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CASE LAW UPDATE

Presented by

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CASE LAW UPDATE

DAVID A. WEATHERBIE
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DALLAS, TEXAS

The case selection for this episode of Case Law Update, like all of them in the past, is very arbitrary. If a case is not mentioned, it is completely the author's fault.

In an effort to streamline the case discussions, various statutory and other references have been reduced to a more convenient shorthand. The following is an index of the more commonly used abbreviations.

"Bankruptcy Code" – The Federal Bankruptcy Code, 11 U.S.C.A. §§ 101 et seq.

"DTPA" – The Texas Deceptive Trade Practices Act, Texas Business and Commerce Code, Chapter 17.

"UCC" – The Texas Uniform Commercial Code, Texas Business and Commerce Code, Chapters 1 through 9.

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.

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CASE UPDATE

DAVID WEATHERBIE
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PART I
MORTGAGES AND FORECLOSURES

! ***Shepard* v. *Boone***, 99 S.W.3d 263 (Tex.App.—Eastland 2003, no pet.). In 1986, the Boones signed a contract for improvements to their home, a deed of trust covering their residence, and a promissory note in the amount of $45,011.00. The note was made payable to Briercroft Savings Association. Briercroft assigned the note to Old Republic Insured Financial Acceptance Corporation. Later, Old Republic assigned all of its interest in the "Contract for Improvements" and "Deed of Trust" executed by the Boones to "MultiMortgage BanCorp." The written assignment did not assign the $45,011.00 note that was executed by the Boones. On January 8, 1998, MultiMortgage notified the Boones by letter that MultiMortgage had purchased the Boones' note and deed of trust. In the letter, the Boones were asked to provide the "Noteholder" with insurance coverage and with proof that all taxes were current and paid when due. The letter also stated that, should the Boones fail to comply within 20 days, the owner and holder of the note could at its option accelerate the indebtedness and foreclose. The Boones did not comply and on January 29, 1998, notice was given to the Boones that a foreclosure sale would be conducted on March 3, 1998, because of default in the payment of the indebtedness. After the sale in March, Mills, as substitute trustee, executed a deed conveying the Boones' real property to Shepard.

The Boones sued for wrongful foreclosure, claiming that MultiMortgage was not entitled to foreclose because it was not the owner or holder of the note at the time of the foreclosure. MultiMortgage claimed to be the owner and holder based upon the assignment from Old Republic.

The "holder" of a negotiable instrument is defined in UCC § 1.201(20) as: "[T]he person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession." UCC § 3.201 provides in part:

"(a) "Negotiation" means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder.

"(b) Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder."

In ***Jernigan* v. *Bank One, Texas, N.A.***, 803 S.W.2d 774, 777 (Tex.App.—Houston [14th Dist.] 1991, no writ), the court recognized that, under certain circumstances, a promissory note can be transferred without a written assignment or proper indorsement. The court held that promissory notes can be transferred lawfully without a written assignment or an indorsement by the legal owner or holder. Absent an indorsement, however, possession must be accounted for by proving the transaction through which the note was acquired. MultiMortgage's written response and summary judgment proof relied upon the written assignment from Old Republic. That assignment did not assign the note. The summary judgment proof conclusively established that MultiMortgage was not the owner and holder of the note.

! ***TMS Mortgage, Inc.* v. *Golias***, 102 S.W.3d 768 (Tex.App.—Beaumont 2003, no pet.). Golias held a second lien on property owned by the Grants. TMS held the first lien. The Grants were supposed to send Golias copies of all payments made on the first lien so Golias could keep up with whether the Grants were jeopardizing her second lien. The Grants defaulted on both loans and filed bankruptcy. Golias was not informed of the filing and was not listed as a creditor. TMS obtained relief from the automatic stay and foreclosed on the house. Again, Golias was not informed of these actions.

Golias sued TMS, alleging that TMS had failed to serve notice of the lift-stay motion on her as required by a local bankruptcy rule, which requires that a motion for relief from the stay must contain "[a] certificate of service reflecting service on the debtor, trustee or United States trustee, other parties who directly claim an interest in the property subject to the motion (for example, junior lienholders or litigation co-defendants), and any committee." Counsel for TMS testified that she did not notify Golias because Golias's name did not appear in the creditor matrix filed by the Grants in their bankruptcy. The attorney who handled the bankruptcy for TMS did not handle the subsequent foreclosure. By the time TMS foreclosed, six months after the stay was lifted in the bankruptcy proceeding, TMS had run a title report and was aware of Golias's existence. TMS did not notify the second lien holder of the foreclosure of the first lien because Texas law does not require such notice. The foreclosure occurred in March 2000, approximately one year after the Grants defaulted on the second lien note. Golias did not take any action in bankruptcy court regarding TMS's relief from the stay.

Golias sued TMS on a theory of ordinary negligence, claiming the local bankruptcy rules required a party seeking relief from the automatic stay to serve a copy of the motion on any parties claiming a security interest of record in the same property; TMS failed to notify her of the filing of the motion to lift the stay, and Golias did not learn of the filing of the bankruptcy in time to protect her security interest; and, therefore, she suffered a loss.

A common law negligence cause of action consists of (1) a legal duty owed by one person to another; (2) a breach of that duty; and (3) damages proximately resulting from the breach. The existence of a legally cognizable duty is a prerequisite to tort liability. Whether a duty exists is a question of law.

Golias claimed TMS had a duty to inspect the records at the county courthouse under the Texas Property Code § 13.002 and give a proper notice to Golias of the filing of its motion to lift the automatic stay in the bankruptcy court. Golias argued that TMS was on notice of her security interest because its existence was recited in documents filed in the real estate records and the recording of an instrument in the real property records is notice to all persons of its existence.

The recording statute serves a dual purpose: the protection of innocent purchasers for value and the protection of those whose rights are disclosed by the record. However, nothing in ' 13.002 creates an additional duty of disclosure or requires the holder of a superior lien to contact junior lienholders before conducting a trustee's sale. Thus Golias provided the Court with no precedent imposing a legal duty of reasonable care on a superior lienholder to protect the security interest of a junior lienholder.

Likewise, Golias presented no precedent imposing such a duty upon litigants with opposing interests. In the absence of a fiduciary obligation, the litigation- related independent causes of action found at common law require malfeasance rather than misfeasance or nonfeasance. For example, malicious prosecution and abuse of process include malice and ulterior motive as elements of the cause of action. In other circumstances, a litigant's misconduct in a court may be addressed in that court without the imposition of a cause of action in common law.

There is no established cause of action in state court for damages caused by failure to comply with the procedural rules imposed upon the parties to federal litigation. A judicial decision to impose a new common-law duty involves complex considerations of public policy. The relevant considerations include social, economic, and political questions, and their application to the particular facts at hand; the extent of the risk involved, the foreseeability and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant. If TMS violated a local bankruptcy rule, the rule could be enforced or its violation could be punished in the bankruptcy court where the offending conduct occurred. In the absence of any relationship, whether contractual or fiduciary, between Golias and TMS, and in absence of intentional or malicious conduct, the court found insufficient basis for imposing liability in ordinary common law negligence for the creditor's failure to comply with the applicable bankruptcy procedure.

! ***Russell* v. *American Real Estate Corporation***, 89 S.W.3d 204 (Tex.App.—Corpus Christi 2002, no pet.). The Russells rented a house Sasuman. Sasuman informed the Russells that the house was going to be foreclosed on by the lender. Three days before the foreclosure date, the Russells had disconnected the electricity, packed many of their possessions, and moved most of them to their new house. They were, however, unable to complete the move by the end of that weekend, so they left many of their household items at the house. They locked the doors and windows, intending to return the following weekend to complete the move. In the middle of the week, two days after the foreclosure, the Russells were notified of a death in the family and had to travel to San Antonio for the funeral.

The foreclosure sale took place and the property was acquired by Fannie Mae. Fannie Mae requested by letter that its local property manager, ARE, visit the property and determine the occupancy status of the property. The letter instructed if the property was vacant, ARE was to re-key it. But if it was occupied, Fannie Mae instructed ARE to place a notice on the door and call the Fannie Mae representative.

That day or the next day, ARE agent, Dana Bellanger, drove to the house. Without entering the house, she saw that a garbage can was overflowing with trash, several newspapers were on the ground, and the mailbox was full of junk mail. Bellanger's secretary had checked with the electric company, which informed her that the electricity was disconnected. Based on this, Bellanger concluded that the house was unoccupied. Bellanger then called a locksmith to re-key the house. She also had her secretary post the notice on the door. Bellanger later entered the house on April 13. She saw numerous household items and made an inventory. On April 15, Bellanger had her husband load most of the property on a trailer and move it to their.

The Russells returned to the house a week later to find most of their remaining possessions missing or damaged. At first, they believed the house had been burglarized and called the police. The police investigated, found what had occurred, and put the Russells and Bellanger in contact. Bellanger promptly returned to the Russells what Bellanger claimed was all the property taken from the house. But on inspection, the Russells discovered that some of their property was damaged or missing. The Russells inventoried the damaged and missing property and estimated the total value at about $19,000. The Russells demanded that ARE return or replace the damaged and missing property, or that ARE pay them the reasonable value of the property.

The Russells filed suit, pleading trespass to realty and personalty, conversion, breach of bailment obligations, negligence, invasion of privacy, and "forcible entry." After discovery, ARE moved for summary judgment on all claims. The trial court granted the motion.

Trespass to real property occurs when a person enters another's land without consent. Every unauthorized entry is a trespass even if no damage is done. Trespass requires only proof of interference with the right of possession.

ARE first claimed that when Fannie Mae foreclosed on the property, the Russells' lease was terminated, thus the Russells no longer had a right to possession. Although ARE is correct that the foreclosure terminated the existing lease that the Russells had with Sasuman by operation of law, the Russells became tenants at sufferance when the foreclosure occurred and when an owner acquires residential property by foreclosure, the Texas Property Code § 24.005(b) requires that the new owner may not begin eviction proceedings--much less gain possession--before giving the tenant at sufferance thirty days' notice to vacate. Texas does not recognize "self-help repossession" of real estate. Accordingly, the Russells remained in possession of the house after foreclosure and could not be removed until the eviction process was complete.

! ***West Trinity Properties, Ltd.* v. *Chase Manhattan Mortgage Corporation***, 92 S.W.3d 866 (Tex.App.—Texarkana 2002, no pet.). The Brookses bought a house with a loan from Sun West Mortgage Company. The note and deed of trust lien securing the loan were later assigned to Chase. On January 25, 1999, the Home Owners Association obtained a judgment lien against the Brookses for past dues owed by the Brookses. The Brookses stopped making payments to Chase, so Chase notified the Brookses that they were in default. Two weeks later, Mrs. Brooks filed for bankruptcy, but Chase was not notified of the filing. Without knowing about the bankruptcy, Chase notified the Brookses it had scheduled a foreclosure sale on the property. Before the foreclosure sale, the bankruptcy court dismissed the bankruptcy action. The substitute trustee under Chase's deed of trust conducted the scheduled nonjudicial foreclosure sale and Chase purchased the property at the foreclosure sale and recorded its deed.

Three months later, the Home Owners Association had a sheriff's sale of the Brooks property. At this sale, West Trinity purchased the property and obtained a sheriff's deed purporting to convey the Brookses' interest in the property.

Chase, having learned about the bankruptcy filing before its foreclosure, tried to get the bankruptcy court to reopen the case and affirm their sale. The bankruptcy court refused to do so, so Chase rescinded the sale. Lawsuits ensued, with, among other things, West Trinity claiming that it has title to the property free and clear of any interest asserted by Chase, asking for removal of the cloud on its title created by Chase's lien, seeking damages for negligence in Chase's foreclosure sale and an injunction against Chase's foreclosing on the property.

Without proof to the contrary, a judgment lien is junior and subject to all equities in existence at the time of the judgment. Regardless of whether the foreclosure sale was valid, void, or voidable, and whether the rescission was valid, West Trinity's interest in the property, if any, is still subordinate to that of Chase. A valid nonjudicial foreclosure sale, as West Trinity urges us to recognize, would extinguish all junior liens, including the Home Owners Association's judgment lien. A voidable sale would have the same effect. In Texas, a voidable foreclosure sale, unlike a void sale, is treated as valid until it is set aside, and acts to pass the debtor's title to the purchaser. Finally, a void foreclosure sale would result in Chase retaining its first lien on the property. The effect of this is that all subsequent purchasers would then take title subject to Chase's lien. Under any theory, West Trinity does not have a superior claim against Chase.

PART II
HOME EQUITY LENDING

! ***Vincent* v. *Bank of America***, 109 S.W.3d 856 (Tex.App.—Dallas 2003, pet. pending). The Vincents got into a dispute with the Bank over how payments were being allocated on their home equity loan. They sued (first attempting a class action, but that didn't go anywhere), seeking forfeiture of all interest and principal under the loan.

The basis for the forfeiture claim was the Bank's alleged failure to comply with a provision of the loan agreement. The Vincents base this claim, in part, on section 50(a)(6)(Q)(x) of the Texas constitution. This section states:

"(x) the lender or any holder of the note for the extension of credit shall forfeit all principal and interest of the extension of credit if the lender or holder fails to comply with the lender's or holder's obligations under the extension of credit within a reasonable time after the lender or holder is notified by the borrower of the lender's failure to comply . . ."

Relying on ***Stringer* v. *Cendant Mortgage Corp.***, 23 S.W.3d 353 (Tex.2000), which held that "Section 50(a)(6), in its totality, establishes the terms and conditions a home-equity lender must satisfy to make a valid loan," the Court held that forfeiture is only available for violations of constitutionally mandated provisions of the loan documents. Violation of any other provision of the loan documents may result in traditional breach of contract causes of action only, with traditional breach of contract remedies. Because the provision of the Loan Agreement in question is not constitutionally mandated, its breach will not support forfeiture.

PART III
PROMISSORY NOTES, LOAN COMMITMENTS, LOAN AGREEMENTS

! ***Kent* v. *Citizen's State Bank***, 99 S.W.3d 870 (Tex.App.—Beaumont 2003, pet. denied). The Kents were in default on two loan obligations to Citizens. In order to avoid foreclosure, the Kents executed a Renewal, Extension and Consolidation Note. The Kents contemporaneously executed a deed in lieu of foreclosure. The loan agreement executed contemporarily with the note provided that, in the event of default by the Kents, the deed would be recorded and Citizens would list the properties with a realtor for 12 months, make every effort to sell the properties at the prevailing market value, and pay to the Kents "any surplus received above all obligations and costs owed" to Citizens. After the 12-month period, the bank would be under no obligation to pay any surplus to the Kents. When the loan matured, the Kents failed to pay the note and Citizens filed the deed that conveyed the property from the Kents to Citizens. Citizens notified Kent that it intended to go forward with efforts to sell the property.

Citizens conveyed the property to Bluebonnet, along with all of its rights under the agreements with the Kents. Bluebonnet succeeded to the rights and obligations of Citizens.

The Kents obtained a potential buyer for the property, named Tom Hanks. Hanks negotiated directly with Bluebonnet. Negotiations broke down, however, over the Kents' refusal to obtain releases from the realtors with whom the property had been listed, Bluebonnet's insistence that the purchase price be calculated using an 18% postmaturity interest rate, and Bluebonnet's demand that the Kents release it from any liability resulting from the transaction. When the Kents wanted the property re-conveyed to Hanks, Citizens and Bluebonnet instructed Kent to deliver to Bluebonnet a cashier's check for purchase price, payable to Bluebonnet, along with executed releases from the realtors. Hanks procured a cashier's check for $287,973.36, payable to Citizens State Bank. The Kents took the check to Citizens, but Citizens refused to accept the check because it no longer held the note.

The Kents argued that Citizens wrongfully refused the tender of the balance due on the note. They claimed there was no evidence that Citizens assigned the note to Bluebonnet, endorsed the note to Bluebonnet, sold the note to Bluebonnet or did anything other than sell the property to Bluebonnet at an amount less than market value. The Court disagreed. Citizen's president testified that Citizens no longer held the note. Bluebonnet's general partner testified that Bluebonnet took over the bank's position, whether as note holder or fee simple title owner. And Dan Kent testified that when he called or a payoff, Citizen's president told him that they no longer owned the note. More to the point, however, the Kents did not sue Citizens for breach of contract for conveying the property to Bluebonnet for less than market value. Rather, they sued Citizens for breach of contract for failing to reconvey the property a year later. The Kents argued that Citizens had obligations to the Kents pursuant to the Loan Agreement, from which it was never released by the Kents. The Loan Agreement was never modified in writing as required by the Loan Agreement, to change the place for payment or change the entity to which payment was required. More important, the Loan Agreement was never modified in writing to relieve Citizens of its obligations to the Kents. The Court noted that the non-assignability clause in the loan agreement was limited to the Kents, and did not limit Citizen's rights of assignment. Furthermore, the Kents were notified in writing to remit payment to Bluebonnet. They did not comply with those instructions.

The Kents argued that the loan agreement established their right to pay the balance due on the note plus other expenses, and have the property, which was the collateral, returned to them. Actually, the Loan Agreement merely obligated the lender to pay any surplus over the balance due on the note, plus expenses, to the Kents. The deed in lieu of foreclosure was filed after the note matured, in the manner provided by the terms of the contract. [Here, for some reason, the court and the Kents completely ignored the body of law which holds that a deed absolute on its face can be a mortgage, if it is given to secure payment of a debt. See ***Johnson* v. *Cherry***, 726 SW2d 4 (Tex. 1987).] The transaction between Citizens and Bluebonnet did not generate surplus funds above the bank's costs. There is some evidence that a purchase price from Hanks would have exceeded the bank's costs, triggering the Kents' right to recover excess proceeds received from the sale had the transaction closed. The Hanks purchase price was set by Bluebonnet, not by Citizens. Bluebonnet was obligated on the contract, and the issue of its breach was submitted to the jury in the charge. The jury failed to find a breach by Bluebonnet and that finding is not challenged on appeal. Even if imputed to Citizens, the actions of Bluebonnet cannot supply the element of breach in the face of an unchallenged jury finding that Bluebonnet did not fail to comply with the loan agreement.

! ***Lairsen* v. *Slutzky***, 80 S.W.3d 121 (Tex.App.–Austin 2002, pet. denied). Lairsen and the Trust owned properties across the street from each other on Lake Travis. When Lairsen started building a two story house, the Trust sued to enjoin him for violating the subdivision's restrictive covenants. They settled the injunction case by Lairsen agreeing to buy the Trust's property. He paid a portion in cash and executed a note and deed of trust for the balance. The note bore interest at 8% per annum and further provided: "[N]otwithstanding any provision in this Note to the contrary, [Lairsen] shall have personal liability *only* for the top twenty-five (25%) percent of the declining balance of the Note."

Lairsen contended that in calculating the deficiency as well as his personal liability under the Note, only the principal amount should be considered, that is $598,000. He argued that the proper deficiency calculation is $598,000 (the principal of the note) less the fair market value, $510,000, for a deficiency of $88,000. Further, he argued that his personal liability under the terms of the note was twenty-five percent of $88,000, or $22,000.

The Trust argued that regardless of whether Property Code § 51.003 and the fair market value as found by the jury are used to determine the deficiency, or whether the foreclosure sale proceeds are used to determine the deficiency amount, both the principal amount *and* the accrued interest should be included in the determination because both are explicitly provided for in the Note. Thus, the Trust contended the proper deficiency calculation is $632,585.90, less the fair market value, $510,000, for a deficiency of $122,585.90. Further, the Trust argues that once the amount of the deficiency is determined, Lairsen is responsible for twenty-five percent of that amount, that is twenty-five percent of $122,585.90, which is $30,646.47. Thus, the difference in the parties' methods amounts to roughly $8600. The Court agreed with the Trust's calculation. In determining the deficiency, the terms of the Note specifically provide for interest to accrue on the principal amount. Based on the explicit terms of the note, and the jury's fair market value finding, the deficiency and Lairsen's personal liability may be calculated in a straightforward manner. The amount due on the Note on the foreclosure date of November 4, 1997, was $632,585.90. Using the statutory fair market value as determined by the jury, $510,000, the deficiency owed on the foreclosure date was $122,585.90.

According to the note, Lairsen's personal liability was limited to the top twenty-five percent of the declining balance. Since Lairsen never made any payments, twenty-five percent of the declining balance as of November 4, 1997 was twenty-five percent of $122,585.90, which was $30,646.48.

PART IV
GUARANTIES

! ***Material Partnerships, Inc.* v. *Ventura***, 102 S.W.3d 252 (Tex.App.–Houston [14th Dist.] 2003, pet. denied). After several requests from MPI that Ventura guaranty the obligations of an affiliated Mexican company, Lopez sent a letter to MPI which said: ""I ... want to certify you [sic] that I, personally, guaranty all outstandings [sic] and liabilities of Sacos Tubulares with Material Partnerships as well as future shipments." The letter was signed "JORGE LOPEZ VENTURA, GENERAL MANAGER." After receiving the letter, MPI resumed shipping materials to Sacos Tubulares. Sacos defaulted on payment for the materials, so MPI sued it, and subsequently joined Lopez as guarantor.

Lopez testified he intended to sign, and did sign, the September 25 letter in his capacity as general manager of Sacos. He gave MPI a corporate guaranty. Lopez made the promise on the company's behalf. He had no personal debts to MPI. Lopez further explained the concept of "aval," as understood in Mexico, means to make a guaranty besides the obligation of the original debtor. But for the aval to qualify as a personal aval, the signator must specify that he is signing in an individual capacity. Lopez gave the September 25 letter to MPI in Lopez's capacity as "general manager" of Sacos. Except for giving an aval to banks, Lopez had never given an "aval," or guaranty, so that his personal assets would be responsible for paying Sacos's debt.

The trial court did not buy Lopez's argument that he was liable only in his representative capacity, and found that he had signed a personal guaranty.

A guaranty agreement is a contract in which one party agrees to be responsible for the performance of another party even if he does not have direct control. Whether a contract is ambiguous is a question of law. If a contract is subject to two or more reasonable interpretations, the contract is ambiguous, thereby creating a fact issue on the parties' intent. In contrast, if the written instrument is worded so that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous, and the court will construe the contract as a matter of law.

In arguing the September 25 letter is ambiguous, Lopez invokes the rule of strictissimi juris, which entitles a guarantor to have his agreement strictly construed and not extended by construction or implication beyond the precise terms of his contract. This rule, however, applies after the terms of the guaranty have been ascertained.

Lopez nevertheless argues the "mere mention" of "guaranty" or "guarantor" is not sufficient to create individual liability without other material terms. In support, he cites ***Tenneco Oil Co.* v. *Gulsby Engineering, Inc.***, 846 S.W.2d 599, 605 (Tex.App.-Houston [14th Dist.] 1993, writ denied), and ***Gulf & Basco Co.* v. *Buchanan***, 707 S.W.2d 655, 657 (Tex.App.-

Houston [1st Dist.] 1986, writ ref'd n.r.e.). In each case, the court emphasized the absence of any guaranty language in the body of the document. Tenneco involved the conveyance of a deed of trust as collateral to secure certain indemnity obligations. The defendants had signed the deed on lines bearing their names "Individually and d.b.a. Gulsby Enterprises" and also on signature lines bearing their names as "Guarantor for Gulsby Engineering, Inc." This court held, "Absent any guaranty language in the body of the deed, we refuse to find that adding a signature line with the word 'guarantor' can transform a deed of trust into a guaranty of obligations additional to the conveyance of property described in the deed." Unlike Tenneco, however, the body of Lopez's letter contains unambiguous guaranty language: "I, personally, guaranty."

In ***Gulf & Basco,***, the court also acknowledged that a signature alone will not create an ambiguity in otherwise clear guaranty language in the body of an instrument: "[T]here is no clear mode of signature that will absolutely fix or avoid personal liability. A signature followed by corporate office will result in personal liability where the individual is clearly designated within the instrument as personal surety for the principal. In such case, the corporate office may be construed a *descriptio personae* of the signator rather than indication of the capacity in which he signs." Lopez contends ***Gulf & Basco Co.*** is on point, arguing the fact he used company letterhead and signed the letter in his capacity as general manager of Sacos, rather than individually, renders the language in the body of the letter ambiguous. Unlike the document in ***Gulf & Basco***, the letter in the present case does express a clear intent to bind Lopez "personally." Accordingly, Lopez's signature over his corporate office does not render the document ambiguous.

On the issue of ambiguity, the court said the document in the present case more closely resembles that in a recent case from the San Antonio court of appeals, ***Taylor-Made Hose, Inc.* v. *Wilkerson***, 21 S.W.3d 484 (Tex.App.-San Antonio 2000, pet. denied). In ***Taylor-Made Hose***, the court considered language at the end of a single-page credit application by North American Transit, Inc. The application had been signed by Lynne Wilkerson under lines containing her hand printed name and a hand printed designation of her title of vice president. The court concluded: "As stated in the credit application ..., Lynne Wilkerson 'personally agree[d] to pay all invoices and cost of collection ... on any amount remaining unpaid after 90 days' on North American Transit's open account with Taylor-Made Hose. This agreement is not in any respect ambiguous. By agreeing to "personally ... pay" North American Transit's delinquent account, Wilkerson made herself personally liable for the corporation's debt."

Finally, Lopez cited UCC § 3.402(b)(1), which provides:

> "(b) If a representative signs the name of the representative to an instrument and the signature is an authorized signature of the represented person, the following rules apply:
>
> > "(1) If the form of the signature shows unambiguously that the signature is made on behalf of the represented person who is identified in the instrument, the representative is not liable on the instrument."

Section 3.402, however, deals only with negotiable instruments. A guaranty agreement is not a negotiable instrument, and is not governed by the provisions of the Texas UCC. Even if it were, however, the commentary to § 3.402 shows examples of unambiguously representational signatures "P[rincipal] by A[gent], Treasurer," differs significantly from Lopez's signature. Here, we have neither the designation "Sacos by Lopez" nor the designation "Lopez for Sacos."

! ***Segal* v. *Emmes Capital, LLC***, 2002 WL 31266203 (Tex.App.-Houston [1st Dist.] 2002, not designated for publication). This unreported case follows ***LaSalle Bank National***

Association* v. *Sleutel, 289 F.3d 837 (5th Cir. 2002) in holding that a guarantor can waive in advance the rights of set-off provided for in Texas Property Code § 51.005.

The guaranty in question contained the following provision: "To the maximum extent permitted by applicable law, the Guarantor hereby waives all rights, remedies, claims and defenses based upon or related to Sections 51.003, 51.004 and 51.005 of the Texas Property Code, to the extent the same pertain or may pertain to any enforcement of this Guaranty." The guarantor argued that this waiver violated Texas's public policy and was invalid because the rights it waived did not exist when the waiver was signed.

Texas Property Code § 51.005 allows a guarantor to challenge the fair-market value of property sold in a nonjudicial foreclosure sale as a prelude to seeking an offset from the deficiency amount. Section 51.005(b)'s purpose is to prevent mortgagees from recovering more than their due at the guarantor's expense. That purpose does not necessarily translate into a policy so fundamental to Texas jurisprudence that it cannot be waived contractually. The Fogartys cite no case so holding. The remainder of the Texas Property Code indicates that § 51.005's protections can be waived contractually. In at least 11 other instances within the Texas Property Code, the Legislature expressly has stated that waivers of given rights, obligations, liabilities, exemptions, etc. are void or voidable, either categorically or under certain conditions. Citing LaSalle, but greatly expanding the shallow reasoning of that case, the court said that this omission indicates strongly that the Legislature did not find the protections afforded in section 51.005 to be so fundamental that they could not be waived contractually.

Furthermore, this court's decision in ***Chase Manhattan Bank, N.A.* v. *Greenbriar North Section II***, 835 S.W.2d 720 (Tex.App.-Houston [1st Dist.] 1992, no writ) provides analogous support for this conclusion. In ***Chase Manhattan***, the court allowed a New York deficiency statute to be applied, which would have deprived the creditor in ***Chase Manhattan*** of any deficiency rights. Nonetheless, as part of a choice-of-law analysis, the Court held that "no 'fundamental policy' of Texas" was implicated or offended by applying the materially different New York deficiency law that would, or could, effectively result in the creditor's total loss of any deficiency rights. If it did not offend the fundamental policy of Texas to apply a foreign law, as the parties had contracted to do, that would effectively destroy one party's deficiency rights because that party had not complied with that law, then, by analogy, it does not offend the fundamental policy of Texas for a party knowingly to waive its right to challenge the foreclosure sale price in a deficiency suit.

The guarantor next argued the contractual waiver is unenforceable because the right waived--the right to seek a fair-market-value determination--did not exist when the waiver was signed. The cases put forth for this argument dealt with implied waivers, not contractual waivers. Unless a statute or fundamental public policy precludes waiver (and the court held it does not), one may generally waive even constitutional or statutory rights, present or future, by contract.

PART V
USURY

! ***Lairsen* v. *Slutzky***, 80 S.W.3d 121 (Tex.App.–Austin 2002, pet. denied). Lairsen and the Trust owned properties across the street from each other on Lake Travis. When Lairsen started building a two story house, the Trust sued to enjoin him for violating the subdivision's restrictive covenants. They settled the injunction case by Lairsen agreeing to buy the Trust's property. He paid a portion in cash and executed a note and deed of trust for the balance. The note bore interest at 8% per annum and further provided: "[N]otwithstanding any provision in this Note to the contrary, [Lairsen] shall have personal liability *only* for the top twenty-five (25%) percent of the declining balance of the Note."

Lairsen made no payments on the note, and, shortly, was sent a demand notice by the Trust. Lairsen claimed he was "shocked" when he discovered that the terms of the note did not comport with what he understood the settlement agreement between the parties required. Several months later, after still having received no payments, the Trust foreclosed. It then sent Lairsen a letter demanding payment of the deficiency.

Lairsen contended that the Trust violated the usury laws when, following the foreclosure and sale, the Trust sent him the letter and demanded that he pay the entire amount of the deficiency despite the fact that the note expressly limited his personal liability to twenty-five percent of the declining balance. Lairsen argued that because the Trust violated the usury laws it should forfeit the debt including principal and interest.

The Court noted that the letter demanded payment of the deficiency that was unpaid as of that date as well as the accrued interest but *only* to the extent provided for in the Note. Lairsen didn't argue that the note was usurious. The note contained a savings clause which provides, "Interest on the debt evidenced by this Note shall not exceed the maximum amount of nonusurious interest that may be contracted for, taken, reserved, charged or received under law...." Savings clauses are construed to defeat an interpretation of a contract that would violate usury laws. Because Lairsen did not complain that the Note was usurious and because the demand letter incorporated the terms of the note and only demanded payment of the amount then due under the note, the Court concluded that the demand letter was not a usurious charge.

! ***Pagel* v. *Whatley***, 82 S.W.3d 571 (Tex.App.–Corpus Christi 2002, pet. denied). Whatley was a crop duster who dusted Pagel's farm. After running up an account of over $7,000, Pagel was asked to "just pay his bill." Whatley said he would forego any service charges if he could just get the principal. Over the course of trying to get paid, Whatley prepared an agreement that would have required Pagel to pay 18% interest on past due amounts, but Pagel never signed the agreement. A few statements were sent with the 18% charge, but when it became clear that Pagel would not agree in writing, the 18% charge was deleted from future invoices. Whatley, who appears very knowledgeable about usury explained his procedures: "We have a computer, and it sends out a statement; and if a person agrees to pay the service charge that we charge, we have a little button. We push on it, and it puts an asterisk by its name, and it sends out the service charge to that person. If it does not have a service charge, we push the little button, and it takes it off. It doesn't even put it on there. So, he agreed to it, and we punched the computer. . . My wife and I were both sitting in the office when he made the agreement, and she can testify to that fact, too. She was there. She's the one that pushed the button."

After wrangling with Pagel for a while, Whatley threatened to sue. Pagel told him that "I've been in business before, and I know how not to pay you;" and he said, "If you file this lawsuit, I'm not going to pay you anything." Whatley sued. Pagel counterclaimed for usury. The trial court found that the 18% charge, without benefit of a written agreement, was a bona fide error and that Whatley's subsequent actions to delete the charge amount to a cure of usury. The Court agreed with Whatley.

Whatley corrected any usury violation by deleting charges of any interest whatsoever on the unpaid account, making demand for only the principal balance reflecting products and services rendered, and applying payments made to principal only, thereby satisfying the first prong of Finance Code § 305.103(a). In addition, the record before us establishes that by Whatley's statement attached to his original petition, he provided Pagel notice of the possibility and consequences of a usury violation. The sufficiency of the notice can reasonably be inferred by Pagel's actions after he received Whatley's written statement. First, we note that Pagel admittedly made no claim for a usury violation at any time prior to his attorney's letter dated over seven months after the lawsuit was filed against him. Second, Pagel filed his counterclaim over fifteen months after receiving Whatley's statement. The trial court could reasonably infer that the statement was sufficient to preempt the counterclaim for usury where none had been urged previously.

! ***Strasburger Enterprises, Inc.* v. *TDGT Limited Partnership***, 110 S.W.3d 566 (Tex.App.—Austin 2003, no pet.). Strasburger Farms deposited several tons of milo with TDGT, a licensed grain warehouseman. TDGT issued warehouse receipts for the grain. Strasburger agreed to sell the warehouse receipts back to TDGT. Payment was due in March, and when it wasn't received, Strasburger sent a demand letter, demanding payment, plus 10% interest. In response, TDGT sent back a letter notifying Strasburger that the demand for 10% was usurious, because there was no agreement for the payment of interest.

Strasburger argues that: (1) in charging ten percent per annum, it did not charge a usurious rate, and (2) it timely cured any usury violation. We disagree. Finance Code ' 305.001 imposes liability when contracting for, charging, or receiving interest that is greater than the amount authorized by law. The solicitation, through a demand letter, of interest exceeding that allowed by law may constitute a "charge" for purposes of section 305.001. All depends on the intent of the letter. "Intent" does not mean an intent to engage in usury, but rather the intent to assess the rate charged.

It is undisputed that Strasburger demanded "interest at 10%"; however, Strasburger contends that interest at ten percent per annum is not usurious. The parties' contract did not specify a rate of interest, thus Finance Code ' 302.002 controls. Section 302.002 states that when no interest rate is agreed upon, "interest at the rate of six percent per year" is permitted "beginning on the 30th day after the date on which the amount is due."

Strasburger asserts that it cured any usury violation by filing its original petition, which sought only interest at "the rates provided by law." However, the sequence of events shows otherwise. Strasburger's demand letter was dated May 19, and TDGT sent its notice of usury violation to Strasburger on June 25. Strasburger filed its original petition on June 21, and TDGT was served with citation and a copy of Strasburger's petition on July 12, 1999," well after TDGT's notice of violation to Strasburger. In Pagel v. Whatley, the court construed the current version of section 305.103 to hold that a creditor had complied with the code provision and cured his request for a usurious rate of interest. 82 S.W.3d 571, 577 (Tex.App.-Corpus Christi 2002, pet. denied). The court held that the creditor had complied with the code because the creditor had: (1) deleted the usurious interest charges on the unpaid account, (2) demanded only the principal amount due, and (3) delivered the petition, with an attached statement, to the debtor acknowledging that the creditor was informed of the "consequences and possibility of a usury violation."

Strasburger failed to comply with section 305.103 in order to cure the usury violation before TDGT sent its notice of violation. Strasburger gave no notice, written or otherwise, to TDGT aside from the petition delivered on July 12. In its original petition, Strasburger only asked for "prejudgment and post-judgment interest at rates provided by law," it did not provide any notification that what it had previously demanded was a violation or that the previous demand was potentially usurious or inappropriate. Moreover, section (c) of section 305.103 requires that notice: (1) be "delivered to the person or to the person's duly authorized agent or attorney of record personally," or (2) "by United States mail to the address shown on the most recent documents in the transaction." Strasburger did not comply with this statutory requirement, because TDGT did not receive the original petition until July 12, after Strasburger had received TDGT's notice of violation.

Strasburger's contention that its filing of the original petition was sufficient to provide notice and to cure the violation is without merit.

The filing of its original petition before TDGT sent its notice simply meant that on June 21 the court, not TDGT, received the information in the petition. In George A. Fuller Co. v. Carpet Services, Inc., the supreme court held that: "There is no indication in the statement of legislative purpose that the legislature intended that the usury laws be applied to pleadings." ." 823 S.W.2d 603, 604 (Tex.1992). The Supreme Court held that a demand for a usurious interest in a pleading is not a usurious charge of interest. The reasoning in George A. Fuller applies to this case. As a pleading alone cannot constitute a demand for usurious interest, a pleading alone is insufficient to serve as notice to correct a usurious violation when not delivered to the obligor before the obligor communicates notice of violation to the creditor.

The court opined that: "A charge must be communicated to the debtor ... [and] need not be direct, as long as the charge is ultimately demanded from the debtor." Similarly, to be in compliance with section 305.103, the creditor that previously demanded the usurious interest must communicate notice of the cure to the debtor before the obligor communicates its notice of violation. Tex. Fin.Code Ann. § 305.103. By filing the original petition only with the court on June 21, Strasburger communicated with the court, not TDGT; therefore, its notice was insufficient to cure the previous demand for usurious interest.

PART VI
VENDOR AND PURCHASER

! ***De La Cruz* v. *Brown***, 109 S.W.3d 73, (Tex.App.—El Paso 2003, pet. pending). In 1984, Arturo purchased some land in a subdivision in El Paso County by executory contract from Columbus P. Brown. Arturo made the final payment in 1997. The property was in the area of the colonias that is subject to certain protective statutes in the Property Code. In January 2001, he filed suit for damages arising from Brown's failure to transfer recorded legal title to the property in question. He argued that Section 5.102 (now Section 5.079) of the Texas Property Code provided for the imposition of fines on the seller of real property if the seller failed to transfer recorded legal title within thirty days of receipt of the purchaser's final payment. Brown recorded the deed to the property on March 30, 2001, nearly four years after final payment was tendered.

De La Cruz filed a motion for summary judgment claiming that he had established as a matter of law his entitlement to the sum of $664,500 in penalties for a violation of Section 5.102. Brown claimed that Section 5.102 did not provide a private cause of action for those penalties.

The statute before amendment provided that the seller is liable for a "penalty" for a seller's failure to deliver a deed after final payment. The last set of amendments changed the "penalty" to "liquidated damages" and now says that the seller is liable to the purchaser for those penalties. Most of the amounts in question related to periods of time before the amendment, so Brown contended that the statutory penalty in the pre-amendment statute applies to enforcement by the State of Texas through the Office of the Attorney General and does not give rise to a private cause of action. The pre-amendment statute did not authorize the Office of Attorney General to collect the penalties.

The court held that the Attorney General was not authorized to collect the penalties. It then noted that, if the penalties weren't subject to a private cause of action, there was no one who could enforce them. "Such a construction is impermissible as the Legislature is never presumed to have done a useless thing." In construing a statute, it is presumed that the entire statute is intended to be effective and a result feasible of execution is intended.

! ***N.P., Inc.* v. *Turboff***, 111 S.W.3d 40 (Tex. 2003). Turboff, a real estate developer, entered into a contract with the MUD District for the construction of water, sewer, and drainage facilities on a 135-acre tract of land Turboff was developing in north Houston. Under the terms of the contract, Turboff promised to build the utility facilities according to certain MUD-approved plans and specifications. In addition, Turboff agreed to convey the facilities to the MUD. In exchange, the MUD promised to purchase the facilities upon receiving title to them if, among other things, the facilities were constructed according to the plans and completed in a good and workmanlike manner. Under the contract, the purchase price acted as a right of reimbursement for Turboff's construction costs.

Turboff borrowed the money to purchase and subsequently develop the tract. As security for the loan, the lender received a lien on the property.

Before Turboff completed the construction and conveyed the facilities to the MUD as required under the contract, the lender declared Turboff in default on his loan. Because Turboff claimed that the lender wrongfully placed him in default, he sued First Texas. While the litigation was pending, lender foreclosed on the property.

Just thirty minutes before the Feds placed the lender in receivership, the lender and Turboff settled all claims between them. According to the settlement agreement, the lender retained title to the property, including the utility facilities, but gave up any claim it had in the construction costs reimbursement under Turboff's 1984 contract with the MUD.

After being declared insolvent by the Feds, the lender's assets were transferred to First Nationwide Bank.

On February 10, 1995, N.P., Inc. purchased the property from First Nationwide, including the existing utility facilities. First Nationwide transferred title to the property, but in both the Real Estate Purchase Agreement and the Warranty Deed, First Nationwide expressly excluded from the conveyance any right to the MUD reimbursement payments.

Turboff sued N.P., Inc., seeking a declaratory judgment that Turboff, not N.P., Inc., was entitled to the MUD payments according to the terms of the 1984 contract. Turboff also asked the trial court to order N.P., Inc. to convey title to the facilities to the MUD. Both parties moved for summary judgment. After reviewing the summary judgment evidence, the trial court found as a matter of law that although N.P., Inc. owned the existing facilities, Turboff owned all sums due from the MUD. But the trial court also held that Turboff had no right to compel N.P., Inc. to convey the facilities to the MUD. Thus, all parties appealed.

On appeal, N.P., Inc., argued that as the owner of the facilities, it was entitled to the MUD payments. But the court of appeals concluded that Turboff was entitled to the reimbursement not only because N.P., Inc. had notice of Turboff's claim to the MUD proceeds, reflected in both the Real Estate Purchase Agreement between N.P., Inc. and First Nationwide and in N.P., Inc.'s Warranty Deed, but also because Turboff specifically reserved the right to the reimbursement through his transactions with First Texas. Regarding Turboff's complaint that N.P., Inc. should be compelled to transfer the facilities' title to the MUD, the court of appeals agreed with the trial court that N.P., Inc. was under no obligation to do so. As a result, the court of appeals affirmed the trial court's judgment.

Before the Supreme Court, N.P., Inc. argued that because Turboff defaulted on his loan with his lender, which then foreclosed on the real estate, Turboff lost title to the facilities and therefore the power to convey title as required by the 1984 MUD contract. And because of his inability to perform, he lost the right to the MUD reimbursement.

In response, Turboff argues that the MUD proceeds were severed from the utility facilities when Turboff and First Texas settled their dispute. Turboff also points to both the Real Estate Purchase Agreement and the Warranty Deed from First Nationwide to N.P., Inc., which excluded the right to reimbursement with the conveyance of the property. Turboff argues that those documents made the conveyance to N.P., Inc. "subject to" that reserved right..

The Supreme Court held that the interest Turboff was attempting to enforce against N.P., Inc. is simply an interest in a contract that Turboff cannot now honor. Turboff acknowledges that the right to receive the MUD proceeds arose from his 1984 contract with the MUD. That 1984 contract between Turboff and the MUD required Turboff, as developer, to have and to transfer clear title to the facilities to the MUD in exchange for the MUD's agreement to buy the facilities. But when Turboff defaulted on his loan and the lender foreclosed on the property, including the utility facilities, it became impossible for Turboff to perform according to the terms of his 1984 MUD contract.

Turboff's right to the MUD proceeds is a right that the parties created by contract, in which the MUD agreed to buy the utility facilities from Turboff if he conveyed title. This contract right to the MUD proceeds is purely personal as between Turboff and the MUD. While an interest in utility facilities may run with the land as appurtenances or improvements, this personal contract right does not.

! ***Comeaux* v. *Suderman***, 93 S.W.3d 215, (Tex.App.—Houston [14th Dist.] 2002, no pet.). Comeaux leased about an acre of land from the Sudermans to operate a public fishing pier. The lease provided that, in the event Suderman received a proposal to sell the leased premises, the sale was subject to Comeaux's right of first refusal to purchase the property. Comeaux's purchase would be on the same terms and conditions as those offered by the prospective purchaser. If Comeaux didn't purchase the property pursuant to his right of first refusal, the new owner had the right to terminate the lease.

Suderman notified Comeaux in writing of a pending offer for the leased premises and some adjoining property to the east and west of the leased premises. Suderman's notice did not specify that the total acreage to be sold was thirty-five acres. No other terms were provided, and no copy of an earnest money contract was provided. In the notice, Suderman reminded Comeaux of his right of first refusal under the lease agreement and the requirement that he exercise his right within thirty days. Suderman also provided his telephone number and that of his real estate agent in case Comeaux wanted to discuss the purchase.

Comeaux received the notice and contacted the broker. Comeaux apparently assumed that the sale involved twenty-two acres surrounding his property, but did not ask the broker to provide him with the specific terms and conditions of the sale, and did not inquire into whether he could purchase only the leased premises. Comeaux informed Liberato that he would not exercise his option because he could not afford the purchase price. Comeaux had no further discussions regarding the proposed sale with either Liberato or Suderman.

Later, Suderman sold the property to the Meiers. Comeaux then began paying rent to the Meiers. During the time Comeaux continued to occupy the leased premises, he never complained to either Suderman or the Meiers that he had been wrongfully denied the opportunity to purchase the leased premises. Comeaux ultimately abandoned the leased premises when a storm destroyed his fishing pier.

Comeaux subsequently filed suit against Suderman and the Meiers, asserting that he was entitled to either specific performance or damages because Suderman and Meiers failed to comply with the terms of the right of first refusal in the lease agreement and tortiously interfered with Comeaux's contractual right to exercise the right of first refusal. Suderman and the Meiers moved for summary judgment on the grounds that the proposed sale was not for the leased premises only, Comeaux failed to tender an offer to purchase the leased premises, and the Meiers did not tortiously interfere with the lease agreement. They also asserted affirmative defenses of laches and unclean hands. The trial court granted summary judgment against Comeaux's claims without specifying the grounds relied upon.

Comeaux claimed that because the written notice he received failed to offer him the opportunity to purchase the leased premises only (rather than the entire thirty-five acre parcel) and did not strictly comply with the lease agreement, the right of first refusal was never triggered. However, it is undisputed that Comeaux received notice of the proposed sale, and had an opportunity to obtain all the terms and conditions of the proposed sale and assert his rights. Also, Comeaux affirmatively declined to exercise the right of first refusal. The court held that the Suderman and Meiers were not liable to Comeaux for breach of contract and tortious interference with his contractual rights.

A right of first refusal, as a preemptive right, requires the property owner to first offer the property to the person holding the right of first refusal at the stipulated price and terms in the event the owner decides to sell the property. Unlike an option contract, a right of first refusal does not give the lessee the power to compel an unwilling owner to sell. However, once an owner decides to sell, there is an obligation to offer the holder of the right of first refusal the opportunity to buy the property on the terms offered by a bona fide purchaser. When a person acquires an option to purchase property, the holder of the option has the right to compel a sale of property on the stated terms before the expiration of the option.

Option contracts have two components: (1) an underlying contract that is not binding until accepted, and (2) a covenant to hold open to the optionee the opportunity to accept. A right of first refusal ripens into an option when the owner elects to sell. When an owner is required to notify the holder of a right of first refusal of the owner's election to sell, the right matures into an enforceable option when the owner gives the notice. Before the option can ripen into an enforceable contract of sale, however, the holder of the option must manifest his acceptance. Acceptance of an option must be unqualified, unambiguous, and strictly in accordance with the terms of the agreement. If an option contract requires the option holder to give notice of his intent to exercise the option, he must timely give this notice. The failure to give it on time is fatal. Accordingly, a failure to exercise an option according to its terms, including untimely or defective acceptance, is simply ineffectual, and legally amounts to nothing more than a rejection. If the lessee declines to purchase the property, the owner may sell to anyone.

Comeaux admits that he received Suderman's March 30, 1997 written notice of the proposed sale of the leased premises and the additional property adjoining the leased premises. Comeaux also admits that he spoke at some point thereafter to George Liberato, Suderman's real estate agent, regarding the proposed sale. Although it is unclear whether the discussion between Comeaux and Liberato took place before the expiration of the thirty-day period provided in the lease agreement for exercising the right of first refusal, it is undisputed that Comeaux told Liberato that he could not afford to match the Meiers' offer of $350,000.

At no time during Comeaux's discussion did he inquire into any of the specifics of the terms and conditions of the sale or contend that the notice was insufficient. Further, he did not assert that he was entitled to purchase only the leased premises, and he did not inquire into the possibility of doing so. Nevertheless, Comeaux stressed that, because Suderman's notice did not include an offer to sell only the leased premises and did not strictly comply with the terms of the lease agreement, the right of first refusal was not triggered. However, the court held that it need not address whether Comeaux should have been offered the opportunity to purchase only the leased premises, and whether the notice was technically insufficient, because Comeaux had actual notice of the proposed sale of the leased premises and an opportunity to purchase it, which he declined. It found that Suderman's notice to Comeaux, while not a model of clarity, reasonably disclosed Suderman's intention to sell the leased premises and additional property to a third party for a total price of $350,000. When an owner makes a reasonable disclosure of the terms of a proposed sale to another, the holder of the right of first refusal has a duty to undertake a reasonable investigation of any terms unclear to him. A right holder who fails to do so cannot subsequently complain that he lacked sufficient information to make an informed choice about whether to purchase the property that is subject to the right of first refusal.

! ***Gonzalez* v. *United Brotherhood Of Carpenters And Joiners Of America, Local 551***, 93 S.W.3d 208 (Tex.App.—Houston [14th Dist.] 2002, no pet.). In 1997, UBC was selling a piece of property in Houston. Sauter, acting as a representative for UBC, engaged in negotiations for the sale of this property with Gonzalez. Gonzalez made several offers that were not approved by UBC members. Gonzalez met with Sauter for the final time. At this meeting, Sauter told him if he made an offer of $550,000 and a 6% realtor's commission, Sauter had authority from the members to accept it. Gonzalez instructed his agents to amend the earnest money contract to reflect the new terms. The contract was signed by both parties. Gonzalez was represented by a licensed real estate broker and an attorney. The contract contained a paragraph which provided that UBC's obligation to sell the Property was subject to approval of its members. The members did not approve the sale and UBC refused to sell the property, asserting that the condition precedent was not fulfilled.

Gonzalez thereafter sued UBC seeking specific performance of the contract. The trial court granted summary judgment for UBC, and Gonzalez appealed, arguing that UBC waived the condition precedent, and should be estopped from relying on the condition precedent.

Gonzalez's claim that UBC had waived the condition precedent was based upon Sauter's statement that he had authority to accept an offer of $550,000 and a 6% commission. UBC countered that Sauter's statement was parol evidence and, therefore, not admissible to vary the terms of the written contract. Parol evidence is, however, admissible to show (1) the execution of a written agreement was procured by fraud, (2) an agreement was to become effective only upon certain contingencies, or (3) the parties' true intentions if the writing is ambiguous. Gonzalez did not assert that the statement was evidence of procurement by fraud, nor did he assert that the statement was evidence that the agreement was to become effective upon the happening of a certain contingency. Finally, Gonzalez did not argue that the contract was ambiguous. Therefore, Sauter's alleged statement is inadmissible under the parol evidence rule, and cannot be considered for summary judgment purposes.

Gonzalez estoppel argument also foundered on the parol evidence rule. It is impermissible to attempt to vary the terms of a document with inadmissible parol evidence under the guise of an estoppel doctrine.

! ***Dickey* v. *McComb Development Co., Inc.,*** 115 S.W.3d 42 (Tex.App.—San Antonio 2003, no pet.). The Dickeys entered into a contract for deed with McComb for the purchase of approximately some land in Montgomery County, Texas. After entering into the contract, the Dickeys made several improvements to the property and moved onto the land. Several years later the Dickeys found it necessary to move off of the property because of a change in deed restrictions. After a failed attempt to sell the property, the Dickeys eventually leased the land to a third party.

After missing a payment or two, the Dickeys received a notice from McComb which stated that the Dickeys were delinquent in the payment of their monetary installments for April and May of 2000 and had also failed to pay certain property taxes. The notice informed the Dickeys they had 30 days, until July 13, 2000, to correct these defaults or the contract would be terminated and the Dickeys would lose their interest in the property. On July 14, 2000, the Dickeys tendered the appropriate sum to McComb. McComb returned the check two days later with a letter from its attorney, stating the payment was rejected because it was one day late and terminating the Dickey/ McComb contract.

The Dickeys subsequently brought suit against McComb for wrongful termination of the contract, alleging that McComb failed to comply with § 5.061 of the Texas Property Code. McComb filed a counterclaim, alleging breach of contract and seeking a declaratory judgment that the Texas Property Code notice provisions did not apply. Following a bench trial, the trial court rendered a take nothing judgment in favor of McComb, finding Texas Property Code § § 5.061-.063 to be inapplicable and holding that additional notice was not required prior to the cancellation of the Dickeys' contract.

The Dickeys argued that Texas Property Code sections 5.061, 5.062, and 5.063 are applicable to their situation, mandating a 60 day cure period before a seller may enforce a forfeiture of a purchaser's interest when (1) at least 20% of a property's purchase price has been paid and (2) the property is "used or to be used as the purchaser's residence." Both parties stipulated to the fact that the Dickeys had paid more than 20% of the total purchase price at the time of the alleged breach. The only issue for this Court was whether the Dickeys' professed intent to reside on the property at some undisclosed future date was sufficient to require the application of the Property Code's notice provisions.

The term "residence" has been construed as the place where one actually lives or has his home. "Residence" connotes a home and a fixed place of habitation to which one returns when away. An individual does not, however, have to be physically present within the home in order to claim it as his residence. He may live temporarily in one place while maintaining his residence in another. In addition, the fact that an individual leases the abode while physically absent from it does not mean, by itself, that the abode is no longer his residence.

Tthe Dickeys offered the testimony of Rose Ann Dickey to prove their intent to reside on the property in question in spite of the fact that they did not actually live on the land at the time of the alleged breach. Rose Ann testified that the Dickeys made improvements to and lived on the land in their mobile home from 1992 to approximately 1998. In 1998, the Dickeys were forced to move off of the land due to a change in land restrictions and their desire to continue their daughter's participation in raising and showing animals. After moving, the Dickeys attempted to sell the property and, when that venture failed, leased the property to a third party. Rose Ann also testified that the family did not receive mail at the property, had their homestead designation removed from the property by the taxing authority, and were no longer registered to vote or employed in Montgomery County. Finally, Rose Ann testified that she and her husband intended to move back onto the property in question no sooner than 2007, five years from the time of trial, when their daughter graduated from high school. In addition, Rose Ann was not able to commit to this date, stating that she "can't predict the future" and that whether they moved depended on her daughter. The Dickeys did not produce any evidence of definite plans or preparations to return to the property in question.

Viewed in a light most favorable to McComb, a trier of fact could reasonably infer from the record that the property was not going to be used as a residence by the Dickeys.

! ***Herman* v. *Shell Oil Company***, 93 S.W.3d 605 (Tex.App.–Houston [14th Dist.] 2002, no pet.). In early 1983, Empire Properties Corporation granted Shell an option to buy a small strip of land measuring .6887 acres in Harris County. The option provided that if Shell exercised it, no other gas stations would be allowed on a surrounding eight-acre tract owned by Empire. In late 1983, Empire sold about 33 acres (including the option tract) to John S. Beeson, Trustee, with the deed made expressly subject to Shell’s option. In 1984, Beeson sold all of the properties to Corum Development Company, L.P., again with a deed expressly subject to Shell’s option. In March 1985, Corum transferred approximately twenty acres to Corum/Mico Joint Venture, again with a deed expressly subject to Shell's option. On July 17, 1985, Corum Development deeded the .6887 acre tract to Shell. The deed contained a restriction on gas stations that purported to extend to all of Corum/Mico's twenty acres, rather than just the eight acres originally covered by the option.

In July 1989, Corum/Mico Joint Venture conveyed its twenty acres to Westside Exchange Accommodators, L.L.C. Unlike all previous deeds, this one made no reference to the restriction on gas stations that appeared in the option or the prior deeds. On the same day it closed on the properties, Westside reconveyed them to appellant Herman, again without reference to any restriction on use. Herman subsequently developed the property as a shopping center called Corum Station. According to Herman, his largest tenant, a Randalls supermarket, refused to renew its lease in because it could not develop a gas station on the premises. In 1999, Herman sued Shell to declare the 1985 restriction inapplicable to his property. He later supplemented his petition to claim $2 million in damages for slander of title and cloud on title due to the loss of the Randalls lease. Both parties moved for summary judgment, and the trial court entered judgment that the land-use restriction applied to eight acres of the tract owned by Herman.

After the appeal was filed, Shell abandoned the restriction on gas stations. Thus, it argued, this appeal is moot. But as, this does not dispose of Herman's claim for damages for slander of title. The Court agreed and held the appeal was not moot.

Herman claimed to be a BFP, who took free of the restrictions. Herman's first argument was he had no notice of Shell's option, since it did not appear in his deed from Westside, nor in the deed Westside received from Corum/Mico. The court disagreed, holding that any mistake these latter entities may have made in drafting their deeds could not have invalidated Shell's rights. Purchasers are charged with knowledge of the provisions of recorded instruments that form an essential link in their chain of ownership If the rule were otherwise, interests in real estate could be made to disappear by the simple expedient of eliminating them from later deeds. Herman cannot claim lack of notice, as it is undisputed the option was in his chain of title.

Herman also argued that because the actual deed to Shell was signed by Corum Development after it had transferred the adjacent properties to Corum/Mico Joint Venture, his interest (derived through Corum/Mico) passed without encumbrance of the use restriction. In effect, Herman is again arguing that the restriction is not valid as it was not in his deed. But while the provision in Corum's deed to Shell may have been outside his chain of title, the pre-existing option was not. A review of the deed records would have shown the property was subject to the exercise of Shell's option, and a reasonable inspection of the deed records (or the property itself) would have shown Shell had. As a matter of law, Herman had constructive notice of the Shell option and the restriction on his property.

Finally, Herman argues that Shell cannot rely on the option agreement as it was merely a promise to impose a restriction rather than a restriction itself. Of course, either would create a valid cloud on Herman's title and defeat his claim for damages. Moreover, even assuming Corum Development could not place a restriction on the surrounding acreage in 1985 because it had transferred that property to its joint venture, this does not defeat Shell's right to enforce the option it paid for and recorded. In the original option, Empire promised for itself and its successors that a restriction would be granted upon the covered eight acres. That is exactly what the trial court ordered.

Herman further attempted to avoid the presence of the option in his chain of title by arguing that Shell failed to exercise the option in accordance with its terms. He was correct that Shell and Corum extended the restriction's coverage beyond the eight acres noted in the original option, and shifted part of the cost of the owner's title policy to Shell. But he was incorrect that this renders the option void. Generally, a party to an option to purchase real property may enforce that option only by strict compliance with the terms of the option. However, that does not mean the parties to an option cannot modify the option or the terms of the underlying sale by mutual agreement. Because the extension of the use restriction from eight to twenty acres occurred after the transfer to Corum/Mico, it is doubtful this could prejudice Herman's interest. But Shell only sought to enforce the restriction against the eight acres originally burdened, and the trial court's judgment extended only that far. As any modification of the option terms between Shell and Corum did not change the restriction on this acreage, Herman has no basis to object.

! ***Joppich* v. *1464-Eight, Ltd.***, 96 S.W.3d 614, (Tex.App.–Houston [14th Dist.] 2002. Buyer and Developer entered into an earnest money contract, under which Buyer agreed to buy and Developer agreed to sell real estate in Fort Bend County. An addendum, which was attached to the earnest money contract, provided that, at the time of closing, Buyer would grant Developer an option to repurchase the property if Buyer did not begin construction of a primary residence on the property within 18 months from closing. Despite the addendum's reference to an attached sample option agreement, there was no option agreement attached to the earnest money contract. At closing, the closer presented the option agreement, which Buyer and Developer signed. The option agreement recited that Developer paid consideration in the amount of ten dollars. Buyer did not begin construction of a primary residence on the property within 18 months of the closing date. On September 4, 1999, Developer sent Buyer a "Notice of Intent to Exercise Option," which set a closing date of October 4, 1999. On October 1, 1999, Buyer sued Developer, seeking a declaratory judgment that the option contract was unenforceable. The trial court rendered judgment for Developer, declared the option contract valid and enforceable, ordered Buyer to sell the property in compliance with the terms of the option contract, and awarded Developer costs and attorney's fees.

In the first issue, Buyer contends that the trial court erred in enforcing the contract because it was unenforceable for lack or failure of consideration. Specifically, Buyer asserts that Developer's failure to actually pay the $10 consideration renders the contract unenforceable. (Interestingly, the recital of consideration mentioned only the $10, and left off the usual "other good and valuable" wording.

A recital of acknowledgment of consideration received, such as this one, is no more than a statement of fact, which may be contradicted by parol evidence. Buyer filed an affidavit stating that Developer never tendered the $10 consideration. In response to discovery requests, Developer stated that it was unable to admit or deny whether it paid the $10. Developer did not produce any cancelled checks, receipts, or other documentary evidence. Therefore, summary judgment for Developer was improper.

! ***Automobile Insurance Company of Hartford, Connecticut* v. *Young***, 85 S.W.3d 334 (Tex.App.–Amarillo 2002, no pet.). Young, as Tenant, and Barnes, ad the Landlord, entered into a Lease/Purchase Agreement, pursuant to which Young would rent property and would own it at the end of the term. When the term expired, Young obtained a judgment that she owned it free and clear of liens. The following day, the place burned down. Young made a demand on Barnes's insurer, but, since Barnes was the only party named on the policy, the insurance company declined coverage.

Young sued, joining Barnes and claiming that Barnes became a constructive trustee of the insurance proceeds pursuant to the Lease/Purchase Agreement. The Court disagreed.

The law presumes that a written agreement correctly embodies the parties' intentions and is an accurate expression of the agreement of the parties. Neither the Lease/Purchase Agreement nor the insurance policy support Young's claims. Moreover, because Young was a "stranger" to the policy she could not maintain a suit on it. The Lease/Purchase Agreement expressly allocated the responsibility of each party to maintain insurance as each deemed appropriate to insure its interest and did not impose any duty on Barnes to provide insurance for Young's benefit. Further, paragraph 18 of the Lease/Purchase Agreement entitled "Fire or Casualty Damage" did not obligate Barnes to restore or repair the property in case of fire or other casualty.

Citing ***Sever* v. *Massachusetts Mut. Life Ins. Co.***, 944 S.W.2d 486 (Tex.App.-Amarillo 1997, writ denied), Young argued that the trial court properly granted her motion on constructive trust grounds; however, her reliance on that case was misplaced. In ***Sever***, the insurance company tendered into court the proceeds of a life insurance policy, not a fire insurance policy. Following a divorce, conflicting claims to the policy proceeds were asserted by a minor child, through her mother and guardian ad litem implicating Family Code § 3.632. The constructive trust imposed in ***Sever*** was the result of the application of the provisions of the Family Code, which do not apply to this case. Moreover, Young did not allege any wrong or breach of legal duty by Barnes to support the imposition of a constructive trust. More importantly however, there is neither allegation nor summary judgment evidence that Hartford did business with or had any contacts with Young in order to support a claim of wrongful or unjust conduct sufficient to support the imposition of a constructive trust.

Similarly, Young's creditor beneficiary theory does not support the judgment against the insurer. Although paragraph 19 of the conditions of the insurance policy entitled "Mortgage Clause" provided for payment of losses to a mortgagee, the policy designated Nationsbanc Mortgage Corporation as the mortgagee. Further, the conditions of the policy provide that any assignment of the policy to a mortgagee: would not be valid unless the insurer gave its written consent. There being no summary judgment evidence of a request for assignment of the policy, and because the policy designated Nationsbanc as the mortgagee, Young's creditor beneficiary theory does not support summary judgment.

! ***Chambers County* v. *TSP Development, Ltd.***, 63 S.W.3d 835 (Tex.App.–Houston [14th Dist.] 2002, pet. denied). TSP had a contract to purchase some land in Chambers County and had submitted applications to be able to use the land to dispose solid waste. After the contract had been entered into, the County passed some ordinances prohibiting such use of the land. TSP sued under the Private Real Property Rights Preservation Act alleging the ordinances were invalid. The County claimed TSP had no standing to bring the suit.

The Act defines an "owner" as "a person with legal or equitable title to affected private real property at the time a taking occurs." The Act does not authorize anyone other than an owner, so defined, to bring suit. Therefore, in order for TSP to have standing to pursue its lawsuit, it must have held legal or equitable title to property affected by the ordinance. TSP did indeed have a contract concerning land in the relevant area, and the trial court held that the contract was one for the sale of land and, consequently, that TSP had standing.

The County argued that TSP had only an option, not a contract, and therefore lacked standing to bring the suit.

A contract for the sale of real estate is an agreement that binds the purchaser to buy and the seller to sell in accordance with the terms of the contract. A contract for sale passes equitable title to the buyer. An option contract for the sale of land gives the optionee the right to elect to purchase the property at stated terms and within a specified period of time, but with no obligation to do so. No title passes at the time an option contract is formed, and time is of the essence.

The primary test for determining

whether a real estate agreement is an option contract or a contract for sale is whether the contract imposes a mandatory obligation upon the seller to accept a sum stipulated as liquidated damages in lieu of the purchaser's further liability.

Here, the Court held that TSP had no standing under the Private Real Property Rights Preservation Act to challenge validity of county waste disposal ordinance, and its applicability to land it allegedly acquired, since its "contract" was an "option" contract, and not a "contract for sale." The contract contained a provision requiring the seller to accept the earnest money deposit as "liquidated damages." It also had a provision expressly granted specific performance to TSP upon seller's default, but did not grant the seller specific performance in the event of buyer's default, and contained no remedies for TSP's breach other than payment of the earnest money deposit to seller. Finally, the contract contained provisions stating that time was of the essence.

! ***Davis* v. *Estridge***, 85 S.W.3d 308 (Tex.App.–Tyler 2002, pet. denied). Purchasers who claimed to have been fraudulently induced to purchase a house and adjacent acreage did ask for rescission of the contract, and tendered the house and property. However, they failed to also tender the value that they obtained from using the property for the time period between the purchase and trial. Further, the trial court did not take into consideration the benefits gained by the purchasers when it rendered judgment. Consequently, the trial court failed to do equity, and it was an abuse of discretion to grant rescission of the real estate contract and a constructive trust on the Seller's homestead.

! ***Limestone Group, Inc.* v. *Sai Thong, L.L.C.***, 107 S.W.3d 793 (Tex.App.–Amarillo 2001, no pet.). Sai Thong agreed to sell Limestone a parcel of property. Limestone apparently desired to develop this parcel, which desire attracted the attention of inhabitants who lived adjacent to it. The contract did not close, and the parties took to suing each other. Limestone sought specific performance of the accord. In turn, Sai Thong asked the trial court to declare that it did not have to convey the property because Limestone defaulted. The default involved its failure to pay $75,000 as earnest money by a specified date. Limestone only delivered $25,000.

Limestone argued that its failure to make a final deposit of earnest money did not preclude specific performance because its obligation to pay the earnest money was not a condition precedent to the formation of the contract. Nor was its failure to comply with the provision a material breach. The court disagreed.

First, no one argues that the contract never came into existence because Limestone failed to pay the earnest money. Indeed, all agree that the conduct of the parties resulted in the formation of a binding agreement. Moreover, it was one of the terms of that binding agreement which Sai Thong invoked to bar Limestone's demand for specific performance. And, logic dictates that it could not have invoked that provision if the contract never came into existence.

Second, the provision invoked by Sai Thong to defeat recovery by Limestone states: "If Purchaser shall not be in default hereunder and if Seller fails to consummate this Agreement for any reason, ... the Earnest Money and any extension payment shall be immediately returned to Purchaser and Purchaser shall have the right to either (i) terminate this Agreement or (ii) enforce specific performance of Seller's obligation under this Agreement, as Purchaser's sole and exclusive remedies for Seller's default." This contractual provision expressly addresses Limestone's right to specific performance and it conditions that right upon two criteria. One is that the Seller fails to perform and the other is that the Limestone not be in default under the contract. Thus, irrespective of whether or not the duty to pay the earnest money was a condition precedent to the formation of the agreement, it constituted a potential condition precedent to the invocation of the right to receive specific performance. Again, before Limestone could pursue that right, it "shall not be in default" under the agreement.

Limestone claimed that the default or breach was not material, and cited authority stating that the breach must be material before specific performance can be withheld. The two cases mentioned, ***Hudson* v. *Wakefield***, 645 S.W.2d 427 (Tex.1983) and ***Cowman* v. *Allen Monuments, Inc.***, 500 S.W.2d 223 (Tex.Civ.App.—Texarkana 1973, no writ), do indicate that only a material breach prevents one from pursuing specific performance. However, neither of those cases involved an agreement that expressly addressed the right of specific performance; instead, the courts were merely orating upon general equitable principles related to the remedy. This distinction is important because parties to an agreement may contractually specify the remedies available to redress its breach and, thereby, modify the legal and equitable remedies generally applicable.

In determining what the parties meant by "default," the court said it had to give the word its plain, everyday meaning. This interpretation of the word comports with that afforded it by the dictionary where it is defined as the "failure" to do an act. Thus, because the plain meaning of the word connotes a mere failure, omission, or breach, the court gave it that meaning in the contract. Given that interpretation of "default," Limestone's failure to pay the entire earnest money as required by the contract was a default. Simply put, it did not perform an obligation required under the contract. Having so defaulted, the purchaser did not satisfy one of the conditions prerequisite to the invocation of its contractual right to specific performance.

! ***FCLT Loans, L.P.* v. *United Commerce Center, Inc.***, 76 S.W.3d 58 (Tex.App.–Eastland 2002, no pet.). The contract of sale provided that taxes would be prorated between the parties on the closing date. There was no provision for post-closing adjustment based on changes in the assessed valuation or tax rate. The closing statement signed by the parties at closing contained the following statement: "Purchaser understands that tax and insurance prorations and reserves were based on figures for the preceeding *[sic]* year or supplied by others or estimates for current year, and in the event of any change for current year, all necessary adjustments must be made between Purchaser and Seller direct."

When taxes on the property turned out to be much higher than the proration amounts, the purchaser sued, claiming, among other things, that the closing statements modified the contract of sale and required a post-closing adjustment.

The Court disagreed. A closing statement is a release of the title company for distribution of funds; a closing statement is not an amendment of the contract of sale. The language in the closing statement is not intended to benefit the seller or the purchaser. Rather, the language is to limit the liability of the title company.

Furthermore, the Court held that any modification to the contract would require consideration for the modification, and there was no new consideration shown with respect to the execution of the closing statements.

! ***Moudy* v. *Manning***, 82 S.W.3d 726 (Tex.App.–San Antonio 2002, pet. denied). The contract described the land as "3,948 acres +/-. Exhibit 'A'." Exhibit A, however, contained no further description of the property. The contract was amended three different times to extend the closing date for the sale. Each amendment described the property as "3949.62 acres, more or less, 20 miles NE of Rocksprings and 25 miles SW of Junction in NE Edwards County, Texas." After a survey was done, the seller found out there was more land than she had thought, and she tried to get out of the contract. The purchaser sued for specific performance.

The statute of frauds requires that a writing be complete within itself in every material detail and contain all essential elements so that it may be understood without resort to parol evidence. The agreement must furnish within itself, or by reference to some other existing writing, information by which the land may be identified with reasonable certainty.

Land is identified with reasonable certainty whenever the two-part test enunciated in ***Pickett* v. *Bishop***, 148 Tex. 207, 223 S.W.2d 222 (1949) is satisfied. Under ***Pickett***, land is identified with reasonable certainty when: (1) the contract contains a "statement of ownership" such as "my property," "my land," or "owned by me"; and (2) it is shown by extrinsic evidence that the party to be charged owns only one tract of land fitting the property description in the contract. The purchaser argued the parties' contract is enforceable because both prongs of ***Pickett*** are satisfied in this instance. The purchaser first contended that the bolded contractual language, "and all other property owned by Seller and attached to the above described real property," satisfies the "statement of ownership" prong of ***Pickett***. It doesn't. When read in the context of the property description, merely indicates that Manning owns the personal property attached to the land-- not the real property itself.

The purchaser also Moudy also contends the contract satisfies the first prong of ***Pickett*** because: (1) Manning is identified as the "Seller" and agrees to sell and convey the Property; (2) seller agreed furnish an Owner policy of Title Insurance; (3) seller agreed to deliver possession of the property at closing; (4) seller was to provide an easement to the Property; (5) seller and purchaser were to split hunting lease payments from the property; and (6) seller and buyer intended to complete a tax deferred exchange. The Court didn't buy this. "We hold Moudy's argument is without merit because we cannot infer Manning's ownership from the fact that she was the person agreeing to sell the property."

Lastly, the purchaser tried to rely on a provision from the addendum to the contract in support of his contention that the contract contains "statements of ownership." The addendum provides as follows:

> "If Closing occurs before November 1, 1998, Buyer and Seller shall split 50/50 all 1998 hunting payments; if Closing occurs between November 1, 1998, and December 31, 1998, all 1998 hunting payments shall be prorated between Seller and Buyer based on the number of days of **their respective ownership** of **the Property during that specific time period."**

This clause, similar to clauses such as "as their interests may appear," does not satisfy the first prong of ***Pickett*** because it is plainly prospective, not referring to an existing interest at the time the contract was made). Accordingly, we hold the clause is not a statement of ownership sufficient to satisfy the first prong of ***Pickett***.

! ***Mayor v. Garcia***, 104 S.W.3d 274 (Tex.App.–Texarkana 2003, pet. dism'd w.o.j.). The contract identified the property to be sold as "Lot ________, Block TR 14A Allison Richey Addition, City of 4.9500 AC Gulf Coast Homes Sec P. County, Texas, known as (C-3 Red, Vacant) ABST 626 0 Pitts," and included the zip code 77025 for the property (incorrectly, it turns out).

According to Garcia, he obtained the "shorthand" description of the property from an HCAD tax report. On its face, the Mayor-Garcia property description is insufficient to identify the property with reasonable certainty. First, the description provides no county or city for the property. Even though the zip code 77025 is listed in the description, presumably providing the data necessary to identify the city and county of the property, at trial, Mayor testified that her property lies within 77047 not the 77025 zip code. Without resorting to parol, there is no way to determine the city or county of the property. While there is no case explicitly holding that failure to list the county and city in the description is, by itself, fatal, several cases have relied on such failure as strong evidence of an insufficient description.

Failure to list a county and state of the property is only one of a series of shortcomings with the Mayor-Garcia property description. The court goes through a whole host of failures, which is compelling reading for anyone worried about the adequacy of the property description in a contract.

PART VII
DEEDS AND CONVEYANCES

! ***Moore* v. *Energy States, Inc.***, 71 S.W.3d 796 (Tex.App.–Eastland 2002, pet. denied). The property in question in this case is a narrow strip of land containing between 10 and 25 acres along, under, and between a railroad right-of-way and a pubic road in Lots Nos. 10 and 11 of the Herndon Pasture Subdivision in Nolan County. The plaintiffs claim ownership of the disputed property as the heirs of C.B. and Fannie Johnston. The Johnstons owned real property in Nolan County and sold it in 1945 to the defendants' predecessor in interest, Lance Sears. The plaintiffs assert that the disputed strip of land was excepted from the deed and retained by the Johnstons. The deed from the Johnstons to Sears indicates that Sears purchased 580.7 acres of land "out of" 3 contiguous tracts: 210.9 acres out of the middle third of the H.J. Stockman Survey No. 291, 184.4 acres out of Lot No. 10 of the Herndon Subdivision, and 185.4 acres out of Lot No. 11 of the Herndon Subdivision. The deed recites that the entire tract lies "South of the T. & P. Ry. Co. right of way and South of the Public road which lies immediately south of said T. & P. Ry. Co. right of way." The metes and bounds description in this deed indicates that the northern boundary of the property is the southern boundary line of the public road. The deed also grants to Sears all "rights and appurtenances thereto."

Although the Johnstons did not expressly reserve any land in the deed, they "continued to claim title and assert dominion over the land" lying north of the southern boundary line of the public road. The record also shows that the Johnstons and their heirs have paid taxes through the years on 3 acres of property located in Lot No. 10 and 7 acres of property located in Lot No. 11.

Under the strip-and-gore doctrine, unless the grantor explicitly reserves with plain and specific language in the deed a fee in a narrow strip of land adjoining the conveyed land, it is presumed that a grantor has no intention of reserving a fee in a narrow, adjoining strip of land when the strip ceases to be of use by virtue of the conveyance. According to well-established law in Texas, when a deed conveys land abutting a street, public highway, or railroad right- of-way, title to the center of the street, public highway, or railroad right- of-way also passes by the deed. This general rule applies even if the description of the land in the deed or field notes terminates at the street, public highway, or railroad right-of-way, unless a contrary intention is expressed in plain and unequivocal terms. The Supreme Court has also applied the strip-and-gore doctrine to a strip of land not used for highway or railroad purposes.

The Supreme Court has defined estoppel by deed as follows:

> "[A] man may bind himself irrevocably by putting his seal to a grant or covenant, and will not be allowed to disprove or contradict any declaration or averment contained in the instrument, and essential to its purpose. A recital or allegation in a deed or bond which is certain in its terms, and relevant to the matter in hand, will therefore be conclusive between the parties in any controversy growing out of the instrument itself, or the transaction in which it was executed." ***Duchess of Kingston's Case***, 2 Smith, Lead. Cas. (8th Amer. Ed.) note, p. 819, and cases cited. The doctrine of an estoppel by deed is ... founded upon the theory that the parties have contracted upon the basis of the recited facts.

In the present case, the deed conveying the land from the Johnstons to Sears stated that the public road "lies immediately south" of the railroad right-of-way. Thus, the Johnstons and their successors in interest are estopped from denying that the public road lies immediately south of the railroad right-of-way and from claiming title to land between the public road and railroad right-of-way.

The Court held that the trial court properly granted summary judgment in favor of the defendants. "The Johnstons conveyed title to any and all appurtenances, which would include the public road and railroad rights-of-way. The deed to Sears indicates that the public road "lies immediately south" of the railroad right- of-way. Consequently, the plaintiffs are estopped from claiming that a parcel of undeeded land exists between the two rights-of-way. The land that may lie between the two rights-of-way was not expressly reserved in the deed to Sears and is, consequently, covered by the strip-and-gore doctrine."

! ***Hatch*** **v.** ***Williams***, 110 S.W.3d 516 (Tex.App.—Waco, 2003. no pet.). Williams orally agreed to sell Hatch 87.2 feet of a 120-foot tract (and the house located thereon) on July 28, 1997. Williams sought to keep the remaining 32.8 feet as additional parking for his store, located on adjoining property. The legal description in the deed describes the entire 120-foot tract, instead of the agreed-upon 87.2 feet. The attorney handling the transaction testified that his office had simply made a mistake in attaching the wrong property description to the paperwork. Neither party knew of the mistake at the time of closing and the parties began jointly using the tract of land at issue.

Williams discovered the mistake on or about October 30, 2000. On November 3, 2000, Williams filed suit to reform the deed, and Hatch filed an answer asserting, among others, the affirmative defenses of the three year statute of limitations (Texas Civil Practice and Remedies Code ' 16.024), estoppel, ratification, waiver, and laches.

A party is entitled to the reformation of a deed upon proving that the parties reached an agreement but the deed does not reflect the true agreement because of a mutual mistake. Further, the fact that an error was caused by a scrivener's failure to embody the true agreement of the parties in a written instrument is a proper ground for reformation. Williams testified that the parties' agreement was to convey only the 87.2- foot tract. Hatch testified that he intended to purchase only the 87.2-foot tract, and that he knew Williams intended to sell only the 87.2-foot tract. The attorney who handled the transaction testified that his office had erroneously attached the wrong property description to the documents. Thus, the record contains some evidence and factually sufficient evidence to support the trial court's judgment.

Hatch next contends that Williams's claim does not survive the three- year limitations period regarding the defense of adverse possession. Adverse possession is statutorily defined as "an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person. Texas Civil Practice and Remedies Code ' 16.021(1). The evidence shows that the parties jointly used the disputed tract. Williams testified that the parties shared expenses for removing tree limbs from the disputed tract and customers of Williams's store frequently parked on the tract without objection. Hatch's testimony confirmed that Williams's customers parked on the tract and that the parties jointly used the land. This joint use negates Hatch's adverse possession claim because it refutes an unmistakable claim of exclusive ownership.

Hatch pleaded estoppel and ratification as equitable defenses to preserve his rights and preclude Williams from claiming title under mutual mistake. An essential element of both equitable estoppel and ratification is knowledge of the material facts. The evidence establishes that, for over three years, Williams did not know that the deed did not correctly describe the agreed-upon 87.2-foot tract, but instead described the entire 120-foot tract. He added that Hatch did not inform him of the mistake in the deed. Therefore, Hatch failed to conclusively establish the estoppel and ratification defenses.

Hatch also asserted waiver as a defense to Williams's claim for reformation. Waiver is the intentional relinquishment of a known right, or intentional conduct inconsistent with claiming that right. Hatch and Williams both testified that the intended conveyance was the 87.2- foot tract, and not the entire 120-foot tract incorrectly described in the deed. There is no evidence that Williams intentionally relinquished his claim to the disputed tract at any time. In fact, the evidence shows that he continued to use the disputed property as additional parking for his store. Accordingly, Hatch failed to conclusively establish the waiver defense.

In order to assert the affirmative defense of laches, a defendant must show 1) unreasonable delay by one having legal or equitable rights in asserting them, and 2) a good faith change of position by another to his detriment because of the delay. In this case, Williams filed his suit for reformation of the deed less than one month after discovering the mistake. The trial court's refusal to find for a defense of laches is not contrary to the great weight and preponderance of the evidence.

PART VIII
ADVERSE POSSESSION

! ***Amerman* v. *Martin***, 83 S.W.3d 858 (Tex.App–Texarkana 2002, pet. granted). In a trespass to try title action, the plaintiff must prove a regular chain of conveyances from the sovereignty, prove superior title out of common source, prove title by limitations, or prove prior possession which has not been abandoned.

Boundary disputes may be tried by a statutory action of trespass to try title; however, it is not a pure trespass to try title action. Rather, it is a boundary suit even though it may involve questions of title. In this type of suit, it is not necessary for the plaintiff to establish a superior title to the property in the manner required by the formal trespass to try title action. Placing into evidence of a recorded deed showing a plaintiff's interest in the disputed property has been held sufficient to establish a present legal right of possession in a boundary suit.

! ***Goebel* v. *Brandley***, 76 S.W.3d 652 (Tex.App.–Houston [14th Dist.] 2002, no pet.). The Texas Supreme Court, in dicta, has acknowledged the propriety of using a declaratory judgment action to determine a boundary line. ***Brainard* v. *State***, 12 S.W.3d 6, 29 (Tex.1999) ("This particular action [a boundary dispute] contemplates the determination and establishment of the boundary line (as would a declaratory judgment action), but not the award of damages or attorney's fees (as could a declaratory judgment action)."). In ***Brainard***, the Court explained that the legislative resolution that gave certain landowners permission to sue for determination of the boundary line did not authorize the landowners to bring a claim under the Declaratory Judgments Act, which could ultimately result in an award of attorney's fees. The Court "recognize[d] that such a claim is certainly one way to resolve a boundary dispute," however, the resolution limited the suit to a judicial determination of the boundary.

! ***Walker* v. *Geer***, 99 S.W.3d 244 (Tex.App.–Eastland 2003, no pet.). Walker obtained a judgment against Foster, who owned the property in question at the time. Walker filed an abstract of judgment in the county records. Shortly after the abstract was filed, Foster conveyed the property to Pipkin. Pipkin conveyed it two years later to Burke, who sold it a year after that to Burke. Walker filed a declaratory judgment action claiming she had a valid lien on the property and seeking to foreclose. Geer claimed title under the three-year adverse possession statute.

A suit to recover property from any person in peaceable adverse possession under title or color of title shall be instituted within three years of the accrual of the cause of action. Texas Civil Practice & Remedies Code § 16.024. A judgment lien will be barred when a purchaser of land from a judgment debtor shows that they have maintained possession under title or color of title for more than three years. Adverse possession is defined as "an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person." Texas Civil Practice & Remedies Code § 16.021(1). Adverse possession need not be in the same person. However, the successive owners must be in privity of estate with each other in order for the limitations period to tack. Texas Civil Practice & Remedies Code § 16.023. A judgment creditor will be charged with notice and the cause of action will accrue when the judgment creditor knew or, with the exercise of ordinary care, should have known about the sale of the property.

Here, the summary judgment evidence conclusively shows the chain of title to the sovereignty, and color of title is established. The evidence also shows that the Pipkins purchased the property by warranty deed from Foster in September 1996. Appellant had knowledge of this sale in October 1996. The evidence showed that all of those in the chain from Foster to Geer purchased the property by warranty deed and were in privity of estate. Geer's possession of the property was actual and visible and was by virtue of the individual deeds. The evidence also showed that the adverse possession was uninterrupted by any adverse suit. Therefore, as a matter of law, appellant's suit was barred by the three-year statute of limitations.

PART IX
EASEMENTS

! ***Marcus Cable Associates, L.P.* v. *Krohn***, 90 S.W.3d 697 (Tex. 2002). In 1939, Alan and Myrna Krohn's predecessors in interest granted to the Hill County Electric Cooperative an easement that allows the cooperative to use their property for the purpose of constructing and maintaining "an electric transmission or distribution line or system. In 1991, Hill County Electric entered into a "Joint Use Agreement" with a cable-television provider, which later assigned its rights under the agreement to Marcus Cable. The agreement permitted Marcus Cable to "furnish television antenna service" to area residents, and allowed the cable wires to be attached only "to the extent [the cooperative] may lawfully do so." The agreement further provided that the electric cooperative did not warrant or assure any "right-of-way privileges or easements," and that Marcus Cable "shall be responsible for obtaining its own easements and rights-of-way."

Seven years later, the Krohns sued Marcus Cable, alleging that the company did not have a valid easement and had placed its wires over their property without their knowledge or consent. The Krohns asserted a trespass claim, and alleged that Marcus Cable was negligent in failing to obtain their consent before installing the cable lines. The Krohns sought an injunction ordering the cable wires' removal, as well as actual and exemplary damages. In defense, Marcus Cable asserted a right to use Hill County Electric's poles under the cooperative's easement and under Texas statutory law.

Marcus Cable claimed rights under Hill County Electric's express easement, that is, an easement conveyed by an express grant. While the common law recognizes that certain easements may be assigned or apportioned to a third party, the third party's use cannot exceed the rights expressly conveyed to the original easement holder.

Marcus Cable raised three arguments to support its contention that the original easement encompasses cable-television use. First, it argued that easements must be interpreted to anticipate and encompass future technological developments that may not have existed when the easement was originally granted. Second, Marcus Cable contended that courts should give strong deference to the public policy behind expanding the provision of cable- television services. Third, Marcus Cable argued that its use is permitted because adding cable-television wires does not increase the burden on the servient estate. These arguments, however, ignore fundamental principles that govern interpreting easements conveyed by express grant. Those principles led the Supreme Court to conclude that the original easement does not encompass Marcus Cable's use.

A court applies basic principles of contract construction and interpretation when considering an express easement's terms. The contracting parties' intentions, as expressed in the grant, determine the scope of the conveyed interest. When the grant's terms are not specifically defined, they should be given their plain, ordinary, and generally accepted meaning.

The common law does allow some flexibility in determining an easement holder's rights. In particular, the manner, frequency, and intensity of an easement's use may change over time to accommodate technological development. But such changes must fall within the purposes for which the easement was created, as determined by the grant's terms. Otherwise, easements would effectively become possessory, rather than nonpossessory, land interests.

Marcus Cable suggested that the court should give greater weight to the public benefit which results from the wide distribution of cable-television services, arguing that technological advancement in Texas will be substantially impeded if the cooperative's easement is not read to encompass cable-television use. But even if that were so, a court may not circumvent the contracting parties' intent by disregarding the easement's express terms and the specific purpose for which it was granted.

Finally, Marcus Cable contended that its use should be allowed because attaching cable-television wires to Hill County Electric's utility poles does not materially increase the burden to the servient estate. But again, if a use does not serve the easement's express purpose, it becomes an unauthorized presence on the land whether or not it results in any noticeable burden to the servient estate.

Marcus Cable also contended that, even if Hill County Electric's easement does not permit it to string cable-television wires across the Krohns' property, section 181.102 of the Texas Utilities Code does. That section, which allows cable-television service providers to utilize certain properties, provides:

> "(a) In an unincorporated area, a person in the business of providing community antenna or cable television service to the public may install and maintain equipment through, under, along, across, or over a utility easement, a public road, an alley, or a body of public water in accordance with this subchapter.
>
> "(b) The installation and maintenance of the equipment must be done in a way that does not unduly inconvenience the public using the affected property."

Marcus Cable argued that the statute's plain language encompasses private easements like the one at issue here. Specifically, Marcus Cable contended that the term "utility easement" is not qualified by the term "public," as are other properties listed in the statute, and therefore the Legislature must have intended to cover private-easement grants to utility companies. The Krohns, on the other hand, argued that the statute's language, purpose, and legislative history support a distinction between general-use, public-utility easements and limited private-easement grants.

The Supreme Court held that section 181.102 does not encompass private easements granted to utilities. The term "utility easement" appears in a list of properties--public roads, alleys, and public waterways–that are generally dedicated to public use. Subsection (b) goes on to prohibit cable companies from "unduly inconvenienc[ing] the public using the affected property," indicating that the Legislature presumed public access to the property interests listed in subsection (a). Texas Utilities Code § 181.102(b). Thus, consistent with the nature of the other specified properties, and harmonizing the statute's subsections, "utility easement" can reasonably be read to cover only public easements, that is, those easements dedicated to the public's use.

! ***Hatton* v. *Grigar***, 66 S.W.3d 545 (Tex.App.–Houston [14th Dist.] 2002, no pet.

pending). "Dedication" is the act of appropriating private land to the public for any general or public use. Once dedicated, the owner of the land reserves no rights that are incompatible with the full enjoyment of the public. There are four essential elements of implied dedication: (1) the acts of the landowner induced the belief that the landowner intended to dedicate the road to public use; (2) he was competent to do so; (3) the public relied on these acts and will be served by the dedication; and (4) there was an offer and acceptance of the dedication.

As a general rule, the intention to dedicate must be shown by something more than an omission or failure to act or acquiesce on the part of the owner. There must be evidence of some additional factor that implies a donative intention when considered in light of the owner's acquiescence in the public's use of the roadway. The additional factor may include (1) permitting public authorities to grade, repair, or otherwise improve the roadway; (2) selling parcels of land from a plat or plan showing the roadway as a means of access to the parcels; (3) construction of facilities for general public use; (4) an express representation by the owner of a road to a land purchaser that the way is reserved for public use; (5) fencing off the roadway from the remainder of the land; or (6) obtaining a reduction in the purchase price commensurate with the area of the roadway. Direct evidence of an overt act or a specific declaration on the part of the landowner indicating an intention to dedicate land to public use as a roadway is not required. It is enough that a donative intention be inferred from evidence showing other factors that suggest such an intention under all of the circumstances surrounding the landowner's acquiescence in the public's use of the roadway. In addition, evidence of long and continued use by the public raises a presumption of dedication by the owner when the origin of the public use and the ownership of the land at the time it originated cannot be shown, one way or the other, due to the lapse of time.

! ***Subak* v. *Zboril***, 56 S.W.3d 785 (Tex.App.–Houston [14th Dist.] 2001, no pet.). Another case dealing with implied dedication.

! ***Machala* v. *Weems***, 56 S.W.3d 748 (Tex.App–Texarkana 2001, no pet.). This case sets out all the rules for establishing easements by necessity, prescription, estoppel, and dedication.

! ***Vinson* v. *Brown***, 80 S.W.3d 221 (Tex.App.–Austin 2002, no pet.). In the 1940s, G.A. and Florence Butler Draper began to develop a subdivision on property they owned on the north shore of Lake Travis in rural Travis County. The Drapers divided the property into lots, named the subdivision Draper's Cove, and began selling these lots in 1948. Luster B. Hobbs purchased lots nine and ten in the subdivision in 1948. Fifty of the lots in Draper's Cove, including lots nine and ten, do not front on Lake Travis. The deed of conveyance for lots nine and ten ("the Hobbs deed") includes the following language intended to create an easement:

> [A] permanent [easement] of the use, together with the owners of other tracts out of said subdivision made by G.A. Draper in the Malinda Settle Survey, of a park located about five hundred (500) feet East of Block No. One (1) of a subdivision out of said survey made by Viggo Miller September 14, 1946 ... and which park extends to a cove on the Lake and the boundaries of which park to be marked and established by said G.A. Draper.

Although the Hobbs deed grants Hobbs use of the easement "together with the owners of other tracts out of said subdivision," the deeds of others who purchased lots in the subdivision from the Drapers do not contain express grants of easement to the park area. However, many, if not all, of the property owners in Draper's Cove have historically used the park area for recreation and access to Lake Travis.

Pa Draper died without ever specifying the boundaries of the park.

In 1985, Vinson installed a locked gate

at the road entrance to the park area and told the property owners in Draper's Cove that they could only access the park by obtaining permission and a key from him. Many, if not all, of the property owners did so, and the use of the park by the property owners continued as before. However, in 1996, Vinson changed the lock on the gate and informed the property owners that he was denying future access to the park to anyone who did not purchase an easement from him for $5,000. Three property owners purchased easements from Vinson, and he created a metes and bounds description of the park for these purchasers. The Browns, protesting that they already possessed an express easement as successors-in- interest to Hobbs, did not purchase an easement, and Vinson never issued them a key to the newly locked gate.

In 1998, Vinson sued the Browns for damages and injunctive relief, alleging that they had on several occasions damaged the gate, chain, and lock he had installed to control access to the park. The Browns counterclaimed, seeking a declaratory judgment that they had an express easement to use the park.

Vinson argued that the Hobbs deed violates the Statute of Frauds because it does not contain a legally sufficient description of the location of the park. As an interest in land, an express easement is subject to the Statute of Frauds. Although the Statute of Frauds provides that all contracts for the sale of real estate must be in writing, no requirements for the writing, other than that it be signed by the grantor, are provided. It has been left to the courts to determine the substance and form a written instrument must satisfy before it is enforceable. Insofar as a description of the property to be conveyed is concerned, the writing must furnish within itself the means or data by which that particular land may be identified with reasonable certainty.

Vinson contends that the easement claimed by the Browns cannot be identified with reasonable certainty because its description in the Hobbs deed is too vague. For example, Vinson argues that the phrase "about five hundred (500) feet East of Block No. One" does not provide a precise starting point for measuring from block one to the park, does not give an exact distance from that starting point, and does not specify whether the park is due east or merely in an easterly direction from block one. Similarly, he points out that the "cove on the Lake" mentioned in the description is not named or otherwise explicitly identified. This vague language, Vinson asserts, leaves the location of the easement too uncertain to satisfy the Statute of Frauds.

However, the fact that an easement clause is vague, indefinite, or uncertain does not authorize a court to completely ignore the valuable right thereby granted. The purpose of a description in a written conveyance is not to identify the land, but to afford a means of identification. If enough appears in the description so that a person familiar with the area can locate the premises with reasonable certainty, it is sufficient to satisfy the Statute of Frauds. With express easements, an exact designation of location is unnecessary, as long as the tract of land that will be burdened by the easement is sufficiently identified. The Hobbs deed sufficiently identifies the land to be burdened by its reference to "Block No. One (1) of a subdivision out of said survey made by Viggo Miller." It then describes the location for the easement in general terms, with the provision that the exact boundaries of the park will be marked and established by Draper at a later time. Although Draper never marked and established these boundaries, this inaction does not cause the grant to fail. At the time the grant was made, the provision for Draper to choose the park's boundaries, within a generally-described area, furnished the means to identify the property interest conveyed with reasonable certainty. The Court concluded that the description of the park in the Hobbs deed is legally sufficient to satisfy the Statute of Frauds.

PART X
RESTRICTIVE COVENANTS SUBDIVISIONS AND CONDOMINIUMS ,

! ***Aghili* v. *Banks***, 63 S.W.3d 812 (Tex.App.–Houston [14th Dist.] 2001, pet. denied). A condominium owner's obligation to pay levied assessments is secured by a continuing lien on the condominium unit. Property Code § 82.113(a). The owners' association creates this lien by recordation of the condominium declaration. Such recordation constitutes both record notice and perfection of the lien. No further recordation is necessary unless so specified by the condominium declaration.

In this case, the condo owners contend the condominium declaration specifically requires further recordation of a notice of lien before non-judicial foreclosure. Among other wording of the condo declaration were these provisions:

> "To evidence such a lien the Board of Managers or Managing Agent may, but shall not be required to, prepare a written notice setting forth the amount of such indebtedness, the name of the owner of the condominium unit and a description of the condominium unit."

And

> "Each owner, upon acceptance of a deed to a condominium unit, hereby expressly vests in the Association or its agents the right and power to bring all actions against such owner personally for the collection of such charges as a debt, and to enforce the foresaid lien by all methods available for the enforcement of such liens, including non-judicial foreclosures pursuant to Article 3810 of the Texas Revised Civil Statutes, and such owner hereby expressly grants to the Association a power of sale in connection with said lien."

The Court held that this wording was not ambiguous, and was to be liberally construed to give effect to the intent of the parties to the contract. The Court held that the use of the word "may" in the sentence that discussed the filing of a notice of lien, as well as the statement that the lien could be foreclosed in any manner permitted by law clearly indicate that filing a notice is not required.

! ***Air Park-Dallas Zoning Committee* v. *Crow-Billingsley Airpark, Ltd.***, 109 S.W.3d 900 (Tex.App.—Dallas 2003, pet. dism'd by agreement). Air Park-Dallas began in 1969, when Milton and Henry Noell decided to create a residential airpark for "people who like to fly airplanes" on their property in southwestern Collin County. As the north Dallas area grew over time, the population spilled over into southern Collin County. The rapid growth in the area north of Dallas, including the situs of Airpark, was that of affluent residential subdivisions and strategically placed commercial centers.

As a consequence, wealthy developers began to eye the jewel of the partially developed Air Park-Dallas for investment purposes. Ultimately in 1983, investors Henry and Lucy Billingsley persuaded Milton Noell to sell one half of his interest in Air Park-Dallas, including one half of an undivided interest in all of the common areas, for three million dollars. The earlier plan to further develop the community as a residential airpark was abandoned. It is undisputed that the Billingsleys purchased their interest solely for investment purposes. There is evidence in the record that Henry Billingsley would turn much of the subdivision, including the runway, into a commercial area if he could unilaterally make that decision. However, before the Billingsley sale, several aviators purchased lots in the subdivision. Each individual lot carries certain restrictive covenants that run with the land. These covenants purport to retain the residential airpark character of the community and provide for a zoning committee to govern land use in the subdivision. Bylaws have been adopted, as well, that govern the actions of the owners association.

Among the many disputes involved in this case, the Committee claimed that a provision in the bylaws that Crow-Billingsley's right to vote as to all of its lots was suspended because of a failure to comply with the restrictions as to some of the lots. The Court held that the voting allocation was made to the lots, not to the owners. Thus, an owner's voting privileges could only be suspended as to the lots that were not in compliance, not as to all lots.

! ***Cottonwood Valley Homeowners Association* v. *Hudson***, 75 S.W.3d 601 (Tex.App.–Eastland 2002, no pet.). The trial court entered a default judgment granting a homeowners association its monetary damages, but did not grant foreclosure of the lien securing those amounts. The Court of Appeals held that, as an inherent part of the property interest, the purchase of a lot in a subdivision with deed restrictions carries the obligation to pay association fees for maintenance and ownership of common facilities and services and the remedy of foreclosure is an inherent characteristic of that property right. Even though foreclosure is a harsh remedy, a court is bound to enforce the agreement the parties entered into. Thus, it was an abuse of discretion for the trial court to refuse to grant the foreclosure.

! ***Ehler* v. *B.T. Suppenas Ltd.***, 74 S.W.3d 515 (Tex.App.–Amarillo 2002, pet. denied). This case concerns the enforceability of deed restrictions preventing alcohol sales on land adjacent to the area known as "the Strip" near the City of Lubbock. "The Strip" is a section of Highway 87 located in Lubbock County Precinct 2. Because Precinct 2 is the only precinct in Lubbock County in which off-premises alcohol sales are permitted, businesses on "the Strip" are primarily alcohol retailers. Suppenas. and Patel & Dunlap are partnerships that own most of the property making up "the Strip." Appellants Gary Michael Ehler and Suzanne Ehler (the Ehlers) brought the underlying suit seeking judgment that the restrictions preventing the sale of alcohol on their adjacent land were not enforceable.

All of the property concerned was originally owned by the Krueger family. The property was originally farm land. In 1984 and 1985, two tracts of the land were sold to the Stuarts. In 1989, the Kruegers sold 18.9 acres of the remaining land to Suppenas for $1,500,000 to build stores for alcohol sales. Contemporaneously, and to induce Suppenas to purchase the 18.9 acre tract, the Kruegers executed and filed a "Declaration of Restrictions" that defined the tract sold to Suppenas as the dominant estate and the remainder of the property as the servient estate. The declaration provided, "[n]o part, parcel, or lot of the real property described herein as the Servient Estate shall ever be used for the purpose of off premises sale of alcoholic beverages." It also provided that the restrictions were imposed "for the purpose of protecting the value and the desirability of the Dominant Estate."

Ehler saw the property in 1997 and, upon contacting the real estate agent, learned of the restrictions against the sale of alcohol. Ehler sought to purchase the property, planning to develop it by "subdividing it into acreage, either half-acre VA lots, sell off the frontage, possibly [for] a liquor store" because he thought "there was a good chance we could get [the restrictions] removed." He purchased the remaining 218 acres for $1,200 per acre. The price paid was a "little higher" than farm land, but Ehler felt its value would increase significantly if the restrictions against alcohol sales were lifted.

Ehlers filed suit against Suppenas seeking a judicial decision that the restrictions amounted to "a covenant not to compete," were unenforceable as an unreasonable restraint on trade.

Ehler relied on ***Bent Nail Developers, Inc.* v. *Brooks***, 758 S.W.2d 692 (Tex.App.--Fort Worth 1988, writ denied). That case involved a covenant restricting the use of land to residential use, even though it was located in an area zoned for commercial use only. In arriving at its decision, the Fort Worth Court of Appeals considered the facts that the covenant and zoning combined to prevent any use of the land, and that the grantor was engaged in commercial development, led it to conclude there was "no substantial difference between such a restriction and a non-competition agreement" and discussed the application of non-compete rules.

However, the Court held the ***Bent Nail*** rationale is not applicable here. First, unlike the restrictive covenant in that case, the restriction applicable to the Ehler property does not prevent any use of the property, it only bars one use. Second, the parties in ***Bent Nail*** had a contractual relationship through the deed at issue. Here, the parties have no contractual relationship. Third, none of the authority cited by the ***Bent Nail*** court held that a real estate restriction was actually a non-competition agreement or should be analyzed under the standards applicable to non-competition agreements. In ***Anderson* v. *Rowland***, 18 Tex.Civ.App. 460, 44 S.W. 911 (1898, no writ), cited in ***Bent Nail***, the court declined to decide if a covenant contained in a deed was real or personal. In the 14 years since it was decided, no Texas court has cited or relied on ***Bent Nail***. To the degree that ***Bent Nail*** might support a conclusion that real property restrictive covenants must satisfy the requisites of non-competition agreements, we decline to follow it.

! ***Reagan National Advertising of Austin, Inc.* v. *Capital Outdoors, Inc.***, 96 S.W.3d 490 (Tex.App.–Austin 2002, no pet.). Reagan is a former lessee of Met and formerly maintained a billboard on the land owned by Met. The lease agreement between Reagan and Met contained a clause prohibiting Met from "releasing" the land to other advertisers for five years after the lease's termination. Capital bought an advertising easement on the same land from Met and built an outdoor advertising billboard on the land. Reagan sued to prohibit the use of the easement, claiming the restrictive covenant in the lease prohibited Met from conveying sign rights, as well as leasing them. Capital claimed that granting an easement does not violate the restrictive lease provision, which prohibits only "releasing" the premises. Capital also claimed that the lease provision is an unenforceable restraint on alienation of real property.

In Austin, as in other places, billboard sign rights are strictly regulated. The sign in this particular case was grandfathered, and could be maintained without additional permitting, as long as the sign remained in continuous use. If the sign ceased to exist, the valuable grandfathered rights would be lost to Met.

Restrictive covenants are subject to the normal rules of contract construction. Doubts about the meaning of a covenant should be resolved against the party seeking to enforce it and in favor of the unrestricted use of land.

The court said Reagan wanted to construe the lease clause in isolation. "It ignores the fact that the instrument containing the clause is itself a commercial lease agreement. But this very fact makes the meaning of the clause unmistakable. If Reagan intended to prohibit Met from conveying the site to other advertisers, it would not have used the word "release" when it drafted the agreement. Neither Met nor Capital violated the restriction on releasing the site. Met conveyed an easement to Capital. It did not lease the property."

The court said there was no doubt about the meaning of the clause, but if there were, Reagan was not asking it to resolve that doubt in favor of unrestricted use of land. Instead, Reagan would the court resolve any doubt in a way that totally destroys Met's grandfathered rights in the billboard site. The court declined to do so. But, the court added, "the infirmity of Reagan's broad reading of the clause is even more serious. If Reagan's construction were correct, the clause would be void as an unreasonable restraint on alienation."

Because Reagan's interpretation would impose contractual liability on Met for attempting to convey its site, and would terminate the property interest that Met conveyed to Capital, it falls squarely within the § 404 Restatement of Property's definition of a restraint on alienation:

> "A restraint on alienation, as that phrase is used in this Restatement, is an attempt by an otherwise effective conveyance or contract to cause a later conveyance ...
>
> > "(b) to impose contractual liability on the one who makes the later conveyance when such liability results from a breach of an agreement not to convey; or
> >
> > "(c) to terminate or subject to termination all or part of the property interest conveyed."

Reagan claimed that because the lease clause restricts only use of the site, and not its conveyance, it is not an unreasonable restraint on alienation. It argued that Met is free to convey its site so long as its grantees do not use it for advertising purposes for five years. But Reagan's argument ignores the fact that under the City ordinances, its interpretation of the lease clause would destroy Met's grandfathered property right to erect a billboard on that site. Thus, to enforce the restriction as Reagan wanted it to be restricted would be an unreasonable restraint on alienation.

Finally, Reagan argued that the lease created an equitable servitude that bound Capital to it. A covenant that does not technically run with the land can still bind successors to the burdened land as an equitable servitude if (1) the successor to the burdened land took its interest with notice of the restriction, (2) the covenant limits the use of the burdened land, and (3) the covenant benefits the land of the party seeking to enforce it. The lease clause cannot be enforced against Capital as an equitable servitude because Reagan owns no land that benefits from the restriction.

! ***Truang* v. *City of Houston***, 99 S.W.3d 204 (Tex.App.–Houston [14th Dist.] 2002, no pet.). Houston brought suit to enforce deed restrictions in appellants' subdivision. Local Government Code § 212.133. The Local Government Code provides that a non-zoned, incorporated city has the power to sue to enforce any restriction contained or incorporated by reference in a recorded plan, plat, replat, or other instrument affecting a subdivision inside the city's boundaries. Local Government Code §§ 212.131-33. Restrictions in a plat recorded before August 30, 1965, may be enforced, but violations occurring before that date may not be enjoined or abated. Local Government Code §§ 212.131-33. The restrictions at issue were recorded August 24, 1945. Thus, Houston had the authority granted to it under the Local Government Code because the deed restrictions were being enforced after the grant of authority to Houston and arising out of deed restrictions that were validly and timely recorded.

Truang contended that it properly pleaded and offered evidence to show the existence of a material fact on numerous affirmative defenses sufficient to defeat the summary judgment. Specifically, he argued that, when Houston enforces deed restrictions, its function is proprietary and further urged, because its function is proprietary, Houston is subject to his affirmative defenses. For their authority, Truang relied on ***Oldfield* v. *City of Houston***, 15 S.W.3d 219 (Tex.App.-Houston [14th Dist.] 2000 pet. denied). The City claimed that appellants' reliance on ***Oldfield*** was misplaced. It claimed that the ***Oldfield*** decision erroneously concluded that, when a city enforces deed restrictions, its function is proprietary-not governmental. Moreover, it argued, after the *Oldfield* decision was issued, the Texas Legislature specifically addressed the issue. In 2001, the legislature amended the relevant portions of the Civil Practice and Remedies Code and the Local Government Code to add the enforcement of land-use restrictions to the laundry list of activities defined as governmental functions. Civil Practice and Remedies Code and Local Government Code § 212.137.

Texas courts have recognized that certain affirmative defenses do not apply if a city is exercising a governmental, as opposed to a proprietary, function. For this reason, cases involving claims against a city begin with the threshold question of whether the city was acting in a proprietary or governmental function. Under the common law, Texas courts developed certain rules for evaluating the distinction between proprietary and governmental functions. Generally speaking, a proprietary function is one a city performs, in its discretion, primarily for the benefit of those within the corporate limits of the city, rather than for the use by the general public. Actions undertaken for the benefit of private enterprise or the residents of the city, rather than for the benefit of the general public, were deemed proprietary. The key difference between a proprietary and governmental function is that the city functions in its governmental capacity when it performs functions mandated by the state.

When the city is enforcing zoning ordinances, it is serving in its governmental function. A governmental unit's zoning authority is derived from the police power of the state, and all property is held subject to the valid exercise of the power. Both zoning ordinances and land-use ordinances are valid exercises of a city's police power to safeguard the health, comfort, and general welfare of its citizens. Land-use ordinances protect local residents from the ill effects of urbanization and enhance the quality of life, and, as such, are proper exercises of a city's police power.

Enforcement of zoning ordinances is akin to enforcement of deed-restriction ordinances. Both accomplish the same objectives. The enforcement of zoning ordinances provides a judicial forum for aggrieved landowners to resolve conflicting interests in land use. Enforcement of zoning and deed restrictions preserves and maximizes property values. Because the enforcement of deed restrictions is like the enforcement of zoning statutes, which qualifies as a governmental function, the court held that the City's action in enforcing the residential-use-only deed restrictions against appellants is a governmental function.

! ***American Golf Corporation* v. *Colburn***, 65 S.W.3d 277 (Tex.App.–Houston [14th Dist.] 2001, pet. denied). The Colburns resided in a subdivision adjoining a country club that automatically made them members and subjected their property to restrictive covenants. Among the covenants was one which stated: "Athletic and social membership dues and other Club charges, together with interest at the highest rate permitted by applicable law, shall be a charge personally to an athletic and social member and shall be a charge and a continuing lien for the benefit of the Golf and Country Club on the Lot owned by such member in the same fashion as the General Assessment owed to the Association." At one point, the club operators began imposing a "Minimum Dining Fee" which required the club members to spend up to $75 a month on meals at the club. The Colburns disputed the imposition of the fee and brought a declaratory judgment action to have it removed.

The Court held that the Declaration was unambiguous and the *only charges* that may be levied under the Declaration in this case are "dues." The Minimum Dining Fee charged in this case are not "dues" within the meaning of paragraph 4(a). Instead, the charges are for food and drink.

! ***Bankler* v. *Vale***, 75 S.W.3d 29 (Tex.App.–San Antonio 2001, no pet.). The Condo Declarations contained a general provision that described the Board's authority, but limited its powers by stating "the Board shall have no authority to acquire and pay for out of the Maintenance Fund capital additions and improvements (other than for purposes of replacing portions of the Common Elements, subject to all the provisions of this Declaration) ... except as expressly provided herein." The provisions did not authorize the Board to impose assessments on the unit owners to pay for capital additions and improvements. Another provision added by amendment allowed the Board to impose assessments on unit owners to cover unforeseen emergency expenses. Yet another article allowed the Board to levy a special assessment "[i]f the insurance proceeds are insufficient to pay all of the costs of repairing and rebuilding" the units. There was no evidence here that the project was damaged by fire or other natural disaster or that insurance proceeds recovered to repair such damage were insufficient. The Declaration allowed the Board to "levy a special, one- time assessment to cover *unforeseen emergency expenses.*" In its letter to the unit owners, the Board stated that "the reserve account is necessary to provide funds for all emergency repairs and future replacement costs of the property." In that same letter, the Board describes the proposed capital improvements as "emergency projects."

After the Board passed a special assessment to build a reserve account and to fund "emergency" improvements to the project, the Vales brought suit against the Board, seeking a temporary restraining order and injunctive relief.

The Texas Supreme Court has characterized an emergency as "a condition arising suddenly and unexpectedly ... and which calls for immediate action." Even though the Board characterized the assessments as a response to "emergency" needs, the evidence supports the notion that the assessments were not imposed to pay for damage caused by an "unforeseen emergency." First, the assessment itself indicates that the proposed projects are non- emergent. The first stage of improvements was set to begin in February of 2001. The next stage runs from April to September of 2001. The third phase runs between October of 2001 and March of 2002. The fourth spans between April and September of 2002, and the final stage runs from October, 2002 to March, 2003. An emergency would require more immediate action than that proposed here. In addition, the plan includes funding for cosmetic repairs. Cosmetic repairs, by their very nature, are not emergencies. And finally, the plans allocates a substantial amount of funds raised through the assessment to a reserve fund. Funding a reserve account cannot be an emergency.

! ***Brooks* v. *Northglen Association***, 76 S.W.3d 162 (Tex.App–Texarkana 2002, pet. granted). This case concerns the authority of the POA to levy and accumulate assessments against the lot owners and increase the amount of those assessments for maintenance purposes, and the authority of the POA to foreclose liens securing those assessments against the homesteads of the lot owners who default in payment of the assessments.

The trial court had held that the association could increase the assessments for Sections four, five, and six, without a vote of the membership, to $120.00 per lot per year, plus the increase in the consumer price index per year or ten percent more than the prior year's assessment, whichever is greater. The trial court further held that the board could accumulate the authorized but unassessed increases as allowed by Texas Property Code § 204.010(a)(16). The lot owners disputed the board's right to accumulate the unassessed increased, and argued that the trial court improperly interpreted the statute, or in the alternative, the statutory provision is unconstitutional as impairing the obligation of contracts.

Section 204.010 provides that "unless otherwise provided by the restrictions or the association's articles of incorporation or bylaws," the board of directors may:

> "(16) if the restrictions allow for an annual increase in the maximum regular assessment without a vote of the membership, assess the increase annually or accumulate and assess the increase after a number of years."

The lot owners contend that if the assessments are accumulated under Property Code § 204.010, it would allow an increase of at least ten percent for every year the deed restrictions were in force (sixteen years) with interest compounded. They contend this would permit the annual assessment for these sections to increase from $120.00 per lot per year to more than $550.00.

The restrictions do not expressly "provide otherwise" to the statutory authorization, so accumulation of the previously authorized but unassessed annual increases were allowed. The phrase "unless otherwise provided" or similar language, when used in a statute, usually refers to other statutes pertaining to the same subject matter. Here the Court construed the language to refer to other statutes on the same subject matter, or to agreements or restrictions applicable to the subdivision. The Court noted it found no instance where silence on the subject has been construed as "otherwise providing."

The lot owners argued that the original provision allowing for the assessments and the annual increases in itself is an exclusive method of making the assessments and increases, and so it effectively "provides otherwise" to the statutory provision authorizing accumulation. The Court disagreed. The deed restrictions in no way either authorize or prohibit accumulation. They are completely silent on that subject. Silence on the subject of accumulation may reasonably be construed to be a positive or express provision that accumulation is not permitted. Indeed, it seemed to the Court that if the Legislature had thought that the original assessment provision itself denied the authority to accumulate, it would not have used the phrase "unless otherwise provided" in the statute authorizing accumulation. "That the Legislature felt it necessary to use these words indicates, we think, that it did not believe that the bare provision for annual assessments necessarily prohibited accumulation."

The lot owners argued that if Chapter 204 of the Texas Property Code gives homeowners' associations authority to accumulate and assess maintenance fees where the original deed restrictions do not, the statute would be unconstitutional as a retroactive law and because it impairs the obligation of contracts in violation of Article I, § 10 of the United States Constitution and Article I, § 16 of the Texas Constitution.

Although both the United States and Texas Constitutions prohibit laws that impair the obligation of contracts, it is now well settled that state police power regulations dealing with physical things such as land or natural resources are valid even if they have incidental effects on pre-existing contracts, if those laws or regulations are exercised in the interest of the public welfare. Here, § 204.010 is not directed to any specific kind of contracts, and it does not directly contradict any contractual provision prohibiting the accumulation of assessments. Indeed, it expressly does *not* authorize accumulation of assessments if the applicable agreements provide otherwise. Therefore, in authorizing the accumulation of assessments it does not impair the obligation of the homeowners' agreements with the subdivisions in the constitutional sense.

The lot owners argued that the statutory provisions of Chapter 204 do not pertain to physical things and were not enacted to promote the common good under the police power, and therefore they violate the provisions against the impairment of contracts. The Court disagreed. Zoning regulations affecting residential subdivisions as well as commercial developments are proper exercises of the police power and are valid even though they may affect or modify the provisions of previously executed contracts. Although Chapter 204 is not a zoning ordinance, it was enacted to promote the public welfare with regard to the property owners associations' ability to better provide services to the homeowners, maintain the common area facilities, and provide for the common security and restriction enforcement.

! ***Brunson* v. *Woolsey***, 63 S.W.3d 583 (Tex.App.–Fort Worth 2001, no pet.). Appellants argued that under the plain language of the statute, "[a] person who has subdivided land" refers to the original developer of a subdivision, who prepared, filed, and recorded the original plat. The Woolseys interpret "has" as synonymous with "owns," arguing that because they are "persons" who own land that has been subdivided, they possess standing to apply to the commissioners court for permission to revise the subdivision plat under Local Government Code § 232.009(b). The crux of the issue before the Court was whether "subdivided," as used in § 232.009(b), is an adjective describing "land," or a part of the verb, "has subdivided."

Appellants contend that § 232.009 establishes two exclusive categories of people: "[a] person who has subdivided land" and "nondeveloper owners." Section 232.009(c) provides for notice of the request to revise the subdivision plat:

> "After the application is filed with the commissioners court, the court shall publish notice of the application in a newspaper of general circulation in the county.... Except as provided by Subsection (f), *if all or part of the subdivided tract has been sold to nondeveloper owners, the court shall also give notice to each of those owners by certified or registered mail, return receipt requested, at the owner's address in the subdivided tract.*"

Appellants argue that "[a] person who has subdivided land" refers to the developer of a subdivision who prepares and submits the original plat application and files the plat with the county clerk. In contrast, the phrase "nondeveloper owners" refers to people like the Woolseys, who are owners of land in the subdivided tract.

Local Government Code § 232.008, pertaining to the cancellation of subdivisions, provides in subsection (b):

> "A person owning real property in this state that has been subdivided into lots and blocks or into small subdivisions may apply to the commissioners court of the county in which the property is located for permission to cancel all or part of the subdivision, including a dedicated easement or roadway, to reestablish the property as acreage tracts as it existed before the subdivision."

Clearly, this section authorizes an owner of land in a subdivision who is not the original developer to submit an application for the cancellation of the subdivision. A comparison of § 232.008(b) and § 232.009(b) reveals that the legislature could have defined those authorized to seek revision of a subdivision as it did those persons eligible to seek the cancellation of all or part of a subdivision. That is, the legislature could have expressly provided that an owner of subdivided land could request permission to revise the subdivision plat. Because the legislature chose not to so provide, the Court presumed that its intent was to allow only the original developer to revise the subdivision plat under section 232.009(b).

PART XI
HOMESTEAD

! **In re *Bouchie*,** 324 F.3d 780 (5th Cir. 2003). Pursuant to Texas Property Code § 41.002(c), a homestead is considered to be urban if, at the time of designation is made, the property is:

> (1) located within the limits of a municipality or its extraterritorial jurisdiction or a platted subdivision; and (2) served by police protection, paid or volunteer fire protection, and at least three of the following services provided by a municipality or under contract to a municipality
>
> > (A) electric; (B) natural gas; (C) sewer; (D) storm sewer; and (E) water.

The bankruptcy court held that the property in question is within the extraterritorial jurisdiction of Converse, Texas; that it is served by police protection and fire protection; but that it is not provided at least three of the listed services by a municipality, as required by the express language of the statute. Thus, as the bankruptcy court concluded, Bouchie's property is a rural homestead. The district court affirmed.

Rush Truck challenged the district court's characterization of Bouchie's property as a rural homestead based on the district court's sole application of Texas Property Code § 41.002(c). The bankruptcy court did not apply the "multiple factors" test adopted in ***United***

States* v. *Blakeman, 997 F.2d 1084 (5th Cir.1992). Those factors are (1) the location of the land with respect to the limits of the municipality; (2) the situs of the land in question; (3) the existence of municipal utilities and services; (4) the use of the lot and adjacent property; and (5) the presence of platted streets, blocks and the like.

The bankruptcy court in this case concluded that the question whether a homestead is rural or urban is answered by first applying ' 41.002(c). If the homestead does not qualify as urban under the statute, it is rural and the inquiry ends. If, however, the homestead meets the statutory definition of "urban," then the court continues with its analysis by applying the ***Blakeman*** five-factor test. The bankruptcy court in the instant case held that Bouchie's property did not meet the statutory definition of "urban" and thus classified it as rural, ending its inquiry.

Prior to 1989, a homestead was characterized as urban or rural by applying a five-factor test developed by the Texas courts. Those factors are (1) the location of the land with respect to the limits of the municipality; (2) the situs of the land in question; (3) the existence of municipal utilities and services; (4) the use of the lot and adjacent property; and (5) the presence of platted streets, blocks and the like. Section 41.002(c) was initially adopted in 1989. As enacted, ' 41.002(c) stated that "[a] homestead is considered to be rural if, at the time the designation is made, the property is not served by municipal utilities and fire and police protection." In ***Blakeman***, the court ruled that the 1989 version of ' 41.002(c) is not the exclusive test to determine whether a property's homestead status: it is but one factor a court considers to determine whether a court considers to determine whether the homestead is urban or rural and thus held that section 41.002(c) did not overturn the common law five-factor test.

In 1999, the Texas legislature substantially rewrote ' 41.002(c) in its current form, as quoted above. Unlike the previous version of the section, the current version provides a detailed framework for determining when a property is "urban" and substantially incorporates the factors included in the traditional test. Like its predecessor version, however, section 41.002(c) does not explicitly state that it is the exclusive test for whether a homestead is urban or rural.

A statute is presumed to have been enacted by the legislature with complete knowledge of the existing law and with reference to it. The holding in ***Blakeman*** that ' 41.002(c) was not the exclusive test for determining homestead status pre-dated the Texas legislature's amendment of section 41.002(c) by seven years. Thus, at first glance, the fact that the amended version does not state that section 41.002(c) supplies the exclusive test suggests that the legislature did not intend to displace ***Blakeman***. As we explain below, however, the Texas legislature did incorporate part of the ***Blakeman*** test into the current version of the statute. Under the well-known canon *inclusio unius est exclusio alterius*, this indicates that the legislature intentionally excluded the other factors from the rural/urban determination. This latter inference is more consistent with the other evidence that ' 41.002(c) in its current form leaves no room for the ***Blakeman*** test.

Another fundamental principle of statutory interpretation holds that when the legislature amends a law, it is presumed that it intends to change the law. This canon of interpretation suggests that the Texas legislature, by substantially amending ' 41.002(c), intended to change the test for determining which homesteads are urban and which are rural. In the framework of these interpretive rules, the court conclude that the ***Blakeman*** approach did not survive the 1999 amendment to ' 41.002(c). In amending ' 41.002, the legislature created a detailed scheme for determining which homesteads are to be considered urban. If courts continued to graft the common law test on to this statute, they would fundamentally rewrite it and, in effect, would defeat the legislature's ability to change the state of the law by statutory amendment.

Having concluded that the ***Blakeman*** approach can no longer be used to distinguish between rural and urban homesteads, the court held that the two step test crafted by the bankruptcy court was incorrect. Under the bankruptcy court's bifurcated approach, a court could determine that a homestead that is "urban" within the express terms of the amended ' 41.002(c) is, nevertheless, not urban based on non-statutory common law factors. This cannot be correct. This may have been designed to accommodate ***Blakeman*** with the amended statute, but our dispensing with ***Blakeman*** removes the need to make such an accommodation. The amended statute is the exclusive vehicle for distinguishing between rural and urban homesteads.

! **In re *Monsivais***, 274 B.R. 263 (Brktcy. W.D. Tex. 2002). The Debtors filed for relief under Chapter 7 of the Bankruptcy Code and claimed as their exempt urban homestead 10.33 acres of land in El Paso County, Texas upon which are located a dwelling and horse sheds. The Debtors never held fee simple title to the Property. When it was acquired, title was taken in the Monsivais Family Limited Partnership, a Texas Limited Partnership. A Texas corporation, Monsco, Inc. was formed to be the general partner, owning 1% of the Partnership. Mr. Monsivais was the sole shareholder of the corporation and a 49.5% limited partner. Ms. Monsivais was a 49.5% limited partner. In 1994 the Debtors allowed the charter of Monsco, Inc. to lapse and thus Mr. Monsivais became the general partner.

In 1886 the Texas Supreme Court determined that a homestead could be claimed in partnership property, stating: "In the absence of definitive legislation to guide us, and in obedience to the progressive tendency adverted to, we hold, against the preponderance of authority, but with the preponderance of reason, that a partner in a solvent firm may destinate his interest in partnership realty as a part of his homestead, and thus secure it from forced sale." ***Swearingen & Garrett* v. *Bassett***, 65 Tex. 267, 273 (1886).

The bankruptcy court questioned the applicability of this authority in light of the adoption of the Uniform Partnership Act, the Uniform Limited Partnership Act and their successors. The adoption of these acts would seem to make the Texas partnership law more like the Texas corporate law on the subject. Under Texas law, in some instances, property leased to a closely held corporation may be claimed as an exempt business homestead, but property owned by a corporation may not be claimed as an exempt homestead by a shareholder of the corporation.

However, a more basic factor directs the decision in this case. Under the older Texas partnership cases where the partner was claiming specific partnership property as exempt, the partner retained his interest in the partnership. That is not true in bankruptcy. The commencement of a bankruptcy case creates an estate composed of "all legal or equitable interests of the debtor in property as of the commencement of the case." Individual debtors are allowed to "exempt from property of the estate" specified property. Thus, upon filing bankruptcy, all property a debtor owns passes to the bankruptcy estate. Thereafter, the debtor is permitted to remove specified property from the estate as exempt.

When these Debtors filed their petition in bankruptcy, all of their property, including their interests in the Partnership, became part of the bankruptcy estate and therefore subject to the control of the Trustee. These Debtors did not claim their interests in the partnership as exempt; thus the partnership remains in the estate and subject to the control of the Trustee. The Debtors do not own the partnership and thus cannot claim an exemption in specific partnership property, even if this court should decide that the older Texas partnership cases applied in this matter. For these reasons, the Debtors' claim of a homestead exemption was denied.

! ***Womack-Humphreys Architects, Inc.* v. *Barrasso***, 83 S.W.3d 211 (Tex.App.—Eastland

2002, no pet.). Enzo and Susan got married. Before the marriage, Enzo bought a house in Plano and after the marriage, Susan moved into it, although Enzo has never lived in the house, residing instead in Italy. Womack obtained a judgment against Enzo and sought to execute against Enzo's interest in the house. Susan sought an injunction prohibiting Womack's foreclosure on the house because it was her homestead. The trial court granted the injunction.

On appeal, the Court held that the trial court abused its discretion in issuing the injunction. Enzo had no homestead interest in the property. The lawsuit giving rise to the judgment did not involve Susan, and the current execution was against Enzo's interest, not Susan's. Whoever took at the execution sale would take subject to her homestead interest. Therefore, the Court held, Susan would suffer no harm as a result of the execution sale of Enzo's property interest.

PART XII
LEASES

! ***911 Glen Oak Apartments* v. *Wallace***, 88 S.W.3d 281 (Tex.App.—Corpus Christi-Edinburg 2002, no pet.). Paragraph 2 of Wallace's HUD lease stated that "After the initial term ends, the Agreement will continue for successive terms of one month each unless automatically terminated as permitted by paragraph 23 of this Agreement." Paragraph 23, subsection b states: "Any termination of the Agreement by the Landlord must be carried out in accordance with HUD regulations, State and local law, and the terms of this Agreement." This subsection allowed the landlord to terminate the lease only for those reasons listed in the agreement. Relevant to the facts of this case these reasons are: (1) the tenant's material non-compliance with the lease terms; or (2) the tenant's material failure to carry out obligations under any state landlord and tenant act; or (3) criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants; or (4) "other good cause. Terminations for 'other good cause' may only be effective as of the end of any initial or successive term."

Glen Oak sent Wallace a notice that told her that Glen Oak would not renew her lease and that the lease was terminated effective October 31, 2000. The reason for termination was material non-compliance with the lease and related documents and HUD rules. The notice listed numerous incidents. The trial court determined that Glen Oaks did not prove either non-compliance with the lease or "good cause" for termination.

Here Paragraph 2 of the lease stated that when the initial lease term ended, the lease was to continue for successive terms of one month each unless automatically terminated as permitted by paragraph 23. By its terms the lease expired June 30, 1998; therefore, the lease continued for successive terms of one month each, and Wallace was a month-to-month tenant. The trial court determined that Glen Oak could not terminate the lease. Moreover, when deciding whether a landlord may terminate a lease involving federally subsidized housing as in this case, landlords may not refuse to renew a lease solely because the term has expired.

! ***Lunsford Consulting Group, Inc.* v. *Crescent Real Estate Funding VIII, L.P.***, 77 S.W.3d 473 (Tex.App.-Houston [1st Dist.] 2002, no pet.). The lease, entered into in September 1997, contained a provision waiving the landlord's obligation to mitigate damages. Kiser conceded he breached the Lease. To defeat summary judgment, Kiser raised the affirmative defense of mitigation.

A landlord's duty to mitigate damages is statutory. Texas Property Code § 91.006 provides:

> "(a) A landlord has a duty to mitigate damages if a tenant abandons the leased premises in violation of the lease.
>
> "(b) A provision of a lease that purports to waive a right or to exempt a landlord from a

liability or duty under this section is void."

The statute only applies, however, to leases entered into on or after September 1, 1997. Before September 1, 1997, a commercial landlord and tenant could contractually avoid the landlord's duty to mitigate damages after a lease default. ***Austin Hill Country Realty, Inc.* v. *Palisades Plaza, Inc.***, 948 S.W.2d 293, 299 (Tex.1997); ***Stucki* v. *Noble***, 963 S.W.2d 776, 781 (Tex.App.-San Antonio 1998, pet. denied). Kiser contended ***Austin Hill Country*** condemns lease clauses that eliminate a landlord's duty to mitigate damages as against public policy. The supreme court clearly envisioned, however, that a landlord and tenant could contractually avoid the landlord's duty to mitigate damages when it said: "We therefore recognize that a landlord has a duty to make reasonable efforts to mitigate damages when the tenant breaches the lease and abandons the property, unless the commercial landlord and tenant contract otherwise." In 1997, the legislature passed ' 91.006, effective September 1, 1997. Therefore, the court held that a lease entered into before September 1, 1997, requires a landlord to mitigate damages, unless the parties agree otherwise, but a lease entered into after September 1, 1997, requires a landlord to mitigate damages, and any clause to the contrary is void.

! ***Aguilar* v. *Weber***, 72 S.W.3d 729 (Tex.App.–Waco 2002, no pet.). A forcible detainer action must be based on a landlord-tenant relationship. Here, the parties' contract did not provide for a landlord-tenant relationship in the event of default. The contract also did not provide that the Aguilars would become tenants at sufferance or subject to a forcible detainer action upon default. Because the justice court and county court at law would be required to determine the issue of title to resolve the right to immediate possession, they lacked jurisdiction in this case.

PART XIII
TITLE INSURANCE

! ***Hispanic Housing & Education Corporation* v. *Chicago Title Insurance Company***, 97 S.W.3d 150 (Tex.App.-Houston [1st Dist.] 2002, pet. denied). HHEC entered into an earnest money to buy apartments from Appletree. HHEC intended to obtain financing through HUD. The contract provided for a 45-day inspection period, with closing to take place on or before 60 days after completion of the inspection period. The contract designated Chicago Title as the title company and required HHEC to deposit $25,000 as earnest money with Chicago Title. Under the provisions of the contract, and upon receipt of the earnest money, Chicago Title was to provide HHEC with a commitment for title insurance and legible copies of all instruments. HHEC deposited its earnest money with Chicago and received a commitment for title insurance from Chicago. Schedule C of the title insurance commitment listed one outstanding lien against the property, a mechanic's and materialmen's lien totaling $649.78.

HHEC negotiated with Appletree for two extensions of the closing date for the purchase of the property. In exchange for these extensions, HHEC deposited an additional $30,000 in earnest money.

Chicago Title later provided HHEC with a second commitment for title insurance. That commitment showed an abstract of judgment filed for record as an additional Schedule C item. In fact, this judgment was settled, although no release of judgment was filed at that time.

The deal fell through because HHEC's HUD funding had not been approved. Appletree subsequently demanded a $600,000 increase in the purchase price of the property in exchange for an additional extension. HHEC never purchased the apartment complex.

HHEC argued Chicago Title's failure to disclose the 1993 judgment against Appletree in the original title insurance commitment constituted an affirmative misrepresentation of the title to the property. It also argued that Chicago Title's inclusion of the same 1993 judgment as an exception in its revised title insurance commitment was also an affirmative misrepresentation of the title to the property, because that judgment had been paid in full or settled. HHEC contended it relied on Chicago's statements in the title insurance commitments as representations about the status of the title of the property, and that such statements were negligent or fraudulent misrepresentations.

Title insurance is regulated under the Title Insurance Act. With regard to title commitments, article 9.07B of the Title Insurance Act provides that a commitment for title insurance constitutes a statement of the terms and conditions on which the title insurance company is willing to issue its policy.

Texas courts have considered title insurance policies as contracts of indemnity. The only duty imposed on a title insurer is the duty to indemnify its insured against losses caused by defects in title. A title insurer owes no duty to point out any outstanding encumbrances. However, a title insurer may be held liable for an affirmative representation regarding title that is a producing cause of damages to an insured.

The court found that title insurance commitment forms reveals no affirmative representations concerning the status of the title to the property at issue. Rather, the items shown on Schedule C of the original and revised commitments are listed as possible exceptions to coverage under the title insurance policy to be issued. Further, a page of the commitment entitled "Texas Title Insurance Information" provides: "The Commitment is not an opinion or report of your title. It is a contract to issue you a policy subject to the Commitment's terms and requirements."

By the terms of its title insurance commitment, Chicago Title made no representations it was affirmatively undertaking a duty to report all outstanding encumbrances affecting title. As a matter of law, a title insurance commitment is not an abstract of title. Thus, Chicago Title made no negligent or fraudulent misrepresentations concerning the title to the property.

Next, HHEC argued that Chicago Title's failure to issue a policy of title insurance constituted a breach of contract. However, HHEC never closed on the property involved, never paid any insurance premiums to Chicago, and never purchased a title insurance policy from Chicago Title. The first page of title insurance commitments provides that the commitment ends 90 days from the effective date. HHEC did not purchase the property within 90 days after the commitment was issued, or by the final extended closing date, and did not pay any premiums to Chicago Title or purchase a policy of title insurance. Thus, the commitment expired and as a matter of law, no breach of contract occurred.

Finally, HHEC argues Chicago Title breached its duty of good faith and fair dealing by refusing to settle HHEC's claim against it. A cause of action for breach of the duty of good faith and fair dealing lies when it is alleged there is an unreasonable delay in payment, or a failure on the part of the insurer to determine whether there is any reasonable basis for denial or delay. HHEC did not purchase a title insurance policy from Chicago Title and was not its insured. Chicago Title was not an insurer of HHEC and thus incurred no duty of good faith and fair dealing.

! ***Stewart Title Guaranty Company* v. *Hadnot***, 101 S.W.3d 642 (Tex.App.-Houston [1st Dist.] 2003, pet. denied). When the home was finished in the spring of 1994, the Hadnots paid Gibraltar, obtained a mortgage loan, and bought a title insurance policy underwritten by Stewart Title. A few months later, the Hadnots received letters and mechanic's lien affidavits from various subcontractors and suppliers. In October 1994, the Hadnots submitted a proof of loss form to Stewart Title, who responded with a denial of the claim. The next month, the subcontractors sued the Hadnots to recover on their claims. The county court rendered judgment against the Hadnots in November 1995. The Hadnots appealed to this court.

While the appeal was pending, they wrote another letter to Stewart Title seeking reconsideration of the denial of coverage. Stewart Title maintained its position that the loss was excluded from coverage. After the court of appeals affirmed the trial court's judgment, counsel for the Hadnots wrote a third letter requesting coverage, which was again denied. Finally, in February 1998, the Hadnots completed another proof of loss form that set out the exact amounts owed under the judgment, the interest that had accrued, and attorney's fees. Stewart Title again declined to pay the claim.

In August 2001, the Hadnots filed suit against Stewart Title for breach of contract. Stewart Title sought summary judgment based on limitations and the contract exclusions they contend govern the claim. The Hadnots sought summary judgment on the breach of contract claim.

A suit for breach of contract must be brought within four years from the date the cause of action arose. Stewart Title relies on well-settled insurance case law to argue that the statute of limitations on the Hadnots' claim for breach of contract began to run on the date coverage was first denied--October 21, 1994--and expired four years later, two and one-half years before the Hadnots filed suit on August 15, 2001.

The Hadnots argue that limitations did not accrue until February 19, 1998--the date Stewart Title rejected the second proof of loss claim. They base this contention on two grounds. First, they argue that they sustained no "out of pocket" losses until their lawsuit was final, and that Stewart Title had no obligation to pay them until suit was final and the losses were sustained. Second, they contend that Stewart Title should be estopped from relying on limitations as an affirmative defense because the company misled them as to when limitations began to run.

The Hadnots rely on language from this Court's disposition of the underlying suit and on language in the title policy to argue that their first loss claim was submitted prematurely, thus they were unable to sue Stewart Title until the underlying suit was final. In the underlying suit, the court noted that a mechanic's lien is not created by agreement of the parties, nor is it self-enforcing; rather, a final judgment is required before a mechanic's lien is established or foreclosed. Although the Hadnots interpret this to mean that Stewart Title had no obligation to cover the loss until the mechanic's lien was established or foreclosed, they are incorrect. Generally, a cause of action for breach of an insurance contract accrues on the date coverage is denied. Here, the policy provides not only a duty to indemnify the policyholder for a covered loss, but also the duty to defend the policyholder against a covered claim and a limited obligation to indemnify the policyholder against anyone to whom the policyholder may transfer or sell the property.

The Hadnots also rely on language in a different provision in the policy to argue that a final judgment was a prerequisite to submitting a claim. They quote a sentence that says, "We do not have to pay your claim until your case is finally decided."

An insurance company decision to pay a claim is an issue separate from what event triggers the running of a statute of limitations. Nothing in the wording of this portion of the policy prevents the filing of a claim at any time. Nothing in this policy provision indicates that the statute of limitations cannot begin to run until an underlying suit is final. The Hadnots have not provided any authority for this contention, nor has our research revealed any.

As to estoppel, the Hadnots argue that Stewart Title should be estopped from relying on the affirmative defense of limitations because it misled them as to when limitations began to run. They assert that the final paragraph of the August 13, 1997, letter denying coverage for the third time deceived them as to how long they had to file suit. Stewart said: "You are hereby notified that you have the right to contest the Denial of the Claim by instituting litigation if you desire. There are deadlines or limitations that require such litigation to be commenced within 2 or 4 years from your receipt of this notice, depending upon the cause of action you assert. In the event an action is not commenced within these time deadlines your right to contest the action of the company may be lost. You should consult your attorney for more specific advice and information in this regard."

The problem with the Hadnots' argument is that an identical paragraph appeared at the end of the first denial letter sent on October 21, 1994, informing them of their right to contest the denial of the claim by filing suit within two or four years. This is evidently a "boilerplate" paragraph included whenever a proof of loss claim is filed. In addition, the Hadnots were represented by counsel for a number of years; thus, they cannot claim that their status as laypersons led to their misunderstanding.

! ***Sunnyside Feedyard, L.C.,* v. *Metropolitan Life Insurance Company***, 106 S.W.3d 169 (Tex.App.–Amarillo 2002, no pet.). Sunnyside sold its land and feedlot operation to Wacross. Part of the purchase was finance by Met Life. The balance was supposed to have been paid in cash at closing by delivering funds to the escrow agent. The deed signed and delivered by Sunnyside acknowledged payment by Met Life to Sunnyside of $1,740,500 as part of the purchase price. The deed also recited that (1) the payment to Sunnyside by Met Life was at the request of Wacross, (2) Wacross had concurrently executed a Vendor's Lien Note (note) in the amount of $1,740,500 to Metropolitan, (3) the note was secured by the Vendor's Lien and superior title which was retained, as well as a Deed of Trust and (4) Sunnyside acknowledged receiving, in addition to the $1,740,500 from Metropolitan, other good and valuable consideration "for which no lien, expressed or implied, is herein retained."

Unfortunately, the escrow agent recorded the deed and disbursed the loan without having collected the balance of the purchase price from Wacross. Sunnyside sued Met Life, arguing that Sunnyside had an implied equitable vendor's lien on the property that was superior to Met Life's lien. Met Life countered that, even if Sunnyside had an implied equitable lien, it was inferior to Met Life's express liens. Summary judgment was entered in favor of Met Life.

Sunnyside challenged the granting of summary judgment based on Met Life's written closing instructions to the escrow agent. Sunnyside asserted that the written instructions made the escrow agent Met Life's agent, that the escrow agent had "multiple fiduciary obligations" at the closing, and that Met Life was responsible for the escrow agent's actions and omissions in failing to ensure receipt of all Sunnyside's purchase price prior to disbursing funds and filing the deed of trust. Sunnyside cited ***Farm Credit Bank* v. *Ogden***, 886 S.W.2d 305 (Tex.App.-Houston [1st Dist] 1994, no writ) for the proposition that "imputable negligent conduct and/or inequitable conduct should subordinate a Deed of Trust lien to an equitable purchase money lien."

Sunnyside argued that (1) Met Life did not have clean hands, (2) Met Life should be bound under "respondent [sic] superior" and/or agency law for the escrow agent's actions, (3) the Escrow Agent violated multiple fiduciary obligations at the closing, (4) Met Life, through the Escrow Agent, breached its duty of good faith and fair dealing, (5) Met Life was negligent in relying on simply giving written instructions to the Escrow Agent and such negligence was a proximate cause of Sunnyside's money damages, and (6) a fiduciary relationship arose between Met Life and Sunnyside because Met Life paid part of the purchase price, making Met Life liable for the Escrow Agent's failure to make certain that all monies were correctly paid.

Thinking its arguments were superior enough to not require the citation of any authority, Sunnyside neglected to include any, other than ***Ogden.*** That was pretty much fatal to the case, since failure to adequately brief an issue before the court can amount to a waiver of that issue. However, the court went on to hold that Sunnyside failed to provide any evidence that Met Life's actions toward Sunnyside were inequitable. There was no evidence that Met Life had any part in choosing the Escrow Agent to close the transaction. Sunnyside neither maintained nor pointed to evidence that the Escrow Agent's actions in filing the warranty deed and deed of trust were outside of his obligations as closing agent, even assuming, arguendo, that such actions (1) were part of his duties as an agent of Met Life, and (2) did not accord with the wishes or instructions of either Sunnyside or Met Life. Assuming further, without deciding, that the Escrow Agent's actions in filing the documents in question and his knowledge of matters were imputable to Met Life, Sunnyside failed to provide evidence that the same knowledge and breaches were not imputed to Sunnyside via the Escrow Agent's unquestioned status as closing agent chosen by Sunnyside. Thus, regardless of whether the Escrow Agent was an agent of Met Life as contended by Sunnyside, such a situation would not evidence Met Life's actions being inequitable vis-a-vis Sunnyside.

PART XIV
TAXATION

! ***Compass Bank* v. *Bent Creek Investments, Inc.***, 52 S.W.3d 419 (Tex.App.–Fort Worth 2001, no pet.). Bent Creek sued Compass Bank for a breach of the warranty against encumbrances in a conveyance of property by general warranty deed, seeking to recover sums that it had paid to discharge agricultural rollback tax liens on the property. Summary judgment was granted in favor of Bent Creek, and Compass Bank appealed, contending that Bent Creek's summary judgment evidence failed to establish that a tax lien had attached to the property at the time of the execution and delivery of the warranty deed.

Land used for agricultural purposes is appraised for tax purposes as "qualified open-space land." Land designated for agricultural use is appraised at its value based on the land's capacity to produce agricultural products. When property appraised as open-space land ceases being used for agricultural purposes, a rollback tax is assessed in order to recapture the taxes the owner would have paid had the property been taxed at market value for each year covered by the rollback. The rollback tax equals the difference between the taxes the owner actually paid in the five years preceding the change in use and the taxes the owner would have paid on his property's market value. The property owner can trigger the rollback by ending agricultural operations or diverting the property to a non-agricultural use.

The rollback tax is a new, additional tax imposed by law, which attaches on the date the change of use occurs. The chief appraiser determines if and when the change of use occurs and must send the owner written notice of the determination to allow the owner an opportunity to protest that determination.

Compass Bank first contends that the trial court erred in granting summary judgment in favor of Bent Creek because Bent Creek failed to present legally sufficient evidence to establish, as a matter of law, that there was a rollback tax lien encumbering the Property at the time the Deed was executed and delivered on December 29, 1995 to Stephens, Bent Creek's predecessor in interest. Specifically, Compass Bank contends that, in order to establish as a matter of law that there was a lien on the Property at the time of the conveyance, Bent Creek had to present evidence that, on or prior to December 29, 1995, the chief appraiser of the Tarrant Appraisal District had determined that the use of the Property had changed so that it was no longer in "agricultural use," as that term is statutorily defined. Compass Bank further contends that, absent such a determination of change of use by the chief appraiser, the rollback tax could not attach to the Property. The Court agreed with Compass Bank.

First, absent a determination by the chief appraiser, no tax lien attaches. Tax Code § 23.55(e) states that "[a] determination that a change in use of the land has occurred is made by the chief appraiser[,]" which the Court believed clearly expresses that the rollback tax lien does not arise purely as a matter of law, but is dependent upon an official determination by the chief appraiser. The legislative history behind § 23.55 further supports this proposition. Before 1989, the statute contained no language expressing who made the determination that a change in use of the land occurred. The pre-1989 version simply stated that the "assessor shall prepare and deliver a statement for the additional taxes as soon as practicable after the change of use occurs." In 1989, however, the Legislature amended the statute to include the current version of § 23.55(e), stating that "[a] determination that a change in use of the land has occurred is made by the chief appraiser." The Texas Attorney General has adopted this precise interpretation that only the chief appraiser's determination that a change of use has occurred can trigger the imposition of the rollback tax lien. Op. Tex. Att'y Gen. No. LO-054 (1995).

Second, even assuming that Bent Creek's summary judgment evidence is sufficient to establish that a tax lien on the Property existed, it still fails to establish when the tax lien attached to the Property. Absent evidence of a determination by the chief appraiser as to *when* the tax lien attached to the Property, Bent Creek cannot be entitled to judgment as a matter of law that the lien encumbered the Property at the time of the December 29, 1995 conveyance to Stephens.

PART XV
CONSTRUCTION AND MECHANICS' LIENS

! ***Centex Homes* v. *Buecher***, 95 S.W.3d 266 (Tex. 2002). The opinion issued August 29, 2002 (2001 WL 1946128), was withdrawn and a virtually identical opinion of the Court substituted. The initial opinion was written by Phillips, and joined in by Owen, Baker, Hankinson, O'Neill, Jefferson, and Rodriguez, with Hecht and Enoch joining in dissent. The substitute opinion was, again, written by Phillips, and joined in by Hankinson, O'Neill, Jefferson, and Smith. Hecht and Owen filed new dissenting opinions, and Enoch merely noted his dissent. Schneider did not participate. Baker and Rodriguez had left the Court. The substitute opinion was issued on December 31, 2002, the day before the composition of the Court would again change.

This case has probably been rendered moot by the legislature's passage of HB 730. Among other things, this bill creates a new agency called the Texas Residential Construction Commission, which is charged with developing standards for construction performance. It also replaces the implied warranty of habitability with a statutory warranty.

A warranty of a home builder to construct a home in a good and workmanlike manner can be waived, if the agreement between the builder and the home-buyer if their agreement specifies enough detail as to the manner and quality of the desired construction. The implied warranty of good workmanship focuses on the builder's conduct, and through it, the common law recognizes that a new home builder should perform with at least a minimal standard of care. This implied warranty requires the builder to construct the home in the same manner as would a generally proficient builder engaged in similar work and performing under similar circumstances. The implied warranty of good workmanship serves as a "gap-filler" or "default warranty"; it applies unless and until the parties express a contrary intention.

The implied warranty of habitability, on the other hand, applies to the finished product rather than the builder's performance. The Court held that this warranty could not be waived. The implied warranty of habitability is more limited in scope, protecting the purchaser only from those defects that undermine the very basis of the bargain. It requires the builder to provide a house that is safe, sanitary, and otherwise fit for human habitation In other words, this implied warranty only protects new home buyers from conditions that are dangerous, hazardous, or detrimental to their life, health or safety. As compared to the warranty of good workmanship, the warranty of habitability represents a form of strict liability since the adequacy of the completed structure and not the manner of performance by the builder governs liability.

These two implied warranties parallel one another, and they may overlap. For example, a builder's inferior workmanship could compromise the structure and cause the home to be unsafe. But a builder's failure to perform good workmanship is actionable even when the outcome does not impair habitability. Similarly, a home could be well constructed and yet unfit for human habitation if, for example, a builder constructed a home with good workmanship but on a toxic waste site. Unfortunately, many courts, including this one, have not consistently recognized these distinctions.

Justice Hecht's dissent was vehement – possibly the reason Enoch didn't join as he did the first dissent. He began with the observation: "Here, now, is an example for appellate lawyers of the perils of moving for rehearing: it is unlikely when you do that things will get much better, and they can certainly get worse."

He assailed the Court for failing to address the following issues raised by Centex and the many amici briefs: (1) That the Court respond to their argument that its decision should not apply retroactively; (2) that the Court clarify whether the express warranty of workmanship most common in the industry can displace the implied warranty; (3) that the Court reconsider its general prohibition of disclaimers of the implied warranty of habitability; and (4) that the Court correct its factual misstatement that the express warranty Centex provided was for only one year, and says: "Here is the Court's ruling: re prospectivity, silence, meaning that Centex and the amici still do not deserve to have their argument addressed at all; re workmanship, a few words are changed in three sentences, and three parenthetical explanations of cited authorities are deleted (as if deleting the explanation deletes the authority), dispelling none of the confusion; re habitability, the scope of the implied warranty is changed at no one's request and without deliberation, generating new confusion; and re the factual error, it is corrected only in a begrudging way that remains misleading. Reading the arguments on rehearing and then the changes the Court has made in its opinion, one is given the distinct impression that the JUSTICES in today's majority share no fundamental agreement on what the law in this case is (or else they would explain themselves) and yet are determined to say what it is before the Court's membership changes again (tomorrow), resulting in an opinion that more resembles legislation than judicial decision-making: compromise cobbled together remotely responding to the parties' arguments but providing as little guidance as possible."

Several pages later, he concludes with an observation that "JUSTICE MAUZY famously ascribed the decision in Melody Home to the personal views of the MEMBERS of the Court. Ironically, in revisiting the subject of implied warranties in this case, the Court has little more on which to base its decision."

! ***CVN Group, Inc.* v. *Delgado***, 95 S.W.3d 234 (Tex. 2002). CVN furnished labor and materials under a written contract for construction of the Delgado's home. The contract provided that disputes between the parties were be decided by arbitration. Before construction was completed, the Delgados instructed CVN to cease work. CVN asserted that the Delgados had materially breached the contract and demanded arbitration.

An arbitrator was appointed. CVN requested damages, plus interest and attorney fees, and an award establishing a valid lien against the Delgados' homestead. The Delgados responded that they were not indebted to CVN and that its lien claims were invalid because CVN filed its lien affidavit late and did not record their contract. The arbitrator awarded CVN $110,925.10 and found valid statutory and constitutional mechanic's liens for the full award.

CVN applied to the district court to confirm the award and foreclose its mechanic's liens. The Delgados answered that the award should be vacated or modified because the award was manifestly unjust and constituted usury, there was no evidence presented by CVN that the lien satisfied the necessary constitutional and statutory provisions, and the lien granted to CVN in the arbitration award violated the Delgados' constitutional rights, exceeds the arbitrator's powers, and is unenforceable as an unconstitutional lien on the Delgados homestead.

The trial court reviewed the arbitration record and concluded that the award should be reduced and that CVN was not entitled to foreclose its mechanic's liens. Regarding CVN's lien claims, the court found that CVN failed to comply with applicable constitutional and statutory requirements for obtaining a lien on the Delgados' homestead, and therefore the arbitrator exceeded his authority in granting CVN an unconstitutional lien against the Delgados' homestead, and that the constitution and statutory protection afforded homesteads constitutes a fundamental public policy which allows this Court to vacate, modify, or correct an arbitration award which violates such fundamental public policy.

CVN appealed. The court of appeals reversed the trial court's reduction of the damages in the arbitration award but affirmed the trial court's refusal to foreclose CVN's mechanic's liens awarded by arbitration. Noting that the Legislature in the Property Code had imposed a number of requirements for perfecting mechanic's liens on homesteads, the appeals court reasoned that a mechanic's and materialman's lien may only be foreclosed on, and a sale ordered by, judicial action, and, in order to safeguard the homestead protection, and comply with the legislative intent expressed in the Property Code, a court should review the validity of the lien prior to ordering or denying foreclosure.

The Delgados argue that the "common law allows (and may even require) a court to overturn an arbitrator's award that is unconstitutional or otherwise violates public policy.

The Supreme Court agreed that an arbitration award cannot be set aside on public policy grounds except in an extraordinary case in which the award clearly violates carefully articulated, fundamental policy. The Delgados argue, and the court of appeals determined, that the policy at stake in the present case is protection of the homestead. The homestead is given special protections in the Texas Constitution and in the Property Code provisions dealing with mechanic's liens. An arbitration award made in direct contravention of those protections would violate public policy. Thus, had the arbitrator wholly disregarded the constitutional and statutory requirements for perfecting a mechanic's lien on a homestead and held that a lien should be valid without regard to such requirements, the award would contravene public policy.

The mechanic's liens awarded CVN do not contravene constitutional and statutory protections. The Delgados' arguments that CVN had failed to satisfy two of the requirements for perfecting its liens were disputed by CVN and were submitted to the arbitrator and decided on evidence and briefs. The Delgados argue that the arbitrator was wrong and the lower courts agreed, but an arbitrator's mere disagreement with a judge does not violate public policy. Nothing in the arbitration proceeding indicates that the arbitrator completely disregarded the requirements for perfecting mechanic's liens.

! ***Page* v. *Structural Wood Components, Inc*.**, 102 S.W.3d 720 (Tex. 2003). In 1997, Herman C. Page hired Mark Sepolio as general contractor on a $300,000 remodeling and expansion project for a building that Page owned in Houston. Sepolio in turn hired several subcontractors, including Structural Wood Components, to provide labor and materials. Structural Wood completed its portion of the job in mid-March, 1998. As work progressed on the construction, Page made periodic payments to Sepolio. Before the project was finished, however, Page terminated Sepolio's contract.

Page then hired six new contractors to finish the construction. Without hiring additional subcontractors, the new contractors completed the project on July 21, 1998.

Meanwhile, because Sepolio failed to pay in full for its labor and materials, Structural Wood filed an affidavit claiming a lien on the property on May 15, 1998, thirty-one days after Page terminated the contract with Sepolio. Structural Wood subsequently filed suit to foreclose on its lien. The trial court concluded that the work was completed on July 21, 1998, when the replacement contractors finished the project. The trial court held Sepolio and Page jointly and severally liable to Structural Wood for $11,861 in actual damages plus pre- and post-judgment interest and costs. The court further ordered foreclosure of the lien on Page's property and held Page individually liable for $4,000 in attorney's fees. Page appealed and the court of appeals reformed the judgment to eliminate the foreclosure order, holding that no evidence supported the trial court's finding that Page had failed to retain ten percent of the contract price as required by section 53.101 of the Property Code. However, based on Texas Property Code § 53.103, the court of appeals upheld the personal judgment against Page, concluding that Structural Wood would still be entitled to a lien on retained funds as long as the lien affidavit was timely filed. Like the trial court, the court of appeals interpreted the statutory definition of completion as the date when the additional contractors finished the project in July 1998.

The Texas Property Code § 53.101 requires owners to retain either "10 percent of the contract price of the work to the owner" or "10 percent of the value of the work ... using the contract price or, if there is no contract price, using the reasonable value of the completed work" for "30 days after the work is completed." A subcontractor or other claimant who wants to make a claim on that retainage must properly give notice and file an affidavit claiming a lien not later than the 30th day after the work is completed. The period during which a claimant can and must file a lien affidavit under section 53.103 is therefore the same period that an owner can and must hold retainage under section 53.101-- thirty days after the completion of work. It is consequently in the best interest of all construction participants to know when the thirty-day period terminates--the owner so that it can release the remaining funds, the original contractor so that it can budget for its final payment, and the claimant so that it can file the lien affidavit before that date.

The statutory definitions of "work" and "completion of an original contract" are set out in the Texas Property Code, which provides that " '[c]ompletion' of an original contract means the actual completion of the work, including any extras or change orders reasonably required or contemplated under the original contract...." and defines "work" as "any part of construction of repair performed under an original contract."

Page focuses on the phrase "under an original contract" and contends that work under an individual contract should be deemed completed when the contract is terminated or abandoned. He argues that just as a contract's retainage amount will change when the contract price is later modified, so too should the retainage period change when the work is modified. Page argues that the work contemplated under a contract is necessarily completed when a contract is terminated, as no additional work is contemplated under that contract.

Structural Wood focuses on the word "contemplated" and counters that because the statute requires "actual completion of the work ... reasonably required or contemplated under the original contract," a court should determine completion based on when all the work initially contemplated under the original contract is finished. In this case, the original contract contemplated the remodeling and expansion of the building, so the lien affidavit could be filed at any time within thirty days of the project's completion. In accepting this interpretation, the court of appeals noted that the statute did not "specify that the work only be done by the contractor who started it, as opposed to a substitute contractor." Structural Wood argues that the alternative interpretation urged by Page works a hardship on subcontractors, who must file their lien affidavits in a shorter time and who may not know if an owner has terminated the general contractor. Structural Wood posits that only its approach comports with the requirement that courts interpret the mechanic's lien statute liberally in order to protect lien claimants.

Although there are strong arguments supporting both interpretations, the supreme court concluded that the greater weight of authority supports Page's contention that the work ends when a contract is terminated. It relied on the history of the mechanic's lien statute to demonstrate the Legislature's intent to make retainage requirements dependent on individual contracts.

A previous version of the mechanic's lien statute phrased the retainage requirement as: ten per cent (10%) of the contract price to the owner ... of such work, or ten per cent (10%) of the value of same, measured by the proportion that the work done bears to the work to be done, using the contract price or, if none, the reasonable value of the completed work as a basis of computing value. In Hayek v. Western Steel Co., 478 S.W.2d 786, 792 (Tex.1972), the Court interpreted this language to mean that the owner must retain ten percent of the project's cost regardless of how many individual construction contracts were awarded. The Court's decision in Hayek focused on protecting lien claimants who might need to share in the retainage fund, based on the Legislature's "broad extension of protection and sharing in this fund to a new class of persons (materialmen)." However, the Legislature determined that Hayek placed too great a burden on owners and original contractors by creating an unreasonable retainage requirement on owners who enter into original contracts.

In response, the Legislature amended the statute at its next regular session. The bill analysis stated that the original intent of the legislation was for the 10% retainage requirement to apply to each individual contract, not the total cost of the job and that the bill's purpose was to carry out the intent of the original legislation which created the 10% retainage requirement by limiting the 10% to each individual contract. The new language added references to "an original contract" in the definitions of "work" and "contract price." "Work" was defined as "any construction or repair ... which is performed pursuant to an original contract," and "contract price" was defined as "the cost to the owner for any construction or repair ... which is performed pursuant to an original contract."

Focusing on the work initially contemplated may give a subcontractor more time to perfect a lien, but it may also greatly delay payment for contractors in general. Under Structural Wood's interpretation of the current statute, an owner who terminated a general contract before the construction project was completely finished would not have to release the ten percent retainage until thirty days after all the new contractors finished the job. Even if an economic downturn postponed completion for years, the terminated general contractor could not claim its final payment until the project was later completed. Such an indefinite delay in payment is exactly what the Legislature was trying to prevent when it added references to "an original contract" in its definitions of "contract price" and "work." Hardship caused by the possibility of such delay would not be limited just to general contractors, but would also affect lien claimants generally. A longer retainage period would give potential lien claimants a longer time in which to file their affidavits, but would also delay a lien claimant's ability to enforce a lien on the owner's retainage. A subcontractor who had finished its work early--for example, the subcontractor who laid the foundation for a building--would take little comfort in having an extended period in which to claim a lien on the owner's retained funds if those funds were retained for many months or years.

Nor did the court agree with Structural Wood's contention that subcontractors need to be able to rely on the work initially contemplated under the original contract in order to know when the thirty-day period begins to run. Under our interpretation, it is true that a subcontractor would not be able to rely on a visual examination of the worksite in order to determine whether the work has been completed. A subcontractor who viewed a half-completed project and assumed that the lien affidavit was not yet due would run the risk that the general contract had been terminated and that the affidavit deadline had passed. But mere visual examination may not be enough under either interpretation. Even under Structural Wood's interpretation a foundation subcontractor would likely have no way to know when an interior-painting subcontractor finished painting, and therefore would not know when the work contemplated by the general contract was finished. Recognizing this hardship, the supreme court suggested that prudent claimants should file their lien no later than 30 days after the date they have finished their own work on the job site.

! ***Page* v. *Marton Roofing, Inc.***, 102 S.W.3d 733 (Tex. 2003). This is a companion case to Page v. Structural Wood Components, Inc., and its facts are substantially similar. After Sepolio failed to pay Marton Roofing the full amount owned for its services, Marton Roofing sent Page a notice of its unpaid invoice on May 21, 1998, and filed a lien affidavit on June 15, 1998. Marton Roofing subsequently filed suit, arguing that Page was liable for the unpaid invoices under both the statutory retainage provision of Texas Property Code § 53.103 and the fund-trapping provision of Texas Property Code § 53.081. The lower courts held that Marton Roofing timely perfected a lien on Page's statutory retainage, as it filed its lien affidavit within thirty days of the time that the replacement contractors finished the project, and that Marton Roofing held a valid fund-trapping lien pursuant to Texas Property Code § 53.081.

Structural Wood Components rejects the lower courts' approach. In Structural Wood, the Supreme Court held that work must be defined in relation to a particular contract. In order to perfect a statutory retainage lien, therefore, a subcontractor must file its lien affidavit within thirty days of the time that the original contract is completed, terminated, or abandoned. Here, Marton Roofing filed its affidavit two months after the original contract was terminated, and consequently failed to perfect a lien on the statutory retainage.

Marton Roofing's attempt to perfect a fund-trapping lien fails for similar reasons. The statutory fund-trapping provision allows subcontractors to trap funds payable to the general contractor if the owner receives notice from the subcontractors that they are not being paid. An owner who receives such notice may withhold from payments to the original contractor an amount necessary to pay the claim for which he receives notice.

Marton Roofing argues that it is entitled to a lien on Page's property because Page paid money to the replacement contractors after receiving notice that Sepolio had failed to pay Marton Roofing. However, Page neither made nor owed any further payments to Sepolio at any time after Page received notice of Marton Roofing's claims. As with retainage liens, fund-trapping liens must be judged in relation to individual original contracts. Marton Roofing's notice authorized Page to withhold funds from Sepolio, because Sepolio was the original contractor that hired Marton Roofing. Page was not authorized to withhold funds from the replacement contractors who had no relationship to Marton Roofing. Consequently, Page cannot be liable under the fund-trapping statute for any funds paid to the replacement contractors.

PART XVI
BROKERS

! ***Miller* v. *Keyser***, 90 S.W.3d 712 (Tex. 2002). Keyser worked as a sales agent for The Homemaker. In 1992 and 1993, Keyser sold Homemaker homes built in Oakbrook, a new subdivision located in Pearland, Texas. Keyser showed prospective purchasers the different lots available, as well as how each home would fit on the lots. The lots were subject to a drainage easement held by the Brazoria County Drainage District on the back twenty-feet of each lot. Each purchaser knew about the drainage easement on his or her lot.

Several homeowners bought Homemaker homes from Keyser in the Oakbrook subdivision. The homeowners informed Keyser that they were interested in larger backyards, many wanting extra space for their children and pets. Keyser represented to the homeowners that The Homemaker lots were oversized and that they were in fact larger than the lots of a competing builder in the subdivision. Keyser told the homeowners that even with the existence of the easement, the lots could be fenced along the back of the property line. The homeowners paid a premium for these "oversized" lots.

In 1994, after the homeowners built their homes, some received a letter from the Brazoria County Drainage District telling them that all fences in the easement must be removed at the owners' expense. As a result, the homeowners sued the The Homemaker, and Barry Keyser, for common-law fraud and misrepresentations in violation of the DTPA. The homeowners claim that Keyser misrepresented the size of the lots and where the fencing could be placed at the back of the lots. The trial court rendered judgment against Keyser.

Keyser appealed, arguing that as a matter of law, under the DTPA, a corporate agent cannot be held personally liable for company misrepresentations. The court of appeals reasoned that, in light of the jury findings that Keyser did not act fraudulently and acted only in the scope of his employment, the trial court erred in rendering a judgment against him.

Under the DTPA, a consumer may bring suit against any person whose false, misleading, or deceptive acts, or other practices enumerated in the Act are the producing cause of the consumer's harm. A consumer may also bring suit for "any unconscionable action or course of action by any person." The DTPA broadly defines "person" as "an individual, partnership, corporation, association, or other group, however organized." The DTPA is a consumer protection statute, and according to the Legislature, is to be construed liberally to promote its central purpose.

Keyser personally participated in the sale of every home sold to the homeowners. He personally made the representations about the size of the lot and the location of the fence. He is the only person with whom the homeowners had any contact. Based on the plain language of the statute, Keyser is liable for his own DTPA violations.

Keyser argues that he should not be held liable because he did not, in fact, know that his representations were false. But a DTPA claim does not require that the consumer prove the employee acted knowingly or intentionally. The DTPA requires that the consumer show that the misrepresentation was false and that the false misrepresentation was the producing cause of the consumer's damages. A consumer is not required to prove intent to make a misrepresentation to recover under the DTPA. The DTPA was enacted to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide consumers with a means to redress deceptive practices without the burden of proof and numerous defenses encountered in a common law fraud or breach of warranty suit. Misrepresentations that may not be actionable under common law fraud may be actionable under the DTPA. Thus, Keyser may be held liable under the DTPA even if he did not know that his representations were false or even if he did not intend to deceive anyone.

Keyser further argues that he is not a "person" subject to the DTPA because at all times, he was acting solely on behalf of The Homemaker. He contends that the statute should not be read to allow a consumer to sue any individual person absent a showing that this individual acted outside the scope of his employment or that this individual acted knowingly. The supreme court concluded that when corporate officers make affirmative misrepresentations in connection with the sale of a home, the agents are personally liable under the DTPA even though they were acting on behalf of the corporation. Liability attaches because the officers themselves made the misrepresentations.

Here, the jury expressly found that Keyser personally violated the DTPA and that his false, misleading, and deceptive actions were the producing cause of the homeowners' harm. The evidence supports that finding. Keyser showed the homeowners the plats of land, he showed them the size of the lots, he told them where their fences could be located, and he was paid commissions as a result of his sales. The plain language of the DTPA grants the homeowners a cause of action against "any person" who violates the Act. Even though the jury found that Keyser acted solely within the course and scope of his employment as an agent for The Homemaker, this finding does not excuse Keyser from DTPA liability.

PART XVII
MISCELLANEOUS

! ***Lot 39, Section C, Northern Hills Subdivision, Grayson County, Texas* v. *State of Texas***, 85 S.W.3d 429 (Tex.App.–Eastland 2002, pet. denied). Helm was convicted of running a methamphetamine lab out of his house. The State brought an action for forfeiture of the house under Article 59 of the Code of Criminal Procedure. Helm claimed that his homestead exemption protected the property from forfeiture.

The constitutional and statutory provisions relating to homestead both provide that a homestead is exempt from seizure for the claims of creditors. Although the issue in this case appears to be one of first impression in Texas, there are a few published opinions from Texas courts that indicate a homestead was forfeited pursuant to Chapter 59 because of drug-related activity. None of these cases, however, dealt with the homestead exemption. Nonetheless, there is one Texas case in which the court addressed the homestead exemption and held that it did not protect a homestead from public nuisance laws. ***1018-3rd St.* v. *State***, 331 S.W.2d 450 (Tex.Civ.App.-Amarillo 1959, no writ). In ***1018-3rd St.***, the court upheld the closing and padlocking of a house for a period of one year upon the finding that the house, which was the defendant's homestead, had been used in violation of the Texas liquor laws.

The issue has been addressed in other states with similar homestead exemptions, and the outcomes are varied. Courts in Florida, Illinois, Iowa, Kansas, and Oklahoma have held that homesteads are protected from seizures and forfeitures based upon the occurrence of criminal offenses. Courts in Arizona, Colorado, and Washington have held that their respective homestead exemption applies to protect homesteads from forced sales arising from the owner's debts but does not apply to protect homesteads from forfeitures brought about by the owner's use of the property to conduct criminal activity.

The Court found the reasoning of the courts in Arizona, Colorado, and Washington to be persuasive. Helm's reliance on the cases from Florida, Illinois, Iowa, and Kansas was misplaced because the homestead provisions in those states contain broader exemption language than the Texas provisions and are, therefore, distinguishable. In Florida, homesteads are exempt from forced sale under process of any court. In Illinois, homesteads are exempt from attachment or judgment for the payment of debts or other purposes. In Iowa, homesteads are exempt from judicial sale unless there is a special statutory declaration to the contrary. In Kansas, homesteads are exempt from forced sale under any process of law. In none of those states is the homestead exemption limited to seizures based upon the owner's debts. The Court did note, however, that the homestead exemption in Oklahoma is limited to seizures based upon the owner's debts and that the homestead provision is not distinguishable from ours. However, it disagreed with the Oklahoma court's holding in which the court disregarded the limiting language of the homestead provision and held that the homestead was protected and that the homestead exemption was not limited to forced sales for the payment of debts.

Although conscious that the homestead exemption is to be construed liberally and that forfeiture statutes are to be strictly construed in a manner favorable to the person whose property is being seized, the Court did not believe the homestead exemption should be construed to protect Helm's homestead from foreclosure in this case. The Texas constitutional and statutory provisions pertaining to the homestead exemption specifically indicate that homesteads may not be seized or subjected to forced sales for the payment of the owner's debts or the claims of creditors. The forfeiture of real property based upon the owner's use of that property to conduct criminal activity, such as the manufacture or delivery of methamphetamine, is not a forfeiture for the payment of the owner's debts or the claims of creditors.

The court in ***1018-3rd St.*** recognized that the Texas homestead exemption was created as a direct result of the loss to creditors of numerous homestead farms during the depression. The court stated that the purpose of the homestead exemption was to preserve the integrity of the family and to provide the debtor with a home and a means to support his family.

> "Neither in this history, nor in any reliable Texas case book authority, do we find even a suggestion that our forebearers conceived of a homestead exemption for the purpose of erecting a barrier behind which criminals might ply their trades while thumbing their noses at law enforcement officers diligently and sincerely seeking to enforce prohibitions residents of the area had expressed a desire for at the ballot box."

! ***Alcorn* v. *Washington Mutual Bank, F.A.***, 111 SW3d 264 (Tex.App.—Texarkana 2003). Alcorn and Allen decided to take out a home equity loan to obtain money for certain expenditures, including some repairs on their house. They negotiated the loan with Long Beach Mortgage Company. They executed a Texas Home Equity Note which provided that they borrowed $80,000.00 from Long Beach Mortgage Company and promised to repay the loan in certain installments with interest. On the same day, both Alcorn and Allen signed a security agreement granting Long Beach Mortgage Company a security interest in their house to secure the note for the $80,000.00 loan. Alcorn and Allen received the amount of the loan, less certain loan expenses, in the form of a check. They cashed the check and received the proceeds.

Alcorn and Allen paid the note installments for some time, but eventually stopped making the payments because they came to believe that, legally, the home equity note did not represent a loan from Long Beach Mortgage Company to them, but instead represented money that was "created" for their own account by their signatures, so the money represented by the note was theirs from the beginning and Long Beach Mortgage Company owed the money to them instead of their owing it to the mortgage company. Alcorn and Allen took the position that, when they executed and delivered the home equity note to Long Beach Mortgage Company, the note did not evidence a debt from them to the mortgage company, but instead "created" money belonging to them that they do not owe to anyone. This is a concept that was apparently based on Alcorn and Allen's misinterpretation of some information they discovered in a publication issued by the Federal Reserve System.

They lost.