this case is the one that involves notice. Notice of an outstanding claim will defeat one's status as a bona fide purchaser. Notice may be either constructive or actual. Actual notice is notice that is based on personal information or knowledge. Constructive notice is that which the law imputes in various circumstances to one who does not have personal information or knowledge. One such circumstance of constructive notice arises when a purchaser is charged with notice of an occupant or a possessor's claims.

Richmond argued that the presence of a pump jack and tank batteries at the well site was constructive notice to the Wellses. But it was constructive notice only as to the claims of the well operator; it was the possessor or occupier. If the Wellses were to be charged with knowledge of the rights of the occupier or possessor of the mineral estate, those would be the mineral lessee's rights. If the Wellses had inquired about the rights of the lessee, the possessor, they simply would have discovered that it possessed the property by virtue of their fee simple determinable ownership interest. That ownership interest was created when Richmond conveyed it to the lessee; a time prior when Richmond undisputedly owned the minerals, prior to the various conveyances that called such ownership into question.

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

Vernon* v. *Perrien, 390 S.W.3d 47 (Tex.App.-El Paso 2012, pet. denied). Property Code § 22.001 states that a trespass to try title suit is the exclusive method to adjudicate rival claims of title to real property. Here, the Perriens filed a suit to quiet title against Mexada and they sought a declaratory judgment of their rights with respect to the Property. The Perriens sought attorney's fees under the Declaratory Judgments Act. They also alleged slander of title and asserted that Mexada is estopped from claiming ownership of the Property by virtue of the 1992 judgment under the principles of collateral estoppel and res judicata. Later, they added Vernon as a defendant. The trial court ruled in favor of the Perriens, removing the offending deeds and conveyances and awarding compensatory and exemplary damages as well as attorneys' fees.

Vernon appealed, claiming that the judgment is void because the court adjudicated the land ownership dispute between the parties as a declaratory judgment when Texas law requires that disputes about ownership be litigated in a trespass-to-try-title action. Vernon contended that the trial court lacked subject matter jurisdiction and requested that the entire judgment be vacated and set aside.

The Declaratory Judgments Act does not alter a trial court's jurisdiction. Rather, it is merely a procedural device for deciding cases already within a court's jurisdiction. Even though a litigant couches its requested relief in terms of declaratory relief, the underlying nature of the suit is not altered. Civil Practice & Remedies Code § 37.004(a) provides that a person interested under a deed 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.

The Perriens' specifically sought an adjudication of their rights as the owners of the Property, and requested that the offending deeds and conveyances be declared null and void, that the Perriens be declared the legal and equitable owners of the Property, and that the cloud on their title be removed. By requesting declarations that deeds are void and that the Perriens are the rightful owners of the Property, the Perriens effectively alleged a trespass to try title claim. Thus, the trial court had subject matter jurisdiction of the Perriens' claims, including the trespass to try title and suit to quiet title. The inclusion of the requests for declaratory relief did not deprive the trial court of subject matter jurisdiction.

Bynum* v. *Lewis, 393 S.W.3d 916 (Tex.App.-Tyler 2013, no pet.). Bynum moved into a farmhouse. Lewis had previously bought the property where the house was located. Lewis filed an eviction action in JP court. Bynum appealed in the county court and filed a pleading stating that he was the owner of the property by virtue of adverse possession. The county court entered judgment in Lewis's favor.

District courts have exclusive jurisdiction to determine title to real property. Chapter 24 of the Property Code governs forcible detainer actions, which provide a summary method for determining the right of a party to possession of real property. To preserve the simplicity and speedy nature of the forcible entry and detainer remedy, Texas Rule of Civil Procedure 746 provides that the "only issue shall be as to the right to actual possession; and the merits of title shall not be adjudicated." To prevail in a forcible entry and detainer action, a plaintiff is not required to prove title, but is only required to show sufficient evidence of ownership to demonstrate a superior right to immediate possession. Because a forcible entry and detainer action is not exclusive, but cumulative, of any other remedy that a party may have in the courts of this state, the displaced party is entitled to bring a separate suit in district court to determine the question of title.

However, if the resolution of a title dispute is necessarily intertwined with the issue of possession so that the right of possession depends upon it, possession may not be adjudicated without first determining title. A county court at law exercising appellate jurisdiction over a justice court judgment is limited to the original jurisdiction of the justice court. Only the district court has jurisdiction to determine title.

In sum, when the question of title is so integrally linked to the issue of possession that the right to possession cannot be determined without first determining title, the justice court and, on appeal, the county court lack subject matter jurisdiction to consider the issue. The affirmative defense of adverse possession invokes a claim to title that can defeat the jurisdiction of the justice court and on appeal, the county court.

In the case at hand, when Bynum raised the affirmative defense of adverse possession to Lewis's forcible entry and detainer action, the title issue became an integral part of the proceeding. Based on our review of the record, the county court, in considering the pleadings before it, would have had to determine title to the property in order to determine whether Lewis had the superior right to possession. Because (1) the county court had no jurisdiction to determine title and (2) title may not be adjudicated in a forcible detainer action, but only in a trespass to try title action, the court held that the county court did not have subject matter jurisdiction to determine if Lewis had a superior right to immediate possession of the property.

PART X
EASEMENTS

McKenna* v. *Caldwell, 387 S.W.3d 830 (Tex.App.-Eastland 2012, no pet.). The express easement reserved in the partition deed stated that it was for the purposes of providing a perpetual free, uninterrupted and unobstructed easement for access, ingress and egress to and from the north half of the property. McKenna acquired the south half. When Caldwell quit raising cattle on the north half, McKenna installed a gate and cattle guards to prevent his cattle from roaming onto Caldwell's land.

McKenna filed suit seeking a declaratory judgment and injunction preventing Caldwell from leaving the gate open or destroying the gate. Caldwell also sued to prevent McKenna from obstructing the easement. Caldwell argued that the terms of the express easement prohibited gates as a matter of law. The trial court entered summary judgment in Caldwell's favor.

The court of appeals reversed. The reservation of the easement appears to be unambiguous on its face. It is to remain free of all obstructions, without breaking the flow of Caldwell's ingress and egress. Yet, an ambiguity arises when the reservation is applied to the subject matter of the actual easement and the collateral matter of McKenna's use of his property for cattle.

The summary judgment evidence shows that, at the time of the partition deed, there was already a gate at the southern entrance of the easement. Most cattle guards would not be considered an " interruption" or an " obstruction," and Caldwell acknowledged that the cattle guard was never an issue. Yet, Caldwell filled in the cattle guard that McKenna used to keep his cattle from roaming onto Caldwell's property. The trial court's final judgment prohibiting any and all obstructions across the easement could be read to include cattle guards, leaving McKenna no way to maintain his preexisting use of the property: raising cattle without the cattle roaming onto Caldwell's property or the public road.

The court concluded that a question of fact exists as to whether, when the easement was created, the parties intended the access easement to be free of gates or cattle guards. What may be considered a proper and reasonable use, as well as what may be necessary to the easement holder's beneficial use and enjoyment, is a question of fact. Because Caldwell did not meet his burden of showing that there were no genuine issues of material fact and that he was entitled to judgment as a matter of law, summary judgment was inappropriate.

State of Texas* v. *NICO-WF1, L.L.C., 384 S.W.3d 818 (Tex. 2012). The easement in question provides for a 100-foot-wide public right of way, but the instrument dedicating the land also provides that the street's curb lines are to be fifteen feet inside the street's boundary lines. The issue is whether this curb-line condition limits the dedication such that only the seventy-foot area between the curb lines can be used for vehicular traffic.

NICO owns a building that fronts Arroyo Boulevard. The building has been there since the 1930s. Part of the building--primarily its attached concrete awning, columns, raised porch, and steps--extends several feet into Arroyo Boulevard's 100-foot public right of way. No part of the building, however, intrudes beyond the boulevard's curb line, which is fifteen feet inside the outer edge of the dedicated street line. NICO interprets the dedication to include a seventy-foot public roadway easement bounded on either side by a fifteen-foot public right-of-way easement. The State, however, contends that Arroyo Boulevard has been dedicated as a 100-foot-wide public street.

A street dedication is setting land apart for public use as a passageway. When a street is dedicated to the public, the governmental entity taking control of the street ordinarily acquires only an easement that it holds in trust for public benefit. The easement, however, carries with it the right to use and control as much of the surface and subsurface of the street as may be reasonably needed for street purposes. In short, a street includes the whole width of the public right of way.

Although NICO concedes that the public right of way here is 100 feet, it nevertheless contends that the grantor did not intend to dedicate the public easement entirely for vehicular traffic. It submits that the grantor limited the State's use of the entire easement for this purpose through the curb-line condition. NICO thus concludes that the State holds a 100-foot-wide right-of-way easement subject to a condition, which limits the easement's use as a roadway to seventy feet.

The State, of course, disagrees about the condition's effect, although it does not dispute that the grantor probably intended limiting vehicular traffic to only a part of the easement. But even assuming that to be the grantor's intent, the fact remains that he dedicated the entire 100-foot area to public use as a street. The State argues that reading the curb-line condition to limit its authority over the entire public street easement contravenes well-established public policy to the contrary.

The establishment, design, construction, and control of public streets are primarily governmental functions over which the government has full authority. Arroyo Boulevard is now part of the state highway system. By statute, the Texas Department of Transportation has exclusive and direct control of all improvement of the state highway system. Transportation Code § 224.031(a).

Texas courts have long recognized, however, that dedicating land for public use may include reasonable restrictions and limitations. But limitations imposed by the dedicator cannot be repugnant to the dedication or against public policy. When a dedication includes a condition that is inconsistent with the grant or contravenes public policy, the dedication is nevertheless effective even though the condition is not. Because the curb-line condition purports to control the construction and use of Arroyo Boulevard, it is repugnant to the State's control and authority over the public street and is void.

Harrington* v. *Dawson-Conway Ranch, Ltd., 372 S.W.3d 711 (Tex.App.-Eastland 2012, pet. denied). A prescriptive easement is not well-regarded in the law. To obtain a prescriptive easement, one must use someone else's land in a manner that is open, notorious, continuous, exclusive, and adverse for a period of ten years or more. Exclusivity is not met when landowner and claimant both use the road. When a landowner and a claimant of an easement both use the same road, use by the claimant is not exclusive to the landowner's use and is not adverse. Joint use of a road, no matter for how long, cannot ripen into an easement by prescription.

Courts have analyzed the acquisition of an easement by prescription as being analogous to the acquisition of title by adverse possession. Therefore, a claim of prescription must be supported by proof of all of the elements that are involved in the statute of limitations for adverse possession. The hostile and adverse character of the use necessary to establish an easement by prescription is the same as that which is necessary to establish title by adverse possession. One test to determine whether a claim is hostile as required to establish an easement by prescription is whether the adverse possessor's use, occupancy, and possession of the land is of such nature and character as to notify the true owner that the claimant is asserting a hostile claim to the land.

The party claiming an easement by prescription must give notice that its use of property is under a claim of right. Otherwise, the use (especially if joint) is presumed to be permissive, and a permissive use can never ripen into an easement by prescription. There must be an independent act of hostility to transform permissive use of an easement into an adverse use so as to begin the prescriptive period.

PART XI
HOMESTEAD

In the Matter of the Marriage of *Peter and Keli Christodolou*, 383 S.W.3d 718 (Tex.App.-Amarillo 2012, no pet.). Early in the marriage, Peter and Keli obtained a $201,000 unsecured loan from Peter's father (Nicholas) to buy a house. They quit making payments at some point. Nicholas died in 2008 and Peter and Keli decided to divorce in 2011. Their community estate consisted mostly of their homestead. The trial court awarded the house to Peter and ordered him to execute a note to Keli for her half of its value. The note was secured by an owelty lien on the property.

Meantime, the executor of Nicholas's estate, Peter's brother, became aware of the unpaid loan that enabled Peter and Keli to purchase the house. The executor informed the trial court that collection of the debt would be made by offsetting against any inheritance Peter was to get. However, the trial court recognized that such an offset would mean that Peter would pay the full amount of the loan. The trial court resolved this problem by imposing an equitable lien against the promissory note he was to give Keli – in effect making her pay her half of the loan.

The way a trial court divides community assets and liabilities lies within its discretion. That discretion, however, has its limits. At the very least, it must comport with controlling guidelines and principles. And, the controlling rule or principle violated at bar, according to Keli, was article 16, § 50 of the Texas Constitution, which prohibits liens against homesteads except in limited circumstances, which extends to proceeds from homesteads as well.

Purchase money liens denote a transaction wherein a person who loans money to another to acquire property obtains a lien on the property purchased. The court noted that equitable liens cannot be imposed where the claimant failed to secure an available statutory lien.

No one disputes that the abode acquired with the monies supplied by Nicholas became the homestead of Peter and Keli. Nor does anyone dispute that at least most of the amount payable by Peter to Keli under the note represented proceeds from Keli's homestead interest in that house. Similarly undisputed is that Nicholas, as opposed to anyone else, loaned the couple the money in question. And, while it may be that the loan proceeds were earmarked for the purchase of the homestead, no one cites any evidence suggesting in any way that Nicholas, Peter, or Keli intended to secure repayment of the loan by imposing a lien on the realty.

So, what we have here is an award of a purported lien equivalent to a purchase money security interest (1) to individuals who did not provide the loan, (2) in a transaction wherein no one intended that the home stand as security to assure repayment though the lender could have demanded as much, and (3) under circumstances suggesting that the lender lost or opted to relinquish his right to payment. None of those indicia, or any other appearing of record, satisfies the criteria for imposing an equitable lien in general or one that equates to a purchase money lien, in particular. Instead, the lien insulated the debtors from bearing more than their proportionate share of a potential debt owed to a third party. As such, it cannot be "equivalent to a purchase money lien" and thereby survive the prohibitions erected by article 16, § 50. The equitable lien encumbering the note representing Keli's proceeds from the disposition of her homestead is therefore void.

Barras* v. *Barras, 396 S.W.3d 154 (Tex.App.-Houston [14th Dist.] 2013, pet. pending). The divorce court, in making the property settlement, imposed an equitable lien on the husband’s separate property homestead. The husband complained that the lien was an impermissible lien on his homestead. The Texas Constitution provides that homestead property is exempt from forced sale to pay debts, except for certain specified categories of debts. The constitutionally allowed exceptions to the homestead exemption include debts for: (1) purchase money of the property; (2) taxes due on the property; (3) owelty of partition by court order or written agreement; (4) refinance of a lien against the property; (5) certain work and material to improve, renovate, or repair the property; (6) certain extensions of credit; (7) reverse mortgages; and (8) conversion and refinance of a personal property lien secured by a manufactured home to a lien on real property. The constitution does not contain an exception allowing a lien to be imposed simply to achieve a " just and right" division of property upon divorce. A court may impose the lien, however, if it satisfies a constitutional exception.

In this case, the lien is supported by an implied finding that it is a purchase-money lien, and thus, it was not imposed simply to achieve a " just and right" division of the marital estate. The purchase money lien in this case was implied. When no express lien is reserved in a deed and the purchase money is not paid, a lien nevertheless arises by implication in favor of the vendor to secure payment of the purchase money.

PART XII
BROKERS

Texas Real Estate Commission* v. *Bayless, 366 S.W.3d 808 (Tex.App.-Fort Worth 2012, pet. denied). In August, 2002, Bunton executed a contract for the sale of real property to Bayless. Bunton made false representations to Bayless that there were no liens against the property. Bayless made a $30,000 down payment on the seller-financed purchase of the property, took possession of the property, and made monthly payments to Bunton. After that, Bayless began receiving notices of foreclosure of the property from a financial institution that held an undisclosed mortgage on the property. Bunton did not make any payments on the undisclosed mortgage and retained all of the funds that Bayless paid to him. Bayless agreed to pay the financial institution an additional $30,000, but the property was foreclosed on in February 2004. Bunton's misrepresentations, dishonesty, and fraud caused Bayless to lose $37,524.66. Bayless alleged claims against Bunton for common law and statutory fraud and for violations of occupations code section 1101.652(a)(3) and the DTPA, and she sought damages of $37,524.66 and attorney's fees. The trial court granted Bayless's motions for summary judgment and in April 2010, awarded her damages.

Approximately five months later, in September 2010, Bayless filed a claim and application for an order directing a payment from the Real Estate Recovery Trust Account. She alleged that she had given notice of the claim to TREC, that she had obtained a final judgment against Bunton based on his violations of the Occupations Code §1101.652(a)(3), that a writ of execution was issued but returned nulla bona, and that she had caused to be issued an abstract of judgment and perfected a judgment lien. Bayless asked the trial court to enter an order directing TREC to pay to her " an amount found to be payable on the claim" from the trust account.

TREC objected to Bayless's application for an order directing a payment out of the trust account, arguing that the claim is time-barred under Occupations Code § 1101.605(a), which, according to TREC, required Bayless to bring her underlying suit against Bunton no later than two years from February 2004, the date of the subject property's foreclosure. TREC argued that Bayless could not recover from the trust account because the limitations period had expired when she sued Bunton more than two years after February 2004.

Section 1101.605(a), titled in part, "Deadline for Action," provides that "[a]n action for a judgment that may result in an order for payment from the trust account may not be brought after the second anniversary of the date the cause of action accrues." Construing the plain and common meaning of the terms used in § 1101.605(a), the court held that legislature intended for the statute to apply to an "action" against a real estate license or certificate holder upon which an uncollectible "judgment" is based. If the legislature had instead intended for section 1101.605(a) to apply to a claim against the trust account for payment of the unpaid amount of an uncollectible judgment and for the limitations period to accrue once a final judgment in the underlying action is entered, a writ of execution is returned nulla bona, and a judgment lien is perfected, then it could have simply stated as much, but it did not, and the court must presume that the legislature chose the words that it used for a purpose, and “we must not engage in a forced or strained construction of the statute.”

Litton Loan Servicing, LP* v. *Manning, 366 S.W.3d 837 (Tex.App.-Dallas 2012, pet. denied). Occupations Code § 1101.806(c) provides that “A person may not maintain an action in this state to recover a commission for the sale or purchase of real estate unless the promise or agreement on which the action is based, or a memorandum, is in writing and signed by the party against whom the action is brought or by a person authorized by that party to sign the document.”

Here, Manning claimed that the commission agreement was contained in an e-mail which set out some terms that had been “accepted,” along with some other documents relating to the closing, constituted a written agreement to pay a commission; however, the court held that the e-mail and other documents did not provide a promise to pay a real estate commission or identify Manning as the broker to whom the commission would be paid.

Dean A. Smith Sales, Inc.* v. *Metal Systems, Inc., 397 S.W.3d 305 (Tex.App.-Dallas 2013, **). Metal and Dean entered into a Standard Listing Agreement, naming Dean as the broker and Metal as the seller. The Agreement gave Dean the exclusive right to sell and authority to arrange the sale of Metal's business. The Agreement described the business and includes the notation " Real Estate Included in Sale: Yes." The Agreement detailed the commission to be paid Dean as broker. Occupations Code § 1101.806(b) provides a party may not maintain an action to collect compensation for an act as a broker or salesperson that is performed in Texas unless the party alleges and proves it was a license holder at the time the act was commenced.

Here, Dean did not allege or prove it was a real estate license holder at the time the listing agreement was entered into. Because Dean did not allege, prove, or create a fact issue that it was a real estate license holder at the time the Agreement was signed, the court could not conclude the trial court erred in granting Metal's motion for no evidence summary judgment on Dean's breach of written contract claim.

839 E. 19th Street, L.P.* v. *Friedson, 373 S.W.3d 674 (Tex.App.-Houston [14th Dist.] 2012, no pet.). Friedson, who is a licensed broker and was doing business as National Property Income, LLC, entered into a listing agreement with Waloon, the owner of the apartment complex. The listing agreement ended on April 30, 2006, with a "protection period" covering the ninety days after the ending date. Borenstein of 839 E. 19th Street found the Mesa Ridge property in an internet search, and contacted Friedson about the property. Friedson delivered a copy of a title insurance policy, financial information, rent rolls, and other due diligence materials to Borenstein. Friedson brokered an offer from 839 E. 19th Street dated April 7, 2006, to purchase the property for $5,800,000. Waloon rejected this offer.

After the primary term of the listing agreement with Waloon expired, Borenstein contacted Friedson. Friedson entered into a buyer representation agreement with 839 E. 19th Street, covering only the property owned by Waloon. The term of the buyer representation agreement ran from May 9, 2006, through September 29, 2006, with a "protection period" extending for 120 days after the termination of the agreement.

Friedson brokered a second offer from 839 E. 19th Street dated May 30, 2006, to purchase the property for $6,250,000. This offer expired for lack of acceptance by Waloon. After the second offer expired, Waloon Properties told Friedson that it had decided not to sell the property, but, instead, refinance it. Borenstein represented to Friedson that he was no longer interested in purchasing the property or dealing with its owner.

Friedson did not list the prospects to be protected under the buyer representation agreement during the 120-day "protection period." 839 E. 19th Street placed the property under contract with Waloon on November 6, 2006, which was during the 120-day "protection period." Waloon sold the property to 839 E. 19th Street for $6,350,000.00.

Friedman didn't receive a commission. He fixed a broker lien on the property and filed suit. The trial court awarded judgment based on a breach of the buyer representation agreement.

The Court of Appeals reversed. The "protection period" began May 9, 2006 and applied only to property called to the client's attention between May 9 and September 29 of that year. Friedson had called the property to the client's attention in April 2006, so the protection period did not apply.

PART XIII
ESCROW AGENTS

Dunmore* v. *Chicago Title Insurance Company, 400 S.W.3d 635 (Tex.App.-Dallas 2013. **). IN 2001, Dunmore entered into a contract to buy lots 8 and 9. Chicago Title was the escrow agent and title company. The closing took place at Chicago Title. The documents executed at closing included a General Warranty Deed with Vendor's Lien and a Deed of Trust in favor of Dunmore's lender. Unfortunately, both the Deed, the Deed of Trust, and the owner's title insurance policy referenced only lot 9. The lender collected and escrowed taxes only for lot 9. In 2009, the taxing authorities sued the seller to collect taxes on lot 8, and Dunmore was joined in the lawsuit.

Dunmore sued Chicago Title asserting breach of contract, negligence, breach of fiduciary duty and violations of the insurance code. Chicago Title asserted limitations and other defenses. It paid claims related to lot 9, but refused to pay anything related to lot 8.

A statute of limitations is a procedural device operating as a defense to limit the remedy available from an existing cause of action. A cause of action accrues, and the statute of limitations begins to run, when facts come into existence that authorize a claimant to seek a judicial remedy. The general rule governing when a claim accrues, to start limitations running, is the " legal injury rule," which provides that a claim 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." a breach of contract claim accrues when the contract is breached. A cause of action for negligence accrues on the date the negligent injury producing act is committed. Breach of fiduciary duty claims generally accrue when the claimant knows or in the exercise of ordinary diligence should know of the wrongful act and resulting injury.

Here, the breach of contract, negligence, and breach of fiduciary duty causes of action are based on the allegation that Chicago Title, as escrow agent, failed to properly describe and include lot 8 in the various documents that were filed more than nine years before Dunmore's claims against Chicago Title were filed. Because of this time difference, limitations had run, unless there is some basis for tolling the limitations periods.

Dunmore claims that, because Chicago Title had a fiduciary duty to them, the mistakes were not discoverable until the problem was corrected nine years later. Chicago Title argued that Dunmore knew or should have known of the error at the time of the closing.

An escrow agent owes a fiduciary duty to the parties to the transaction, seller and buyer under a contract. In cases where alleged injuries arise from a breach of fiduciary duty, a fiduciary's conduct may be inherently undiscoverable. Nonetheless, once the fiduciary's conduct becomes apparent, the claimant cannot ignore it, regardless of the fiduciary nature of the relationship. In other words, even in a breach of fiduciary duty case where a fiduciary's misconduct is inherently undiscoverable, a breach of fiduciary duty claim accrues when the claimant knows or in the exercise of ordinary diligence should know of the wrongful act and resulting injury.

The court held that, in this case, the wrongful act and resulting injury were not inherently undiscoverable. The undisputed evidence was that the closing documents showed only lot 9. Parties are presumed to have consented to the terms of agreements they sign and are charged with knowledge of the legal effect of the documents. Accordingly, Dunmore should have known of the injury at the time of closing.

PART XIV
CONSTRUCTION
AND MECHANICS' LIENS

***Direct Value, L.L.C.* v. *Stock Building Supply, L.L.C*.** 388 S.W.3d 386 (Tex.App.-Amarillo 2012, no pet.). Krisel entered into a contract with Direct for it to install new windows in his house and paid it the full contract price. Direct ordered the windows from SBS. However, Direct didn't pay SBS from the funds it had received from Krisel, instead paying them to a third party. Cody is the manager and majority owner of Direct and had the ability to direct where payments went. The trial court found that Direct had breached it contract with SBS and that Cody, as a trustee under the Texas Construction Trust Act, Property Code §§ 162.001-033, had misapplied Krisel's funds.

The Texas Construction Trust Act was specifically enacted to serve as a special protection for subcontractors and materialmen when contractors refuse to pay a subcontractor or materialman for labor and materials. Because the Act is a remedial statute, courts must give it a broad construction to effectuate its protective purposes.

Under the Act, payments made to a contractor or subcontractor or to an officer, director, or agent of a contractor or subcontractor under a construction contract for the improvement of real property are considered trust funds. Trust funds may only be distributed for purposes unrelated to the construction project after all current or past due obligations to the supplier beneficiaries have been paid. A trustee misapplies trust funds if he or she intentionally or knowingly or with the intent to defraud, directly or indirectly, retains, uses, disburses, or otherwise diverts trust funds without first paying all current or past due obligations incurred by the trustee to the beneficiaries of the trust fund. Any officer or director who has control or direction over the trust funds is also a trustee of the funds.

Direct contends that, in order to establish personal liability as a trustee, the beneficiary must prove the officer, director, or agent has the ability to sign the company's checks. Although this type of evidence has been used to establish an officer's ability to control or direct payment, the Act does not require direct evidence of such an ability. Rather, the Act requires that a beneficiary establish that an officer, director, or agent "directly or indirectly retains, uses, disburses, or otherwise diverts trust funds without first fully paying all current and past due obligations." Property Code § 161.031. Further, if Cody's bright-line test were allowed, any officer, director, or agent could circumvent liability under the Act by simply directing an employee without disbursement authority to sign all company checks even though an officer, director, or agent has the ultimate authority to decide whether to pay a beneficiary. Such an interpretation would emasculate those provisions of the Act related to a trustee's liability leading to absurd and unintended consequences.

Jewelry Manufacturer's Exchange, Inc.* v. *Tafoya, 374 S.W.3d 639 (Tex.App.-Dallas 2012, pet. denied). It was improper for the trial court to grant summary judgment for retainage to a subcontractor based on the original contract price when the evidence showed that work under the original contract was not completed. Because the record did not show the "portion of the work done" to establish the actual amount of retainage due, a material fact question precluded summary judgment.

In addition, it was improper to require funds trapping from contractors hired to complete the work under the terminated contract. The Texas Supreme Court has made it clear that work must be defined in relation to a particular contract, thus, the owner was not authorized to withhold funds from replacement contractors who had no relationship to the subcontractor in question.

PART XV
CONDEMNATION

City of Austin* v. *Whittington, 384 S.W.3d 766 (Tex. 2012). For the expansion of the Austin Convention Center, the City originally pursued a project that would include a hotel and other amenities, including an underground parking garage. It entered into a deal with H.L. Hotels to build the hotel and parking garage. Before H.L. Hotels broke ground, it was discovered that the construction of the planned garage would be much more expensive than originally thought. So the City decided to build a smaller garage on the tract of land owned by the Whittingtons. It also decided that it wanted to use the Whittingtons' land to construct a district cooling plant. All of this had the practical effect of reducing the hotel project costs by $10-12 million.

Negotiations between the City and the Whittingtons broke down, so the City filed a condemnation action. The trial court and later the court of appeals determined that the taking was fraudulent, in bad faith, and arbitrary and capricious. Damages were awarded to the Whittingtons.

In the absence of allegations that the condemnor's determinations of public use and necessity were fraudulent, in bad faith, or arbitrary and capricious, the legislative declaration that a specific taking is necessary for a public use is conclusive. The questions of fraud, bad faith, and arbitrariness are affirmative defenses that the landowner has the burden to prove.

The basis for the Whittingtons' claims of fraud, bad faith, and arbitrariness was that the decision to condemn their property was made to relieve H.L. Hotels of its obligation to build the underground garage. The Supreme Court determined that the condemnation was not fraudulent because the parking garage was for a public use, was not in bad faith because bad faith requires an intent to injure or some other improper motive, which was not proven here, and was not arbitrary and capricious because the decision was made according to reason and judgment.

Justice Hecht wrote and concurring and dissenting opinion joined in by Justice Willett, which was primarily based on his belief that the taking was for the private benefit of H.L. Hotels.

El Dorado Land Company, L.P.* v. *City of McKinney, 395 S.W.3d 798 (Tex. 2013). El Dorado sold several acres of land to the City to use as a park. The deed provided that the conveyance was "subject to the requirement and restriction that the property shall be used only as a Community Park." If the City did not use the property for that purpose, El Dorado had the option to purchase the property for the lesser of what the City paid for it or market value. El Dorado had the right to inspect the property and had to close within 90 days after inspection.

Ten years after acquiring the property, the City built a library on it. The City did not offer El Dorado the right to purchase the property or even give notice before building the library. After learning about the library, El Dorado notified the City by letter that it intended to exercise its option to purchase. When the City failed to acknowledge its obligations, El Dorado sued for inverse condemnation. The City countered that El Dorado's claim did not involve a compensable taking of property, but a mere breach of contract for which the City's sovereign immunity had not been waived. The trial court and court of appeals agreed with the City.

El Dorado argues that its right to purchase this property is a real property interest, in the nature of a reversionary interest, and more particularly described as a right of reentry. The City, on the other hand, contends that El Dorado's option is not a real property interest but a mere contract right. As such, the City argues that the option is unenforceable against it absent an express waiver of the City's governmental immunity. Because the Legislature has not chosen to waive governmental immunity for this particular type of contract claim, the City concludes that the court of appeals correctly affirmed the dismissal of El Dorado's claim.

The court of appeals similarly reasoned that the deed restriction and option were merely contract rights that were not compensable against a governmental entity under the Texas Constitution. The court of appeal accordingly rejected El Dorado's argument that, pursuant to the deed provision, it held a reversionary interest or the possibility of reverter' in the property. The Supreme Court agreed that the deed did not create a possibility of reverter, but disagreed that El Dorado did not retain another type of reversionary interest in the property.

Under the deed, El Dorado's possessory interest was contingent on the property's use. If the City violated the deed restriction, El Dorado retained the power to terminate the City's estate. The deed referred to this power or right as an option, but it effectively functioned as a power of termination, or as El Dorado labels it, a right of reentry. El Dorado's deed conveyed a defeasible estate (i.e., a fee simple subject to a condition subsequent), retaining a conditional future interest -- the power to terminate the City's defeasible estate on the occurrence of a condition subsequent. The Supreme Court has previously equated this right to an estate or interest in land.

Contrary to the court of appeals, the Supreme Court held that El Dorado retained a reversionary interest in the property. It likewise disagreed with the court of appeals' analysis of El Dorado's claim as a contract right dependent on a statutory waiver of the City's governmental immunity. A statutory waiver of immunity is unnecessary for a takings claim because the Texas Constitution waives governmental immunity for the taking, damaging or destruction of property for public use.

The court ultimately held that the reversionary interest retained by El Dorado would support a takings claim. The court did not express an opinion as to whether a taking had occurred and remanded the case for that determination.

Hanford-Southport, LLC* v. *City of San Antonio, 387 S.W.3d 849 (Tex.App.-San Antonio 2012, pet. denied). Hanford-Southport was not entitled to value trees and other flora separately from the land. Rather, precedent states that although trees and other improvements on the land can be considered as possible enhancements to the value of the land (if they actually enhance the value), they cannot be valued separately, and the market value of the land as land is the proper method by which a condemnation award is determined.

PART XVI
LAND USE PLANNING, ZONING, AND RESTRICTIONS

Wiese* v. *Heathlake Community Association, 384 S.W.3d 395 (Tex.App.-Houston [14 Dist.] 2012, no pet.). The Association's Declaration prohibited boats from being stored in public view. Wiese repeatedly left his boat out in the open and was repeatedly told he was in violation of the Declaration. He usually cured within the period of time given him to do so, but after a while, the neighbors got tired of it, so the Association sued for an injunction and statutory penalties. The trial court entered a permanent injunction prohibiting Wiese from keeping his boat unscreened for more than 24 consecutive hours. Wiese appealed.

To obtain injunctive relief, a party must ordinarily show (1) the existence of a wrongful act; (2) the existence of imminent harm; (3) the existence of irreparable injury; and (4) the absence of an adequate remedy at law. When the basis for suit is the enforcement of a deed restriction, instead of showing proof of irreparable injury, the party seeking relief need only demonstrate that the defendant intends to do an act that would breach the restrictive covenant. Once granted, an injunction must be specific in its terms to be enforceable, describing in clear and precise detail the acts sought to be restrained. It should be broad enough to prevent subsequent violations of those already committed, but not so broad as to enjoin a defendant from activities that are a lawful and proper exercise of his rights.

The trial court concluded as a matter of law that a boat stored in excess of 24 hours is being stored "semipermanently" in violation of the Declaration. The trial court's injunction forbids Wiese from having a boat that is not screened from public view in excess of twenty four consecutive hours.

Wiese first argues that the covenant creates an irreconcilable conflict. He contends that the covenant's first sentence absolutely prohibits all storage because it states that "no ... boats ... shall be semipermanently or permanently stored in the public street right-of-way or on driveways." Wiese contends this prohibition is inconsistent with the second sentence, which permits a boat to be stored if it is " screened from public view, either within the garage or behind a fence which encloses the rear of the Lot." The court said these were not inconsistent. The first provision bars the storage of boats on a permanent or semi-permanent basis, but it does so based on a geographic limitation applying only to streets and driveways. No part of the prohibition can be read to encompass garages or areas enclosed by a fence. Because the sentences are tailored to distinguish between separate areas, the covenant's restriction may be given a definite legal meaning. It is not ambiguous.

In his next argument, Wiese contends that the injunction's 24-hour rule is unsupported by the Declaration. Wiese insists that this rule cannot be enforced because the Declaration neither defines the term "semipermanently" nor contains a provision expressly restricting homeowners from storing their boats unscreened for more than 24 consecutive hours. The Association argues that the injunction comports with the Declaration because, even without explicit definitions or provisions, the covenant always has been understood to bar the storage of boats for more than 24 consecutive hours. In support of this argument, the Association relies on its own history of enforcement practices. A member of the Architectural Control Committee testified at trial that the Association has been enforcing a 24-hour rule for more than two decades. Past and current officers of the the Association's board agreed that the 24-hour rule was a reasonable interpretation of the covenant because it afforded homeowners a practical period of time for someone to use a boat in a normal way then get it out of their driveway or street. The Association also produced evidence that its board members had been developing official interpretations of the Declaration. The evidence showed that the 24-hour rule was included in one of those proposed interpretations, but these interpretations were not formally ratified and published for the benefit of homeowners.

Covenants restricting the free use of land are not favored at common law, but they will be enforced if clearly worded and confined to a lawful purpose. All restrictive covenants in instruments governing certain residential developments, regardless of the date on which they were created, must be liberally construed to give effect to their purpose and intent. Property Code §§ 202.002(a) and 003(a). Texas appellate courts have not been consistent in their discussion or application of these two rules of construction. Some courts, including our own, have held or suggested that the Property Code's liberal construction rule has superseded the common law's approach to strictly construing restrictive covenants. By contrast, others have held that there is no discernible conflict between the two rules. Among these courts, there persists a separate disagreement as to how the rules should be applied. Some courts have continued applying the common law rule without attempting to reconcile it with the Property Code. Other courts have applied the common law rule only when confronted with an ambiguity, but these courts first apply the Property Code's liberal construction rule to determine if such an ambiguity exists.

Other courts, including this one, have continued to apply the common law rule without any reference to the Property Code. In similar fashion, some courts have applied the Property Code without mentioning the common law standard. The Texas Supreme Court has noted, but has not addressed, the potential tension between these two methods of construction. But, said this court, “We need not confront this tension to resolve the case presently before us. Under either approach, the covenant at issue is incapable of supporting the 24-hour rule adopted in the injunction.”

The term "semipermanently" is nowhere defined in the Declaration, and its ordinary meaning has no certain limits. One dictionary defines the word "semipermanent" as "permanent in some respects: partly permanent" and "lasting for an indefinite time: virtually permanent." The term is amorphous, having no authoritative definition that can be measured in precise units of time. Without a definite meaning, the covenant must be strictly construed against the Association and in favor of Wiese.

The outcome is the same even when the covenant is liberally construed. After reading the covenant as a whole, the intent of the drafters appears to be mainly aesthetic. The restriction applies to boats, large trailers, and other vehicles not usually found in front of a standard suburban home. The covenant aims to reduce visual clutter by limiting the presence of these objects; this preserves a cleaner image of the community and enables all residents to fully enjoy their individual properties. At trial, members of the Associations board also testified that the covenant can advance certain safety concerns, such as preventing the opportunity for theft and other property crimes. Even with this backdrop, a liberal construction of the covenant does not answer the difficult question of how much time must elapse before storage becomes semi-permanent. “Six weeks plus” is probably semipermanent. The limits are not so obvious, however, when we consider more transitory periods of storage.

Sanchez* v. *Southampton Civic Club, Inc., 367 S.W.3d 429 (Tex.App.-Houston [14th Dist.] 2012, no pet.). The restrictive covenant reserved a 3-foot strip of land at the rear of each lot for “the laying of gas mains, water mains, storm and sanitary sewer laterals and connections, and electric light poles, telephone poles and other proper or necessary public utility other than railroad, street railway, and other transportation lines.”

The strip has a number of uses. Most importantly, it has been used for garbage collection throughout the subdivision. The City's trucks are too big, so the Southampton subdivision uses a private service.

Sanchez moved into the subdivision in 2009 and immediately began constructing a new fence within the three-foot tract on his property. After several meetings with Southampton representatives, in which they told him about an enhanced enforcement policy to remove obstructions and asked him to stop, Sanchez continued to build the fence. Southampton sued, seeking a permanent injunction for removal of the fence. The trial court ordered the removal of the fence.

In construing a restrictive covenant, the court's primary task is to determine the intent of the framers of the covenant. In that regard, it must decide whether the restrictive covenant is ambiguous, which is a question of law. If it is unambiguous, then its construction is also a question of law. The court held that the restriction was not ambiguous. It also held that garbage collection is a public utility falling within the boundaries of the restrictive covenant. Furthermore, the fact that a private contractor, as opposed to a government agency, is collecting the garbage has no bearing on whether the activity is a public utility.

PART XVII
AD VALOREM TAXATION

In re *Nestle USA, Inc.*, No. 12-0518 (Tex. October 19, 2012). The Texas Supreme Court has again upheld the Margins Tax on constitutional grounds. Nestle had argued that the tax bears no "reasonable relationship" to the value of the privilege of doing business in Texas, because of its many deductions and exemptions, and that the tax treats similarly situated taxpayers differently. Accordingly, Nestle contended that the Margins Tax violates the Texas Constitution's requirement of equal and uniform taxation (Texas Constitution article VIII, § 1(a)) and the U.S Constitutions' Fourteenth Amendment's Equal Protection and Due Process guarantees. It also argued that the tax violates the Commerce Clause of the U.S. Constitution because the tax is higher for manufacturers located outside of Texas and, so, discriminates against interstate commerce.

The Texas Supreme Court held that the Margins Tax doesn't violate the requirement of equal and uniform taxation. The court noted that exact uniformity and equality is unattainable. Differentiation among different classes of taxpayers is not prohibited as long as the differentiation is rational. The court wrote that the tax's classifications must relate to differences in doing business that affect the value of the privilege of doing business in Texas. Nestle pointed out a number of classifications that it didn't like, but the court concluded that the Legislature's structure of the franchise tax is reasonably related to its object and held that there was no violation of the Equal and Uniform Clause.

Turning to the Equal Protection arguments, the court held that, since it had held that the Legislature had a rational basis for structuring the franchise tax the way it did, it did not violate Equal Protection in doing so.

Morris* v. *Houston Independent School District, No. 11-0650 (Tex. October 26, 2012). Harris CAD listed the Taxpayers as owners of 9.38 acres that the Taxpayers actually owned and as owners of .96 acres that the Taxpayers didn't own. The Taxpayers did not timely challenge this determination administratively. The Taxing Units filed suit against the Taxpayers to collect taxes unpaid on all 10.34 acres for the years 1983 through 2003. The Taxing Units placed a lien on the properties to secure the payment of taxes, penalties, interest, and costs. The Taxpayers answered with a general denial and affirmative defenses, including that the petition failed to comply with the requirements in the Tax Code, that the Taxing Units never properly notified the Taxpayers of the delinquent taxes, that the assessment of taxes is erroneous based on the description of the property, and that designated parties to the lawsuit have no ownership interest in the properties.

While the suit was pending, the Taxpayers, under protest, paid the taxes to stop further penalties and interest from accruing, to avoid foreclosure of the 9.38 acres that they did own, and to avoid breaching a contract to sell the 9.38 acres. The Taxpayers explained that they paid under protest the entire amount because the Taxing Units would not accept payment of the taxes apportioned between the 9.38 acres that the Taxpayers did own and the .96 acres that the Taxpayers did not own. Shortly after paying the taxes, the Taxpayers filed a counterclaim for a refund of the taxes, penalties, and interest they had paid on the .96 acres. After receiving payment, the Taxing Units nonsuited their claims for delinquent taxes. At the Taxpayers' motion, the district court realigned the parties, designating them as the plaintiffs.

The Taxpayers contended they have never owned any interest in the .96 acres for which they paid taxes under duress and they sought a refund of that amount through a declaratory judgment. The Taxing Units answered by asserting affirmative defenses of governmental immunity, failure to exhaust administrative remedies, voluntary payment, and other allegations. The Taxing Units filed a plea to the jurisdiction asserting the district court lacked jurisdiction because the Taxpayers failed to exhaust their administrative remedies as required by the Tax Code.

The court of appeals reversed and granted the plea to the jurisdiction. 355 S.W.3d 668, 671. The court of appeals reasoned that after the realignment, the Taxpayers became plaintiffs so the affirmative defense of non-ownership was no longer available under section 42.09(b)(1). Since the only other means for bringing up non-ownership was a protest before the appraisal review board under section 41.41(a)(7), and the Taxpayers brought no timely protest, the court of appeals held that the trial court lacked jurisdiction due to the Taxpayers' failure to exhaust administrative remedies.

The Taxpayers appealed, arguing that they were not stripped of their affirmative defense of nonownership when the taxing units non-suited and the Taxpayers were realigned as plaintiffs. The Supreme Court agreed and held that the court of appeals erred in reversing the trial court's order denying the taxing authorities' plea to the jurisdiction.

The Tax Code establishes a detailed set of proced dures that property owners must abide by to contest the imposition of property taxes. Those procedures are exclusive and a taxpayer must exhaust the remedies provided in order to raise most grounds of protest in defense of a suit to collect taxes or as a basis for a claim for relief. Section 42.09(b)(1), however, allows a person sued for delinquent taxes to assert as an affirmative defense "that the defendant did not own the property on which the tax was imposed" if the suit is to enforce personal liability.

The court of appeals emphasized the distinction between the Taxpayers' assertion of non-ownership as an affirmative defense and non-ownership as the basis for an affirmative claim for reimbursement of taxes paid under protest. That there is a distinction between an affirmative defense and an affirmative claim for relief is beyond dispute. But the technical distinction between the two is insignificant in this context. In section 42.09(b)(1), the Legislature provided taxpayers a mechanism to avoid the imposition of tax liability for property they do not own. Under the court of appeals' reading of the statutory scheme, however, even persons who were never provided an opportunity to pursue the administrative remedy provided in section 41.41(a)(7) of the Code would be unable to recoup taxes paid under protest after being sued for delinquent taxes on property they did not own if the taxing authorities non-suited. Further, the court of appeals' construction of the statute discourages taxpayers' compliance with section 42.08 of the Tax Code, which requires prepayment of taxes under protest as a condition of judicial review; as the Taxpayers in this case note, they would have been in a better position had they resisted payment and pursued the litigation to the end, despite not availing themselves of administrative remedies.

While Section 42.09(b)(1) refers to non-ownership as an affirmative defense, it evidences the Legislature's intention to provide taxpayers with an opportunity to avoid tax liability for property that they do not own. Taxing statutes are construed strictly against the taxing authority and liberally for the taxpayer. The court of appeals' reading of the statute contravenes that precept: it allows taxing authorities to thwart the Legislature's intent by accepting taxes paid under protest and then non-suiting, just as happened in this case.

So, the Supreme Court held that the Taxpayers did not lose their entitlement to contest tax liability on the basis of non-ownership when the taxing units non-suited and the Taxpayers were realigned as plaintiffs.

PART XVIII
MISCELLANEOUS

Strickland* v. *Medlen, No. 12-0047 (Tex. April 5, 2013). "Texans love their dogs. Throughout the Lone Star State, canine companions are treated—and treasured—not as mere personal property but as beloved friends and confidants, even family members. Given the richness that companion animals add to our everyday lives, losing "man's best friend" is undoubtedly sorrowful. Even the gruffest among us tears up (every time) at the end of Old Yeller."

In this case, poor old Avery, a "mixed breed dog" (aka, mutt) owned by the Medlens, escaped their back yard and was picked up by animal control and taken to the pound. The Medlens went to retrieve him, but didn't bring enough money to spring Avery. The shelter hung a "hold for owner" sign on Avery's cage to alert employees that the Medlens were coming for him. Despite the sign, Strickland mistakenly placed Avery on the euthanasia list and he was put to sleep.

The Medlens and their children learned of Avery's fate a few days later. Devestated, they sued Strickland for causing Avery's death and sought "sentimental or intrinsic value" damages since Avery had little or no market value and could not be replaced.

The trial court dismissed the suit, stating that Texas law barred such damages. The court of appeals reversed, becoming the first Texas court to hold that a dog owner may recover intangible loss-of-companionship damages in the form of intrinsic or sentimental-value property damages. Stating that Texas has changed, and noting that in several non-dog cases where property has little or no market value courts have awarded damages based on sentimental or intrinsic value. "Emphasizing these iron truths—that "[d]ogs are unconditionally devoted to their owners" and owners, reciprocally, have a deep attachment "to their beloved family pets" —the court of appeals declared "the special value of 'man's best friend' should be protected."

The Supreme Court, despite the sloppy sentimentality about Old Yeller, did not agree. The "true rule" in Texas remains this: Where a dog's market value is unascertainable, the correct damages measure is the dog's "special or pecuniary value" (that is, its actual value)—the economic value derived from its "usefulness and services," not value drawn from companionship or other non-commercial considerations.

"We recognize that the benefit of most family dogs like Avery is not financial but relational, and springs entirely from the pet's closeness with its human companions. Measuring the worth of a beloved pet is unquestionably an emotional determination — what the animal means to you and your family — but measuring a pet's value is a legal determination. We are focused on the latter, and as a matter of law an owner's affection for a dog (or ferret, or parakeet, or tarantula) is not compensable."