CASE LAW UPDATE

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CASE LAW UPDATE

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

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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PART I
MORTGAGES AND FORECLOSURES

***Dominey* v. *Unknown Heirs and Legal Representatives of Lokomski*,** 172 S.W.3d 67 (Tex.App.—Ft. Worth, 2005, no pet.). In 1987, Stelleta Weir sold a home to Linda and Kenneth Lokomski for cash and a $23,000 promissory note. The note was secured by a deed of trust and express vendor's lien retained in the deed. Linda moved to a nursing home in 1993, and Kenneth died in November 1996. In November 1996, the City of Lake Worth scheduled the home for demolition due to its poor condition. The Domineys heard about the scheduled demolition at a city council meeting, drove by the house, and estimated how much it would cost to make the necessary repairs. They then obtained a document entitled Transfer of Lien from Weir, which purported to transfer Weir's vendor's and deed of trust liens on the property to them.

The Domineys took possession of the property to make the repairs. On December 16, 1996, they filed a warranty deed in the Tarrant County property records purporting to rescind the contract between themselves as holders of the vendor's lien and the Lokomskis as the vendees. The Domineys spent $12,000 repairing the home. They then entered into an executory contract with Daniel Wilson for the sale of the home. In anticipation of transferring title to Wilson, appellant received the results of a title search, which showed that title was still vested in the Lokomskis or their heirs.

The Domineys then filed this action to foreclose on the liens. After a bench trial, the trial court found, among other things, that title to the property was vested in the Lokomski heirs, free and clear of any liens, that the deed of trust and vendor's liens were barred by limitations, and that the Domineys had wrongfully taken possession of the property in 1996, entitling appellees to damages for the wrongful possession.

There was no evidence that the Domineys possession of the property was consented to. The Domineys contend that as the then holders of the superior title, they were entitled to rescind the contract and take possession of the property as a result of Linda's default. They also claim that the evidence shows the Domineys were entitled to take possession under either the deed of trust or the vendor's lien. They contend that the following defaults entitled them to do so: the Lokomskis' failure to make payments on the note; failure to pay taxes; failure to keep the property in good repair; and failure to keep the property insured.

When an express vendor's lien is retained to secure unpaid purchase money, the vendor holds superior title, and the vendee has a mere equitable right to acquire title by carrying out the agreement. The vendor has a choice of remedies on the vendee's default in the payment of the purchase price: the vendor may sue for his money, rescind the contract and take possession, or sue to recover title and possession. The remedy of rescission is separate and distinct from and wholly independent of the remedies to enforce payment.

To be entitled to the remedy of rescission pursuant to a vendor's lien, the vendor must show that the vendee has not repaid the purchase price in accordance with the note. To prove default under a promissory note, a plaintiff must establish that a certain balance is due and owing on the note. The Domineys did not show that a certain balance was due and owing on the note when they took possession of the property. Thus, they did not show that they entitled to rescission and to take possession of the property under the vendor's lien.

The trial court had held that the remedy of foreclosure of the vendor's lien was not available because it was barred by the statute of limitations. The Domineys argued that it was not barred because they were mortgagees in possession of the property subject to the lien. But in order to defeat the affirmative defense of limitations, the mortgagee must be lawfully in possession of the property. For a mortgagee's possession to be lawful, it must be peaceably and legally acquired, taken in good faith, free from deceit, fraud, or wrong, and without violation of any contract relation with the mortgagor. The trial court had found that the Domineys wrongfully possessed the property, so they were not mortgagees in lawful possession.

Adams* v. *First National Bank of Bells/Savoy, 154 S.W.3d 859 (Tex.App.—Dallas 2005, no pet.). Adams bought a house and gave the Bank a lien to secure a purchase money mortgage. The loan documents contained a "due-on-sale" clause and also contained a waiver of notice of intention to accelerate and notice of acceleration.

Adams was also the sole shareholder of Adams First Financial, Inc. In order to shore up the financial statements of the corporation, it was recommended to Adams by her accountant that she transfer the house to the corporation. Adams executed a deed conveying the property to the corporation, but did not record it. The bank's consent to the transfer was not sought or obtained. Adams continued to show the house as an asset on her personal financial statements and also showed it as an asset of the corporation. When the bank discovered this, they asked Adams if she had transferred the house, to which she replied "yes."

Shortly thereafter, the bank notified Adams that she was in default. It did not notify her that it intended to accelerate the loan or provide an opportunity to cure the default. A short while later it accelerated the debt.

Adams' attorney sent a letter to the bank after the acceleration, stating that the warranty deed transferring the property to Adams First Financial had not been recorded and had been rescinded, and that corrected financial statements would be prepared and sent to the bank. Adams sent two checks to the bank representing her regular monthly payments. The bank returned the two checks, telling Adams that the loans had been accelerated and that the Bank would not accept the partial payments.

The bank posted for foreclosure and ultimately foreclosed. The trustee's deeds contained recitals that the bank had given notice of default and an opportunity to cure, even though it had not actually provided the opportunity to cure. Adams sued for wrongful foreclosure. Among her claims was that she had not waived the right to cure the due-on-sale violation.

The waiver provision said: "each surety, endorser and guarantor waive all demands for payment, presentations for payment, notices of intention to accelerate maturity, notice of acceleration of maturity, protests, and notices of protest." Adams complained that, since this wasn't included in the due-on-sale provision, it wasn't applicable to that provision. The court disagreed, holding that the wording was sufficient to cover "any" obligation contained in the loan documents.

Adams also contended that she didn't violate the due-on-sale provision. She contended that there was no transfer of title and, alternatively, that any transfer had been rescinded.

A conveyance of an interest in real property must be in writing, signed by the grantor, and delivered to the grantee. A deed does not have to be recorded to convey title. A conveyance is effective and title is transferred when the following has occurred: (1) execution of the deed, and (2) delivery of the deed. Two elements must be established to prove delivery of a deed: (1) the deed must be delivered into the control of the grantee, and (2) the grantor must intend the deed to become operative as a conveyance. The question of whether a deed has been delivered is primarily one of the grantor's intent. Without the required grantor's intent, the manual delivery of the deed to the grantee does not pass title. The intent of the grantor is determined by examining all the facts and circumstances preceding, attending, and following the execution of the deed. Also, a secret or undisclosed intention of the grantor not to divest himself of title will not prevent a duly executed and delivered deed from taking effect. What constitutes a delivery is a question of law.

When the bank asked Adams if she had transferred the property, she responded that she had. Before the bank foreclosed, her accountant also represented to Adams in a letter she forwarded to the bank that the property was transferred. Adams contended that her accountant's statement that the property was placed on the corporate books, not that title had been transferred, raised an issue of fact regarding whether the property was transferred. She also argued that her deposition testimony shows that she did not intend to transfer the property, although she failed to point to where in the record that testimony may be found. And she contended that because the letters and deed indicate different dates for the transfer there was an issue of fact regarding whether it occurred. But, held the court, this evidence does not create an issue of fact because it merely indicates she may have subsequently changed her intention to transfer the property or that she secretly never intended to transfer the property. A subsequent change of intention or a secret, undisclosed intention not to transfer the property, does not affect whether the property was actually transferred.

Adams argued that because she rescinded the warranty deed, there was no default at the time of foreclosure and that there was a fact issue about whether the foreclosure was wrongful. The bank responded that Adams' attempt to rescind the transfer was too late and is of no consequence to this appeal. The court agreed with the bank. Because of the waiver Adams signed, she did not have a right to cure the default by rescinding the transfer.

Associates Home Equity Services Company, Inc.* v. *Hunt, 151 S.W.3d 559 (Tex.App.—Beaumont 2004, no pet.). The Hunts owned a house that was subject to a mortgage held by Associates. The property was sold by the school district pursuant to a tax foreclosure. The Hunts redeemed the property from the tax sale purchaser. After that, Associates posted its mortgage for foreclosure.

The Hunts argued that the tax lien was prior to the mortgage and that, therefore, the tax foreclosure wiped out the mortgage lien. The trial court agreed and held that Associates' lien was extinguished, discharged, and void.

The redemption privilege was made available to delinquent taxpayers with the adoption of Article 8, § 13 of the Texas Constitution in 1876. The right of redemption is also set forth in chapter 34, subchapter B of the Tax Code. A purchaser at a tax sale receives a conditional estate, which is subject to defeat upon "compliance with the redemption laws by those entitled to redeem." Redemption does not give new title. One under an obligation to pay property taxes who undertakes to purchase the tax title will be estopped to claim that he did anything other than redeem the property from the tax sale. In other words, an owner who does not pay taxes should not be allowed to strengthen his title at a tax sale and an owner who redeems his property does not strengthen his title against other owners or lienholders.

The Hunts relied on cases holding foreclosure of a senior lien extinguishes junior liens, but the court did not read the cases as determinative of the effect of redemption. Generally, a deed of trust is a mortgage with a power to sell on default. The Hunts admit the debt still exists, but they argued it was now unsecured. But redemption merely relieves the property of the tax sale. When the Hunts redeemed the property, they restored the title to what it was before the tax sale, except the tax lien has been discharged. They did not discharge their agreement with Associates reflected in the deed of trust. The Hunts' ownership of the property was subject to Associates' deed of trust. That ownership was what they redeemed. The deed of trust was a valid lien on the property after the Hunts' redemption.

Yokogawa Corporation of America* v. *Skye International Holdings, Inc., 159 S.W.3d 266 (Tex.App.—Dallas 2005, no pet.). Skye was having financial problems. One of the companies it owed money to was Yokogawa, who had brought an arbitration action to get paid. Skye obtained a working capital loan and received funds from Moore and Trojan. In return, Skye granted Moore and Trojan a first lien on Skye's assets. In the meantime, Skye settled its disputes with Yokogawa with a settlement agreement that required regular settlement payments, guarantied by Skye's parent company.

The settlement fell apart when several payments were missed. Yokogawa then filed suit to recover the settlement amount. It sued both Skye and its parent. Shortly thereafter, Skye defaulted on the Moore and Trojan loan, so Moore and Trojan foreclosed. They acquired the assets of Skye for a bid of $400,000 and immediately transferred them to a newly formed corporation named Skye Delaware. Yokogawa sued everyone when that happened, including a claim that the creation of the secured loan and the subsequent foreclosure amounted to a fraudulent transfer under the Texas Uniform Fraudulent Transfer Act, Texas Business & Commerce Code § 24.001 et seq.

Section 24.005 provides, in pertinent part, as follows:

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim rose before or within a reasonable time after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(B) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

A transfer is not voidable under section 24.005(a)(1) against a person who took in good faith and for reasonably equivalent value. Texas Business & Commerce Code § 24.009(a) (Vernon 2002). Pursuant to section 24.005(a)(2), a transfer is not fraudulent if it was made for reasonably equivalent value.

Here the court agreed that this transfer was not voidable. It was made in good faith and it was for reasonably equivalent value.

Dominguez* v. *Castaneda, 163 S.W.3d 318 (Tex.App.—El Paso 2005, pet. denied). When Mrs. Dominguez was getting ready to serve a term in prison, she gave her husband a power of attorney. After she started serving her term, in 1996, Mr. Dominguez borrowed some money from Castaneda and signed a deed of trust in his wife's name covering a house that was owned and occupied by his wife's father. Mr. Dominguez told Castaneda that he and his wife owned the house and lived in another house down the street.

The original agreement relating to the loan was that the deed of trust would be recorded if the loan were not repaid in 30 days. When the 30 days came and went, the deed of trust was recorded. While Mrs. Dominguez was still serving time, her father died, and she and her brother inherited it. After her release from prison, she and her husband moved into the house. Soon they visited with Castaneda to discuss the loan, and, for the first of several times, she acknowledged the debt and the lien. Two payments were made on the loan, but nothing else was paid.

After a failed Chapter 13 bankruptcy and after a threatened tax foreclosure, Castaneda posted the house for foreclosure in 2002.

Mrs. Dominguez argued first that foreclosure was barred by the statute of limitations. Texas Civil Practice and Remedies Code § 16.035(b) provides that: "A sale of real property under a power of sale in a mortgage or deed of trust that creates a real property lien must be made not later than four years after the day the cause of action accrues." The parties to a real property transaction may suspend the running of the four-year limitations period by filing a written agreement as provided by Section 16.036 of the Texas Civil Practice and Remedies Code.

The court found that the extension provisions of § 16.035(b) were inapplicable here. However, § 16.065 is applicable to this claim. Section 16.065 provides for acknowledgment of a barred claim by a debtor if the acknowledgment is in writing and is signed by the party to be charged. The court noted that the debt had been acknowledged in the Chapter 13 filings, so Mrs. Dominguez had effectively revived the barred debt.

PART II
PROMISSORY NOTES, LOAN COMMITMENTS, LOAN AGREEMENTS

Wagner* v. *Compass Bank, 170 S.W.3d 220 (Tex.App.—Dallas 2005, no pet.). The Bank extended a $200,000 line of credit to Badge, Inc. The line of credit was later increased to $250,000. When the increase was made, the Bank required that Badge provide collateral. One of the co-owners, Wagner, pledged some CDs and stock he owned. The pledge was done pursuant to a series of security agreements which provided, among other things, that the collateral also secured any future obligations of Badge to the Bank. Some time later, after some stock market fluctuations, the Bank also required more stock to be pledged and that Wagner execute a personal guaranty. The guaranty was limited to $50,000 of the principal amount of Badge's debts to the Bank.

Later, Badge obtained a $75,000 inventory loan. It was secured by inventory and also guarantied by the other co-owner, Himelfarb.

Badge defaulted. The bank liquidated the shares of stock that were pledged to it, paid off the loans, and returned some unliquidated stock and excess proceeds to Wagner. Wagner then sued, claiming that the collateral securing the line of credit (i.e., his stock) could not be applied to the inventory loan.

Wagner's initial assertion was that the documents, read together, were ambiguous, creating a fact question as to the Bank's right to apply the line of credit collateral to the inventory loan. The alleged ambiguity was that, if the collateral was security for the inventory loan, the Himelfarb guaranty was not necessary and thus meaningless. The court found, however, that the Himelfarb guaranty wasn't meaningless. If the collateral became worthless, the Himelfarb guaranty and the Wagner guaranty would both be available to cover the Bank.

Wagner also contended that an ambiguity existed because the inventory loan listed only the inventory as collateral for that loan and failed to mention the Wagner collateral. The court noted that the inventory loan does not state, however, that it is secured only by the inventory. No language in the inventory loan or Himelfarb's personal guaranty prevents application of the future advance clause in the security agreements. Moreover, it is not necessary for a subsequent agreement to reference the prior pledged collateral for the future advance clause to apply.

Having determined that the loan documents were not ambiguous, the court then looked at whether the future advance clause was enforceable. The Texas Business and Commerce Code recognizes the validity of future advance clauses, stating that a "security agreement may provide that collateral secures ... future advances or other value, whether or not the advances or value are given pursuant to commitment." UCC § 9.204(c). A future advance clause applies to a future obligation between the parties if it was in the reasonable contemplation of the parties to the agreement at the time it was made. Wagner contended the inventory loan was not within the reasonable contemplation of the parties at the time the security agreements were signed.

In line with Supreme Court and Fifth Circuit holdings, this court held that the future advance clauses here, which stated that the collateral secured advances in the future from this bank to this borrower. That was within the reasonable contemplation of the parties at the time the documents were signed.

FFP Marketing Company* v. *Long Lane Master Trust IV, 169 S.W.3d 402 (Tex.App.—Ft. Worth, 2005, no pet.). FFP Operating executed a number of promissory notes payable to FMAC and FFP Marketing guarantied them. Long Lane and MTGLQ claimed to be the successors to the FMAC promissory notes and guaranties. Long Lane and MTGLQ claimed that FFP Operating failed to make payment on the notes and sent notice accelerating the notes. They subsequently filed suit against FFP Operating on the notes and FFP Marketing on the deeds of trust. The trial court granted summary judgment in favor of Long Lane and MTGLQ.

FFP claimed that Long Lane and MTGLQ failed to prove ownership of the notes and guaranties. Long Lane and MTGLQ argued that these were negotiable instruments governed by the UCC, that Texas law requires that they establish that they are either owners or holders of the notes, and that they did establish that they were holders.

If an instrument is negotiable, the holder has a right to enforce it, whether or not he is the lawful owner. The "holder" of a negotiable instrument is the person in possession of an instrument that is payable to bearer or to an identified person who is the person in possession. While negotiation or assignment of a promissory note can change ownership, the endorsement of a non-negotiable promissory note does not create a presumption of ownership in the endorsee. To recover on a non-negotiable promissory note, the holder must establish his status as the instrument's legal owner. A general denial is sufficient to raise the issue of legal ownership, placing the burden of proof on the person claiming ownership.

In this case the court held that the notes were not negotiable instruments. In order to be a negotiable instrument, the instrument must be a written unconditional promise to pay a sum certain in money, upon demand or at a definite time, and be payable to order or to bearer.

These promissory notes all defined the indebtedness to include "all indebtedness and all liability, responsibility and obligation of the Borrower, each Guarantor or any of their respective Affiliates to the Lender," going on to include contingent, direct, indirect, tort, contract, or other obligations. The court held that the presence of this definition in the notes defeats the "sum certain" requirement. Furthermore, the notes failed the requirement for an "unconditional promise" since each note specifically "incorporates by reference" the terms of other documents.

The court held that there was insufficient evidence of ownership of the non-negotiable notes to support summary judgment.

First National Acceptance Company* v. *Dixon, 154 S.W.3d 218 (Tex.App.—Beaumont 2004, pet. denied). Dixon and Bramble were friends. Bramble had apparently talked Dixon into signing a promissory note on the pretext that he would help Dixon sell the property. Dixon was oblivious to the fact that he had actually signed a promissory note and a deed of trust, and it was obvious that the Dixon/Bramble transaction was a complete sham and that there was no consideration for it.

First National, which is in the business of buying "B Paper" loans made by persons with inferior credit, generally purchases a stream of payments in what it calls a "partial transaction." In this case, Bramble took the Dixon Note to First National and sold the first sixty installments to it. Before making its offer to buy the installments, the First National conducted a telephone interview with a person claiming to be Dixon, and verified the information provided by Bramble. Bramble and First National executed an agreement, titled "Purchase and Sale Agreement TX Deed of Trust Partial Purchase Program," in which First National bought the next 60 installments of the note. Bramble executed an indorsement that stated "Pay without recourse to the order of First National Acceptance Company." The indorsement was physically attached to the note. Thus, the indorsement purported to convey the entire note to the appellant, although First National had purchased only 60 payments. When payments to First National stopped, it foreclosed on the deed of trust of Dixon's property.

When the note payment notices started coming from First National, simply looked to Bramble to handle the matter., but Bramble failed to do so. There was no evidence, however, that First National knew any of this background.

The trial court found: (1) Bramble transferred only 60 payments of the $60,000 note, not the entire note, and as a result First National became a partial assignee of the note with Bramble; (2) as a partial assignee First National was not a holder in due course; (3) Bramble was not entitled to payment from Dixon; (4) therefore, First National was not entitled to enforce the note or the lien against Dixon. First National argued that the trial court erred in holding it was a partial assignee rather than a holder in due course.

First National had actual possession of a note that had been indorsed to it. Therefore, the appellant was a "holder," as defined in UCC § 1.201. UCC § 3.302(a) states that the holder of an instrument is a "holder in due course" if:

(1) the instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity; and

(2) the holder took the instrument:

> (A) for value;
>
> (B) in good faith;
>
> (C) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series;
>
> (D) without notice that the instrument contains an unauthorized signature or has been altered;
>
> (E) without notice of any claim to the instrument described in Section 3.306; and
>
> (F) without notice that any party has a defense or claim in recoupment described in UCC § 3.305(a).

The crucial issue for the appellant's status as a holder in due course is whether it is merely a partial assignee under UCC § 3.203(d). First National argued the indorsement itself is what controls, and the legal effect of its transaction was to make First National the owner of the note with Bramble having only a contingent future interest in the remaining payments due. Dixon contended that Bramble purported to transfer only 60 of the installments payable under the note. The UCC Comment to § 3.203 states that any indorsement which purports to convey to any party less than the entire amount of the instrument is not effective for negotiation. Dixon argued the entire Bramble/First National transaction must be considered in determining whether the indorsement is a partial assignment. According to Dixon, the "Purchase and Sale Agreement" modified the indorsement and prevented negotiation of Dixon's note.

The court held that agreement between Bramble and First National does not alter Bramble's indorsement. Bramble indorsed the note with the following language: "Pay without recourse to the order of First National Acceptance Company." That act is an indorsement under UCC § 3.204, and together with possession of the document is sufficient to transfer the instrument under Section 3.203 and for negotiation under Section 3.201 and made First National a holder. The only basis asserted by Dixon for denying First National holder in due course status is Section 3.203(d), which did not apply in this case. Therefore, First National is a holder in due course as a matter of law, and the trial court erred in holding First National was a mere assignee.

PART III
GUARANTIES

First Union National Bank* v. *Richmont Capital Partners I, L.P., 168 S.W.3d 917 (Tex.App.—Dallas 2005, no pet.). First Union and Chase had each made a series of loans to Marketing Specialist. The initial Chase loan was partially guaranteed by Richmont. Also, when Chase made its loan, Chase and First Union executed an Intercreditor Agreement, setting out relative priorities and rights with respect to their loans.

In November 2000, Marketing Specialist needed more money, and, in a complex transaction, Chase increased its loan and sold a large participation in it to MS Acquisition. At the same time, Richmont increased its liability under its guaranty to cover certain amounts funded by Chase and MS Acquisition. In addition, Chase, MS Assets, First Union, and Richmont executed an amendment to the Intercreditor Agreement. Among other things, the Amended Intercreditor Agreement contained a provision that stated that neither Chase nor First Union would accept as security for their loans "any additional collateral" unless the other lender is also granted security in that additional collateral. It also provided for allocation of proceeds from the collateral among the various parties.

About six months later, Marketing Specialist filed bankruptcy. This triggered a lawsuit by Chase against Richmont on its guaranty. First Union intervened, claiming, among other things, a right to payment under the Guaranty by seeking enforcement of its security interest in MS Acquisition's right to payment under the Guaranty.

First Union first argued that the trial court erred in granting summary judgment against it when the court found, as a matter of law, that First Union did not have a security interest in Richmont's guaranty. First Union claimed that: (1) because there is no specific definition of "Additional Collateral" in the Amended Intercreditor Agreement, there is a fact issue regarding whether the parties intended Richmont's Guaranty to be included within the provision entitled, "Additional Collateral"; (2) the parties' failure to specifically exclude guaranties from this broad definition of "Additional Collateral" evidences their intent to include them; and (3) Marketing Specialist obtained the Guaranty for the purpose of providing additional security for the Chase loan and, because it is axiomatic that collateral is security for a loan, First Union has a security interest in the Guaranty. Richmont responded that First Union did not assert that the meaning of "Additional Collateral" is unclear because of ambiguity and evidence of intent is not admissible to explain the meaning of an unambiguous contract. Also, Richmont responded to First Union's assertions by arguing First Union was aware of the Guaranty because the Guaranty is included in the recital in paragraph "F" of the Amended Intercreditor Agreement and, if they intended to address the rights and issues affecting the Guaranty, they could have done so by specific reference. The court agreed with Richmont.

Neither party argued that the Amended Intercreditor Agreement was ambiguous, hence, its interpretation was a matter of law for the court. The entire Amended Intercreditor Agreement must be read and considered within its four corners to determine the true intention of the parties. While the Amended Intercreditor Agreement provides First Union an undivided interest in "Additional Collateral," there is no specific term or other language identifying the Guaranty as "Additional Collateral" or including it within the terms setting out the priority of rights in the Amended Intercreditor Agreement.

First Union claimed that in the absence of a specific definition of "Additional Collateral" in the Amended Intercreditor Agreement, the court should look to the common, ordinary meaning of the word "collateral." It argued that such an analysis leads to the conclusion that the Guaranty is "collateral" in which First Union held a security interest. It also argued that the court could find such common meaning using two sources. The first source is Webster's New World Dictionary where "collateral" is defined as "anything, such as stocks or bonds, that secures or guarantees the discharge of an obligation." The second is § 9.102(a)(12) of the Texas Business and Commerce Code which defines "collateral" as the property subject to a security interest or agricultural lien, including: (A) proceeds to which a security interest attaches; (B) accounts, chattel paper, payment intangibles, and promissory notes that have been sold; and (C) goods that are the subject of a consignment.

While generally agreeing that the court should interpret terms using their ordinary meanings, the court disagreed with the contention that the Webster's Dictionary definition or the UCC definition supported the characterization of the Guaranty as collateral. The dictionary does not define a guaranty as collateral. Rather, that definition identifies "collateral" as "anything, such as stocks or bonds, that secures or guarantees " an obligation. First Union did not describe how this dictionary definition should cause the court to construe the term "collateral" to include the Guaranty except that it "secures or guarantees" an obligation. The operative language in the definition describes "anything such as stocks and bonds." The court did not see that the Guaranty can be considered to be like "stocks or bonds." Likewise, we cannot agree the Guaranty is within the list of property which may be subject to a security interest as set out in § 9.102(a)(12). That list does not refer to guaranties. Accordingly, the court refused to conclude that these definitions reflect a common and generally accepted meaning of "collateral" which would operate to include the Guaranty within the "Additional Collateral" provision of the Amended Intercreditor Agreement.

Mays* v. *Bank One, N.A., 150 S.W.3d 897 (Tex.App.—Dallas 2005, no pet.). The borrower executed a promissory note to Bank One. The note was guarantied by Mays. Later, the debt was restructured and Bank One was granted a second lien on the borrower's real property. Bank of America held the first lien. When Bank of America wasn't paid, it foreclosed and bid in about 40% of the fair market value of the property. There were no excess proceeds from the foreclosure sale. Bank One then sued on the promissory note and the guaranty. The guarantor claimed that he was entitled to an offset for the fair market value of the property covered by the second lien, pursuant to Property Code § 51.005.

In its suit for recovery of the balance due on a promissory note and guaranty agreements, Bank One made no claim to a lien on real property, nor did it claim partial payment by foreclosure on any collateral. It was Bank of America that foreclosed its first lien on the real property against which Bank One held a second lien deed of trust. Bank of America was the successful bidder, yet its bid was sufficient only to satisfy its debt. Mays asserted that Bank of America's bid was approximately forty percent of the property's fair market value. In his response to Bank One's motion for summary judgment, Mays contended that "... since the property was not sold for an amount sufficient to cover both the first and second lien, there is a deficiency."

Property Code § 51.005(c) applies to foreclosures under § 51.002, and provides a mechanism for determining the offset, if any, against the unpaid debt secured by that property where the property's fair market value exceeds the price for which the property was sold at foreclosure. Section 51.005(c) provides: "If the finder of fact determines that the fair market value is greater than the sale price of the real property at the foreclosure sale, the persons obligated on the indebtedness, including guarantors, are entitled to an offset against the deficiency in the amount by which the fair market value, less the amount of any claim, indebtedness, or obligation of any kind that is secured by a lien or encumbrance on the real property that was not extinguished by the foreclosure, exceeds the sale price. If no competent evidence of fair market value is introduced, the sale price at the foreclosure sale shall be used to compute the deficiency."

The well-established rule is that following the valid foreclosure of a senior lien, junior liens, if not satisfied from the proceeds of sale, are extinguished.

Mays sought to impose the deficiency calculation provided for in § 51.005(c) upon Bank One, based upon a foreclosure sale conducted by Bank of America. Mays did not contend that Bank One or any creditor other than Bank of America instituted a foreclosure action against the subject real estate. It is plain then that the only foreclosure was of the lien held by Bank of America.

The language of § 51.005(c) makes it clear that the calculation of a "deficiency" includes only a lien or encumbrance on the real property "that was not extinguished by the foreclosure." It is without question that Bank One's debt, which was secured by a second lien to that of Bank of America, remained wholly unsatisfied from the proceeds of the foreclosure sale conducted by Bank of America. By operation of law, Bank One's second lien was extinguished when Bank of America foreclosed on its senior lien.

Byrd* v. *Estate of H.G. Nelms, 154 S.W.3d 149 (Tex.App.—Waco 2004, no pet.). Byrd, along with others in a joint venture, signed an agreement guaranteeing a debt incurred by the joint venture. Years after Byrd assigned away his interest in the joint venture, he was sued by the Nelms Partnership, one of the current venture partners and also a co-guarantor, which, after purchasing the underlying debt, sought payment of the debt from its fellow co-guarantors. A jury found that the Nelms Partnership paid the debt in its capacity as a co-guarantor and not as a partner in the joint venture. The trial court held Byrd jointly and severally liable for the debt. The court of appeals held that there is sufficient evidence that the Nelms Partnership paid the debt in its capacity as a guarantor. It also held that a co-guarantor can purchase a note and sue its fellow co-guarantors as an assignee. However, despite "joint and several" language in the guaranty agreement at issue, the Nelms Partnership was limited in its recovery to the proportionate share of the co-guarantors.

PART IV
USURY

Weisfeld* v. *Texas Land Finance Company II, 162 S.W.3d 379 (Tex.App.—Dallas 2005, no pet.). TSN owned some property in Dallas. In 2001 and 2002, Texas Land Finance paid TSN's ad valorem taxes on the property, and the taxing authority transferred the tax liens to it. TSN signed a promissory note payable to Texas Land Finance in the amount of those taxes. It later filed suit against TSN for payment of the Note. It held a foreclosure sale of the property, where Weisfeld's group bought it. Texas Land Finance then joined Weisfeld's group in the lawsuit. Weisfeld counterclaimed for usury.

Texas Tax Code § 32.065(e) provides for penalty if excessive interest is charged in contract for foreclosure of tax lien. The Weisfeld group contended they had standing to assert their usury claim under section 32.065(e) of the Texas Tax Code even though they were not "obligors" under the applicable usury statutes. Texas Land Finance argues the Weisfeld group were not "obligors" under Texas Finance Code § 349.001 who can recover for usury under the applicable statutory provisions.

The Weisfeld group conceded that where a statute imposes a usury penalty and establishes the lender's liability for the penalty "to the obligor," only the obligor has standing to assert a usury claim. However, they argued that their claim for usury arises under section 32.065(e), which provides: "If in a contract under this section a person contracts for, charges, or receives a rate or amount of interest that exceeds the rate or amount allowed by this section, the amount of the penalty for which the person is obligated is determined in the manner provided by Chapter 349, Finance Code." They contended that in section 32.065(e), the legislature intended to make usury remedies available to parties who are not obligors because there is no language restricting the remedy to the obligor.

The court disagreed, holding that the statute clearly refers to “a contract under this Section,” meaning that the usury penalty would be available only with regard to a contract subject to section 32.065, hence only to an “obligor.”

PART V
VENDOR AND PURCHASER

1464-Eight, Ltd. **v.** ***Joppich***, 154 S.W.3d 101 (Tex. 2004). This reverses the court of Appeals opinion reported in 96 S.W.3d 614, (Tex.App.–Houston [14th Dist.] 2002. Buyer and Developer entered into an earnest money contract, under which Buyer agreed to buy and Developer agreed to sell real estate in Fort Bend County. An addendum, which was attached to the earnest money contract, provided that, at the time of closing, Buyer would grant Developer an option to repurchase the property if Buyer did not begin construction of a primary residence on the property within 18 months from closing. Despite the addendum’s reference to an attached sample option agreement, there was no option agreement attached to the earnest money contract. At closing, the closer presented the option agreement, which Buyer and Developer signed. The option agreement recited that Developer paid consideration in the amount of ten dollars. Buyer did not begin construction of a primary residence on the property within 18 months of the closing date. On September 4, 1999, Developer sent Buyer a “Notice of Intent to Exercise Option,” which set a closing date of October 4, 1999. On October 1, 1999, Buyer sued Developer, seeking a declaratory judgment that the option contract was unenforceable. The trial court rendered judgment for Developer, declared the option contract valid and enforceable, ordered Buyer to sell the property in compliance with the terms of the option contract, and awarded Developer costs and attorney’s fees. The Court of Appeals held that the trial court erred in enforcing the contract because it was unenforceable for lack or failure of consideration. Specifically, Developer’s failure to actually pay the $10 consideration renders the contract unenforceable. (Interestingly, the recital of consideration mentioned only the $10, and left off the usual “other good and valuable” wording.)

A promise to give an option is valid if supported by an independent consideration. For example, if a sum of money be paid for the option, the promisee may, at his election, enforce the contract. In addition, under the Restatement (Second) of Contracts, certain promises that lack consideration are enforceable. The Restatement 2d expressly adopts the view that a clause reciting nominal consideration in either a guaranty or an option contract should operate as a formalistic validation device, supporting the promise in either type of contract, regardless of the fact that the recited amount was never paid.

Section 87(1)(a) of the Restatement (Second) of Contracts provides: “An offer is binding as an option contract” if the offer “is in writing and signed by the offeror, recites a purported consideration for the making of the offer, and proposes an exchange on fair terms within a reasonable time.” Similarly, section 88(a) provides: “A promise to be surety for the performance of a contractual obligation, made to the obligee, is binding” if the promise “is in writing and signed by the promisor and recites a purported consideration.”

Before the court of appeals' decision in this case, no Texas appellate court had decided whether a written option agreement that contains a fictional recital of a nominal consideration is unenforceable for lack of consideration. The position taken by section 87(1)(a) of the Restatement (Second) of Contracts is the minority position among the limited number of state supreme courts that have addressed the question. Nevertheless, the Texas Supreme Court was persuaded that the position of the Restatement (Second) of Contracts, which, according to the court, is supported by a well-articulated and sound rationale, represents the better approach.

Tolpo **v.** ***DeCordova***, 146 S.W.3d 678 (Tex.App.—Beaumont 2004, no pet.). Tolpo alleged that his former attorney, DeCordova, negligently prepared and drafted a contract for unimproved property located in Hardin County, Texas. The contract provided that the Buyer could, within seven days of the title commitment, object in writing to matters disclosed in the commitment. The contract further provided that Tolpo could, at his option, cure the objections within twenty days. The contract contained special conditions, none of which affected the buyer's right to object to matters disclosed in the title commitment. The contract provided seller the sole remedy of enforcing specific performance, or terminating the contract, in which case the seller would receive the earnest money.

The title commitment revealed mineral reservations in prior conveyances and prior easements to the city. Before the sale closed, the Buyer learned that a zoning change would allow a lumberyard to operate across the street. The Buyer wanted out of the contract and offered to forfeit the earnest money. Tolpo refused. Immediately after that, the Buyer made a written objection to nine of the exceptions in the title commitment. The buyer purchased another tract of land from a third party a few months later. Tolpo hired another attorney and sued the Buyer for breach of the earnest money contract. The trial court denied Tolpo's request for specific performance, awarded Tolpo the earnest money and denied both parties' request for attorney fees. No appeal was taken from the judgment entered in that case.

Tolpo did not instruct DeCordova to use a particular contract, and he did not dispute the decision to use the form, as it was appropriate for the property in question. He testified that the contract should have included the following clause: "The above tract is subject to all prior reservations or conveyances of minerals and/or royalties of record...." That language was not required by the power of attorney, and its inclusion was not requested by Tolpo. Tolpo testified: "Most attorneys that I've visited with include that as part of their sales agreement, particularly on raw land." Asked which attorney, Tolpo identified the attorney "right here," the second attorney he hired to replace DeCordova, and one other lawyer. Tolpo blamed DeCordova for losing the sale. The Buyer would not have been able to avoid the contract because of the zoning change, but could object to the encumbrances on the property because he reserved that right in the earnest money contract.

To recover on a claim for legal malpractice, the plaintiff must establish: (1) the attorney owed the plaintiff a duty, (2) the attorney breached that duty, (3) the breach proximately caused the plaintiff's injuries, and (4) damages occurred.

DeCordava's motion for summary judgment attacked the elements of breach and causation. Tolpo contends that the buyer was able to make valid objections to the title commitment because DeCordova omitted language from the contract. The summary judgment record established that DeCordova utilized the correct pre-printed form and followed Tolpo's instructions in preparing the contract. DeCordova argued that this was sufficient to establish that he acted as a reasonably prudent attorney in exercising his professional judgment, and that Tolpo produced no evidence that these actions failed to meet the standard of care for a reasonable, prudent attorney.

To overcome DeCordova's "no evidence" motion for summary judgment, Tolpo presented the affidavit and deposition testimony establishing the following: three other lawyers included the clause in sales agreements, particularly for raw land; mineral reservations were mentioned in sales contracts in two other transactions in which DeCordova was identified as the seller's attorney; the previous year DeCordova had reviewed a proposed sales contract for the property and that contract stated the seller did not own the minerals; and, in the opinion of the attorney who tried the contract suit, DeCordova's past familiarity with the property would have caused him to exclude prior reservations of minerals and royalties in the earnest money contract. Tolpo argued that this summary judgment evidence raises a fact issue on breach of the standard of care.

A lawyer in Texas is held to the standard of care which would have been exercised by a reasonably prudent attorney, based on the information the attorney had at the time of the alleged act of negligence. If an attorney makes a decision which a reasonably prudent attorney could make in the same or similar circumstance, it is not an act of negligence even if the result is undesirable. The anecdotal evidence that other earnest money contracts address the issue of reservations and easements does not establish that an attorney drafting an earnest money contract for unimproved property must, in the objective exercise of professional judgment, include such a clause in any contract to convey property. Thus, Tolpo failed to raise a fact issue on breach of the standard of care.

The second issue was whether or not Tolpo produced any evidence DeCordova's acts and omissions were the proximate cause of the Tolpo's damages. Causation may be determined as a matter of law if the circumstances are such that reasonable minds could not arrive at a different conclusion. The attorney who tried Tolpo's lawsuit against the Buyer provided his professional opinion that, had DeCordova inserted a reservations and easements clause in the contract, Tolpo would have prevailed at the trial on the contract. He does not reveal his rationale, and there were three very obvious flaws in Adams's statement. First, Tolpo *did* prevail in his lawsuit against the Buyer. It is undisputed that the trial court ordered the Buyer to forfeit the earnest money. Such a ruling required a finding that Buyer defaulted on the contract. Second, the contract drafted by DeCordova contained a specific performance clause. Therefore, specific performance was an available remedy. Third, the affidavit is conclusory. A conclusory statement of an expert witness is insufficient to create a question of fact to defeat summary judgment.

Lewis* v. *Foxworth, 170 S.W.3d 900 (Tex.App.—Dallas 2005, no pet.). The Foxworths as sellers and Lewis as the buyer entered into a contract for the sale of 450 acres in Grayson County. Lewis deposited $50,000 in earnest money with the title company. Among the other provisions in the contract was a special provision that stated: "Both Seller and Purchaser agree that there are items of Personal Property which will be removed from the Property and that all fixtures which are attached to the Property will remain with the Property, said fixtures including, but not limited to fences, working pens, gates, chutes, water well fixtures, and tanks." The Foxworths removed some items of personal property from the land, but some still remained as of the scheduled closing date.

Two days after the scheduled closing date, when the sale had not closed, the Foxworths sent Lewis a letter stating they were willing to extend his time for performance. They also informed him that, if he failed to tender the remaining funds by the extended performance date, they would exercise their right to recover the earnest money and terminate the contract.

Lewis did not tender the money, so the Foxworths sent him a letter terminating the contract and demanding the earnest money. The title company refused to release it without Lewis's consent, so the Foxworths filed suit to recover it.

In response to the Foxworths claim for breach of contract, Lewis claimed he was excused from performance, that there was a failure of conditions precedent, and that there was a failure of consideration. All of these were based on the fact that the Foxworths had not removed all of the personal property from the land before closing. The jury found that the Foxworths had not been in material breach of the contract and the trial court granted judgment in favor of the Foxworths.

Lewis's argument was that the evidence conclusively shows that the Foxworths failed to comply with the special provision requiring them to remove their personal items from the land and that that failure excused his performance under the contract. The court noted that the contract provision said only that the parties acknowledge "that there are items of Personal Property which will be removed." The evidence showed that some items were removed and, therefore, the requirements of the provision were met. For the contract to require the Foxworths to remove all personal items from the property before the property was transferred, the contract would have to be rewritten to state that "both Seller and Pruchaser agree that all items" will be removed. The actual contract language is not that expansive. "Lewis agreed to the terms and provisions of the contract as it was written, and we cannot now change those provisions simply because Lewis believes something more was needed."

Lewis then asked the court to construe the contract strictly against the Foxworths because they were the drafters. The court refused to do so. The doctrine of contra proferentem is applied only when construing an ambiguous contract. Here, no one ever argued that the contract was ambiguous – in fact, Lewis stridently argued that the contract was not ambiguous.

West* v. *Brenntag Southwest, Inc., 168 S.W.3d 327 (Tex.App.—Texarkana 2005, no pet.). Delta Solvents leased some land in Longview, where it conducted a business that disposed of solvents and paint and also carried on a drum recycling business The disposal business involved dumping the paint and solvents into earthen pits and into a buried milk truck. Delta also washed out the fifty-five gallon drums onto the ground and buried other drums that contained hazardous waste. In 1980, Delta "suspected the soil was polluted" and ceased its business.

In 1980, Delta sold the business to Sikes, who continued to lease the land to operate on. Two years later, Sikes decided he wanted to buy the land. Before he did so, he required the removal of a buried tank and the buried milk truck. He also had Delta remove some of the contaminated soil, which Delta simply moved to another one of its properties down the road. While he owned the property, Sikes said he "heard" that fifty-five gallon drums had been buried on the property, but he hadn't located any.

In 1984, West bought the property from Sikes. In 1988, when West began to build a loading dock on the property, it bulldozed a tree. The bulldozer struck a buried drum that began spewing liquid, which then ignited. West then notified the Texas Water Department (now TCEQ) and twenty drums were ultimately unearthed. West then entered an agreed order with TCEQ for remediation. The agreed order named West, his company, and Delta as respondents and deemed them "responsible" and "liable" parties. The order found that Delta had buried the drums and discharged rinsewater and spent solvents into earthen pits.

After a decade since the Agreed Order with no approval having been obtained on a remediation plan, West filed suit, among other things, for injury to the land.

On appeal, Brenntag argued that West lacked standing to bring an action against it. It pointed out that West bought the property years after Delta had deposited the contaminants. It argued that the injury occurred before West's ownership, and that West did not get an assignment of claims from the previous owner.

In order for a landowner to have standing to sue for injury to land, one of two circumstances must exist. One, in the case where the injury occurred to the land before the current landowner's purchase of the land, the seller must have assigned those claims to the landowner. Two, the injury to the land must have occurred during the landowner's ownership of the property. There was no contention that Sikes, the intermediate landowner, had ever assigned his claims to West. Thus, the only issue was whether this injury was an injury to the land while West owned it.

West argued that the gradual leaking of contamination into the soil continued to occur while he owned the property and that, therefore, he sustained a new injury and has standing to sue. He argued that he sustained a new injury since "the hazardous waste had not been fully removed, the ground water had been contaminated, the water had migrated offsite, and the site had not been fully secured."

The court disagreed. The record establishes that the injury to the property occurred during the years 1976-1980, while Delta irresponsibly dumped solvents into the earth and buried several drums of solvents into the earth. The fact, on which West relies, that the injury has remained throughout West's ownership does not create a new injury to the land. Rather, the injury is a continuous, lingering injury [and one for which West, a subsequent landowner without an assignment of claims, has no standing to sue. The trial court was without subject-matter jurisdiction over these claims.

PART VI
LIS PENDENS

In re *Collins*, 172 S.W.3d 287 (Tex.App.—Ft. Worth, 2005, no pet.). Collins and Kest are former business partners. Together, they were partners in the ownership of a shopping mall. When the mall entity had some financial difficulty, the Collins side and the Kest side entered into a memorandum of understanding pursuant to which Collins agreed that he wouldn't interfere if the lender decided to foreclose and that Kest could do whatever he wanted with the mall. Not included in the memorandum was an agreement that Collins alleged existed that, if Kest ended up with the mall by buying at foreclosure, Kest would convey Collins a half ownership interest in the mall.

The foreclosure took place and an entity owned by Kest, Tex Mall, bought it. Kest did not give Collins the interest in the mall that Collins thought he was entitled to, so Collins filed suit for fraud, breach of fiduciary duty, and conspiracy. Collins also sought a declaratory judgment that he was entitled to the ownership interest in the mall, as well as damages and a constructive trust on the mall. In connection with the lawsuit, Collins also filed a lis pendens against the mall.

Tex Mall, the Kest entity, discovered the lis pendens when it began to redevelop the mall. Because the lis pendens was interfering with its financing, Tex Mall moved to have the lis pendens removed. In its motion, Tex Mall contended that the lis pendens was improper because title to land is not disputed in the third-party lawsuit and the suit does not seek to enforce an encumbrance on land. The trial court granted the motion to void the lis pendens.

A lis pendens statute gives litigants a method to constructively notify anyone taking an interest in real property that a claim is being litigated against the property. A notice of lis pendens may be filed during the pendency of an action involving (1) title to real property, (2) the establishment of an interest in real property, or (3) the enforcement of an encumbrance against real property. A recorded lis pendens is notice to the world of its contents, regardless of whether service has been made on the parties to the proceeding.

If a notice of lis pendens satisfies the requirements of section 12.007, the trial court may not cancel it except as provided in Texas Property Code § 12.008, which requires payment of a deposit or a bond, which the trial court did not require. To satisfy § 12.007, the suit on which the lis pendens is based must claim a direct interest in real property, not a collateral one. In other words, the property against which the lis pendens is filed must be the subject matter of the underlying lawsuit. If the suit seeks a property interest only to secure the recovery of damages or other relief that the plaintiff may be awarded, the interest is merely collateral and will not support a lis pendens.

Here, the parties disagree over what a trial court may consider in determining whether a suit involves a claim to a direct interest in property and, therefore, complies with § 12.007. Collins asserts that the trial court must limit its review to the pleadings of the party who filed the lis pendens. Tex Mall, on the other hand, contends that the trial court may look beyond the pleadings and consider evidence relevant to the question of whether the party's alleged interest in the property is direct or collateral.

The courts of appeals that have addressed this question appear to be split. The

First Court of Appeals has held that the validity of a lis pendens must be determined based on the pleadings alone. At least two other courts of appeals (Dallas and Austin), have followed the First Court. Three courts, however (Beaumont, Tyler, and Dallas), allow evidence to be considered in determining whether a lis pendens is improper. The court noted that Dallas has come down firmly on both sides of the issue.

In resolving this issue, the court of appeals turned to the Supreme Court's analysis in cases involving pleas to the jurisdiction. The Supreme Court has held that when a plea to the jurisdiction challenges the pleadings, the trial court looks to the pleadings to determine if facts have been alleged that affirmatively demonstrate the court's jurisdiction to hear the case. If, however, a plea to the jurisdiction challenges the existence of jurisdictional facts, the trial court considers relevant evidence submitted by the parties to resolve the jurisdictional issues raised. The trial court must not weigh the merits of the plaintiff's claims, but must confine itself to the evidence relevant to the jurisdictional issue.

When the jurisdictional challenge implicates the merits of the plaintiffs' cause of action, the court reviews the evidence relevant to the jurisdictional issue to determine if a fact issue exists. If the evidence raises a fact question regarding the jurisdictional issue, the trial court must deny the plea to the jurisdiction, and the fact issue must be resolved by the fact finder., however, the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law.

Applying these principles to the determination of a motion seeking the removal of a lis pendens, the court held that when the motion challenges the pleadings supporting the lis pendens, the trial court should examine the pleadings to determine whether the pleader has alleged facts that affirmatively demonstrate that the lis pendens is proper. If, however, a motion seeking the removal of a lis pendens challenges the existence of facts supporting the pleader's alleged interest in the property, the trial court should consider evidence relevant to the question of whether the alleged property interest is direct or collateral. In so doing, the trial court must not decide the merits of the parties' claims, but must confine itself to the evidence relevant to the issue of whether the alleged property interest is direct or collateral.

If the evidence raises an issue of fact regarding whether the alleged property interest is a direct interest, the motion should be denied and the issue must be resolved by the fact finder. If, however, the relevant evidence is undisputed, or fails to raise a fact question concerning the true nature of the alleged property interest, the trial court should rule on the validity of the lis pendens as a matter of law. This rule, according to the court, strikes the necessary balance between protecting the plaintiff's asserted interest in the property, on the one hand, and protecting the property owner from the adverse effects of a lis pendens that is based on a sham pleading, on the other, without depriving the parties of the right to present the merits of their case at trial.

The court then examined the record and found the evidence presented to the trial court raised a fact issue on the question of whether Collins has a direct interest in the Mall property, as allege in his pleadings. Accordingly, the Court held that the trial court clearly abused its discretion by granting Tex Mall's motion to void the lis pendens.

PART VII
ADVERSE POSSESSION

Cherokee Water Company* v. *Freeman, 145 S.W.3d 809 (Tex.App.—Texarkana 2004, pet. denied). In a 1948 conveyance to Cherokee Water, W.R. and Dessie Freeman retained the right to fish on the lake. This reservation did not specify which lot Freeman could use to access the lake. The Freeman heirs claimed title to the Park A Lot by adverse possession, but Cherokee Water argued that the permission to fish in the lake meant that any possession of Park Lot A was permissive and adverse possession would not commence until that permissive use was repudiated.

The court disagree with this argument. It cannot be determined as a matter of law that the Park A Lot was a part of the 48-1/2 acre tract in which the fishing permission was reserved. It was not established that this was a tract for which permission was given for fishing on the lake. Without that determination, it was not necessary for Freeman to repudiate Cherokee's title.

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.

PART VIII
EASEMENTS

Baker* v. *Peace, 172 S.W.3d 82 (Tex.App.—El Paso 2005, pet. pending). "Dedication" is the act of appropriating private land to the public for any general or public use. Once dedicated, the owner of the land reserves no rights that are incompatible with the full enjoyment of the public. There are four essential elements of implied dedication: (1) the acts of the landowner induced the belief that the landowner intended to dedicate the road to public use; (2) he was competent to do so; (3) the public relied on these acts and will be served by the dedication; and (4) there was an offer and acceptance of the dedication.

As a general rule, the intention to dedicate must be shown by something more than an omission or failure to act or acquiesce on the part of the owner. There must be evidence of some additional factor that implies a donative intention when considered in light of the owner's acquiescence in the public's use of the roadway. The additional factor may include (1) permitting public authorities to grade, repair, or otherwise improve the roadway; (2) selling parcels of land from a plat or plan showing the roadway as a means of access to the parcels; (3) construction of facilities for general public use; (4) an express representation by the owner of a road to a land purchaser that the way is reserved for public use; (5) fencing off the roadway from the remainder of the land; or (6) obtaining a reduction in the purchase price commensurate with the area of the roadway.

Direct evidence of an overt act or a specific declaration on the part of the landowner indicating an intention to dedicate land to public use as a roadway is not required. It is sufficient if the intent is properly inferable from the circumstances in evidence. The theory of implied dedication carries with it the idea that the owner consented to the use of his land as a highway to the extent that the court will hold that he dedicated it to public use, whether by express words, overt acts, or even by such inaction on the part of the owner as would justify a conclusion that he intended to dedicate his land to public use.

Thus, there must be something more than an omission or failure to act or acquiescence on the part of the landowner. However, the "something more" need not rise to the level of an overt act or an explicit declaration demonstrating a donative intention. It is enough that a donative intention be inferred from evidence showing other factors that suggest such an intention under all of the circumstances surrounding the landowner's acquiescence in the public's use of the roadway. In addition, evidence of long and continued use by the public raises a presumption of dedication by the owner when the origin of the public use and the ownership of the land at the time it originated cannot be shown, one way or the other, due to the lapse of time. For this rule to apply, the origin of the public use and the ownership at that time must be "shrouded in obscurity, and no proof can be adduced showing the intention of the owner in allowing the use."

Reed* v. *Wright, 155 S.W.3d 666 (Tex.App.—Texarkana 2005, pet. denied). A road on the landowner's property was presumed to be dedicated to public use, given that origin of road was "shrouded in obscurity," and the public made long and continuous use of the road prior to owner's purchase of property. There was no evidence of the identity and no direct evidence of the intent of the owner who originally established the road. Also, there was no claim or evidence of incompetency of any prior owners, and witnesses testified that they and others had continuously used road for at least twenty-five years without asking permission to do so, prior to property owner's purchase of property.

Hubert* v. *Davis, 170 S.W.3d 706 (Tex.App.—Tyler 2005, no pet.). "Restrictive covenants" filed in 1967 with respect to a lake lot subdivision contained a provision (paragraph 13) granting all owners in the subdivision a right to ingress and egress to the lake, as well as parking, on Lot 9. Another provision in the document (paragraph 14) stated that the restrictions continued for 25 years and after that for one successive period of 10 years unless terminated by vote of the owners. In 2003, Hubert bought Lot 9 and erected a fence to prevent people from entering it. Davis and some other people breached the fence in order to get to their fishing boats. Hubert filed a declaratory judgment action, seeking a determination that the "restrictive covenant" for egress and ingress had terminated pursuant to the termination provision of the restrictive covenants.

An easement confers upon one person the right to use the land of another for a specific purpose. An easement has been further defined as a "liberty, privilege, or advantage in land without profit, existing distinct from the ownership of the soil." As such, easements consist of the following characteristics: (1) an easement is a burden on one estate, the servient estate, for the benefit of another, the dominant estate; (2) an easement may be created by express grant, but must be derived from the owner of the servient estate; (3) an easement is a nonpossessory interest in land that is not revocable at will, and (4) an easement confers no right to participation in the profits arising from the servient estate.

Since an easement is an interest in land, the grant of an easement should be drawn and executed with the same formalities as a deed to real estate. The description of an express easement must be definite and certain upon the face of the instrument itself or in some writing referred to in the instrument, such that a surveyor can go upon the land and locate the easement from the description. The writing required by the statute of frauds, which identifies the servient estate of an easement, must contain the essential terms of a contract, expressed with such certainty and clarity that it may be understood without recourse to parol evidence to show the intention of the parties. In spite of these formal requirements, the fact that an easement clause is vague, indefinite, or uncertain does not authorize the court to completely ignore the valuable right thereby granted if the clause is still susceptible of a reasonable construction as to its true intent and meaning. Generally, any language that clearly shows an intention to grant an easement is sufficient for the purpose; no special form or particular words need be employed.

The rules of contract construction govern the interpretation of restrictive covenants and easements. Whether restrictive covenants or easements are ambiguous is a question of law. Courts must examine the covenants and easements as a whole in light of the circumstances present when the parties entered the agreement. Like a contract, covenants and easements are unambiguous as a matter of law if they can be given a definite or certain legal meaning. On the other hand, if the covenants or easements are susceptible to more than one reasonable interpretation, they are ambiguous.

In the case at hand, the trial court in its declaratory judgment found that Lot 9 is burdened with an easement created by paragraph 13 of the restrictive covenants and that the easement is not subject to expiration through the same time limits set for the restrictions. The courts review concerned whether paragraph 13 unambiguously created an easement as a matter of law as opposed to a restriction or covenant, which, by the terms of the document, was subject to expiration.

By its plain language, paragraph 13 creates by express grant a burden on a servient estate, Lot 9, for the benefit of the dominant estates, all other lots in the subdivision. Paragraph 13 further grants a nonpossessory interest in Lot 9 and contains no indication that the grant is revocable at will. Moreover, paragraph 13 confers no right by which owners of the dominant estates may profit from the servient estate. The court found itt significant that paragraph 13 states that the interest is "granted" to all owners of lots in the subdivision. The word "grant" is a word of present conveyance indicating complete alienation.

From the language of paragraph 13, it is reasonable to conclude that Bauguss intended to then and there grant to all other lot owners in the subdivision the free use and right of passage in and along, over and across Lot 9 with free ingress and egress for specific purposes. Therefore, the trial court reasonably interpreted the unambiguous language employed in paragraph 13 as creating an easement.

Hubert argues that paragraph 13 grants a privilege rather than a right. A privilege, according to Hubert, is a term of limitation. Although Hubert cites no authority for the proposition that the word "privilege" was intended to limit the express grant in paragraph 13, we note that a "privilege" is defined as a "peculiar right." Moreover, an easement is defined as a "liberty, privilege, or advantage in land without profit, existing distinct from the ownership of the soil." The term "privilege," without more, does not limit the grant in paragraph 13.

Hubert further argues that paragraph 13 makes no use of the word "easement." However, as we have noted previously, any language that clearly shows an intention to grant an easement is sufficient for the purpose; no special form or particular words need be employed. Even though paragraph 10 of the restrictive covenants agreement made specific use of the word "easement" in reserving land for use by utilities, it does not necessarily follow that identical language must be used to create another easement.

Yet, while not revocable at will, easements do not necessarily run in perpetuity. A determinable easement may be created that will terminate on the happening of a particular event. Thus, the court was required to determine whether the developer intended that the terms for termination apply to the easement created by paragraph 13.

The court held that from the language used in the termination paragraph, that the covenants and restrictions terminate, the trial court could reasonably find that the time limitations applied only to the restrictions and covenants contained in the document.

As set forth above, the language used in paragraph 13 can reasonably be interpreted to grant an easement in Lot 9. Therefore, it reasonably follows that since the grant in paragraph 13 is an easement and the time restrictions in paragraph 14 apply only to restrictions and covenants, the time restrictions in paragraph 14 are inapplicable to the easement granted by paragraph 13.

Still* v. *Eastman Chemical Company, 170 S.W.3d 851 (Tex.App.—Texarkana 2005, no pet.). All-terrain vehicles, including four-wheelers and other motorized vehicles, using the ATV Park operated by Oscar Wardon Still, Future Income L.L.C., Rabbit Creek Mountain Mud Blast, Rabbit Creek ATV-RV Park, and East Texas All-Terrain Monsters (collectively Still), ranged over Still's land, as well as over the pipelines buried in five pipeline easements crossing his land. Soon after personnel of Eastman Chemical Company and Enbridge Pipelines (East Texas), L.P. noticed erosion and rutting of the soil over and adjacent to the pipelines, they sought to stop Still from allowing the vehicles to continue using the pipeline easements in a way that caused such erosion or rutting.

Still appealed from a temporary injunction prohibiting the operation of ATVs over the easements.

The purpose of a temporary injunction is to maintain the status quo pending trial. A temporary injunction should issue only if the applicant demonstrates a probable injury and a probable right to recovery after a final hearing. A temporary injunction may not issue "upon mere fear, apprehension, or possibility of injury."

Review of the trial court's action in granting a temporary injunction is limited to determining whether the action constituted an abuse of discretion. A trial court abuses its discretion if it acts without reference to guiding rules and principles, acts unreasonably or arbitrarily, or if it misapplies the law to the facts before the court. A trial court does not abuse its discretion if its decision is based on conflicting evidence. When the trial court does not issue written findings of fact and conclusions of law, as is the case here, the court of appeals must affirm the trial court's judgment if that ruling is correct under any theory applicable to the case.

At the hearing on Eastman's request for a temporary injunction, the trial court received testimony from three witnesses. The first witness was McDaniel, a pipeline supervisor and chemical engineer for Eastman. McDaniel testified that one mud hole above one of the pipelines appeared to be eighteen or twenty inches deep. McDaniel stated he observed numerous ATV trails running beside and crossing the pipelines. McDaniel said he could not tell whether the trails had been created as a result of Still's purposeful designation or whether the ATV riders had themselves independently created the trails. But during one site visit, McDaniel did find a printed sign reading "Poker Run Station 1" near Eastman's right-of-way. McDaniel then testified that the risk of an explosion, fire, or other injury was so great that it would be imprudent for Eastman to merely seek a legal remedy after the explosion, fire, or other injury had occurred and, therefore, an injunction was necessary to pre-empt Still's activities from causing the feared injury. McDaniel believed, "From what we've witnessed out there, it's pretty likely that an accident will occur in the next few months." He even thought it was possible the damage to the pipeline would occur as quickly as the weekend following the trial court's hearing on the temporary injunction.

Jack Hart, the North Area Operations Manager for Enbridge, testified next. Hart said the burial depth of one pipeline was thirty-six inches at the time of construction. Another pipeline was buried forty inches below the surface. The depth of a third pipeline, however, which was constructed between 1958 and 1959, varied from "very, very shallow to very deep, depending on what the construction company ran into when they were building it." Hart admitted on cross-examination that parts of this third pipeline were probably laid at a depth of less than twenty-four inches.

Hart told the trial court he had seen a significant loss of soil cover over the pipelines at Still's ATV park. Hart hypothesized that, if the ATVs continued cutting deep ruts along the pipelines, the pipelines would eventually be exposed, which "increases the likelihood of significant damage to the pipeline." "The exposure will--can take the coating of the pipeline off, which will then accelerate the rate of corrosion...."

Finally, Still testified in opposition to the injunction. Still began operating Rabbit Creek RV Park on Memorial Day weekend of 2002. Still claimed he has not designated, built, or created any specific four-wheeler trails over Appellees' pipelines. Instead, he merely allowed patrons to roam across the surface estate as they saw fit. Still does not try to regulate where the ATV riders go, and his testimony made it clear he plans to continue allowing ATV patrons unfettered access to the entire park. Still discounted the impact that ATVs had on the soil cover over Appellees' pipelines. Instead, he blamed Appellees' own tractors, used to mow the rights-of-way, for causing the deep ruts in question. At oral argument, however, Still made certain factual concessions: "Now, for purposes of this issue and this argument, I will concede that the conduct complained of was intended to be continued. I will concede that the conduct complained of did some disturbance or damage to the surface estate-- that it caused ruts. There's no question [that] riding four-wheelers across the ground is going to disturb the grass; it's eventually going to cause a rut if you ride it through mud.... It's going to do it whether you do it on this pipeline or whether you do it anywhere in the world."

At common law, a fee owner may not interfere with an easement holder's reasonable use and enjoyment of that easement. Nor may the property owner make a use of the surface that might endanger or interfere with a pipeline. The rights of an easement holder may be protected by injunction.

Viewing the evidence in the light most favorable to the trial court's ruling, the court of appeals could not say the trial court's ruling was made without reference to guiding rules and principles, was arbitrary and unreasonable, or was not supported by any evidence. There was direct testimony that the harm caused by allowing the ATVs to continue to ride over the pipelines could lead to an explosion as quickly as the weekend following the hearing on the temporary injunction (or, alternatively, within the next few months). Such an explosion would, in turn, endanger the surrounding homes and neighborhood. The common law in Texas expressly forbids a surface estate owner from making use of the surface in any way that endangers a pipeline, and--drawing all reasonable inferences from the evidence before the trial court--it is clear that the trial court had before it evidence that would support a conclusion that allowing Still to continue his activities, unfettered, would endanger the pipelines. Accordingly, we could not say the trial court abused its discretion by granting the temporary injunction.

PART IX RESTRICTIVE COVENANTS SUBDIVISIONS AND CONDOMINIUMS

VICC Homeowners' Association, Inc.* v. *Los Campeones, Inc., 143 S.W.3d 832 (Tex.App.–Corpus Christi-Edinburg 2004, no pet.). The original covenants and restrictions of the Country Club Estates subdivision were created in 1969. The 1969 Covenants specifically provided procedures for their amendment. The amending provision required any written agreement terminating, modifying or revising the 1969 Covenants to be filed in the Cameron County Clerk's office. VICC attempted to amend the 1969 Covenants by circulating petitions among the lot owners. Lot owners who signed the petitions requested that the 1969 Covenants be terminated. No amendments or revisions were attached to or accompanied the petitions. No subsequent agreement amending or revising the 1969 Covenants was agreed to or signed by the lot owners.

VICC filed an "Amended Covenants and Restrictions" in the county clerk's office. The instrument, containing eight pages of amendments and revisions to the 1969 Covenants, was verified by the secretary/treasurer of VICC. The verification stated, "a majority of owners of the Subdivision ... have executed an agreement in writing ... approving the attached amendments."

For a subsequent instrument to amend the original restrictive covenants governing a subdivision, three conditions must be met. First, the right to amend and the method of amendment must be expressly provided for in the instrument creating the original restrictions. Second, the right to amend implies only those changes contemplating a correction, improvement, or reformation of the agreement rather than complete destruction of it. Third, the amendment may not be illegal or against public policy.

When VICC filed the Amended Covenants, the instrument purported to be an agreement to amend or revise the 1969 Covenants. The verification, by the secretary/treasurer of VICC, stated, "a majority of owners of the Subdivision ... have executed an agreement in writing ... approving the attached amendments...." However, a majority of the homeowners had not executed an agreement in writing approving the attached amendments made to the 1969 Covenants. The record contains no evidence that the homeowners who signed the circulated petition ever saw what was eventually filed with the county clerk as the Amended Covenants. At most, by signing the circulated petition, the homeowners agreed only to terminate the 1969 Covenants. Because VICC attempted to modify or revise the 1969 Covenants without the consent of a majority of the landowners, the court held that VICC failed to comply with the method of amendment and that such action was contrary to the intention of the amending provision of the 1969 Covenants, and thus, is of no effect.

Voice of the Cornerstone Church Corporation* v. *Pizza Property Partners, 160 S.W.3d 657 (Tex.App.—Austin 2005, pet. denied). Mobil Oil] owned and operated an oil pipeline terminal that served as a bulk fuel storage and transfer station. As a result of groundwater contamination, an environmental clean-up was ordered. Part of that clean-up required the then owner of the property to impose a restrictive covenant to prohibit uses that could create environmental risks. The covenant that was imposed when Mobil sold to Pizza Property Partners said that the property "shall be used for commercial/light industrial purposes only and neither the property herein conveyed nor any part thereof shall at any time be used for (1) the storage and sale of motor fuels; (2) for residential purposes, healthcare facilities, daycare facilities, schools, playgrounds; (3) that irrigation and drinking water wells shall be prohibited; and (4) that subsurface structures, including without limitation basements and below ground parking but excluding building foundations are prohibited."

Pizza Property Partners sold the property to Cornerstone, an evangelical church, subject to "any and all restrictions, encumbrances, easements, covenants and conditions" as filed with the Travis County Clerk. The deed did not further elaborate on the restrictive covenant or explicitly refer to the instruments filed with the County Clerk.

At the time of purchase, the property contained several old industrial warehouses. Cornerstone converted the largest of these buildings into a church sanctuary, removing walls to create a larger space. It also constructed a small kitchen attached to the sanctuary to provide meals for its members on Sundays. It received permits from the City of Austin for those renovations. Cornerstone also created a baptismal pool from one of the tank farm's fuel storage tanks. It removed sand that had filled the hole where the tank had been, mixed the sand with cement, and used the resulting concrete to form the floor and walls of the baptismal pool in the excavated hole. It then tiled the concrete circumference of the hole.

Cornerstone did not seek Mobil's permission to engage in any of these renovations or construction projects.

Worship services occur on the property at least four times each week, estimated by Cornerstone to constitute seventeen percent of the property's use. In a smaller building, Cornerstone runs a printing press to provide financial support for the church; it otherwise does not generate a profit. The pastor has also operated an appliance repair shop and retail store on the property to help pay the monthly expenses of the congregation. There is also evidence that some church members have stored inoperable cars on the property for short periods of time.

After it learned of activity on the property, Mobil contacted Cornerstone to inform it of its belief that Cornerstone's use violated the restrictive covenant. The parties were unable to come to an agreement concerning permitted uses of the property, and, in 2001, ExxonMobil (Mobil's successor) sought to enjoin both Cornerstone's use of the property for church purposes and any further construction projects, alleging that Cornerstone's activities constituted a breach of the restrictive covenant, access agreement, and use-restriction agreement Mobil signed with Pizza Property Partners.

Cornerstone's issues on appeal can be grouped for discussion as follows: (1) ExxonMobil lacked standing to seek enforcement of the restrictive covenant; (2) there is no evidence that Cornerstone violated the "commercial/light industrial" limitation or any other provision of the restrictive covenant; (3) the district court abused its discretion in refusing to cancel or modify the restrictive covenant on the basis of changed circumstances, hardship, latent ambiguity, or equitable estoppel; and (4) enforcement of the covenant, as interpreted, violates Cornerstone's religious freedoms.

To establish standing, one must show a justiciable interest by alleging an actual or imminent threat of injury peculiar to one's circumstances and not suffered by the public generally. A "restrictive covenant" is a negative covenant that limits permissible uses of land. The original grantor of the property is entitled to enforce a restrictive covenant on that property. A restrictive covenant can bind a successor to the burdened land in two ways: as a covenant that runs with the land at law or as an equitable servitude. The court held that this covenant runs with the land. Thus, ExxonMobil could enforce the covenant against Cornerstone.

In construing a restrictive covenant, as in construing any written instrument, the court's first duty is to seek the intention of the parties to give effect to their purposes. The court will give words and phrases used in a covenant their commonly accepted meaning. In this case, although the restrictive covenant does not, in so many words, prohibit worship services or related church activities, it unequivocally prohibits any use of the property other than "commercial/light industrial purposes." Especially given the environmental remediation context in which the covenant was created, it was not necessary for Mobil to enumerate with precision every conceivable non-commercial, non-industrial use for that limitation to be effective. Absent some bar to enforcement, the court is bound to give effect to the clear intent of the drafters.

Significantly, Cornerstone does not contend that its worship services, baptisms, and similar activities are within the sphere of "commercial/light industrial purposes" permitted under the restrictive covenant. Instead, apparently conceding that these activities violate the covenant, Cornerstone urges that church uses nonetheless do not constitute a "direct and substantial" breach because they constitute only a small percentage of the property's uses relative to its commercial enterprises. Given Cornerstone's concession, the court found that it had to conclude that the church uses are neither nominal nor inconsequential to the permitted "commercial/light industrial" uses. Cornerstone is organized primarily for religious purposes. All other activity on the property is conducted for the purposes of supporting the church's religious mission-the printing press functions to spread Cornerstone's religious message, and any money earned through the operation of the appliance repair shop is directed to cover Cornerstone's operating expenses. Church services may constitute only seventeen percent of the time the property is used for activities; however, they form the fundamental core of Cornerstone's use of the property.

Additionally, the court rejected Cornerstone's characterization of the baptismal pool as “an already existing concrete hole” that did not violate the restrictive covenant's prohibition of subsurface structures. In restrictive covenants, the word “structure” may be used in a broad sense or in a restricted one. The broad definition of a structure is “any production or piece of work artificially built up, or composed of parts joined together in some definite manner; any construction.” In a restricted sense, “structure” means “a building of any kind, chiefly a building of some size or of magnificence; an edifice.” Given the background of the restriction and the broad language of the covenant, the court was compelled to find that the parties intended the broad sense of the definition to control. Thus, when considering the baptismal pool, the court noted that it originally was a sand-filled, in-ground, abandoned petroleum tank. Cornerstone removed the sand from the tank, mixed it with cement, and used the resulting concrete to build the walls and floor of the baptismal pool, four-and-a-half feet deep. The court concluded that the baptismal pool was a structure under the meaning intended by the parties to the restrictive covenant. The pool may have been easier to construct because Cornerstone only had to dig and remove sand, but that fact does not change its nature as a structure. Cornerstone did not merely use a “hole” that already existed.

Finally, Cornerstone argued that enforcement of the restrictive covenant violates its rights to religious freedom. As an initial matter, we note that Cornerstone's argument here is a narrow one. Cornerstone contends only that enforcing the restrictive covenant would violate its right of religious freedom and expression under the Texas Constitution by prohibiting religious services and meetings. Texas courts have routinely rejected the notion that a facially neutral, otherwise valid restrictive covenant violates constitutional religious freedom protections if applied against a church and the court did not see any reason not to follow that routine in this case.

PART X
HOMESTEAD

Chase Manhattan Mortgage Corporation* v. *Cook, 141 S.W.3d 709 (Tex.App.–Eastland 2004, no pet.). The 1999 deed of trust in favor of Chase contained a recital that it was in renewal and extension of a 1992 deed of trust executed by Cook’s father in favor of Security State Bank covering the homestead. In fact, the Security State Bank loan was not secured by the homestead but by other property that was not homestead and it had been paid off and released in 1996. The homestead loan paid off by Chase was actually a lien in favor of Mid-States Mortgage.

The court held that Cook had shown the property was her homestead at the time the Chase loan was borrowed. It was then Chase’s burden to show that its deed of trust lien was one of the permitted homestead liens. Chase argued that it met its burden because the deed of trust created an enforceable lien against Cook's homestead under the doctrine of contractual subrogation. Subrogation is an equitable doctrine that may arise from the agreement of the parties or by implication and equity to prevent fraud or injustice. Subrogation substitutes another person in the place of a creditor so that the person in whose favor it is applied succeeds to the right of the creditor in relation to the debt. One common situation in which subrogation arises is when a lender or other third party advances money to pay off a prior lien on the property.

A party claiming subrogation must plead and prove the right to subrogation. Chase did not allege a subrogation claim in its pleadings or attempt to raise it by trial amendment. Chase stipulated during trial that it was not seeking equitable subrogation. In its appeal, Chase attempted to distinguish contractual subrogation from equitable subrogation; however, Chase did not make any mention of a contractual subrogation claim during trial. Thus, Chase waived its subrogation theory by failing to plead it in the trial court.

Even if Chase had not waived its subrogation theory, the trial court would not have erred in finding against Chase on its subrogation claim. Chase failed to present any evidence establishing how Cook used the proceeds from its loan.

In the Matter of Norris, 316 B.R. 246 (W.D. Tex. 2004). The debtors' houseboat in this case is a moveable "motor boat" that cannot support a homestead exemption under Texas law. Debtors' boat, by virtue of its self-powered mobility, is a moveable chattel, not a permanent residence entitled to homestead protection.

Dominguez* v. *Castaneda, 163 S.W.3d 318 (Tex.App.—El Paso 2005, pet. denied). When Mrs. Dominguez was getting ready to serve a term in prison, she gave her husband a power of attorney. After she started serving her term, in 1996, Mr. Dominguez borrowed some money from Castaneda and signed a deed of trust in his wife's name covering a house that was owned and occupied by his wife's father. Mr. Dominguez told Castaneda that he and his wife owned the house and lived in another house down the street.

The original agreement relating to the loan was that the deed of trust would be recorded if the loan were not repaid in 30 days. When the 30 days came and went, the deed of trust was recorded. While Mrs. Dominguez was still serving time, her father died, and she and her brother inherited it. After her release from prison, she and her husband moved into the house. Soon they visited with Castaneda to discuss the loan, and, for the first of several times, she acknowledged the debt and the lien. Two payments were made on the loan, but nothing else was paid.

After a failed Chapter 13 bankruptcy and after a threatened tax foreclosure, Castaneda posted the house for foreclosure in 2002.

Mrs. Dominguez argued that the lien was invalid because it was a lien on her homestead. After a lengthy treatise on allowable homestead loans, the court turned to the evidence, which clearly showed that Mr. Dominguez granted the lien on the property well before the house was owned or occupied by Mrs. Dominguez. Since the lien predated the homestead character of the property, the lien was valid.

PART XI
CONSTRUCTION
AND MECHANICS' LIENS

Taylor Electrical Services, Inc.* v. *Armstrong Electrical Supply Company, 167 S.W.3d 522 (Tex.App.—Ft. Worth, 2005, no pet.). Armstrong was late in delivering some electrical equipment to Taylor, the general contractor on two church construction projects. While disputing that the deliveries were late, Armstrong billed Taylor for the equipment. Taylor paid the invoices, making a deduction for liquidated damages. The payment was in two checks, one for each church project and one of which Armstrong cashed right away, the other of which it held onto. Without crediting Taylor's account for the uncashed check, Armstrong filed mechanics' liens against both church properties for the full amounts it had billed Armstrong.

Taylor's contract with the churches stated that it would be suspended if any mechanics' liens were filed and that Taylor would be subject to penalties. Taylor was also obligated to indemnify the churches against any liens. Thus, Taylor hired a lawyer and sued Armstrong to have the liens removed and to recover damages for breach of contract, fraud and DTPA violations.

The jury awarded damages to Taylor for fraud. Armstrong appealed the finding that it had filed the mechanics' liens with knowledge that it was asserting a fraudulent lien. It also contended that Taylor lacked standing to assert the fraud claim.

Section 12.002 of the Texas Civil Practice and Remedies Code states that person may not make, present, or use a document or other record with knowledge that the document or other record is a fraudulent lien or claim against real or personal property or an interest in real or personal property, with intent that the document be given the same legal effect as a document evidencing a valid lien or claim against real or personal property or an interest in real or personal property, and with intent to cause another person to suffer physical injury, financial injury or mental anguish or emotional distress. A person who violates the fraudulent lien provisions may be liable for the greater of $10,000 or actual damages. District, county, and municipal attorneys, as well as the "obligor or debtor, or a person who owns an interest in the real or personal property," are allowed to enjoin such actions or to recover damages.

Armstrong argued that because the liens are filed against the church's property, the church would be the only party with standing to sue under the fraudulent lien or claim statute. Armstrong also argued that the liens simply do not create an obligation or debt on Taylor's part that would entitle it to bring this claim. The statute, however, allows property owners as well as "obligors or debtors" to pursue its remedies. Unfortunately, neither of those terms is defined.

When a statute is clear and unambiguous, the court should give the statute its common meaning as found in the plain and common meaning of the words and terms used. The dictionary definition of "obligor" is "one that binds himself or gives his bond to another or one that places himself under a legal obligation." A "debtor" is "one indebted to another or one under obligation to another." The statute clearly lists "obligors" or "debtors" or persons owning interests in real or personal property in the disjunctive such that any one of those persons is authorized to bring a cause of action for a fraudulent lien or fraudulent claim. The statute does not require the "obligor" or "debtor" to also be a person owning an interest in the real or personal property. If we were to read an ownership requirement into the statute, as Armstrong urges, then the language clearly including persons owning real or personal property would be unnecessary and superfluous. The court therefore held that one who is liable as an obligor or debtor on the underlying debt, whether a property owner of the encumbered property or not, may pursue a cause of action under the fraudulent lien or claim statute. Thus, so long as Taylor showed that it was an obligor or debtor on the debt represented by the lien, it had standing. The court found sufficient evidence to show that Taylor was an obligor and debtor, based on his indemnity to the churches and on Armstrong's own counterclaim that Taylor owed the balance on the invoices.

New AAA Apartment Plumbers, Inc.* v. *DPMC-Briarcliff, L.P., 145 S.W.3d 728 (Tex.App.–Corpus Christi-Edinburg 2004, no pet.). DPMC-Briarcliff argued at trial that AAA Plumbers failed to provide its predecessor-in-interest, Briarcliff Housing, with proper notice because the copy of the lien affidavit was sent to the property owner and the original contractor before it was actually filed. DPMC-Briarcliff asserted that notice of the lien affidavit should have been sent after the lien affidavit was filed with the clerk and that therefore the copy of the affidavit that was sent to the property owner prior to filing did not suffice to provide notice under the statute. DPMC-Briarcliff essentially contends that a second copy of the affidavit should have been sent out after it was actually filed.

Section 53.055(a) of the Texas Property requires that notice of a mechanic's and materialman's lien must be given to the property owner no later than five days after the affidavit is filed. The statute does not, however, require that the lien affidavit actually be filed before notice is sent. Mechanic's and materialman's statutes are to be liberally construed for the purpose of protecting laborers and materialmen. Substantial compliance with the relevant sections of the property code is sufficient to perfect a mechanic's and materialman's lien. Section 53.055 of the Texas Property Code is intended to ensure that the owner receives actual notice of an affidavit being filed against his property so that he can take steps to protect himself. The purpose of requiring a lien affiant to give actual notice to the property owner of the lien is, in part, to ensure that a property owner will not be ambushed by recorded liens, the existence of which he is not aware and has no reason to be aware.

In this case, the purpose of the statute was fulfilled. AAA Plumber's return-receipt “green cards,” which were admitted into evidence, confirm that both the property owner and the original contractor received copies of the lien affidavit by certified mail not more than five days after it was filed.

C & G, Inc.* v. *Jones, 165 S.W.3d 450 (Tex.App.—Dallas 2005, no pet.). Jones and Duncan were the principal officers of CCG. CCG supplied construction equipment for projects on which it was a contractor. Fox hired CCG to be a contractor and supply equipment. CCG received payments from construction projects at its lock box and deposited them into CCG’s checking account. These payments were Trust Funds under Texas Property Code § 162.031(a) and Fox was the beneficiary of those Trust Funds.

Jones and Duncan had signatory authority on CCG’s checking accounts. They did not personally receive any trust funds from those accounts, nor did they determine to whome the trust funds should be paid. They were instructed by CCG’s parent company, American Eco, to make certain disbursements of the funds. At one point, after disputing how American Eco was directing the funds to be disbursed, Jones and Duncan asked to resign from CCG.

Fox sued Jones and Duncan for misapplication of Trust Funds. The trial court declined to find Jones and Duncan personally liable, so Fox appealed.

Texas Property Code § 162.031(a) states: “A contractor, subcontractor, or owner or an officer, director, or agent of a contractor, subcontractor, or owner, who receives trust funds or who has control or direction of trust funds, is a trustee of the trust funds.” A trustee who intentionally or knowingly or with intent to defraud directly or indirectly retains, uses, disburses, or otherwise diverts trust funds without first fully paying all current or past due obligations incurred by the trustee to the beneficiaries of the trust funds, has misapplied the trust funds.

Thus, a party who misapplies these trust funds is subject to civil liability if (1) the party breaches the duty imposed by chapter 162, (2) with the requisite scienter, and (3) the claimants are within the class of people chapter 162 was designed to protect and have asserted the type of injury chapter 162 was intended to prohibit. Any officer or director who has control or direction over the funds is also a trustee of the funds and is, therefore, personally liable. However, there must be some evidence that the officer or director had control or direction over the trust funds, such as possessing and exercising the power to divert the trust funds by sending the funds wherever they choose and actually controlling the disposition of the funds.

Fox argued that the following stipulated facts conclusively establish that Jones and Duncan were trustees pursuant to § 162.002: (1) Jones was an officer of CCG, specifically, the president, and a director of CCG; (2) Duncan was an officer, specifically, the vice-president and chief financial officer, and a director of CCG; (3) they had control over the trust funds because they had signatory authority on the checking account into which the trust funds were deposited; and (4) they had the ability to direct the trust funds because they disbursed the funds. Additionally, Fox argued that, pursuant to § 162.031(a), it conclusively established that both Jones and Duncan misapplied the trust funds based on these stipulated facts: (1) CCG misapplied trust funds of which Fox was the beneficiary; and (2) Jones and Duncan disbursed the trust funds.

Jones and Duncan argue that the following facts stipulated conclusively establish that they were not trustees: (1) CCG was wholly owned by American Eco Corporation; (2) Neither Jones nor Duncan personally received any of the trust funds, nor did they independently determine to whom the trust funds should be paid. Jones and Duncan disbursed such funds in accordance with the instructions received from the officers of American Eco in Houston, Texas; and (3) Jones and Duncan objected to the capture, use, and direction of such funds by American Eco and its officers. In April 2000, Jones and Duncan were asked by American Eco officers to leave their employment with CCG, in large part because of their objections to the manner in which funds were being handled by American Eco and its officers. Basically, the defense was "we were just following orders."

Despite the paucity of case law on the subject of "control or direction of trust funds," the court held that the facts show that Jones and Duncan participated in both the decision by CCG and American Eco to divert the funds and the actual diversion of the funds. Thus, the court could not conclude that Jones and Duncan had no control over the trust funds or that they exercised no such power in the disbursement of the trust funds. It held that Jones and Duncan were "officers" of CCG who had "control or direction" of trust funds, pursuant to section§ 162.002, and "directly or indirectly" used, disbursed, or otherwise diverted the trust funds at issue, pursuant to section 162.031(a). Accordingly, they are personally liable, jointly and severally, to Fox.

PART XII
BROKERS

American Garment Properties, Inc.* v. *CB Richard Ellis-El Paso, L.L.C., 155 S.W.3d 431 (Tex.App.—E Paso 2004, no pet.). CB sued AGP for failure to pay the full amount of a brokerage commission. CB and AGP had an agency agreement for payment of a 6% commission on the sale of AGP's property. Later, a purchase contract was entered into that provided for a 6% commission, to be split between CB and the buyer's broker. The buyer's broker got his half, but AGP declined to pay CB because, as AGP alleged, there was an oral modification of the agreement and CB had agreed that it would reduce CB's commission in order to help defray additional operating expenses because of delays in the closing. Although there were discussions about reducing the commission, nothing was ever put into writing to modify the original agreement, and, at Closing, CB demanded the entire, unreduced commission. After this happened, AGP's counsel wrote a letter to the Texas Real Estate Commission concerning a broker's failure to abide by an oral agreement with his client to contribute part of the brokers' commission to the client. In its response, the Commission stated that "[t]he broker's actions could be construed as violating Section 15(a)(6)(V) of the Real Estate License Act ("the Act"), which authorizes disciplinary action against a licensee for dishonesty, bad faith, or untrustworthiness. The Commission would ordinarily expect a licensee to abide by an agreement with a client to reduce the amount of a commission, even if the agreement is not in writing." The Commission then advised AGP's counsel on how to file a complaint.

The general rule in Texas is that an agreement that contains a no-oral-modification clause can be orally modified if it is not subject to a statute of frauds. The controlling issue in this case is whether the statute of frauds provision in the Real Estate License Act, requiring real estate commission agreements be in writing, bars AGP's oral modification defense. The Texas Supreme Court has interpreted this statutory provision as coming within the Statute of Frauds. Under the Statute of Frauds, a promise or agreement in a contract for the sale of real estate is not enforceable unless the promise or agreement, or a memorandum of it, is in writing and signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him.

AGP contends that the plain language of statute of frauds provision in the Real Estate License Act demonstrates its limited application to only the broker. AGP argues that the only prohibition is that "an action may not be brought" in a court of this state "for the recovery of a commission" for the sale or purchase of real estate unless the promise or agreement is in writing and signed by the party to be charged. Therefore, the statute imposes a requirement upon the broker to have a written agreement in order to recover a commission, but imposes no such requirement upon the public from whom the broker is attempting to recover.

The court disagreed with AGP's narrow reading of the statutory provision for several reasons. First, the plain language does not expressly state that the written agreement requirement to the parties' transaction applies only to the broker. Rather, the Texas Real Estate License Act statutory provision, like other sections of the Statute of Frauds, is primarily focused on the specific requirements of the parties' promise or agreement in the context of real estate commissions. Second, as a general principle of contract law, "[w]here a contract within the Statute of Frauds is not enforceable against the party to be charged by an action against him, it is not enforceable by a set-off or counterclaim in an action brought by him, or as a defense to a claim by him." Under AGP's interpretation of the statute, the parties could mutually agree to orally modify their commission agreement, but CB would nevertheless be barred from bringing any action to recover under that modified agreement because it would be an unenforceable agreement pursuant to the statute of frauds provision. To hold that the commission agreement would be unenforceable against one of the parties, but not the other, is at the very least untenable and would clearly be contrary to the purpose of the Real Estate License Act's statute of frauds provision, that is, to prevent fraud by imposing a requirement that such agreements be in writing.

AGP also contended that there were additional reasons why the trial court erred in granting summary judgment. Specifically, AGP asserts that it raised a fact issue on ratification because of CB's attempts to negotiate a lower reduction amount and it raised a fact issue on AGP's reliance on CB's agreement to reduce its commission when it agreed to a three-month extension of the closing date. AGP's contentions, however, do not raise genuine issues of material fact in this case. As discussed above, the parties' purchase agreement falls within the Real Estate License Act's statute of frauds provision. Not every oral modification to a contract within the Statute of Frauds is barred. The critical determination is whether the modification materially effects the obligations of the underlying agreement. The oral modification asserted in this case would materially alter the parties' written agreement, therefore AGP's summary judgment evidence related to that oral agreement did not raise genuine issues of material fact that precluded summary judgment in CBRE-El Paso's favor.

Moreover, the court found that the record does not support any estoppel claim. Estoppel does not arise unless the acts, words, or conduct relied on to establish estoppel have mislead the other party to his detriment, or have caused him to waive a right he had. The conduct or words must have caused the other party to have acted in a way different from the way he would have acted otherwise and to his prejudice. The summary judgment evidence does not show that AGP was mislead to his detriment by CB nor does it show that he would have acted otherwise.

Rosas* v. *Hatz, 147 S.W.3d 560 (Tex.App.—Waco, 2004, no pet.). While a broker has no duty to inspect the property and disclose all facts which might affect its value or desirability, one who knows all the facts and provides false information, or one who makes a partial disclosure and conveys a false impression, may be liable for negligent misrepresentation. Fraud and DTPA claims also require a false representation.

The Rosases claim that the Broker, Hatz, told Mrs. Rosas that the house had been "partially re-wired" and the plumbing "replaced or redone" and that this constitutes an affirmative misrepresentation due to the wiring and plumbing problems discovered afterwards. Hatz's representation to Mrs. Rosas that the house had been re-wired and the plumbing "redone" gives rise to a reasonable inference that any problems with the house had been fixed. This statement, in combination with the evidence that the seller's tenant told Hatz of a leak in the home, creates a fact issue as to whether Hatz's statements were affirmative representations of false information. Thus, there is more than a scintilla of evidence that Hatz made affirmative misrepresentations.

Swor* v. *Tapp Furniture Company, 146 S.W.3d 778 (Tex.App.—Texarkana 2004, no pet.). Swor sued the Emersons to recover a fee for finding a buyer to purchase a funeral home business. The Emersons filed a motion for summary judgment on their affirmative defenses claiming that, because Swor had no real estate license or written commission agreement, he violated Sections 19 and 20(b) of the Real Estate License Act and was barred from bringing an action to recover a real estate commission.

The president of Tapp Furniture Company, wanted to sell Tapp Funeral Home. She asked Swor to find financing for her son and another employee to purchase the funeral home. Swor testified that, when that deal did not materialize, Dian orally agreed to pay him a fee of ten percent of the sale price, if he introduced a buyer. Swor introduced a potential buyer and a contract was entered into to purchase the funeral home.

The oral agreement for the finder's fee did not specifically reference the selling of the real estate. The absence of a specific reference to real estate raises a fact issue as to whether "a funeral home" necessarily includes both assets and associated real estate. Whether the nature of an agreement contemplates the sale of real estate is a fact question which, if not submitted to the jury, would preclude summary judgment.

Swor, however, admitted in his deposition he had agreed that all assets, including the real estate of the funeral home, were for sale. He had the appraisal district records of the funeral home, as well as the financing statements of the business, which generally include the profit/loss margin and a list of all assets, liabilities, and capital. According to Swor's testimony, he was also presented a copy of a contract entered into between Tapp and the buyer. The contract outlined all the assets involved in the sale. Those included inventory, supplies, equipment, furniture, fixtures, vehicles, and real estate.

The fee for handling the sale of property consisting in part of real estate is considered a real estate commission. Additionally, the definition of real estate broker is so broad that it covers compensation labeled as "finder's fee." Swor expected to be compensated for assisting in a transaction contemplating a sale of real estate. Therefore, the Real Estate License Act applied to Swor, as a broker.

The Texas Legislature requires that a real estate dealer secure a license from the Texas Real Estate Commission. It is a criminal offense to engage in the business of a real estate broker, or salesperson, without having procured such license. In addition, Section 19 of the Real Estate License Act denies the use of the courts to real estate brokers for the recovery of a commission unless the broker seeking recovery alleges and proves that he or she was a duly licensed real estate broker, or salesperson, at the time the alleged cause of action arose. Further, Section 20(b) of the Act provides that an action may not be brought for the recovery of a commission for the sale or purchase of real estate unless the agreement on which the action is brought is in writing and signed by the party to be charged.

It is undisputed that no written agreement existed in the instant case and that Swor was not a licensed real estate broker or salesperson at the time the alleged cause of action arose. The burden was on the dealer or broker to prove that no real estate was included in the transaction. Hence, Swor could recover a commission only by showing that he "was not employed to procure prospects or property for the purpose of effecting a transaction that involved any real estate."

The court then addressed the question whether the contract is divisible between nonrealty assets and realty assets. Where part of the consideration is illegal because it violates a statute, the entire agreement is void if the contract is entire and indivisible. Swor failed to advance any arguments or offer any evidence to suggest that the contract was anything but entire and indivisible.

The contract being indivisible and none of the agreements being in writing meant that

Swor failed on all of his causes of action.

PART XIII
CONDEMNATION

Benefit Realty Corporation* v. *City of Carrollton, 141 S.W.3d 346 (Tex.App.—Dallas 2004, pet. denied). The City acquired a strip of land from Hebron Baptist Church for widening and reconstruction of a street. Benefit Realty, who had a right of first refusal on the church's property, did not receive compensation for the City's acquisition of the land. Benefit Realty brought suit against several parties including the City. The City filed a plea to the jurisdiction based on sovereign immunity. The trial judge granted the plea.

If Benefit Realty's property has been "taken, damaged, or destroyed for or applied to public use without adequate compensation being made," then Benefit Realty has stated a claim under article I, section 17 of the Texas Constitution, to which governmental immunity does not apply. The parties agree a claim for inverse condemnation consists of three elements: intent, taking, and public use. They disagree, however, on whether a "taking" occurred. Benefit Realty argued its right of first refusal was a property right that was "taken" by the City, noting that a "taking" may include any direct invasion of a property right.

The City contended no "taking" of Benefit Realty's right of first refusal occurred as a matter of law. The City argued Benefit Realty's right of first refusal only applied to a voluntary sale of the property, and the City's acquisition was an involuntary sale. In support of this argument, the City pointed to the language of the right of first refusal granting Benefit Realty the right to purchase to property "[i]n the event that Hebron Baptist Church shall desire to sell all, or any portion of, or interest in, the Property to any third party." The City contends this language gives Benefit Realty a right to purchase only in the event of a voluntary sale.

In ***Draper* v. *Gochman***, 400 S.W.2d 545, 548 (Tex.1966), Gochman held a right of first refusal in the event Draper "desired to sell" the property. The property was later sold at a trustee's sale after foreclosure. The Supreme Court held the trustee's sale "was not a voluntary sale so as to give Gochman a preferential right to purchase."

Because there are no Texas cases directly on point, the City relied on two cases from other jurisdictions for its argument there was no taking. The City cited ***Campbell* v. *Alger***, 71 Cal.App.4th 200, 83 Cal.Rptr.2d 696 (1999), in which the court held "when a public entity condemns land for a public purpose, a private party's right of first refusal to purchase the property is not triggered."

The court agreed with reasoning of the California court. The purpose of condemnation is to ensure that public entities obtain land needed for public purposes to benefit the community. Public entities have the right and the duty to act swiftly in condemnation proceedings for the public health, safety, and welfare. And land is not fungible. Public entities may not simply go to another vendor for the same or similar widgets such as paper clips. The Legislature has provided that if a public entity is forced into eminent domain litigation, it should settle with as many owners as swiftly as possible to minimize the costs, uncertainties and time to obtain such needed land. Private holders of rights of first refusal may not thwart such public purposes by forcing the owner or the subsequent public entity to sell it to them.

The City also relied on ***City of Ashland* v. *Kittle***, 347 S.W.2d 522(Ky.1961). In City of Ashland, the City condemned property owned by the Kittles. The Kittles had leased the property and in the lease, granted a right of first refusal to the lessees to purchase the property. The jury in the condemnation proceeding was instructed to assign a value both to the leasehold interest and to the lessees' "privilege to purchase." The Kentucky court of appeals held this instruction was error: "An option in a lease giving the lessee the right to purchase the fee, not exercised prior to the time the property was taken for public use, gives the lessee no interest in the real estate which is compensable in a condemnation proceeding." The Kentucky court noted "that otherwise the lessee would have the privilege of waiting until the award was made and then exercising or not exercising his option according to whether or not the amount of the award was in excess of the option price." Moreover, the lessees "did not even have an option to buy, but merely a right of first refusal, in the event the lessor decided to sell."

The court held that the trial judge correctly concluded Benefit Realty did not plead a cause of action for inverse condemnation. Because the Church's sale to the City was involuntary, Benefit Realty's right of first refusal did not apply. As a matter of law, there was no "taking" from Benefit Realty.

PART XIV
ESCROW AGENTS AND TITLE INSURANCE

Lyman D. Robinson Family Limited Partnership* v. *McWilliams & Thompson, PLLC, 143 S.W.3d 518 (Tex.App.—Dallas 2004, pet. denied). Lyman had a contract to sell some property to Baker. McWilliams was the escrow agent and was delivered a $20,000 earnest money deposit. McWilliams was also the escrow agent for another transaction involving Baker in which it held another $15,000 earnest money deposit.

Baker and Lyman amended the purchase contract which required the release of escrowed funds to Lyman. When Lyman demanded release of the escrowed funds. McWilliams mistakenly released both the $20,000 escrowed under the purchase contract and the $15,000 escrowed under the other transaction involving Baker. Lyman refused to return the extra money, so McWilliams sued. Summary judgment was granted McWilliams.

Lyman argued that summary judgment was improper because a fact issue exists as to whether appellants were misled or prejudiced by the overpayment and subsequent delay in seeking repayment. Specifically, appellants rely on their uncontroverted affidavits that they paid taxes on the amount of the overpayment and made other expenditures in reliance on the accuracy of the payment.

It is a general rule that money paid under a mistake of fact, that is, an unconscious ignorance or forgetfulness of a fact, may be recovered. This is true where, for example, by reason of such a mistake a debt has been paid twice, or the amount paid was in excess of the amount due. The reason for the rule is that the payee ought not to retain what in conscience does not belong to him as against the person to whom in conscience it does belong. Negligence in paying does not give the payee the right to retain what was not his due, unless he was misled or prejudiced by the mistake.

Here, the Lymans argued it was prejudiced by McWilliams's mistake in that they paid taxes on the extra $15,000 and made other expenditures in reliance on the payment. However, the court refused to conclude that receiving money to which they were not entitled, claiming it and paying taxes on it, and spending it "prejudiced" the Lymans.