CASE LAW UPDATE

Presented by

DAVID A. WEATHERBIE
Carrie, Cramer & Weatherbie, LLP
Dallas, Texas

DAVID A. WEATHERBIE
CARRIE, CRAMER & WEATHERBIE, L.L.P.

EDUCATION:

- M B.A., Southern Methodist University - 1971
- M Juris Doctor, *cum laude*, Southern Methodist University - 1976
- M Order of the Coif
- M Research Editor, Southwestern Law Journal

PROFESSIONAL ACTIVITIES:

- M Licensed to practice in the State of Texas
- M Partner/Shareholder - Jenkens & Gilchrist, 1976 - 1988
- M Partner - Cohan Simpson Cowlishaw & Wulff, 1988 - 1996
- M Partner - Carrie, Cramer & Weatherbie, L.L.P., Dallas Texas 1996 to present
- M Council Member – Real Estate, Probate & Trust Law Section of the State Bar

LAW RELATED PUBLICATIONS, ACADEMIC APPOINTMENTS AND HONORS:

- M Adjunct Professor of Law, Southern Methodist University School of Law / Real Estate Transactions - 1986 to 1995
- M Council Member, Real Estate, Probate & Trust Section, State Bar of Texas
- M Author B *Weatherbie=s Texas Real Estate Law Digest* (James Publishing, 1999)
- M Author/Speaker for the State Bar of Texas, Advanced Real Estate Law Course - 1987 to present
- M Author/Speaker for the Houston Bar Association - 1987 to present
- M Author/Speaker for the Dallas Bar Association - 1990 to present
- M Author/Speaker for the Travis County Bar Association - 1991 to present
- M Author/Speaker for the University of Texas at Austin - Mortgage Lending Institute - 1992 to present
- M Author/Speaker for Texas Land Title Institute - 1992 to present
- M Author/Speaker for Southern Methodist University - Leases in Depth - 1992 to 2000
- M Author/Speaker for Southern Methodist University - Transactions in Depth - 1992 to 2000
- M Author/Speaker for the State Bar of Texas, Advanced Real Estate Drafting Course - 1996
- M Panel Member for State Bar of Texas, Advanced Real Estate Transactions Course B 1997
- M Course Director for the State Bar of Texas, Advanced Real Estate Law Course – 1995
- M Course Director for the University of Texas at Austin - Mortgage Lending Institute - 2002
- M Author of "Annual Survey of Texas Law -- Real Estate," 51 SMU L. Rev. 1321 (1998) and 52 SMU L. Rev. 1393 (1999).
- M Author/Speaker for the Houston Real Estate Law Council for 1998 to present

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DAVID A. WEATHERBIE
CARRIE, CRAMER & WEATHERBIE, L.L.P.
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.

"Prudential" – ***Prudential Insurance Co. of America* v. *Jefferson Associates***, 896 S.W.2d 156 (Tex.1995), the leading case regarding "as-is" provisions in Texas.

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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CARRIE, CRAMER & WEATHERBIE
DALLAS, TEXAS

PART I
MORTGAGES AND FORECLOSURES

Olivares* v. *Nix Trust, 126 S.W.3d 242 (Tex.App.—San Antonio 2003, pet. denied). BNT obtained a judgment against Olivares in November 1975. Eight days after the judgment was rendered, but several months before it was abstracted and the abstract recorded, non-judicial foreclosure sales were held for three tracts of land that were owned by Olivares. The deeds of trust covering two the three tracts had not been recorded. The appointment of a substitute trustee was also not recorded. Warner, who was the assignee of the deeds of trust (such assignment also not being recorded), was the high bidder at the foreclosure sale and he obtained substitute trustee's deeds that were filed a few months later. Warner then conveyed the lots to Olivares's wife Nancy. Her deed was recorded more than two years later.

Between the time the lots were conveyed to Nancy and her recording of her deed, the City of San Antonio condemned the three lots. The value of the lots was placed with the court. Olivares, Nancy, and Warner's estate all appeared to claim their share as owners or claimants. Seven lienholders also showed up. BNT also intervened claiming the proceeds because of its judgment lien. The case then sat dormant for twenty years until finally Nancy showed up again to claim her share of the proceeds. The trial court ordered payment to BNT based on its judgment lien.

Olivares and Nancy claimed that Olivares didn't own the property at the time the BNT judgment was abstracted and, therefore, the judgment lien did not attach to the property. This contention was based on the trustee's deeds acquired by Warner at the foreclosure sale which were obtained and recorded before the abstract. However, noted the court, there were no deeds of trust or appointments of substitute trustees on record to provide authority for the execution of the substitute trustee deeds.

A deed of trust does not pass legal title, but only equitable title. In a deed of trust, the mortgagor conveys only the equitable title and retains the legal title, whereas a sale transfers legal title. In executing the foreclosure deed, the trustee merely effects the transfer of legal title from the debtor to the foreclosure purchaser. However, the power of a trustee to sell the property is derived solely from the deed of trust and can only be exercised in strict compliance with the note and conditions of sale. The trustee must pursue the terms of the trust instrument, the provisions of law relative to the sale, and the details prescribed as to the manner of the sale. In addition, a purchaser at a foreclosure sale obtains only that title which the trustee has authority to convey. Where no deed of trust is recorded, the scope and existence of the trustee's purported authority of sale is unknown, and a subsequent purchaser is unable to determine what title, if any, the trustee has authority to convey. The same is true where the substitution of a trustee is unrecorded. Thus, a gap in the chain of title arises when the trustee executes a conveyance without recorded authority to do so.

Here, the purported deeds of trust securing a lien in favor of Warner for two of the three tracts were not recorded nor were they produced at trial. Furthermore, the purported transfer of the deeds of trust to Warner was neither recorded nor produced at trial. Because the three substitute trustee deeds were unsupported, legal title to the three tracts did not pass to Warner. Olivares held legal title to the three tracts both when BNT recorded its abstract of judgment and when the land was condemned.

Bennett* v. *Bank United, 114 S.W.3d 75 (Tex.App.—San Antonio 2003, no pet.).

Bennett's mortgage required her to pay the premiums for private mortgage insurance. There were no provisions for eliminating the requirement that she provide the insurance, but after twenty years of paying the premiums, noting that the loan to value ration was well below the 80% threshold usually imposed as a condition to not requiring the insurance, she asked to be relieved of the obligation. The lender declined to do so. Bennett sued under the DTPA.

After a lengthy discussion, the court held that Bennett was a "consumer" under the DTPA even though all she got from the lender was the loan. Bennett executed a note and deed of trust incidental to the purchase, and Weyerhaeuser, the original lender, required PMI as a condition of the financing. Although the loan by itself was not a purchase of goods or services, it was incidental to the purchase of the residence--a good. The court then turned to the question of whether the lender's refusal to eliminate the PMI requirement was an unconscionable course of conduct.

The DTPA defines an "unconscionable action or course of action" as one which "to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree." To prove an unconscionable action or course of action, Bennett would have to show that the lender took advantage of her lack of knowledge and that the resulting unfairness was glaringly noticeable, flagrant, complete and unmitigated.

The court held that the bank's action was not unconscionable. First, the deed of trust executed by Bennett provides for PMI premium reimbursement "until the Note is paid in full." Second, although the servicer expressed that it had a policy that may permit the canceling of a mortgagor's requirement to pay the PMI premiums, this policy had no effect on Bennett because it is undisputed that the holder of the had a policy to the contrary. Finally, the practice of requiring a mortgagor to pay PMI premiums for the lender has long been used in the mortgage industry, and both Fannie Mae and Freddie Mac require PMI when the loan-to-value ratio is greater than eighty percent before they will purchase a mortgage on the secondary market.

In re *Wells Fargo Bank Minnesota N.A.*, 115 S.W.3d 600 (Tex.App.–Houston [14th Dist.] 2003, no pet.). In a case of first impression, the Houston Court of Appeals has held that jury waivers contained in loan documents are enforceable in Texas. Although no Texas court has directly addressed the enforceability of contractual jury waivers, Texas allows parties to contractually waive the right to a jury trial by enforcing arbitration agreements. It is clear that when a party agrees to have a dispute resolved through arbitration rather than judicial proceeding, that party has waived its right to a jury trial. Moreover, Texas has a strong commitment to the principle of contractual freedom and its indispensable partner--contract enforcement.

The borrowers and guarantors contended that the jury waivers in question were not enforceable because, among other things, they were not entered into knowingly and voluntarily. However, the jury waivers explicitly state they were given "knowingly and voluntarily" by the maker and guarantor. They further state the payee is authorized to file a copy of this paragraph in any proceeding as conclusive evidence of this waiver. Because the banks introduced this conclusive evidence that the waivers were knowing and voluntary, the burden shifted to the borrowers and guarantors to show they were not knowing and voluntary. The borrowers and guarantors suggested two reasons the waivers were not knowing and voluntary. First, they claimed there was no meaningful negotiation over the waivers because the note and guaranty were standard forms submitted to them on a "take it or leave it" basis. However, they presented no evidence in the court below supporting this claim.

The borrowers and guarantors also contended the jury waivers were not knowing and voluntary because they could not know what claims might accrue in the future. Again, the arbitration analogy refutes this contention. A

party that contractually agrees to arbitration, thereby waiving more than just the right to a jury trial, does not necessarily know every claim that might accrue in the future; yet, arbitration agreements are enforceable. Moreover, because the waivers provide they cover "each instance and each issue as to which the right to a trial by jury would otherwise accrue," they clearly encompassed any conceivable future claims.

Martin* v. *Cadle Company, 133 S.W.3d 897 (Tex.App.—Dallas 2004, pet. pending). Two judgment liens against Jack Junior were junior to a mortgage on some property in Dallas owned one-half by Jack Junior and Jack Senior. The bank executed and recorded a release of its mortgage lien, but two weeks later a notice of substitute trustee's sale was sent out (stating that Evelyn Johnstone was the holder of the note and lien) and subsequently a foreclosure sale was held. Pratt Senior bought the property at the foreclosure sale. About ten days after the foreclosure sale, the bank executed a transfer of lien in favor of Evelyn Johnstone, in which it said that the transfer was given "in lieu and substitution of" the release of lien. Later, Pratt Senior sold the property to Martin. Pratt Senior then sold the property to Martin. In the meantime, Cadle had acquired the judgment liens and a little more than four years after the foreclosure sale, Cadle sued for a declaratory judgment that its judgment liens were valid, subsisting, and superior to all other liens against the property and seeking to foreclose on the property. According to Cadle, its judgment liens remained attached to the property throughout the later transfers or attempted transfers of ownership and Cadle had a right to foreclose on the property to satisfy the liens.

Martin defended asserting various affirmative defenses including three and four-year statutes of limitations. The Martins also filed a counterclaim for a declaratory judgment to remove the cloud from their title to the property. In addition, they argued that the recorded release of lien was a mistake and was corrected by the "transfer of lien" to Evelyn Johnstone. According to the Martins, Johnstone's foreclosure on the property cut off the judgment liens and clear title passed to Pratt Senior and, subsequently, to the Martins. They further argued that even if they did not have clear legal title, foreclosure of the judgment liens on the property was barred by the statute of limitations.

The central issue for the court of appeals was what effect, if any, the bank's purported transfer of lien had on its earlier release of lien. The Martins contended the bank had an absolute right to correct its "mistaken" release of lien and, at the very least, the summary judgment evidence, including the transfer of lien, created a fact issue about the validity of the release. Cadle responded that when the bank released its lien on the property, the judgment liens became superior to all other liens and neither the bank's later transfer of the released lien nor the purported foreclosure of the lien by Johnstone affected the superior status of the judgment liens.

The Martins rely on the Texas Supreme Court's opinion in ***First State Bank of Amarillo* v. *Jones***, 183 S.W. 874, 107 Tex. 623 (Tex.1916), to support their contention that the bank had a right to rescind its release of lien and replace it with a transfer of lien. In Jones, the court held that if a release of lien was occasioned by a mutual mistake, the lien holder has an equitable right to its correction. It is clear, therefore, that an erroneous release of lien can be corrected. However, it is also clear in this case, however, that the bank never legally effected such a correction nor was an equitable right to a correction shown.

In Jones, the mistake was obvious on the face of the document – it was supposed to have been a partial release, but it mistakenly described all of the property. In this case, there was no mistake apparent on the face of the release. The document recites the note was paid in full and releases all the property subject to the deed of trust. There is no discrepancy in the release that would put one on any inquiry notice of a possible error.

Furthermore, what the Martins were seeking was not a correction of the release, but its rescission. Rescission is an equitable remedy

that operates to extinguish a contract that is legally valid but must be set aside due to fraud, mistake, or for some other reason to avoid unjust enrichment. The Martins claimed the bank's attempted substitution of a transfer of lien for the release of lien was clear and unambiguous evidence of a mistake in the release. But the attempted transfer is no evidence that the parties to the release were mistaken about the content or the effect of the release "at the time it was executed." At most, it shows that approximately two months after executing the release, the bank wished to set aside the release and transfer the lien to Johnstone. Absent a showing that the bank was equitably entitled to rescind the release, however, the later transfer of the released lien is without effect.

The Martins next argue that Johnstone acquired equitable title to the property superior to the judgment liens when she paid off note. According to the Martins, this equitable title was then passed on to Pratt Senior at the foreclosure sale and the foreclosure resulted in the extinguishment of the judgment liens. A fundamental problem with this argument is that there is no evidence in the record showing Johnstone paid the debt entitling her to equitable title in the property. The release states only that the bank acknowledges full payment of the note and releases the lien on the property. There is no mention of Johnstone. The purported transfer states that in exchange for "good and valuable consideration" the bank agrees to transfer the note and all attendant liens to Johnstone. The transfer makes no mention of what consideration was paid, who paid it, or when it was paid.

The Martins alternatively claim the trial court erred in granting judgment in favor of Cadle because foreclosure of the judgment liens is barred by both the three and four-year statutes of limitations. The three-year statute of limitations relied upon by the Martins is the statute governing adverse possession under title or color of title. Texas Civil Practice & Remedies Code § 16.024. The court held that the Martins reliance on this statute is misplaced because they can claim neither title nor color of title to the property. Because the lien was released, there was no lien to foreclose, and the substitute trustee had no power to transfer title to the property to Pratt Senior. The Martins, therefore, could not have obtained title or color of title from Pratt Senior. The Martins contend that even if they did not acquire legal title to the property from Pratt Senior, they acquired equitable title as bona fide purchasers. However, in this case, the Martins cannot be considered innocent purchasers without notice because, although they submitted affidavit testimony stating they purchased the property in good faith, they are charged with knowledge of all facts appearing in the chain of title to the property. Again, the release of lien prior to foreclosure got in the way of their argument.

The Martins also argued that the four-year statute of limitations applies in this case because the superiority of the judgment liens depends on the wrongfulness of the foreclosure sale instituted by Johnstone. Wrongful foreclosure actions are governed by the four-year limitations statute. Contrary to the Martin's contention, however, the court held that the superiority of the judgment liens is dependent solely upon the validity of the release. Cadle never sought to directly challenge the validity of the foreclosure, but instead argued that the foreclosure conducted after the vendor's lien was released had no effect on the superiority of their judgment liens.

Powell* v. *Stacy, 117 S.W.3d 70 (Tex.App.—Ft. Worth 2003, no pet.). Powell and Milton owned a used car lot and had an adjacent lot where Powell lived in a trailer. They had mortgaged the property. Milton's parents bought the note and deed of trust. In January 2000, Powell and Milton missed a payment on the note. Accordingly, the Stacys' attorney sent a notice of delinquency to Powell and Milton. That delinquency was subsequently cured. On May 15, 2000, the Stacys' attorney sent a notice of acceleration of all amounts due on the note, which the Stacys later withdrew because their attorney discovered Powell was living on the property, thus requiring them to send a homestead notice. On May 31, 2000, the Stacys' attorney sent Powell and Milton a letter indicating that the note was again past due and stating that the entire unpaid principal balance of

the note, plus all accrued and earned interest, would become due if the past due amounts were not paid in full by June 20, 2000. The letter also indicated that payment arrangements could be made through the attorney. The letter contained a statement of principal owed on the note that was more than the amount owed and an interest rate in excess of the rate set forth in the note. Powell hired an attorney, who wrote the Stacys' counsel a letter asking for clarification of the amount owed on the note. The Stacys did not respond, and neither Powell nor Milton made any further payments on the note.

The Stacys did not accelerate the debt in June because they learned Powell had a potential buyer for the property. They instructed their attorney to wait on acceleration and foreclosure to see if Powell and Milton could sell the property. However, in November 2000, the Stacys instructed their attorney to send notice of acceleration and foreclosure on the debt.

On November 6, 2000, the Stacys' attorney sent a notice of acceleration and foreclosure to Powell and Milton. The notice again contained a statement of principal owed that was more than the amount owed and usurious interest in excess of what was actually owed. Powell did not receive the notice. He was no longer living on the property by then, but he never gave the Stacys a change of address, and the address used was the last known address they had for him. The Stacys did not know until November 11 or 12 that Powell had been living elsewhere. In addition, Powell was in jail from October 2000 to January 2001.

The Stacys purchased the property at the foreclosure sale on December 5, 2000.

Powell contends that the trial court erred in concluding that "[a]ll required notices to ... Powell were given in accordance with law" and that Powell "was given a required statutory notice of default and opportunity to cure." The May 31, 2000 letter was sent by certified mail and signed for by Powell. The letter indicated that Powell and Milton had twenty-one days from the date of the letter in which to cure the default. Notice of acceleration and foreclosure was not given until November 6, 2000. Thus, Powell and Milton had one hundred fifty-nine days in which to cure any default before the entire amount of the debt became due.

Powell contends that he was denied an opportunity to cure because the May 31 letter specifically stated that payment arrangements could be made by contacting the Stacys' attorney, and the Stacys failed to adhere to this "express representation" by not responding to his attorney's attempts to clarify the total amount of outstanding principal due on the note. However, Powell admitted that he did not sign any checks for payments on the note after April 2000. Additionally, the letter from Powell's attorney inquired only about the payoff amount of the loan and the total amount of principal the Stacys claimed was due; it did not dispute that Powell and Milton were in default. Powell and Milton had the opportunity to cure the default before acceleration of the debt by paying the installment payments due from April to November 2000. The fact that there may have been a dispute about the total amount of outstanding principal and interest due on the note before acceleration did not excuse Powell and Milton from making payments on the note from April to November 2000.

Powell also claims that the Stacys owed him a duty of good faith and fair dealing and that they breached that duty by (a) sending a default notice that listed an excessive amount of principal and usurious amount of interest and (b) not responding to his requests to clarify the amounts due under the note. Powell claims that because these actions were taken in connection with the note rather than the deed of trust, the good faith standard set forth in Section 1.28 of the Texas Uniform Commercial Code applies.

The court didn't decide whether the UCC applied or not, since there was no evidence that, even if there were a duty of good faith and fair dealing, the Stacys had breached it. The note Powell and Milton signed waived the right to notice of intent to accelerate and notice of acceleration; therefore, they were not entitled to notice. Thus, the only required notice was the Property Code § 51.002 notice, which was

necessary because Powell was using the property as his residence. The May 31 letter contained all the information required by section 51.002, which does not require the note holder to include the amount that would be due after acceleration. Furthermore, the only evidence explaining why the incorrect amount was included in the letter is that the Stacys' attorney made a mistake in calculating the total principal and interest due on the note; there is no evidence that the Stacys or their attorney acted dishonestly.

Powell further contends that the notices were not given in accordance with the statute because the substitute trustee violated his duty of fairness and impartiality. When exercising a power in a deed of trust, the trustee becomes a special agent for both parties, and he must act with absolute impartiality and with fairness to all concerned in conducting a foreclosure. The trustee must conduct the foreclosure sale fairly and not discourage bidding by acts or statements made before or during the sale; however, the trustee has no duty to take affirmative actions beyond that required by statute or the deed of trust to ensure a fair sale. A trustee's duties are fulfilled by strictly complying with the terms of the deed of trust. In this case, the substitute trustee abided by the terms of the deed of trust and section 51.002. The fact that he was also representing the Stacys does not show that he breached his duty of fairness and impartiality.

Next, according to Powell, the Stacys' bid was far less than the fair market value of the property. Powell claims that this inadequacy of consideration, coupled with irregularities in the sale, rendered the foreclosure void. Powell contends the sale was irregular because (1) he did not receive adequate notice of the sale nor an opportunity to cure, (2) the Stacys did not send his attorney a copy of the notice of foreclosure, and (3) the notice of foreclosure contained a statement of excessive principal and usurious interest.

Inadequacy of consideration does not render a foreclosure sale void if the sale was legally and fairly made. There must also be evidence of some irregularity, though slight, that caused or contributed to the sale for a grossly inadequate price. The trial court found that the Stacys bid $55,000 for the property, but within the six months prior to the sale, someone had offered to purchase the property for $200,000. However, the trial court did not conclude that the consideration paid by the Stacys was inadequate.

The threshold issue is whether there were any irregularities in the sale and if so, whether there is proof that those irregularities caused a sale at a grossly inadequate price. The first argument Powell came up with that the court had not already shot down was that the Stacys had failed to deliver a copy of the foreclosure notice to his lawyer. However, there is no duty to deliver a notice to the debtor's lawyer, so that didn't work. The second was that the incorrect statement of principal and interest contained in the notice of foreclosure is an irregularity that caused the property to be sold at a grossly inadequate price. A trustee owes no duty to provide either the debtor or any potential bidders at the foreclosure sale any information about the payoff amount of the underlying obligation. Nevertheless, Powell avers that the misinformation skewed the foreclosure process and led to an unfair sale because it increased the inherent disadvantage to third party bidders in a foreclosure sale: that the third party bidder must bid cash while the mortgagee need only bid "credit" against the amount due on the note. Powell argues that the overstatement of the amount due on the note discouraged third party bidders who may have bid on the property had they known the Stacys' credit was less than what was listed in the foreclosure notice. Again, Powell failed to show the court that the error was anything other than a mistake. In addition, the court disagreed with his contention that the irregularity could have caused a grossly inadequate price to be paid for the property. The Stacys bid $55,000, more than the total amount owed on the note. Powell complains that this price is lower than the property's fair market value, which is approximately $200,000. But if third party bidders were discouraged from bidding against a possible credit of $72,500, as Powell claims, then the logical conclusion is that they would

not have been prepared to bid cash in an amount close to $200,000, the property's claimed value.

Stanley* v. *CitiFinancial Mortgage Company, Inc., 121 S.W.3d 811 (Tex.App.—Beaumont 2003, pet. pending). The Stanleys sued to set aside the bank's foreclosure. Their petition alleged that the bank failed to comply with the requirements of the law pertaining to foreclosures that proper notice was not provided, that the consideration received from the foreclosure sale was grossly inadequate, and that the trustee failed to comply with the general and fiduciary duties owed to Stanleys. They also contend that Mary, as the owner of an alleged "equitable title" in the property, was not provided notice of the sale, and further, that the sale should be set aside due to alleged misrepresentations of material facts.

One of the arguments was that the trustee had failed to give the notices as required by the deed of trust, unfortunately, the Stanleys failed to include a copy of the deed of trust in its summary judgment evidence. Thus, by failing to do this, they raised no competent summary judgment evidence that the trustee failed to comply with the deed's own notice requirements. There was no evidence that the trustee had failed to provide the statutorily required notices, and that was sufficient for the court to support summary judgment by the court that the Stanleys had received proper notice.

The Stanleys also complained that failure to give notice to Mary, the "equitable owner" of the property, was a basis for setting aside the sale. Mary's affidavit, filed as responsive summary judgment evidence, acknowledges that she is a party to neither the deed nor the deed of trust. A trustee has no affirmative duty beyond those required by law or as contained in the deed of trust; his or her duties are fulfilled by strict compliance with applicable laws and the terms of the deed of trust. There is no legal requirement that personal notice of a foreclosure be sent to persons not parties to the deed of trust. Since Mary also did not file a copy of the deed of trust as responsive summary judgment evidence, the court could not determine if any provisions of the deed require that she receive notice. She therefore failed to demonstrate even a scintilla of evidence of a genuine issue of material fact regarding her right to notice.

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 § 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.

Adams* v. *Ameriquest Mortgage Co., 307 B.R. 549 (Bkrtcy. N.D. Tex. 2004). The Adams' had a conventional first lien loan on

their home. It was refinanced once with a home equity loan from AAMed Funding. Later, the Adams' refinanced that loan with the loan in question from Ameriquest. This refinancing was not documented as a home equity loan, and, in fact, specifically disclaimed any intention to be a qualifying home equity loan.

Section 50(f) of article XVI of the Texas Constitution requires that a refinance of an existing home-equity loan, as defined by subsection (a)(6) of section 50, must also be a home-equity loan. The Adamses argued that the Ameriquest loan is not a home-equity loan as defined by section 50(a)(6) of the Constitution and therefore the lien granted is invalid as an improper attempt to refinance a prior home-equity loan. Ameriquest did not dispute that the 2002 loan was not handled as a home-equity loan, but contended it could save its lien by curing the various defects in the 2002 loan that prevent it from being characterized as a home-equity loan. Alternatively, Ameriquest contended it is subrogated to the rights of the prior lienholder. Section 50(a)(6)(Q)(x), the forfeiture and cure provision of the home equity laws, provides that: "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...."

The court held that the Ameriquest refinance was, in fact, the refinance of a home-equity loan. Ameriquest claimed that it had the right to cure its failure to document its loan as a home equity loan, as permitted by § 50(a)(6)(Q)(x). The Adams argued that, since the Ameriquest loan was not a home equity loan, and specifically disclaimed that it had been made pursuant to the constitutional provisions for home equity loans, that was not governed by any of the home equity provisions in the constitution and that the cure provisions could not be applied. Without any discussion, the court held that the cure provisions could be applied to this loan.

However, that still left the problem of how to cure the various shortcomings in the Ameriquest refinancing. The Adamses alleged that the 2002 loan failed to meet several of the seventeen general requirements of § 50(a)(6): that the principal amount of the loan exceeds eighty percent of the fair market value of the property in violation of § 50(a)(6)(B); that the loan purports to make the Adamses personally liable in violation of § 50(a)(6)(C); that the loan is secured by a deed of trust that allows foreclosure without court order in violation of § 50(a)(6)(D); that there was a lack of required notices under § 50(a)(6)(M)(i); that the security instruments securing the loan did not contain a disclosure that the loan was an extension of credit defined by § 50(a)(6) in violation of § 50(a)(6)(Q)(vi); and that neither the Adamses nor Ameriquest signed a written acknowledgment of the fair market value of the property on the date that the loan was made in violation of § 50(a)(6)(Q)(ix). The Adamses contend that Ameriquest cannot use the cure provision of § 50(a)(6)(Q)(x) to remedy these defects and validate its otherwise invalid lien. The Adamses argued that the cure provision of § 50(a)(6)(Q)(x) only applies to those defects in the loan that the lender can unilaterally remedy on its own accord after-the-fact of the execution of the loan.

The court almost agreed with the Adamses, saying that these arguments were not without merit. However, based upon the Supreme Court's holding in ***Doody* v. *Ameriquest Mortgage Company,*** 49 S.W.3d 342 (Tex.2001), the court held that the alleged defects could be cured. The court, after lengthy discussion, essentially held that the defects in the Ameriquest loan, including both those that could only be cured if the borrower agreed to amend documents and those that really couldn't be cured because time periods had been waived, could be cured if the lender offered to completely redo the transaction.

Pelt* v. *U.S. Bank Trust N.A., 359 F.3d 764 (5th Cir. 2004). The borrowers sought to have their home equity loan declared invalid and to have all principal and interest forfeited because the lender failed to provide the

borrowers with copies of all documents signed at closing as they alleged was required by § 50(a)(6)(Q)(v) of the Texas Constitution. In a typical bit of lender laziness, it had provided unsigned copies of documents that were signed.

Here, said the court, § 50(a)(6)(Q)(v) states that a lender must provide to the borrower a "copy of all documents signed by the owner"--it does not require that the owner be provided "a signed copy" of each of these documents. Instead, the phrase "signed by the owner" simply identifies which--of the numerous documents presented at the closing of the home equity loan--must be copied and given to the borrower: only those that the borrower actually signs in connection with the loan. In other words, the provision does not further require that the documents be photocopied only after they are signed.

PART III
PROMISSORY NOTES, LOAN COMMITMENTS, LOAN AGREEMENTS

Beal Banc SSB* v. *Schleider, 124 S.W.3d 640 (Tex.App.–Houston [14th Dist.] 2003, pet. denied). There was a dispute between the Schleider, the note maker, and the bank about whether an extension had been agreed to by the bank officer in a series of phone conversations. Schleider thought it had been and didn't pay the note on time. When the note matured, he received a demand letter for payment of the note. He sued the bank for fraud, negligent misrepresentation, and breach of contract and sought declaratory judgment that the note had been extended. The jury found that Schleider had been defrauded.

Schleider's allegation of fraud rested on his purported conversation with Dickenson, the bank officer handling his account. Therefore, to recover for fraud, Schleider had to prove: (1) Dickenson made a material representation; (2) the representation was false; (3) when Dickenson made the representation, Dickenson knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) Dickenson made the representation with the intention that Schleider act on it; (5) Schleider acted in reliance upon the representation; and (6) Schleider suffered injury. A future promise to act, such as that attributed to Dickenson, constitutes fraud only when made with the intent to deceive and with no intention of performing the act.

Beal Bank argues there was no evidence of intent to deceive. Because intent to deceive or defraud is not susceptible to direct proof, it invariably must be proven by circumstantial evidence. The only representations Schleider attributes to Dickenson are (1) the extension would not be a problem, (2) "we're set on go," and (3) Beal Bank would get back to Schleider. Considering the preceding evidence in the light most favorable to the jury's verdict and indulging every reasonable inference in favor of Schleider, concluded there was no evidence of probative force to support a finding Dickenson, at the time he purportedly made these representations, had the intent of deceiving Schleider, with no intention Beal Bank would perform. The fact Beal Bank did not perform, standing alone, is no evidence of a lack of intent to perform at the time the agreement was made, but only a circumstance to be considered with other facts to establish intent. The mere failure to perform a contract is no evidence of fraud. Denial of having made a promise is also a factor showing no intent to perform when the promise was made.

The elements of a cause of action for negligent misrepresentation are: (1) the defendant's making a representation in the course of its business, or in a transaction in which it has a pecuniary interest; (2) the defendant's supplying "false information" for the guidance of others in their business; (3) the defendant's failure to exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff's suffering pecuniary loss by justifiably relying on the representation.

The type of "false information" contemplated in a negligent misrepresentation case is a misstatement of existing fact, not a

promise of future conduct. Here, Schleider was very knowledgeable about loans and extensions. He knew extensions needed to be in writing. Given Schleider's awareness that modifications had to be in writing and given that any modification depended on the parties agreeing to an interest rate and due date, the court concluded, as a matter of law, Schleider failed to prove he justifiably relied to his detriment on Dickenson's statements.

Scott* v. *Commercial Services of Perry, Inc., 121 S.W.3d 26 (Tex.App.—Tyler 2003, pet. denied). The Scotts obtained federally guaranteed agricultural loans from Southwest Bank of Jennings, Louisiana to purchase and operate a dairy farm in Sulphur Springs. According to the Scotts, an employee of Southwest Bank misrepresented the Scotts' assets and liabilities in order to obtain the Farm Service Agency's guarantee of the loans at issue. Southwest Bank failed and the FDIC was appointed receiver of the bank. Commercial Services purchased the Scotts' loans from the FDIC as part of a bulk purchase. The notes were in default at the time Commercial Services purchased them. Commercial Services made demand upon the Scotts for payment of the notes, and when the payment was not forthcoming, posted the dairy for foreclosure. The Scotts then filed a declaratory action requesting injunctive relief and asking the court to find that the notes were vitiated by the Southwest Bank employee's fraud and, thus, legally unenforceable.

In its motion for summary judgment, Commercial Services argued that the provisions of the Financial Institutions Reform, Recovery, and Enforcement Act, specifically 12 U.S.C.A. § 1823(e), precluded the Scotts' assertion of personal defenses against it, since it is a transferee of the FDIC. Commercial Services also asserted that, without regard to the application of § 1823(e), the fraud complained of was perpetuated on the FSA, not the Scotts. Consequently, it had no legal effect upon their responsibility under the note. The court agreed with FSA.

Actionable fraud occurs when (1) a party makes a material representation that (2) is false, (3) the party knows it is false or makes it recklessly without any knowledge of its truth and as a positive assertion (4) with the intention that the other party act upon it, and (5) the other party relies or acts upon the misrepresentation and (6) thereby suffers injury. In this case, the contract which was induced by the alleged fraud was the contract entered into by the FSA to guarantee the loan. The Scotts were not induced to enter into the loan agreement with the bank because of the false information. Instead, the FSA was the party against which the fraud was perpetrated. Further, although the Scotts may have been duped into signing the application without knowledge of the contents therein, which would be classified as fraud in the factum, they received the loans which they applied for and under the terms agreed upon. Again, the FSA was the party against which the fraud was perpetrated, not the Scotts. Therefore, the Scotts failed in their burden to present to the trial court any issues that would preclude summary judgment on the notes.

PART IV
GUARANTIES

Segal* v. *Emmes Capital, LLC, 2004 WL 440900 (Tex.App.-Houston [1st Dist.] 2004, 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, 5.004 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 § 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 court distinguished ***SBKC Service Corp.* v. *1111 Prospect Partners***, F.3d 728, 1998 WL 436579 (10th Cir. July 30, 1998) (not designated for publication) on which the Segals relied for the proposition that a debtor cannot prospectively waive his deficiency-related rights. First, the SBKC Service court's holding did not concern whether a debtor could prospectively waive these rights, but instead concerned whether California or Kansas law applied to the deficiency suit. It was only in dictum that the court noted that California's anti-deficiency statute barred such a prospective waiver. Second, the California anti- deficiency statute considered in SBKC Service differs materially from the deficiency statute of Texas: the California statute bars deficiency judgments entirely after a non-judicial foreclosure sale, whereas the Texas statute allows a creditor to seek a deficiency judgment after a non-judicial foreclosure sale, subject to the debtor's or guarantor's right to seek a valuation of the property and an offset. This statutory difference prevents SBKC Service's dictum from applying here.

The Segals claimed that contractual clauses waiving procedural or substantive rights must limit the waiver to a reasonable time and that the guaranty's valuation-and-offset waiver is such a clause and that it fails this requirement. The Segals relied on ***Duncan* v. *Lisenby***, 912 S.W.2d 857 (Tex.App.—Houston [14th Dist.] 1995, no writ) for this proposition, but that opinion does not support them. Duncan concerned only a prospective agreement to waive the defense of limitations: "A general agreement in advance to waive or not to plead the statute of limitations on a particular obligation is void as against public policy. The agreement must be specific and for a predetermined length of time." Duncan did not concern the waiver of a substantive right, but the waiver of a procedural bar. This is an important distinction. A limitations bar differs materially from a debtor's or guarantor's rights to valuation and offset under chapter 51. Limitations is the Legislature's procedural device for establishing a point of repose for past actions and for "ensur[ing] that the search for truth is not impaired by stale evidence or the loss of evidence." ***Childs* v. *Haussecker***, 974 S.W.2d 31, 38-39 (Tex.1998); accord ***Stewart Title***

Guar. Co.* v. *Hadnot, 101 S.W.3d 642, 644 (Tex.App.-Houston [1st Dist.] 2003, pet. denied). Because one waiving a limitations bar is effectively expanding the time that the Legislature has allowed for suit, it is logical to require the waiving party to confine that waiver to a reasonable amount of time, rather than to waive the bar altogether. In contrast, a guarantor's valuation and offset rights under chapter 51 are substantive rights, not procedural bars to suit. Those substantive rights do not spring into existence until the creditor seeks a deficiency judgment--an event necessarily occurring after the guarantor waives those rights in the underlying guaranty contract. There is thus no continuing period, such as the time in which to file suit, which the guarantor is extending by its contractual waiver. Accordingly, Duncan's holding does not apply.

The Segals 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.

In their fourth issue, the Segals claim that the guaranty's waiver (and the deed of trust's parallel waiver) was unenforceable for being ambiguous and inconspicuous. The Segals argue that the guaranty's paragraph 14, which contains both a release and the waiver provision on which Emmes relies, is ambiguous when read in its entirety. Specifically, the Segals claim that an earlier recitation in paragraph 14--that appellants released Emmes from claims "existing as of the date [of the guaranty]"--rendered ambiguous the paragraph's later waiver of appellant's Property Code rights, which waiver did not specify when the waived rights accrued. The court disagreed.

Paragraph 14 was clearly divided into two parts. The first part (two sentences) of paragraph 14 released Emmes from claims that existed as of the date of the guaranty's signing:

> [Appellants] hereby releases, discharges and acquits forever [Emmes] and its officers, directors, trustees, agents, employees and counsel ... from any and all Claims existing as of the date hereof (or the date of actual execution hereof by [appellants], if later)....

Those two initial sentences functioned as a backwards-looking release from previously or simultaneously incurred liability.

In contrast, the second part (one sentence) of paragraph 14 was necessarily a waiver of future rights and defenses because that sentence waived only those rights and defenses that "pertain[ed] or may pertain to any enforcement of this Guaranty":

> To the maximum extent permitted by applicable law, [appellants] hereby waives all rights, remedies, claims and defenses based upon or related to Sections 51.003, 5.004 and 51.005 of the Texas Property Code, to the extent the same pertain or may pertain to any enforcement of this Guaranty.

The enforcement of a guaranty necessarily post-dates the making of the guaranty because enforcement comes only after the borrower's default on the note that the guaranty supports. The parties thus clearly intended paragraph 14's "waiver" section to be separate from its "release" section and for the paragraph's two sections to concern claims or defenses arising at different points in time. There was thus no ambiguity in paragraph 14, and the trial court did not err in implicitly determining as much.

In the remainder of their fourth issue, the Segals argued that the waiver in paragraph 14 of the guaranty is unenforceable because it was not conspicuous. The Segals cited no authority holding that a waiver such as this must be conspicuous. Rather, they relied on a line of authority holding that indemnity agreements and agreements to release another in advance from liability for the other's negligence must be conspicuous. See ***Littlefield* v. *Schaefer***, 955

S.W.2d 272, 273 (Tex.1997). The court noted its serious doubts about whether this line of authority applies here.

The waiver in paragraph 14 is not a release of liability for Emmes's future negligence. A release of future liability is a contractual arrangement in which one party assumes the liability inherent in a situation and thereby surrenders legal rights or obligations. See ***Dresser Industries, Inc.* v. *Page Petroleum, Inc.***, 853 S.W.2d 505, 508 (Tex.1993). Such a release thus operates to extinguish a claim or defense as effectively as would a prior judgment and is an absolute bar to any right of action on the released matter. Although most contractual provisions operate to transfer risk, a contractual release that frees a party in advance from liability for its own negligence represents an "extraordinary shifting of risk," so much so that the risk-shifting provision must be conspicuous, among other things.

By paragraph 14's waiver, the Segals surrendered the right to a fair-market-value determination and an offset if Emmes sought a deficiency judgment. The Segals claimed that, by barring their assertion of these rights, the waiver effectively shifted to them "the risk of loss attributable to real estate market nuances." However, the shifting of that risk is not necessarily so extraordinary that the waiver had to be conspicuous. Most contractual provisions shift risk, but only those provisions that represent an extraordinary shifting of risk must be conspicuous. Moreover, the waiver does not expressly release Emmes from its future acts, and the reasons for which Emmes might seek a deficiency judgment are not necessarily limited to Emmes's conduct in holding the sale, i.e., the reasons could include a poor market or low bidding on the day of sale, for example. The court found this waiver sufficiently different from those considered in the line of authority on which the Segals rely and was not convinced of the application of the Segals' authority. But even if the conspicuousness requirement applied to this type of waiver, the court would hold that paragraph 14's waiver was sufficiently conspicuous. Whether a release is conspicuous is a question of law. ***Dresser***, 853 S.W.2d at 509. For a release to be conspicuous, something must appear on the contract's face to attract the attention of a reasonable person against whom it is to operate. "For example, language in capital headings, language in contrasting type or color, and language in an extremely short document, such as a telegram, is conspicuous."

Paragraph 14 contained only two provisions: (1) a release of past liability (first two sentences) and (2) the waiver attacked in this appeal (last sentence). The paragraph was the final contractual provision and appeared immediately above the signature lines. Most importantly, however, the Property Code sections that were being waived were underlined, a significant fact that the Segals fail to mention in their brief. Under these circumstances, the trial court would not have erred if it concluded that a reasonable person's attention would have been drawn to this waiver. The court thus held that, if the conspicuousness requirement applied, it was met.

PART V
USURY

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. The court again disagreed. 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 § 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***, 82 S.W.3d 571, 577 (Tex.App.-Corpus Christi 2002, pet. denied), the court construed the current version of § 305.103 to hold that a creditor had complied with the code provision and cured his request for a usurious rate of interest. 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 § 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 § 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 § 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. Texas Finance Code § 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.

Korrody* v. *Miller, 126 S.W.3d 224 (Tex.App.—San Antonio 2003, no. pet.). Korrody entered into an oral financing agreement with Miller. Miller contends that she agreed to "factor" Korrody's accounts receivable. Upon collection of the receivables, Korrody was obligated to repay Miller the amount that had been advanced to him as well as a designated fee. Korrody, by contrast, contends that Miller agreed to provide him a loan or line of credit. Miller sued Korrody for failing to comply with their oral factoring agreement after Korrody refused to remit payments in excess of $140,000. Korrody denied liability and filed a counterclaim for usury asserting that the financing agreement with Miller was a line of credit which assessed interest in excess of the legal amount permitted under the Texas Finance Code.

Korrody initially had a factoring agreement with Merit, Miller's employer, where Merit would advance funds to Korrody in exchange for the ability to purchase Karrody's account receivables from the San Antonio Development Association, Miller managed Korrody's account on behalf of Merit. At trial, evidence was presented that Merit typically required Korrody as a borrower to execute various documents before making an advance. Additionally, third parties such as SADA were notified in writing to make their payments in the name of the borrower (Korrody), but transmit them directly to Merit. At times, Korrody would make oral requests for Miller to factor funds without the completion of the requisite paperwork. With the approval of her supervisor, Miller advanced the requested funds without following Merit's general procedures regarding the execution of documents.

Miller ultimately left Merit and formed Elite Capital, with Korrody requesting that she continue to service his account. Miller drafted the required contract documents which contained essentially the same language used by Merit in its factoring relationship with Korrody, but those contract documents were never signed by Korrody. To minimize transfer costs, Miller and Korrody agreed that third-party payments would initially be received by Korrody, who would then deposit them into an account maintained by Miller. In May of 2000, Korrody failed to remit approximately $140,000, representing the partial payment advanced by Miller for receivables.

Korrody contends that Miller never exercised "ownership" over the accounts receivable as would be expected under a factoring relationship. Specifically, Miller never notified SADA in writing to make payments directly to her and never held the accounts receivable. Korrody maintains the absence of executed contract documents, the failure to notify SADA of the assignment, and the fact that SADA made payments to Korrody and not Miller demonstrates Miller's departure from the standards typically followed in a factoring agreement, and defeat her claim. If left uncontroverted and unexplained, these factors might be persuasive evidence of loans secured by pledges of the contracts rather than purchases of the contracts at discount.

However, the evidence is legally and factually sufficient to support the finding that the differences in the procedures used was at Korrody's request and for his benefit. Miller testified that Korrody asked her to refrain from executing their contract documents and from notifying SADA about their new agreement until his prior relationship with Merit Financial had fully terminated. Therefore, there was a plausible explanation as to why the procedures Miller used at Elite Capital differed in some respects from the Merit procedures. The record also supports the conclusion that Korrody understood that standard procedures are not always followed when parties establish a factoring relationship. In his testimony, Korrody admitted that he previously had a factoring agreement with Merit and that he understood the mechanics involved in factoring receivables. Additionally, Korrody acknowledged that he would occasionally ask Merit to factor his accounts without the completion of the required documentation, and Merit would accommodate him. There is more than sufficient evidence in the record that Miller and Korrody engaged in the same basic financial relationship as they had at Merit. The court

found ample evidence to support the district court's findings that a factoring agreement existed.

PART VI
VENDOR AND PURCHASER

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.

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 §§ 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.

Tithe 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.

Graves* v. *Alders, 132 S.W.3d 12 (Tex.App.—Beaumont 2004, no pet. history to date). Purchaser was entitled to specific performance of a contract to purchase real estate, in action against the heir of the seller, where the purchaser's assignee exercised option within contractual time deadline, the purchaser subsequently acquired by assignment original purchaser's interest, the heir of vendor by contract agreed to cooperate with the closing of the sales contract, the purchaser appeared at scheduled closing ready to execute the necessary documents, the heir failed to appear at closing as agreed, and the examiner of title to real property determined that the legal descriptions used in the sales contract were adequate to describe the real estate intended to be conveyed.

Bonnie Blue, Inc.* v. *Reichenstein, 127 S.W.3d 366 (Tex.App.—Dallas 2004, no. pet.). This matter concerns a 1.5-acre tract of land located in Dallas County, Texas. From 1964 to 1982, the Reichenstein operated a wood preserving business on the property utilizing an underground storage tank, a concrete sump, and a steel vat containing wood preserving chemicals. In 1982, the Reichensteins sold the property to T.D. Corporation. The contract signed by the Reichensteins as sellers and T.D. as Purchaser contained the following as-is provision: "Purchaser acknowledges that he has inspected all buildings and improvements situated on the property and is thoroughly familiar with their condition, and Purchaser hereby accepts the property and the buildings and improvements situated thereon, in their present condition, with such changes therein as may hereafter be caused by reasonable deterioration." In 1991, Bonnie Blue bought the property. In 1999, after discovering environmental contamination, appellants entered the property into the Texas Voluntary Cleanup Program, and the underground storage tank, concrete sump, steel vat, and contaminated soil were removed. Appellants then filed this cost recovery action asserting a claim under the Solid Waste Disposal Act and a common law contribution and indemnity claim.

The Reichensteins moved for and were granted summary judgment on the ground that paragraph 8 of the sales contract between the Reichensteins and T.D. Corporation was an "as is" clause that barred appellants' claims. Bonnie Blue contends that even if paragraph 8 constitutes an "as is" provision by which they are bound, it still does not bar their claim under the SWDA. No Texas case specifically addresses the effect of an "as is" provision on a contribution claim under the SWDA. The Reichensteins contend the holding in ***Prudential*** compels a ruling that appellants' SWDA claim is barred by paragraph 8.

In ***Prudential***, the buyer of a commercial building sued the seller for damages alleging it misrepresented the condition of the building and failed to disclose the building contained asbestos, a condition that lowered its value. The court held that an "as is" clause in the sales contract between the parties barred the buyer's claims for fraud, DTPA, negligence, and breach of good faith and fair dealing by precluding it from proving the seller's conduct caused it any harm. Unlike the buyer in ***Prudential***, Bonnie Blue did not file a damages lawsuit based on misrepresentations or a failure to disclose. Instead, it has presented a statutory contribution claim for environmental cleanup costs. The causation issues which were dispositive in ***Prudential*** do not exist in the case before us.

The SWDA was intended to facilitate and encourage the prompt cleanup of solid waste and to "force those responsible for creating hazardous waste problems to bear the cost of their action." Section 361.344 of the SWDA authorizes appellants to recover an equitable share of the costs of remediation from other "responsible persons" as defined by the statute. Tex. Health & Safety Code § 361.344. To prevail on a cost recovery claim under the SWDA, Bonnie Blue must simply show (1) the defendant is a "person responsible" for solid waste as defined in section 361.271; (2) the TNRCC commission approved Bonnie Blue's remedial or removal action; (3) the remedial or removal action is necessary to address a release or threatened release of a solid waste into the environment; (4) the costs of the action are reasonable and necessary, and (5) they made reasonable attempts to notify the defendant of the release and their intended cleanup.

After reviewing the SWDA's applicable provisions and considering the legislative purpose in enacting the SWDA, the court concluded the holding of ***Prudential*** is inapposite to the circumstances presented and that the purported "as is" clause of paragraph 8 does not bar Bonnie Blue's statutory contribution claim. Unlike ***Prudential*** where causation was required to establish the seller's liability, the statute here clearly intends to hold those responsible for hazardous waste liable for their fair share of the cleanup costs without the need to establish causation. Allowing an otherwise "responsible party" to avoid liability based on paragraph 8 would clearly circumvent both the intent and language of the statute. The court noted that various courts have held that the SWDA's federal counterpart, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) permits parties to enter contracts affirmatively to insure or to indemnify against CERCLA liability. CERCLA has a specific provision authorizing such contracts. See 42 U.S.C. § 9607(e). The court did not address the issue of whether the SWDA similarly permits such insurance or indemnification contracts between parties as it is not necessary for the disposition of this appeal. Its holding is limited to the purported "as is" clause before us.

Cendent Mobility Services Corporation* v. *Falconer, 135 S.W.3d 349 (Tex.App.—Texarkana 2004, no pet. history to date). The Gregg County house purchased by Kenneth S. Falconer turned out to be a nightmare. Falconer purchased the house in 1999 through Cendant Mobility Services Corporation, a relocation firm selling the property for the prior owners, the Gunnelses. After the purchase, and a severe drought, Falconer began to see damage to interior and exterior walls and floors revealing serious and widespread structural flaws. Falconer sued Cendant, asserting causes of action for fraud and violation of the DTPA, claiming that Cendant failed to disclose that the

house's foundation had shown evidence of substantial movement in the past and that Cendant provided only a portion of the relevant engineer's report for his review. The evidence reveals, however, that Falconer's initials appear on each page of the previous homeowner's real estate disclosure and an engineer's structural inspection report.

Despite Falconer's admission that he received and initialed at least those portions of the documents describing the foundation's condition, he nevertheless maintains that he was misled by Cendant's agent. He testified he would not necessarily characterize what she affirmatively told him about the house as a misrepresentation of the information available to her, but believed she misled him by selectively informing him of certain portions of the disclosures and reports, omitting the fact that substantial movement had taken place in the past. Instead, she reportedly pointed out from the seller's disclosure statement only that minor settlement had occurred in the past and then jumped forward to the last two sentences of the engineers report, indicating that the foundation was stable, that the house was structurally sound, and that no additional repairs were warranted. In answer to the question: "Do you expect Cendant to sit down and read each--the contract through line by line with you?" he said: "If that's what it takes."

Despite Falconer's belief that Cendant's agent should have explained every detail of the contract, including any disclosures or attached reports, this is simply not the law. Even where there exists a fiduciary relationship--which did not exist here--there is no duty under the DTPA requiring sellers to orally disclose the contents of a written contract. The information provided in the seller's disclosure and the engineers report was clear and unambiguous and subject to Falconer's review before signing. It is well settled that the parties to a contract have an obligation to protect themselves by reading what they sign. Unless there is some basis for finding fraud, the parties may not excuse themselves from the consequences of failing to meet that obligation. In this case, there was no evidence of fraud. The evidence was that he had everything in front of him and didn't read it. The failure of one party to read a contract, or any of the materials appertaining to it, however, does not equate with a failure of the other party to disclose the information contained within the four corners of that contract. Absent a showing Cendant misrepresented the information disclosed in written form, Falconer was obligated to protect himself by reading the contract. He cannot now be excused from the consequences of failing to meet that obligation.

Cherry* v. *McCall, 138 S.W.3d 35 (Tex.App.—San Antonio 2004, pet. pending). The Cherrys bought a home from the McCalls. After the Cherrys bought the home, they discovered a walled-in room in the basement. The room was filled with trash, including rusty plumbing fixtures, bathtubs, sinks, commodes, boards, pipes, rocks, and used building materials. The trash was damp and contaminated with mold.

The Cherrys brought a declaratory judgment action, seeking declaration that (1) the McCalls breached the contract, and (2) the walled-in room constitutes a mutual mistake justifying rescission. The McCalls answered by general denial. The McCalls also asserted the "as is" provision of the contract as an affirmative defense.

The Cherrys argue that the "as is" clause is unenforceable under the "totality of the circumstances" test set out by ***Prudential***. The Cherrys do not allege that the McCalls fraudulently induced them to buy the house or concealed knowledge about the hidden room. Nor do they allege that they were prevented from making their own inspection. Rather, they argue that their lack of sophistication, the fact that the "as is" provision was not negotiated but a standard boiler-plate provision, the high price the Cherrys paid for the property, and the fact that the defect was hidden are all factors indicating that the "as is" clause is unenforceable under the "totality of the circumstances."

The court disagreed. While there is some evidence indicating that Mrs. Cherry, who had never handled the details of purchasing a

home on her own before, was less sophisticated than the McCalls, who owned rental properties, there is no evidence that the Cherrys and the McCalls entered into the contract from unequal bargaining positions or that the transaction was not made at arm's length. Additionally, there is no evidence to support the Cherrys' argument that the "as is" provision was not freely negotiated. In fact, Mrs. Cherry confirmed in her deposition testimony that she "agreed to purchase the property in its current condition" and that she "accepted the risk" that the property might be deficient. Because the Cherrys contracted to accept the property "as is," they cannot, as a matter of law, prevail on their breach of contract claim.

In order to be entitled to a declaratory judgment that the contract was made under a mutual mistake, the Cherrys had to prove: (1) a mistake of fact, (2) held mutually by the parties, (3) which materially affects the agreed-upon exchange. Under section 154 of the Restatement (Second) of Contracts, however, a party bears the risk of mistake when the risk is allocated to him by agreement or when he knowingly treats his limited knowledge of the facts surrounding the mistake as sufficient. Here, the risk of mistake was allocated to the Cherrys by agreement when they contracted to accept property "in its current condition." Accordingly, their claim of mutual mistake fails as a matter of law.

The Cherrys argue, however, that the contract itself is invalid because a mutual mistake prevented the "meeting of the minds" necessary to the formation of a valid contract. Again, the court disagreed. Mrs. Cherry confirmed in her deposition testimony that she "agreed to purchase the property in its current condition" and that she "accepted the risk" that the property might be deficient. Thus, the evidence confirms that a meeting of the minds did take place, i.e., though neither party knew of the hidden room when it entered into the agreement, both parties agreed to place the risk of any unknown defects on the Cherrys.

Nelson* v. *Najm, 127 S.W.3d 170 (Tex.App.-Houston [1st Dist.] 2003, pet. denied). There were four underground gasoline tanks and one underground waste oil storage tank. Although the gasoline tanks were registered with the Texas Natural Resource Conservation Commission (TNRCC), the waste oil tank was not. Nelson told Najm about the four gasoline tanks, but not about the waste oil tank. On the commercial property disclosure form, Nelson checked the "not aware" box in response to a question concerning underground storage tanks and "not aware" in response to a question regarding toxic waste; he left all boxes blank in response to a question regarding hazardous waste on the property.

The station was not in compliance with state environmental guidelines governing underground petroleum storage tanks. As the station owner, Nelson was required to comply with administrative requirements promulgated to regulate such tanks. As part of what was called "Phase One," Nelson should have implemented modifications to assure tank and pipe system integrity by the end of 1989. By the end of 1994, as part of Phase Two, Nelson should have installed spill prevention equipment. Nelson did not comply with either Phase One or Phase Two.

Despite testimony that all gas station owners were regularly notified by TNRCC of changing environmental regulations, Nelson testified that he never received any notices and that he relied on "Mr. Texaco" to comply with all regulations. He did acknowledge, however, that he received his annual dues notice from TNRCC. In addition to not disclosing the existence of one of the tanks, Nelson did not comply with his statutory duty as the seller to inform Najm in writing of a tank owner's obligations in regard to tank registration, construction, and certification.

The parties signed the earnest money contract in mid-June, and the closing took place on July 1, 1996. In the interim, Najm asked Nelson if he could have the site inspected. Nelson declined, saying there was no need for testing. He told Najm that testing would be a waste of money and that he had no problems with the government, saying, "Look, you don't have to make no test. This is a gas station. I'm

selling gas. You see the people buying gas, selling gas, and that's it. And I have been here 30 years. I don't have any problem. I selling gas. Everything is fine." Najm did not pursue testing or arrange for any environmental inspections before the closing. Nevertheless, the deed included a clause noting that Najm had inspected the property and was relying solely on his own investigation, not on information provided by Nelson or on Nelson's behalf. In addition, the earnest money contract contained two provisions pertinent to our analysis of this case. The first provision specified that Najm was accepting the property "as-is" in its then-current condition. The second provision specified that the sale was contingent on Najm's approval of a contamination inspection.

When the company that had supplied gasoline to Nelson told Najm it would no longer service the station, Najm attempted to enter into a fuel contract with another gasoline supplier. However, when the supplier's representative came to the station to discuss the matter, he immediately discovered that the soil was contaminated. He informed Najm that neither his company nor any other could supply gas to the station until it came into compliance with environmental regulations, and he estimated the cost of bringing the station into compliance at approximately $60,000. He also informed Najm of the existence of the waste oil tank.

To recover for common law fraud, Najm was required to establish that (1) Nelson made a material representation; (2) the misrepresentation was made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion; (3) Nelson made the misrepresentation with the intention that it should be acted on by Najm; and (4) Najm acted in reliance on the misrepresentation and thereby suffered injury.

Nelson argues that he did not make an affirmative misrepresentation and did not fail to disclose material facts. The record reflects that he did both. Nelson failed to disclose the existence of the underground waste oil tank, which the court concluded was a material omission. He did not verbally inform Najm about this tank or disclose it on the commercial property form. He made an affirmative misrepresentation when he told Najm--in response to a request to inspect the property--that an inspection was not necessary, that everything was "fine," and that he had "no problem" with the government, while using the operation of the station as demonstrative proof of these assertions. Nelson contends that his assertions were true statements, and thus cannot be considered misrepresentations. However, Texas courts recognize that a statement that is literally true may be actionable if used to create an impression that is substantially false. A false representation may consist of a deceptive answer or any other indirect but misleading language.

Relying chiefly on ***Prudential***, Nelson contends that (1) he had no duty to disclose this information because Najm could have discovered the tank himself upon "reasonable investigation and inquiry" and there was no proof that Nelson had actual knowledge of contamination or non-compliance with current environmental regulations, and (2) the "as-is" clause in the contract and the independent inspection provisions in the bill of sale and the deed preclude Najm from recovering on any of his causes of action, even if Nelson had a duty to disclose. The court did not agree. Nelson had a statutory duty to disclose not only the existence of every tank on the property, but also the regulations governing their functioning and maintenance. See 30 Texas Administrative Code § 334.9. Moreover, Nelson thwarted Najm's attempt to inspect the station. Nelson's argument that the evidence only creates an inference that he should have known about environmental regulations simply because he owned the property is contradicted by testimony that all gas station owners are regularly notified by TNRCC of changing environmental regulations. Apparently, the trial court did not find Nelson's disclaimer of any knowledge to be credible, given the number of years he owned the station, the TNRCC's custom of sending all notices directly to the owners, and his receipt of annual dues notices from the TNRCC. The court concluded that Nelson had a duty to disclose the existence of the waste oil tank.

The court further concluded that the "as-is" provision in the contract did not bar Najm's recovery. Although the court in ***Prudential*** held that an as-is agreement negated causation that was essential to the plaintiff's recovery for fraud, it also pointed out that the plaintiff did not assert fraud in the inducement, and noted that a buyer is not bound by an as-is agreement that he is induced to make because of the seller's fraudulent representation or concealment of information.

Roundville Partners, L.L.C.* v. *Jones, 118 S.W.3d 73 (Tex.App.—Austin 2003, pet. denied). After a sale of commercial real estate was not consummated, Roundville sued the Joneses seeking specific performance of the commercial earnest-money contract. Prior to scheduled closing date, closing statements were prepared showing that the Joneses would have to come up with about $15,000 to sell the property. The closing on contract three did not take place. Roundville's principals all testified that their understanding of why contract three did not close in January was that the Joneses needed more time because they lacked sufficient funds to close. The Joneses, however, testified that the reason contract three did not close was because they were never told an exact date and time for the closing and they were never provided a closing statement showing how much money they needed to close. After the original closing date of January 30, 1998 passed, Roundville's principals all testified that they were under the impression that the closing deadline would be extended. Roundville prepared and signed an addendum to the purchase agreement extending the closing date. The Joneses, however, never signed the extension. As a result of the failure to close, Roundville filed suit against the Joneses to compel the Joneses to convey the remainder of the property. Roundville moved for summary judgment on the issue of specific performance. In support of their motion for summary judgment, the Joneses claimed, among other things, that Roundville had failed to tender performance and the contract had expired under its own terms.

Specific performance is an equitable remedy that rests in the discretion of the court. This equitable remedy is frequently granted when a valid contract to purchase real property is breached by the seller. A decree of specific performance is not a matter of right even to enforce terms of a contract, but is "a matter of grace" in the discretion of the court.

In ***Bell v. Rudd***, the Supreme Court held, as a fundamental matter, that before a grantee or obligee may assert any rights under an escrow contract he must show that he has complied with the conditions of the escrow, i.e., actually tendered performance, or has offered to perform and was prevented without fault of his own. 144 Tex. 491, 191 S.W.2d 841, 844 (1946). In cases where the seller's and buyer's contract obligations are mutual and dependent, in that a deed is required to be delivered upon tender of the purchase price, the purpose of a tender satisfies two purposes. First, a valid tender of the purchase price invokes the seller's obligation to convey and places him in default if he fails to do so. Second, the tender satisfies the fundamental prerequisite of specific performance--that the buyer show that he has done or offered to do, or is then ready and willing to do, all the essential and material acts which the contract requires of him.

In general, actual tender is a prerequisite to obtaining the remedy of specific performance. However, when actual tender would have been a useless act, an idle ceremony, or wholly nugatory, constructive tender will suffice. For example, when a seller has conveyed the property to a third person, actual tender by a buyer is unnecessary. However, when the contract specifies that "time is of the essence," as this contract does, there is a more particular rule that applies. "In such cases, the buyer 'must make an actual tender of the price and demand of the deed' within the time allowed by the contract." When time is of the essence in a contract, a party must perform or tender performance in strict compliance with the provisions of the contract and within the time prescribed in order to be entitled to specific performance.

It is undisputed that Roundville did not actually tender performance on this contract

within the time specified--January 30, 1998. Because Roundville conceded that it did not actually tender performance, it had the burden to prove at trial that it was prevented from tendering performance by the actions of the Joneses. The evidence did not support a conclusion that it was prevented from tendering performance.

PART VII DEEDS AND CONVEYANCES

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

Martin v. Amerman, 133 S.W.3d 262, 47 Tex. Sup. Ct. J. 285 (Feb. 13, 2004). Plaintiffs filed suit seeking a judgment declaring the proper boundary line and granting permanent injunctive relief. They also alleged trespass and wrongful encroachment, adverse possession, trespass-to-try-title, boundary by recognition and acquiescence, and an action to quite title. Ultimately, all claims were non-suited except those for declaratory judgment and to remove the cloud on their title. Both parties agree that the ownership of the disputed 30 foot strip of land depended upon the determining the boundaries proper location on the ground. The case was submitted to the jury solely as a boundary dispute. The trial court rendered judgment on the jury's verdict and awarded the Martin, Plaintiffs, attorney's fees pursuant to the Texas Declaratory Judgments Act. The court of appeals affirmed the trial court's judgment in part but reversed the attorney's fees award because the trespass-to-try-title statute does not provide for the recovery of attorney's fees. On appeal to the Supreme Court, the court had to determine whether a trespass-to-try-title action is the exclusive means to resolve the dispute between neighbors over the proper location of a boundary line separating their properties or whether the declaratory judgment action is the proper way to resolve the dispute.

The court acknowledged they have, in the past, held that the boundary disputes may be tried as trespass-to-try-title actions but not that they must ***Hunt v. Heaton***, 643 S.W.2d 677, 679 (Tex. 1982); ***Plumb v. Stuessy***, 617 S. W. 2d 667, 669 (Tex.1981). Noting that the Declaratory Judgments Act provides an efficient vehicle for parties to seek a declaration of rights under certain instruments, while trespass-to-try-title actions involve detailed pleading and proof requirement. To lessen the harsh effects of the pleading requirements under trespass-to-try-title actions (when the sole dispute between the parties involves a boundaries location) a recorded deed is sufficient to show an interest in the disputed property without having to prove a formal chain of superior title. In affirming the court of appeals, the Texas Supreme Court concluded that the trespass-to-try-title statute governs the parties' substantive claims in boundary lines disputes Texas Property Code § 22.001(a). The court disapproved its own dicta in ***Brainard v. State,*** 12 S.W.3d 6 (Tex.1999) and to the extent any courts of appeals have expressed a different view, the courts expressly disapproved those decisions.

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.

Harlow* v. *Giles, 132 S.W.3d 641 (Tex.App.–Eastland 2004, pet. pending). Case law distinguishes "casual fences" from those that "designedly enclose" an area. The law is well settled that the mere grazing of land incidentally enclosed by a fence created by others cannot support a claim of adverse possession. Where the fence existed prior to the claimant's possession of the land and the claimant fails to demonstrate the purpose for which the fence was erected, the fence is a "casual fence." Repairing or maintaining a casual fence, even for the express purpose of keeping the claimant's animals within the enclosed area, generally does not change a casual fence into a designed enclosure.

King Ranch, Inc.* v. *Chapman, 118 S.W.3d 742, 46 Tex. Sup. Ct. J. 1093 (2003). This is a very interesting case, from a historical perspective, involving the King Ranch and disputes that go back 150 years. Among the many claims and defenses in the case was the question of whether the King Ranch side of the argument had established title by adverse possession.

There was a partition suit between the original King and Chapman's widow, filed in 1879, that was ultimately settled with King buying the Chapman half of the land for $5,811.75. The heirs, who had not been joined in the suit after the widow's death, were certain they had been sold out by their lawyer. This action was commenced in 1995.

Adverse possession is "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." King Ranch moved for summary judgment on the ten year and the two twenty-five year adverse possession statutes.

A co-tenant may not adversely possess against another co-tenant unless it clearly appears he has repudiated the title of his co-tenant and is holding adversely to it. The court of appeals stated that whether there has been a repudiation of a non-possessory co-tenant's title is a question of fact. The Supreme Court revised that holding and held that, while repudiation is often a fact question, when the pertinent facts are undisputed, repudiation may be established as a matter of law.

The court noted that, in the initial 1879 lawsuit, Helen Chapman had admitted in an affidavit that King had ousted her from the property. Even if she hadn't admitted the ouster, the judgment entered in settlement, which quieted title in King, was sufficient ouster for purposes of commencing limitations. As a matter of law, repudiation occurred not later than April 7, 1883, the date the court entered judgment.

King Ranch also produced summary

judgment evidence on the remaining elements of adverse possession, establishing as a matter of law that it has cultivated, used, and enjoyed the land for over a hundred years. The Supreme Court then scolded the court of appeals, saying that, by holding that a fact issue existed as to whether King Ranch has adversely possessed property it has used openly, notoriously, and exclusively for over one hundred years, despite the undisputed facts of record, the court of appeals ignored our precedent and frustrated the policy behind our adverse possession statutes. The policy behind statutes which permit adverse possession is the settlement and repose of titles. Without such laws, time, instead of lending a helping hand to cure apparent defects and remove opposing claims, will only be the means and afford a ready opportunity of rendering titles less secure against mistakes, frauds, and perjuries. The older the title the less secure it becomes against such attacks.

The final paragraph of the case expressed the Supreme Court's relief that the 150-year old dispute was finally over. "This case demonstrates the wisdom in protecting the stability of final judgments. Richard King and William Chapman, along with every witness with personal knowledge of the events at issue, have long since expired. The paper trail of evidence, though surprisingly detailed, cannot turn speculation about King's motives into evidence of his fraud. Assuming the court had the ability, more than a century later, to ferret from history facts supporting the Chapman heirs' claim, it held that it must nevertheless presume that, absent extrinsic fraud, the 1883 judgment settled the dispute, once and for all. Even if not settled by judgment, the King Ranch's continued dominion over the Rincon, in a manner obviously hostile to the heirs' claims, establishes adverse possession conclusively."

Natural Gas Pipeline Company of America* v. *Pool, 124 S.W.3d 188, 47 Tex. Sup. Ct. J. 153 Tex. 2003). In Texas it has long been recognized that an oil and gas lease is not a "lease" in the traditional sense of a lease of the surface of real property. In a typical oil or gas lease, the lessor is a grantor and grants a fee simple determinable interest to the lessee, who is actually a grantee. Consequently, the lessee/grantee acquires ownership of all the minerals in place that the lessor/grantor owned and purported to lease, subject to the possibility of reverter in the lessor/grantor. The lessee's/grantee's interest is "determinable" because it may terminate and revert entirely to the lessor/grantor upon the occurrence of events that the lease specifies will cause termination of the estate. In the cases before us today, the lessors retained only a royalty interest. When an oil and gas lease reserves only a royalty interest, the lessee acquires title to all of the oil and gas in place, and the lessor owns only a possibility of reverter and has the right to receive royalties. A royalty interest, as distinguished from a mineral interest, is a non-possessory interest.

A mineral estate, even when severed from the surface estate, may be adversely possessed under the various statutes of limitations. Once severance occurs, possession of the surface alone will not constitute adverse possession of minerals. Generally, courts across the country including Texas courts have said that in order to mature title by limitations to a mineral estate, actual possession of the minerals must occur. In the case of oil and gas, that means drilling and production of oil or gas.

In order to acquire title under a statute of limitations, that statute's requirements must be met. The three-year statute of limitations says: "A person must bring suit to recover real property held by another in peaceable and adverse possession under title or color of title not later than three years after the day the cause of action accrues." Texas Civil Practice & Remedies Code § 16.024. The five-year statute requires adverse possession by one who pays taxes and holds under a deed. Texas Civil Practice & Remedies Code § 16.025. An oil and gas lease is considered a deed. The ten-year statute of limitations requires suit to be brought within ten years "to recover real property held in peaceable and adverse possession by another who cultivates, uses, or enjoys the property." Texas Civil Practice & Remedies Code § 16.026(a).

The court of appeals concluded in these

cases that the lessees' continuation of oil and gas operations and possession of the minerals after the leases terminated was not adverse because no notice of repudiation had been given to the lessors. The court reasoned that because the lessees' original possession of the mineral estate was permissive, adverse possession could not be established "unless notice of the hostile nature of the possession or repudiation of [the record title owners'] title is clearly manifested."

The Supreme Court held, however, parties to the leases were not co-tenants. The lessors retained only a royalty interest and the possibility of reverter. The lessors had no right to possess, explore for, or produce the minerals. The exclusive right to do so was conveyed to the lessees. Accordingly, even when the lease was in effect, there was no co-tenancy. More importantly, if the leases terminated as the lessors contend, the lessees retained no interest whatsoever in the minerals. The entire mineral interest reverted to the lessors. There was no co-tenancy.

A lessee's position after a lease expires is more analogous to one holding over after the execution of a deed or after a judgment vesting title in another is entered. The court has long said that, as a general rule, a party holding over after the execution of a deed or the rendition of an adverse judgment is merely a permissive tenant. In such circumstances, possession cannot be considered adverse until the tenancy has been repudiated, and notice of such repudiation has been brought home to the titleholder. Actual notice of repudiation is not required. Rather, notice can be inferred, or there can be constructive notice. A jury may infer notice of a repudiation without any change in the use of the land, if there has been long-continued use.

In this case, the lessors asserted no claim for at least fourteen years with regard to some of the leases, and for at least twenty-nine years with regard to the others. That is a strong circumstance tending to authorize an inference of notice of adverse possession. There is also uncontroverted evidence that the lessees' long-continued possession was open, notorious, exclusive, and inconsistent with the existence of title to all the minerals in the lessors.

The court stated that it is important to bear in mind that the lessees were not required to give actual or constructive notice that they were no longer claiming an interest under the leases, but instead that they were claiming an interest that was inconsistent with the lessors' title to all the minerals when the leases expired. Thus, it was not the leases that the lessees must have been adverse to, but the lessors' fee title to all the minerals after the leases allegedly terminated. The lessees continued to claim rights under the leases, and it was that claim that was adverse to the lessors' fee title, unencumbered by the leases.

It is also important to recognize that the holding over of an oil and gas lessee after the lease has expired can differ from a tenant of the surface with regard to what is "open, notorious, exclusive, and inconsistent." A tenant of the surface that holds over and does nothing more than continue to occupy the premises as before, paying the same rent as before, is not in the same position as an oil and gas lessee who holds over. Surface leases do not typically contemplate that the tenant will remove permanent fixtures on or improvements to the property or consume or destroy the property itself. But an oil and gas lease contemplates that the mineral estate itself may be permanently and irrevocably depleted by removing and exhausting the minerals. An oil and gas lessee that holds over continues to physically remove and dispose of the very valuable, non-renewable minerals for its own account. Such actions are by their nature hostile to the lessor's ownership of all the minerals in place once the lease expires and the mineral estate reverts to the lessor in its entirety.

The court's decision should not be read as awarding fee simple absolute interests to the lessees in the oil and gas resources at issue. The lessees acquired the same interest that they adversely and peaceably possessed, that is, the oil and gas leasehold estates as defined by the original leases. Those interests are fee simple determinable interests in the respective

properties on the same terms and conditions as the original leases. The terms that made the original mineral estates "determinable" continue to apply to the fee simple determinable interests acquired by adverse possession.

Perkins* v. *McGehee, 133 S.W.3d 287 (Tex.App.—Ft. Worth, 2004, no pet.). The party claiming title by virtue of adverse possession has the burden of proving a description of the property adversely possessed. ***Coleman* v. *Waddell***, 151 Tex. 337, 249 S.W.2d 912, 913 (1952); ***Julien* v. *Baker***, 758 S.W.2d 873, 877 (Tex.App.-Houston [14th Dist.] 1988, writ denied), cert. denied, 493 U.S. 955, 110 S.Ct. 367, 107 L.Ed.2d 353 (1989). The claimant must identify the land to establish its location and to show the extent of its interest in the land claimed. In other words, the adverse claimant must merely prove the location of the disputed property on the ground. The general test for determining the sufficiency of a description of the land is whether the tract can be identified with reasonable certainty.

At trial, both parties introduced copies of their deeds, which contain metes and bounds descriptions of their adjoining properties, into evidence. Perkins offered into evidence a map depicting his property, which shows the fence line. An aerial photograph from the Hood County Appraisal District dated 1984 also admitted into evidence at trial shows the fence as well. The testimony at trial was that this fence has been in its present location since at least 1982. Moreover, while the trial court's judgment failed to state any description of the property in dispute, the trial court's findings of fact and conclusions of law states that the fence line established by the evidence in this case is the legal boundary between Perkins's real property and McGehee's real property, and McGehee has legal title to and are entitled to possession of the area of real property north of the fence line, which was the area of real property in dispute in this case. Thus, the Court of Appeals held that the legal description of the parties' adjoining properties, the maps and aerial photo of the existing fence, and the court's ruling, provide sufficient evidence to identify the disputed property with reasonable certainty so that it may be located upon the ground.

Witcher* v. *Bennett, 120 S.W.3d 922 (Tex.App.—Texarkana 2003, pet. denied). A party that holds over after an adverse judgment has been rendered against it is merely a permissive tenant, or a tenant at sufferance. Consequently, before the tenant can begin to adversely possess the land, he or she must repudiate the tenancy. Actual notice is not required. Such notice may be constructive and will be presumed to have been brought home to the co-tenant or owner when the adverse occupancy and claim of title to the property is so long-continued, open, notorious, exclusive and inconsistent with the existence of title in others, except the occupant, that the law will raise the inference of notice to the co-tenant or owner out of possession, or from which a jury might rightfully presume such notice.

The last judgment prohibiting the Witchers from entering the property was granted on April 13, 1989. Bennett filed this suit on January 18, 2002. Therefore, in order to acquire title by adverse possession under the ten-year statute, the Witchers must have given constructive notice after April 13, 1989 and before January 18, 1992. Bennett argues that a period of two years and nine months is insufficient as a matter of law to entitle the Witchers to establish constructive notice of the permissive tenancy by "long-continued" possession. In ***Sweeten* v. *Park***, 154 Tex. 266, 276 S.W.2d 794, 798 (1955), the Texas Supreme Court affirmed the court of appeals' decision that three years and seven months was insufficient to establish long-continued possession as a matter of law. While in general whether constructive notice has been given is a fact issue, Sweeten indicates that a period of less than three years and seven months is insufficient as a matter of law. Witcher only possessed the land two years and nine months after the second adverse judgment. Based on Sweeten, the court held that the Witchers did not repudiate the tenancy at sufferance due to long-continued possession as a matter of law.

Zanfardino* v. *Jeffus, 117 S.W.3d 495 (Tex.App.—Texarkana 2003, no pet.). In 1999,

Belinda A. Zanfardino, daughter of Virginia Antone and granddaughter of John Antone, came under the impression, after reviewing the documentation of the above transactions, that, in 1952 Tom Jeffus had fraudulently induced her mother and grandfather into deeding those tracts to him. Accordingly, Zanfardino contacted the title company to assert her claim to the property. At that time, the Lamar County tract was in the possession of Tom Jeffus' grandson, Hugh L. Jeffus, Jr. Hugh claims that, because Zanfardino created a cloud on the title, he was unable to sell the tract. Zanfardino defended on the basis of fraud. The court held that there was no evidence to support her claim of fraud. Even if there had been fraud, the court noted that summary judgment against Zanfardino was appropriate based on the statute of limitations and adverse possession.

Under the Texas Civil Practice and Remedies Code § 16.021, adverse possession is defined as "actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person." The only issue in dispute in this case is when limitations began to run. When a deed reserves a vendor's lien, possession of the vendee is not adverse to the superior title of the vendor, and the statute of limitations for adverse possession does not begin to run until the vendor's lien is released, or the vendee gives the vendor unequivocal notice of repudiation of the vendor's superior title. In 1955, Deport issued a partial release of lien and therein declared its note paid. In 1962, Banker's released its lien and declared its note paid. The court concluded the statute of limitations for adverse possession began to run in 1962, when the Antones no longer had a valid vendor's lien, and any Zanfardino claim to title of the land would have been barred by adverse possession regardless of whether the twenty-five-year or ten-year statute of limitations is applied.

PART IX
EASEMENTS

Nicol* v. *Gonzalez, 127 S.W.3d 390 (Tex.App.—Dallas 2004, no pet. history to date). The south boundary of Nicol's lot is the north boundary of Gonzales's lot. In 1983, Nicol and Gonzales's predecessor in title signed and filed the document in question. It states that, in about 1920, a garage was constructed on Gonzalez's, which encroached onto the Nicol's lot. The document also recites that, since about 1920, Ulrey and her predecessors have used a driveway partially on Nicol's lot for ingress and egress to and from the garage. In order to settle the controversy and conflicting claims from those encroachments on Nicol's lot, the document purported to convey to Ulrey and her heirs, successors, and assigns an easement on that portion of Nicol's lot presently being used as a driveway. In 1998 the garage was razed. Later, with the garage no longer there, Nicol fenced her boundary line and eliminated Gonzalez's access.

Nicol argued that the driveway easement did not survive the razing of the garage. The court parsed the wording of the easement, which said that the easement existed "for ingress and egress to a garage or out-building situated on the rear portion of said Lot 24, after which it will cease and come to an end" meant that the easement existed as long as any out-building existed at the rear of Gonzalez's lot, and, since there was a tool shed back there, the easement continued.

PART X
RESTRICTIVE COVENANTS SUBDIVISIONS AND CONDOMINIUMS

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.

Myer* v. *Cuevas, 119 S.W.3d 830 (Tex.App.—San Antonio 2003, no pet.). Myer, who owns a unit at Wurzbach Towers, sued the Board of Directors as well as four Board members, in their individual capacity. Myer's petition alleged violations of the open meetings requirements of the Uniform Condominium Act, mismanagement of corporate assets, and breach of fiduciary duty. The Board members filed a plea in abatement alleging that Myer lacked standing to sue them individually. The plea in abatement alleged that Myer asserted causes of action belonging to the corporation itself, which could only be brought by the Council of Co-owners, Inc. The members argued that Myer's ownership interest in the common elements via his membership in the Council does not grant him a right to recover individually for damage to the corporation itself.

Standing is an element of subject matter jurisdiction that can be raised at any time. The test for standing requires that there be a real controversy between the parties which will actually be determined by the judicial declaration sought. Without breach of a legal right belonging to the plaintiff, no cause of action can accrue to his benefit. A corporate stockholder cannot recover damages personally for a wrong done solely to the corporation, even though he may be injured by that wrong. Texas property law sets out the corresponding well-established rule that in a suit to recover for injury to land owned in common, all tenants must join.

This principle of property law was most recently applied in ***Scott* v. *Williams***, 607 S.W.2d 267, 271 (Tex.App.-Texarkana 1980, writ ref'd n.r.e.), where several condominium owners brought suit for themselves individually and as "equitable representatives of the co-owners of Belle Meadow" against members of the condominium's Board of Administration. Like the present case, the plaintiffs' petition alleged that the Board members controlled the affairs of the regime for personal gain, mismanaged its affairs, and misapplied its funds. On appeal, the plaintiff argued that the trial court's judgment only awarded damages based on the injuries suffered by the named parties and would not bind the unnamed remaining owners. However, the Texarkana Court of Appeals recognized that the absent owners should have been made parties, either as plaintiffs or defendants, and the absence of those co-tenants prevented the trial court from according "complete relief" under Rule 39 of the Texas Rules of Civil Procedure. The court noted that joining all co-tenants would further policies of judicial economy by preventing multiple suits based on the same injury to property owned

jointly.

Myer argues that the Texas Condominium Act statutorily confers standing on condominium owners to sue in their own names based on their proportionate ownership of the common elements. The Condominium Act does not limit an owner's right to sue individually, but does grant the council of owners the right to institute litigation on behalf of two or more apartment owners concerning a matter related to the common elements. The court noted, however, that this statute does not establish standing for individual owners or exempt a plaintiff from the requirement of invoking the trial court's jurisdiction by establishing subject matter jurisdiction. It held that Myer had no standing to sue for harm to the common elements of the condominium.

Anderson* v. *New Property Owners' Association of Newport, Inc., 122 S.W.3d 378 (Tex.App.—Texarkana 2003, pet. denied). An association has standing to sue when it satisfies a three-pronged test. First, the members must otherwise have standing to sue in their own right. Second, the interests it seeks to protect must be germane to the organization's purpose. Finally, neither the claim asserted nor the relief requested may require the participation of individual members in the lawsuit.

Ordinarily, any person entitled to benefit under a restrictive covenant may enforce it. This means that, generally, an interested property owner may enforce a restrictive covenant. In its petition, NPOAN alleges it is a nonprofit Texas corporation whose members consist of residents and owners of property in the Newport Subdivision. NPOAN members, as property owners, would have standing to bring this suit to enforce deed restrictions. NPOAN thus satisfies the first requirement for standing as an association.

Also, since NPOAN's purpose is aligned with that of its members, it satisfies the second prong of the test. In its articles of incorporation, NPOAN states its purpose is to: "[D]evote itself to the civic betterment of social improvement of the Newport property development in Harris County, Texas, and to the maintenance, operation, acquisition and ownership of the common areas and recreational facilities within the Newport subdivision, and to engage in any other activity permitted by law which may be useful in accomplishing any of the foregoing, with the best interests of the residents of Newport to be its primary consideration."

NPOAN's members certainly have an interest in the civic betterment and social improvement of life in their neighborhood. Applying the terms in a broad sense, the court concluded that such a purpose could include protection of the property owners' interests in maintaining an aesthetically pleasing and well-defined appearance.

Further, the claim NPOAN asserts and the relief it requests do not require the participation of any individual members. When, as here, an association seeks declaratory or injunctive relief, it is reasonable to suppose that the relief sought will inure to the benefit of the injured members. Granting of the relief NPOAN sought will not require proof of any of the association members' circumstances. The court thus held that NPOAN, as an association, did have, through its members, an interest which was allegedly violated by Anderson's construction of the driveway, establishing standing to bring suit for the violation.

Buckner* v. *Lakes of Somerset Homeowners Association, Inc., 133 S.W.3d 294 (Tex.App.—Ft. Worth 2004, pet. pending). The restrictive covenants setting up an architectural control committee provided that, if the ACC failed to approve or disapprove any such detail, design, plan, specification or location within thirty (30) days after submission to it, or "in any event" if no suit to enjoin has been commenced prior to the completion thereof, approval will not be required and this Article will be deemed to have been fully complied with.

Buckner was putting on a roof, and the ACC didn't like his roofing materials. They advised him in a letter that the materials were not approved, and, instead of changing materials

(as he had indicated he would do). Buckner finished the job with the ones disliked by the ACC. After the job was finished, the owners association filed suit.

Buckner argued that the restrictions meant that suit had to be begun before completion of the installation, and since it wasn't, the association could not prevail.

Both Buckner and LSHOA contend that the language in the restriction is unambiguous; however, they disagree on its meaning. Buckner claims that the phrase "in any event" means that regardless of whether the ACC timely approved or disapproved of replacement roofing materials, it was required to file suit to enjoin the Buckners' activities before the roof was completed. LSHOA contends that the phrase should be read to mean that it was required to file suit to enjoin the Buckners' activities only in the event the ACC failed to approve or disapprove of the materials within 30 days after the Buckners requested approval.

The court agreed that the wording was unambiguous. After describing one manner in which approval will be deemed, i.e., in the event the ACC fails to approve or disapprove submitted plans within 30 days after submission, the article continues by describing another manner of deemed approval: i.e., LSHOA's failure to file suit before the roof is complete. The use of the word "any" shows an intent to describe all scenarios other than those in which the ACC gives its explicit approval or fails to disapprove submitted plans within 30 days: when the homeowner has not complied with Article VI by requesting preapproval or when the ACC has denied approval and the homeowner continues making alterations in accordance with the disapproved plans. LSHOA's proposed interpretation would render the "in any event" language meaningless; if the ACC does not approve or disapprove of the submitted plans within 30 days, the plans are deemed approved in accordance with Article VI. Thus, a subsequent suit to enjoin activities completed in accordance with such plans would be pointless because LSHOA would lose.

City of Pasadena* v. *Gennedy, 125 S.W.3d 687 (Tex.App.–Houston [1st Dist.] 2003, pet. denied). Restrictive covenants are subject to the general rules of contract construction. As when interpreting any contract, the court's primary duty in construing a restrictive covenant is to ascertain the drafter's intent from the instrument's language. In ascertaining the drafter's intent, the court must examine the covenant as a whole in light of the circumstances present when the covenant was made. Whether restrictive covenants are ambiguous is a matter of law for the court to decide. A covenant is unambiguous if, after appropriate rules of construction have been applied, the covenant can be given a definite or certain legal meaning.

At common law, covenants restricting the free use of land are not favored, but will still be enforced when they are confined to a lawful purpose and are clearly worded. Accordingly, under the common law, a restrictive covenant's words cannot be enlarged, extended, stretched, or changed by construction. All doubts concerning a restrictive covenant's terms are resolved in favor of the free and unrestricted use of the land, and any ambiguity must be strictly construed against the party seeking to enforce the covenant.

In 1987, the Legislature amended the Texas Property Code to provide that all restrictive covenants contained in instruments governing certain residential developments, regardless of the date on which the covenants were created, must be liberally construed to give effect to their purposes and intent. See Texas Property Code §§ 202.002(a) and 202.003(a).

Some courts of appeals have recognized that the common-law requirement of construing restrictions strictly and section 202.003(a)'s requirement of construing residential covenants liberally to effectuate their purposes and intent might appear contradictory. Apparently on this basis, some courts of appeals have held or implied that section 202.003(a)'s liberal-construction rule concerning residential covenants supersedes the common-law strict-construction rule entirely.

In contrast, other courts of appeals have concluded that there is no discernable conflict between the common law and section 202.003(a). Even courts in this "no-discernable-conflict" category differ in what conclusion they draw from their determination that no conflict exists between the construction rules of the common law and those of section 202.003(a). For example, some of these courts have simply continued to apply the common-law strict-construction rules without a precise explanation of how the statutory and common-law construction rules interact without inconsistency. In contrast, other courts of appeals have held that the common-law strict-construction rule applies only when there is an ambiguity concerning the drafter's intent; however, to determine if an ambiguity concerning the drafter's intent exists, these courts first apply section 202.003(a)'s liberal-construction mandate. Of course, these two views of how section 202.003(a)'s and the common law's construction rules interact can theoretically lead to different constructions of the same term, even if the term is ultimately found to be unambiguous.

Finally, some courts of appeals since 1987 have simply continued applying the common-law strict-construction rule without referring to section 202.003(a) at all; others have applied or referred to section 202.003(a)'s liberal-construction standard without referring to the common-law construction principles at all; and still another has referred to both standards together without discussing whether the standards do or do not conflict.

The Supreme Court has noted, but not yet resolved, the potential conflict between the common-law and section-202.003(a) construction rules. This court urges the Supreme Court to resolve the differences among the courts of appeals on this issue. However, because the court concluded that, under either a liberal or a strict construction of the original deed restrictions in this case, it would reach the same conclusion, the court elected to continue to follow its earlier holdings—that no discernable conflict exists between the common law and section 202.003(a)—without reconsidering the issue.

H.H. Holloway Trust* v. *Outpost Estates Civic Club Incorporated, 135 S.W.3d 751 (Tex.App.–Houston [1st Dist.] 2004, pet. pending). In April, 1951, L.D. and Ada conveyed a 43-acre tract of land in Harris County to Hamilton Little, who were developers. In May 1951, the developers and L.D. and Ada (who had retained a lien on the property) signed a plat of a 53-acre subdivision, which included the 43-acre tract, named Outpost Estates Section One. According to the plat, the property was subdivided into 52 lots, numbered 1 through 50, 52, and 53. (A footnote points out that there is no explanation for the missing lot number 51 other than the statement by W.E. Little during his deposition that he did not know why the lots were numbered as they were and that "Roy (Pitner, the engineer who platted the tract) was a most unusual man."

In August, L.D. and Ada executed a deed covering lots 52 and 53 to their daughter. It was recorded much later. Following the description of the lots, the deed stated: "SAID LOT IS RESTRICTED IN ITS USE, AND THE RESTRICTIONS Said [Sic] ARE FILED WITH THE COUNTY CLERK OF HARRIS COUNTY UNDER FILE NO.________ IN VOL.____ PAGE__"

Margaret testified that she knew at the time she was given the lots that they were restricted to residential use.

In September, 1951, restrictive covenants were filed that restricted the subdivision to residential uses. The recitals stated that Hamilton and Little owned the property and that L.D. and Ada were joining as lienholders. The deed to Margaret was filed and recorded after the restrictions. In 1953, Margaret sold her lots to H.H. Holloway.

In 1988, Doris Holloway, as executor of the estate of H.H. Holloway, conveyed Lots 52 and 53 to the H.H. Holloway Trust (the Trust). In 1998, the trustee, H.H. Holloway Jr. the architectural committee that he wanted to

develop the two lots for commercial purposes. The committee told Holloway that the subdivision was restricted and that businesses were not allowed. The Trust filed an action for a judgment declaring that Lots 52 and 53 do not fall within and are not restricted by the deed restrictions of Outpost Estates Section One. After a bench trial, the trial court rendered judgment that the deed restrictions apply to the lots.

The Trust contends that Lots 52 and 53 cannot be bound by the deed restrictions because the deed conveying the lots to Margaret did not specify where the filed deed restrictions were recorded. The Trust argues that the reference to restrictions in Margaret's deed is a general statement of restriction designed to protect a grantor. The court disagreed and held that the reference to restrictions is not such a general statement. It is a specific statement inserted by the grantor: "Said lot is restricted in its use...." But the reference to the location of the recorded restrictions is incomplete. Nevertheless, the statement of restrictions is sufficient to put a subsequent purchaser on notice that there are use restrictions that apply to the property.

The Trust also contends that the trial court erred in determining that Lots 52 and 53 are subject to the deed restrictions for Outpost Estates Section One under the doctrine of implied reciprocal negative easement because the ownership of the lots was not derived from a common grantor, which is required to trigger the doctrine. The Trust reasons that, at the time the restrictions were signed, Lots 52 and 53 were owned by Margaret, and it implies that the remaining portion of the subdivision was owned by the developers; therefore, according to the Trust, there was no common grantor of the entire subdivision.

The doctrine of implied reciprocal negative easements applies when an owner of real property subdivides the property into lots and sells a substantial number of those lots with restrictive covenants designed to further the owner's general plan or scheme of development. When the owner of a tract of land subdivides it into lots according to a general scheme or plan, and sells those lots by deeds containing substantially uniform restrictions, the grantees acquire by implication an equitable right to enforce similar restrictions against any lots retained by the grantor or sold by the grantor without such restrictions to a purchaser with actual or constructive notice of the restrictions. This implied right is variously called an implied reciprocal negative easement or an implied equitable servitude.

In this case, the L.D., Ada, and the developers joined together to sign and file the plat of Outpost Estates Section One. The platted tract included the 43 acres conveyed by the Chacheres to the developers and an additional 10 acres. That the Chacheres gave two of the platted lots to Margaret and two to their son is some evidence that the Chacheres retained some of the platted tract. There is nothing in the record to show that the additional acreage was owned by anyone other than the Chacheres. Therefore, the court concluded that the Chacheres and the developers, together, were common grantors of the related parcels of land.

In addition, there was evidence that the owners of the lots had actual or constructive notice of the deed restrictions. Margaret, a donee rather than a purchaser, testified that she knew when she was deeded the lots that they were subject to deed restrictions and that they were to be used only for residential purposes. As discussed above, the deed from to Margaret gave some notice that the lots were restricted in their use.

Youssefzadeh* v. *Brown, 131 S.W.3d 641 (Tex.App.—Ft. Worth 2004, no pet. history do date). Restrictive covenants dating back to 1954 limited the use of the property to residential, except for lot 24, which was limited to commercial uses. The restrictions were effective for thirty years, with automatic 10 year extensions "unless by a vote of the majority of the then owners of the lots it is agreed to change the said covenants in whole or in part." No other provision in the restrictions mentions amendments or modifications.

In May 1961, after a number of lots in

the addition had been sold, a document was filed by the owners of lot 24 purporting to amend the restrictions on lot 24 so that, in effect, the lot was restricted partly to residential and partly to commercial. The document stated that "this amendment ... imposes additional restrictions on Block 24 thereof not in conflict with the provisions of the original dedication thereof and in all other respects than that mentioned herein, the provisions of said original dedication shall apply and control." While the change of use applied only to Block 24, the 1961 Amendment's stated purpose was to carry out a general plan for the protection, use and benefit of each and every purchaser of a lot or lots in the restricted subdivision.

Fat Cat's Liquor Store opened November 12, 2001, on Block 24 and would violate the 1961 Amendment if the amendment is valid.

A subdivision developer is generally free to amend restrictions in covenants for the subdivision prior to the sale of lots in the subdivision, assuming the amendments do not violate public policy. However, the sale of subdivision lots triggers any amendment mechanism set forth in the dedication. When the power to amend the land use restriction is reserved in the developer, the amendment of a restrictive covenant must be in the precise manner authorized by the dedicating agreement. The court held that the same "precise manner" requirement should logically be required when the amendment mechanism lies other than with the developer.

In this case, the 1954 Dedication provided no mechanism whereby an owner of property in the subdivision could unilaterally alter the covenant's restrictive use of the property. Rather, pursuant to Paragraph nine of the 1954 Dedication, the covenants continued in place from 1954 until 1984, after which time a majority of the property owners could amend the 1954 Dedication. Therefore, the plain and unambiguous wording of the 1954 Dedication leads to the conclusion that the attempted 1961 Amendment, utilizing an amendment method not called for in the 1954 Dedication to divide commercial-use Block 24 into both commercial and residential use, was not in the "precise manner" called for in the 1954 Dedication and, therefore, was of no force and effect.

Brown argues that the amended restrictions are limited to Block 24 and there is no attempt to modify or change the restrictions, conditions, or limitations to the subdivision as a whole, and furthermore that the restrictions enhance the other lots by creating a residential lot between the commercial portion of Block 24 and the residential lots of the neighborhood. Were this court to follow that reasoning, every lot owner could place restrictions on his own lot, and a uniformly planned subdivision could fall into disarray.

PART XI
HOMESTEAD

In the *Matter of Perry*, 345 F.3d 303 (5th Cir. 2003). Perry owned two tracts of land. He formed a corporation and conveyed one of the tracts, a 26-acre tract, to the corporation. The corporation mortgaged the property, although later Perry refinanced it in his own name. The property was never deeded back to Perry, although he executed an affidavit that the corporation was defunct and that he had assumed all its liabilities and assets. Perry then filed bankruptcy, claiming the two tracts, including the 26-acre tract, as his rural homestead.

Title to the 26-acre tract, despite Perry's arguments to the contrary, remained in the corporation. However, Perry was in possession as a tenant-at-will, therefore, the court held, he had a homestead interest in the property to the extent of his interest as a tenant-at-will. The court noted that Perry's interest in the corporation was presumably a part of the bankruptcy estate and whoever ended up with the corporation would probably terminate the tenancy.

The court then dealt with the question of whether the two tracts, whatever their ownership status, could qualify for rural homestead status, since they were used to operate a non-

agricultural business, namely a trailer park. The court held that nothing in the Texas Constitution or the Texas Property Code precluded the operation of a business on rural homestead property, citing the agrarian past of Texas as an indication that the framers just hadn't gotten around to thinking of that possibility. However, although the court was unable to agree that the operation of a non-agricultural business on a rural homestead necessarily sacrifices the homestead character of that portion of the property, it was not in a position to say that Perry, by operating a mobile home and RV park, did not abandon the 26-acre tract for homestead purposes. The court suggested that, on remand, the trial court look into whether the use of the property, renting it out to mobile home and RV tenants, was sufficiently inconsistent with homestead uses that the homestead was lost as to these tracts. As an initial matter, the court should determine whether, and if so, over what portions of property, Perry released possession and control. Then, the court should consider Perry's intent with respect to that portion of the property. If Perry intended to resume control over the property, the property will not lose its homestead character.

In re *Jay*, 308 B.R. 251 (Brktcy. N.D. Tex. 2002). Article XVI § 51 of the Texas Constitution was amended in 1999. In pertinent part, the proposition adopted by the voters amended section 51 to provide for an urban homestead which "shall be used for the purposes of a home, or as both an urban home and a place to exercise a calling or business." Previously section 51 provided that the homestead "shall be used for the purpose of a home, or as a place to exercise the calling or business of the homestead claimant." The key difference between the two versions for purposes of the present adversary, therefore, is that no longer can a person claim an urban business homestead without having a home there.

The electorate voted on the amendment on November 2, 1999. Anticipating its passage, the legislature passed amendments to the Texas Property Code, to be effective on January 1, 2000, which were contingent on the passage of the amendment.

The Jays had owned a .85 acre tract on which they operated a gas station. In December 1999, they entered into a transaction with Nesco which appeared to be nothing more than a way of placing an otherwise improper lien on their business homestead. When they ultimately filed bankruptcy, they claimed the property as homestead and sought to have the transaction set aside. Nesco argued, among other things, that because of the change in the homestead law, the property was not a business homestead at the time of the transaction.

The Jays argued that the amendments were not effective until January 1, 2000, when the new legislation became effective. The court disagreed and held that the constitutional amendments were "self-executing" and became effective when the vote was certified.

The Jays then argued that the pre-2000 statutory provisions were sufficient to provide the business homestead exemption. Even though the constitution had changed, the legislation had not. The court disagreed. The legislature has no power to enlarge or modify constitutionally defined homesteads.

The court did hold, however, that the property was business homestead because the amendment of the Constitution did not operate retroactively to eliminate the business homestead that had been established on the property before the amendments became effective. There was a retroactive effect when the statutory provisions changed in January 2000, though. But since the Jays entered into the transaction before that, they retained their exemption.

PART XII
LEASES

In re *Prudential Insurance Co. of America*, 2004 WL 1966015, 47 Tex. Sup. Ct. J. 1104 (Tex. 2004). The lease contains the following paragraph: "In the event that the Landlord commences any summary proceeding or action for nonpayment of rent or other charges provided for in this Lease, Tenant shall

not interpose any counterclaim of any nature or description in any such proceeding or action. Tenant and Landlord both waive a trial by jury of any or all issues arising in any action or proceeding between the parties hereto or their successors, under or connected with this Lease, or any of its provisions."

Prudential did not specifically point out this provision to the tenant, and the tenant testified that she never noticed it. She also testified that notwithstanding the clear meaning of the second sentence, she never intended to waive a jury trial in any future litigation. The guaranty agreement does not contain a similar waiver but does state that the owners of the tenant agree to guarantee the tenant's "full and timely performance and observance of all the covenants, terms, conditions, provisions, and agreements" in the lease, and in the event of the tenant's default, to "faithfully perform and fulfill all of such terms, covenants, conditions, provisions, and agreements".

Some nine months after the lease was executed, the tenant sued Prudential in statutory county court, claiming in part that it was impossible to do business on the premises because of a persistent odor of sewage. Prudential counterclaimed for amounts allegedly due under the lease and guaranty. When the trial court notified the parties that a date for non-jury trial had been set, the tenant filed a jury demand and paid the jury fee. The court then notified the parties that a date for jury trial had been set. Prudential moved to quash the jury demand, based on the waiver in the lease.

As a rule, parties have the right to contract as they see fit as long as their agreement does not violate the law or public policy. The tenant argues that a contractual jury waiver does both.

The Supreme Court did not dwell on the tenant's argument that contractual jury waivers violate various provisions of the Texas Constitution, an argument the trial court did not endorse. The five provisions the tenant cites in its argument guarantee various personal rights--trial by jury, access to the courts, due course of law, and the Bill of Rights in general. The provisions say nothing about whether and under what conditions such rights can be waived. For the most part, personal rights can be waived, at least under certain conditions. The tenant concedes that the right to trial by jury can be waived by failure to comply with the procedures prescribed by Rule 216. Nothing in the constitutional provisions themselves suggests that parties are powerless to waive trial by jury under any other circumstances, before or after suit is filed.

The tenant argues that Rule 216 prescribes the only way in which trial by jury can be waived, but it plainly does not. Rule 216 states that "[n]o jury trial shall be had in any civil suit, unless " a timely demand is made and jury fee paid. By the rule's express language, those conditions are prerequisites to a jury trial, not guarantees of one.

The tenant's principal argument, and the one accepted by the trial court, is that an agreement to waive trial by jury is contrary to the public policy expressed in the constitutional provisions and Rule 216. This is so, the tenant contends, because to allow such waivers gives parties the power to alter the fundamental nature of the civil justice system by private agreement. But parties already have power to agree to important aspects of how prospective disputes will be resolved. They can, with some restrictions, agree that the law of a certain jurisdiction will apply, designate the forum in which future litigation will be conducted, and waive in personam jurisdiction, a requirement of due process. Furthermore, parties can agree to opt out of the civil justice system altogether and submit future disputes to arbitration. State and federal law not only permit but favor arbitration agreements. The tenant argues that while it does not offend public policy for parties to agree to a private dispute resolution method like arbitration, an agreement to waive trial by jury is different because it purports to manipulate the prescribed public justice system. The Supreme Court was not persuaded. Public policy that permits parties to waive trial altogether surely does not forbid waiver of trial by jury.

Among its other arguments, the tenant argues that if contractual jury waivers are permitted,

some parties will attempt to take unfair advantage of others, using bargaining position, sophistication, or other leverage to extract waivers from the reluctant or unwitting. The court agreed that agreements made in such circumstances cannot be enforced. A waiver of constitutional rights must be voluntary, knowing, and intelligent, with full awareness of the legal consequences.

Caldwell* v. *Curioni, 125 S.W.3d 784 (Tex.App.—Dallas 2004, pet. denied). A landlord generally has no duty to tenants or their invitees for dangerous conditions on the leased premises. However, there are several exceptions to the general rule. A landlord who makes repairs may be liable for injuries resulting from the landlord's negligence in making the repairs. In addition, a landlord who conceals defects on the leased premises of which the landlord is aware may also be liable.

The landlord need not have actual knowledge of a dangerous condition. It is enough that he has reason to know that the condition exists ... that is, that he has information from which a person of reasonable intelligence, or of his own superior intelligence, would infer that the condition exists, or would govern his conduct on the assumption that it does exist, and in addition would realize that its existence will involve an unreasonable risk of physical harm to persons on the land.

The Caldwells argue there was sufficient summary judgment evidence to prove Curioni had reason to know, and should have known, of the infestation of mold and its potentially harmful effects. Further, they argue that when he advertised the house as being "freshly redone" he assumed the duty to exercise reasonable care for the protection of prospective tenants such as the Caldwells.

It was undisputed that there was a foul odor in the house when the Caldwells signed the lease. The Caldwells acknowledged there was a pet odor and the parties agreed the Caldwells would not be held responsible for the odor at the end of the lease. Curioni argues this odor was not sufficient notice to charge him with constructive knowledge of the existence of toxic mold. Moreover, Curioni contends there was no evidence he knew or should have known there was mold in the house, no evidence there was mold when the Caldwells signed the lease, and no evidence the amount of mold was harmful.

However, the Caldwells offered the opinion of a construction expert who said that there was widespread mold growth throughout the house which had probably resulted from flooding caused by a ruptured water heater before the Caldwells had moved in. The expert offered his opinion that the dangers of mold at the time the Caldwells signed the lease were well-known, and that Curioni's efforts to prepare the house for occupancy were "so lacking as to be non-existent." The expert noted that the carpet tackboards had been freshly painted, which he interpreted as an attempt to cover up a serious problem. Further, he observed that advertising the property as "freshly redone" under these circumstances indicated an attempt to deceive. In addition, the Caldwells offered the opinion of an industrial hygienist that a toxic strain of mold was present in the Richland house. Further, the Caldwells offered evidence that Curioni should have known of the mold problem at the Richland house, and made inadequate preparations for renting the house for occupancy. Under these circumstances, and in view of the standard described in § 358 of the Restatement (Second) of Torts, the court concluded Curioni failed to conclusively negate he owed a duty to the Caldwells.

The Caldwells also contend that an "as is" clause in the lease does not bar their cause of action. Under paragraph 32 titled "Special Provisions," the parties wrote in their own handwriting: "residual pet odor, tenant will try to improve but will not be held responsible for at end of lease; property is as-is with refrige. ice maker not working; $275 pet deposit for dog under 30 # s." Curioni argues the meaning of this paragraph is that the parties explicitly agreed the Caldwells took the property "as is," and, therefore, Curioni was not liable to the Caldwells for personal injuries due to any

condition found on the property.

Additionally, Curioni argues the provisions of this paragraph 32 control over the provisions of another, "as is" paragraph of the lease, paragraph 17. This paragraph provides "[t]enant has inspected and accepts the Property AS IS except for conditions materially affecting the safety or health of ordinary persons or unless expressly noted otherwise in this Lease."

The provisions here are not ambiguous. The handwritten "as-is" provision of paragraph 32 of the lease refers to the inoperative condition of the "refrige. ice maker." The Caldwells have made no complaint regarding the refrigerator ice-maker. Examining the entire writing to harmonize and give effect to all its provisions, paragraph 32 is not inconsistent with paragraph 17, and the provisions of paragraph 17 are not reduced or modified. The Caldwells took the property "as is," except for conditions materially affecting the safety or health of ordinary persons. The court concluded the "as-is" provisions of the lease did not bar the Caldwells' causes of action against Curioni.

Gibson* v. *Dynegy Midstream Services, L.P., 138 S.W.3d 518 (Tex.App.–Ft. Worth 2001, no pet.). In May 2003, Hattie sued Dynegy Midstream Services, L.P. in the justice court of Young County for forcible entry and detainer and forcible detainer, asserting her right to immediate possession of a two-acre tract of land in Young County (the Property). In response, Dynegy filed a plea to the jurisdiction, asserting that the justice court lacked subject matter jurisdiction over Hattie's claims because they were an attempt to have the court determine ownership or title to the Property. The justice court dismissed Hattie's suit, and she appealed that ruling to the county court. After a hearing, the county court also dismissed Hattie's suit for want of jurisdiction. Hattie then appealed to the court of appeals.

Dynegy argued that the court of appeals had no jurisdiction over the appeal because section 24.007 of the Texas Property Code precludes appeals from eviction proceedings involving property not being used for residential purposes, and neither the Texas Constitution nor another statute grants us jurisdiction over such an appeal. Hattie asserted that section 24.007 only limits appeals involving the issue of possession and that her appeal does not raise the issue of who is entitled to possession of the Property but, instead, whether the justice and county courts had subject matter jurisdiction over her claims. The court agreed. Section 24.007 is not intended to preclude appellate review of all issues arising from an eviction proceeding involving commercial property, but only to limit review over appeals raising the issue of possession. Because possession is not an issue in this appeal, the court held that section 24.007 does not prevent Hattie from appealing the propriety of the justice and county courts' orders dismissing her suit for want of subject matter jurisdiction and that the court of appeals has appellate jurisdiction over such an appeal.

Unfortunately, the court also held that the justice and county courts had no jurisdiction. Dynegy's affirmative defense was an adverse possession claim, and that could be determined only by a determination of title issues, which the justice court has no jurisdiction to handle.

Ward* v. *Malone, 115 S.W.3d 267 (Tex.App.–Corpus Christi-Edinburg 2003, pet. denied). The contract for deed did not provide that, upon default, the purchaser would be considered a tenant at sufferance. Consequently, in order to determine the right to possession, issues of title would have to be resolved, and the justice court lacked jurisdiction to proceed with the FED action.

Kukis* v. *Newman, 123 S.W.3d 636 (Tex.App.–Houston [14th Dist.] 2003, no pet.). from Kukis in early November 1999. The lease provided in part, "Tenant has inspected and accepts the Property AS IS except for conditions materially affecting the safety or health of ordinary persons or unless expressly noted otherwise in this Lease." The lease also provided the landlord was to pay for repairing a condition caused by the landlord's negligence or a condition that was not the tenant's obligation to pay and "that adversely affects the health or safety of an ordinary tenant."

Before executing the lease, the Newmans had viewed the home for about thirty minutes in late afternoon. As they walked around the house, there was no electricity and visibility was poor. Because the Newmans had small children, they were concerned about open spindles at the top of a staircase between the first and second floor and also about the lack of a barrier at the top of the stairs. The Newmans did not notice the lack of a handrail on the staircase. Kukis knew there once had been a handrail in the house, but the previous occupant had removed it. Kukis did not tell the Newmans there had once been a handrail on the staircase.

The Newmans moved into the house two weeks after signing the lease. The morning after the move, Mrs. Newman fell as she was carrying her one-year-old son down the set of stairs to the first floor. The accident occurred when Newman's right heel caught only the edge of the second-to-last step, causing her to fall forward onto the entryway. As a result, she broke her ankle.

The Newmans sued Kukis and three other parties, alleging multiple causes of action including negligence for failing to (1) exercise ordinary care in inspecting the residence for unsafe conditions, (2) exercise ordinary care in maintaining the residence, including the staircase, (3) provide adequate warnings of the unsafe condition of the staircase, (4) properly and timely repair the stairway, including failing to install appropriate handrails, and (5) perform obligations under the lease agreement. At the close of the Newmans' case, Kukis moved for a directed verdict on the ground a landlord has no duty to tenants or their invitees for dangerous conditions on the leased premises. Kukis noted the exception for areas over which a landlord retains control and argued his reservation of the right to come onto the property to inspect and make repairs was not sufficient to invoke that exception. The trial court denied the motion. Kukis subsequently objected to the jury charge on the ground there was no duty on his part in relation to the leased property, and there was at least a fact issue on the right of control, requiring the control issue to be submitted to the jury. The trial court overruled the objection and submitted the standard charge for invitees, instructing the jury Kukis was negligent with respect to a condition of the premises if (1) the condition posed an unreasonable risk of harm, (2) Kukis knew or reasonably should have known of the danger, and (3) Kukis failed to exercise ordinary care to protect Newman from the danger by both failing to adequately warn Newman of the condition and failing to make that condition reasonably safe. The jury answered the question affirmatively, found Kukis and Newman each fifty percent negligent, found Jayme Newman sustained total damages of $45,500, and found James Newman sustained zero damages. The court of appeals reversed.

In a premises liability case, the duty owed depends on the relationship between the parties. A lessor generally has no duty to tenants or their invitees for dangerous conditions on the leased premises. This rule originates from the notion that a lessor relinquishes possession or occupancy of the premises to the lessee. Texas courts, however, recognize three exceptions to this general no-duty rule. A lessor may be liable for injuries arising from (1) the lessor's negligent repairs, (2) concealed defects of which the lessor was aware when the premises were leased, and (3) a defect on a portion of the premises that remained under the lessor's control.

Newman relies on the second exception: failure to disclose a concealed defect. When there is no agreement by the landlord to repair the premises and he is not guilty of fraud or concealment by failing to disclose defects existing when the lease is made, he is not liable to the tenant for injuries caused by such defects. The court didn't think the handrail was concealed. Although Newman contends Kukis should have warned her about the absence of the handrail, there is no evidence he concealed the lack of a handrail from her.

In the present case, there was evidence the cost of reinstalling the handrail was negligible: approximately thirty minutes of time and $31.00 in supplies. Notwithstanding Kukis's testimony that staircases are "inherently

dangerous," there is no evidence anyone ever fell on the subject staircase before the occurrence at issue. Moreover, the alleged defective condition on the staircase was not hidden. Finally, there was controverted evidence suggesting the addition of a handrail could complicate moving larger furniture up the stairs. Considering the general no-duty rule, the lack of any evidence of concealment, and the factors relevant to the imposition of a duty, under the circumstances of the present case, Kukis owed no duty to Newman.

Lee* v. *Perez, 120 S.W.3d 463 (Tex.App.–Houston [14th Dist.] 2003, no pet.). Perez leased two lots in Houston to operate a used car lot. The "Commercial Lease" he signed was for a period of three years beginning on March 1, 2000, and limited his use of the lots to the sale, financing, and insurance of autos. Two months later, a Houston city attorney sent a letter informing him he was violating a deed restriction limiting the property to residential use, and threatening a lawsuit unless he shut down his business within 15 days. Perez complied, and then sued, claiming that the existence of the restrictions made the commercial premises unsuitable for their intended use.

Texas law provides an implied warranty that a commercial lease is suitable for the intended commercial purpose. ***Davidow* v. *Inwood North Professional Group--Phase I***, 747 S.W.2d 373, 377 (Tex.1988). This implied warranty applies only to latent defects, which appellants contend this was not. The trial court found that Perez had not been told about the restrictions, but Lee argued that the fact that the restrictions were recorded constituted constructive notice. The court disagreed, with no discussion.

Lee pointed to five other provisions in the lease that, he argued, disavowed any implied warranty. First, the lease stated that Perez was accepting the premises “as is.” Again, with not much discussion, the court held that the “as is” provision dealt only with the physical condition of the premises and declined to hold that the provision disavowed the implied warranty.

Second, Lee tried to argue that the “merger” provision (which voided any prior agreements between the parties) eliminated the warranty. The court held that the implied warranty wasn’t a prior agreement, but a part of this agreement.

Third, Lee pointed to a provision requiring Perez to "comply with all laws, orders, and requirements of all governmental entities with reference to the use and occupancy of the leased premises." Assuming this deed restriction was a requirement of a governmental entity, it is undisputed Perez did comply by shutting down his business. His compliance hardly excuses appellants’ initial breach of the implied warranty regarding how the premises could be used.

Fourth, appellants point to a provision they say limits Perez’s remedies to terminating the lease or making repairs for the landlord’s account. But the lease also provided this remedy was cumulative rather than preclusive of the tenant’s other rights and remedies. A cumulative remedy cannot preclude the one Perez pursued.

Finally, appellants point out the commercial lease shows only "Grace Real Estate Management" as landlord; they argue judgment against any other party was improper. But at trial, James Lee admitted he owned the lots, and deeds were introduced proving that to be so. Lee also testified he and his wife were the sole owners, officers, and directors of the corporate defendant. There was evidence the corporation’s charter had been forfeited for failure to pay franchise taxes long before this lease was signed. None of the appellants filed a verified denial that they had been sued in the wrong capacity. In their motion for new trial, the appellants themselves alleged that "Defendants" (i.e., all of them) leased the two lots to Perez. That was enough evidence to permit judgment against all the defendants.

Universal Health Services, Inc.* v. *Renaissance Women’s Group, P.A., 121 S.W.3d 742, 47 Tex. Sup. Ct. J. 20 (Tex. 2003). A group of physicians contracted to lease office

space for ten years in a building which also housed a hospital where they would practice. About two years into the lease term, the owners decided to close the hospital for financial reasons and notified the physicians of their intentions. The doctors sued, alleging that the owner was bound by the lease and letter agreements to operate the hospital for the entire term of the lease. The Supreme Court held that the express wording of the lease did not require the hospital to remain in operation. A part of this wording was a statement that the project would be composed of a women's hospital located on the first floor of the Project and medical offices and clinic leased to the clinic located on the second floor. Other provisions required the hospital to be properly licensed. The court held that the language that the project "will be composed of a women's hospital ... and medical offices and clinic" is only a general description of the project, not an obligation on either party. Similarly, the language regarding Universal's obligation to acquire permits and insurance agreements does not impose an obligation to operate the hospital. The clinic failed to properly plead its case for an implied covenant, so the court didn't even go there.

PART XIII
AD VALOREM TAXATION

Rourk* v. *Cameron Appraisal District, 131 S.W.3d 285 (Tex.App.—Corpus Christi-Edinburg 2004, pet. pending) This was a class action brought by a bunch of owners of travel trailers and park model recreational vehicles they kept at various trailer parks in Cameron County. The Cameron CAD appraised the vehicles for ad valorem taxes. The owners challenged the assessment, arguing the assessment was unconstitutional treatment of their recreational vehicles as "manufactured housing." During the time period relevant to this suit, article VIII, § 1(d)(2) of the Texas Constitution provided that the Legislature may not exempt from ad valorem taxation, in relevant part, "structures which are personal property and are used or occupied as residential dwellings." This article was amended in 2003, and now says that the legislature may not exempt "structures which are substantially affixed to real estate and are used or occupied as residential dwellings."

Most of the class members had exhausted their administrative remedies, but several had not, and the Cameron CAD argued that the court had no jurisdiction to decide the case, since those plaintiffs had failed to exhaust their administrative remedies and the Tax Code procedures provide the exclusive remedy for tax disputes. The court held otherwise.

A violation of a taxpayer's constitutional right to an assessment conforming to the Texas constitution and statutes may be judicially enforced. Acts that are prohibited or unauthorized by law are subject to taxpayers' suits for injunctive or other appropriate relief. As a general rule, a party must exhaust his administrative remedies before seeking judicial review of agency action. However, the doctrine has no application when there are pure questions of law involved. Further, the doctrine has no application where the legal question is one of whether a statute is constitutional: administrative agencies have no power to determine the constitutionality of statutes. Accordingly, there is no sound reason for forcing a litigant through the administrative process when in good faith he is advancing a substantial complaint that the statute that he is charged with violating is unconstitutional. The futility of requiring the exhaustion of administrative remedies in such cases is apparent. It is for this reason that exhaustion may be excused wherein substantial constitutional questions are involved. Furthermore, the question of whether the appraisal district usurped the legislature's authority may be decided in a suit without exhausting administrative remedies.

The case went on to discuss whether the trailers and other vehicles could be taxed, and found that they were not fixtures and that the district had failed to provide evidence that they were manufactured housing. Since the constitutional provision has changed, the significance of these rulings may be diluted.

Whitehead* v. *Jasper County Water Control & Improvement District No. 1, 118

S.W.3d 485 (Tex.App.—Beaumont 2003, pet. denied). Judgment was entered in favor of Buna ISD, the Water District and Jasper County against the taxpayer's property, including two designated as Tract 2 and Tract 8. Tract 2 is 31.57 acres and adjoined by Tract 8, which is 4.43 acres. The judgment was executed by Order of Sale and the Jasper County Sheriff conducted a tax sale at which he struck off Tract 2 and Tract 8 to Buna ISD, for the use and benefit of Buna ISD, Jasper County, the Water District, and the Jasper County Education District, pursuant to Tax Code § 34.01(c). Buna ISD, as Trustee, conveyed Tract 2 to the Water District by a Tax Resale Deed on April 12, 1999. Subsequently, Whitehead tendered to the Water District the amount of $41,740.24 to redeem Tract 2 in accordance with the Tax Code. The Water District then executed a quitclaim deed on Tract 2 in favor of Whitehead. The Water District apparently thought Tract 2 was a vacant tract of land and that an office building was located on Tract 8. Later, it was discovered the office building, thought to be located on Tract 8, was actually on Tract 2 with some encroachment on Tract 8. The Water District filed suit to rescind the redemption deed alleging mutual mistake of a material fact, namely that Tract 2 was unimproved property or mistake as to a material feature of the condition of Tract 2 of so great a consequence that to not rescind would be unconscionable.

Whitehead contends the "mistake" in this case is not one such as would support a cause of action for rescission of the redemption deed. The court agreed.

With a bit of diligence on their parts, the taxing authorities could have completely and finally litigated their interests with regard to the delinquent taxes. They had before them all of the parties, all of the property, a step-by-step blueprint in the Tax Code, and the proper forum. The taxing authorities were all a party to the judgment and were aware that the descriptions of both Tract 2 and Tract 8 fail to indicate whether a building is located on the property and neither is described as "unimproved." At no time prior to redemption did the taxing authorities seek to determine the location of the office building—not before seeking a judgment for delinquent taxes, not before foreclosure, not before the tax sale, not before conveying the property by deed to another taxing unit, and not before executing the quitclaim deed to Whitehead. A final judgment was rendered by a court of competent jurisdiction. All further action was taken based upon that judgment and in accordance with the tax code.

The true "mistake" is in the amount due, owing and unpaid that the taxing authorities sought and obtained judgment on in 1994. That judgment was executed in 1999. Following the tax sale of the property and its subsequent conveyance to the Water District, Whitehead was entitled to redeem the property pursuant to the Tax Code by paying the amount of the judgment against the property, plus certain fees and costs. When Whitehead tendered that amount to the Water District the judgment was satisfied and the property was redeemed. Any error in the 1994 judgment cannot be transformed into a cause of action for rescission of the deed. The Tax Code provides no such remedy to the taxing units.

Conseco Finance Services Corp.* v. *J&J Mobile Homes, Inc., 120 S.W.3d 878 (Tex.App.—Ft. Worth 2003, pet. denied). On August 22, 1996 McAdams purchased a manufactured home and executed a retail installment contract and security agreement for the purchase. Conseco purchased the contract and obtained a perfected security interest in the manufactured home, which was noted on the certificate of title. McAdams became delinquent in the property taxes. Boyd ISD and Wise County perfected tax liens on the home for the tax years 1997-2000.

The home was sold at public auction to J & J Mobile Homes. The parties stipulate that the taxing authorities followed the statutory requirements of a summary tax sale under the Texas Tax Code §§ 33.21 - 25 (Vernon 2001).

Acting pursuant to a court order granting Conseco's Motion to Distribute Excess Proceeds, the district clerk sent a check for $5,872.37. Conseco accepted the check, leaving

a balance owed on the home of $74,850.13, plus interest.

The parties agree that, until the date of the tax sale, Conseco had a valid security interest in the home. The status of appellant's lien is only contested after the tax sale.

Under Texas Tax Code § 32.01(a), on January 1 of each year, a tax lien attaches to property to secure the payment of all taxes imposed for the year, regardless of whether the taxes are imposed in the year the lien attaches. The tax lien takes priority over the claim of any creditor of a person whose property is encumbered by the lien and over the claim of any holder of a lien on property encumbered by the tax lien, whether or not the debt or lien existed before attachment of the tax lien.

The parties do not dispute the fact that both Conseco and the taxing authorities held duly perfected liens on the same property. Conseco's lien was properly recorded on the certificate of title, and pursuant to the tax code, the tax lien attached to the property on January 1, 1997. The Manufactured Housing Standards Act provides that proper registration and recordation of a lien under the Act is notice to all persons that the lien exists. Texas Revised Civil Statutes art. 5221f, § 19(m). Liens recorded or registered under the Act have priority, in the chronological order of recordation, over other liens or claims against the manufactured home, other than as expressly provided by Chapter 32, Tax Code. Thus, any priority status granted by the act is made subject to the provisions of the tax code, which expressly grant priority status to tax liens. Therefore, under section 32.05(b) of the tax code, the tax lien was superior to appellant's lien.

The taxing authority followed all required statutory procedures and provided adequate notice to Conseco. The Texas Supreme Court has noted that proper notice and foreclosure of a lien on property causes legal and equitable title in the property to merge. Accordingly, in foreclosure prior lienholders are divested of title to the property, and their liens are extinguished. Following the valid foreclosure of a senior lien, junior liens, if not satisfied from the proceeds of sale, are extinguished. Thus, when a senior lien is foreclosed, the purchaser at the sale acquires title to the property free from any junior lienholder claims.

Still, although Conseco agreed that the preceding rules apply to the foreclosure of real property; it argued that the legislature did not intend for liens on personal property to be extinguished. Appellant's basis for its argument is the absence of a comparable section to section 33.95 of the tax code from the subchapter entitled "Seizure of Personal Property." After a lengthy parsing of the statutes, the court disagreed and held that the lien was extinguished, even if the mobile home were considered personal property.

PART XIV CONSTRUCTION AND MECHANICS' LIENS

Beard Family Partnership* v. *Commercial Indemnity Insurance Company, 116 S.W.3d 839 (Tex.App.—Austin 2003, no pet.). When the contractor went belly-up, the surety completed the job as permitted by its performance bond. When the surety applied for payment in accordance with the contract, the owners declined for various reasons. One reason given was that the surety had failed to provide an all bills paid affidavit as the contractor was required to provide for payment pursuant to the original contract. The court held that delivery of the affidavit was not a condition to the surety getting paid.

Because they are contracts, performance and payment bonds are construed to effectuate the parties' intentions. When the provisions are clear and unambiguous, a court must enforce the terms of the bond as written. The intent of the parties to a surety bond as well as their rights and obligations are determined by the language of the bond itself. Although the performance and payment bonds at issue incorporate the terms and conditions of the construction contract, any

conflicting clauses must be harmonized to reflect the intent of the parties.

When reading together and harmonizing the underlying contract's provision regarding the requirement of an all-bills-paid affidavit from the contractor, together with the bonds, the intent of the parties makes clear that the affidavit is not a requirement also imposed upon the surety. In addition to the affidavit, the contract also requires the "consent of surety, if any, to final payment." Because the surety is the assurance of payment--and continues to be liable on the bond until the expiration of a specified time period--the affidavit would under these circumstances perform no function.

Cavazos* v. *Munoz, 305 B.R. 661 (Brktcy. S.D. Tex. 2004). The court held that an original contractor, who has complied with the requirements of Article 16, Section 50(a)(5)(A)-(D) of the Texas Constitution and Section 53.254(a)-(c), (e) of the Texas Property Code, has a valid mechanics' lien even if he has failed to also file a lien affidavit pursuant to Section 53.052(b) of the Property Code.

This case contains an exhaustive and apparently complete history of Texas mechanics' lien laws and is interesting reading for anyone who wants to know how those laws evolved from the days of the Republic of Texas until now.

Texas Wood Mill Cabinets, Inc.* v. *Butter, 117 S.W.3d 98 (Tex.App.—Tyler 2003, no pet.). The home builder asked TWM to build cabinets in a new house construction that the builder was building on a lot he owned. The initial installation was done in mid-May. Additional work on the cabinets was done on June 17 and July 5. The Butters entered into a contract to buy the house on June 18, and the closing occurred July 6.

TWM didn't get paid, and on October 11, it filed an "Original Contractors Affidavit of Claim for Mechanic's Lien." He sent a copy to the Butters and the builder. A little less than a year later, he sued to foreclose the lien. The Butters filed a general denial and also alleged first that the affidavit was not timely filed and second that they were subsequent purchasers who had neither actual nor constructive notice of TWM's lien against the property. The trial court agreed, holding that the Butters were BFP's, and even their actual knowledge that there was construction going on for the house did not amount to constructive knowledge of the cabinet work or TWM's claim.

The Butters contend that the house they purchased was a "residential construction project." Therefore, they argue, subsection (b), and not subsection (a), of Texas Property Code § 53.052 prescribes the time within which TWM was required to file its lien affidavit. Subsection (b) provides that a person claiming a lien arising from a residential construction project must file an affidavit with the county clerk of the county in which the property is located not later than the fifteenth day of the third calendar month after the day on which the indebtedness accrues. Subsection (a) allows an additional month for filing the affidavit. If subsection (b) applies and the contract was completed in May as the Butters assert or in June as the trial court found, TWM's lien affidavit was untimely.

The term "residential construction project" means "a project for the construction or repair of a new or existing residence, including improvements appurtenant to the residence, provided by a residential construction contract." Texas Property Code § 53.001(10). The house was constructed by the builder as a "spec house" and not pursuant to a residential construction contract. Therefore, the trial court correctly concluded that Property Code § 53.052(a) applies and that TWM was required to file its lien no later than the fifteenth day of the fourth calendar month after the day on which the contract is completed. Consequently, TWM's lien affidavit was untimely only in the event the contract was completed in May 1999 as the Butters allege.

TWM argued that the evidence at trial established as a matter of law that the contract was completed in July 1999. The Butters contended that the evidence clearly established that all "work" done after May 25, 1999 related

to specific requests made by the builder to make adjustments on work already billed for and abandoned by TWM. Using the common definition of "completed" to mean ended or concluded, the court held that the cabinets couldn't be completed until they were constructed, installed, and functional. After the initial installation, the cabinets would have to be trimmed, the doors hung, and adjustments made so that the doors would properly open and shut. All that wasn't done until July. So the affidavit was timely filed.

The court then turned to the BFP status of the Butters. Bona fide purchaser status in the context of a constitutional mechanic's lien is an affirmative defense that must be supported by pleadings and evidence. At trial, Mr. Butter testified that he was not a party to the builder's contract with TWM and that he purchased the property after TWM had completed its work. He also stated that prior to closing, he requested a title search on the property, which revealed no liens or clouds on the title to the property. Leo also testified that he checked with the builder to determine whether they "owed anyone any money" and was told that "all the bills were paid in full." At closing, the builder provided him with an affidavit stating that "there are now no unpaid labor or material claims against the improvements or repairs, if any, or the property upon which same are situated...." Consequently, it was his understanding that on July 6, the property was free and clear from any liens and clouds on the title. He was not aware that anyone had a right to file a lien against the property until he received notice that TWM had filed its lien affidavit. Still the court held that there was no evidence supporting the trial courts finding that the Butters didn't have constructive notice. The Butters first saw the house in June 1999, while it was still under construction. When they first saw the house, it had a concrete slab, but no flooring. The bricking may have been in progress, and the interior painting had begun. The cabinets were installed, but the countertops had not been laid. Some of the plumbing fixtures were in, but the mirrors and "things of that nature" were not. Between June 18, the date of the contract, and the closing on July 6, there was more work to be done to complete the structure.

This evidence establishes that, in June 1999, the Butters had personal knowledge that improvements were being constructed on the property. In turn, this knowledge is sufficient to charge the Butters with constructive notice of TWM's right to assert a lien claim during the statutory period. Moreover, TWM's lien affidavit was in compliance with the statutory requirements and was timely filed on October 11. Consequently, even if the Butters had no personal knowledge of the improvements, they were charged with constructive notice of TWM's right to assert a lien for the statutory period.

Laughlin Environmental, Inc.* v. *Premier Towers, L.P., 126 S.W.3d 668 (Tex. App.-Houston [14th Dist.] 2003, no pet.). A subcontractor brought action to foreclose a mechanic's lien and also brought claims against original property owner, current property owner, and surety, seeking to collect on putative statutory payment bond. The Court of Appeals, held that the current owner did not establish attempted compliance with requirements for statutory payment bond, and thus, subcontractor was not precluded from filing or foreclosing on mechanic's liens.

If a payment bond meets the statutory requirements, a claimant may not file lien claims against the property owner or seek foreclosure of the claimant's lien on the owner's property. Texas Property Code § 53.201. Instead of looking to the property, claimants must look to the payment bond. Texas Property Code § 53.201(b). Although § 53.202 speaks in terms of mandatory requirements for statutory payment bonds, the Texas Property Code does not require perfect compliance with these requirements. The legislature included a savings provision in § 53.211(a), which allows a nonconforming payment bond to be treated as a conforming one as long as there is "attempted compliance with [subchapter I of Chapter 53 of the Texas Property Code]" or the bond evidences by its terms an "intent to comply with [subchapter I of Chapter 53 of the Texas Property Code]."

Despite the fact that the purported statutory payment bond for private construction project was titled "Payment and Performance Bond," and the fact that it contained provisions for protection of unpaid subcontractors, the owner did not establish a bona fide attempt to comply with requirements for valid statutory payment bond, and thus, subcontractors were not precluded from filing mechanic's liens. Specifically, the bond did not recite that it was issued under the Texas Property Code provisions governing statutory payment bonds, or that it intended to comply with those provisions, or that those provisions had priority over any conflicting language in the bond, the bond did not incorporate those provisions, bond's "penal amount" was less than the amount of the construction contract, and protection of unpaid subcontractors was a feature of both statutory and nonstatutory payment bonds.

PART XV
BROKERS

Bynum v. Prudential Residential Services Ltd. Partnership, 129 S.W.3d 781 (Tex. App.-Houston [1st Dist.], 2004, pet. pending). Parents sued on behalf of their children to hold various Prudential entities (relocation company), inspectors and sellers, alleging violations of the Deceptive Trade Practices Act. They alleged that the home was remodeled without getting building permits. The contract for sale to the Bynums included an "as is" clause. The Court held that there was no evidence that Prudential had actual knowledge that the Sellers had remodeled their home without the necessary permits and, therefore, the Buyers were not entitled to have the "as is" clause set aside on grounds of fraudulent misrepresentation or concealment.

As it related to the Seller's Disclosure Form, the Court held that the Homeowner's Disclosure Form, standing alone, is not evidence that the McNamara's knew that their Disclosure Statement to the Bynums was false. The McNamaras apparently did not know much about construction, did not inquire as to the necessity of building permits, so it did not follow that they had actual knowledge that permits were required to remodel their bathrooms. In upholding the "actual knowledge" standard the Court said that there was no evidence that the McNamaras actually knew that they had remodeled without the necessary permits. The Court further noted long-standing Texas law that when a Buyer purchases "as is", he is agreeing that there is no express or implied warranties and that the Buyer is relying only on his own examination of the property.

An important issue was raised concerning the Homeowner's Disclosure Form. The Court held that the law (§ 5.008 of the Property Code) requires only that the form be completed to the best of Seller's belief at the time the Notice is completed and signed, and there was no duty to provide continuing updates as to matters within the form.

Meyer v. Holley, 123 S.Ct. 824 (2003). The U.S. Supreme Court dealt with agency issues concerning a Fair Housing violation. Mr. Crank, a salesman for Triad Realty allegedly prevented the Holleys from buying a house for racially discriminatory reasons. After filing suit in Federal Court against this salesman and Triad, the Holleys filed a separate suit against Mr. Meyer, the president, sole shareholder, and licensed broker, claiming that he was vicariously liable in one or more of these capacities of his salesman's unlawful actions. The District Court dismissed the claim against Meyer individually, which was reversed by the Ninth Circuit Court of Appeals. The Ninth Circuit held that there was strict liability for principals of real estate companies beyond those traditionally associated with the agent/principal or employee/employer relationships. The Supreme Court, however, reversed the Ninth Circuit, holding that the Fair Housing Act imposing liability without fault upon the employer and in accordance with traditional agency principals (apparently holding that there is vicarious liability as a broker for its salespeople), but held that it did not impose this liability upon officers or the owners of that corporation. The court noted in the absence of special circumstances, it is the corporation, not its owner or officer, who is the principal or

employer, and thus subject to vicarious liability for torts committed by its employees or agents. The corporate employee typically acts on behalf of the corporation, not its owner or officer. The court went on to comment that nothing in the Fair Housing Act allows a plaintiff to pierce the corporate veil at will. The court held that the Fair Housing Act does not impose a legal rule that would hold every corporate supervisor personally liable without fault for the unlawful act of every corporate employee with whom he or she has the right to supervise. The "right to control" is insufficient by itself under traditional agency principles, to establish a principal/agent or employer/employee relationship.

The Supreme Court is apparently telling us that corporate liability will be upheld, however, if a corporate officer, director, shareholder, or supervisor is complicit in any misconduct, there will be vicarious liability for that supervisor as well as for the corporation. It will not, however, hold innocent officers, directors, and shareholders personally liable for misconduct of an employee.

Sherman* v. *Elkowitz, 130 S.W.3d 316 (Tex.App.-Houston [14th Dist.] 2004, no pet.). The Shermans purchased a home from Patrick and Amy Shields. Elkowitz, a realtor employed with Re/Max, acted as listing agent for the Shields and assisted them with the sale of the property to the Shermans. Before the sale, the Shields, with Elkowitz's assistance, completed and provided to the Shermans a Seller's Disclosure Notice, in which the Shields represented their knowledge of the features and condition of the property. In the notice, the Shermans identified cracks in the driveway as a known defect needing repair, and also disclosed a treatment for termites in 1990. The Shermans, represented by their real estate agent, Mike Stavinoha, had the property inspected before agreeing to the purchase.

Some time after moving in, the Shermans discovered various defects in the property, and they eventually learned that, in 1994, the Shields had sued the previous owner for failing to disclose, allegedly, the same defects the Shermans discovered. Neither the alleged defects nor the lawsuit had been disclosed in the Seller's Disclosure Notice.

The Shermans brought suit against the Shields, Elkowitz, and Re/Max for statutory and common-law fraud, violations of numerous provisions of the Texas Deceptive Trade-Practices Consumer Protection Act ("DTPA"), negligence, and gross negligence. They claimed the Shields and Elkowitz were required to disclose the alleged defects and the earlier lawsuit. At the close of the Shermans' case, the trial court granted Elkowitz and Re/Max a directed verdict, but refused to grant a directed verdict for the Shields. At the conclusion of the trial, the Shermans obtained a favorable judgment against the Shields. This appeal of the directed verdict for Elkowitz and Re/Max followed.

The Shermans' issue do not claim that Elkowitz and Re/Max made verbal representations to them. Rather, the misrepresentations on which they rely are in the Seller's Disclosure Notice and relate to two discrete problems: the alleged misrepresentation and concealment of defects, and the alleged misrepresentation and concealment of the earlier lawsuit.

Under section 5.008 of the Texas Property Code, a seller of certain residential real property is required to give the purchaser of the property a written notice--the "Seller's Disclosure Notice"--which requires the seller to disclose his knowledge of the condition of the property. This notice must be in the form prescribed in the statute, or in a form that is "substantially similar" to the prescribed notice.

The three-page notice Elkowitz provided was printed by the Texas Association of Realtors, and appears to be substantially similar to the form of the notice in Property Code section 5.008. The first page of the notice provides that it is to be "completed by the Seller," and, just below the space for the property address, in all capital letters, appears the following disclaimer:

THIS NOTICE IS A DISCLOSURE OF

> SELLER'S KNOWLEDGE OF THE CONDITION OF THE PROPERTY AS OF THE DATE SIGNED BY SELLER AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THE PURCHASER MAY WISH TO OBTAIN. IT IS NOT A WARRANTY OF ANY KIND BY SELLER, SELLER'S AGENTS, OR ANY OTHER AGENT.

The questions that follow are each directed to "you (Seller)," and inquire into the property's features, conditions, defects, repairs needed, and certain previous conditions and repairs. And, as discussed in greater detail in the next section, the notice also requires the disclosure of lawsuits "directly or indirectly affecting the property." Below the signature lines for the sellers is the following notice:

> NOTICE TO PURCHASER: Listing Broker, _______, and Other Broker, _______, advise you that this Seller's Disclosure Notice was completed by Seller, as of the date signed. The Listing Broker and Other Broker have relied on this notice as true and correct and have no reason to believe it to be false or inaccurate. This notice is not a warranty of any kind by Seller, Seller's Agents or any other Agent. YOU ARE ENCOURAGED TO HAVE AN INSPECTOR OF YOUR CHOICE INSPECT THE PROPERTY PRIOR TO CLOSING.

The Shermans place great emphasis on the language in the "Notice to Purchaser" section that "Listing Broker and Other Broker have relied on this notice as true and correct and have no reason to believe it to be false or inaccurate " However, the Shermans direct us to no authority for the proposition that, by signing in the spaces provided, real estate brokers somehow adopt as their own the representations of the seller. Indeed, the notice makes clear that it is a disclosure by the seller only, not the seller and the broker. Twice the disclosure notice warns that no warranties are made by the seller, the seller's agents, or other agents, and even the sentence the Shermans emphasize warns that the brokers "have relied" on the information provided by the seller. At best, the only representation Elkowitz and Re/Max made in acknowledging the notice was that they "have no reason to believe [the disclosure notice] to be false or inaccurate."

This statement—that the broker has no reason to believe that the seller's disclosures are false or inaccurate—is not an affirmative representation by the broker of the condition of the property. It is a statement of the broker's knowledge concerning the seller's disclosures. Consequently, the broker would have a duty to come forward only if he had any reason to believe that the seller's disclosures were false or inaccurate, and the only way he could be held liable for his statement in the notice is if it were shown to be untrue. The court found no evidence that Elkowitz had any reason to believe the information provided by the Shields was false or inaccurate regarding defects in the property.

The court then held that the prior lawsuit, which Elkowitz knew about, did not have to be disclosed because the disclosure requirements mention only pending litigation and the lawsuit was dismissed several years before the property was sold.

PART XVI CONDEMNATION

Carson* v. *State of Texas, 117 S.W.3d 63 (Tex.App.—Austin 2003, pet. pending). When Carson was trying to sell his property, the buyer required assurance of continued access to I-35 and Wonder World Drive. He approached the State for permission to build three driveways that would provide the access, but was informed that the State was about to reconfigure the intersection, so permission was denied. He retained access on the I-35 frontage road, but the State would be closing an existing driveway that provided access to the San Marcos ISD bus barn located nearby and used by Carson for access to the intersection in question. He sued asking for an injunction to prevent closing the driveway and requiring the State to issue the permits. He also alleged that the State had committed inverse condemnation by closing the driveway. At trial,

Carson conceded that it would be unsafe to grant the permit for the requested driveway off Wonder World Drive. He then argued that the State must compensate him for the removal of the current driveway that provides them access via the gravel road because they will be deprived of access to Wonder World Drive.

Although Carson historically enjoyed access to Wonder World Drive by way of the bus depot driveway, it was clear that he merely used the driveway by permission. He didn't have any contractual right to use the driveway and, of course, access by prescription couldn't be obtained by adverse possession against the State (not that he would have been able to prove adverse possession in any event, since the access he enjoyed was not exclusive).

Further, case law clearly holds that a property owner is not entitled to compensation unless his access is materially and substantially impaired. A landowner's access is not materially and substantially impaired if he retains access to his property by way of a different street or a more circuitous route. In other words, a landowner is not entitled to compensation if he has reasonable access to his property after construction of the public improvement. The benefits of private ownership have been assured so long as there is reasonable access and an action for compensation under the Constitution will not lie where such is the case. Here, Carson retained full access to the I-35 frontage road. Access to his property may be slightly more circuitous, requiring a turn onto the frontage road, but his property is not materially or substantially impaired. The court recognized that the case law cited by it discusses when a roadway is closed, not when a driveway is closed. However, it stated its belief that the rule regarding material and substantial impairment applies equally to this situation.

Coble* v. *City of Mansfield, 134 S.W.3d 449 (Tex.App.—Ft. Worth 2004, no pet.). The owner of property which was partially condemned by city was not entitled to damages to the remainder of his property based on his claim that he was now required to construct a screening wall in accordance with a city ordinance dealing with residential subdivision development near highways. The property owner offered no evidence that any of the ordinance prerequisites were met at the time of condemnation, and city offered evidence indicating that property owner was seeking to change zoning from residential to commercial, and thus, any damages claimed by the owner to comply with the ordinance to develop property as a residential subdivision were not reasonably foreseeable, but were remote, speculative, and conjectural.

Davis* v. *May, 135 S.W.3d 747 (Tex.App.—San Antonio 2003, pet. denied). Section 711.041 of the Texas Health and Safety Code provides, "Any person who wishes to visit a cemetery or private burial grounds for which no public ingress or egress is available shall have the right to reasonable ingress and egress for the purpose of visiting the cemetery or private burial grounds. This right of access extends only to visitation during reasonable hours and only for purposes usually associated with cemetery visits." Section 711.041(b) further provides, "The owner or owners of the lands surrounding the cemetery or private burial grounds may designate the routes of reasonable ingress or egress."

May's great-grandfather, James Riley Alexander, and a few additional relatives of May are buried on land that is now owned by the Davises. The land was formerly owned by Alexander. In the deed conveying the property from Alexander to others and then to the Davises, no reservation or exception was made for the Alexander Cemetery. May's husband requested Debra Davis's permission to visit the cemetery and later to clean the brush away from the cemetery. Although the Davises granted May permission, Debra Davis's brother, Steve Callaway, later told the Mays that they were trespassing and made them leave.

May sued the Davises to obtain a right of ingress and egress to the cemetery. The Attorney General of Texas intervened to address the constitutionality of section 711.041 and to represent the rights of the members of the general public who were related to the

decedents.

The Davises rely on ***Meek* v. *Smith***, 7 S.W.3d 297 (Tex.App.-Beaumont 1999, no pet.), to assert that section 711.041 is unconstitutional and that giving May and the other relatives of the decedents a right of ingress and egress across their property is an unconstitutional taking. However, the court in Meek was careful to note that a reviewing court must consider the facts and circumstances surrounding each case in determining whether a compensable taking occurred. One such fact in the Meek case was that the actual cemetery grounds involved are not surrounded by, adjacent to, nor contiguous with the Meeks' property. This fact makes the decision in Meek readily distinguishable from this because the Alexander Cemetery is surrounded by the Davises' property. The court in Meek also noted that the only challenge to the statute involved the contention that the statute in question, though generally constitutional, operated unconstitutionally as to the challenging party because of the party's particular circumstances, and the court limited its holding to finding section 711.041 unconstitutional as applied to the facts presented.

The Attorney General asserts that because May had a common law right of ingress and egress to reach the cemetery, no taking occurred, and section 711.041 is constitutional as applied to the facts presented in the instant case. The San Antonio Court of Appeals agreed.

No particular instrument or ceremony is required to dedicate a tract of land to cemetery purposes. Actual use of land for burial purposes is a sufficient dedication. Property once dedicated to cemetery purposes and in use as a burial ground for the dead may not be sold either voluntarily or through judicial proceedings in such a manner as to interfere with the uses and purposes to which it has been dedicated and devoted. When once dedicated to burial purposes, and interments have been made, the then owner holds the title to some extent in trust for the benefit of those entitled to burial in it, and the heir at law, devisee, or vendee takes the property subject to this trust.

Because May and the other relatives of the decedents have a common law right of ingress and egress and because the Davises' title to the property was already burdened by this common law right, neither section 711.041 nor the trial court's ruling resulted in a "taking" of the Davises' property under the facts as presented. As a result, section 711.041 is constitutional as applied in this case, and no taking occurred.

Town of Flower Mound* v. *Stafford Estates Limited Partnership, 135 S.W.3d 620, 47 Tex. Sup. Ct. J. 497 (Tex. 2004). The Town of Flower Mound's Land Development Code requires that a subdivision developer improve abutting streets that do not meet specified standards, even if the improvements are not necessary to accommodate the impact of the subdivision. Accordingly, the Town conditioned its approval of Stafford Estates Limited Partnership's development of a residential subdivision on Stafford's rebuilding an abutting road. After objecting and requesting an exception from the Town, which was denied, Stafford rebuilt the road and then sued the Town to recover the cost. The district court held that the condition imposed on Stafford's development was a taking without compensation in violation of article I, section 17 of the Texas Constitution, the Fifth Amendment to the United States Constitution, and the federal Civil Rights Act of 1871, and awarded Stafford the cost of improvements not necessitated by increased traffic from the subdivision. The district court also awarded Stafford expert witness fees and attorney fees under the federal Civil Rights Attorney's Fees Awards Act of 1976. The court of appeals reversed the award of expert witness fees and attorney fees and otherwise affirmed.

The three principal questions before the Supreme Court were whether Stafford could wait until after making the improvements to sue, whether the Town's condition on Stafford's development amounted to a compensable taking, and whether Stafford is entitled to recover fees under federal civil rights laws.

The court first took up the Town's argument that this action is barred because

Stafford did not sue until after it had rebuilt Simmons Road and obtained final approval of its development plan. The Town argued that it is in the public interest for the government to have the opportunity to withdraw a condition of approval that is found to constitute a taking and thereby avoid the expense to taxpayers of money damages. That opportunity is lost if suit may be brought after the condition has been satisfied and the landowner's only remedy is a damage award. Moreover, the Town added, it is simply unfair for an applicant to accept the benefits of an approved plan of development and later challenge the conditions of that approval. The Town urged the court to "adopt a standard that requires developers to first seek to strike down conditions that they believe are unconstitutional before accepting the conditions and irreparably changing the status quo". The court noted that the Town did not address the obvious concern that such a standard would pressure landowners to accept the government's conditions rather than suffer the delay in a development plan that litigation would necessitate. The Town also conceded that no statute, rule, or Texas case supports its argument but nonetheless insisted that post-approval actions like Stafford's must be barred as a matter of public policy as courts in other states have done.

Generally, "the State's public policy is reflected in its statutes." On the subject of whether an action like this one must be brought before the challenged condition is satisfied, Texas statutes are silent, although they speak at length and in detail to other matters regarding local regulation of property development. There is nothing in this statutory framework to suggest that the time for bringing an action like this one is constrained by anything other than the applicable statute of limitations, which the Town does not argue would bar the present action. The court was not persuaded by the authorities from California, Minnesota, or the Eighth Circuit, and held that, since there wasn't a statutory basis for requiring the Town's position, the court wasn't going to create one.

The court then turned to the "taking" issue. Both sides were arguing their positions based upon two United States Supreme Court cases ***Nollan* v. *California Coastal Commission***, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), and ***Dolan* v. *City of Tigard***, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). After thoroughly analyzing the two cases, the Texas Supreme Court concluded its analysis by restating the rule of Nollan/Dolen as follows: conditioning government approval of a development of property on some exaction is a compensable taking unless the condition (1) bears an essential nexus to the substantial advancement of some legitimate government interest and (2) is roughly proportional to the projected impact of the proposed development.

The Town was arguing that requiring the building of a road based on its city ordinance was not a taking under Nollan/Dolen because it had not exacted a dedication of a property interest. Both of those cases had involved actual takings of property. The town contended that the underlying doctrine in those cases (that the government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property) did not apply where the thing given up in exchange for a discretionary benefit is simply money. The court found the Town's reading of the cases to be too narrow. That doctrine was only one of several lines of constitutional arguments advanced in Nollan/Dolen. The court also noted that several courts in other jurisdictions have applied Nollan/Dolen in instances where no property interest was taken. After lengthy discussion, the court ultimately concluded that an actual taking of a property interest is not required under Nollan/Dolen.

The Town also argued that it was not a compensable taking because the Town had not imposed the obligation on an ad hoc basis. Their arguments were based, somewhat, on the notion that generally applicable impositions of exactions go through a democratic scrutiny that provides political controls against unfair exactions. The court noted the argument, recognizing that an ad hoc decision is more likely to constitute a taking than general

legislation. But the court also noted it was entirely possible that the government could "gang up" on particular groups to force extractions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others. Again, following a lengthy discussion, the court held that the Town's action was compensable, even if it was not an ad hoc action.

Finally, the court held that that Stafford had obtained adequate relief for its compensation claims under state law, and therefore the Federal Civil Rights Act did not apply and no attorneys' fees or expert witness fees could be recovered.

PART XVII
MISCELLANEOUS

Gregg & Valby, L.L.P.* v. *Great American Insurance Company, 316 F.Supp.2d 505 (S.D. Tex. 2004). The law firm prepared home loan closing documents for various lenders. A fee, usually around $175 was put on the buyers' settlement statements for document preparation. In fact, the law firm had a long-standing arrangement with the lender whereby at each closing the borrower or seller paid the document preparation fee and the settlement agent disbursed a check for the fee to the law firm. Then, in a completely separate transaction, the law firm would send the lender a check for a portion of each document preparation fee collected during the month, representing payment for "clerical" services the lender provided in conjunction with the document preparation. This arrangement between the law firm and its lender was not disclosed on any of settlement statements.

A couple of big class action suits were brought alleging that the settlement papers prepared in conjunction with their real estate closings misrepresented the amount of attorney's fees paid to the law firm in violation of RESPA,12 U.S.C. §§ 2601-2617 (2001). The law firm sought coverage for the claims from its malpractice carrier and when coverage was denied, it sued the insurance company to determine whether coverage was available.

RESPA was enacted in order to ensure that home buyers would be provided with greater information on the nature and costs of the settlement process and to prevent unnecessarily high closing costs caused by certain abusive practices. To this end, RESPA strictly prohibits kickbacks and fee-splitting between lenders and third parties involved in a real estate settlement. 12 U.S.C. § 2607(a), (b). The home buyers' RESPA claims alleged that by either splitting the "Document Preparation Fee" between itself and its lender or by kicking back to the lender a portion of the fee "pursuant to an agreement" between the two parties the law firm violated the Act.

The malpractice carrier contended that all of the claims arose solely out of the law firm's billing and fee setting practices, i.e., its alleged misrepresentation of fees on the HUD-1. Setting fees and billing, according to the insurer, do not require the specialized knowledge, training, or professional judgment necessary to constitute "professional services". If these weren't professional services, they wouldn't be covered by the malpractice policy.

A professional must perform more than an ordinary task to perform a professional service. To qualify as a professional service, the task must arise out of acts particular to the individual's specialized vocation. The court would not deem an act to be a professional service merely because it is performed by a professional. Rather, it must be necessary for the professional to use his specialized knowledge or training. Professional services are those acts which use the inherent skills typified by that profession, not all acts associated with the profession.

With these criteria in mind, the court had little trouble concluding that the law firm's billing and fee-setting practices were not "professional services". Nothing shown to the court suggests that billing or fee-setting require specialized legal skill and knowledge, nor are they acts particular to the legal profession. Simply put, they are merely administrative tasks inherent to all businesses.

The law firm argued that its determination of the document preparation fee required legal skill and knowledge of real estate law and, therefore, was a "professional service". It also maintained that it had to research pertinent provisions of state and federal law before advising its lender clients as to the legality of the document preparation arrangement. The court was shown two legal opinion letters written to its clients in which it analyzed whether the arrangement with the lender was legally viable. These letters, argued the law firm, "clearly involved legal research and examination" and therefore demonstrated that the claims in the underlying suits were based on its professional services. The court said this argument misses the point. The plaintiffs in the underlying suits did not complain of any legal advice the law firm gave its clients in the letters. There were no complaints that the law firm committed malpractice. Instead, the claims in the underlying suits complained of the firm's billing practice as manifested through the fee on the HUD-1 Settlement Statement and the document preparation arrangement.